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

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

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF AND JURY DEMAND

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 by offering flexible work arrangements that decouple compensation from hours worked.

The Department of Labor ("DOL" or "the Department") promulgated an unlawful regulation that would take away the white-collar exemption from a majority of Flint Avenue's

employees. Instead of defining white-collar employees based on the *capacity* in which they are employed—as Congress commanded—DOL is impermissibly using the time period on which their pay is computed and the amount of such pay to define the exemption. The Department's Final Rule prohibits employees from being eligible for the EAP exemption unless they are paid a fixed weekly salary of at least $1128 (equivalent to $58,656 annually), regardless of the capacity in which they are employed. This minimum salary would exclude 7.7 million white-collar employees who work in an executive, administrative, or professional capacity from qualifying for the exemption. The new rule wreaks havoc on small businesses like Flint Avenue that employ white-collar workers. Among the 7.7 million white-collar workers who would lose their EAP exemptions are five Flint Avenue employees who could no longer benefit from 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 requires exempting anyone "employed in a [white-collar] *capacity*"—a 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 an employee's salary determinative factor for deciding the overtime eligibility of millions of white-collar employees. The FLSA did not authorize the Department to impose a minimum weekly salary requirement on exempt white-collar employees. Indeed, such delegation of lawmaking power would violate the Vesting Clause of Article I Section 1 of the Constitution because the Act contains no intelligible principle to guide the Department's exercise of that authority. The Final Rule also includes an automatic mechanism to ratchet up the minimum salary level every three years. This mechanism unlawfully evades § 213(a)(1)'s command to delimit the white-collar exception from "time to time by regulation[,]" as well as the notice and comment requirements of the Administrative Procedure Act ("APA").

Even if all these defects were not fatal, the Department's new rule would still be invalid because Acting Secretary of Labor Julie Su lacked authority to promulgate it. She has purported to exercise the powers of the Secretary for over a year without the advice and consent of the Senate, and the President intends for her to do so indefinitely, in violation of federal law. This scheme violates the Appointments Clause. Su therefore lacks authority to exercise the Secretary's powers, including the issuance of the challenged rule.

PARTIES

1. Plaintiff Flint Avenue is a software development and marketing firm headquartered in Lubbock, Texas.

2. Defendant United States Department of Labor is the federal agency within the Executive Branch responsible for issuing the challenged rule.

3. Defendant Julie Su is the Acting Secretary of Labor and has been the pending nominee for the position of Secretary of Labor for over a year.

4. Defendant Jessica Looman is the Administrator of the Wage and Hour Division, an agency within DOL that promulgated the challenged rule.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns authority under the Constitution of the United States and the FLSA. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.

6. Venue is proper within this district pursuant to 28 U.S.C. § 1391. Defendants are United States agencies or officials sued in their official capacities. Flint Avenue has its principal place of business in this judicial district, and substantial parts of the events or omissions giving

rise to the Complaint occurred within this district.

7. The Court is authorized to award the requested declaratory relief under the APA, 5 U.S.C. § 706, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201–2202. The Court is authorized to award injunctive relief under 5 U.S.C. § 705 and 28 U.S.C. § 1361.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

8. The FLSA requires covered employers to pay non-exempt employees a minimum hourly wage set by statute. 29 U.S.C. § 206. Employers must further pay non-exempt employees overtime pay at one-and-a-half times the regular rate of pay for all hours worked in excess of a 40-hour workweek. *Id.* § 207. Employers who fail to comply with these requirements are subject to criminal penalties and civil liability. *See id.* §§ 215−216.

9. The FLSA is enforced by the Department's Wage and Hour Division. *Id.* § 204. It also provides a private right of action that allows employees to file suit against their employers. *Id.* § 216(b).

10. The Act contains several exceptions to its requirements. The "white collar" or "EAP" exemption at issue is codified at 29 U.S.C. § 213(a)(1), which exempts from minimum wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited … by regulations of the Secretary[.]"

