IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COLT & JOE TRUCKING LLC,

Plaintiff,

v. Case No. 1:24-cv-00391-KWR-GBW

U.S. DEPARTMENT OF LABOR; JULIE SU, Acting Secretary, U.S. Department of Labor, in her official capacity; JESSICA LOOMAN, Administrator, Wage and Hour Division, U.S. Department of Labor, in her official capacity;

Defendants.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Colt & Joe Trucking LLC is a family-owned trucking company that routinely hires owner-operator truck drivers as independent contractors as part of its business. In January 2021, the U.S. Department of Labor ("DOL" or "Department") announced a clear standard for when an individual hired by Plaintiff may be classified as an independent contractor, as opposed to an employee subject to the Fair Labor Standards Act's ("FLSA" or "the Act") wage and hour requirements. *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168 (Jan. 7, 2021) ("2021 Rule"). Under the 2021 Rule, a business generally can classify as independent contractors workers who exercise independent judgment and control over the work and have an opportunity to profit (or risk of loss) from such judgment and control. *Id.* at 1246.

The Department abruptly and arbitrarily reversed course with a new rule, published in January 2024, that states a worker's control over the work and opportunity for profit are not sufficient to enable a business to classify him or her as an independent contractor. *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 89 Fed. Reg. 1638 (Jan. 10, 2024) ("2024 Rule"). The 2024 Rule replaces the 2021 Rule's simple and objective control-and-opportunity standard with an open-ended balancing test that obscures the distinction between contractors and employees, making it impossible for businesses like Plaintiff to hire independent contractors without risking FLSA liability. Plaintiff challenged the 2024 Rule under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. ("RFA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 ("DJA"). ECF No. 1 at 20–29. It now moves for summary judgment on all counts.

DOL does not question its own conclusion in 2021 that a worker's control over the work and opportunity for profit are the most probative factors in distinguishing independent contractors from employees. DOL's primary justification for abandoning these factors as the foci of the analysis is the

mistaken belief that emphasizing *any* factors is inconsistent with the FLSA. This belief is based on a flawed legal premise because neither the Act nor case law interpreting it prohibits focusing on the most probative factors in determining whether a worker is in business for himself as a matter of economic reality.

DOL also departs substantially from the economic reality factors articulated by the Supreme Court in *United States v. Silk*, 331 U.S. 704 (1947). The 2024 Rule unjustifiably elevates what is theoretically possible with a contracting relationship to be equally probative as actual practice, in violation of Supreme Court precedent that focuses on "economic reality." *Id.* at 713. It adopts a new "integral part" factor, again in defiance of Supreme Court authority, and twists other factors into one-way ratchets that expand the scope of employment under the FLSA. Ultimately, DOL falls back on the FLSA's "remedial purpose" to support both its rescission of the 2021 Rule and its promulgation of the 2024 Rule, a canon of interpretation that the Supreme Court has firmly rejected in *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018) ("*Encino II*").

DOL also justifies its replacement of the 2021 Rule with the 2024 Rule on the ground of improving regulatory clarity for regulated employers. But the 2024 Rule's formless, totality-of-the-circumstances test is the very antithesis of clarity and exacerbates regulatory confusion and uncertainty. It produces the opposite of what DOL claims to be its rationale and is therefore arbitrary and capricious. *Off. of Commc'n of United Church of Christ v. FCC*, 779 F.2d 702, 707–08 (D.C. Cir. 1985) ("Rational decisionmaking … dictates that the agency simply cannot employ means that actually undercut its own purported goals.").

DOL compounds its error with a cost-benefit analysis that the Small Business Administration's Office of Advocacy ("SBA") found to be grossly inadequate. The RFA requires DOL to consider and respond meaningfully to SBA's objections. 5 U.S.C. § 604. DOL violated the RFA

and APA by ignoring the significant costs that SBA said the 2024 Rule will impose on small businesses and independent contractors.

Even if these defects were not fatal, the 2024 Rule would still be invalid because Acting Secretary of Labor Su lacked authority to promulgate it. She has purported to exercise the powers of the Secretary for over a year without the advice and consent of the Senate, and the President intends for her to do so permanently. This scheme violates the Appointments Clause and the Federal Vacancies Reform Act of 1998 ("Vacancies Act"). Su therefore lacks authority to exercise the Secretary's powers, including promulgating the challenged rule.

STATEMENT OF MATERIAL FACTS[1]

I. STATUTORY BACKGROUND

1. The FLSA requires covered employers to pay their employees minimum wage and overtime pay. See 29 U.S.C. §§ 206–07. Employers who fail to comply with these requirements are subject to criminal penalties and civil liability. *See id.* § 216.

2. While FLSA imposes no obligation on employers for their work with independent contractors, neither the statute nor the Supreme Court has articulated a clear test to distinguish employees from independent contractors.

3. The Act's definition for "employee" as "any individual employed by an employer" is "circular." *See Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021) (quoting 29 U.S.C. § 203(e)(1)). Its definitions for "employ" and "employer" are likewise "unhelpful." *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994) (citing 29 U.S.C. § 203(d), (e), (g)).

[1] All statements of undisputed material facts are derived from the Administrative Record that DOL certified, ECF No. 17-1, case law, and publicly available sources. For publicly available sources, Plaintiff requests that the Court take judicial notice pursuant to Federal Rule of Evidence 201.

4. The Supreme Court explained decades ago that "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). The Court further explained that FLSA employment should be based on "'economic reality' rather than 'technical concepts.'" *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (citing *Silk*, 331 U.S. at 713 and *Rutherford*, 331 U.S. at 729); *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("employees are those who as a matter of economic reality are dependent upon the business to which they render service")).[2]

5. The Court identified several factors relevant to that "economic reality" inquiry, these are "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation," *Silk*, 331 U.S. at 716, along with whether the work being performed is "part of the integrated unit of production," *Rutherford*, 331 U.S. at 729.

6. In *Silk*, the Court emphasized control and opportunity for profit or loss to hold that the driver-owners of trucks in that case were independent contractors, without analyzing other factors. 331 U.S. at 717–19 ("[T]he risk undertaken, the control exercised, the opportunity for profit from sound management, [] marks these driver-owners as independent contractors."). In *Goldberg*, the Court again emphasized the lack of control and opportunity for profit to hold that homeworkers in that case were employees rather than independent contractors. 366 U.S. at 32–33.

7. Lower courts have applied different variations of the *Silk* factors. The precise test varies, with the Tenth Circuit "generally look[ing] at (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work;

[2] *Silk* and *Bartels* concerned the Social Security Act, but the Court relied upon *Silk* in *Rutherford* when applying the FLSA. 331 U.S. at 729–30.

and (6) the extent to which the work is an integral part of the alleged employer's business." *Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).[3]

8. When applying the "economic reality" test, courts tend to avoid explaining "which aspects of 'economic reality' matter, and why." *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). This judge-made multi-factor balancing test has produced uncertainty and litigation, with panels within the same circuit weighing the factors differently to arrive at opposite conclusions in nearly identical circumstances. *Compare, e.g.*, *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App'x 57 (5th Cir. 2009) (cable splicers hired by Bellsouth to perform post-Hurricane Katrina repairs were employees), *with Thibault v. BellSouth Telecomms., Inc.*, 612 F.3d 843 (5th Cir. 2010) (cable splicer hired by same company to perform the same work was an independent contractor). As such, it is often impossible for businesses to determine whether independent contractors they hire are properly classified as such.

9. DOL estimated that uncertainty over independent contractor status generated almost 10% of all FLSA litigation, totaling approximately 700 cases a year. 86 Fed. Reg. at 1234.

