No. 18-40246

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS,

Plaintiffs-Appellees,

CHIPOTLE MEXICAN GRILL, INCORPORATED; CHIPOTLE SERVICES, L.L.C.

Petitioners-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant,

CARMEN ALVAREZ, and her Counsel,

Respondent-Appellant.

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

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PARTIES

State of Nevada, et al. v. United States Department of Labor, No. 18-40246

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 possible disqualification or recusal.

Plaintiffs-Appellees:
State of Nevada and State of Texas

Petitioners-Appellees:
Chipotle Mexican Grill, Incorporated and Chipotle Services, L.L.C.

Defendant:
United States Department of Labor

Respondent-Appellants:
Carmen Alvarez, Joseph M. Sellers, Justin M. Swartz, Miriam R. Nemeth, Melissa L. Stewart, and Glen D. Savits

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For Respondent-Appellants:
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STATEMENT REGARDING ORAL ARGUMENT

The States agree with Respondents-Appellants' request for oral argument.

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JURISDICTIONAL STATEMENT

The States agree that this Court has jurisdiction under 28 U.S.C. § 1291. But the Court does not have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because the parties below did not request—and the District Court did not grant or deny—a continuance, modification, or dissolution of the injunction. The District Court's contempt order "'merely enforce[ed] or interpret[ed] a previous injunction.'" *In re Seabulk Offshore, Ltd.*, 158 F.3d 897, 899 (5th Cir. 1998) (quoting *In re Complaint of Ingram Towing Co.*, 59 F.3d 513, 516 (5th Cir. 1995)). Bare allegations, like Appellants' Jurisdictional Statement, that a contempt order modified rather than interpreted an injunction do not create appellate jurisdiction. *Id.*

STATEMENT OF THE ISSUE

Before the Department of Labor's 2016 overtime rule took effect, the District Court's preliminary injunction enjoined the Department on a nationwide basis from "implementing and enforcing" its new rule. The injunction expressly discussed "delaying" the rule and maintaining the status quo pending its review to "protect[] both employees and employers from being subject to different [overtime] exemptions based on location." With full knowledge of the District Court's injunction, and without seeking clarification, Appellants filed a lawsuit in New Jersey seeking to enforce the 2016 overtime rule. Did the District Court's injunction prevent the 2016 overtime rule from taking effect?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The States' primary interest in this appeal is responding to the Appellants' explicit and implicit collateral attacks on the merits and scope of the District Court's preliminary and permanent injunctions enjoining the Department of Labor's 2016 overtime rule. In their desire to escape contempt, Ms. Alvarez and her counsel, among other arguments, pretend that the District Court's preliminary injunction didn't do what it plainly says it did. Before the rule ever took effect, the District Court ordered that "the Department's Final Rule … is hereby enjoined." While Judge Mazzant clearly enjoined DOL from "enforcing" the Rule, that was not all he did. The District Court also explicitly enjoined DOL from "implementing" the rule. Yet Appellants contend DOL still somehow "implemented" the Rule, and that it could be privately enforced against employers.

Nevada and its coalition of States that challenged the new overtime rule were not simply asking that DOL be enjoined from enforcing its new rule. The pre-effective date challenge was predicated on the fact that DOL lacked any authority to promulgate its new rule, and therefore should be enjoined from ever implementing it in the first place. That is why the States, in their motion for a preliminary injunction, unambiguously asked the District Court to "enjoin the new overtime rule *from becoming effective* pending a full hearing on the merits and any review by higher courts." The District Court granted the States' request and entered the injunction before the rule's effective date. The injunction order unmistakably expressly discussed "delaying" implementation and enjoined "implementation" on a nationwide basis. The District Court explained that the

injunction's purpose was to maintain the status quo while the District Court considered the underlying merits before the rule became operational. Under the then-existing status quo, the rule was not in effect. And the District Court granted a preliminary injunction precisely because it agreed with the States' arguments that the "Final Rule … is contrary to the statutory text and Congress's intent." Given that rationale, it would make no sense for the District Court to allow DOL to go ahead and put into effect a rule that the Court had determined DOL had no authority to implement in the first place. In short, Appellants' contorted interpretation of the District Court's order cannot be squared with its plain text or its expressly stated rationale.

There is a mountain of cases demonstrating that everyone—except Appellants and their cadre of law professors—understood the District Court's injunction as preventing the rule from taking effect. All other private litigants recognized that they were bound by the injunction. After all, injunctions can apply to nonparties, and courts have inherent authority to protect and enforce their lawful orders even against strangers to the proceeding—especially where, as here, the injunction eliminated the legal basis for any lawsuit seeking to enforce the nonexistent rule. That's why no one else, anywhere, tried to enforce the new rule out of the "tens or even hundreds of millions of Americans" that Appellants worry are subject to the District Court's injunction. Appellants are the only ones. The consistent interpretation of other judges and possible litigants is further

confirmation that the District Court's injunction unambiguously precluded the conduct at issue here.

If Appellants were genuinely confused about the meaning or scope of the District Court's injunction, they had a duty to petition for clarification, modification, or construction of the order from the District Court *before* they filed the New Jersey action. They did not. Instead, they supplanted the judiciary with the academy—a curious species of forum-shopping that seems especially predisposed to deliver desired results. By neglecting to seek an authoritative interpretation of the injunction from the District Court, Appellants proceeded at their own risk. They cannot now claim ambiguity or collaterally attack the underlying correctness of the preliminary injunction through this proceeding.

The District Court's preliminary injunction was clear, unequivocal, and easily understood. It prevented DOL's new overtime rule from becoming effective and banned enforcement. If the agency responsible for the nation's overtime regulations was enjoined from bringing the new rule into existence, it necessarily follows that the rest of the world was precluded from enforcing a never-born rule.

STATEMENT OF THE CASE

A. The White Collar Exemption is Enacted Without a Compensation Requirement.

The FLSA was originally enacted in 1938. 52 Stat. 1060. It generally requires that all 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. *See generally id.*; *see also* 29 U.S.C. §§ 206-07.

When enacted, however, the FLSA contained a number of exceptions to the overtime requirement. 52 Stat. 1067-68. Section 13(a)(1) of the enabling legislation contained what is commonly referred to as the "white collar" or "EAP" exemption. It excluded from both minimum wage and overtime "any employee employed in a bona fide executive, administrative, or professional … capacity …." 52 Stat. 1067. Congress did not initially define the terms "executive," "administrative," or "professional." *See* 52 Stat. 1060-61, 1067-68; 81 Fed. Reg. 32394. The statute provided that those terms would be "defined and delimited by regulations of the Administrator [of the Department of Labor's Wage and Hour Division]." 52 Stat. 1067. Nor did the statutory language include any minimum salary for this exemption, or *any* compensation level associated with the overtime exemption.

The relevant language of the white collar exemption remains largely unchanged and is presently codified at 29 U.S.C. § 213(a)(1). It states:

> The provisions of section 206 [minimum wage] and section 207 [overtime] of this title *shall not apply* with respect to —
>
> (1) *any employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (*as such terms are defined and delimited from time to time by regulations of the Secretary*, subject to the provisions of subchapter II of chapter 5 of Title 5 …

Id. (emphases added).

B. DOL Adds Minimal Compensation and Salary Requirements to the Overtime Exemption.

DOL first issued regulations to interpret the white collar exemption in 1938. 3 Fed. Reg. 2518. "Executive" and "administrative" employees were jointly defined primarily based on the duties performed. *Id.* As one might expect, those duties included managing an establishment or department, directing the work of other employees, exercising discretionary powers, and possessing authority to hire and fire or to offer suggestions for the same. *Id.* Even though the statute did not express any intention regarding employee compensation, the regulations contained a marginal $30 per week compensation element. *Id.* ("[A]nd who is compensated for his services at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek."). But the regulations did not require employers to pay "executive" and "administrative" employees on a salary basis. *Id.* At first, the definition of "professional" employees did not include a compensation component at all; that term was described solely in terms

of duties. *Id.*; 81 Fed. Reg. 32401. A compensation regulation was not added for "professional" employees until 1940. 5 Fed. Reg. 4077.