11. The FLSA does not define the terms "executive," "administrative" or "professional." Nor does it provide any intelligible principle by which the Secretary could define or apply these terms. *Id.*

12. DOL issued its first regulation concerning the white-collar exemption in October

1938. 3 Fed. Reg. 2515 (Oct. 20, 1938). The 1938 regulation required *bona fide* administrative and executive employees to earn a minimum weekly salary, meaning they are generally paid a minimum amount each week regardless of hours worked. The 1938 regulation did not contain a minimum weekly salary requirement for professional employees, whose exempt status depended solely on the duties they "customarily and regularly" performed. *Id.* at 2518. Two years later, DOL revised its regulations to require all three types of exempt white-collar employees to earn a minimum weekly salary. 5 Fed. Reg. 4077 (Oct. 15, 1940).

13. The Department has periodically increased the minimum weekly salary needed for the white-collar exemption. *See, e.g.,* 14 Fed. Reg. 7730 (Dec. 28, 1949); 26 Fed. Reg. 8635 (Sept. 15, 1961); 28 Fed. Reg. 9505 (Aug. 30, 1963); 32 Fed. Reg. 7823 (May 30, 1967); 35 Fed. Reg. 883 (Jan 22, 1970); 38 Fed. Reg. 11,390 (May 7, 1973); 40 Fed. Reg. 7091 (Feb. 19, 1975).

14. Even as it raises the minimum weekly salary needed for the white-collar exemption, DOL previously acknowledged during the Obama Administration that it is "without specific Congressional authorization" to do so. 81 Fed. Reg. 32,391, 32,431 (May 23, 2016).

15. The Department has created regulatory carveouts to the weekly salary requirement for industries it favors. For example, in response to lobbying by the Association of Motion Picture Producers, the Department created a "[s]pecial provision" stating that "[t]he requirement … that the employee be paid 'on a [weekly] salary basis' shall not apply to an employee in the motion picture producing industry[.]" 29 C.F.R. § 541.5a (2004); *see also id.* § 541.709 (updating pay flexibility for movie industry).

16. The Department has historically set a minimum weekly salary as a floor to "screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." *Nevada v. United States Dep't of Lab.*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017) (quoting Harry

Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949)). In carrying out this screening function, the Department acknowledged that the salary level "should also be somewhere near the lower end of the range of prevailing salaries for these employees." *Id*. (quoting Weiss Report at 11–12).

II. DOL'S RECENT WEEKLY SALARY REGULATIONS

17. The Department did not update the minimum weekly salary between 1975 and 2004. 69 Fed. Reg. 22,122 (Apr. 23, 2004). In 2004, the Department set the new salary level at the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, which was the South. *Id.* That methodology raised the minimum weekly salary from $155 per week (set in 1975) to $455 per week or $23,660 annually. *Id.* This represented an increase of 193 percent over 29 years, or an annualized inflation of approximately 4 percent.

18. The Department changed its methodology in 2016 to set the EAP minimum weekly salary at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, which increased the requirement to $913 per week or $47,476 annually. 81 Fed. Reg. 32,391 (May 23, 2016). The 2016 minimum salary represented an increase of 101 percent over 12 years, or an annualized inflation of approximately 6 percent.

19. The Department estimated this change in methodology would exclude 4.2 million workers who would otherwise qualify for the EAP exemption. *Id.* at 32,393.

20. A federal judge in the Eastern District of Texas permanently enjoined the 2016 adjustment to the EAP weekly salary requirement. *Nevada*, 275 F. Supp. 3d at 806. The court held that § 213(a)(1) requires the Department to delimit the EAP exemption primarily through workers' duties, *i.e.*, the *capacity* in which they are employed. *Id.* at 806. A $20,000 increase in the minimum salary requirement that excludes 4.2 million workers who otherwise would qualify for the EAP

exemption "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)).

21. Thereafter, the Department finalized a new rule in 2019 that returned to a salary requirement based on the 20th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (the South), which amounted to $684 per week or $35,568 annually. 84 Fed. Reg. 51,230 (Sep. 27, 2019). The 2019 minimum salary represented an increase of 50 percent over 15 years, or an annualized inflation of approximately 3 percent.

