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

PLAINTIFF'S RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The plain text of the Fair Labor Standards Act ("FLSA") makes clear that the executive, administrative, and professional exemption ("EAP Exemption") from Act's minimum wage and overtime requirements must be defined with respect to the "capacity" in which a worker is employed, meaning their job duties. The text says nothing about salary. *Mayfield v. DOL*, No. 23-50724, 2024 WL 4142760 (5th Cir. Sept. 11, 2024), does not save the Final Rule. There, the Fifth Circuit held that the Department of Labor ("DOL") has authority to "use[] salary as a proxy for EAP status," but only to the extent the "link between the job duties identified and salary is strong." *Id.* at *5. It upheld a much lower salary level that did not deny the EAP Exemption for a significant number of workers who otherwise performed EAP duties. By contrast, the Final Rule exceeds DOL's authority because its salary cutoff is so high that it breaks any plausible link to EAP duties.

By increasing the minimum salary threshold by 65 percent, the Final Rule effectively eliminates the EAP Exemption for over 4 million workers, based not on any change in their duties, but rather based solely on how much they earn. Such a "salary only" approach for so many departs from DOL's own longstanding interpretation and violates the FLSA's requirement to focus on duties. The Final Rule would later deny the Exemption to millions more employees based only on their salaries through an unprecedented *automatic* updating mechanism by which the salary cutoff will increase every three years without any agency action or notice-and-comment rulemaking. The Eastern District of Texas struck down DOL's 2016 Rule that similarly severed the link between salary and duties and that included automatic updating, *Nevada v. DOL*, 275 F.Supp.3d 795 (E.D. Tex. 2017) ("*Nevada II*"), and it preliminarily enjoined this Final Rule for exceeding statutory authority, *Texas v. DOL*, No. 4:24-CV-499-SDJ, 2024 WL 3240618 (E.D. Tex. June 28, 2024). This Court should draw the same conclusion here.

For these reasons and those below, Plaintiff requests that this Court grant its motion for summary judgment, deny DOL's cross motion, and vacate the 2024 Final Rule.

ARGUMENT

I. THE FINAL RULE EXCEEDS DOL'S STATUTORY AUTHORITY

DOL is wrong that *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*, 144 S. Ct. 2244 (2024), supports the Final Rule simply because the FLSA "expressly delegates authority" to define and delimit "bona fide executive, administrative, or professional capacity." *See* ECF 45-1 at 25 (citing 29 U.S.C. § 213(a)(1)). *Loper Bright* does not limit this Court's ability to determine the scope of DOL's authority. To the contrary, it held that "[t]he APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their *own judgment*." 144 S. Ct. at 2261 (emphasis added). "That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate." *Id.* at 2266. It is this Court's duty to determine "the boundaries of the delegated authority" at § 213(a)(1) and ensure DOL acts within them. *Id*. at 2263 (cleaned up). *See also Restaurant Law Ctr. v. DOL*, No. 23-50562, 2024 WL 3911308, at *5 (5th Cir. Aug. 23, 2024) (*Loper Bright* requires reviewing courts to "parse the text of the FLSA using the traditional tools of statutory interpretation").

Applying that standard, DOL's Final Rule exceeds statutory authority because its unprecedented increase in the salary level "effectively displace[s] the FLSA's duties test with a predominant, if not exclusive, salary-level test." *Texas*, 2024 WL 3240618, at *10. Neither *Mayfield v. DOL*, 2024 WL 4142760, nor *Wirtz v. Mississippi Publishers Corp.,* 364 F.2d 603 (5th Cir. 1966), rescues the Final Rule because the modest salary levels upheld in those cases were

reasonable proxies for EAP duties. Unlike the Final Rule, they did not subject over four million more employees to what amounts to a salary-only test. Indeed, as explained further below, the 2019 Salary Rule that *Mayfield* upheld explicitly disclaimed DOL's authority to set a salary level as high as the one that will take effect in January 2025 under the Final Rule. *See* 84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019) (disclaiming authority to "exclude[] from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt[.]").

The Final Rule's automatic updating mechanism—which no court has ever upheld and departs from DOL's longstanding practice—likewise exceeds statutory authority. Setting the salary level on autopilot violates both the FLSA's command for DOL to define the Exemption "from time to time by regulation[,]" 29 U.S.C. § 213(a)(1), and the APA's notice-and-comment requirement for substantive rulemaking, 5 U.S.C. § 553.