That same year—two years after the FLSA was enacted—DOL first required that EAP employees be paid on a salary basis at a certain specified amount. *Id.* "Professional" and "administrative" employees were defined as those "compensated for … services on a salary or fee basis at a rate of not less than $200 per month …." 5 Fed. Reg. 4077. "Executive" employees were considered those "who [are] compensated for … services on a salary basis at not less than $30 per week …." *Id.* The regulations continued to require that certain duties be performed.

DOL purposefully set the salary threshold low. For instance, it defended the legality of a salary level test in 1949 by explaining that the test's purpose was to "screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." ROA.1670; 81 Fed. Reg. 32412. DOL argued that "[i]n an overwhelming majority of cases … personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them." ROA.1670. DOL justified the use of the salary level test because it lacked "evidence" that the test had defeated 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." ROA.1671. It acknowledged that it could not adopt a test "based on salary alone …" ROA.1685.

C. The Salary Requirement Has Always Been Controversial.

The addition of the salary-level test was controversial when first implemented and remained so. The same year the salary-level test was first promulgated, DOL noted in its Stein Report that "some parties claimed that the Administrator did not have authority and should not establish a general national minimum requirement for exemption." ROA.1571-72. "It was asserted by some that the Administrator has no authority to include a salary qualification." ROA.1585. To defend its salary-level test, DOL, in the Report, noted that many state wage-and-hour laws contained a salary qualification, but it never explained how the text of the FLSA authorized a *federal* one. ROA.1585-86. The Report defended a salary-level test as an "easily applied …. best single test of the employers' good faith" in categorizing an employee as EAP (ROA.1585), but the same Report undercut that rationale when, in defending "such a low [salary] requirement," it acknowledged that some EAP employees "are paid exceedingly low wages." ROA.1587-88. These inherently conflicting positions were reiterated in future Reports, where DOL continued to defend its salary-level test against claims that the test is illegal, mostly by emphasizing that its low salary cutoff was merely used as "a ready method of screening out the obviously nonexempt employees," and that DOL believed that "a good deal of the opposition to maintaining a salary level test … resulted from th[e] *misunderstanding*" that DOL might "rais[e] the figure so high as to

disqualify for exemption individuals" that Congress intended to be exempt. ROA.1669-70 (emphasis added).

Even so, the lack of statutory support manifested in federal courts. In each of the next two years after the rule was announced, a court struck down the salary-level test as beyond the statute's plain language. *Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284, 286 (N.D. Ga. 1941); *Buckner v. Armour & Co.*, 53 F. Supp. 1022, 1024 (N.D. Tex. 1942). DOL's 1949 Weiss Report received multiple comments arguing "that the salary tests were illegal," but avoided the issue, stating that "this is not the place to settle the question of their validity." ROA.1669. Decades later, the Minimum Wage Study Commission observed precisely what the District Court concluded in this case: "It is clear that the Congress intended *all* bona-fide executives, administrators, and professionals to be exempt from both the minimum wage and the [overtime] provisions of the Act. The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept … counter to the original intent of the exemption." ROA.1309 (emphasis added).

Despite continuously asserted doubts about the validity of the salary-level test, as time went on there were few legal challenges to its use because the salary thresholds were always purposefully set at a low level. There was rarely any reason for employers to

contest the salary-level test.[1] In fact, when pressed to defend the legality of a salary-level test, DOL emphasized that it was purposefully set low to *avoid* any genuine debate about the EAP status of affected employees. In 1940, DOL first justified its use of a salary-level test as "such a low requirement" because "some foremen and supervisors are paid exceedingly low wages." ROA.1587-88. Again, in 1949, DOL expressly disclaimed any intent to set "the required salary … [at] a figure so high as to disqualify for exemption individuals who … were intended by Congress to be exempt." ROA.1669. Instead, "the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption." ROA.1677. DOL considered the minimum salary test as merely "a ready method of screening out the obviously nonexempt employees" and emphasized that "[i]n an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations"—i.e., the duties test. ROA.1670. DOL continued to defend its salary-level test as "a relatively low figure" deliberately set "near the lower end of the range of prevailing salaries." ROA.1674.

A decade later, DOL reiterated in the Kantor Report that "the primary objective of the salary test is the drawing of a line separating bona fide [EAP] employees" from non-EAP employees. ROA.1769. Thus, "it is clear that the objectives of the salary tests will

[1] By 2004, for example, the long-test cutoff used by DOL was below the minimum wage. 69 Fed. Reg. 22164.

be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories." ROA.1770. Again, the Kantor Report brushed aside concerns that the salary test was illegal. ROA.1768. Into the next century, DOL continued to explain that it deliberately set the new salary cutoff to be "consistent with the Department's historical practice of looking to 'points near the lower end of the current range of salaries'" so as to avoid "'disqualifying any substantial number of [EAP] employees.'" 69 Fed. Reg. 22171 (quoting Kantor Report). As DOL explained, the "Department followed this same methodology when determining the appropriate salary level" in 1963, 1970, and 1975. *Id.* at 22166.

From the 1940s until 2016, DOL had consistently set the minimum salary cutoff very low in a deliberate effort to ensure that the "overwhelming majority" of bona fide EAP employees could be eligible for an overtime exemption under the rule, based on their duties. The low level of the salary test also insulated DOL from litigation, but the *legality* of the test was hardly well-accepted. DOL's 2016 rule, instead of setting the salary-level cutoff "at points near the lower end of the current range of salaries," set the cutoff at the 40th percentile, deliberately and categorically denying *over a third* of salaried employees an EAP exemption, regardless of their duties. This was a radical departure from DOL's historical practice.

D. The "Long" and "Short" Tests

Once DOL manufactured the salary level test as a regulatory requirement for the statutory EAP exemption, it steadily raised and modified the test through rule-making. *See*, *e.g.*, 14 Fed. Reg. 7705; 14 Fed. Reg. 7730; 19 Fed. Reg. 4405; 23 Fed. Reg. 8962; 26 Fed. Reg. 8635; 28 Fed. Reg. 9505; 32 Fed. Reg. 7823; 35 Fed. Reg. 883; 38 Fed. Reg. 11390; 40 Fed. Reg. 7091.

In 1949, DOL developed two tests to assess whether an employee qualified for the EAP exemption. 14 Fed. Reg. 7705; *see also* 81 Fed. Reg. 32401. The first, the "long test," had a lower salary threshold paired with a longer list of duties that employees had to satisfy before being considered exempt from overtime. 14 Fed. Reg. 7706. There was also a cap on the amount of nonexempt work an employee could perform and still remain exempt. *Id.* The second, the "short test," had a higher salary threshold but a shorter list of duties that the employee had to meet. *Id.* The short test did not have a limit on the amount of nonexempt work that an employee could do. *Id.* From 1949 to 1975, there was a single short test salary level and multiple long test salary levels that applied to the different EAP categories. 81 Fed. Reg. 32402. The original long test salary level was $55 weekly for executive employees and $75 for administrative and professional employees. 14 Fed. Reg. 7706. The short test salary level was initially set at $100 weekly for all three classes. *Id.*; *see also* 81 Fed. Reg. 32401.

E. The End of the "Long" and "Short" Tests

In 2004, DOL abolished the long and short tests and replaced them with a single salary threshold for all three categories and a "standard" duties test. 81 Fed. Reg. 32403. DOL justified the changes because the "duties" tests had not been updated since 1949 and the minimum salary level had not been revised since 1975. 69 Fed. Reg. 22122. DOL set the new minimum salary level at $455 a week.[2] 29 C.F.R § 541.600. Thus, under the new test, to be exempt from overtime an employee had to earn a minimum of $455 per week *and* meet the rule's additional requirements relating to the employee's actual duties.

In its 2004 rulemaking, DOL recognized that Congress had expressly limited its power to use a minimum salary for defining and delimiting who is a bona fide EAP employee. "[T]he law," DOL acknowledged, "does not give the Department authority to set minimum wages for executive, administrative and professional employees." 69 Fed. Reg. 22165. DOL reiterated that it did not have authority under the FLSA to employ a "salary only" test. *Id.* at 22173. According to DOL, any change in the salary threshold part of the EAP rule "has to have as its primary objective the drawing of a line separating exempt from nonexempt employees." *Id.* at 22165. DOL furthermore denied that it had authority to adopt a regulation to automatically update the salary level. *Id.* at 22171-72.