22. A federal judge in 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 pending*. The decision was explicitly based on deference to the Department's interpretation of the FLSA under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984). *Id.* The Supreme Court is currently considering whether to overturn that precedent and instead require federal judges to interpret statutes for themselves. *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. 22-1219, *cert. granted on Question 1 of Pet*. (Oct. 13, 2023).

III. THE CHALLENGED 2024 RULE

23. On September 8, 2023, DOL issued a notice of proposed rulemaking ("NPRM") to raise the minimum salary level needed for the EAP exemption to $1,059 per week or $55,069 annually. 88 Fed. Reg. 62,152 (Sep. 8, 2023). The NPRM proposed a new salary level equal to the 35th percentile of earnings for full-time salaried workers in the lowest-wage Census Region. *Id.*

24. The NPRM also proposed to raise salary levels automatically going forward: the Department would review census data every three years and publish a new threshold without going

through notice-and-comment rulemaking. *Id.* at 61,154.

25. The rule was finalized on April 26, 2024. 89 Fed. Reg. 32,842 (Apr. 26, 2024) ("Final Rule"). It set the new salary level based upon the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. *Id.* at 32,842. This results in a minimum weekly salary of $1128 or $58,656 annually. *Id.* The new level represents a 65 percent increase over the salary level set in 2019, or an annualized inflation of approximately 11 percent.

26. The Department estimates that there currently are 7.7 million "white-collar workers" who earn a salary between the current threshold of $684 per week and the new threshold of $1,128. *Id.* at 32,879, Figure A. This means the Final Rule will deny the EAP or white-collar exemption to 7.7 million employees based solely on their weekly salary. That number is 3.5 million more employees than the amount that was held to be unlawful in *Nevada*, 275 F. Supp. 3d at 806 (invalidating salary level because "4.2 million workers … will automatically become eligible under the Final Rule without a change to their duties.").

27. The revised minimum weekly salary for the EAP exemption will take effect on January 1, 2025.

28. The Final Rule set a lower, interim minimum weekly salary requirement of $844 per week or $43,888 annually, which takes effect July 1, 2024. *Id.* at 32,933.

29. The Final Rule also established a mechanism that allows the Department to automatically raise the minimum weekly salary level every three years based on the Department's review of census salary data, without notice-and-comment rulemaking. The automatic update provisions are set forth in new 29 C.F.R. § 541.607. The first update is scheduled to occur on July 1, 2027. *Id* at 32,852.

IV. IMPACT ON FLINT AVENUE

30. Plaintiff Flint Avenue is a software development and marketing firm headquartered in Lubbock, Texas. It competes with larger and higher-paying companies by offering a flexible work culture, including unlimited vacation and remote or hybrid arrangements.

31. Flint Avenue's employees all take substantially more vacations than the standard two weeks available in comparable jobs with competitors. They also often work remotely and/or on a part-time basis. One employee recently took a three-month trip across the country and worked remotely on a part-time basis from his RV.

32. Flint Avenue has seven employees, all of whom work in a *bona fide* executive, administrative, or professional capacity and are paid more than $35,568 per year. As such, they all qualify for the EAP exemption under the minimum weekly salary set in 2019.

33. One Flint Avenue employee is 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 for the EAP exemption, which takes effect on July 1, 2024. The junior graphic designer regularly takes multiple weeks of vacation to travel or to visit family.

34. 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. Flint Avenue would be forced to reclassify him as an hourly employee, which precludes work flexibility and unlimited vacation time.

35. Four Flint Avenue employees—an Office Manager, a Project Manager, a Marketing Manager, and a Senior Graphic Designer—perform EAP duties and are each paid less than the Final Rule's $1,128 minimum weekly salary, which takes effect on January 1, 2025.

36. Once the Final Rule's $1,128 minimum weekly salary takes effect, these employees

will no longer be exempt from FLSA's minimum wage and overtime pay requirements. Flint Avenue would be forced to reclassify them as hourly employees, which precludes work flexibility and unlimited vacation time.