A. The Salary Level Exceeds Statutory Authority Because It Is Not a Reasonable Proxy for EAP Duties

The FLSA exempts from the Act's minimum wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity," and grants DOL authority to define and delimit those terms. 29 U.S.C. § 213(a)(1). "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." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012). In other words, the term "capacity" looks to an employee's job role, function or duties. "The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid." *Helix Energy Sols. Grp. Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting). *See also Nevada II*, 275 F.Supp.3d at 805 ("Congress unambiguously intended the

exemption to apply to employees who perform 'bona fide executive, administrative, or professional capacity' duties.").

DOL quotes the 2019 Salary Rule that *Mayfield* upheld to argue that "[s]alary is a helpful indicator of the capacity in which an employee is employed[.]" ECF 45-1 at 26–27 (quoting 84 Fed. Reg. at 51,237). But that Rule admitted in the next sentence that salary "is not 'capacity' in and of itself." 84 Fed. Reg. at 51,237. The Fifth Circuit held that DOL may use salary only as "a reasonable proxy" for the capacity in which an employee is employed and cautioned "that power is not unbounded." *Mayfield*, 2024 WL 4142760, at *5.[1] The Appeals Court held that "[u]sing salary as a proxy for EAP status is a permissible choice because … the link between the job duties identified and salary is strong." *Id.* But "[i]f the proxy characteristic frequently yields different results than the characteristic Congress initially chose," *i.e.*, duties, "then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them." *Id.* Accordingly, "[t]he application of a salary threshold for the EAP Exemption only comports with the Department's authority under the FLSA … to the extent such threshold serves as a plausible proxy for the categories of employees otherwise exempted by the duties test." *Texas*, 2024 WL 3240618, at *11.

The Final Rule exceeds DOL's authority to use salary as a proxy because its $1,128 per week salary requirement ($58,656 annually) is not strongly linked to EAP duties. Rather, it is so high that that it "effectively displace[s] the FLSA's duties test with a predominant, if not exclusive, salary-level test." *Id.* *10. And it represents a drastic and unlawful departure from how DOL has

[1] Plaintiff preserves its arguments that the FLSA does not permit DOL to define the EAP Exemption through any salary test, that the major-questions doctrine applies, and that delegation of authority to DOL to use salary to define and delimit the EAP Exemption would violate the Vesting Clause.

used the salary-level test in the past. In prior rulemakings, DOL's longstanding interpretation has been that § 213(a)(1) requires it to define the EAP Exemption by focusing on duties, with salary as a proxy to screen out "the *obviously* nonexempt employees, making an analysis of duties in such cases unnecessary." Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 8 (1949) ("Weiss Report"). To be a reasonable proxy for job duties, the salary level must avoid denying the exemption for "any substantial number of individuals that could reasonably be classified" as an EAP employee. *Id.* at 9.

The 2019 salary level that *Mayfield* upheld as a "reasonable proxy" used the methodology that DOL developed in 2004 to set the salary cutoff at the 20th percentile of weekly salary in the lowest salary census region, which is the South. ECF 45-1 at 35 (citing 89 Fed. Reg. 32,868–69). DOL's attempt in 2016 to dramatically raise the cutoff to the 40th percentile was struck down because such a high threshold would "exclude [too] many employees who perform exempt duties." *Nevada II*, 275 F.Supp.3d at 807. In returning to the 20th percentile with the 2019 Rule, DOL admitted that the 2016 approach was inconsistent with its "longstanding policy" of using the salary test as a limited proxy for capacity:

> By excluding from exemption, without regard to their duties, 4.2 million workers who would have otherwise been exempt because they passed the salary basis and duties tests established under the 2004 final rule, the 2016 final rule was in tension with the [FLSA] and with the Department's longstanding policy of setting a salary level that does not "disqualify[ ] any substantial number of" bona fide executive, administrative, and professional employees from exemption.