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[2] $455 per week equates to a minimum annual salary of $23,660.

F. President Obama's New Overtime Rule

During his tenure, President Obama tried to pass a minimum wage increase as part of his legislative agenda, but Congress stymied his efforts.[3] To avoid the congressional blockade, the President ordered DOL to "update" the EAP exemption because, in his view, "millions of Americans lack the protections of overtime *and even the right to the minimum wage*." 79 Fed. Reg. 18737 (emphasis added). President Obama proclaimed the new overtime rule "the single biggest step [he] can take through executive action *to raise wages* for the American people."[4]

So, on March 13, 2014, President Obama sent to the Labor Secretary a Presidential Memorandum "directing him to modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." 79 Fed. Reg. 18737. "Because these regulations are outdated," opined President Obama, "millions of Americans lack the protections of overtime and even the right to the minimum wage." *Id.*

In a July 2015 response to the President's memorandum, DOL published a Notice of Proposed Rulemaking to suggest revisions to 29 C.F.R. Part 541. 80 Fed. Reg. 38516. DOL proposed a salary level "at the 40th percentile of all full-time salaried

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[3] Wesley Lowery, *Senate Republicans Block Minimum Wage Increase Bill*, WASH POST. (Apr. 30, 2014) *available at* https://www.washingtonpost.com/news/post-politics/wp/2014/04/30/senate-republicans-block-minimum-wage-increase-bill/?utm_term =.df324940e688.

[4] Remarks of President Barack Obama as Delivered in his Weekly Address at the White House: Expanding Overtime Pay (May 21, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/05/21/weekly-address-expanding-overtime-pay (emphasis added).

employees [nationally] ($921 per week, or $47,892 for a full-year worker, in 2013) ….” *Id.* at 38517. DOL also proposed 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”—the same automatic indexing mechanism that it had rejected in 2004 as beyond its power. *Id.* at 38518.

Despite the President’s instruction to “address the changing nature of the workplace,” 79 Fed. Reg. 18737, DOL did not propose any revisions to the standard “duties” test that was put in place in 2004, because that was considered “more difficult.” 81 Fed. Reg. 32444. Thus, increasing the salary level test was DOL’s only proposed solution to the problems and concerns that motivated the Notice of Proposed Rulemaking. *Id.*

The final version of the overtime rule was announced on May 23, 2016. *Id.* at 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. The revised rule more than doubled the previous salary test level of $455 per week.

The final rule expressly acknowledged that "[w]hite 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). Thus, the new rule created a de facto salary-*only* test for any employee earning less than $913 per week—a species of litmus test that DOL repeatedly acknowledged Congress did not authorize. DOL defended its decision to simply double the salary threshold because, per DOL, "a salary threshold significantly below the 40th percentile would require a more rigorous duties test than the current standard duties test in order to effectively distinguish between white collar employees who are overtime protected and those who may be bona fide EAP employees." *Id.* at 32404. In other words, DOL knew full well that its new threshold would trap many "bona fide EAP employees" under the cutoff, but deliberately set the threshold high because it was unwilling to adopt a "more rigorous duties test" that would distinguish between actual EAP and non-EAP employees. DOL opted for a new cutoff that it knew would err on the side of denying an exemption to many bona fide EAP employees, to avoid changing the current standard duties test (which it said elsewhere was "more difficult").

DOL estimated that "*4.2 million* employees who meet the standard duties test will no longer fall within the EAP exemption and therefore will be overtime-protected." *Id.* at 32405; *see also id.* at 32393. The sheer number of employees that would have been no

longer exempt demonstrates that DOL flipped the very purpose for which the salary test was adopted. It started as a measure to screen out only those who were "obviously nonexempt employees" without disqualifying "any substantial number of individuals who could reasonably be" considered bona fide EAP employees. ROA.1670-71. The new overtime rule did exactly the reverse: it purposefully denied an exemption to many "bona fide EAP employees" that DOL knew should have been exempt under the FLSA, just to avoid improperly giving an overtime exemption to any non-EAP employees.

The new rule also invented an indexing mechanism to automatically update the standard salary level threshold every three years. *Id.* at 32430. The indexing regulation was to be memorialized in 29 C.F.R. § 541.607. The revised salary level threshold was scheduled to take effect on December 1, 2016 and the first automatic ratcheting up of that threshold was planned for January 1, 2020. *Id.* at 32399, 32430.

G. The States Filed Suit and the District Court Prevented the New Rule From Becoming Effective Before Its Effective Date.

Because the new overtime rule threatened significant financial harm and injury to their sovereign interests, a twenty-one State coalition, led by Nevada, sued on September 20, 2016. ROA.50-79. The States alleged that they are employers—like private businesses—that pay certain EAP employees less than the new salary level test. ROA.53-56. The States requested declaratory relief under the Declaratory Judgment Act and the Administrative Procedure Act as well as injunctive relief. ROA.50-79. The

States prayed for "[t]emporary or preliminary relief enjoining the new overtime rules and regulations from having any legal effect" and "a final, permanent injunction preventing Defendants from implementing, applying, or enforcing the new overtime rules and regulations." ROA.77-78. A number of business entities filed a concurrent suit, which was later consolidated with the States' action. *See* ROA.3828.

Shortly after filing the Complaint, the States filed an Emergency Motion for Preliminary Injunction. ROA.105. They argued, among other things, that the new salary-level test was without statutory authority. *See generally* ROA.105-201. The States "respectfully request[ed] that the Court enjoin the new overtime rule *from becoming effective pending a full hearing on the merits and any review by higher courts*." ROA.165 (emphasis added).

The Business Plaintiffs filed an expedited motion for summary judgment and made similar arguments. *See* ROA.270-307. They also contended that the new overtime rule was arbitrary and capricious. ROA.302-306. In the interest of judicial economy, the District Court considered the Business Plaintiffs' Motion for Summary Judgment as an amicus to the States' Motion for Preliminary Injunction. ROA.268. The States also joined the Business Plaintiffs' Motion for Summary Judgment and the District Court consolidated the preliminary injunction briefing with the summary judgment proceedings. ROA.4348.

On November 22, 2016—nine days before the new overtime rule's effective date—the District Court issued a Memorandum and Order enjoining the rule.

ROA.3825. The Court concluded at *Chevron* step-one that "it is clear Congress intended the EAP exemption to apply to employees doing actual executive, administrative, and professional duties. In other words, Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level." ROA.3835. The District Court continued: "The plain meanings of the terms in Section 213(a)(1), as well as Supreme Court precedent, affirms the Court's conclusion that Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary." ROA.3836. Consequently, the District Court held that the new overtime rule, including the automatic indexing provision, exceeded DOL's statutory authority. ROA.3836-39. And the new overtime rule failed at *Chevron* step-two because it was not based on a permissible construction of the statute. ROA.3837. It was outside the ambit of statutory authority because "the Department estimate[d] 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary lever, will automatically become eligible under the Final Rule without a change in their duties. Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption." ROA.3838 (internal citation omitted).

The District Court found that the States sufficiently established the other preliminary injunction factors. ROA.3840-41. Allowing the rule to go into effect would "create new legal obligations for employers who must pay a higher salary for certain employees to be exempt from overtime." ROA.3829. The District Court determined

that "Defendants have not articulated any harm they will suffer *from delaying an implementation of the Final Rule*." ROA.3841 (emphasis added). The District Court ruled that a preliminary injunction served the public interest because, if the rule was ultimately upheld, "then an injunction will *only delay the regulation's implementation* …. A preliminary injunction preserves the status quo while the Court determines the Department's authority to make the Final Rule as well as the Final Rule's validity." ROA.3841-42.

The Court's injunction order clearly stated that "Defendants are enjoined from *implementing and enforcing* the [the new overtime rule regulations] pending further order of this Court." ROA.3843-44 (emphasis added). And because both the scope of DOL's statutory violation and the States' irreparable harm extended to the entire country, the District Court enjoined the rule on a nationwide basis. ROA.3842-43. The District Court reasoned that "a nationwide injunction protects *both employees and employers* from being subject to different EAP exemptions based on location." ROA.3842 (emphasis added).

