No. 16-41606

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF 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; PHIL BRYANT, Governor of the State of Mississippi; ATTORNEY GENERAL BILL SCHUETTE, on behalf of the people of Michigan,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas, No. 4:16-CV-731

MOTION OF 60 BUSINESS ASSOCIATIONS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES

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January 24, 2017

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate potential disqualification or recusal.

s/Paul D. Clement
Paul D. Clement

Plaintiffs-appellees

State of Nevada
State of Texas
State of Alabama
State of Arizona
State of Arkansas
State of Georgia
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State of Kansas
State of Louisiana
State of Nebraska
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State of Oklahoma
State of South Carolina
State of Utah
State of Wisconsin
Commonwealth of Kentucky, by and through Gov. Matthew G. Bevin
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Governor Phil Bryant of the State of Mississippi
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Thomas E. Perez, as Secretary of Labor
The Wage and Hour Division of the Department of Labor
Dr. David Weil, as Administrator of the Wage and Hour Division
Mary Ziegler, as Assistant Administrator for Policy of the Wage and Hour Division

Amici Curiae

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
National Restaurant Association
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
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Pursuant to Federal Rule of Appellate Procedure 29(b), amici curiae 60 business associations respectfully move this Court for leave to file the attached brief in support of Appellees the State of Nevada et al. Appellants and Appellees both consent to this filing.

REASONS FOR GRANTING THE MOTION

The amici include 60 business associations who are co-plaintiffs ("the Business Plaintiffs") alongside the Appellees challenging the Department of Labor's ("DOL") new Overtime Rule, as well as additional business associations that have similar interests in the outcome of this appeal (collectively "the Business Association amici"). A description of each amicus is included in Appendix A to this motion.

There is good cause to continue to allow the Business Plaintiffs and their co-amici to participate as amici curiae before this Court. The Business Association amici and their members face significant monetary costs and regulatory burdens as a result of the rule. The Business Plaintiffs accordingly filed a complaint challenging the Overtime Rule in the district court, which consolidated the Business Plaintiffs' challenge with the States' challenge. *See Plano Chamber of Commerce v. Perez*, No. 4:16-cv-00732-ALM (E.D. Tex. filed Sept. 20, 2016). At the same time the Appellees filed a motion for preliminary injunction, the Business Plaintiffs filed an expedited motion for summary judgment. In addition to

considering that motion for summary judgment, the district court also construed the Business Plaintiffs' motion as an amicus brief in support of the States' preliminary injunction motion, and permitted counsel for the Business Plaintiffs to present oral argument regarding the overlapping legal issues presented by the two motions.

The two challenges to the Rule complement each other, as the States have a unique interest in protecting their status as sovereigns, whereas the business associations seek to protect the interests of their members and the business community more generally. Amici are thus able to offer a unique perspective on the important legal and factual issues in this case that would assist this Court's resolution of those issues.

CONCLUSION

For the reasons set forth above, amici curiae have a direct and significant interest in the outcome of this case, and there is good cause for the Court to allow the filing of the attached brief.

Respectfully submitted,

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Counsel for National Restaurant Association and Texas Restaurant Association

January 24, 2017

APPENDIX A

The 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 National Automobile Dealers Association ("NADA") is a national nonprofit 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.

The 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 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.

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.

The 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.

The National Restaurant Association was founded in 1919 and is the nation's largest trade association that represents and supports the restaurant and foodservice industry with over 500,000 member business locations. The industry employs 14.4 million workers in over one million restaurant and foodservice establishments. The National Restaurant Association's mission is to represent and advocate for

industry interests, primarily with national policymakers and in the courts mainly through the Restaurant Law Center.

The 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.

The 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.

The 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.

The 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.

The 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.

The 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.

The 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.

The 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.

Amicus National Association of Federally-Insured Credit Unions ("NAFCU") represents the interests of more than 800 of the nation's most innovative and dynamic federally-insured credit unions before the federal government, including 87 of the largest 100 federal credit unions (FCU) as well as many smaller credit unions with relatively limited operations. NAFCU represents 70 percent of total FCU assets and 66 percent of all FCU member-owners. It provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment.

The 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.

