IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

STATES OF NEVADA; STATE OF TEXAS; ALABAMA; ARIZONA; ARKANSAS; GEORGIA; INDIANA; KANSAS; LOUISIANA; NEBRASKA; OHIO; OKLAHOMA; SOUTH CAROLINA; UTAH; WISCONSIN; COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN; TERRY E. BRANSTAD, GOVERNOR OF THE STATE OF IOWA; PAUL LePAGE, GOVERNOR OF THE STATE OF MAINE; SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO; GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI; and ATTORNEY GENERAL BILL SCHUETTE ON BEHALF OF THE PEOPLE OF MICHIGAN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor, THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR; DR. DAVID WEIL, in his Official Capacity as Administrator of the Wage and Hour Division; MARY ZIEGLER, in her Official Capacity as Assistant Administrator for Policy of the Wage and Hour Division,

Defendants.

CIVIL ACTION NO. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION AND NATURE OF THE ACTION

On March 13, 2014, President Obama ordered the Department of Labor ("DOL") to "revise" the Fair Labor Standards Act's ("FLSA") overtime exemption for "bona fide executive, administrative, or professional" employees—the so-called "white collar" or "EAP" exemption. According to the President, new overtime regulations were necessary to "ke[ep] up with our modern economy." DOL, rather than analyze (and allow for notice and comment about) the duties that employees actually perform in our modern economy, simply doubled the current "salary basis test" that must be satisfied before an EAP employee is ineligible for overtime, and rendered virtually irrelevant any inquiry into whether an employee is actually working in an executive, administrative, or professional capacity. To DOL, salary level—not the type of work actually performed—"is the best single test of exempt status for white collar employees." 81 Fed. Reg. 32391, 32392 (May 23, 2016). Thus, under the premise of updating regulations related to the FLSA, DOL has disregarded the actual requirements of the statute and imposed a much-increased minimum salary threshold that applies without regard to whether an employee is *actually* performing "bona fide executive, administrative, or professional" duties.

DOL's use of, and conclusive emphasis on, the salary test defies the statutory text of 29 U.S.C. 213(a)(1), Congressional intent, and common sense. One would think—as the statute indicates—that actually performing white collar duties (*i.e.* being "employed in a [white collar] *capacity*") would be the best indicator of white collar exempt status. Instead, DOL relegates the type of work actually performed to a secondary consideration while dangerously using the "salary basis test," unencumbered by limiting principles, as the exclusive test for determining overtime eligibility for EAP employees.

Worse still, under the guise of interpretation, DOL included in their final rule an automatic indexing mechanism to ratchet-up the salary level every three years without regard for current economic conditions or the effect on public and private resources. Indexing not only evades the statutory command to delimit the exception from "time to time," as well as the notice and comment requirements of the Administrative Procedure Act ("APA"), it also ignores DOL's prior admissions that "nothing in the legislative or regulatory history … would support indexing or automatic increases …. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate." 69 Fed. Reg. 22122, 22171–72 (Apr. 23, 2004).

The new rule exceeds Constitutional authorization too. Under the new overtime rule, *States* must pay overtime to *State* employees that are performing executive, administrative, or professional functions if the *State* employees earn a salary less than an amount determined by the Executive Branch of the *Federal*

Government. And there is apparently no ceiling over which DOL cannot set the salary level. The threat to the States' budgets and, consequently, the system of federalism, is palpable. By committing an ever-increasing amount of *State* funds to paying State employee salaries or overtime, the Federal Executive can unilaterally deplete State resources, forcing the States to adopt or acquiesce to federal policies, instead of implementing State policies and priorities. Without a limiting principle (and DOL has recognized none) the Federal Executive could deliberately exhaust State budgets simply through the enforcement of the overtime rule. But even aside from that possibility, there is no question that the new rule, by forcing many State and local governments to shift resources from other important priorities to increased payroll for certain employees, will effectively impose the Federal Executive's policy wishes on State and local governments. The Constitution is designed to prohibit the Federal Executive's ability to dragoon and, ultimately, reduce the States to mere vassals of federal prerogative. Therefore, the new overtime rule must be set aside as violative of the Constitution, the authority given by Congress in 29 U.S.C § 213(a)(1), and the APA.

I. PARTIES

1. Plaintiff State of Nevada is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

2. Plaintiff State of Texas is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees

working in a bona fide EAP capacity.

3. Plaintiff State of Alabama is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

4. Plaintiff State of Arizona is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

5. Plaintiff State of Arkansas is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

6. Plaintiff State of Georgia is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

7. Plaintiff State of Indiana is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

8. Plaintiff State of Kansas is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

9. Plaintiff State of Louisiana is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

10. Plaintiff State of Nebraska is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

11. Plaintiff State of Ohio is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

12. Plaintiff State of Oklahoma is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity

13. Plaintiff State of South Carolina is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

14. Plaintiff State of Utah is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

15. Plaintiff State of Wisconsin is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity

16. Plaintiff Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity

17. Plaintiff Terry E. Branstad is the Governor of the State of Iowa, which is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

18. Plaintiff Paul LePage is the Governor of the State of Maine, which is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

19. Plaintiff Susana Martinez is the Governor of the State of New Mexico, which is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

20. Plaintiff Phil Bryant is the Governor of the State of Mississippi, which is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

21. Plaintiff Bill Schuette is the Attorney General of the State of Michigan, which is subject to the new overtime rule because it is an employer that pays a salary less than $913 per week to certain of its employees working in a bona fide EAP capacity.

22. Defendant United States Department of Labor is the federal agency responsible for supervising the formulation, issuance, and enforcement of rules, regulations, policies, and forms by the Wage and Hour Division ("WHD"). *See* 29 U.S.C § 204(a).

23. Defendant Thomas E. Perez is the United States Secretary of Labor ("Secretary"). He is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of DOL and WHD. He is sued in his official capacity.

24. Defendant Wage and Hour Division is the Division within DOL that is responsible for formulating, issuing, and enforcing the new overtime rule. *See* U.S.C. § 204(a); 29 C.F.R. § 541.1; 81 Fed. Reg. 32391, 32549.

25. Defendant Dr. David Weil is the Administrator of the WHD and he is responsible for the rules and regulations formulated, issued, and enforced by the WHD, including the new overtime rule. He is sued in his official capacity.

26. Mary Ziegler is the Assistant Administrator for Policy of the WHD and she is responsible for the rules and regulations formulated, issued, and enforced by the WHD, including the new overtime rule. She was also the designated recipient of comments for the new overtime rule. She is sued in her official capacity.

II. JURISDICTION AND VENUE

27. 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 Fair Labor Standards Act. 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.

28. Venue is proper in the Eastern District of Texas pursuant to 28 U.S.C. § 1391(e) because the United States, several of its agencies, and several of its officers in their official capacity are Defendants; a substantial part of the events or

omissions giving rise to Plaintiffs' claims occurred in this District; and the Plaintiff State of Texas is an employer of workers in this District.

29. 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 28 U.S.C. § 1361.

III. FACTUAL BACKGROUND

A. Legislative History

30. The FLSA became law on June 25, 1938. It generally requires, amongst other things, that employees "engaged in commerce" receive not less than the Federal minimum wage for all hours worked and also receive overtime (at one-and-half times the regular rate of pay) for all hours worked in excess of a forty-hour workweek. 52 Stat. 1060 (June 25, 1938).

31. FLSA contained a number of exceptions to the overtime requirement. Section 13(a)(1) set forth the "white collar" exemption which excludes from both minimum wage and overtime "any employee employed in a bona fide executive, administrative, or professional capacity …." 52 Stat. at 1067. The white collar exemption is now codified at 29 U.S.C. § 213(a)(1) ("The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—any employee employed in a bona fide executive, administrative, or professional capacity … (as such terms are defined and delimited from time to time by regulations of the Secretary …).").

32. Congress, through FLSA, did not define the terms "executive," "administrative," or "professional." Nor did it provide any intelligible principles by which the Secretary was to define or apply those terms. 52 Stat. at 1067 ("[A]s such terms are defined and delimited by regulations of the Administrator ….").

33. Pursuant to that complete delegation of Congress's legislative authority, DOL issued its first regulation concerning the white collar exemption approximately four months later, in October 1938. 3 Fed. Reg. 2518 (Oct. 20, 1938). The regulations are embodied in 29 C.F.R. § 541 *et seq*.

34. The first regulations promulgated to interpret the white collar exemption did not contain a salary test for all three categories; "professional" employees were only assessed by the work "customarily and regularly" performed. 3 Fed. Reg. 2518; *see also* 81 Fed. Reg. at 32395, 32400, 32423.

35. DOL did not add a salary test for all three categories until two years later. 5 Fed. Reg. 4077. The salary test has been steadily raised and modified ever since. *See, e.g.,* 14 Fed. Reg. 7705 (Dec. 24, 1949); 14 Fed. Reg. 7730 (Dec. 28, 1949); 19 Fed. Reg. 4405 (July 17, 1954); 23 Fed. Reg. 8962 (Nov. 18, 1958); 26 Fed. Reg. 8635 (Sept. 16, 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. 11390 (May 7, 1973); 40 Fed. Reg. 7091 (Feb. 19, 1975).