H. Chipotle Moves For Contempt While DOL Appeals.

DOL appealed the injunction order on December 1, 2016. *See* ROA.3967. During the appellate briefing, DOL "decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time" and instead sought to defend its

general ability to use a salary level test while DOL engaged in new rulemaking. ROA.3975.

While DOL's appeal was pending before this Court, Chipotle moved for contempt in front of Judge Mazzant because Alvarez and her counsel violated the injunction by seeking to enforce the 2016 overtime rule in a New Jersey lawsuit. ROA.4043. Before ruling on Chipotle's motion, the District Court entered summary judgment against DOL for substantially the same reasons expressed in the preliminary injunction order. *See* ROA.4356-73. The District Court determined that DOL's "Final Rule described in 81 Fed. Reg. 32,391 is invalid" and it entered final judgment. ROA.4373-74.

The District Court's summary judgment ruling mooted DOL's ongoing preliminary injunction appeal so DOL filed a second appeal of the final judgment. ROA.4375-80; ROA.4881. At DOL's behest, this Court stayed the second appeal pending the outcome of new rulemaking.

Meanwhile, the District Court held a hearing on Chipotle's contempt motion. ROA.5229. The States appeared at the hearing and argued that the District Court's injunction order unambiguously prevented the new rule from going into effect. ROA.5448-50. The District Court granted Chipotle's Motion for contempt. ROA.4958.

Because Appellants assert that the preliminary injunction order didn't do what it said it did, the States are participating in this appeal to defend the clarity and legal effect of the District Court's ruling.

ARGUMENT

A. Appellants Cannot Relitigate the Merits of the Preliminary Injunction in this Proceeding.

At the contempt hearing, Appellants disavowed any attack on the underlying injunction order, stating that "we're not challenging this Court's authority or this Court's order." ROA.5390. They claimed to only dispute "the procedure that has been used by Chipotle." *Id.* Yet Appellants' arguments on appeal directly and indirectly attempt to undermine the legitimacy of the District Court's preliminary injunction order.

A civil "contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948). Rather, a party must obey a lawfully issued injunction, until modified or reversed, notwithstanding reasonable objections or even grave constitutional concerns. *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439-40 (1976) (citing *United States v. Mine Workers*, 330 U.S. 258 (1947) and *Walker v. City of Birmingham*, 388 U.S. 307 (1967)); *see also U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (1988) (nonparty held in contempt could challenge the court's subject matter jurisdiction but could not "rais[e]

matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties or a limitations statute that would compel dismissal of the action. As to such matters, even if it were ultimately determined that the court should not have allowed the suit to proceed, the order or process it issued in the conduct of the litigation would still be valid.").

This circuit's caselaw similarly discourages collateral attacks on injunctions through civil contempt proceedings. *See TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 885-90 (Fed. Cir. 2011) (applying Fifth Circuit law). And courts apply this bar to nonparties to the original injunction proceeding. *See Alemite Mfg. Corp. v. Staff,* 42 F.2d 832, 833 (2d Cir. 1930) (Learned Hand, J.) (addressing an attempt to hold a nonparty in contempt and holding that in "proceedings to punish for contempt, the propriety of the decree is not open, even though it be founded upon an unconditional statute. The respondent may only deny any knowledge of the decree, or that his act was within it.") (internal citation omitted). The proper procedure to challenge an injunction is to file a "motion to modify in the issuing court and then, failing there, by appeal of that court's denial of their motion …." *Spangler*, 427 U.S. at 440.

Appellants should not be allowed to use this contempt proceeding to refight old battles already decided by the District Court. Appellants cannot, for example, attack the District Court's conclusion that the new overtime rule exceeded DOL's statutory authority and should be enjoined from going into effect. Nor do Appellants get a

second shot to dispute that a nationwide injunction was warranted. Appellants are limited to contesting their knowledge of the preliminary injunction order and whether it covered their actions. *Alemite Mfg. Corp.*, 42 F.2d at 833; *see also Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013).

Even if Appellants were allowed to relitigate the preliminary injunction, the District Court correctly determined that the new overtime rule flunked both steps of the infamous framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At step one, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, Congress has not unambiguously addressed the precise question at issue, the Court proceeds to step-two and assesses whether the agency's regulation is based on a permissible construction of the statute. *Id.* at 843.

Here, Congress did not define what it means to be "any employee employed in a bona fide executive, administrative, or professional capacity," 81 Fed. Reg. 32394, but left it to DOL to "define[] and delimit[]" these terms "from time to time by regulations." Because the operative phrase is not defined, the District Court properly looked to the commonly understood meaning of those words around the time that the FLSA was

enacted in 1938 to determine their meanings. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

As explained by the District Court, the contemporary dictionary definitions of Section 213(a)(1)'s operative words—"executive," "administrative," "professional," and "capacity"—all "counsel[] in favor of a *functional* … inquiry … that views an employee's *responsibilities*," not the employee's salary alone. *Id.*; *see also* ROA.3834-36; ROA.146-59. And Congress's use of the term "bona fide" in Section 213 did not change or expand the commonly understood meaning of the those words; if anything, it *limited* it. Near the time of enactment, "bona fide" meant "[i]n good faith, with sincerity; genuinely." 1 THE OXFORD ENGLISH DICTIONARY 980 (1933). So, for example, if the word "professional" must by its plain meaning be defined with respect to duties, not pay, then adding the modifier "genuine" or "sincere" in front of "professional" only reinforces the word's already-existing meaning. Thus, under the plain language of Section 213, *any* "genuine" or "sincere" EAP employee *must* be allowed an overtime exemption, irrespective of compensation.

And if the plain language were not enough, DOL itself has conceded that the statute "does not reference … a salary level or salary basis test …. These changes were all made *without specific Congressional authorization*." 81 Fed. Reg. 32431 (emphasis added). DOL has consistently recognized that its authority "to define and delimit who is employed in a bona fide [EAP] capacity" does not authorize it to adopt a "salary only"

test. *Id.* at 32429, 32446 (stating that a salary only approach is "precluded by the FLSA"); 69 Fed. Reg. 22173 ("Secretary does not have authority under the FLSA to adopt a 'salary only' test …. The Department has always maintained that the use of the phrase 'bona fide [EAP]' in the statute requires the performance of specific duties.").

DOL's pretermitted overtime rule did precisely what it acknowledged it could not do by promulgating the equivalent of a salary-only test for literally *millions* of EAP employees earning less than $913 per week. Under the new rule, "[w]hite 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*." 81 Fed. Reg. 32405 (emphasis added). In other words, an employee's duties, functions, tasks, and activities will not matter *at all* below the new salary threshold.

DOL estimated that, as a result of the new salary level, "4.2 million employees who meet the standard duties test will no longer fall within the EAP exemption and therefore will be overtime-protected." *Id.* Put simply, the new rule's increased salary level would have excluded from exemption, on the basis of pay alone, *millions of employees* that Congress authorized to be exempt based upon the EAP duties they perform. But

Section 213(a)(1) plainly states that "*any*" bona fide EAP employee "*shall not*" be eligible for overtime.[5]

B. The Preliminary Injunction Issued Before the New Overtime Rule's Effective Date, and Clearly Prevented the Rule From Coming Into Existence.

For obvious reasons, a court order must be construed with reasonable deference to the court that issued the order. The issuing court need not "anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000). A court is "entitled a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order." *Hornbeck*, 713 F.3d at 792; Fed. R. Civ. P. 65(d)(1)(C) (requiring injunctions to "describe in *reasonable* detail" the acts restrained) (emphasis added). "'[T]he interpretation of the scope of the injunctive order[ ] is a question of law to be determined by the independent judgment of this Court.'" *Hornbeck*, 713 F.3d

[5] This Court's earlier decision in *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966) does not alter this outcome because it was decided pre-*Chevron* and did not make a step-one-type holding by examining the plain statutory text. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *U.S. v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1842-44 (2012). Other federal courts that actually analyzed the text held that the salary level test was without statutory authority. *Devoe*, 40 F. Supp. 286; *Buckner*, 53 F. Supp. 1024.

at 792 (quoting *Drummond Co. v. Dist. 20, United Mine Workers*, 598 F.2d 381, 385 (5th Cir. 1979)).