37. Even if Flint Avenue raises the pay of its current EAP employees to $1,128 per week, it will have to raise them again in 2027 when the minimum salary level rises automatically under 29 C.F.R. § 541.607, or else reclassify them as hourly employees.

38. The Final Rule will force Flint Avenue either to raise the salaries for five of its employees to more than it can afford or reclassify them as hourly employees who cannot benefit from the flexible work arrangements. It thus increases Flint Avenue's labor costs and undermines its ability to recruit and retain employees by offering flexible work arrangements, including unlimited vacation time.

V. ACTING SECRETARY'S LACK OF AUTHORITY

39. The Secretary of Labor is an officer of the United States. As such, he or she may be appointed only with the advice and consent of the Senate.

40. In March 2023, then-Secretary of Labor Marty Walsh resigned. In his place, President Joe Biden nominated Deputy Secretary of Labor Julie Su.

41. The Senate held initial hearings on Su's nomination. The Senate did not, however, vote to confirm or reject her. Su's nomination expired with the end of Congress's 2023 session. The administration failed to put forward a different, more acceptable candidate; it instead renominated Su in January 2024. It did so despite public opposition from senators of both parties and a consensus that Su did not have sufficient support to be confirmed. *See* Letter from Sen. Bill Cassidy, Ranking Member, to Sen. Bernie Sanders, Chair, U.S. Senate Comm. on Health, Education, Labor, and Pensions (Feb. 13, 2024) (Cassidy Letter to Sanders) (observing that both

Democratic and Republican senators opposed Su's nomination and raising concerns that her renomination was an attempt to circumvent the constitutionally required advice-and-consent process).

42. Since then, Su has continued to act as the Secretary of Labor. She has now served for over a year without being confirmed—the longest such period of any nominee from a president whose party holds a majority in the Senate. Meanwhile, she has purported to exercise all the powers of that office, including the power to direct subordinate civil servants in the Department of Labor. In particular, the 2024 Rule was proposed and finalized while she purported to lead the Department and wield the Secretary's powers.

43. It is clear that Su will not receive the Senate's consent. She has acted as the Secretary for over a year without receiving a vote. Public reports have confirmed that key senators will not vote to confirm her. As a result, leading senators have called on the President to withdraw her nomination and submit an acceptable candidate. *See* Letter from Sen. Bill Cassidy to President Joseph Biden (July 19, 2023)[1] (Cassidy Letter to Biden); Cassidy Letter to Sanders, *supra*.

44. The President has refused to do so. Instead, he allows Su to run the Department unlawfully without the Senate's consent. He has no intent to submit a new, acceptable nominee. He intends to circumvent the Constitution's advice-and-consent requirement by leaving Su in office indefinitely. *See* Cassidy Letter to Biden. ("White House officials have communicated to the press that your administration does not have the votes in the Senate to confirm Julie Su's nomination."); *see also* Sahil Kapur and Liz Brown-Kaiser, *Biden to Keep Julie Su on Indefinitely as Labor Chief Despite Lack of Senate Votes*, NBC News, July 21, 2023 ("The White House plans

[1] Available at: https://www.help.senate.gov/imo/media/doc/julie_su_nomination_letter1.pdf (last visited Apr. 23, 2024).

to use a little-known law to keep acting Labor Secretary Julie Su in the job even if she fails to win Senate approval, a White House official told NBC News.").

45. The Department has relied on 29 U.S.C. § 552, which defines the duties of the Deputy Secretary of Labor, as the basis for her indefinite Acting status. Among those duties is to serve as the acting Secretary of Labor during vacancies resulting from "death, resignation, or removal from office."

46. That statute, however, allows the Deputy Secretary to exercise the Secretary's powers only on a temporary basis. It does not purport to allow the Deputy Secretary to serve as Acting Secretary indefinitely with no good-faith effort to fill the position with a permanent nominee whom the Senate would confirm.