The Allen-Fairview Chamber of Commerce, 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, Frisco Chamber of Commerce, Galveston Regional Chamber of Commerce, Gilmer Area 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 Port Arthur 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, Kilgore Chamber of Commerce, Killeen Chamber of Commerce, Longview Chamber of Commerce, Lubbock Chamber of Commerce, Lufkin-Angelina County Chamber of Commerce, McAllen Chamber of Commerce, McKinney Chamber of Commerce, Mineral Wells Area Chamber of Commerce, North San Antonio Chamber of Commerce, Paris-Lamar County Chamber of Commerce, Pearland Chamber of Commerce, Plano 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, San Angelo Chamber of Commerce, and the Tyler Area Chamber of Commerce (collectively "the Texas Chambers of Commerce") are thirty-nine voluntary, non-profit, membership organizations representing tens of thousands of businesses located throughout the State of Texas, including within the U.S. District Court for 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.

The Texas Hotel and Lodging Association ("THLA"), Texas Restaurant Association, Texas Retailers Association, and Texas Travel Industry Association ("TTIA") are non-profit trade associations representing every aspect of the lodging, restaurant, retail, travel, and tourism industries statewide in Texas.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing motion (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 365 words as determined by the word counting feature of Microsoft Word 2010.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) the hard copies submitted to the clerk are exact copies of the ECF submission;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, updated January 23, 2017, and according to the program is free of viruses.

Dated: January 24, 2017

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

No. 16-41606

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICI CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The FLSA expressly exempts from the statute's overtime-pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). Since the statute was enacted in 1938, both DOL and the business community have understood this so-called "white-collar" or

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

"EAP" exemption to turn on whether an employee actually *performs* an executive, administrative, or professional function. And for good reason, as the statute's text, structure, and purpose confirm that Congress adopted a functional approach in which an employee's white-collar "capacity" turns, above all, on the employee's job duties and responsibilities. An employee's salary may be relevant as a proxy to screen for obviously exempt employees, but absolutely nothing in the statute allows DOL to use salary *alone* as the basis for denying the exemption to employees who are performing executive, administrative, or professional job duties. An executive, administrator, or professional with a relatively low salary is still an executive, administrator, or professional and is still exempt under the statute.

DOL disregarded this clear statutory text in the regulation at issue here. Under public pressure from the President to find creative means to expand wage entitlements without going to Congress, DOL finalized a regulation in May 2016 that categorically strips the white-collar exemption from 4.2 million individuals with the stroke of a pen. Under the new Rule, unless executives, administrators, and professionals earn salaries above $913 per week (more than $47,000 per year), they will be categorically non-exempt from the FLSA's overtime-pay requirements *regardless* of whether they perform executive, administrative, or professional functions 100% of the time. That Rule flouts Congress' unambiguous intent to

employ a functional exemption in which *job duties* are the primary criterion for applying the exemption.

Even if there were ambiguity about Congress' adoption of a functional approach, the new Rule would not be a reasonable interpretation of DOL's authority under the FLSA. Indeed, it is black-letter administrative law that an agency action is entitled to no deference if it unreasonably ignores important aspects of the regulatory problem. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). The Overtime Rule is defective in this regard thrice over.

First, DOL refused to acknowledge just how radically it was changing course. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DOL suggested in its new Rule that it was just correcting a mismatch in a 2004 rule, which, according to DOL, impermissibly fused the "short test" and "long test" that had governed the white-collar exemption from 1949 to 2004. In fact, the new Rule does something unprecedented and profoundly consequential: it includes *only* a high salary threshold (more than doubled since 2004), which is no longer merely excluding obviously non-exempt employees. The upshot is that millions of workers whose status previously turned on their functional job duties will now be *categorically* non-exempt based on their salary alone. The new Rule is not just a technical "update" to the salary level but a profound change in the regulatory

regime, and DOL to this day has not acknowledged, let alone justified, the full scope of the changes it has wrought.

Second, DOL altogether ignored a fundamental aspect of the regulatory problem. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707-08 (2015). DOL has conceded that 4.2 million employees earn between the current and new salary levels, and thus will become categorically non-exempt under the new Rule. Yet, remarkably, DOL has never attempted to answer the critical question of how many of those previously exempt employees would have been exempt based on their functional job duties. A sweeping change in regulatory status for millions of individuals cannot be treated as an afterthought. *Cf. Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015) (questioning administrative action that unilaterally changed the status of 4.3 million individuals), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). It was plainly unreasonable for DOL to significantly raise the salary threshold for the white-collar exemption without assessing whether it was improperly sweeping in employees who should have been exempt based on their job duties.