As with their belated collateral attack on the merits of the preliminary injunction, Appellants initially conceded in the lower court that "[w]hether or not the preliminary injunction barred the Overtime Rule from going into effect is not at issue in this contempt proceeding." ROA.4419. They reiterated that "the question of whether the Overtime Rule went into effect need not, and should not, be decided in this proceeding." *Id.* at n.9. But Appellants have changed their tune on appeal. They now assert that the District Court's preliminary injunction "did not actually prohibit [Appellants] from pursuing their allegations in New Jersey." Opening Br. 15. Or, at least, the injunction did not do so clearly. *Id.* at 6, 38-39. These arguments are as wrong as they are late.

The preliminary injunction squarely prevented the rule from taking effect and, consequently, barred anyone and everyone from enforcing it. As an initial matter, the States moved the District Court to "enjoin the new overtime rule *from becoming effective* …." ROA.165. The States asked for this relief on the basis that the proposed rule exceeded the agency's statutory authority. The District Court expressly agreed that the soon-to-be-effective rule "exceeds [DOL's] delegated authority and ignores Congress's intent," ROA.3837, and *on that basis* granted the States' motion and "enjoin[ed] the Final Rule on a nationwide basis." ROA.3843. The face of the injunction order

unambiguously enjoined the defendants—including the Labor Secretary—from "*implementing* and enforcing" the new regulations. *Id.* (emphasis added). Since the Labor Secretary is statutorily tasked with "defin[ing and delimit[ing]" the terms "executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), the injunction barred the Secretary from redefining those terms in the new way and prevented the Secretary from "implementing" the new unlawful salary-based definitions on December 1, 2016. No complicated legal gymnastics can avoid the conclusion that the District Court "enjoined" the Labor Secretary and DOL from bringing its planned rule into effect. A planned rule that never went into effect cannot be enforced by anyone—it is like trying to enforce a proposed statute that was never actually enacted.

The remainder of the District Court's injunction order confirms this result. The District Court expressed concern that its "ability to render a meaningful decision on the merits [was] in jeopardy" due to the looming deadline. ROA.3841. It thus issued the preliminary injunction to maintain the status quo while it finally considered DOL's statutory authority to issue the new overtime rule. ROA.3841-42. Of course, the status quo at the time of the District Court's ruling was that the new overtime rule was not yet in effect. So, by preserving the status quo, the District Court froze the state of affairs in a position where the new overtime rule did not legally exist.

Contrary to Appellants' tortured reading of the injunction order (Opening Br. 39), the District Court expressly referenced "delaying" implementation of the new rule.

ROA.3841 ("Defendants have not articulated any harm they will suffer from *delaying an implementation* of the Final Rule.") (emphasis added). The District Court unmistakably explained that the injunction would "*delay the regulation's implementation*." *Id.* (emphasis added). The District Court's intent to stop the rule from going into effect on December 1, 2016 is indisputable.

As a legal matter, enjoining a rule's implementation and delaying its effective date prevents it from having any future effect whatsoever. *See Nat. Res. Def. Council, Inc. v. E.P.A.*, 683 F.2d 752, 762 (3d Cir. 1982). Because of the injunction, the rule was a legal nullity when the calendar turned to December 1, 2016 and no entity—public or private—needed to comply. *See id.* ("In short, without an effective date a rule would be a nullity because it would never require adherence."). The new overtime rule simply never got off the ground and there was nothing for Appellants to enforce—private or otherwise.

Appellants argue that the District Court did not cite 5 U.S.C. § 705. That statute provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process to postpone the effective date of an

agency action or to preserve status or rights pending conclusion of the review proceedings."

But there is no requirement a court applying Section 705 must cite to it. The District Court's order was consistent with Section 705. It "issue[d] all necessary and appropriate process"—an injunction—"to postpone the effective date of" the new overtime rule "to preserve the status [and] rights" of the plaintiffs "pending conclusion of the review proceedings." Section 705 merely provides another basis for the District Court to issue a preliminary injunction.[6] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-64 (2010) (reversing nationwide injunction but indicating that a party may file suit challenging agency action and seeking injunctive relief under 5 U.S.C. §§ 702 and 705 if it can satisfy the four preliminary injunction factors); *see also B & D Land & Livestock Co. v. Conner*, 534 F. Supp. 2d 891, 905 (N.D. Iowa 2008) ("[T]he court finds, that 5 U.S.C. § 705 permits a reviewing court to enjoin agency action pending judicial review").

The same four factors are considered under both Section 705 and Federal Rule of Civil Procedure 65. *B & D Land*, 534 F. Supp. 2d at 905; *Monsanto Co.*, 561 U.S. at 156-64. And courts have held that "the distinction between Rule 65 and Section 705 is

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[6] *Superior Trucking Co. v. United States*, 614 F.2d 481, 483-84 (5th Cir. 1980) ("Parenthetically, the power of the courts of appeals to enter such an injunction might emanate from any of several sources. Authority can be found in (1) 28 U.S.C. § 2349(b); (2) the All Writs Statute, 28 U.S.C. § 1651 (1976); (3) part of the Administrative Procedure Act, 5 U.S.C. § 705 (1976); and (4) the inherent power of the courts of appeals to maintain the status quo pending review") (footnotes omitted).

mostly technical because a Section 705 stay is a provisional remedy in the nature of a preliminary injunction, and its availability turns on the same four factors considered under a traditional Rule 65 analysis." *Colorado Coal. for Homeless v. Gen. Servs. Admin.*, No. 18-CV-1008-WJM-KLM, 2018 WL 3109087, at *1 (D. Colo. June 25, 2018) (citing *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980) and *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007)).[7]

Appellants cannot plausibly argue that the absence of a single cite to a single APA provision led them to "doubt that the *Nevada* order rendered the Overtime Rule itself legally inoperative" despite the District Court's clear statements otherwise. Opening Br. 39. Appellants' argument sounds more like an exceedingly thin, post-hoc justification for having tried to circumvent Judge Mazzant's clear order, rather than an honest attempt to accurately interpret that order.

The two cases Appellants cite do not support their claim that the District Court needed to invoke Section 705 to halt the new rule from becoming effective. In *Texas v. E.P.A*, 829 F.3d 405, 414 (5th Cir. 2016), the agency promulgated a final rule with a February 4, 2016 effective date. *See* 81 Fed. Reg. 296. *After the effective date*, on March 1, 2016, Texas petitioned the court of appeals to review the rule and, while the petition was pending, filed a request to stay the final rule on March 3, 2016. 829 at 416-17; *see*

[7] The only substantive distinction is that Rule 65 requires a bond. *Id.* at *1 n.2.

Docket in Case No. 26-60118 (5th Cir.). Likewise, in *Abbott Labs. v. Gardner*, 387 U.S. 136, 151, 155-56 (1967), an agency made a regulation effective on publication and the court held that, without a Section 705 stay, the effective date was not postponed. Neither *Texas* nor *Abbott Labs* dealt with a court stopping a rule from ever going into effect in the first place. Instead, at most, those cases suggest that a Section 705 stay request may be appropriate where a rule is already in effect.[8]

Abbott Labs actually undermines Appellant's argument. It holds that the APA does not prevent a pre-enforcement challenger from resorting to the Declaratory Judgment Act and injunctive remedies. *Id.* at 153, 155. "[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance," the Court held, "access to the courts under the Administrative Procedure Act *and the Declaratory Judgment Act* must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." *Id.* at 153 (emphasis added). *Abbott Labs* stands for the proposition that

[8] Appellants' reliance on *League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) is also inapposite. *Newby* involved agency decision making, not rulemaking, and the challenge there also came after the decisions became effective. *Id.* at *6. Accordingly, it makes sense that a preliminary injunction did not vacate already effective decisions but merely prohibited the agency from giving them effect. *Cf.* Opening Br. 39 (parenthetically quoting *Newby*). Had the preliminary injunction issued *before* the effective date, the agency would have also been prohibited from giving effect to the decisions *without* vacatur.

challengers are not restricted to expressly invoking Section 705 to stop unlawful administrative regulations from ever taking effect in the first place.