36. To satisfy today's salary basis test, "an employee must be compensated on a salary basis at a rate of not less than $455 per week …." 29 C.F.R § 541.600. Similarly, so-called "Highly Compensated Employees" ("HCEs") must have a "total

annual compensation of at least $100,000 [to be] deemed exempt under section 13(a)(1) ….” 29 C.F.R. § 541.601.

B. Supreme Court Precedent

37. Originally, FLSA did not apply to employees of the States or political subdivisions. 52 Stat. at 1060 § 3(d) (“‘Employer’ … shall not include the United States or any State or political subdivision of a State ….”).

38. Congress extended FLSA coverage to certain State and public entities in the 1960s, 75 Stat. 65 (May 5, 1961); 80 Stat. 830, 831 (Sept. 23, 1966), and attempted to extend coverage to all public sector employees in 1974. 88 Stat. 55, 58–59 (Apr. 8, 1974). The 1974 amendments imposed upon almost all public employers the minimum wage and maximum hour requirements that were previously limited to employees engaged in interstate commerce.

39. In 1976, the Supreme Court held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Tenth Amendment limited Congress’s power under the Commerce Clause to apply FLSA’s minimum wage and overtime protections to the States. The Court recognized that “[o]ne undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.” *Id*. at 845.

40. The overtime requirements’ coercive effect and impact on the States’ ability to perform integral governmental functions were particularly troubling to

the Court. *Id.* at 849–51. It held that the Federal Government does not have the authority to usurp the policy choices of the States as to how they structure the pay of State employees or how States allocate their budgets. *Id.* at 846–48. The Federal Government cannot dictate the terms on which States hire employees. *Id.* at 849. And it cannot force States to cut services and programs to pay for the Federal Government's policy choices related to wages. *Id.* at 855. To permit the Federal Government to manage State employment relationships would be to trample upon the principles of federalism by regulating the States as States. *Id.* at 842, 845. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'" *Id.* at 851 (quotations omitted).

41. Almost a decade later, however, the Supreme Court backed away from its decision in *Usery*, overruling it in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "The political process," the Court said in *Garcia*, "ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556. DOL's incorporation of "automatic indexing" in the final rule demonstrates that the political process provides states with no protection from administrative and executive overreach where the rule-makers nefariously use the rules to shield themselves from the political process.

42. Over three decades of experience since *Garcia* has cast serious doubt on the Court's optimistic reliance on mere politics to protect our federalist system

from Federal dominance. Subsequent Commerce Clause, Tenth Amendment, and Eleventh Amendment decisions call the continuing validity of *Garcia* into question. *See*, *e.g.*, *West v. Anne Arundel Cnty., Md.*, 137 F.3d 752, 757–58 (4th Cir. 1998) (Wilkerson, J.), *superseded on other grounds as stated in Morrison v. Cnty. of Fairfax, Va.*, No. 14-2308, --- F. 3d ---, 2016 WL 3409651 (4th Cir. June 21, 2016).

43. After *Garcia*, the Supreme Court next addressed the applicability of FLSA's white collar exemption and salary basis test to public employees in *Auer v. Robbins*, 519 U.S. 452 (1997). The Court acknowledged that "FLSA did not apply to state and local employees when the salary-basis test was adopted in 1940." *Id.* at 457. Nonetheless, because the government Respondents in *Auer* "concede[d] that the FLSA may validly be applied to the public sector, and they also d[id] not raise any general challenge to the Secretary's reliance on the salary-basis test," the Court did not address those issues in *Auer*. *Id.*

C. The New Overtime Rule

44. On March 13, 2014, the President sent to the Secretary a Presidential Memorandum "directing him to modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." 79 Fed. Reg. 18737.

45. The President opined that, despite being updated in 2004, "regulations regarding overtime exemptions from the [FLSA]s overtime requirement, particularly for executive, administrative, and professional employees (often

referred to as "white collar" exemptions) have not kept up with our modern economy." *Id.*

46. The President improperly equated the white collar exemption with the federal minimum wage (which, in any event, only Congress can change): "Because these regulations are outdated, millions of Americans lack the protections of overtime *and even the right to the minimum wage*." *Id.* (emphasis added).

47. With the President's instruction, DOL and WHD published a Notice of Proposed Rulemaking to propose revisions to 29 C.F.R. Part 541 on July 6, 2015. 80 Fed. Reg. 38516 (July 6, 2015).

48. In the proposed regulations, DOL proposed a salary level "at the 40th percentile of all full-time salaried employees [nationally] ($921 per week, or $47,892 for a full-year worker, in 2013) …." *Id.* at 38517. The proposed nationwide standard failed to account for regional and State variations in salaries and economic vibrancy. Yet DOL nonetheless stated that such a level would "accomplish the goal of setting a salary threshold that adequately distinguishes between employees *who may meet the duties requirements of the EAP exemption* and those who likely do not …." *Id.*

49. DOL also proposed "to set the HCE total compensation level at the annualized value of the 90th percentile of weekly wages of all full-time salaried employees ($122,148 per year) …." *Id.*

50. "Finally, [DOL] propose[d] to automatically update the standard salary and compensation levels annually … either by maintaining the levels at a fixed

percentile of earnings or by updating the amounts based on changes in the CPI-U." *Id*. at 38518.

51. DOL considered automatic updates to the salary level—not, for instance, regular updates to the duties component—"the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees." *Id*.

52. Despite the President's instruction to "address the changing *nature of the workplace*," 79 Fed. Reg. at 18737, DOL did not propose any revisions to the standards duties test that has been in place since 2004. 81 Fed. Reg. at 32444. Changes to the duties test were considered "more difficult," so increasing the salary level test was DOL's only answer to the problems and concerns that motivated the Notice of Proposed Rulemaking. *Id*.

53. The final rule was published on May 23, 2016. 81 Fed. Reg. 32391. It set the new salary level based upon the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region, which is currently the South. *Id*. at 32404. Utilizing only data from the fourth quarter of 2015, DOL "determined that the required standard salary level will be $913 per week, or $47,476 annually…." *Id*. at 32405.

54. The revised rule nearly doubles the previous salary test level of $455 per week.

55. DOL openly acknowledges that the revisions effectively create a minimum overtime-exempt salary level for white collar employees. "White collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*." *Id*. at 32405 (emphasis added). DOL "has concluded that white collar employees earning a salary of less than $913 per weeks are not bona fide EAP workers." *Id*. at 32419.

56. DOL agreed with commenters, such as AFL-CIO, that the new salary level test should be set relative to the minimum wage. 81 Fed. Reg. at 32405.

57. DOL disregarded concerns expressed by local governments that they do not have the same ability as private employers to increase prices or reduce profits. *Id*. at 32421. In its opinion, basing the new salary level on the lowest wage census region sufficiently addressed the concern of those governments. *Id*. Even so, DOL perpetuated the special salary level historically applied to American Samoa. *Id*. at 32422–23.

58. Additionally, the new rule increases the total annual compensation requirement for HCEs "to the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally, which based on fourth quarter of 2015 data is $134,004." *Id*. at 32429. Unlike the standard salary level test, DOL did not make a regional adjustment to the HCE compensation level. *Id*.

59. The revised salary level test and HCE compensation level will take effect on December 1, 2016. *Id*. at 32391.

60. Lastly, the new rule establishes an indexing mechanism to automatically update the standard salary level test and the HCE compensation requirement every three years on the first of the year. *Id*. at 32430. The indexing provisions are set forth in the new § 541.607. *Id*. The first automatic ratcheting will occur on January 1, 2020. *Id*.

61. DOL admits that the Section 13(a)(1) exemption does not reference automatic updating, a salary level, or the salary level test. *Id*. at 32431. While simultaneously claiming authority to enact these regulations, DOL bluntly states these regulations "were all made without specific Congressional authorization." *Id*.

D. The Impact on State Governments and Businesses

62. The Plaintiff States estimate that the new overtime rule will increase their employment costs significantly based, in part, upon the number of salaried EAP employees that will no longer be overtime exempt.

63. Because the Plaintiff States cannot reasonably rely upon a corresponding increase in revenue, they will have to reduce or eliminate some essential government services and functions. For example, certain infrastructure and social programs may be reduced or cut. The Plaintiff States' budgets will have less discretionary funds available because, as result of the new federal overtime rule, a greater percentage of their funds will be devoted to employment costs against the States' will. These changes will have a substantial impact on the lives and well-being of the Citizens of the Plaintiff States.

64. The Plaintiff States will be irreparably harmed by the application of the new overtime rule because the new rule "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *See Nat'l League of Cities*, 426 U.S. at 847.