II. THE 2021 RULE

10. In January 2021, DOL promulgated a final rule after notice and comment to address confusion and uncertainty over the economic-reality test, which had become worse "over time as technology, economic conditions, and work relationships [] evolved." 86 Fed. Reg. at 1172. The rule was based on DOL's thorough review of case law and sought to "clarify and sharpen" the tests used by circuits to determine whether a worker was, "as a matter of economic reality, in business for him- or herself." *Id.* at 1246.

[3] There is variation among the circuits. For example, the Second Circuit analyzes opportunity for profit or loss and investment (the second and third factors listed above) together as one factor. *See, e.g.*, *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988). And the Fifth Circuit does not use the sixth "integral part" factor listed above. *See, e.g.*, *Usery v. Pilgrim Equip. Co.*, 527 F.2d at 1308, 1311 (5th Cir. 1976).

11. DOL determined that two "core" factors—the nature and degree of control over work and the individual's opportunity for profit or loss—are "most probative" of whether an individual is truly independent as a matter of economic reality. *Id.* at 1196–1203, 1246–47.

12. DOL relied on the ordinary understanding of what it means to be in business for oneself to focus on a worker's control and opportunity. It also relied on case law. DOL reviewed every relevant circuit court case since 1975 and determined that where these two factors pointed toward the same classification, courts uniformly concluded that was the accurate classification. *Id.* at 1196–97.

13. The 2021 Rule said that where these core factors indicated the same classification, "there is a substantial likelihood that is the individual's accurate classification." 86 Fed. Reg at 1246. This prioritization of the core factors did not discard the relevance of the totality of the circumstances. DOL also specified that three other factors—the amount of skill required for the work; the degree of permanence of the working relationship between the individual and the potential employer; and whether the work is part of an integrated unit of production—may be relevant. *Id.* These were "less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors." *Id.* The 2021 Rule explicitly left open the possibility for the secondary factors to outweigh the core factors. *Id.* at 1197.

14. Businesses and the "overwhelming majority" of independent contractors who commented supported the 2021 Rule because it increased the clarity and predictability of an otherwise vague and inconsistent legal standard. 86 Fed. Reg. at 1171–72. DOL analyzed the costs and benefits of the 2021 Rule to conclude that it would "improve the welfare of both workers and businesses." *Id.* at 1209.

15. DOL said businesses would benefit from "improved clarity," which would "increase the efficiency of the labor market, allowing businesses to be more productive and decreasing their litigation burden." *Id.* Workers would benefit from reduced compliance costs, decreased

misclassification, increased creation of independent contractor jobs, and likely conversion of some existing positions from employee to independent contractor status. *Id.* at 1209–10.

16. The 2021 Rule also expressly provided that regulated employers like Plaintiff could rely on the Rule "in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. [§§] 251–262," which provides a good-faith defense in FLSA litigation. *Id.* at 1246.

17. After the change in administration, DOL postponed the effective date of the 2021 Rule, 86 Fed. Reg. 12,535 (Mar. 4, 2021), and then withdrew it, 86 Fed. Reg. 24,303 (May 6, 2021). In March 2022, the Eastern District of Texas ruled that DOL's delay and withdrawal of the 2021 Rule violated the APA, thereby reinstating the 2021 Rule. *See Coal. for Workforce Innovation v. Walsh*, No. 1:21-cv-130, 2022 WL 1073346, at *3, 6 (March 14, 2022) ("*CWI*").

18. The Department immediately announced that it intended to rescind and replace the 2021 Rule through new notice-and-comment rulemaking. Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, DOL Blog (June 3, 2022).[4]

III. THE 2024 RULE

19. On January 10, 2024, DOL published the 2024 Rule after notice and comment, which again rescinded the 2021 Rule and this time replaced it with a new test. 89 Fed. Reg. 1638. DOL notably did not dispute its prior conclusion that control and opportunity were the most probative factors. Instead, it contended that the 2021 Rule's core-factors framework "did not fully comport with the FLSA's text and purpose," *id.* at 1647, and that the 2021 Rule "would have likely caused confusion and uncertainty" and "would have complicated rather than simplified" the worker-classification analysis. *Id.* at 1654. In DOL's newfound view, these two supposed errors result in more workers being classified as independent contractors rather than employees. *Id.* at 1657–58.

[4] https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act (last visited July 31, 2024).

20. DOL replaced the 2021 Rule with a freewheeling totality-of-the-circumstances test that has at least seven unweighted factors—six enumerated factors, plus unenumerated "[a]dditional factors." *Id.* at 1742–43. DOL refused to give any guidance about how to balance those factors, asserting that doing so would undermine the test's "flexibility" to "encompass continued social changes." *Id.* at 1649. It also recharacterized many of the factors to weigh in favor of classifying workers as employees and removed employers' good-faith defense under the Portal-to-Portal Act.

21. Commenters who identified as businesses and independent contractors opposed the 2024 Rule "as ambiguous and biased against independent contracting." 89 Fed Reg. at 1646.

IV. IMPACT ON PLAINTIFF

22. Plaintiff is a family-run business with 12 employees. Declaration of Stanley Pettingil ¶ 4 ("Pettingil Decl."), attached as Exhibit A. It also routinely hires drivers as independent contractors. *Id.* ¶ 5.

23. Plaintiff is regulated under the FLSA because its annual gross sales exceed $500,000 and it engages in interstate commerce. *Id.* ¶ 6–7; *See* 29 U.S.C. § 203(s).

24. The 2024 Rule expands the definition of FLSA employment and increases the regulatory burden of hiring independent contractors. Instead of having to ensure independent drivers it hires satisfy the two core factors, Plaintiff must consult at least seven factors, one of which is the totality of circumstances, without knowing how to balance them. Pettingil Decl.¶¶ 8–9.

25. Due to the 2024 Rule, Plaintiff must spend more time and resources analyzing whether drivers with whom it contracts are properly classified as independent contractors or employees. *Id.* ¶ 10. The working relationship between Plaintiff and one of its four independent drivers ended in April 2024. Plaintiff has been unable to hire a replacement independent driver in part due to greater uncertainty and regulatory burdens created by the 2024 Rule. *Id.* ¶ 11.

26. The 2024 Rule further removes a safe harbor under the Portal-to-Portal Act that benefited employers in FLSA litigation.

V. DEFENDANT SU'S STATUS AS PERMANENT ACTING SECRETARY

27. On March 11, 2023, then-Secretary of Labor Marty Walsh resigned. In his place, President Biden nominated Deputy Secretary of Labor Julie Su. The Senate held initial hearings on Su's nomination. The Senate did not, however, vote to confirm her.

28. When Su's nomination expired with the end of Congress's 2023 session, the President failed to put forward a different, more acceptable candidate. He instead renominated Su in January 2024 despite public opposition from senators of both parties and a consensus that Su did not have sufficient support to be confirmed. *See* Letter from Sen. Bill Cassidy, Ranking Member, to Sen. Bernie Sanders, Chair, U.S. Senate Comm. on Health, Education, Labor, and Pensions (Feb. 13, 2024) ("Cassidy Letter")[5]; Press Release, Manchin Opposes Julie Su for U.S. Secretary of Labor (July 13, 2023) ("Manchin Press Release").[6]

29. The Senate did not confirm Su in large part because of her desire to limit opportunities for independent contractors. *See* Cassidy Letter at 4. *See also* Burgess Everett, *et al.*, Manchin Opposes Julie Su for Labor Secretary, Jeopardizing Nomination, Politico (July 13, 2023) ("But Su has faced a barrage of criticism for … her policy positions on hot-button subjects like rules governing independent contractors and franchise businesses.").