The D.C. Circuit applied *Abbott Lab*'s principle to a pre-enactment challenge just two years later. In *Textile & Apparel Grp., Am. Importers Ass'n v. F.T.C* ., 410 F.2d 1052, 1053 (D.C. Cir. 1969), the court condoned a lawsuit "prior to the effective date of the rule, for a declaratory judgment and an injunction …." One district court granted a preliminary injunction but another judge set it aside. *Id.* The agency, however, agreed to hold the rule in abeyance pending appeal so the rule never became effective. *See id.* at 1053 n.4. The appellate court deduced that there was nothing improper about a pre-effective date injunction "[s]ince their challenge goes to the basis of the rule itself and would, if successful, require permanently enjoining the rule, it is to the advantage of both the [challengers] and the Commission to know now whether the [challengers] will have to live with the rule (and thus alter their contracts accordingly) or whether the Commission should cancel plans to appropriate sums and personnel to implement the rule before a large apparatus is actually set up." *Id.* The D.C. Circuit did not cite or discuss Section 705.

Appellants' reliance on *Owen v. City of Portland*, 236 F. Supp. 3d 1288 (D. Or. 2017) similarly backfires. Opening Br. 38. Indeed, *Owen* demonstrates that the District Court's injunction stopped the new overtime rule before it went into effect. There, the Portland City Council enacted a landlord-tenant ordinance and made it "effective

immediately upon adoption." *Id.* at 1290. After its adoption, a group of landlords sued "seeking to enjoin the City from allowing the Ordinance 'to take effect.'" *Id.* 1291.

The Federal District of Oregon cited to the District Court's overtime rule injunction and stated that "[s]ometimes, when a law, ordinance, or regulation is challenged in court as being invalid, a court may temporarily or preliminarily enjoin the *implementation* or *enforcement* of that law, ordinance, or regulation during the pendency of the lawsuit seeking to declare the law invalid." *Id.* at 1297.

But the *Owen* court distinguished Judge Mazzant's injunction from the Portland ordinance challenge. It determined that it could not enjoin implementation of the ordinance at issue in *Owen* because it had "already taken effect, it is too late for a Court to direct the City not to allow the Ordinance to take effect." *Id.* Unlike the pre-effective date challenge in this case, the injunction in *Owen* would have been meaningless because "there [was] nothing further for the City to do to implement the Ordinance." *Id.* at 1298. Accordingly, the *Owen* court interpreted Judge Mazzant's order enjoining "implementation" as stopping the new overtime rule from ever "tak[ing] effect."

Every other reasonable observer—judges and litigants—interpreted the District Court's injunction on nationwide implementation as foreclosing private lawsuits wielding the new overtime rule. The injunction references the unlawful effects on 4.2 million workers across the country—not just State employees—and states that the injunction is meant to "protect[] *both employers and employees* from being subject to

different EAP exemptions based on location." ROA.3838, 3842 (emphasis added). Allowing the Business Plaintiffs to participate as amicus also indicates that the District Court considered private employers' interest, not solely the States'.

In fact, no one except Appellants and their chosen law professors thought the new overtime rule went into effect on December 1, 2016 or allowed private party suits. There are many examples showing how everyone else interpreted the District Court's injunction order in private litigation. For instance, the Sixth Circuit stressed that "[t]he text of subsection (a)(1) *was slated to change* on December 1, 2016, [but] [t]he United States District Court for the Eastern District of Texas has enjoined DOL from implementing or enforcing that change, along with certain other proposed changes to Chapter 541." *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191, 197 n.4 (6th Cir. 2017) (emphasis added).

The Second Circuit described its view of the District Court's injunction by saying "[t]he salary threshold was recently increased to 'not less than $913 ... per week.' That amendment, however, *is presently enjoined nationwide*." *Fernandez v. Zoni Language Centers, Inc.*, 858 F.3d 45, 49 n.5 (2d Cir. 2017) (internal citation omitted). Similarly, the Middle District of Florida correctly construed the District Court's injunction as *staying* implementation of the new overtime rule. *Sims v. UNATION, LLC*, 292 F. Supp. 3d 1286, 1295 n.2 (M.D. Fla. 2018) ("Amendments to 29 C.F.R. §§ 541.100-.200 were

scheduled to become effective on December 1, 2016, but were held invalid and implementation stayed").

Multiple courts have expressly highlighted that they were required to apply the old overtime regulations and previous salary cutoff as a result of the District Court's injunction. For example, the Western District of Texas explained its reading of the injunction like this: "The Department of Labor issued an amendment to the rule in 2016 that *was scheduled* to take effect on December 1, 2016. *That amendment was halted by a preliminary injunction issued on November 22, 2016* …. All references to the regulation in this order will be to its form as it existed prior to the amendments, *which never took effect*." *Miller v. Travis Cty., Texas*, No. 1:16-CV-1196-RP, 2018 WL 1004860, at *4 (W.D. Tex. Feb. 21, 2018) (internal citations omitted; emphases added).

The Eastern District of Arkansas also understood that the new overtime rule "amendments have been enjoined from implementation and enforcement since November 22, 2016. *Accordingly, the Court applie[d] the regulations in effect prior to the injunction.*" *Buford v. Superior Energy Servs., LLC*, No. 4:17-CV-00323-KGB, 2018 WL 2465469, at *9 (E.D. Ark. June 1, 2018) (internal citation omitted; emphasis added). Other courts did the same. *See, e.g., Brashier v. Quincy Prop., LLC*, No. 3:17-CV-3022, 2018 WL 1934069, at *2 n.2 (C.D. Ill. Apr. 24, 2018) ("Therefore, the Court applies the regulations in effect prior to the injunction."); *Morgan v. Guardian Angel Home Care, Inc.*, No. 14 C 10284, 2018 WL 1565585, at *2 n.3 (N.D. Ill. Mar. 30, 2018) ("Accordingly,

the court applies the regulations in effect prior to the injunction."); *Parrish v. Roosevelt Cty. Bd. of Cty. Comm'rs*, No. CIV 15-0703 JB/GJF, 2017 WL 6759103, at **14-18 nn.29-31 (D. N.M. Dec. 31, 2017) (similar).

No court has interpreted the District Court's injunction like Appellants suggest. *See, e.g., Hines v. Key Energy Servs., LLC*, No. 5-15-CV-00911-FB-ESC, 2017 WL 2312931, at *3 n.6 (W.D. Tex. May 26, 2017) ("On May 23, 2016 [DOL] published a Final Rule increasing the salary basis to $913 per week, to take effect beginning on December 1, 2016. This new rule, however, was preliminarily enjoined approximately a week before its effective date.") (internal citation omitted); *Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275, 290 (D. D.C. 2017) ("The court recognizes that, in May 2016, the Department of Labor issued a final rule that revises the first prong of the standard duties test. That rule is currently enjoined nationwide"); *Young Chul Kim v. Capital Dental Tech. Lab., Inc.*, 279 F. Supp. 3d 765, 776 n.10 (N.D. Ill. 2017) ("A new version of this rule was set to take effect on December 1, 2016, but its implementation and enforcement has been enjoined."); *Patton v. Ford Motor Co.*, No. 14-CV-0308-RJA-HBS, 2017 WL 2177621, at *3 (W.D.N.Y. May 18, 2017) ("In November 2016, however, the United States District Court for the Eastern District of Texas issued a nation-wide injunction enjoining the Secretary from implementing or enforcing the amended regulations.").

Judges were not the only ones that could read the injunction's plain language and readily grasp its terms. Individual litigants also comprehended that new overtime rule

was inoperative and the old overtime regulations still applied to their private party litigation. In *Brooks v. Tire Discounters, Inc.*, No. 3:16-CV-02269, 2018 WL 1243444, at *9 n.4 (M.D. Tenn. Mar. 8, 2018), for instance, "[s]ome of the plaintiffs were employed past December 1, 2016, but the parties apparently presume[d] that the version of the regulation requiring payment of at least $455 per week applies."

There would have been no reason for courts and parties to uniformly apply the old overtime rule in private disputes unless the District Court's injunction clearly and unambiguously prevented the 2016 rule from going into effect. And if the injunction was as opaque as Appellants would have the Court believe, surely some other intrepid litigant, somewhere, would have tried to enforce the new overtime rule in some court. But they didn't. The absence of other similar suits before—and after—Appellants' New Jersey litigation shows that nonparties could *not* "very reasonably fail to grasp that they were personally restrained from pursuing such a suit." *Cf.* Opening Br. 39. Such silence, in an otherwise active area of FLSA litigation, is especially deafening.