Finally, DOL entirely failed to account for the serious reliance interests that the previous rules engendered. *Encino Motorcars*, 136 S. Ct. at 2126. Year after year, businesses built white-collar workforces on the premise that the exemption hinged first and foremost on job duties as long as the employee's salary exceeded a

relatively low threshold. But DOL then cast aside those settled expectations with the stroke of a pen by *doubling* the salary threshold to unprecedented heights. The result will be not only dramatically increased monetary costs for businesses, but a need to fundamentally restructure the white-collar workforce. DOL's failure to display awareness of the far-reaching implications of its change of course shows that it did not adequately consider the weighty reliance interests that will be obliterated by the new rule. The preliminary injunction should be affirmed.[2]

ARGUMENT

I. DOL's New Overtime Rule Is Inconsistent With The Text, Structure, And Purpose Of The White-Collar Exemption.

There is no dispute about the practical effect of the new Overtime Rule. If employees do not earn $913 per week (which translates to $47,476 per year), they will be *categorically* ineligible for the white-collar exemption "irrespective of their job duties and responsibilities." 81 Fed. Reg. 32,391, 32,405 (May 23, 2016). But the text, structure, and purpose of the FLSA make unambiguously clear that an employee's *job functions*, rather than salary alone, must be the centerpiece of the

[2] Amici address only the plaintiffs' likelihood of success on the merits, as the States have extensively briefed the other preliminary injunction factors. *See* States' Br. 45-50. Since the States filed their brief, the new Administration has instructed all executive agencies to postpone the implementation of new regulations that have not yet gone into force. *See* Memorandum for Heads of Executive Departments and Agencies, (Jan. 20, 2017), http://bit.ly/2kkOVYV. That action further counsels in favor of leaving the preliminary injunction in place pending the resolution of this litigation and any additional regulatory review.

inquiry. That should be the end of the matter because "the intent of Congress is clear." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

A. Enacted in 1938, the FLSA was designed "to help those who toil in factory and on farm." Message from the President of the United States, H.R. Doc. No. 75-255 (1st Sess.1937). The statute's objectives were modest. It was intended to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." S. Rep. No. 75-884, at 3-4 (1937). The Act thus proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule requiring employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of 40 per week. *See* 29 U.S.C. §206(a), 207(a)(1), 212.

But the FLSA's mandatory-overtime rules were never intended to apply to all employees, as reflected in more than 50 exemptions for certain types of employers and employees. *See id.* §213. Some exemptions broadly cover an entire industry, such as the exemptions for all employees of certain rail and air carriers, *id*. §213(b)(2), (3), and all employees engaged in the "catching, taking, propagating, harvesting ... or farming of any kind of fish," *id*. §213(a)(5). Others

cover more specific activities, such as the exemption for employees "engaged in the processing of maple sap into sugar," *id*. §213(b)(15), and "any employee employed on a casual basis in domestic service employment to provide babysitting services," *id.* §213(a)(15).

Congress also broadly instructed that the statute's overtime-pay provisions "shall not apply" to "any employee employed in a bona fide executive, administrative, or professional capacity." *Id.* §213(a)(1). The inclusion of that exemption for white-collar employees reflects the FLSA's modest statutory purpose of addressing only "oppressive" job conditions. White-collar employees are unlikely to face such working conditions, and Congress made an eminently reasonable determination that it was unnecessary to bring those employees within the FLSA's regulatory regime.

B. The white-collar exemption applies to employees who work in an executive, administrative, or professional "capacity." Since the FLSA's early days, courts have uniformly recognized that Congress employed a functional approach to the FLSA exemptions such that an employee's *job duties* are the touchstone of whether the exemption applies. Congress could have adopted a readily administrable approach where workers who made above and below certain monetary thresholds were categorically covered or categorically exempt. Instead, from the outset, Congress adopted a functional approach. As the Tenth Circuit

explained just six years after the statute was enacted, "[o]bviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs," and "a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives." *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944); *see also Walling v. Gen. Indus. Co.*, 155 F.2d 711, 714 (6th Cir. 1946) ("The most pertinent test for determining whether one is a bona fide executive is the duties which he performs.").

The Supreme Court has embraced a similar interpretation of the word "capacity" in the FLSA. For example, the Court concluded that the FLSA's exemption for anyone "'employed … in the capacity of an outside salesman'" requires a "functional" inquiry into "an employee's *responsibilities* in the context of the particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (emphasis added).

The district court's reasoning in the decision below is entirely consistent with that long line of authority. As the court explained, the words executive, administrative, and professional "relate to a person's performance, conduct, or function." ROA.3817. Based on the "plain meaning" of the statute, the court correctly concluded, "Congress intended the EAP exemption to apply to employees

doing actual executive, administrative, and professional duties." *Id.* (emphasis added).