30. Public reports indicate that key senators will not vote to confirm her, and leading senators called on the President to withdraw her nomination and submit an acceptable candidate. *See* Cassidy Letter; Manchin Press Release. But the President intends to leave Su in office indefinitely. *See* Sahil Kapur and Liz Brown-Kaiser, *Biden to Keep Julie Su on Indefinitely as Labor Chief Despite Lack of Senate*

[5] https://www.help.senate.gov/imo/media/doc/final_julie_su_hearing_letter.pdf (last visited July 31, 2024).
[6] https://www.manchin.senate.gov/newsroom/press-releases/manchin-opposes-julie-su-for-us-secretary-of-labor (last visited July 31, 2024).

Votes, NBC News (July 21, 2023) ("The White House plans to use a little-known law to keep acting Labor Secretary Julie Su in the job even if she fails to win Senate approval[.]").

31. Su has continued to act as the Secretary of Labor for over 500 days—the longest such period of any acting secretary. *See* Cassidy Letter at 8 (noting previous longest term was 215 days). In the meantime, she has purported to exercise all the powers of that office, including promulgating the 2024 Rule.

PLAINTIFF HAS SELF-EVIDENT STANDING

To establish Article III standing, a plaintiff must plead: (1) an injury in fact; (2) that is fairly traceable to the challenged action of defendants; and (3) will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "For standing purposes, [courts] accept as valid the merits of [a party's] legal claims." *FEC v. Cruz*, 596 U.S. 289, 298 (2022).

"When the suit is one challenging the legality of government action" and "plaintiff is himself an object of the action, … there is ordinarily little question that the action … has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561–62. Hence, courts have thus found standing to challenge a new regulation to be "self-evident" where plaintiff were themselves regulated parties. *Am. Secs. Ass'n v. DOL*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573, at *8 (M.D. Fla. Feb. 13, 2023), *appeal dismissed*, 2023 WL 4503923 (11th Cir. May 17, 2023) (collecting cases). That is because "increased regulatory burden typically satisfies the injury in fact requirement." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). *American Securities Association* held that an association had standing to challenge a DOL guidance regarding an investment advisor's fiduciary duties because its members included investment advisors who are "plainly the objects of regulation that expands the definition of a fiduciary." 2023 WL 1967573 at *9.

Like the American Securities Association's members, Plaintiff has self-evident standing as a regulated employer to challenge a regulation that expands the definition of FLSA employee. *See Am.*

Sec. Ass'n, 2023 WL 1967573, at *9. Indeed, DOL openly admits that the purpose of the 2024 Rule is to compel regulated companies to hire fewer independent contractors and more employees compared to the 2021 Rule. *See, e.g.*, 89 Fed. Reg. at 1658–59, 1726 ("Compared to the 2021 IC Rule, the Department anticipates that this rule may reduce misclassification of employees as independent contractors."); *see also, e.g.*, U.S. Department of Labor News Release, *U.S. Department of Labor Announces Final Rule on Classifying Workers as Employees or Independent Contractors Under the Fair Labor Standards Act* (Jan. 9, 2024) ("This rule will help protect workers … by making sure they are classified properly … [as employees]").

DOL has admitted that rescission of the 2021 Rule and promulgation of the 2024 Rule will impose economic costs on regulated parties, including $150 million in just familiarization costs on businesses (including Plaintiff). 89 Fed. Reg. at 1733. SBA further concluded that the 2024 Rule would impose significant additional compliance and recordkeeping costs on small businesses that hire independent contractors. *See* SBA, *Comment Letter on 2024 Rule* (Dec. 12, 2022) ("SBA Comment").[7] These regulatory burdens and economic costs are directly traceable to the 2024 Rule. The regulatory burden would have been lighter and economic costs avoided had the 2021 Rule not been rescinded. Vacatur of the 2024 Rule would redress Plaintiff's injuries by lifting burdens.

Plaintiff is further eligible to sue under the RFA, which provides a cause of action for "small entit[ies]." 5 U.S.C. § 611(a)(1). Plaintiff is a "small business" as defined in 5 U.S.C. § 601(3), and thus is a "small entity" as defined in 5 U.S.C. § 601(6), because its annual receipts are below the threshold established by the SBA for trucking companies. *See* 13 C.F.R. § 121.201; Pettingil Decl. ¶ 6.

STANDARD OF REVIEW

Courts review agency action pursuant to the APA, which provides that a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary,

[7] https://www.regulations.gov/comment/WHD-2022-0003-51006 (last visited July 31, 2024).

capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). Reviewing courts must exercise independent judgment to "decide *all* relevant questions of law," without deference to the agency. *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 2244, 2265 (2024) (emphasis added) (quoting 5 U.S.C. § 706).

An agency's change in position is arbitrary and capricious where the agency fails to provide "good reasons" for the change, including when rescinding rules and reversing policies. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). Where, as here, an agency "chang[es] position," it must "show that there are good reasons for the new policy" and "provide a more detailed justification than what would suffice for a new policy." 556 U.S. at 515; *accord Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("*Encino I* "). An agency's action is also arbitrary and capricious where it relies on inconsistent reasoning, fails to consider important aspects of the problem, offers explanations that run counter to the evidence, relies on factors that it should not have considered, or fails to adequately consider important issues raised by commenters. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983); *Fox*, 556 U.S. at 515. Finally, agency action is arbitrary or capricious when the agency fails to "consider[] the costs and benefits associated" with the action. *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023).

SUMMARY OF ARGUMENT

A federal court already held DOL's first attempt to rescind the 2021 Rule violated the APA. *CWI*, 2022 WL 1073346, at *2. This latest effort to replace the 2021 Rule should suffer the same fate. To start, DOL's primary justification is based on the faulty legal premise that the FLSA prohibits the agency from focusing on more probative core factors when determining whether a worker is an employee or an independent contractor. Nothing in the Act nor any case interpreting it forbids such

a logical focus. To the contrary, Supreme Court and circuit precedent recognize a worker's control and the opportunity for profit as more probative than other factors.

DOL's second rationale of ostensibly improving regulatory clarity is likewise meritless. Replacing the 2021's core-factor framework with the 2024's Rule's totality-of-the-circumstances test exacerbates uncertainty and violates employers' due process right to know what subjects them to liability under the FLSA. Additionally, DOL's cost-benefit analysis of the 2024 Rule fails to consider significant costs to both small businesses and independent contractors. Finally, because Defendant Su's position as permanent Acting Secretary of Labor is unlawful, she lacks authority to promulgate the 2024 Rule. For all these reasons, the Court should set aside and vacate the 2024 Rule.

ARGUMENT

I. THE 2024 RULE IS BASED ON DOL'S ERRONEOUS LEGAL INTERPRETATIONS

DOL's primary justification for the 2024 Rule is that the 2021 Rule's focus on more probative core factors to distinguish independent contractors from employees is incompatible with the FLSA. Because focusing on more probative factors is fully consistent with the Act—not to mention common sense—the 2024 Rule rests upon a faulty legal premise and thus is contrary to law and must be set aside. The Rule also exceeds DOL's statutory authority because it impermissibly relies on the Act's purported "remedial purpose" to define FLSA employment more expansively than what a "fair reading" of the text permits. *See Encino II*, 584 U.S. at 89.

A. DOL Relied on a Faulty Legal Premise to Withdraw the 2021 Rule

The Court must set aside agency action that is based on a faulty legal premise. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) ("Where a statute grants an agency discretion but the agency erroneously believes it is bound to a specific decision, we can't uphold the result as an exercise of the discretion that the agency disavows."); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) ("We have held EPA's conclusion …

legally erroneous. Because that flawed premise is fundamental … EPA's outcome on those statutory interpretation questions is 'arbitrary, capricious, or otherwise not in accordance with law.'"); *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) ("If a regulation is based on an incorrect view of applicable law, the regulation cannot stand ….").

