IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

COALITION FOR WORKFORCE INNOVATION, et al., Plaintiffs, v. JULIE A. SU, et al. Defendants.	)	Case No. 21-CV-00130-MAC

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT AND PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Fair Labor Standards Act (FLSA) provides vital minimum wage, overtime, and other protections to "employees" and vests authority in the Wage and Hour Administrator, a Department of Labor (DOL) official, to administer the law. Since the FLSA's enactment in 1938, disputes have arisen over whether certain workers are "employees," who are protected by the statute, or are instead "independent contractors," who are not. And since 1949, DOL has issued numerous documents informing the public how it interprets the broad statutory definitions of "employ" and "employee." Those interpretations guide DOL's enforcement of the FLSA's substantive provisions and provide guidance to which employers and workers can look to ensure proper classification and compliance.

Nonetheless, employers continue to misclassify employees as independent contractors and, as a result, deny workers the wages and benefits to which they are statutorily entitled. In 2021, DOL issued a rule that risked making this problem worse. DOL, Final rule, Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021). Whereas courts and DOL had previously weighed several factors as part of an "economic realities" test, without placing a thumb on the scale for any particular factor, the 2021 Rule confusingly divided the relevant factors into "core" factors" and "other" factors to be considered. 86 Fed. Reg. at 1246–47 (29 C.F.R. §§ 795.105(c)–(d) (2021)). While stating that these factors were "not exhaustive, and no single factor is dispositive," DOL stated that these new "core" factors— "the nature and degree of control over the work," and "the individual's opportunity for profit or loss"—were deemed "most probative," and suggested that, "if they both point towards the same classification," it was "highly unlikely" the other factors were relevant. *Id.* at 1246 (§ 795.106(c) (2021)).

In 2024, after providing notice and considering extensive input from interested parties, DOL issued a new rule re-establishing its earlier interpretations of the statute, rescinding the 2021 Rule, and explaining that the 2021 Rule was inconsistent with the statutory definition of employment. *See* DOL, Final Rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1646–47 (Jan. 10, 2024), *codified at* 29 C.F.R. parts 780, 788, 795. After considering four alternatives, DOL identified six factors that "should guide an assessment of the economic realities of the working relationship and the question of economic dependence." 89 Fed. Reg. at 1742 (29 C.F.R. § 795.110(a)(2)). Like DOL had in 2021, the agency specified that these factors are "not exhaustive." *Id.* Whereas in 2021, however, DOL had left unclear whether the *two* "core" factors should be dispositive, 86 Fed. Reg. at 1246 (29 C.F.R. § 795.106(c) (2021)), DOL in 2024 stated that "no one factor or subset of factors is necessarily dispositive." 89 Fed. Reg. at 1742 (29 C.F.R. § 795.110(a)(2)). In so doing, the DOL's guidance relied heavily on the statutory definitions, as well as the interpretations and approach that the Supreme Court, appellate courts, and DOL itself had applied prior to the novel 2021 Rule.

Plaintiffs are various groups of employers who challenge the 2024 Rule. NELP and Public Citizen submit this amicus brief in opposition to the Plaintiffs' motion for summary judgment and in support of the Defendants' cross-motion for summary judgment to emphasize two points. First, employer misclassification of employees as independent contractors is a serious problem that causes real harm to workers across the country, particularly low-wage workers. Second, the interpretation of the statute reflected in the 2021 Rule risked worsening the problem of worker misclassification.

INTERESTS OF AMICI CURIAE

Amicus curiae National Employment Law Project (NELP) is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP seeks to ensure that all employees receive the workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws, including the child labor, minimum wage, and overtime protections of the FLSA. NELP has litigated directly on behalf of workers misclassified as "independent contractors," submitted amicus briefs in numerous independent contractor cases, testified to Congress regarding the importance and scope of the FLSA's employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. NELP submitted comments in the rulemaking at issue in this case, and also in the rulemaking that led to the 2021 Rule.

Amicus curiae Public Citizen, Inc., a non-profit organization with members in all 50 states, appears before Congress, agencies, and courts on a wide range of issues. Among other things, Public Citizen works for enactment and enforcement of laws to protect workers, consumers, and the public, including federal agency efforts to administer and enforce worker protection statutes such as the FLSA. Public Citizen frequently appears as amicus curiae to address issues of statutory interpretation and administrative law.

ARGUMENT

As the Supreme Court has recognized, the statutory definition of the term "employee" under the FLSA is one of "striking breadth"—indeed, broader than the definition of that term under other statutes and the common law. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945). The 2024 Rule accurately reflects the Courts' and DOL's longstanding view that, to determine employee status

under the FLSA, the "task is to determine whether the individual is, as a matter of economic reality, in business for himself." *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) (quoting *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993)). Consistent with the broad statutory definition of "employee," and the longstanding interpretation of the courts, including the Supreme Court and the Fifth Circuit, the Rule identifies "non-exhaustive factors" to be considered as part of a "totality of the circumstances test," while making clear "no single factor is determinative" and "the factors should not be applied mechanically." *Id.* at 379–80 (applying *United States v. Silk*, 331 U.S. 704, 716 (1947)); 89 Fed. Reg. at 1742 (§ 795.110(a); (b)(7)).

By contrast, the 2021 Rule had diverged from the courts' and the agency's longstanding understanding of the statutory definitions and how to determine whether an individual is an employee by promoting an analysis that was both unduly narrow and unclear. Because the 2021 Rule risked exacerbating worker misclassification and stripping low-paid workers of the bedrock wage protections afforded by the FLSA, DOL had good reason to rescind the 2021 Rule and restore the established understanding of this important law.