To be sure, the FLSA grants DOL authority to "define[] and delimit[] from time to time" which job duties are properly characterized as "executive, administrative, or professional." 29 U.S.C. §213(a)(1). Pursuant to that authority, DOL may identify the types of activities or job functions that involve exempt white-collar work. For example, DOL's regulations have outlined relevant considerations, such as whether the employee supervises other employees, exercises "discretion and independent judgment," and performs management functions. *See, e.g.*, 29 C.F.R. pt. 541. But DOL's authority to "define" and "delimit" the types of job functions that qualify as executive, administrative, or professional hardly gives the agency carte blanche to radically *change the entire inquiry* from a functional analysis of job duties to a test based on salary alone that categorically excludes executives, administrators, and professionals even if 100% of their job functions are exempt.

C. The paramount role of an employee's job duties in determining applicability of the white-collar exemption is further confirmed by the nature of the FLSA's other exemptions. *See United States v. Kaluza*, 780 F.3d 647, 663 (5th Cir. 2015) (subsequent provisions in a statute "must be read consistently with earlier parts of the statute").

One need look no further than the exemptions that follow the white-collar exemption to understand that DOL lacks statutory authority to elevate salary to the dispositive consideration. For example, the exemption applicable to "any employee employed in the catching … of any kind of fish," 29 U.S.C. §213(a)(5), necessarily turns on whether the employee catches fish. It would take considerable chutzpah for DOL to deny the exemption to a bona fide fisherman solely because he or she did not earn $913 per week. Similarly, it would be preposterous for DOL to suggest that the exemption for "any employee employed on a casual basis … to provide babysitting services" does not cover a babysitter unless he or she earns close to $50,000 per year. *See id.* §213(a)(15). DOL is foreclosed by the statutory text from reading dispositive salary tests into similarly worded FLSA exemptions, and has no greater authority with respect to the white-collar exemption.

D. None of this is to suggest that *any* consideration of an employee's salary is categorically off-limits, and the district court did not hold otherwise. From the start, DOL has set relatively low salary thresholds in order to "screen[] out the *obviously nonexempt* employees"—*i.e.*, those earning such low salaries that they could not possibly be performing bona fide white-collar job duties. Harry Weiss, Wage & Hour & Pub. Contracts Divs., U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations 8 (1949) ("Weiss Report") (emphasis added). And DOL has also considered salaries at the high end

to screen for *obviously exempt* employees whose very high compensation "is a strong indicator of an employee's exempt status." 29 C.F.R. §541.601(c). In other words, salaries can "serve as a *guide* to the classification of bona fide executive employees" but only so long as a myopic focus on salary does not act "as a *barrier* to their exemption." *See* Harold Stein, Wage & Hour Div., U.S. Dep't of Labor, Report and Recommendations at Hearings Preliminary to Redefinition 15 (1940) (emphasis added).

In the decision below, the district court confronted just such a barrier to exemption and made no "general statement on the lawfulness of the salary-level test for the EAP exemption." ROA.3818 n.2. The Court thus had no occasion to address whether it is appropriate for DOL to use salary as a proxy to screen for obviously exempt or obviously non-exempt employees with a functional test doing the work for employees in the middle range.[3]

Instead, the sole question in the district court (and now this Court) is whether DOL can deny the white-collar exemption to millions of employees based on salary alone "*irrespective*" of their concededly white-collar job duties and

[3] This Court's pre-*Chevron* decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), is thus not to the contrary. *Wirtz* upheld DOL's use of a "minimum salary requirement" for application of the white-collar exemption, but had no occasion to address a DOL rule that used salary not just as a low-end threshold to identify obviously non-exempt employees but as the dispositive consideration for millions of workers who previously would have been exempt based on their job duties.

responsibilities. 81 Fed. Reg. at 32,405 (emphasis added). The answer to *that* question is a resounding no: regardless of the legality of using salary levels to establish outer bounds on the exemption, it is both unprecedented and unlawful for DOL to use an employee's salary as the *dispositive* consideration in the mine-run case. A de facto salary-only test such as the one DOL established in its Overtime Rule clearly conflicts with the plain text of the statute for all the reasons noted above, as even DOL previously acknowledged before its recent change of heart. *See* 69 Fed. Reg. 22,122, 22,173 (Apr. 23, 2004) ("[T]he Secretary does not have authority under the FLSA to adopt a 'salary only' test for the exemption.").