DOL concluded that a worker's control over the work and opportunity for profit based on initiative and investment are the "most probative" factors in distinguishing employees and independent contractors under the FLSA. 86 Fed. Reg. at 1246–47. Critically, DOL does not dispute that prior conclusion. Instead, DOL's primary justification for withdrawing the 2021 Rule is its belief that a test that focuses on factors that it believes to be the most probative "did not fully comport with the FLSA's text and purpose." 89 Fed. Reg. at 1647. It concluded that the FLSA does not permit a test that emphasizes those factors, regardless of their greater probative value. 87 Fed. Reg. 62,218, 62,226 (Oct. 13, 2022) ("[R]egardless of the rationale for elevating two factors, there is no legal support for doing so."). The Final Rule repeatedly reaffirmed DOL's rationale for withdrawing the 2021 Rule as being incompatible with the Act. *See, e.g.*, 89 Fed. Reg. at 1638–39, 1647, 1663–64. This purely legal conclusion is subject to independent and *de novo* review, *Loper Bright/Relentless*, 144 S. Ct. at 2265 (2024), which DOL fails because the 2021 Rule's focus on the most probative factors is wholly consistent with the FLSA.

Nothing in the FLSA's text indicates that control and opportunity cannot be the most probative factors in a test for employment. To the contrary, the Act supports such emphasis. A fair reading of the FLSA's circular and unhelpful definitions of "employ" and "employee," *Henthorn*, 29 F.3d at 684, without further explication, indicates that the Act incorporates the ordinary meaning of those terms. *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1231 (10th Cir. 2016); *See also Bond v. United States*, 572 U.S. 844, 857 (2014) ("Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions.") (quotation omitted).

Regarding the opportunity for profit (or risk of loss): the ordinary meaning of "employee" at the time of the Act's passage was understood to mean someone who is "hired by another … to work for *wages or salary*." *Webster's New Twentieth Century Dictionary* (2d ed. 1934) (1956 reprint) 595 (emphasis added). Hence a worker who is compensated through profit based on his own initiative or investment rather than wages or salary stands apart from the ordinary understanding of "employee." The 2021 Rule's emphasis on that factor to distinguish independent contractors from employees thus reflects the ordinary understanding of "employee."

Next, control is highly probative because it is the common-law test for employment. While the FLSA did not adopt the common-law test, the presence or absence of common-law employment remains highly relevant. In the 2021 Rule, DOL acknowledged this, and explained its interpretation was based, in part, on "commonsense logic that, when determining whether an individual is in business for him- or herself, the extent of the individual's control over his or her work is more useful information than, for example, the skill required for that work." 86 Fed. Reg. at 1199. Indeed, because *Rutherford* held that FLSA employment is broader than the common law, *see* 331 U.S. at 728–29, the existence of common-law employment based solely on control is likely sufficient to indicate FLSA employment in most instances. Unsurprisingly, "control" appears first whenever the Court lists economic reality factors. *See, e.g., Silk*, 331 U.S. at 716.

DOL ignores the ordinary meaning of the FLSA's text and instead claims that the 2021 Rule is "contrary to" precedent because the "Supreme Court has emphasized that employment status … turns upon 'the circumstances of the whole activity,' rather than 'isolated factors.'" 89 Fed. Reg. at 1644, 1651. But the Supreme Court never prescribed a particular test, instead explaining that the Act's scope of employment is broader than the common-law agency relationship based solely on control, and the "circumstances of the whole activity" may be relevant. *Rutherford*, 331 U.S. at 730. The 2021 Rule is indisputably broader than the common law's control test because a worker cannot be classified

as an independent contractor based solely on his or her control over the work. Rather, one must consider both control *and* opportunity for profit as core factors, alongside other factors. 86 Fed. Reg. at 1246–47. Recognizing that two core factors are "more probative" than others does not "effectively (and impermissibly) adopt[] a common law test for independent contractor status." 89 Fed. Reg. at 1650.

Nor does the 2021 Rule assign to any factor "a specific and invariably applied weight," as DOL suggests. 89 Fed. Reg. 1651; *see also id.* at 1642. Rather, it explicitly allows consideration of all circumstances, 86 Fed. Reg. at 1246 ("These factors are not exhaustive, and no single factor is dispositive."), and recognizes that "in unusual cases" other considerations could "outweigh the combination of the two core factors," *Id.* at 1197. "While all circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.*, factors, must also be 'given equal weight.'" *Id.* at 1201. *Silk*, the very case that announced the economic reality factors, did not treat those factors equally. 331 U.S. at 716. Rather, the Court emphasized that "the risk undertaken, the control exercised, the opportunity for profit from sound management, [] marks these driver-owners as independent contractors." *Id.* at 719. *Rutherford* likewise emphasized facts relating to control and supervision to find the workers in that case were employees. 331 U.S. at 730–31; *see also Goldberg*, 366 U.S. at 32–33 (primarily considering control and opportunity for profit).

Appellate cases point to the same conclusion. Courts do not always analyze every *Silk* factor. Rather, "[t]hese factors are merely aids" to be relied upon "only insofar as they elucidate the 'economic reality' of the arrangement." *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 139–140 (2d Cir. 2017) (quoting *Thibault*, 612 F.3d at 846). The Tenth Circuit and others have emphasized control and opportunity for profit over other aspects of economic reality. In *Baker*, after discussing each of the economic reality factors separately, the Tenth Circuit undertook a "final step" to ask whether the workers at issue "depend upon [the putative employer's] business for the opportunity to render

service, or are in business for themselves." 137 F.3d at 1443. *Baker*'s final inquiry homed in on the same concept of dependence as the 2021 Rule and emphasized control and opportunity, analyzing whether the workers were "free to exercise their judgment in completing their work" and had "the ability to make a profit or sustain a loss." *Id. Baker* explicitly recognized that being "highly skilled" was less probative in this ultimate inquiry. *Id.* at 1444 The Second Circuit eschewed factor-by-factor analysis altogether in *Saleem*, and simply analyzed drivers' control over their work, entrepreneurial opportunities, investment and return, and work flexibility to conclude they were independent contractors. 854 F.3d at 140.[8] The Third Circuit in *Razak v. Uber Technologies* took a similar approach by emphasizing disputed facts regarding "whether Uber exercises control over drivers" and whether drivers had "the opportunity for profit or loss depending on managerial skill" to deny summary judgment. 951 F.3d, 137, 145–47 (3d Cir. 2020).[9]

In promulgating the 2021 Rule, DOL evaluated every appellate court decision going back to 1975 and found that in every case where "opportunity for profit" and "control" pointed toward the same classification, courts identified that as the correct classification. 86 Fed. Reg. at 1196–97. While courts do not always explain "which aspects of 'economic reality' matter, and why," *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring), DOL's analysis indicates that, as a practical matter, they find control and the opportunity for profit to matter most. 86 Fed. Reg. at 1196–97. That is unsurprising given that the importance of such factors comports with a commonsense understanding of employment. *Id.* at 1199.

DOL does not contest its own prior analysis nor the commonsense conclusion that control and opportunity are the most probative factors. It instead recites the "totality of the circumstances"

[8] The five *Silk* factors were listed in a footnote but not analyzed. *Saleem*, 854 F.3d at 139 n. 19.
[9] *Razak* briefly addressed other factors in dicta, including a footnote on the "integral" factor and a discussion that was nominally about the permanence factor but actually concerned control: "On one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required." 951 F.3d at 147 n.12.

dicta from cases to argue that the 2021 Rule failed to recognize the relevance of other factors. Not so. For example, *Saleem* found drivers to be independent based on their control over the work and opportunity for profit or loss without explicitly analyzing other economic reality factors. 854 F.3d 139–40. But that does not mean the Second Circuit somehow held that other circumstances are irrelevant to the analysis. Rather, it simply means that, given what the most probative factors indicated, there was no need to analyze other relevant factors to determine their classification. The same is true of the 2021 Rule. As such, its recognition that control and opportunity for profit are more probative is faithful to the FLSA and judicial precedent. DOL's contrary conclusion rests upon the legal premise that the FLSA somehow requires equal treatment to all factors and circumstances that may be relevant to a worker's classification. The agency thus failed to "appreciate the full scope of [its] discretion," *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1910–11 (2020), to give more probative factors greater weight in the analysis.