65. The Plaintiff States will be forced to reclassify some salaried EAP employees as hourly employees and reduce their hours to avoid the payment of overtime. The Plaintiff States may also have to increase the workload of EAP employees that will remain overtime exempt to accommodate the reduced workload of reclassified workers. And the Plaintiff States may have to eliminate some employment positions due to the new budgetary constraints.

66. The State of Iowa is an example of the effect on the Plaintiff States. It estimates that the new rule will add approximately $19.1 million of additional costs on the State of Iowa government and its public universities in the first year.

67. The State of Arkansas is another illustration. Under the new overtime rule, the State of Arkansas estimates that approximately 3,995 employees reporting through the Arkansas Administrative Statewide Information System (AASIS) will no longer be overtime exempt. The resulting financial burden to the State in additional annual employment costs and overtime/compensatory time accruals would far exceed $1,000,000 if the State maintained its current level of overtime usage and payouts.

68. The State of Arkansas will likely be required to reclassify many salaried EAP employees as hourly employees and limit those employees' hours to

avoid the payment of overtime. Limiting and shifting workloads to avoid additional overtime liability is likely to result in the reduction of services or delays in the provision of those services.

69. The State of Arkansas agencies that employ large numbers of specialized job classifications, such as nurses or law enforcement officers, are inherently restricted in the ability to shift or limit workloads, and will therefore necessarily suffer increased overtime payouts that could cripple budgets.

70. The adverse impacts of the overtime rule are most noticeable on the state level, as the State of Arkansas employs roughly 14% of the State's workforce. However, the drastic expansion of the salary threshold also directly impacts all other public and private FLSA-covered employers, including small businesses, low-profit margin businesses, and rural communities. The County Quorum Courts of Baxter, Pope, Benton, White, and Marion Counties have passed resolutions citing the undue hardship (financial and otherwise) that the new overtime rule will impose upon employers and employees in the State of Arkansas and requesting that the Arkansas Attorney General take legal action to protect the interests and well-being of all Arkansas citizens.

71. Similarly, the State of Kansas has approximately 550 exempt Executive and Judicial Branch employees—which is approximately 20% of all such employees in Kansas—who would be affected by the new overtime rule. These numbers do not include employees of the Kansas Board of Regents.

72. Private employers in Kansas will also suffer. DOL estimates that approximately 40,000 employees in Kansas will be affected by the new overtime rule.

73. The State of Maine provides another example of the effect on the Plaintiff States. Under the new overtime rule, the State of Maine estimates that approximately 450 employees could be no longer overtime exempt. The State of Maine's biennial budget does not include funding to offset the resulting financial burden to the State in additional annual employment costs and overtime/compensatory time accruals, if the State maintained its current level of overtime usage and payouts.

74. The State of Maine will likely be required to reclassify many salaried EAP employees as hourly employees and limit those employees' hours to avoid the payment of overtime. This will likely result in the loss of flex schedules over Maine's two-week pay period and the elimination of telecommuting for affected employees, as well as other strategies to manage hours to conform with the State's biennial budget. Limiting and shifting workloads and eliminating workplace flexibility to avoid additional overtime liability is likely to result in the reduction of services or delays in the provision of those services.

75. Likewise, the Commonwealth of Kentucky estimates that, by December 1, 2016, it will have approximately 1,600 state employees who will move into the category of employees covered by the new rule, i.e. into non-exempt status.

76. The State of Arizona also has about 1,437 employees that are currently classified as "exempt" that are earning an annual salary less than the new threshold. If there were no other changes to FLSA designation, and the only thing that changed was an increase to the employees' base salary to ensure they are at least equal to the new threshold, the budgetary impact would be nearly $10,000,000.

77. Private employers in the Plaintiff States will suffer the same ill-effects. The harm to the Plaintiff States' private employers will impact the Plaintiff States' tax revenue—the same source from which they will now have to pay the Federal Executive's increased overtime pay requirement.

IV. CLAIMS FOR RELIEF

COUNT ONE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules at Issue Are Unlawful by Violating the Tenth Amendment

78. The allegations in paragraphs 1 through 77 are reincorporated herein.

79. 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. Similarly, 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).

80. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to

the states respectively, or the people." U.S. Const. amend X.

81. The Tenth Amendment is a barrier to Congress's power under the Commerce Clause to apply FLSA to the States and the 29 C.F.R. Part 541 salary basis test and compensation levels.

82. As set forth herein, enforcing FLSA and the new overtime rule against the States infringes upon state sovereignty and federalism by dictating the wages that States must pay to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

83. FLSA and the new overtime rule commandeer, coerce, and subvert the States by mandating how they structure the pay of State employees and, thus, they dictate how States allocate a substantial portion of their budgets. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012) ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

84. Further, as a result of the new overtime rules and the accompanying damage to State budgets, States will be forced to eliminate or alter employment relationships and cut or reduce services and programs. Left unchecked, DOL's salary basis test and compensation levels will wreck State budgets.

85. The new overtime rule regulates the States as States and addresses matters that are indisputable attributes of State sovereignty (employment

relationships, services, functions, and budgets). Compliance with the overtime rule directly impairs the States' ability to structure integral operations in areas of traditional governmental functions and there is no federal interest that justifies State submission. *See Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 & n.29 (1981).

86. To the extent *Garcia* can be read to hold otherwise, it should be overruled.

87. Because the new rules and regulations are not in accordance with the law as articulated above, they are unlawful, should be declared invalid, and should be set aside.

COUNT TWO

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules at Issue Are Unlawful by Exceeding Congressional Authorization – Salary Basis Test, HCE Compensation Level, and Indexing

88. The allegations in paragraphs 1 through 87 are reincorporated herein.

89. 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. Similarly, the APA requires this Court to hold unlawful and set aside any agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

90. 29 U.S.C. § 213(a)(1)'s plain terms address "employees employed in a bona fide executive, administrative, or professional *capacity* …." (Emphasis added.) It speaks in terms of "*activities*," not salary. *Id*. Accordingly, the applicability of the exemption must be determined based upon the duties and activities actually performed by the employee, not merely with respect to the salary paid to the employee. Salary may be one factor to be considered, but it cannot be a litmus test.

91. There is no indication that Congress intended an employee's salary level to be a proxy (or substitute) "for distinguishing between overtime-eligible employees and overtime exempt white collar workers." *Cf.* 81 Fed. Reg. 32404. And Congress had no intention of effectively establishing a federal minimum overtime-exempt salary for white collar workers through 29 U.S.C. § 213(a)(1).

92. The new rule also violates Congressional authorization by failing to exempt "bona fide executive, administrative, or professional" employees whose salaries fall below the new threshold.

93. Moreover, there is no specific Congressional authorization in 29 U.S.C. § 213(a)(1), or FLSA generally, for the new indexing mechanism related to the salary basis test and HCE compensation level.

94. DOL has acknowledged that its historical use of a salary level and salary basis test, as well as its future attempted use of indexing, are "without specific Congressional authorization." 81 Fed. Reg. at 32431. Invalid action does not become valid through the passage of time.

95. Therefore, the new rules and regulations described herein go so far beyond any reasonable reading of the relevant statutory text that the new salary level, salary basis test, HCE compensation level, and indexing mechanism are in excess of Congressional authorization and must be declared invalid and set aside.

COUNT THREE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules at Issue Are Being Imposed Without Observance of Procedure Required by Law – Indexing

96. The allegations in paragraphs 1 through 95 are reincorporated herein.

97. 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. Similarly, the APA requires this Court to hold unlawful and set aside any agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

98. 29 U.S.C. § 213(a)(1) mandates that the white collar exemption be "defined and delimited from time to time by regulations of the Secretary …."

99. With exceptions that are not applicable here, agency rules must go through notice-and-comment rulemaking. 5 U.S.C. § 553.

100. The Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the new rules and described herein are "rules" under the APA. 5 U.S.C. § 551(4).

101. By purporting to implement automatic updates of the salary basis test and HCE compensation level every three years, the indexing mechanism that will be set forth in new 29 C.F.R. § 541.607 violates the statutory command to "define

and delimit from time to time," as well as the APA's notice-and-comment rulemaking process.

102. DOL concedes that indexing will dispense with "the need for frequent rulemaking" in violation of the statutory language and APA. 81 Fed. Reg. 32400.

103. Therefore, the new rules and regulations described herein do not observe the procedures required by law, are in excess of Congressional authorization, and must be declared invalid and set aside.

COUNT FOUR

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules at Issue Are Arbitrary and Capricious

104. The allegations in paragraphs 1 through 103 are reincorporated herein.

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

106. 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.

COUNT FIVE – IN THE ALTERNATIVE

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202 (DJA) and 5 U.S.C. § 706 (APA) that the new Rules at Issue Are Unlawful by Improperly Delegating Congressional Legislative Power

107. The allegations in paragraphs 1 through 106 are reincorporated herein.

108. 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. Similarly, 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).