II. DOL's Overtime Rule Is Unreasonable Even If The Statutory Text Were Ambiguous.

Even if the text of the white-collar exemption did not unambiguously embrace a functional approach, the Overtime Rule must still be set aside as unlawful under step two of *Chevron*. *See* ROA.3819 (district court concluding in the alternative that the Rule "does not deserve deference at *Chevron* step two"). The Rule, at bottom, was an impermissible attempt by DOL to bypass Congress and boost wages administratively as a presidential term came to a close. Whatever the merits of that policy goal, the agency cannot promulgate a regulation that ignores statutory text, reclassifies millions of employees without explanation, and ignores the legitimate reliance interests of the business community.

A. DOL Failed to Acknowledge That its New Rule Radically Upends a Decades-Old Regulatory Scheme.

Even if the white-collar exemption were ambiguous, any DOL rule interpreting that provision must still represent a reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 843. This second step of the *Chevron* inquiry "ask[s] whether an agency interpretation is 'arbitrary or capricious in substance.'" *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011). Just last Term, the Supreme Court reiterated that when DOL changes an existing policy, "the agency must at least 'display awareness that it is changing position.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television Stations*, 556 U.S. at 515)). When an agency fails to display such awareness, its interpretation of the statute is not entitled to any deference under *Chevron*. *Id*.

1. For decades, DOL administered a white-collar exemption that fundamentally turned on job duties. Beginning in 1949, DOL used two tests to determine whether an employee qualified for the white-collar exemption. The first was dubbed the "short test"—if white-collar employees earned sufficiently high salaries, they qualified for the exemption after a short, straightforward assessment of their job duties. *See* 14 Fed. Reg. 7705, 7706 (Dec 24, 1949). But, in recognition that not all white-collar employees earned high salaries, DOL included a second test, dubbed the "long test," as a safety valve for employers. If white-collar employees earned salaries that were significantly lower than the cutoff for

the short test but still above a low threshold, they could still be treated as exempt based on a longer, more thorough review of their job duties. *See id.* The "long test" thus ensured that employees who performed bona fide white-collar job duties were treated as exempt notwithstanding their lower salaries, in keeping with Congress' intent to keep the primary focus on job duties. *See* 29 U.S.C. §213(a)(1).

DOL streamlined that dual-test system in 2004. *See* 69 Fed. Reg. 22,122. The 2004 rule effectively combined the "short test" and the "long test" to create a single "standard test," which was more demanding than the prior "short test." 81 Fed. Reg. at 32,392. But because the new salary threshold for the "standard test" continued to remain relatively low ($455 per week), salary posed no barrier to exemption for bona fide white-collar employees, and the primary focus remained on employee job duties.

2. In the Rule at issue here, DOL radically shifted course by interpreting the white-collar exemption as requiring a focus on *salary alone* for millions of employees whose exempt or non-exempt status previously turned on their job duties. Yet DOL stubbornly fails to acknowledge the dramatic regulatory shift its Rule has sought to effectuate.

Over the last two years, DOL apparently came to an epiphany. It now asserts that the 2004 rule created an impermissible "mismatch" between job duties

and salary that required "correct[ing]." *Id.* at 32,409. In DOL's revised view, the white-collar exemption's salary threshold was set too low in 2004 and the duties test was too lenient, thereby creating a dilemma where many employees were improperly classified as exempt from the FLSA's overtime-pay provision. *See id.* That shift neatly coincided with the President's 2014 directive to DOL to ensure that more employees receive overtime pay. *See* Presidential Memorandum, Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014).

Under public pressure to craft a new regulatory regime that satisfied a predetermined policy goal, and foreclosed by political realities from obtaining any legislative changes to the FLSA, DOL introduced its new Rule, which "corrects" the supposed "mismatch" by *doubling* the "standard" salary threshold from $455 to $913 per week—a level "within the historical range of [the higher] *short test salary levels*."[4] 81 Fed. Reg. at 32,409 (emphasis added). Because the "standard test"

[4] The new salary threshold is commensurate with the 40th percentile of full-time salaried employees in Census Region South. 81 Fed. Reg. at 32,393. The Rule also includes a provision that *automatically* updates the threshold every three years based on changes in average salary levels for salaried employees in that region. *See id.* at 32,430. That automatic-indexing mechanism—which has nothing to do with employees' job duties—further confirms that DOL has impermissibly elevated employees' salaries above all else, and strayed far beyond the project that Congress envisioned for DOL in "defining and delimiting" the term "executive, administrative, or professional *capacity*." 29 U.S.C. §213(a)(1) (emphasis added).

already incorporated the duties requirement from the "short test," DOL's new Rule, in practical effect, establishes the "short test"—which combines a higher salary threshold with a more lenient test for job duties—as the sole way to show that an employee is exempt. *See* ROA.3820 (district court concluding that Rule "creates essentially a de facto salary-only test").