47. Because Su has not received the consent of the Senate, she has not been confirmed as the Secretary of Labor. She cannot continue to exercise the powers of that office indefinitely. She cannot continue to direct the Department's functions, including its regulatory functions. She has no constitutional authority to continue leading the Department. And because she lacks constitutional authority, she could not promulgate, direct, or approve the Final Rule.

CLAIMS FOR RELIEF

Count One
Excess of Statutory Authority

48. Plaintiff incorporates the preceding paragraphs by reference.

49. The DJA empowers the Court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

50. The APA requires this Court to hold unlawful and set aside any agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

51. Section 213(a)(1)'s plain terms address "employee[s] employed in a bona fide executive, administrative, or professional *capacity* …." (Emphasis added.) It does not include or even mention a minimum weekly salary level. Accordingly, the applicability of the EAP exemption must be determined based on the duties and activities that the employee performs, not with respect to how often or how much the employee is paid.

52. As Justice Kavanaugh recently concluded: "it is questionable whether the Department's [EAP] regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act." *Helix Energy Solutions Grp., Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting).

53. Being paid a weekly salary has nothing to do with being "employed in a bona fide executive, administrative, or professional *capacity* …." 29 U.S.C. § 213(a)(1). The word "capacity" as used in in § 13(a)(1) "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*., 542 U.S. 142, 161 (2012). Nothing in § 213(a)(1) suggests that only employees who are paid a minimum weekly salary are exempt. Rather, "it is clear Congress defined the EAP exemption with regard to duties." *Nevada*, 275, F. Supp.3d at 805.

54. The FLSA contains other exemptions that *do* require specific methods and amounts of compensation. The Act exempts retail or service employees from overtime pay if they are paid by commission and their regular rate of pay exceeds 1.5 times the minimum wage. 29 U.S.C. § 207(i). Certain computer-related employees are exempt from overtime pay if they are "compensated … at a rate not less than $27.63 an hour." *Id.* § 213(a)(17). The Act exempts baseball

players who are "compensated pursuant to a contract that provides a weekly salary … at a rate that is not less thana weekly salary equal to the minimum wage … for a workweek of 40 hours." *Id.* § 213(a)(19). It also exempts married couples who work as house parents in a nonprofit boarding school if they "are together compensated … at an annual rate of not less than $10,000." *Id.* § 213(b)(24).

55. Congress knows how to draft FLSA exemptions that depend on how pay is computed and the amount of payment. But it did not include any such requirement for the white-collar/EAP exemption at § 213(a)(1). The Department is thus without authority to limit that exemption to employees who are paid a fixed weekly salary, let alone a weekly salary that meets a minimum dollar amount.

56. Indeed, § 213(a)(1) specifically exists to exempt white-collar employees from FLSA's minimum hourly wage requirement. That purpose would be undermined if the Department could establish a minimum weekly salary requirement for exempt white-collar employees. Congress did not hide a delegation to set a federal minimum salary inside an exception to the federal minimum wage. *See Whitman v. American Trucking Assns.*, 531 U.S. 457, 468 (2001) ("Congress … does not, one might say, hide elephants in mouseholes.").

57. Nor could the FLSA have delegated power to the Department to define the EAP exemption by requiring a minimum weekly salary because the statute lacks any intelligible principle to guide the Department's exercise of such power. *See id.* at 473; *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) ("Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it.").

58. The Act contains no intelligible principle to guide the Department's choice in

deciding across what time period an exempt employee must receive a fixed weekly salary, *e.g.*, daily versus weekly versus monthly. Nor does it contain any intelligible principle to guide the Department's choice in deciding what the minimum salary should be. Constitutional avoidance requires the Court to interpret § 213(a)(1) not to grant the Department unfettered power to determine how and how much exempt EAP employees must be paid.

59. In the alternative, even if the Act grants the Department authority to set a federal minimum salary for exempt white-collar workers, the salary set by the Final Rule exceeds that authority because it categorically excludes millions of workers who are employed in a *bona fide* executive, administrative, or professional capacity. *Nevada*, 218 F. Supp. 3d at 531 ("Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption.").