109. Article 1, § 1 of the Constitution vests "[a]ll legislative Powers herein granted … in a Congress of the United States." The text does not permit the delegation of those powers so the Supreme Court has "repeatedly said that when Congress confers decisionmaking 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 v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quotations omitted).

110. 29 U.S.C. § 213(a)(1) fails to lay down any intelligible principle by which DOL was to establish the qualifications of the white collar exemption. On the contrary, Congress impermissibly conferred unlimited legislative authority on DOL.

111. As a result of Congress's failure to provide an intelligible principle to guide DOL's rulemaking under 29 U.S.C. § 213(a)(1), DOL asserts:

> While it is true that section 13(a)(1) does not reference automatic updating, it also does not reference a salary level or salary basis test, a duties test, or other longstanding regulatory requirements. Rather than set precise criteria for defining EAP exemptions, Congress delegated that task to the Secretary by giving the Department the broad authority to define and delimit who is bona fide executive, administrative, or professional employee … These changes were all made without specific Congressional authorization.

81 Fed. Reg. 32431.

112. Therefore, DOL is unconstitutionally exercising Congress's legislative power to establish a Federal minimum salary level for white collar workers through the new overtime rules.

113. Because the new rules and regulations are not in accordance with the law as articulated above, they are unlawful, should be declared invalid, and should be set aside.

V. DEMAND FOR JUDGMENT

Plaintiffs respectfully request the following relief from the Court:

114 A declaratory judgment that the new overtime rules and regulations are substantively unlawful under the Constitution;

115. A declaratory judgment that the new overtime rules and regulations are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under the APA;

116. A declaratory judgment that the new overtime rules and regulations must be set aside actions taken "without observance of procedure required by law" under the APA;

117. A declaratory judgment that the new overtime rules and regulations, are arbitrary and capricious under the APA;

118. A declaratory judgment that the new overtime rules are unlawful as applied to the States;

119. Temporary or preliminary relief enjoining the new overtime rules and regulations from having any legal effect;

120. A final, permanent injunction preventing the Defendants from implementing, applying, or enforcing the new overtime rules and regulations; and

121. All other relief to which the Plaintiffs may show themselves to be entitled, including attorney's fees and costs of court.

Respectfully submitted,

Dated: September 20, 2016.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

PLANO CHAMBER OF COMMERCE; TEXAS ASSOCIATION OF BUSINESS; ALLEN-FAIRVIEW CHAMBER OF COMMERCE; FRISCO CHAMBER OF COMMERCE; MCKINNEY CHAMBER OF COMMERCE; PARIS-LAMAR COUNTY CHAMBER OF COMMERCE; GILMER AREA CHAMBER OF COMMERCE; GREATER PORT ARTHUR CHAMBER OF COMMERCE; KILGORE CHAMBER OF COMMERCE; LONGVIEW CHAMBER OF COMMERCE; LUFKIN-ANGELINA COUNTY CHAMBER OF COMMERCE; TYLER AREA CHAMBER OF COMMERCE; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL AUTOMOBILE DEALERS ASSOCIATION; THE NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; NATIONAL RETAIL FEDERATION; AMERICAN BAKERS ASSOCIATION; AMERICAN HOTEL & LODGING ASSOCIATION; AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES; ASSOCIATED BUILDERS AND CONTRACTORS; INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA; INTERNATIONAL FRANCHISE ASSOCIATION; INTERNATIONAL WAREHOUSE AND LOGISTICS ASSOCIATION; NATIONAL ASSOCIATION OF HOMEBUILDERS; ANGLETON CHAMBER OF COMMERCE; BAY CITY CHAMBER OF COMMERCE & AGRICULTURE; BAYTOWN CHAMBER OF COMMERCE; CEDAR PARK CHAMBER OF COMMERCE; CLEAR LAKE AREA CHAMBER OF COMMERCE; COPPELL CHAMBER OF COMMERCE; CORSICANA AND NAVARRO COUNTY CHAMBER OF COMMERCE; EAST PARKER COUNTY

CHAMBER OF COMMERCE; GALVESTON REGIONAL CHAMBER OF COMMERCE; GRAND PRAIRIE CHAMBER OF COMMERCE; GREATER EL PASO CHAMBER OF COMMERCE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; GREATER NEW BRAUNFELS CHAMBER OF COMMERCE; GREATER TOMBALL CHAMBER OF COMMERCE; HOUSTON NORTHWEST CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE d/b/a LAKE HOUSTON CHAMBER OF COMMERCE KILLEEN CHAMBER OF COMMERCE; LUBBOCK CHAMBER OF COMMERCE; MCALLEN CHAMBER OF COMMERCE; MINERAL WELLS AREA CHAMBER OF COMMERCE; NORTH SAN ANTONIO CHAMBER OF COMMERCE; PEARLAND CHAMBER OF COMMERCE; PORT ARANSAS CHAMBER OF COMMERCE; PORTLAND CHAMBER OF COMMERCE; RICHARDSON CHAMBER OF COMMERCE; ROCKPORT-FULTON CHAMBER OF COMMERCE; ROUND ROCK CHAMBER OF COMMERCE; SAN ANGELO CHAMBER OF COMMERCE; TEXAS HOTEL AND LODGING ASSOCIATION; TEXAS RETAILER ASSOCIATION; and TEXAS TRAVEL INDUSTRY ASSOCIATION,

PLAINTIFFS,

v.

THOMAS E. PEREZ, in his official capacity as Secretary of Labor, U.S. Department of Labor, DAVID WEIL, in his official capacity as Administrator, Division of Wage and Hour, U.S. Department of Labor, and the U.S. DEPARTMENT OF LABOR

DEFENDANTS.

Civil Action No. 16-cv-732

COMPLAINT

Plaintiffs are a broad and diverse coalition of more than fifty-five Texas and national business groups. On behalf of themselves and the millions of businesses and employers they represent in Texas and throughout the nation, they allege as follows:

INTRODUCTION

1. Plaintiffs bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, challenging a final rule promulgated by the United States Department of Labor ("DOL" or "Department") on May 18, 2016 entitled, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," (hereafter the "new Overtime Rule" or simply "the Rule"), 81 Fed. Reg. 32,391 (May 23, 2016). The Overtime Rule exceeds the authority of the DOL and Defendants Thomas E. Perez and David Weil under the Fair Labor Standards Act ("FLSA" or "Act"), and also is arbitrary, capricious, contrary to procedures required by law, and otherwise contrary to law. Unless this Court vacates and sets aside the new Overtime Rule, this unprecedented Rule will impair Plaintiffs' statutory rights to treat as exempt from overtime millions of heretofore exempt executive, administrative, professional, and computer employees. The Rule will go into effect on December 1, 2016, causing economic harm to both employers and many of the employees who will be subject to the Rule's new overtime requirements.

2. The new Overtime Rule drastically alters DOL's minimum salary requirements for exemption—increasing the minimum by 100%—so as to impose new overtime payment requirements on businesses of all sizes and employers that employ millions of individuals who have historically been considered to be exempt from overtime. The new Overtime Rule defies the mandate of Congress to exempt executive, administrative, professional, and computer employees from the overtime requirements of the FLSA. The Rule raises the minimum salary threshold so

high that the new salary threshold is no longer a plausible proxy for the categories exempted by Congress. As a result, the exemption is effectively lost for entire categories of salaried executive, administrative, professional, and computer employees whose job duties qualify them to be treated as exempt, in a manner that is inconsistent with and departs from more than 75 years of congressionally approved regulation by the Department. As explained further below, the justifications offered by DOL for the new minimum salary do not constitute a permissible construction of the statutory terms and are based upon reasoning that is arbitrary, capricious, and otherwise contrary to law.

3. In an implicit acknowledgement that its new minimum salary threshold would otherwise exclude many employees intended by Congress to be treated as exempt executive, administrative, professional, or computer employees, DOL's new Overtime Rule permits employers for the first time to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the minimum salary level for exemption. However, this provision is so restricted by the DOL as to be meaningless to the great majority of employers, because the Rule arbitrarily excludes nondiscretionary bonuses, incentives and commissions paid less frequently than quarterly and because it arbitrarily excludes other types of compensation (e.g., discretionary bonuses, profit-sharing, stock options, employer-funded retirement benefit, and deferred compensation).

4. The new Overtime Rule also violates the Act and exceeds DOL's regulatory authority by establishing an unprecedented "escalator" provision that will dramatically increase the minimum salary over time. This provision not only departs from the terms of the FLSA, it does so without additional notice and comment required by the APA. Furthermore, DOL's

justifications for this departure from three-quarters of a century of administrative practice are again arbitrary, capricious, and otherwise contrary to law.