If Appellants really harbored any doubts about the meaning or scope of the District Court's injunction, they should have sought clarification from the court that issued the injunction before risking contempt. *See Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 517 (5th Cir. 1969). "[W]here a party faced with an injunction perceives an ambiguity in the injunction, it cannot unilaterally decide to proceed in the face of the injunction and make an after-the-fact contention that it is unduly vague." *TiVo Inc.*,

646 F.3d at 885. If an actor has a good faith belief that an injunction is facially vague and susceptible to two alternative meanings, it has the burden to seek clarification. *Id.* at 886. Nonparties too should seek clarification if they have question about who is bound by an injunction. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 130 n.4 (2d Cir. 2014).

The Supreme Court has advised this practice in other FLSA cases, including *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). In *McComb*, an employer was enjoined from further violations of the Act's minimum wage and overtime provisions. Years later, the Administrator initiated contempt proceedings. *Id.* at 189. The district court found the employer in contempt and the intermediate appeals court affirmed. *Id.* at 190-91. The Supreme Court affirmed. It underscored that if the employer was unclear about the injunctions' interpretation, it could have petitioned the lower court for a modification, clarification, or construction of the order. *Id.* at 192. By not doing so, the employer acted at its own peril. *Id.*

It was no defense to claim, as Appellants do, that their precise "plan or scheme which they adopted was not *specifically enjoined*." *Id.* (emphasis added); *compare* Opening Br. 39 ("the text of the order did not 'specifically' address private FLSA lawsuits"). The Court rejected that actors can avoid civil contempt "by showing that the specific plan adopted by [them] was not enjoined." *Id.* at 192-93. "Such a rule," the Court surmised, "would give tremendous impetus to the program of experimentation with disobedience

of the law …." *Id.* at 192. District courts are not required to anticipate every potential contemnor's creative misinterpretation of their orders. *See id.*

The Supreme Court in *McComb* colorfully painted a picture that aptly applies to Appellants here. "They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act. [Appellants] are not unwitting victims of the law. Having been caught in its toils, they were endeavoring to extricate themselves. They knew full well the risk of crossing the forbidden line." *Id.* at 193. If they really wanted to clarify the scope of the preliminary injunction, Appellants should have petitioned Judge Mazzant before they filed their New Jersey lawsuit. They did not do so because they knew full well the answer they would get. Because they refused to do so, Appellants must bear the consequences of any artificial ambiguity they now claim.

C. Even as Nonparties, Appellants Were Properly Held in Contempt of the Nationwide Injunction.

Appellants protest that making an injunction "nationwide" has never meant expanding the set of enjoined actors to strangers throughout the country. Opening Br. 41-42.[9] But that is inaccurate, as Chipotle's and the District Court's privity-based

[9] Appellants are correct that the typical nationwide injunction dispute centers on whether a defendant can be restrained from acting toward other nonparty potential *plaintiffs*, whereas this case asks whether an injunction can be enforced against a nonparty like it is enforced against the party *defendants*. But in this context, the distinction is not as significant as Appellants would like the Court to believe, because in their lawsuit against Chipotle, Appellants were deliberately seeking to exercise authority that they

arguments demonstrate. Appellants are also wrong for another reason. Courts of equity have long exercised their inherent authority to protect lawful injunctions through contempt proceedings against nonparties where the nonparties knowingly and intentionally interfere with compliance and obstruct justice. This Court can affirm on either basis. *Renasant Bank v. St. Paul Mercury Ins. Co.*, 882 F.3d 203, 210 (5th Cir. 2018).

As a threshold matter, the term "nationwide injunction" is a misnomer. A court's equitable powers have never been limited by geography. "[T]he principles of equity give a court jurisdiction wherever the person may be found …." *Massie v. Watts*, 10 U.S. 148, 158 (1810); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). This Circuit has correctly recognized that, in considering a nationwide injunction, "the Constitution vests the District Court with 'the judicial Power of the United States.' That power is not limited to the district wherein the court sits but extends across the country." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015).

A "nationwide" injunction's central feature therefore is not its terrestrial scope but its application to nonparties. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 482 n.5 (2017). A more fitting, and less ominous, label is not "nationwide" or "universal" injunctions, but rather "nonparty"

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purportedly received directly and exclusively through DOL, the defendant in the underlying lawsuit. In other words, Appellants should have to take the bitter with the sweet—if they want to piggyback on a rule issued by a federal agency, then they should not be allowed to complain that an injunction against that agency involving that rule affects them also.

injunctions. And that definition can be further narrowed to nonparties with knowledge.[10]

Despite some recent controversy over so-called "nationwide" injunctions,[11] there is nothing historically unusual about applying injunctions to nonparties or holding nonparties in contempt for knowingly violating injunctions to which they are not directly a party. As Justice Thomas recently emphasized, whether the authority to issue a nationwide injunction springs from statute or the courts' inherent constitutional power, the authority must comply with our country's history and traditions as well as longstanding principles of equity. *Trump*, 2018 WL 3116337, at **26-28. There is history and tradition in equity to support binding Appellants to the District Court's injunction in this case.

The English rule, announced by the Court of Chancery in the seminal case of *Seaward v. Paterson*, [1897] 2 Ch. 545 (C.A.), held that although the traditional rule was that an injunction was only binding on parties, a nonparty with actual knowledge of the injunction was bound by it on the theory that violation of the injunction constituted

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[10] *See* discussion of *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972), *infra*.

[11] *See* Bray, *supra*, at 420 ("the national injunction is a recent development in the history of equity, traceable to the second half of the twentieth century"); *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *26 (U.S. June 26, 2018) (Thomas, J., concurring) ("I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding."). One reason for the scarcity of nationwide injunctions in the early years of the Republic could be the relatively small size and authority of the administrative state in those years. The rise in nationwide injunctions has coincided with the meteoric rise of administrative agency power.

obstruction of justice. 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2956 & n.4 (3d ed. 2018) (describing *Seaward*).

Seaward established two different types of people bound by an injunction upon penalty of contempt. The first consists of parties to the injunction and the second consists of nonparties with knowledge of the injunction that act to obstruct justice or frustrate the purpose of the order. *In re Reese*, 107 F. 942, 946 (8th Cir. 1901) (quoting *Seaward*). The *Seaward* court held that "'[i]n the one case the party who is bound by the injunction is proceeded against. The proceedings against him are for the purpose of enforcing the order of the court for the benefit of the person who got the order. In the other case the court will not allow its process to be set at naught, and treated with contempt.'" *Id.* (quoting *Seaward*).

In the former scenario, "'the party who is interested in enforcing the order is enforcing it for his own benefit, while in the other case, if the order of the court has been contumaciously set at naught, he cannot settle it with the person so acting, and save that person the consequences of his act. The difference between the two kinds of contempt is well known ….'" *Id.*

Early American courts adopted *Seaward*'s framework and "issued injunctions *purporting to bind the world*." *Federal Practice and Procedure* § 2956 (emphasis added). The Eighth Circuit's decision in *In re Reese* is a prominent example. An injunction was issued against certain citizens of Kansas to stop them, in part, from threatening and preventing

employees from working and hindering others who desired to work for a mining business. 107 F. at 942-43.

Reese, being a citizen of Iowa, was not a party to the underlying case, *id.* at 944, and he was not served with the injunction. *Id.* at 943. Nor was Reese charged with "aiding, abetting, or assisting, or combing, confederating, or conspiring" with the bound parties or acting as their agent. *Id.* It was alleged that "he did the acts complained of without any relation to or connection with the defendants, as an independent exercise of his own will." *Id.* at 945. Since he was not a party to the injunction, the moving parties "attempted to sustain the [contempt] sentence of commitment on the broad ground that [Reese], if not technically guilty of violating the injunctive order, was guilty of contemptuously obstructing the administration of justice by doing the things which other parties had been enjoined from doing, with knowledge of such injunctive order against them." *Id.*

Relying on *Seaward*, the Eighth Circuit held that such a person could be held in contempt. The court reasoned that "[i]t is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order." *Id.* Aside from the effect of the act on the parties, a knowing violation of a court's injunction "is a

flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order." *Id.*

The court employed *Seaward*'s two classes of contemptuous acts. It identified the one class as "an offense against the majesty and dignity of the law" while the "other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court." *Id.* Violating an injunction order to which the litigant is a party is one thing, and "independently and intentionally preventing the execution of such order, and thereby thwarting the administration of justice, and contemning the authority of the court, is another, and essentially different, thing." *Id.* at 947.