Ultimately, DOL falls back on the purported remedial purpose of the FLSA to justify its rescission of the 2021 Rule. 89 Fed. Reg. 1668 n.221; *see also, e.g., id.* at 1639; 1640; 1645; 1647; 1649; 1661; 1663; 1668; 1724; 1725; 1726; 1739 (invoking "purpose"); *id.* at 1650; 1667; 1668 ("intent"). But the Supreme Court has expressly rejected "this principle as a useful guidepost for interpreting the FLSA" and instructed that there is "no license" to give the Act "anything but a fair reading." *Encino II*, 584 U.S. at 88–89. DOL contends that *Encino*'s prohibition against relying on the Act's remedial purpose as an interpretive guide applies only to "exemptions" and not the "definitions" at issue here. 89 Fed. Reg. at 1668 n.221. But nothing in *Encino* suggests that the case is so limited, and courts have not found it so. *See, e.g., Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321, 1329 (11th Cir. 2021) (recognizing that *Encino II* applies to the FLSA in full). Dismissing "the flawed premise that the FLSA pursues its remedial purpose at all costs," the Court instructed that the statute be given "a fair reading." *Encino II*, 584 U.S. at 89 (cleaned up). It is particularly misguided to invoke the Act's remedial purpose

to protect employees when addressing the antecedent question of whether a worker is an employee in the first place.

A fair reading of the FLSA would give effect to the ordinary meaning of "employee," and thus recognize that most workers who control the key aspects of the work and have an opportunity for profit (or risk of loss) based on their initiative and investment are not employees under the Act. The 2021 Rule appropriately assigned greater probative value to those two core factors. The 2024 Rule, by contrast, attempts to expand the FLSA definition of employee to cover workers who control key aspects of the work and have an opportunity for profit by denying the greater probative value of those factors to the ordinary meaning of "employee." DOL's effort is grounded in neither text nor precedent but rather on a purposivist interpretation that the Supreme Court explicitly rejected. *Encino II*, 584 U.S. at 89. The 2024 Rule is thus contrary to law and exceeds DOL's statutory authority.

B. The 2024 Rule Improperly Tilts Economic Reality Factors to Expand FLSA Coverage

DOL's impermissible reliance on the Act's supposed remedial purpose is reflected in the 2024 Rule's reinterpretation of several economic reality factors to broaden the statute's coverage. These recharacterizations exceed the agency's statutory authority and are arbitrary and capricious because DOL fails to explain its departure from the 2021 Rule's treatment of the same factors.

Control. The 2024 Rule improperly expands what DOL considers to be indicative of control by the hiring entity that indicates an employment relationship in three ways.

First, the 2024 Rule improperly elevates "reserved right or authority to [] control worker[s]" under a contract to the same importance as "actual practice." *See* 89 Fed. Reg. 1638, 1639, 1653. The Supreme Court commanded that "'economic reality' rather than 'technical concepts' is to be the test" for employment under the FLSA. *Goldberg*, 366 U.S. at 33 (citing *Silk*, 331 U.S. at 713 (1947); *Rutherford*, 331 U.S. at 726). As the 2021 Rule explained, these precedents mean "the actual practice of the parties involved—both of the worker (or workers) at issue and of the potential employer—is more relevant

than what may be contractually or theoretically possible." 86 Fed. Reg. at 1203. The 2024 Rule erroneously departs from precedent by treating theoretical possibilities as "*equally*" or even "*more probative*" than actual practice. 89 Fed. Reg. at 1720 (emphasis added). DOL utterly fails to respond to the on-point Supreme Court decisions discussed in the 2021 Rule, pointing only to a clause in *Silk* that mentioned the "'power of control, whether exercised or not.'" *See* 89 Fed. Reg. at 1718 n.529 (quoting *Silk*, 331 U.S. at 713). But that was a description of the Restatement of Agency's "technical" control test that the Court rejected, not instructions on what may establish employment under the economic reality test. *Silk*, 331 U.S. at 713 (citation omitted).

Second, DOL inappropriately expands the object of an employer's control. The 2021 Rule focused its analysis on control over "key aspects of the performance of the work," 86 Fed. Reg. at 1246–47, which is consistent with *Silk*'s understanding of control over "the manner of performing service to the industry" and over "how 'work shall be done.'" 331 U.S. at 713–714. The 2024 Rule, however, redefines control to include control over "the performance of the work *and the economic aspects of the working relationship*." 89 Fed. Reg. at 1743 (*emphasis added*). This ambiguous new phrase is inconsistent with *Silk* and does not appear in any case applying the economic reality test. It improperly expands the object of control beyond the binding original meaning of the statute and exacerbates confusion caused by the 2024 Rule.

Third, the 2024 Rule also states that a business requiring workers to follow legal and safety obligations may indicate employee classification. That pronouncement is directly contradicted by court decisions stating such measures are "not the type of control that counsels in favor of employee status" because they indicate control by a regulator, not an employer. *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 382 (5th Cir. 2019). As the 2021 Rule explained, "these types of requirements are generally imposed by employers on both employees and independent contractors," so that "insisting on adherence to certain rules to which the worker is already legally bound would not make the worker

more or less likely to be an employee." 86 Fed. Reg. at 1182–83. The 2024 Rule purports to address this flaw by stating that measures taken "for the *sole purpose* of complying with a specific" regulation do not weigh in favor of employee classification. *See, e.g.*, 89 Fed. Reg. at 1694. But this narrow carveout provides no practical relief because it invites a fact-intensive inquiry into a company's motive and exacerbates uncertainty.

"Integral Part" of Employer's Business. DOL's replacement of the 2021 Rule's "integrated unit of production" factor contravenes Supreme Court precedent. As the Court explained, the "integrated unit" factor can be probative of worker classification because it asks whether workers "'work alongside admitted employees'" toward "'a common objective'" in a manner that suggests they are not in business for themselves. *Rutherford*, 331 U.S. at 726 (cleaned up). The 2024 Rule instead asks whether the work performed is an "integral part"—*i.e.*, a "critical, necessary, or central" part—of the employer's business. 89 Fed. Reg. at 1743. Although some lower courts have used this alternative meaning of the "integral" factor, as the 2021 Rule explained, such an interpretation "deviate[s] from the Supreme Court's guidance" in *Rutherford*. 86 Fed. Reg. at 1194.

As Judge Easterbrook rightly pointed out, "everything the employer does is 'integral' to its business—why else do it?" *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring). Asking what is "essential" simply fails to distinguish between employees and anyone else in the web of a company's relationships. Numerous people may be essential or important to a business—parts suppliers, retailers, marketing consultants, customers, regulators—without being employees. DOL's only response for this about-face is an unreasoned recitation of circuit court opinions that used the "integral" framing, sometimes in loose language. 89 Fed. Reg. at 1655. DOL cannot rely on lower court dicta to depart from *Rutherford*'s original formulation of the "integrated unit" factor. DOL's abdication of its obligation for reasoned decision-making and its failure to recognize its own discretion once again renders the 2024 Rule arbitrary and capricious and thus invalid. *Regents*, 140 S. Ct. at 1910–11.