60. The Final Rule violates § 213(a)(1) by failing to exempt millions of workers who are "employed in a bona fide executive, administrative, or professional capacity," but who are not paid a minimum weekly salary set by the Department.

61. The Final Rule exceeds the Department's statutory authority and thus must be declared invalid and set aside.

Count Two
Failure to Observe Procedure Required by Law

62. Plaintiff incorporates the preceding paragraphs by reference.

63. Section 213(a)(1) requires that the EAP exemption be "defined and delimited from time to time by regulations of the Secretary[.]"

64. With exceptions that are not applicable here, the APA requires substantive agency rules to go through notice-and-comment rulemaking. 5 U.S.C. § 553.

65. The Department is an agency under the APA, and its rules defining and delimiting the EAP exception are substantive rules under the APA.

66. By purporting to implement automatic updates of the salary basis test every three years, the indexing mechanism that will be set forth in 29 C.F.R. § 541.607 violates the statutory command that the Secretary "define and delimit from time to time by regulation" the EAP exemption. The automatic updates established by the Final Rule also violate the APA's notice-and-comment rulemaking process.

67. The Final Rule fails to observe procedures required by law and thus must be declared invalid and set aside.

Count Three
Violation of the Constitution, Vesting Clause

68. Plaintiff incorporates the preceding paragraphs by reference.

69. Article 1, § 1 of the Constitution vests "[a]ll legislative Powers herein granted … in a Congress of the United States." "This text permits no delegation of those powers." *Am. Trucking*, 531 U.S. at 472.

70. Setting a minimum weekly salary requirement for white-collar employees is a legislative act that Congress may not delegate to the Department. By authorizing the Department to set such a requirement without guidance, § 213(a)(1) violates the Vesting Clause.

71. Section 213(a)(1) fails to provide any intelligible principle by which the Department could define "employee[s] employed in a bona fide executive, administrative, or professional capacity[.]" It does not even require the Department to act in the public interest. Nor does it offer any guidance as to what the public interest may be in the context of the white-collar exemption. On the contrary, the statute impermissibly confers unlimited legislative discretion onto the Department.

72. In promulgating the Final Rule, the Department is unconstitutionally exercising Congress's legislative power to establish a federal minimum salary level for white-collar workers.

73. The Final Rule violates the Vesting Clause and thus must be declared invalid and set aside.

Count Four
Violation of the Constitution, Appointments Clause

74. Plaintiff incorporates the preceding paragraphs by reference.

75. Article II of the U.S. Constitution empowers the President to appoint "Officers of the United States." This power is significant, as officers wield significant governmental power. Among other things, they lead federal agencies, develop national policy, and direct federal civil servants. The Founders therefore placed strict limits on the appointment power. Most important, they required the President to obtain the advice and consent of the U.S. Senate. *See* U.S. Const. art. II § 2.

76. The advice-and-consent requirement acts as a check on presidential favoritism. It also prevents the President from appointing unfit candidates. And it lends stability and predictability to the administration of government. It is not a mere formality; it is a foundational pillar in the Constitution's scheme for protecting private liberty. *See* The Federalist No. 76 (A. Hamilton); *Bullock v. BLM*, 489 F. Supp. 3d 1112, 1124 (D. Mont. 2020).

77. Courts must reject efforts to circumvent the advice-and-consent requirement. They have allowed the President to appoint "acting" officials only under procedures authorized by Congress itself—and even then, only temporarily. They have refused to allow the President to appoint acting officials outside of approved channels. And they have never allowed the President to circumvent the requirement by appointing such acting officials indefinitely. *See Bullock*, 489 F. Supp. 3d at 1126.

78. The Secretary of Labor is an officer of the United States. As such, he or she may be appointed only with the advice and consent of the Senate. Julie Su has purported to wield the

powers of the Secretary since March 2023, when then-Secretary Walsh resigned.

79. The President nominated Su to be Secretary on February 28, 2023, but the Senate has refused to confirm her. Instead of nominating someone the Senate might approve, the President renominated her in January 2024 despite its being clear that she would not receive the Senate's consent.