84 Fed. Reg. at 51,238. DOL further conceded that "[a] salary level set that high does not further the purpose of the [FLSA], and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption." *Id.*

DOL now turns away from its longstanding policy and attempts again to change its salary-setting methodology to deliberately exclude otherwise exempt EAP employees, this time raising

the cutoff from the 20th percentile to the 35th percentile, just below the unlawful 2016 Rule's cutoff. This game of "I am not touching you" with the 40th percentile is still unlawful. Indeed, the Final Rule would exclude *more* otherwise exempt employees than the 2016 Rule. In DOL's own words, "of the 12.7 million full-time salaried white-collar workers who earn less than $1,128 per week, … 38 percent—about 4.8 million workers—meet the standard duties test," and thus would be eligible for the EAP exemption but for the new salary level. 89 Fed. Reg. 32,842, 32,880 (Apr. 26, 2024).[2] DOL claims this error rate of 38 percent is acceptable because "a minority of salaried white-collar workers who earn below the salary level meet the standard duties test." ECF 45-1 at 38; *see also* 89 Fed. Reg. at 32,880. A less than 50 percent error rate is not the standard for being a "plausible proxy." *See Texas*, 2024 WL 3240618, at *11. The 2016 Rule had a nearly identical error rate of 42 percent but was still struck down.[3] That is because § 213(a) requires DOL to fashion a test that exempts "*any employee* employed in a bona fide executive, administrative, or professional capacity," not merely "most employees." *Id.* (quoting § 213(a)(1)). As such, a proxy must be closely tailored to avoid denying the exemption for "any substantial number of individuals that could reasonably be classified" as an EAP employee. Weiss Report at 9. A salary cutoff that denies the the exemption to over 4 million employees who perform EAP duties (as the defined by

[2] The Final Rule also "estimates in the first year after implementation, there will be 4.3 million affected workers," 89 Feg. Reg. at 32,891, rising to 6 million after 10 years, *id.* at 32,940.

[3] The 2016 Rule estimated that "4.2 million employees who meet the standard duties test will no longer fall within the EAP exemption" and there were another 5.7 million white-collar employees who earned below the new threshold but did not meet the standard duties test. 81 Fed. Reg. 32, 391, 32,405 (May 23, 2016). This implies an error rate of 42 percent (4.2 million out of 9.9 million). The error rate may have been slightly lower because the denominator did not include the (likely very small) number of white-collar employees who earned below the 2004 salary level of $23,660 annually.

DOL) "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Nevada II*, 275 F.Supp.3d at 806.

The link between the Final Rule's salary level and job duties is even weaker than that of the 2016 salary level struck down in *Nevada II*. When assessing the linkage between a new salary level and EAP duties, in addition to the number of EAP-duty-performing employees who would be denied the exemption, it is also important to consider the length of time since the salary level was last updated. DOL would have more leeway in excluding employees who perform EAP duties if the prior salary level had not been updated in a long time, and vice versa. The 2019 Rule excluded 1.2 million employees who perform EAP duties when updating the 2004 salary level after 15 years. *See* 84 Fed. Reg. at 51,231. By contrast, the unlawful 2016 Rule excluded a much greater number of otherwise eligible employee—over 4 million—when attempting to update the 2004 salary level after a shorter period: just 12 years. The Final Rule is much worse. Like the 2016 Rule, it would exclude over 4 million otherwise eligible employees but does so after only 5 years since the 2019 update. 89 Fed. Reg. 32,880. Compared to the 2019 Rule that *Mayfield* upheld, the 2024 Final Rule excluded nearly four times as many employees in just one-third the time.[4] And it excludes as many as the unlawful 2016 Rule in less than half the time. The link between the Final Rule's salary level and EAP duties is far weaker than the link in 2019 Rule and even weaker than the 2016 Rule.

Mayfield upheld DOL's 2019 Rule and its approach "because … the link between the job duties identified and [2019] salary is strong." 2024 WL 4142760, at *5. That decision does not rescue the Final Rule, which departs dramatically from the 2019 approach by "mak[ing] salary

[4] Rising cost of living does not explain this difference. According to DOL's Bureau of Labor Statistics, inflation from 2004 to 2019 was approximately 35 percent, while inflation from 2019 to 2024 was approximately 22 percent. *See* Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sep. 18, 2024).