Investment. The 2024 Rule improperly counts "investment" as a separate factor from "opportunity for profit or loss." 89 Fed. Reg. at 1639, 1742. *Silk* analyzed these factors together. 331 U.S. at 719. Disregarding *Silk*, the 2024 Rule lists investment as a separate factor and instructs that a worker's capital investment be compared to the company's investment. Such comparison creates a one-way ratchet because the vast majority of bona fide independent contractors invest less capital than the companies that hire them. A comparison of relative investments is also not probative because employees and contractors alike typically will have fewer investments than companies that hire them. DOL acknowledges that "the Supreme Court in *Silk* did not make such a comparison," but erroneously attempts to justify this approach by asserting that "federal courts of appeals … routinely" do. 89 Fed. Reg. at 1684. While some federal appellate courts have compared investments, such comparison has never been a necessary basis for decision and thus is merely dicta. Once again, DOL may not rely on non-binding dicta to abdicate its independent obligation to explain why a comparison inquiry is probative of independent contractor status.

Permanence. DOL also turns the "permanence of the work relationship" factor into a one-way ratchet in favor of employee classification. Under the 2024 Rule, a permanent relationship definitively "weigh[s]" in favor of employee classification, but a lack thereof is "not necessarily indicative of independent contractor status." 89 Fed. Reg. at 1685–86. Not only is that logically flawed—impermanent work for a particular business suggests that the individual is in business for himself—it has no support in law. Under the 2021 Rule, this factor "weigh[ed] in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic" and, conversely, "weigh[ed] in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous." 86 Fed. Reg. at 1247. DOL failed even to "display awareness" of its departure from its prior analysis, *see Fox*, 556

U.S. at 515, when adopting a new framework without addressing this aspect of the 2021 Rule. 89 Fed. Reg. at 1685–86.

II. DOL'S FORMLESS TEST IS ARBITRARY AND CAPRICIOUS AND VIOLATES DUE PROCESS

DOL's second proffered reason for replacing the 2021 Rule's clear test with the 2024 Rule's freewheeling approach is to increase regulatory clarity and reduce confusion. *See* 89 Fed. Reg. at 1640. Because the rescission of the 2021 Rule "will undermine [DOL's] own objective" to improve clarity, it is arbitrary and capricious. *In re FCC 11-161*, 753 F.3d 1015, 1143 (10th Cir. 2014); *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th 2019) (citation in second quotation omitted) (where "the agency's rationales contradict themselves," its action is "'illogical on its own terms' and therefore cannot stand"). Additionally, the 2024 Rule's vagueness violates due process because a totality-of-the-circumstances test fails to explain what circumstances matter and why, and because it lacks "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Sackett v. EPA*, 598 U.S. 651, 680–81 (2023) (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)).

A. DOL's Rescission of the 2021 Rule Is Arbitrary and Capricious Because It Exacerbates Rather than Remedies Regulatory Confusion

Judge Easterbrook criticized the economic realty test as being vague and confusing because it fails to articulate "which aspects of 'economic reality' matter, and why," *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring). More recently, the Eastern District of Texas found that, "due to the courts' varied approaches to applying the economic realities test, there has been confusion among businesses and workers as to whether an employment relationship exists." *CWI*, 2022 WL 1073346, at *16. DOL promulgated the 2021 Rule to address this confusion and bring much-needed structure and clarity to worker classification by focusing on the two most probative core factors, while retaining the continued relevance of other factors. It now abandons that focus in favor of a seven-factor, "totality-of-the-circumstances analysis in which the economic reality factors are not assigned a

predetermined weight" on the theory such an open-ended approach would "provide *more* consistent guidance to employers." 89 Fed. Reg. 1640 (emphasis added).

By definition, a test that prioritizes two core factors is simpler, clearer, and less confusing than "th' ol' 'totality of the circumstances' test" that Justice Scalia warned is "most feared by [parties] who want to know what to expect." *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). "[E]xperience has shown that" this precise type of "open-ended balancing tests[] can yield unpredictable and at times arbitrary results." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014). DOL's replacement of the 2021 Rule's focused approach with a freewheeling test is arbitrary and capricious because it "will undermine [DOL's] own objective[,]" *In re FCC 11-161*, 753 F.3d at 1143, to provide "more consistent guidance to employers," 89 Fed. Reg. 1640.

DOL nonetheless claims that it is the 2021 Rule that would "result in greater confusion." 89 Fed. Reg. at 1639. But how? The 2021 Rule relies on the same factors present in existing case law. Whereas the case law failed to prioritize among the factors, the 2021 Rule provided prioritization based on DOL's review of all appellate cases since 1975 confirming that control and opportunity for profit are the most probative factors. Even if the 2021 Rule left some ambiguity, it is a substantial improvement over the 2024 Rule's refusal to provide any guidance at all.

Unsurprisingly, businesses and independent contractors—the groups that must navigate the economic reality test—overwhelmingly supported the 2021 Rule because it provided them with additional clarity. 86 Fed. Reg. at 1171–72. And they overwhelmingly opposed its rescission. 89 Fed Reg. at 1646. So, DOL cannot point to the experience of regulated groups to support its view that the 2021 Rule caused confusion and instead claimed that the increased clarity of the 2021 Rule was outweighed by uncertainty in the extent to which federal courts would adopt the core-factor framework. 89 Fed. Reg. at 1639. But the only court to address the substance of the 2021 Rule concluded it was "consistent with the existing case law." *CWI*, 2022 WL 1073346, at *16–17. DOL

cited a single district court's concern that the 2021 Rule "may not be valid." 89 Fed. Reg. at 1655 n.150. But that court was hesitant to adopt the 2021 Rule only because DOL was in the process of rescinding it. *Wallen v. TendoNova Corp.*, No. 20-cv-790, 2022 WL 17128983, at *4 n.6 (D.N.H. Nov. 22, 2022). In other words, DOL created hesitancy in the court by (unlawfully) attempting to rescind the 2021 Rule and then pointed to that hesitancy as the basis for the rescission. This bootstrap reasoning fails to provide "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino I*, 579 U.S. at 222 (quoting *Fox*, 556 U.S. at 515–16).

DOL has failed to "show that there are good reasons" for abandoning the 2021 Rule. *Fox*, 556 U.S. at 515. DOL's rescission of the 2021 Rule actually "undermine[s] [its] own objective." *In re FCC 11-161*, 753 F.3d at 1143. Because promoting clarity is a principal rationale on which DOL "seek[s] to justify" withdrawing the 2021 Rule, the withdrawal "cannot [be] upheld." *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839–40 (D.C. Cir. 2006).

B. The Amorphous 2024 Rule Violates Due Process

The 2024 Rule's amorphous test is not only arbitrary and capricious, but it is also incompatible with the due process of law. The Supreme Court declared over a decade ago that agencies, including DOL, cannot promulgate "vague and open-ended regulations that they can later interpret as they see fit." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). The Court more recently reaffirmed that the Due Process Clause requires an agency to interpret a penal statute to have "sufficient definiteness that ordinary people can understand what conduct is prohibited" and in a way that prevents "arbitrary and discriminatory enforcement." *Sackett*, 598 U.S. at 680–81 (cleaned up). The 2024 Rule's standardless test for who is an employee under the FLSA fails that requirement.