5. Employer members of the Plaintiff associations, and their previously exempt employees across many industries, job categories, and geographic areas, will be injured by the new Overtime Rule. The costs of compliance will force many smaller employers and non-profits operating on fixed budgets to cut critical programming, staffing, and services to the public. Many employers will lose the ability to effectively and flexibly manage their workforces upon losing the exemption for frontline executives, administrators, and professionals. Millions of employees across the country will have to be reclassified from salaried to hourly workers, resulting in restrictions on their work hours that will deny them opportunities for advancement and hinder performance of their jobs—to the detriment of their employers, their customers, and their own careers. Finally, the failure of DOL to provide any phase-in period for the radical increase in the minimum salary level required for exemption under the Rule, and the inclusion of an unprecedented escalator provision, exacerbates the significant impact on businesses, both large and small, that will be harmful to the economy as a whole. The new Overtime Rule should be vacated in order to protect the rights of Plaintiffs and their members and employees, and the interests of the public.

PARTIES

6. Plaintiff Plano Chamber of Commerce ("Plano Chamber") is committed to maximizing business development and economic growth of the Plano community through advocacy, education, innovation, and collaboration. Founded in 1946, the Plano Chamber has worked tirelessly to promote local economic growth, foster business-friendly policies, and serve its members through exceptional programs, benefits, and service. Accredited as a five-star

chamber of commerce in 2015, the Plano Chamber is recognized as being in the top 1 percent of all chambers in the United States. The Plano Chamber is the voice of the business community in Plano and brings this action on behalf of itself and its members, in order to advance the interests of its members. Along with all of the Plaintiffs identified below, many of the Plano Chamber's member organizations employ executive, administrative, professional, or computer employees whose previously exempt status will be adversely affected by the new Overtime Rule, to the detriment of Plano Chamber's members, employees, and customers.

7. Texas Association of Business ("TAB") is the state chamber of commerce for Texas, advocating for policies favorable to businesses on behalf of Texas employers and businesses of all sizes and representing more than 4,000 business members and their over 600,000 employees at the state and federal levels. On the federal level, TAB works to promote a national affairs agenda aimed at improving the climate for employers, so their employees may thrive. TAB regularly brings litigation challenging the legality of rulemaking by federal agencies, including the U.S. Department of Labor, in order to protect the legal rights of Texas businesses with respect to subjects such as employment regulations, wages, hours, and benefits, and regulatory cost-benefit analysis. The new Overtime Rule is directly contrary to TAB's goal of minimizing the regulatory burdens faced by Texas employers. TAB brings this action on behalf of itself and its members, in order to advance the interests of its members and, more broadly, the entire business community in Texas.

8. Plaintiff Allen-Fairview Chamber of Commerce ("Allen-Fairview Chamber") is a non-profit association that strives to be the indispensable resource for Allen and Collin County businesses. The Allen-Fairview Chamber is a voluntary organization of business owners and citizens who are investing their time and money in a true community development program to

improve the economic, civic, and cultural fortitude of the region, community, and greater Allen area. The Allen-Fairview Chamber brings this action on behalf of itself and its members.

9. Plaintiff Frisco Chamber of Commerce ("Frisco Chamber") is a four-star accredited chamber of commerce and is the "Voice of Business" and an advocate for the business community in the Frisco area, implementing ideas and maintaining and strengthening the business environment in the area. The Frisco Chamber does this by providing information, resources, and connections to and for the business and local community. The Frisco Chamber has more than 1,150 member businesses that provide goods and services to the growing, bustling economy in Frisco and the surrounding area. The Frisco Chamber brings this action on behalf of itself and its members.

10. Plaintiff McKinney Chamber of Commerce ("McKinney Chamber") is a four-star accredited chamber of commerce. The McKinney Chamber is an advocate and voice for the McKinney business community. The McKinney Chamber represents over 40,000 employees from over 1,200 business investors in the McKinney and North Texas region. It serves as the unified business voice for McKinney. The McKinney Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

11. Plaintiff Paris-Lamar County Chamber of Commerce ("Paris-Lamar County") seeks to lead the way for economic growth in Lamar County by promoting and meeting the needs of business, industry, and tourism. The Paris-Lamar County Chamber brings this action on behalf of itself and its members.

12. Plaintiff Gilmer Area Chamber of Commerce ("Gilmer Area Chamber") is an active association of local business owners and individual members whose main goal is to promote commerce, tourism and charity in Upshur County, Texas. The Gilmer Area Chamber

has more than 200 members. The Gilmer Area Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

13. Plaintiff Greater Port Arthur Chamber of Commerce ("Port Arthur Chamber") is a membership organization of business and community representatives that works together as a team to advocate for enhanced educational opportunities, infrastructure improvements, the creation of jobs, and a positive vision for the future for the Port Arthur area and surrounding communities. The Port Arthur Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

14. Plaintiff Kilgore Chamber of Commerce ("Kilgore Chamber") is a business organization of member investors and partners from a cross-section of the business community. The Kilgore Chamber is a voice for business and is focused on strengthening the business environment. The Kilgore Chamber represents more than 350 businesses that provide goods and services to Kilgore and the surrounding area. The Kilgore Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

15. Plaintiff Longview Chamber of Commerce ("Longview Chamber") is a voluntary organization of businesses and professional men and women who have joined together for the betterment of business, development of tourism, development of downtown Longview, and the overall quality of life in Longview and the surrounding area. The Longview Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

16. Plaintiff Lufkin-Angelina County Chamber of Commerce ("Lufkin-Angelina Chamber") advocates to improve the economic prosperity and the business environment in Lufkin and Angelina Counties. For more than 90 years, the Lufkin-Angelina Chamber has served to improve the business community in both counties through the stimulation of economic

growth and trade, the education of the public in the role and purpose of business, and the support of activities which enhance the area's quality of life, and by serving as a catalyst for positive change in the community. The Lufkin-Angelina Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

17. Plaintiff Tyler Area Chamber of Commerce ("Tyler Area Chamber") aims to enhance the business environment, economic well-being, and quality of life for the Tyler area. The Tyler Area Chamber consists of more than 2,500 businesses, organizations, and individuals that work to advance the interests of the business community in the Tyler area. The Tyler Area Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members.

18. Plaintiff Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and business associations. It directly represents 300,000 members and indirectly represents the interests of more than three million businesses and trade associations of every size, in every industry sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly brings litigation challenging the legality of rulemaking by federal agencies, including the U.S. Department of Labor, in order to protect the legal rights of American businesses with respect to subjects such as employment regulations, wages, hours, and benefits, and regulatory cost-benefit analysis. The Chamber brings this action on behalf of itself and its members, in order to advance the interests of its members and, more broadly, the entire business community.

19. Plaintiff National Automobile Dealers Association ("NADA") is a national non-profit trade organization, founded in 1917, serving and representing franchised new car and truck dealers nationwide. Its members sell new cars and trucks and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. As of October 2015, NADA had approximately 16,000 franchised motor vehicle dealerships as members in the United States. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals to advocate interpretations of federal and state statutes that will advance the interests of its members as a group. NADA brings this action on behalf of itself and its members.

20. Plaintiff National Association of Manufacturers ("NAM") is the leading advocate for the U.S. manufacturing community. The NAM represents thousands of businesses of all sizes from every industry and every region of the country. The NAM's membership includes several employer associations as well as individual employers. The NAM and its members regularly advise employers on labor relations matters. The NAM brings this action on behalf of itself and its members.

21. Plaintiff National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit trade association that represents the wholesale distribution industry. NAW is composed of direct member companies and a federation of approximately 85 national, regional, state and local associations and their member firms, which together include approximately 40,000 companies operating at more than 150,000 locations throughout the nation. NAW's members form the backbone of the United States economy; the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and

governmental end users. Although wholesaler-distributors vary widely in size, the overwhelming majority are small to medium size, closely held businesses. The wholesale distribution industry generates $5.6 trillion in annual sales volume and provides stable and well-paying jobs to more than 5.9 million workers. NAW brings this action on behalf of itself and its members.

22. Plaintiff the National Federation of Independent Business ("NFIB") is the nation's leading small business advocacy association, representing members in all 50 states and Washington, DC. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents about 325,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the small businesses affected by the new Overtime Rule. NFIB brings this action on behalf of itself and its members.

23. Plaintiff National Retail Federation ("NRF") is the world's largest retail trade association, representing retailers of all types and sizes from across the United States, ranging from the largest department stores to the smallest sole proprietors, including specialty, apparel, discount, online, independent, grocery retailers, and chain and local restaurants and service establishments, among others. NRF brings this action on behalf of itself and its members.

24. Plaintiff American Bakers Association ("ABA") is the leading voice for the wholesale baking industry. The ABA represents the interests of bakers before Congress, federal agencies, the courts, and international regulatory authorities. The baking industry generates more than $102 billion in economic activity annually and employs more than 706,000 highly skilled people. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. ABA brings this action on behalf of itself and its members.

25. Plaintiff Associated Builders and Contractors ("ABC") is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. The vast majority of ABC member contractors are small businesses, but they employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry, and include many exempt employees covered by the new Rule. ABC brings this action on behalf of itself and its members.