DOL would have this Court believe that this is no big deal. But the reality is that DOL has just created something entirely unprecedented. Critically, DOL's "correction" to what it deemed the "mismatch" from the 2004 rule *does not include a reintroduction of the* "*long test*," which had operated for nearly seven decades as a safety valve that de-emphasized salary as a disqualifying factor and ensured that the exemption turned on a closer review of job duties. In particular, the "long test" recognized that, despite a lower salary, an employee should still qualify for the white-collar exemption if he or she: (1) performed "non-manual work directly related to management policies or general business operations"; (2) exercised "discretion and independent judgment"; (3) worked with other executive or administrative employees or performed work requiring "special training, experience, or knowledge"; and (4) did not devote more than 20 percent of her work to non-EAP tasks (40 percent for retail or service employees). *Id.* at 32,401 n.23.

What DOL did in the Overtime Rule is nothing short of a regulatory bait-and-switch: DOL dramatically raised the salary threshold on the ground that the 2004 threshold had strayed too far from the level for the "short test," but it then failed to reintroduce the "long test" that had always been the other half of the regulatory equation. Employers will thus be forced to comply with an entirely new system that elevates salary above all else for millions of employees whose exempt status previously turned on job duties. Worse still, DOL has failed to even "display awareness" that it is radically changing position. *Encino Motorcars*, 136 S. Ct. at 2126. Indeed, DOL denies that it has established a salary-only test, *see*, *e.g.*, DOL Br.31, and characterizes its Rule as nothing more than "update" to the salary thresholds, 81 Fed. Reg. at 32,392. But such false modesty is not a virtue in administrative rulemaking.

The Supreme Court's recent decision in *Michigan v. EPA* is highly instructive. There, the Court struck down as unreasonable EPA's conclusion that costs were irrelevant to its decision to subject power plants to burdensome new regulations. As the Court explained, "it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost." 135 S. Ct. at 2708. Although agencies have discretion to "choose among competing reasonable interpretations of a statute," any deference to agencies in that regard "does not license interpretive

gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.*

Those principles apply with full force here. Indeed, it is absurd to read an instruction that the FLSA's overtime-pay requirement "shall not apply" to bona fide white-collar employees as an invitation for DOL to *include* potentially millions of employees who perform white-collar duties on the grounds that the Department believes they do not get paid enough for the work they actually perform. While DOL believes that its Rule is reasonable because employees must still satisfy the "standard duties test," 81 Fed. Reg. at 32,405, that is true *only* for employees who first clear DOL's historically high salary threshold—which millions of white-collar workers do not. And even assuming the FLSA allows consideration of salary on the margins—*e.g.*, to "screen[] out the obviously nonexempt employees," Weiss Report, *supra*, at 8—DOL's new Rule makes salary dispositive for everyone below a newly doubled salary threshold. That is a blatant "interpretive gerrymander[]" even worse than that rejected in *Michigan*, as DOL has taken the parts of the prior *regulations* it liked, while discarding the *statute* (which focuses on job duties and not salary), all without adequately confronting or explaining the change.

B. DOL Failed To Consider Whether its New Rule Would Impermissibly Sweep in Employees Who Should Have Been Exempt Based on Their Job Duties.

"Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan*, 135 S. Ct. at 2705. It is thus well established that "an agency may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Id.* at 2707. Instead, an agency "must operate 'within the bounds of reasonable interpretation,'" and must account for all relevant factors before making a decision. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014).

Here, before proceeding with the Rule, DOL was obligated to pay at least *some* attention to whether the Rule would prove overinclusive by sweeping in employees who were performing bona fide executive, administrative, or professional job duties even though their salaries were below the new (and much-higher) threshold. But DOL paid literally *zero* attention to that critical issue.

In particular, when promulgating its new Rule, DOL did not even attempt to quantify whether any employees who will now be *categorically* nonexempt because of their salaries alone would have previously been exempt based on an analysis of their job duties. That omission is particularly glaring given that, according to DOL's own estimate, *4.2 million* employees "earn between the current

and new salary levels" and have thus become categorically exempt for the first time ever. 81 Fed. Reg. at 32,441. For those 4.2 million employees, DOL has effectively established by administrative fiat a white-collar minimum wage despite zero statutory authority authorizing such a drastic step. *See* 69 Fed. Reg. at 22,165 (Preamble to 2004 Rule stating: "While the purpose of the FLSA is to provide for the establishment of fair labor standards, the law does not give the Department authority to set minimum wages for executive, administrative, and professional employees.").