predominate over duties for millions of employees," thereby breaking the link between job duties and salary and "exceed[ing] the [statutory] authority delegated by Congress to define and delimit the relevant [duty-based] terms." *Texas*, 2024 WL 3240618, at *11. Nor does *Wirtz* control, *see* ECF 45-1 at 22–23, because that case merely considered whether a salary level was arbitrary and capricious, not whether it exceeded statutory authority, *Mayfield*, 2024 WL 4142760, at *2 ("*Wirtz* does not control our analysis."). In any event, the 1963 salary level that *Wirtz* considered was purposefully set low to avoid denying the EAP exemption to substantial numbers of workers who perform EAP duties—no one who earned at least 10th percentile in low-wage areas and industries would have been denied the exemption based on salary alone.[5] The Final Rule's 35th percentile approach rejects this past practice by introducing a methodology that deliberately excludes a substantial number of white-collar workers who perform EAP duties. "As was true of the 2016 Rule," the Final Rule challenged here "'effectively eliminate[s]' consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties in favor of what amounts to a salary-only test." *Texas*, 2024 WL 3240618, at *11.

B. The Automatic Updating Mechanism Violates the FLSA and the APA

The 2024 Rule's automatic updating mechanism exceeds statutory authority because the annual baseline annual salary of $58,656 from which the updates would take place is unlawful. But regardless of the baseline, the mechanism itself violates the FLSA and the APA.

Section 213(a)(1) commands that DOL must define and delimit the EAP Exemption "from time to time by regulation[]." 29 U.S.C. § 213(a)(1). DOL responds that automatic updates would

[5] Prior to 2004, DOL used a two tier-method to set the salary level: (1) a "long test" that had set the salary level at the 10th percentile of salaried white-collar employees who performed EAP duties in lower-wage areas and industries, and (2) a "short test" with a higher salary level but less rigorous duties test. 89 Fed. Reg. at 32,845.

"by no means 'preclude[] the Department from engaging in future rulemaking from time to time,'" ECF 45-1 at 40 n.8, and that the agency would retain the "ability to engage in future rulemaking to change the updating mechanism," *id.* at 41 (quoting 89 Fed Reg. at 32,857). That is backwards. The "from time to time by regulations" language authorizes DOL to change EAP requirements only through active rulemaking. *Any* increase to the salary level changes the scope of the EAP Exemption—exempt employees who fall below the new threshold are no longer exempt. The fact that DOL may elect not to change the salary level—or to change it by a different amount—through rulemaking does not change the fact that each automatic update would define and delimit the EAP Exemption without rulemaking and thus falls outside of the "boundaries of … delegated authority." *Loper Bright*, 144 S. Ct. at 2263 (quoting H. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983)).

DOL concedes that the automatic update mechanism is designed to evade the APA's notice-and-comment requirement. It claims such updates are not "regulations" subject to notice and comment because "the triennial updates simply apply updated data to the earnings thresholds and methodology established in the regulations." ECF 45-1 at 41. If true, the mechanism would violate the FLSA's command that the EAP Exemption may be defined and delimited only "by regulation[]." 29 U.S.C. § 213(a)(1). DOL's view is in any event wrong. "Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019). "On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving label, when deciding whether statutory notice-and-comment demands apply." *Id.* Notice and comment is mandatory whenever the agency "'creates rights or obligations.'" *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)). Any change to EAP

requirements, including increasing the salary threshold, affects the rights and obligations of employers and employees, and must undergo notice and comment.

DOL cites no authority to support its contrary and atextual interpretation of the APA, which would eviscerate the very purpose of the notice-and-comment requirement. As Justice Thomas explained, notice and comment is designed to provide a "'surrogate political process' that takes some of the sting out of [] inherently undemocratic and unaccountable [regulatory] rulemaking." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 58 n.13 (2020) (Thomas, J., concurring) (quoting Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin L. Rev. 703, 708 (1999)). It allows affected parties to develop evidence in the record and influence the agency's final decision. Each automatic update, by contrast, imposes substantive changes on employers' obligations and employees' rights without any corresponding obligation on DOL to invite and consider evidence before increasing the salary threshold. Not only does this eject regulated parties from the "surrogate political process," but it also prevents DOL from having "the broadest base of information" from which to make its decision. *Phillips Petrol. Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994).