In *Sackett*, the Supreme Court rejected EPA's "hopelessly indeterminate" test using "vague concept[s]" and "open-ended factors that evolve as scientific understandings change" for determining

what constitutes "waters of the United States" that may be regulated under the Clean Water Act. *Id.* Regulated landowners were left to "feel their way on a case-by-case basis" as to whether their waters were covered by the Act. *Id.* As in *Sackett*, the 2024 Rule establishes a hopelessly indeterminate test based on at least seven open-ended and unweighted factors. DOL openly admits that it intends the test to be "flexible" enough so DOL can apply it to "encompass continued social changes" and "changed circumstances." 89 Fed. Reg. at 1649. But a test that is flexible for DOL is amorphous for regulated employers, who cannot predict what "social changes" DOL might deem to justify taking advantage of its flexible approach. Employers must speculate on a case-by-case basis whether workers they hire are covered by the Act. And like the statute at issue in *Sackett*, the FLSA carries severe civil liabilities and even criminal penalties for willful violations. *See* 29 U.S.C. § 216(a). DOL must avoid interpreting the FLSA to create this type of "know it when I see it" test for a penal statute. *See SmithKline*, 567 U.S. 142, 159 (DOL may not "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding").

III. THE 2024 RULE VIOLATES THE APA AND RFA BECAUSE DOL IGNORES COSTS

It is "arbitrary and capricious" for an agency to fail to "consider[] the costs and benefits associated" with its action. *Mexican Gulf*, 60 F.4th at 973. The RFA goes further and requires agencies to analyze their rules' impact on small businesses particularly. 5 U.S.C. § 604. The RFA also requires agencies to respond to comments submitted by SBA and authorizes private parties to enforce that requirement through judicial review. *Id.* §§ 604(a)(3), 611(a)(1). An agency violates the RFA where it fails to comply with the Act's requirements of "precise, specific steps an agency must take." *Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 178 (D.C. Cir. 2007). "[A] small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review" under the RFA

5 U.S.C. § 611(a). Plaintiff is a "small entity" within the meaning of the RFA because it has less than $34 million in annual receipts. *See* 13 C.F.R. § 121.201. Pettingil Decl. ¶ 6.

DOL violated the APA and RFA by failing to adequately consider significant costs of withdrawing the 2021 Rule and replacing it with the 2024 Rule. SBA commented that the 2024 Rule's cost-benefit analysis was "deficient and severely underestimates the economic impacts of this rule on small businesses and independent contractors." SBA Comment at 4. Yet, DOL's discussion of the 2024 Rule's costs is less than two pages and addresses only the cost of reading the rule—i.*e.*, "rule familiarization." 89 Fed. Reg. at 1733–34. DOL unreasonably omits whole categories of important costs to small businesses and independent workers.

A. The 2024 Rule Ignores Compliance Costs to Small Businesses

SBA commented that the 2024 Rule increases regulatory burdens on small businesses that hire independent contractors and thus would impose compliance costs, including costs related to reclassification, increased tax liabilities, recordkeeping, and more. SBA Comment at 6. DOL acknowledged SBA's and other commenters' concerns regarding regulatory compliance costs. 89 Fed. Reg. at 1739–40. But it refused to consider those costs.

SBA specifically commented that "some number of independent contractors who qualify under the current rule will not qualify under the rule as proposed" and requested that DOL "estimate of how many small businesses will be impacted by reclassification and estimate these compliance costs." SBA Comment at 6. DOL responded with the unsupported assertions that no widespread reclassification would occur. 89 Fed. Reg. at 1740. That assertion is contradicted by DOL's own belief that the 2024 Rule would reduce "misclassification" of workers as independent contractors, *id.* at

1658–59, 1726, which necessarily requires such workers to be "reclassified" as employees. DOL's refusal to consider reclassification costs lacks rational explanation.

DOL next claimed that any worker reclassification is due to an improper misclassification to begin with and declared that it "does not believe that coming into compliance with the law would be a 'cost' for the purposes of the economic analysis of this rulemaking." *Id.* at 1740. This logic eviscerates Congress's command in the RFA for agencies to consider regulatory compliance costs on small businesses. 5 U.S.C. § 604. If whatever regulation an agency promulgates is "the law," and compliance with that law is not a "cost," then agencies could always ignore regulatory compliance costs, and the RFA would be meaningless. While an agency has discretion regarding *how* it estimates compliance costs, it cannot outright refuse to consider such costs at all, as DOL has done here. *Mexican Gulf*, 60 F.4th at 973.

DOL apparently considered "health insurance and other benefits" and "higher taxes" to be paid on reclassified employees to be merely "transfers" from employers to workers or the government. 89 Fed. Reg. at 1734. But these transfers are costs from the perspective of small businesses paying them. DOL must take that perspective because the RFA requires agencies to analyze a regulation's impact specifically on small businesses and to take steps to "minimize" such impact. 5 U.S.C. § 604(a). DOL did not do so here.

DOL's refusal to consider regulatory compliance costs is especially egregious in light of its own 2021 analysis indicating such costs are significant. DOL estimated that the 2021 Rule would result in nearly $500 million per year in benefits by alleviating regulatory burdens. 86 Fed. Reg. at 1211. AS SBA explained, DOL must consider the loss of those benefits as economic costs when withdrawing the 2021 Rule. SBA Comment at 5. Yet, the 2024 Rule did not discuss the loss of benefit that DOL itself calculated in 2021. While an agency is allowed to change its mind, it must provide a reasoned explanation for departing from its prior positions. *Encino I*, 579 U.S. at 222. Failure to do so here, even

after SBA commented, reinforces the conclusion that the 2024 Rule is arbitrary and capricious and violates the RFA.

DOL's treatment of recordkeeping costs is another striking example of its failure to address the 2024 Rule's costs on small businesses. *See* 5 U.S.C. § 604(a) (requiring agencies to describe recordkeeping costs). The FLSA requires employers to keep various records relating to "wages, hours, and other conditions and practices of employment." 29 U.S.C. § 211(c); *see also* 29 C.F.R. § 825.500(c). If workers performing services as independent contractors are forced to take employee roles, businesses will need to keep additional records to demonstrate compliance and avoid litigation. But DOL explicitly disclaims such costs, asserting that the 2024 Rule "does not create any new reporting or recordkeeping requirements for businesses." 89 Fed. Reg. at 1740–41. That misses the point. The 2024 Rule extends the FLSA's preexisting recordkeeping requirements to businesses and workers that have never before been considered subject to them. The D.C. Circuit has characterized a similar failure to consider a rule's consequences merely because the consequences were not an explicit requirement of the rule as "unutterably mindless." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (vacating rule). So too here. DOL's refusal to meaningfully consider statutorily-mandated factors fails its obligations under the RFA, and thus violates both the RFA and the APA. *See, e.g., Aeronautical Repair*, 494 F.3d at 178.

B. The 2024 Rule Ignores Costs to Independent Contractors

SBA and others also criticized DOL for ignoring harms to independent contractors whom the 2024 Rule would reclassify as employees. SBA explained most independent contractors do "not want to be employees" and "believe they will lose work because of this rule." SBA Comment at 4, 6–7. The 2024 Rule would force some workers currently offering services as independent contractors to work set shifts or a fixed number of hours. If forced to be reclassified as employees, some "[w]orkers … might sorely miss the flexibility and freedom that independent-contractor status confers." *McFeeley v.*

Jackson St. Ent., LLC, 825 F.3d 235, 243 (4th Cir. 2016); *see also* 86 Fed. Reg. at 1210 (describing "autonomy" of independent contractors). Extending FLSA coverage to independent contractors may also lead to job cuts, hiring freezes, resignations, retirements, or automation. When promulgating the 2021 Rule, DOL said that the two-factor framework would make it easier for individuals who value autonomy to find work as independent contractors and counted the increase in such work arrangements as an economic benefit. 86 Fed. Reg. 1209–10. The withdrawal of the 2021 Rule would logically result in a decrease of such arrangements, which must count as an economic cost of repeal.