This Court has previously vacated an executive action that sought to unilaterally change the immigration status of "4.3 million otherwise removable aliens." *Texas*, 809 F.3d at 181. As the Court explained, "'we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Any regulatory action affecting that many individuals (such as the 4.2 million individuals at issue here) necessarily implicates "question[s] of deep 'economic and political significance,'" and "had Congress wished to assign that decision to an agency it surely would have done so expressly." *Id*.

DOL attempts to brush this aside as "*only* 4.2 million" employees, 81 Fed. Reg. at 32,441 (emphasis added), but half of the States have entire populations of

"only" 4.2 million people or less. *See* State Population Totals Tables: 2010-2016, U.S. Census Bureau (last modified Jan. 18, 2017), http://bit.ly/2iWgRS9. Indeed, 4.2 million employees constitute nearly three percent of the *entire U.S. workforce*. *See* Economic News Release, Bureau of Labor Statistics (last modified Jan. 6, 2017), http://bit.ly/2jYgJ8U (159.6 million employees in civilian labor force). It strains credulity for DOL to suggest that a rule affecting millions of employees and three percent of the civilian workforce is insignificant, especially when the President and DOL both trumpeted how important it was to "[r]aise Americans' wages by an estimated $12 billion over the next 10 years." White House Fact Sheet, *Growing Middle Class Paychecks and Helping Working Families Get Ahead By Expanding Overtime Pay* (May 17, 2016), http://bit.ly/2jNIcrk.

DOL seeks to defend the Rule based on speculation that some of those 4.2 million employees who are now non-exempt based on their salary alone "may not have met the long duties test prior to 2004." 81 Fed. Reg. at 32,409-10. But that conclusory assertion (which was accompanied by zero evidence or analysis) cannot come close to justifying a rule that will change the regulatory status of millions of employees. The fact some (perhaps millions) of workers were misclassified under DOL's old approach does not justify the fact that some (perhaps millions) will be misclassified under its new approach. And an ipse dixit is neither an excuse for not knowing whether it is some or millions in each category nor a substitute for

reasoned decisionmaking. To this day, DOL has no idea whether (and to what extent) its new Rule will actually accomplish its goal of distinguishing between bona-fide white-collar employees and non-exempt employees who allegedly had previously been "misclassified."

C. DOL Failed to Give Any Consideration to the Business Community's Legitimate Reliance Interests.

Black-letter administrative law places a special duty on agencies to exercise caution before taking actions that would upset the legitimate reliance interests of regulated parties. An agency is free to change its policy if there are good reasons for doing so, but it must at least "be cognizant that longstanding policies may have 'engendered serious reliance interests that *must be taken into account*." *Encino Motorcars*, 136 S. Ct. at 2126 (emphasis added) (quoting *Fox Television Stations*, 556 U.S. at 515). An agency action that does not give due consideration to reliance interests is unreasonable and must be set aside. *See id.* ("An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.").

1. Here, the business community has long relied on an interpretation of the white-collar exemption that placed job duties at the fore, and has structured its business models accordingly. *See, e.g.*, Complaint at 29, *Plano Chamber of Commerce v. Perez*, No. 4:16-cv-00732-ALM (Sept. 20, 2016), ECF No. 1 ("The new Overtime Rule … 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.").

There are countless advantages to white-collar positions wholly apart from whether such employees receive overtime pay. Moving into an exempt position is often "the first rung on the promotional ladder" as an employee transitions into a management role. *See generally* U.S. Chamber of Commerce, Comment Letter on Proposed Rule 80 Fed. Reg. 38,516 (Sept. 4, 2015), http://uscham.com/2kdHQKx. White-collar employees earn salaries well above the minimum wage, receive above-average benefits, and have better opportunities for advancement than many other employees. And such employees enjoy the benefits of a *guaranteed* salary regardless of the number of hours they work. Exempt white-collar employees may not receive overtime pay if they work more than 40 hours per week, but (unlike non-exempt hourly employees) they continue to be paid their full salary even in weeks where they work *less* than 40 hours.

Another hallmark of bona fide white-collar work is *flexibility*. Executive, administrative, and professional employees often do not work standard 9-to-5 shifts. An employee of an accounting firm may work long hours during the company's busy tax season but then have a more relaxed schedule over the summer. And the flexibility and autonomy of white-collar work is often highly

advantageous for the countless employees who need to balance work and family obligations. An employee may work 6 hours at the office in the morning, then leave to pick up his children from school, then complete his work projects from home after the kids have been put to bed.