II. THE ACTING SECRETARY WAS NOT PROPERLY APPOINTED

DOL's argument that Ms. Su could "lawfully wield[] the Secretary's authority under 29 U.S.C. § 552," ECF 45-1 at 47, misses the point because Plaintiff does not dispute that Su could serve Acting Secretary upon Secretary Walsh's resignation in March 2023. Rather, Plaintiff argues that § 552 permits her to serve in that capacity only *temporarily*, but she has done so *indefinitely*. DOL's cases affirming Su's authority under § 552 as Acting Secretary are inapposite because they do not address her *indefinite* service. *Su v. WiCare Home Care Agency, LLC*, No. 22-cv-224, 2024 WL 3598826, at *17 (M.D. Pa. July 31, 2024), cited at ECF 45-1 at 48, *appeal filed sub nom.*

Walsh v. Wicare Home Care Agency LLC, No. 24-2565 (3d Cir. Aug. 22, 2024), held that Su was able to bring an enforcement action without addressing whether she overstayed her temporary role as Acting Secretary or whether § 552 authorizes her indefinite service. Similarly, *Su v. Starbucks Corp.*, 697 F.Supp.3d 1078, 1082 (W.D. Wash. 2023), cited at ECF 45-1 at 48, held that § 552 allowed Su to perform Secretary Walsh's duties upon his resignation without addressing whether she is able to do so indefinitely.

DOL tellingly does not deny that Ms. Su is serving *indefinitely* as Acting Secretary of Labor—nor could it, given that she has held the position for over 550 days with no end in sight. Section 552 does not allow the Deputy Secretary to serve as Secretary *indefinitely* because doing so violates the Constitution's unwaivable advice-and-consent requirement. And if it did somehow permit indefinite service, then § 552 would not qualify as statutory provision that allows her "to perform the functions and duties of [Secretary of Labor] *temporarily* in an acting capacity," 5 U.S.C. § 3347(a)(1), which is the basis on which DOL claims (ECF 45-1 at 48) her to be exempt from the Vacancies Act's 210-day limit on serving in an acting capacity. The Vacancies Act's 210-day limit would therefore apply, and she would have violated that limit by January 2024. Either way, Su could not have exercised the Secretary's authority to define and delimit the EAP Exemption.

DOL also argues it does not matter whether Su could properly exercise the Secretary's authority in January 2024 because Wage and Hour Administrator Looman promulgated the Final Rule pursuant to power delegated by the Secretary. ECF 45-1 at 46. DOL's reliance on *United States v. Gomez*, No. 3:21-CR-0001, 2024 WL 1620392 (D.V.I. Apr. 15, 2024), cited at ECF 45-1 at 47, is misplaced. There, a Department Head's "purported unlawful appointment had no effect" on Coast Guard officers' decision to interdict a vessel because they "acted under authority

expressly provided to the officers by statute," and the interdiction "did not require approval or review by the Secretary of DHS[.]" *Gomez*, 2024 WL 1620392 at *4 (citing 14 U.S.C § 522, which authorizes Coast Guard officers to conduct interdictions). By contrast, no statute authorizes Administrator Looman to independently promulgate the Final Rule, which Acting Secretary Su reviewed and approved. In any event, Administrator Looman could exercise power delegated by the Secretary only if Su could have delegated the Secretary's "define and delimit" powers under 29 U.S.C. § 213(a) in the first place. As explained above, Su could not exercise the Secretary's powers because she was serving indefinitely—as opposed to temporarily—as Acting Secretary. She therefore could not have lawfully delegated powers she did not have to Looman nor anyone else.

III. THE FINAL RULE SHOULD BE VACATED IN ITS ENTIRETY

A. Vacatur Is the Appropriate Remedy in APA Cases where the Agency Exceeds Statutory Authority

On finding a rule violates the APA by exceeding statutory authority, "universal vacatur" under § 706 is "required in this circuit." *Tex. Med. Ass'n v. U.S. Dep't of Health and Hum. Servs*., 110 F.4th 762, 780 (5th Cir. 2024)*; see also Data Mktg. P'ship, LP v. DOL*, 45 F.4th 846, 859 (5th Cir. 2022). None of DOL's arguments justifies a departure from that remedy.

First, DOL argues that § 706 "does not authorize the type of universal vacatur that Plaintiff seeks." ECF 45-1 at 52 n.12. But the Fifth Circuit has repeatedly considered and rejected this argument. *Tex. Med. Ass'n*, 110 F.4th at 779 (recognizing that "[b]inding Fifth Circuit precedent" authorizes vacatur of agency action that violates the APA). The APA provides that a "reviewing court shall . . . hold unlawful and set aside [unlawful] agency action." 5 U.S.C. § 706(2). By its nature, the "scope" of setting aside agency action under 5 U.S.C. § 706 is "'nationwide' . . . 'not party-restricted' and 'affects all persons in all judicial districts equally.'" *Braidwood Mgmt., Inc.*

v. Becerra, 104 F.4th 930 (5th Cir. 2024) (first and third quotations quoting *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024); second quotation quoting *Career Colls. & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024)).