In response, DOL dismissed what it deemed the "suggest[ion]" that the 2024 Rule "would infringe upon workers' or businesses' choices," because "FLSA protected rights cannot be waived." 89 Fed. Reg. at 1670–71. But the inability to waive the FLSA's requirements *is* an infringement upon workers' choices that carries costs. Workers choose to become independent contractors instead of employees because they benefit from not being "protected" by the FLSA. Forcing them to reclassify as employees is a cost that DOL must consider. By refusing to do so, DOL arbitrarily ignored SBA's and other commenters' concerns. *Aeronautical Repair*, 494 F.3d at 177 (agency violated RFA by failing to consider costs on contractors of regulated businesses).

DOL further ignored the obvious economic truth that the overall number of workers may decrease because the 2024 Rule makes their services more expensive for employers (who incur new tax and employee-benefit obligations) and less attractive to workers (who lose flexibility and autonomy). Indeed, DOL recognized that some employers may respond to the 2024 Rule by adopting "a downward adjustment in the worker's wage rate to offset a portion of the employer's cost associated with these new benefits." 89 Fed. Reg. at 1736. Yet the agency does not even attempt to analyze how many workers will face lower rates of pay, how much lower wages from a newly created position may

be, or whether and how many opportunities for work will be lost from the workforce altogether. Such failure to consider a policy's cost is arbitrary and capricious. *Mexican Gulf*, 60 F.4th at 973.

IV. DEFENDANT SU LACKED AUTHORITY TO PROMULGATE THE 2024 RULE

The U.S. Constitution provides only two methods for appointing executive officers of the United States: (1) the President may nominate officers and appoint them with the advice and consent of the Senate; and (2) he may make temporary appointments during a recess of Congress. U.S. Const. art. II § 2, cl. 2–3. Recess appointments terminate with the end of the following congressional session. *Id.* There are no other kinds of appointments. *See also NLRB v. Noel Canning*, 573 U.S. 513, 522–23 (2014).

Defendant Su was not appointed Secretary of Labor under either of these methods. She was nominated and confirmed to serve as the Deputy Secretary of Labor, a different position. *See* U.S. Gov't Accountability Office, *Legality of Service of Acting Secretary of Labor*, No. B-335451, at 1 (Sept. 21, 2023) (hereinafter GAO Letter) (analyzing Su's appointment under 29 U.S.C. § 552).[10] When the President later nominated her for the Secretary position, the Senate repeatedly refused to confirm her. Leading senators from both major political parties publicly opposed her nomination. *See* Cassidy Letter; Manchin Press Release. Yet, she has purported to exercise the Secretary's powers as an acting official since March 2023—over 500 days ago.

The Vacancies Act limits the period that an acting official may serve in a vacant executive branch position that requires presidential appointment and Senate confirmation to 210 days. 5 U.S.C. § 3346(a)(1). It is the "exclusive means for temporarily authorizing an acting official" unless another "statutory provision expressly" "designates an officer or employees to perform the duties of a specified office temporarily in an acting capacity," or authorizes the President, a court, or Department head to make such temporary designation. 5 U.S.C. § 3347(a)(1). DOL claims that Su is not subject to

[10] https://www.gao.gov/assets/870/861240.pdf (last visited July 31, 2024).

the Vacancies Act's 210-day limit because she was designated Acting Secretary under a statutory provision that satisfies § 3347(a)(1). *See* GAO Letter at 2.

In particular, DOL cites 29 U.S.C. § 552, which designates the Deputy Secretary to fill in for the Secretary during "death, resignation, or removal from office." *See* GAO Letter at 2. But that statute could satisfy 5 U.S.C. § 3347(a)(1) only if it designates the Deputy Secretary to "perform the duties of a specified office *temporarily* in an acting capacity." (emphasis added). DOL, however, intends for Su to perform the duties of the Secretary *indefinitely*. She cannot serve indefinitely as Acting Secretary because nothing in § 552 authorizes the Deputy Secretary to assume the Secretary's role indefinitely. Nor does § 552 license the President to refuse to make a good-faith effort to fill the position on a permanent basis. If § 552 somehow authorized Su's indefinite appointment as Acting Secretary, then it could not satisfy § 3347(a)(1) as a designation to "temporarily" perform the Secretary's duties. Su would have to be appointed under the Vacancies Act and be subject to its 210-day limit, which expired October 23, 2023, long before she promulgated the Final Rule.

A statute that authorizes Su's indefinite designation as Acting Secretary would also be constitutionally infirm. Advice and consent are unwaivable duties of the Senate. The Constitution entrusts the Senate with the responsibility of vetting and approving—or not—the President's nominations. *See* U.S. Const. art. II, § 2. It can no more waive that responsibility by statute than it could give the President authority to implement his own budget. *Cf. Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (holding that Congress could not license the president to veto individual line items of a budget bill because Congress, not the president, was responsible for authorizing federal appropriations).

Section 552 therefore does not and cannot allow a president to bypass advice and consent and the Vacancies Act's 210-day limit by leaving the Deputy Secretary in place indefinitely as Acting Secretary. Such an interpretation would effectively create a third method of appointment: a default

appointment. And default appointments are alien to the Constitution. *See* U.S. Const. art. II, § 2 (providing only two methods of appointment); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (noting that the clause was not simply an "abstract generalization in the minds of the Framers"). DOL's interpretation also prevents § 552 from being a designation for a deputy to "temporarily" perform the duties of the Secretary under 5 U.S.C. § 3347(a)(1), and thereby subjects the Deputy Secretary serving as Acting Secretary to the Vacancies Act's 210-day limit.

The Court should therefore reject DOL's construction of § 552 to allow Su to serve as Acting Secretary indefinitely. *See Bullock v. U.S. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1128 (D. Mont. 2020) (stating that presidents may not "avoid their constitutional obligation to appoint Officers on advice and consent of the Senate by making 'temporary' delegations with evasive titles and delegations"). By January 2024, she could not properly exercise authority to replace the 2021 Rule that a prior Secretary validly promulgated. Accordingly, the 2024 Rule was promulgated in excess of authority and must be set aside. 5 U.S.C. § 706(2)(C); *see Asylumworks v. Mayorkas,* 590 F.Supp.3d 11, 25 (D.D.C. 2022) (vacating prior acts of improperly appointed official under Vacancies Act).

V. THE 2024 RULE SHOULD BE VACATED

The APA directs that courts "shall … hold unlawful and set aside agency action" that is contrary to law. 5 U.S.C. § 706(2) (emphasis added). Accordingly, "[v]acatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts." *N.M. Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1175 (D.N.M. 2018) (alteration in original) (quoting *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017)); *see also id.* ("the APA's text indicates that vacatur is the mandatory remedy for arbitrary and capricious agency action"). While remand without vacatur may occasionally be appropriate where the agency could "substantiate its decision on remand" and vacatur would be "quite disruptive," *id.* at 1177 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)), there is no basis for doing so here.

Because the 2024 Rule is contrary to law, it contains "fundamental flaws … [that] make it unlikely that the same rule would be adopted on remand." *Id.* at 1178 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir 2015)). Accordingly, vacatur is the appropriate remedy. *See* E. Gaiser, M. Sridharan & N. Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Action* at 3, Chicago L. Rev. (forthcoming) ("Every circuit has recognized that the APA authorizes them to vacate a rule.").[11]

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment[12] and vacate the 2024 Rule.

Dated: August 2, 2024.

Respectfully submitted,

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[11] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4830962 (last visited Aug 2, 2024).

[12] Pursuant to D.N.M.LR-CIV 7.1(a), Plaintiff has requested concurrence from Defendants in the relief requested and this Motion is opposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2024, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** with the Court pursuant to CM/ECF procedure for the District of New Mexico, which will send notification of such filing and cause the parties to be served via electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/Eric R. Burris
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