80. The President intends to allow Su to run the Department indefinitely as Acting Secretary without the Senate's consent. This scheme violates the Appointments Clause by circumventing the advice-and-consent process. If allowed, it would license the President to appoint officers with no external check. The President could choose acting officers—who would wield all the powers of confirmed officers—and simply leave them in place for the duration of the administration, renominating them periodically. Such artifice mocks the Constitution's design and threatens individual liberty. *See Bullock*, 489 F. Supp. 3d at 1126 ("The President cannot shelter unconstitutional 'temporary' appointments for the duration of his presidency through a matryoshka doll of delegated authorities.").

81. Since Su's nomination, the Department has relied on 29 U.S.C. § 552, which defines the duties of the Deputy Secretary of Labor. Among those duties is to serve as the acting Secretary during vacancies resulting from "death, resignation, or removal from office." That statute, however, allows the Deputy Secretary to exercise the Secretary's powers only on a temporary basis. It does not purport to allow the Deputy Secretary to serve as acting Secretary indefinitely, with no good-faith effort to fill the position with a permanent replacement.

82. Nor, indeed, could the statute authorize such a scheme. If the statute licensed such behavior, it would effectively create a new appointment mechanism—an appointment by default. Such an appointment is alien to the Constitution, which allows indefinite appointments only by

advice and consent. Congress could not license the administration to dispense with advice and consent any more than it could license the administration to write its own budget. The Senate may not waive its duty to provide advice and consent. *Cf. Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (holding that Congress could not license the president to veto individual line items of a budget bill because Congress, not the president, was responsible for authorizing federal appropriations).

83. Because Su has not received the Senate's consent, she has not been confirmed as the Secretary of Labor. She cannot continue to exercise the powers of that office indefinitely. She cannot continue to direct the Department's functions, including its regulatory functions. She has no constitutional authority to continue leading the Department. Because she lacks constitutional authority, she cannot license, direct, or approve binding rules on the Department's behalf.

84. The 2024 Rule was issued under Su's purported authority. Because she has no such authority, it is invalid. *See Bullock*, 489 F. Supp. 3d at 1130 (granting declaratory and injunctive relief against agency actions taken under acting official improperly put in office without the advice and consent of the Senate).

85. Because the 2024 Rule was issued without valid authority, it is void in its entirety. Its provisions are not severable because they all suffer the same constitutional infirmity. They should be set aside in their entirety. *See* 5 U.S.C. § 706(2)(B) (requiring a court to set aside final agency action that violates the Constitution); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021) (vacating entire rule issued under purported authority of acting secretary not properly appointed in accordance with Federal Vacancies Reform Act).

Count Five
Arbitrary and Capricious

86. Plaintiff incorporates the preceding paragraphs by reference.

87. The APA requires this Court to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

88. As set forth herein, Defendants' actions are arbitrary and capricious, are not otherwise in accordance with the law, and must be declared invalid and set aside.

RELIEF REQUESTED

Plaintiff respectfully requests that the Court grant it relief as follows:

A. Declaratory judgment that the Department lacks statutory authority under § 213(a)(1) to set a minimum weekly salary requirement for EAP employees; or in the alternative that § 213(a)(1) unconstitutionally delegates legislative power to set such minimum weekly salary;

B. Declaratory judgment that Acting Secretary Su lacks authority to promulgate the Final Rule;

C. Declaratory judgment that the Final Rule's minimum weekly salary exceeds the Department's statutory authority and is arbitrary and capricious;

D. Declaratory judgment that the Final Rule's automatic indexing mechanism violates procedures required by law and is arbitrary and capricious;

E. Preliminarily and permanently enjoin Defendants from enforcing the Final Rule;

F. Declare the Final Rule unlawful and set it aside;

G. Award attorneys' fees and costs to Plaintiff as a prevailing party, pursuant to 28 U.S.C. § 2412; and

H. Award Plaintiff any additional relief that the Court deems just, proper, or equitable.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Flint Avenue demands trial by jury in this action of all issues so triable.

Respectfully submitted,

/s/ Karen Cook

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

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

Attorneys for Plaintiff