Second, DOL argues that the APA "is not properly read to require vacatur …, in light of traditional equitable principles generally restricting relief beyond the parties." ECF 45-1 at 53. But equities cannot supersede the APA's text, which commands that courts "'shall'—not may—'hold unlawful and set aside' [] agency action." *Nat'l Ass'n of Priv. Fund Mgrs. v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) (quoting 5 U.S.C. § 706) (other citation omitted). Hence, the Fifth Circuit recently made clear that: "[W]e do not read our precedent to require consideration of the various equities at stake before determining whether a party is entitled to vacatur." *Braidwood Mgmt.,* 104 F.4th at 952; *see also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2467 (2024) (Kavanaugh, J., concurring) ("The Government has contended that equitable relief is ordinarily limited to the parties in a specific case. Therefore, nationwide injunctions would be permissible only if Congress authorized them. But in the APA, Congress did in fact depart from that baseline and authorize vacatur.").

The Fifth Circuit has granted a more limited remedy—a "'remand for the agency to correct its errors'"—only in "'rare cases.'" *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 375 n.29 (5th Cir. 2022) (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)). Such departure from the default APA remedy is appropriate only "when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021) (citing *Cent. and S. W. Srvs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000)). That exception to the presumption-of-vacatur rule is applicable to cases involving a finding that

an agency's action is arbitrary and capricious, not to cases (as here) involving agency action that exceeds statutory authority. *Franciscan Alliance*, 47 F.4th at 374–75. In an arbitrary-and-capricious case, a reviewing court typically bases an APA-violation holding on a finding that the federal agency has failed to articulate "a satisfactory explanation" for its decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Under those circumstances, it is plausible that the agency could articulate the requisite "satisfactory explanation" if provided a second chance to do so on remand. But no similar possibility exists in excess-of-authority cases, such as this one, because an agency may not expand its statutory authority.

Third, DOL argues that, despite being the default remedy, "the Fifth Circuit has treated universal vacatur as a discretionary equitable remedy, neither automatic nor compelled in every case." ECF 45-1 at 54 (citing *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality opinion), *aff'd sub nom. Garland v. Cargill*, 602 U.S. 406 (2024)). DOL's reliance on *Cargill* is misplaced: the Fifth Circuit remanded the remedy question to the district court only because "the parties ha[d] not briefed the remedial-scope question." *Cargill*, 57 F.4th at 472. As another Fifth Circuit panel explained when rejecting DOL's exact argument here: "What the Government's short parenthetical citation to *Cargill* fails to capture is that just before the plurality decided that remand was appropriate given the lack of briefing, it recited plainly the proposition that is at odds with its argument: 'vacatur of an agency action is the default rule in this Circuit.'" *Braidwood Mgmt.,* 104 F.4th at 952 n.102 (quoting *Cargill*, 57 F. 4th at 472). *Cargill* thus does not support DOL's request for a more limited remedy.

B. The 2024 Final Rule Is Not Severable

DOL may not rely on the Final Rule's severability clause to salvage any of its components. *See* ECF 45-1 at 50. "[T]he ultimate determination of severability will rarely turn on the presence or absence of a severability clause." *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1145 (D.C. Cir. 2022) (citation omitted). Rather, DOL must show that it would have adopted the same rule without the unlawful provisions and the remaining provisions would still "function sensibly." *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 816 (5th Cir. 2024). DOL asserts that "the Rule's three distinct adjustments to the standard salary-level test (the wage growth update, the January 1 methodology update, and the future triennial updates) could each 'function sensible' alone." ECF 45-1 at 50–51 (citation omitted). But how can that be when each adjustment is used to justify the next? Such interconnection means the adjustments are "'intertwined' in such a way that makes severance problematic." *Nasdaq*, 38 F.4th at 1145 (quoting *Epsilon Electronics, Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017)).

CONCLUSION

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

September 18, 2024

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Sheng Li