26. Plaintiff American Hotel and Lodging Association ("AH&LA"), founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. Supporting 8 million jobs and with over 24,000 properties in membership nationwide, the AH&LA represents more than half of all the hotel rooms in the United States. The mission of AH&LA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AH&LA serves the lodging industry by providing representation at the federal, state and local level in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry. AH&LA brings this action on behalf of itself and its members.

27. Plaintiff American Society of Association Executives ("ASAE") is a membership organization of more than 21,000 association professionals and industry partners representing more than 9,300 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States. ASAE's mission is to provide resources, educations, ideas, and advocacy to enhance the power and performance of

the association community. ASAE is a leading voice on the value of associations and the resources they can bring to bear on society's most pressing problems. ASAE brings this action on behalf of itself and its members.

28. Plaintiff Independent Insurance Agents and Brokers of America ("IIABA") is a voluntary federation of state associations comprising the nation's largest association of independent insurance agencies, and representing the interests of a nationwide network of over 21,000 small, medium and large businesses in all 50 states. The new Overtime Rule will result in thousands of independent insurance agencies suffering tangible economic harm. IIABA and its state associations, as employers, will also be subject to the new Overtime Rule, and will suffer economic injury as a result of the rule. IIABA brings this action on behalf of itself, its 50 state associations, and its member businesses.

29. Plaintiff International Franchise Association ("IFA") is a membership organization of franchisors, franchisees, and suppliers. Founded in 1960, the IFA is the world's oldest and largest organization dedicated to the use of the franchise business model. The IFA's membership includes more than 1,350 franchisor companies and more than 12,000 franchisees nationwide, including in Texas. IFA brings this action on behalf of itself and its members.

30. Plaintiff International Wholesale and Logistics Association ("IWLA") was founded in 1891 to advocate for the interests of warehouse-based third party logistics providers (3PLs) that store, distribute and add value to manufacturers' products as they move through the supply chain. The vast majority of IWLA member companies are small businesses. IWLA brings this action on behalf of itself and its members.

31. Plaintiff National Association of Homebuilders ("NAHB") is a national trade association whose mission is to enhance the climate for housing and the building industry. Chief

among NAHB's goals is providing and expanding opportunities for all consumers to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's 140,000 members are involved in home building, remodeling, multifamily construction, and other aspects of residential and light commercial construction. NAHB members will construct approximately eighty percent of the housing built this year.

32. Plaintiffs Angleton Chamber of Commerce, Bay City Chamber of Commerce & Agriculture, Baytown Chamber of Commerce, Cedar Park Chamber of Commerce, Clear Lake Area Chamber of Commerce, Coppell Chamber of Commerce, Corsicana and Navarro County Chamber of Commerce, East Parker County Chamber of Commerce, Galveston Regional Chamber of Commerce, Grand Prairie Chamber of Commerce, Greater El Paso Chamber of Commerce, Greater-Irving Las Colinas Chamber of Commerce, Greater New Braunfels Chamber of Commerce, Greater Tomball Chamber of Commerce, Houston Northwest Chamber of Commerce, Humble Area Chamber of Commerce d/b/a/ Lake Houston Chamber of Commerce, Killeen Chamber of Commerce, Lubbock Chamber of Commerce, McAllen Chamber of Commerce, Mineral Wells Area Chamber of Commerce, North San Antonio Chamber of Commerce, Pearland Chamber of Commerce, Port Aransas Chamber of Commerce, Portland (Texas) Chamber of Commerce, Richardson Chamber of Commerce, Rockport-Fulton Chamber of Commerce, Round Rock Chamber of Commerce, and San Angelo Chamber of Commerce (collectively "the Texas Chambers of Commerce") are twenty-eight voluntary, non-profit, membership organizations representing tens of thousands of businesses located throughout the rest of the State of Texas (i.e., outside of the physical confines of the Eastern District of Texas). The Texas Chambers of Commerce all advocate for the interests of their respective members on a

wide variety of legislative, regulatory, and economic development matters affecting businesses and the communities within their respective jurisdictions throughout the State of Texas. These Texas Chambers bring this action on behalf of themselves and their members.

33. Plaintiffs Texas Hotel and Lodging Association ("THLA"), Texas Retailers Association ("TRA"), and Texas Travel Industry Association ("TTIA") are non-profit trade associations representing every aspect of the lodging, retail, travel, and tourism industries statewide in Texas. THLA, TRA, and TTIA bring this action on behalf of themselves and their members.

34. As a result of the new Overtime Rule, Plaintiffs and their member employers will be harmed in their ability to maintain the overtime exemption for executive, administrative, and professional employees who otherwise would be exempt from payment of overtime under the FLSA. Plaintiffs and their members will incur legal, payroll, and accounting costs in order to comply with the new Rule, both before and after its effective date. They will also suffer harm to their ability to manage their businesses due to the loss of flexibility in the hours worked by previously exempt executive, administrative, professional, and computer employees and the forced conversion of millions of previously exempt salaried employees to an hourly basis.

35. In addition to having standing in their own right as employers of many exempt employees whose status is adversely affected by the new Rule, Plaintiffs also have standing to pursue this action as associations representing millions of employers and businesses, under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and

(3) neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

36. Defendant Thomas E. Perez is the United States Secretary of Labor with his office located at 200 Constitution Avenue, NW, Washington, DC 20210. Pursuant to 5 U.S.C. § 703, he is being sued in his official capacity as head of DOL, along with DOL itself, which promulgated the Rule.

37. Defendant David Weil is the Administrator of the DOL's Wage and Hour Division. Pursuant to 5 U.S.C. §703, he is being sued in his official capacity as the officer at the Department primarily responsible for the promulgation and implementation of the Rule.

JURISDICTION AND VENUE

38. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it is a civil action arising under the Constitution and laws of the United States, including the FLSA, 29 U.S.C. § 201 *et seq.*, and the APA, 5 U.S.C. § 500 *et seq.*

39. The Court is authorized to award relief under the APA, 5 U.S.C. §§ 701-706, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

40. Venue is proper in this district under 28 U.S.C. § 1391(e) because this is an action against officers and an agency of the United States, and Plaintiffs Allen-Fairview Chamber, Frisco Chamber, McKinney Chamber, Plano Chamber, Gilmer Area Chamber, Kilgore Chamber, Longview Chamber, Lufkin-Angelina County Chamber, and Paris-Lamar County Chamber, and Port Arthur Chamber reside in this judicial district and no real property is involved in this action.

Venue is also proper in the Sherman Division of this Court because Plaintiffs Allen-Fairview Chamber, Frisco Chamber, McKinney Chamber, Plano Chamber, and Paris-Lamar County Chamber reside in this Division.

BACKGROUND

I. The FLSA's Exemption of Executive, Administrative, Professional and Computer Employees Prior to the New Overtime Rule

41. The Fair Labor Standards Act, enacted by Congress in 1938 during the Great Depression, generally requires covered employers to pay their employees at least the federal minimum wage (currently, $7.25 per hour) for all hours worked and overtime pay at one and one-half an employee's regular rate of pay for all hours worked over 40 in a single workweek. 29 U.S.C. §§ 206 (minimum wage), 207 (overtime).

42. Congress never intended the overtime requirements to be applied universally. As enacted in 1938, and amended through the years since, the FLSA includes almost 50 partial or complete exemptions from the Act's overtime requirements. This case concerns exemptions enacted by Congress as part of the original FLSA in 1938, which are in turn based upon provisions contained in the National Industry Recovery Act of 1933: the so-called "white collar" exemption from both the minimum wage and overtime requirements, for "any employee employed in a bona fide executive, administrative, or professional, … capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Secretary), subject to the provisions of [the APA]." 29 U.S.C. § 213(a)(1).

43. Congress did not further define the terms "executive," "administrative," or "professional" ("EAP") in the Act itself. However, the contemporaneous legislative record establishes that Congress meant to exempt these types of employees because they typically earn salaries well above the minimum wage and enjoy other compensatory privileges such as above

average fringe benefits, greater job security and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. As a result, these categories of employees generally have little need for the protections of the FLSA. Furthermore, the legislators who enacted the FLSA viewed the type of work performed by executive, administrative, and professional employees as difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and thus potentially precluding the expanded hiring of hourly employees that was intended by the FLSA.

44. Since 1940, DOL's Part 541 regulations (29 C.F.R. Part 541) have included three tests that employees must meet before qualifying for the white-collar exemption: First, employees must be paid on a "salary basis," meaning that they must be paid a regular, predetermined amount of compensation which is not subject to reduction because of variations in the quality or quantity of the work performed.[1] Second, employees must be paid at least the minimum salary level for exemption established in the regulations, currently $455 per week ($23,660 annually) as set in 2004. Third, the employees must have a primary duty of performing the exempt executive, administrative, professional, computer or outside sales job duties.[2]

45. In 1990, Congress enacted legislation directing DOL to permit computer systems analysts, computer programmers, software engineers and other similarly-skilled professional workers to qualify for exemption under 29 U.S.C. 213(a)(1). This enactment also extended the exemption to such computer employees paid on an hourly basis at a rate at least 6 and 1/2 times

[1] Teacher, doctors, lawyers and outside sales employees are not subject to the salary level and salary basis tests. 29 C.F.R. § 541.303(d) (teachers); 29 C.F.R. § 541.304(d) (doctors and lawyers); 29 C.F.R. § 541.500(c) (outside sales). In addition, exempt computer employees may be paid by the hour. 29 U.S.C. § 213(a)(17); 541.29 C.F.R. § 541.400(b).