All of this would change (for the worse) if millions of white-collar employees became subject to the one-size-fits-all mandatory overtime regime under the FLSA. If employers must now pay overtime to millions of white-collar employees who have previously never received it, they would either have to raise salaries to potentially unaffordable levels to maintain exempt status or fundamentally restructure those positions. For example, many previously exempt salaried employees would now have to be converted to an hourly pay system, which has negative effects for both employers and employees. The employees would likely be forced into standardized 40-hour work schedules and would lose much of the flexibility and autonomy that previously characterized their jobs. The employers would face significantly increased compliance burdens as they are forced to monitor and track each employee's hours even when there is no business reason for doing so. And employee morale may suffer as employers are forced to closely supervise each employee's *hours* in addition to their work product.

In sum, the Overtime Rule will leave employers with only bad options: convert salaried employees to an ill-fitting hourly compensation system; enact

white-collar employee hiring freezes; or reduce the number of positions to ensure that funds are available to pay overtime to newly non-exempt workers.

2. Even though employers and employees have structured millions of jobs in reliance on the exempt status of white-collar workers, one searches the Federal Register in vain to find DOL's discussion of the reliance interests that will be affected by the new Rule. That stunning omission from DOL's analysis is, by itself, grounds for vacating the Rule.

In *Encino Motorcars*, for example, the Supreme Court refused to accord deference to a DOL interpretation of the FLSA exemption applicable to certain automobile-dealership employees because the agency failed to adequately consider reliance interests. *See* 136 S. Ct. at 2127. Just as in this case, the "automobile and truck dealership industry had relied since 1978 on the Department's position" that certain employees would be exempt, and dealerships had "negotiated and structured their compensation plans against this background understanding." *Id.* at 2126. But DOL then suddenly reversed course, and its new position threatened to "necessitate systemic, significant changes to the dealerships' compensation arrangements." *Id.* Because DOL failed to provide the necessary justification for

its change of course—particularly "[i]n light of the serious reliance interests at stake"—the Court granted no deference to DOL's interpretation. *Id.* at 2127.[5]

The reliance interests in this case are every bit as compelling as those in *Encino Motorcars*—with the only difference being that the Overtime Rule will affect *millions* of employees rather than the tens of thousands of "service advisors" at issue in *Encino*. As noted above, the Rule will make at least 4.2 million employees *categorically* ineligible for exempt status regardless of their job duties. And, according to DOL's own (almost certainly low) estimates, the new Rule will cost employers more than $1.2 billion *each year*. *See* 81 Fed. Reg. at 32,393.[6] And the consequences of noncompliance for employers are similarly high given the double wages imposed as a penalty. *See* 29 U.S.C. §216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum

[5] DOL is well aware of how to properly account for reliance interests while changing position. For example, DOL changed its regulatory approach to home-care workers in the wake of *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007), and the agency's new regulation included a robust discussion of the important reliance interests at stake. *See* 78 Fed. Reg. 60,454, 60,494-95 (Oct. 1, 2013) (adopting lengthy phase-in period for new rule in light of "the needs of the diverse parties affected by [the] Final Rule").

[6] *But see* Jesse Panuccio, *The Real Cost of Obama's Overtime Mandate*, Wall Street Journal (Nov. 13, 2015), http://on.wsj.com/1spEOq4 (costs of Overtime Rule in Florida alone will be "more than 80% of the Labor Department's estimate for the whole country"); CBO, *The Economic Effects of Canceling Scheduled Changes to Overtime Regulations* at 9 (Nov. 2016), http://bit.ly/2g5lx8t (employers would save $1.9 billion in 2017 if Rule were repealed).

wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.").

Notwithstanding those serious implications for the way employment arrangements have been structured for decades, DOL said not a word about the business community's legitimate reliance interests. *See Encino Motorcars*, 136 S. Ct. at 2127 (vacating DOL rule that "said almost nothing" about reliance interests). Indeed, further underscoring its utter lack of concern for reliance interests, DOL gave businesses just *six months* to come into compliance with a new Rule that marked a dramatic change from the *ancien regime*. 81 Fed. Reg. at 32,399. DOL's failure to provide reasoned consideration of this critical issue independently warrants vacatur of the Rule.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's order issuing a preliminary injunction.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 6,310 words as determined by the word counting feature of Microsoft Word 2010.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

s/Paul D. Clement
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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Dated: January 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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