The Seventh Circuit reached a similar conclusion in *Garrigan v. United States,* 163 F. 16 (7th Cir. 1908). *Garrigan* stemmed from a "teamsters' strike" and related mob violence. *Id.* at 21. Part of the injunction prohibited certain individuals or entities from "from accompanying, following, talking with, or calling upon any person or persons employed by or doing business with said complainant against the express will of said person or persons, for the purpose of or in such manner as to intimidate, threaten, or coerce any such person or persons …." *Id.* at 18.

When assessing the contempt allegations, the court distinguished between parties to an injunction and their privies, on one hand, and nonparties that knowingly flaunt a

district court's order, on the other hand. *Id.* at 20. "[T]he above-mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies and the conduct of others in contempt of the authority and commands of the court, [is] elementary," according to the court. *Id.* The alleged contemnor was not a party to the injunction and there was no averment that he was in "privity with either of the parties enjoined …" *Id.* at 19. The court reversed the contempt finding because there was insufficient knowledge that the purported contemnor, as a nonparty, had knowledge of the injunction. *Id.* at 23. But had he been aware of the injunction, he would have been subject to contempt. *See id.*

By contrast, there was sufficient evidence to impose contempt in *Chisolm v. Caines*, 121 F. 397 (C.C.D.S.C. 1903), even though the trespassers were not a party to an injunction or in privity with a party. There, Chisolm obtained an injunction to prevent Caines from trespassing on certain land. *Id.* 397-98. Other individuals, "not parties nor privy in the original suit," but with "ample notice" of the decree invaded the property. *Id.* at 401.[12] The court set forth the standard that "[a] person may be in contempt either by [1] violating an express restraining order issued to him in a suit to which he was a party by name or privity, or by adequate representation, or, if he be not such a party to the suit, he may be in contempt either by [2] aiding or abetting a party

[12] While some of these cases were *in rem*, the courts did not focus on the nature of the underlying enjoined conduct; they focused on whether the contemnor was intentionally obstructing the injunction or otherwise offending the dignity of the court.

to the suit in disobeying or resisting the injunction, or by [3] independently and intentionally interfering with and preventing the execution of the decree of the court, hereby thwarting the administration of justice, rendering nugatory its action, and contemning the authority of the court." *Id.*

The court found that the trespassers had notice of the injunction and one of them, as a member of the bar, should have "known better." *Id.* at 402. It made no difference that it was an injunction from a circuit court because the court possessed jurisdiction to issue the injunction. *Id.* The purpose of contempt in these circumstances is to vindicate the dignity and authority of the court. *Id.*

Some commentators suggest that the courts' inherent power to impose contempt on non-privy, nonparties that knowingly obstruct an injunction—and thus the authority to issue injunctions against "the entire world"—was narrowed by the time that Federal Rule of Civil Procedure 65 was adopted. *See Federal Practice and Procedure* § 2956. Other observers seem to disagree.[13] This circuit has sided with the latter.

For example, in *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972), this Court held that an independent nonparty may still be held in contempt of an injunction even after Federal Rule of Civil Procedure 65 was adopted. There, in the context of school

[13] *See, e.g.,* 19 Stacy L. Davis & Lisa A. Zakolski, *Federal Procedure, Lawyers Edition* § 47:51 (2018) ("Although Fed. R. Civ. P. 65(d) provides that nonparties in general are not bound by injunctive or restraining orders, this general prohibition cannot be read to restrict the inherent power of a federal court to protect its jurisdiction from being obstructed by the actions of nonparties who are properly on notice of the outstanding order or orders.").

desegregation, a court entered an injunction which, among other things, restricted entry into a high school. *Id.* at 263-64. The court directed that the injunction be served on Eric Hall, but Hall was not a party to the litigation. *Id.* at 263-64. Four days later, Hall entered the school "for the purpose of violating the order." *Id.* at 264. He was arrested and convicted of criminal contempt. *Id.*

Hall appealed his conviction. He argued that the injunction did not apply to him because he was not a party to it and he was acting independently of the bound parties. *Id.* He rested on the "common law rule that a nonparty who violates an injunction solely in pursuit of his own interests cannot be held in contempt." *Id.* Hall also contended that Federal Rule of Civil Procedure 65(d) prevents the injunction from binding him because the rule only runs to "'parties to the action, their officers, agents, servants, employees, and attorneys, and … those in active concert or participation with them who receive actual notice of the order ….'" *Id.* (quoting Fed. R. Civ. P. 65(d)).

This Circuit rejected those contentions and affirmed the conviction. It held that courts of equity have inherent authority to preserve their ability to render judgment in injunctive relief cases, even against nonparties that act for their own purposes to frustrate the court's order. *Id.* at 265. The court bolstered its equitable authority by

analogizing to *in rem* injunctions, even though such an injunction was not at issue. *See id.* at 265-66 (collecting cases).

The court concluded that the enactment of Federal Rule of Civil Procedure 65 did not diminish the court's equitable authority. *Id.* at 266-67. "Rule 65(d), as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment." *Id.* at 2657.[14] Consequently, *Seaward*'s two classes of potential contemnors survived the implementation of Rule 65. *See id.*

Holding nonparties with knowledge in contempt is appropriate where their willful actions interfere with the party-defendant's ability to comply with the injunction, especially in cases of community-wide importance. *See id.* "The activities of Hall, however, threatened both the plaintiffs' right and the defendant's duty as adjudicated in the [underlying] litigation." *Id.* at 265. Specifically, the children had a right to attend an integrated school and the school board had a corresponding duty to provide an integrated school free from interference. *Id.* The court was careful to note that the

[14] Federal Rule of Civil Procedure 71 also contemplates that orders "may be enforced against a nonparty."

injunction was not "against all the world;" it was only against individuals with knowledge of the order. *Id.* at 267.

The District Court's national injunction-based contempt order against Appellants can be upheld on the same rationale. Appellants had notice of the District Court's injunction enjoining implementation and enforcement of the new overtime rule, yet filed the New Jersey action anyway. By acting as though the new overtime rule took effect, Appellants deliberately interfered with the protection granted the States and businesses, as well as DOL's ability to comply with the District Court's injunction. The States and business employers were found to have a right not to be subjected to the unlawful overtime rule and the District Court imposed upon DOL a duty not to implement the rule. DOL cannot comply with the injunction barring "implementation" if individuals like Alvarez and her counsel, with knowledge of the injunction, still pretend as if the rule was, in fact, implemented. And like the injunction in *Hall*, the District Court "adjudicated the rights of the entire community with respect to the" overtime rule when it entered the preliminary injunction. *See id.* Appellants' actions have deliberately frustrated the purpose for which the injunction was entered.

Moreover, as the District Court's comments at the contempt hearing reflect, Appellants' New Jersey lawsuit was an affront to the dignity of the court and the respect

that litigants owe its orders.[15] The lawsuit has obstructed justice by both tarnishing the District Court's otherwise clear injunction order and sowing fake confusion about the status of the overtime rule. If successful, Appellants' manufactured uncertainly would have substantial real-life consequences for millions of employees, employers, and the States. That's why the States fought for the preliminary injunction in the first place. Appellants should not be able to cavalierly attempt to undermine those efforts and the District Court's order without consequences.

CONCLUSION

The District Court should be affirmed.

Respectfully submitted,

Dated: July 6, 2018.

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[15] As with the District Court's contempt order against Appellants, the D.C. Circuit has invoked *Hall* to force parties to immediately dismiss and stop litigating another case in another court. *See*, *e.g.*, *Envtl. Def. Fund, Inc. v. E.P.A*, 485 F.2d 780, 784 n.2 (D.C. Cir. 1973).

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Lawrence VanDyke

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 12,933 words.

/s/ Lawrence VanDyke