[2] 29 C.F.R. § 541.100 (executives); 29 C.F.R. § 541.200 (administrative employees); 29 C.F.R. § 541.300 (professionals); 29 C.F.R. § 541.400 (computer); 29 C.F.R. § 541.500 (outside sales).

the minimum wage (in addition to computer employees paid on a salary basis as required under the Part 541 regulations). DOL issued final regulations implementing this enactment in 1992. However, when the minimum wage was increased in 1996, Congress enacted a separate exemption for computer employees in 29 U.S.C. § 213(a)(17), and froze the hourly rate requirement at $27.63 (which equaled 6 and 1/2 times the former $4.25 minimum wage). Section 213(a)(17) does not grant DOL authority to further define the required job duties for computer employees or to change the $27.63 hourly wage. In 2004, DOL collected into a new Subpart E of Part 541 the substance of the original 1990 congressional enactment, the 1992 final regulations and the 1996 congressional enactment. Thus, the same duties tests now apply to computer employees paid $455 per week on a salary basis under Section 213(a)(1) or paid $27.63 on an hourly basis under Section 213(a)(17).

46. In 2004, DOL added a streamlined duties test for highly compensated employees, currently defined as employees with total annual compensation of at least $100,000, who are exempt if they customarily and regularly perform at least one of the exempt duties of an executive, administrative or professional employee. 29 C.F.R. § 541.601.

47. The new Overtime Rule changes only the minimum salary level that an employer must pay their exempt executive, administrative, or professional employees under Section 213(a)(1) in order for them to qualify for the white-collar exemptions. As DOL has acknowledged repeatedly from the beginning of its regulation of the exemption, the Department is not authorized to set wages or salaries for exempt employees. Thus, when DOL first issued regulations to define and delimit the white collar exemptions on October 20, 1938, DOL set a minimum salary level for exemption at $30 per week and established the job duties employees must perform to qualify for the exemptions. 3 Fed. Reg. 2,518 (Oct. 20, 1938). At the time, this

salary level reflected a reasonable proxy for workers who were genuinely employed in a white-collar capacity.

48. Shortly thereafter, in 1940, the Wage and Hour Division of DOL held hearings and issued a report under the name of the Presiding Officer, Harold Stein.[3] The Stein Report declared that the salary level should "deny exemption to a few employees who might not unreasonably be exempted," but that the Department would act contrary to the mandate of Congress if it set the minimum salary level for exemption so high as to exclude from the exemption many employees who would meet the duties requirements. 1940 Stein Report at 6. This statement is consistent with a fundamental principle of separation of powers: that the FLSA gives DOL authority to resolve ambiguity at the edges of the statutory exemptions, but that DOL is not free to add additional requirements on top of the statutory terms.

49. Similarly, in his report on hearings held in 1949 to update the salary levels for the EAP exemptions, Presiding Officer Weiss reaffirmed that the minimum salaries for exempt status should not be set at a level that would result "in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees." 1949 Weiss Report at 9. Weiss also observed that "improving the conditions of such employees is not the objective of the regulations." *Id.* at 11. Rather, the Department declared that the sole purpose of the salary level test is "screening out the obviously nonexempt employees." *Id*. at 8. *See also, e.g.*, *id*. at 11-12 ("Any new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees."); *id*. at 14 ("Consideration must also be given to the fact

[3] Executive, Administrative, Professional . . . Outside Salesman Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct.10, 1940) (''Stein Report'').

that executives in many of the smaller establishments are not as well paid as executives employed by larger enterprises."); *id*. at 15 ("The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption."). Presiding Officer Weiss further acknowledged that the Department must take into account regional and industry-sector variations in compensation for similar white-collar responsibilities: "To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary." 1949 Weiss Report at 11.

50. Presiding Officer Kantor reaffirmed these principles after the Wage Hour Division held further hearings on the salary tests in 1958: "Essentially the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of *screening out the obviously non-exempt employee*." 1958 Kantor Report at 2-3 (emphasis added). Thus, to avoid excluding millions of employees from the exemption who do perform exempt job duties, for many decades the Department has recognized that "the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries," 1958 Kantor Report at 5, of exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry," *id.* at 6-7.

51. Most recently, the Administrator of the Wage Hour Division stated in 2004:

> The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[4]

52. Between 1940 and 2004, administrations of both parties raised the minimum salary level for exemption seven times—in 1940, 1949, 1958, 1963, 1970, 1975, and 2004.[5] With few exceptions, DOL has until now set the minimum salary level for exemption by studying the salaries actually paid to exempt employees and setting the salary at no higher than the 20th percentile in the lowest-wage regions, the smallest size establishment groups, the smallest-sized cities and the lowest-wage industries.

53. The last major revisions to the Part 541 regulations came in 2004 during the Administration of President George W. Bush, 29 years after the previous increases to the salary level tests. At that time, DOL eliminated the long-dormant "long" duties test and established a new standard minimum salary for exempt status at $455 per week ($23,660 annually). DOL also established a new "highly compensated" salary test applicable to employees currently defined as employees with total annual compensation of at least $100,000, who are exempt if they

[4] Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (April 23, 2004) (hereinafter "2004 Final Rule), *citing* Report of the Minimum Wage Study Commission, Volume IV at 236, 240 (June 1981) ("1981 Commission Report") ("Higher base pay, greater fringe benefits, improved promotion potential and greater job security have traditionally been considered as normal compensatory benefits received by EAP employees, which set them apart from non-EAP employees.). *See also* 1981 Commission Report at 243 ("These compensatory privileges include authority over others, opportunity for advancement, paid vacation and sick leave, and security of tenure.").

[5] 5 Fed. Reg. 4,077 (Oct. 10, 1940); 14 Fed. Reg. 7,705 (Dec. 24, 1949); 23 Fed. Reg. 8,962 (Nov. 18, 1958); 29 Fed. Reg. 9,505 (Aug. 30, 1963); 35 Fed. Reg. 883 (Jan. 22, 1970); 40 Fed. Reg. 7,091 (Feb. 19, 1975).

customarily and regularly perform at least one of the exempt duties of an executive, administrative or professional employee. 29 C.F.R. § 541.601.

54. In setting the minimum salary level in 2004, DOL "considered the data . . . showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of all salaried employees, and salaried employees in the lower wage south and retail sectors."[6] The Department set the minimum salary level at $455 per week ($23,660 annually), the 20th percentile for salaried employees in the south region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the "short" and "long" test structure and because the data included nonexempt salaried employees."[7]

B. DOL'S New Overtime Rule

55. Notwithstanding the foregoing statutory mandates and longstanding regulatory precedent, on May 18, 2016, DOL published its new Overtime Rule, fundamentally departing from Congressional intent and decades of regulatory policy. For the first time in the history of the FLSA, the new Overtime Rule establishes a minimum salary test that will exclude from the white-collar exemptions forty percent or more of all salaried workers in the lowest wage Census region, currently the "South"—although the Department's metric for the "South" includes Maryland, the District of Columbia, and Virginia, which are three of the top ten median income states. Under the new Rule, effective December 1, 2016, the minimum salary for exempt employees will more than double, from $455 per week to $913 per week ($23,660 to $47,476, annualized). *Id*. at 32,393.

[6] 2004 Final Rule, 69 Fed. Reg. at 22,167 & Table 2.

[7] 2004 Final Rule, 69 Fed. Reg. at 22,168-69 & Table 3.

56. At $913 per week, the new minimum salary level will result in defeating the exemption for a substantial number of individuals who could reasonably be classified as bona fide executive, administrative, or professional employees on the basis of their duties. The Department's new salary threshold is so high that it is no longer a plausible proxy for delimiting which jobs fall within the statutory terms "executive," "administrative," or "professional." The new Overtime Rule thus contradicts the congressional requirement to exempt such individuals from the minimum wage and overtime requirements of the FLSA.

57. In an implicit acknowledgement that its new minimum salary level will exclude many employees who perform exempt job duties, DOL's Final Rule permits employers for the first time to count nondiscretionary bonuses, incentives, and commissions toward up to ten percent of the minimum salary level for exemption. 81 Fed. Reg. at 32,443. However, this new provision fails to prevent the Rule's radical departure from the intent of Congress as expressed in the statutory exemption. In particular, the inclusion of bonuses, incentives, and commissions, is so restricted that it fails to mitigate and actually exacerbates the impact of the new Overtime Rule's exclusion of millions of employees who perform exempt duties. This is so because the new provision arbitrarily excludes nondiscretionary bonuses, incentives and commissions constituting more than ten percent of exempt employees' salaries, and excludes entirely those bonuses, incentives and commissions paid less frequently than quarterly, as well as other types of compensation (e.g., discretionary bonuses, profit-sharing, stock options, employer-funded retirement benefit, and deferred compensation). Furthermore, DOL's selection of ten percent was arbitrary and without any specific reasoning to justify it.

58. The new Overtime Rule also establishes an "index" provision, which automatically sets in motion an update to the minimum salary requirements to even higher levels

every three years. 81 Fed. Reg. at 32,430. The Rule's automatic indexing will cause the salary threshold to even further depart from any meaningful approximation of the terms "executive," "administrative," and "professional." Nor is there any basis to conclude that Congress authorized the Department to index the salary level test for exemption under section 213(a)(1). Congress has provided for automatic indexing in numerous other statutes, such as the cost of living increases for Social Security benefits in the Social Security Act. But in the 77 year history of the FLSA, Congress has never provided for automatic increases of the minimum wage. Congress also has never indexed the minimum hourly wage for exempt computer employees under 29 U.S.C. § 213(a)(17), the tip credit wage under 29 U.S.C. § 203(m), or any of the subminimum wages available in the Act. And Congress similarly has never indexed the minimum salary threshold for the white-collar exemptions.

59. There also is no precedent for indexing the minimum salary threshold in the regulatory history of Part 541. In its 2004 rulemaking, the DOL rejected indexing as contrary to congressional intent and as disproportionately affecting lower-wage geographic regions and industries, stating:

> [T]he Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6.5 times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (6.5 times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.

2004 Final Rule, 69 Fed. Reg. at 22,171-72.

60. Finally, the Rule significantly increases the total annual compensation required to qualify as a "highly compensated employees" to $134,004, up from $100,000. 81 Fed. Reg. at 32,393.

61. DOL projects that more than 4.2 million employees all over the country will lose their exempt status immediately when the Rule goes into effect, with an additional 3.9 million employees in the second year. 81 Fed. Reg. at 32,393 & 32394, Table ES1. By Year 10, because of the automatic increases to the minimum salary level, DOL predicts that an additional 5 million employees will lose their exempt status. *Id*. at 32,393.

62. The economic analysis set forth by DOL in support of the new Rule was inadequate due to its: reliance on the Current Population Survey as the sole source of salary data; inadequate assessment of compliance costs, transfers, benefits, regulatory flexibility analysis and unfunded mandate impacts; inadequate analysis of the full costs and benefits of available alternatives; and inattention to the regulatory risks inherent in a sudden change in regulatory requirements and salary test adjustment procedures.

COUNT ONE:

The New Overtime Rule's Minimum Salary Threshold Exceeds DOL's Statutory Authority Under the FLSA in Violation of the Administrative Procedure Act

63. Plaintiffs incorporate by reference the allegations in paragraphs 1-62 as if fully set forth here.

64. The Administrative Procedure Act, 5 U.S.C. § 706(2)(C), directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

65. The FLSA declares that employers shall have no obligation to pay overtime to any employee who is an executive, administrative, professional, or computer-professional employee. 29 U.S.C. § 213(a)(1).

66. DOL's dramatic increase in the minimum salary threshold for exempt employees disqualifies millions of bona fide executive, administrative, and professional employees from the exempt status that Congress established, in violation of the FLSA and the APA. The Rule raises the minimum salary threshold so high that the new salary threshold is no longer a plausible proxy for the categories exempted from the overtime requirement by Congress.

67. Alternatively, the minimum salary threshold, taken to this extreme, must be found not to be authorized by Congress.

68. For these reasons, the new Overtime Rule should be held unlawful and set aside.

COUNT TWO:

The New Overtime Rule's Escalator Provision Exceeds DOL's Statutory Authority Under the FLSA in Violation of the Administrative Procedure Act

69. Plaintiffs incorporate by reference the allegations in paragraphs 1-68 as if fully set forth here.

70. The Administrative Procedure Act, 5 U.S.C. § 706(2)(C), directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." It also directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be … without observance of procedure required by law." *Id.* § 706(2)(D)

71. DOL's unprecedented escalator provision in the new Overtime Rule exceeds any authority granted to the Department by Congress, which has never authorized indexing of the minimum salary thresholds related to overtime under the FLSA.

72. The FLSA mandates that the terms "executive," "administrative," and "professional" shall be "defined and delimited by regulations of the Secretary[], subject to the provisions of [the APA]." 29 U.S.C. § 213(a)(1).

73. With exceptions that are not applicable here, the regulations of the Secretary referenced in Section 213(a)(1) must go through notice-and-comment rulemaking under the APA, 5 U.S.C. § 553.

74. By purporting to implement automatic updates of the minimum salary thresholds every three years, the indexing provision in the new Overtime Rule violates the notice-and-comment rulemaking requirements of the APA.

75. For these reasons, the new Overtime Rule should be held unlawful and set aside.

COUNT THREE:

The New Overtime Rule is Arbitrary, Capricious, and Otherwise Contrary to Law in Violation of the Administrative Procedure Act

76. Plaintiffs incorporate by reference the allegations in the preceding paragraphs as if fully set forth here.

77. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." In rulemaking under the APA, an agency may not ignore significant evidence in the record, draw conclusions that conflict with the record evidence, rely on contradictory assumptions or conclusions, consider factors that Congress did not permit the agency to address, or fail to consider an important aspect of the problem it purports to be remedying. *See Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Insurance*, 463 U.S. 29, 43 (1983); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). Finally, an agency reversing longstanding regulatory

policy is required to acknowledge, explain and justify its reversal, and such explanation must take cognizance of the strong reliance interests of the regulated community with regard to the original regulation. *See Encino Motorcars v. Navarro*, 136 S.Ct. 2117 (June 20, 2016).

78. In promulgating the new Overtime Rule, the Department acted arbitrarily, capriciously, and otherwise not in accordance with the law in several respects outlined above. DOL failed to provide a reasoned explanation, consistent with the FLSA and Congress's expressed intentions, for its doubling of the minimum salary standard to a level that for the first time excludes a high percentage of all salaried employees nationally, regardless of job duties, geographic area or size of business. To the extent that DOL acknowledged at all the regulatory change imposed by its new Overtime Rule, the agency improperly minimized its departure from decades of precedent and Congressional intent.

79. Furthermore, it is apparent from the preamble to the Rule that DOL relied on factors that Congress did not intend for it to consider, specifically by excluding far more than the "obviously non-exempt employees" and instead excluding millions of employees who are performing bona fide exempt job duties. DOL also based its radical new fortieth percentile salary standard on grounds that run counter to the evidence before the agency, specifically the false claim that the current salary threshold was improperly paired with the obsolete long duties test.

80. The new Overtime Rule also fails to take cognizance of the strong reliance interests of the regulated community—consisting of millions of employers across the country—whose business models have been built on the salary levels for exempt status established over the course of the past 75 years. Again, DOL fails to acknowledge the radical increase in the salary

threshold, which has never been set at the twentieth percentile of overall salaries, but is now being doubled to the fortieth percentile adopted in the new Overtime Rule.

81. The nature of the Department's arbitrary and capricious minimum salary threshold is further exposed by DOL's decision to allow employers to satisfy only up to ten percent of the minimum salary level with nondiscretionary bonuses, incentives, and commissions, and only if such payments are made quarterly or more frequently. DOL's decisions to exclude nondiscretionary bonuses, incentives and commissions paid less frequently than quarterly and to exclude other types of compensation (e.g., discretionary bonuses, profit-sharing, stock options, employer-funded retirement benefit, deferred compensation) are also arbitrary and capricious.

82. For these reasons as well, the new Overtime Rule should be held unlawful and set aside.

PRAYER FOR RELIEF

83. WHEREFORE, Plaintiffs pray for an order and judgment:

a. Vacating and setting aside the new Overtime Rule under 5 U.S.C. § 706.

b. Declaring that the new Overtime Rule was promulgated by the Defendants in excess of statutory jurisdiction, authority, or limitations under 5 U.S.C. § 706(2)(C); is arbitrary, capricious, or otherwise contrary to law within the meaning of 5 U.S.C. § 706(2)(A); and was promulgated without observance of procedures required by law within the meaning of 5 U.S.C. § 706(2)(D);

c. Enjoining the defendants and all its officers, employees, and agents from implementing, applying, or taking any action whatsoever under the Final Rule anywhere within the Defendants' jurisdiction to implement the challenged Rule;

d. Issuing all process necessary and appropriate to postpone the effective date of the Overtime Rule and to maintain the status quo pending the Court's review of this case, including by issuing relief under 5 U.S.C. § 705;

e. Awarding Plaintiffs their reasonable costs and expenses, including reasonable attorneys' fees under the Equal Access to Justice Act or otherwise, incurred in bringing this action; and

f. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

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