I. Worker misclassification is a persistent, serious problem.

Congress enacted the FLSA to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). It did so by providing minimum standards that govern employment, and by adopting broad definitions as to the scope of covered relationship—defining "employ" as "to suffer or permit to work," and an "employee" as "any individual employed by an employer." 29 U.S.C. §§ 203(g), (e). These definitions, borrowed from child labor laws, reflect a "striking breadth" that "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Darden*, 503 U.S. at 326

(citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)); *see also Rosenwasser*, 323 U.S. at 362 ("A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."); 89 Fed. Reg. at 1640 (discussing the breadth of the statutory definition).

Despite the broad scope of the statutory text, not to mention its purpose, many employers have misclassified workers as "independent contractors." 89 Fed. Reg. at 1656 (citing studies and data). Opponents of the 2024 Rule, including employer representatives, conceded this much, "acknowledg[ing] that 'independent contractor status can be abused'" and "that worker misclassification is a pressing issue to be solved at the Federal level." *Id.* at 1657 (quoting comments). "The misclassification of workers as independent contractors is occurring with increased frequency as workplaces fissure, and firms outsource bigger and bigger portions of their workforces to other entities and to workers themselves." *Id.* at 1656 (cleaned up) (quoting comment).

Misclassification harms both the workers themselves, denying them the minimum wage, child labor, and overtime protections of the FLSA, and creates competitive advantages over businesses that provide their workers with the benefits Congress directed they provide. *Id.* at 1647, 1657. Workers misclassified as "self-employed" earn significantly less than their employee counterparts, and are also more likely to be the victims of wage theft.[1] DOL has found that wage theft is prevalent in the agricultural, retail, food service, hotel, construction, janitorial, landscaping, and beauty and nail salon industries where misclassification is common.[2] *See also* 89 Fed. Reg. at

[1] NELP, Comments on RIN 1235-AA43: Employee or Independent Contractor Classification Under the Fair Labor Standards Act at 4 (Dec. 13, 2022), https://www.regulations.gov/comment/WHD-2022-0003-53881 (citing sources).

[2] DOL, Wage and Hour Div., "Low Wage, High Violation Industries," https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

1657. One construction employer group, for example, estimated that 20 percent of construction workers are misclassified, resulting in a loss of "close to $1 billion in wages annually."[3] Misclassified workers are also wrongfully denied FLSA-mandated break time to pump breast milk, and face a variety of other consequences beyond those directly related to the statute, including "decreased access to employment benefits such as health insurance or retirement benefits, inability to access paid sick leave, unemployment insurance, and workers' compensation, a lack of ability to take collective action to improve workplace conditions, and a lack of anti-discrimination protections under various civil rights laws." 89 Fed. Reg. at 1657. Misclassification is particularly pervasive in low-wage, labor-intensive industries, where workers of color and immigrants are overrepresented. *Id.*

Misclassification of employees as independent contractors also places law-abiding businesses at a competitive disadvantage, in direct contravention of the statute's purpose to combat unfair competition, 29 U.S.C. § 202(a).[4] *See Tony & Susan Alamo Fdn. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (noting impact of misclassification of workers on competing businesses). Businesses that misclassify their employees pocket between 20 to 40 percent of the payroll costs that they would otherwise incur for unemployment insurance, workers compensation premiums,

[3] Signatory Wall and Ceiling Contractors Alliance (SWACCA), Comments on Proposed Rule Regarding "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (RIN 1235-AA43), at 8 (Nov. 4, 2022), https://www.regulations.gov/comment/WHD-2022-0003-15886 (quoted in 89 Fed. Reg. at 1657).

[4] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1, 2018-IC-R002 (Feb. 20, 2018), https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf; *see* 2024 Rule, 89 Fed. Reg. at 1646–47.

the employer share of social security, and health insurance premiums.[5] Such savings thus "creates perverse incentives for companies to misclassify workers," leading to a "race to the bottom."[6]

Misclassification also imposes huge costs on federal and state governments, which lose billions of dollars each year in unreported payroll taxes and unemployment insurance contributions.[7]

II. The 2024 Rule is a reasonable step to eliminate the increased risk of worker misclassification created by the 2021 Rule.

DOL explained its rescission of the 2021 Rule in part by discussing concerns that the 2021 Rule would lead to increases in worker misclassification, depriving workers of the wages Congress intended they be paid. *See*, *e.g.*, 89 Fed. Reg. at 1656–68. These concerns provide an appropriate reason for DOL to shift course from the 2021 Rule and are supported by the record.

First, Plaintiffs are wrong to suggest that DOL's consideration of how the 2021 Rule would increase worker misclassification is an improper reliance on "a statute's remedial purpose." ECF 52 at 17. Rather, consideration of whether DOL's stated reading of the statute would advance or impede Congress's purpose reflects basic principles of statutory interpretation and administrative law. As the Fifth Circuit has reiterated, "'[a] statute's purpose may not override its plain language,' but it 'may be a consideration that strongly supports a textual interpretation.'" *Seago v. O'Malley*, 91 F.4th 386, 392 (5th Cir. 2024) (quoting *United States v. Rainey*, 757 F.3d 234, 245 (5th Cir. 2014)). Thus, although DOL could not rely on the FLSA's purpose to give the statutory text

[5] Françoise Carré, *(In)Dependent Contractor*, Econ. Pol'y Inst. at 5 (Jun. 8, 2015), https://files.epi.org/pdf/87595.pdf.

[6] International Ass'n of Machinists and Aerospace Workers, AFL-CIO (IAM), Comments on RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, at 4 (Dec. 13, 2022), https://www.regulations.gov/comment/WHD-2022-0003-53353 (citation omitted) (quoted in 89 Fed. Reg. at 1657).

[7] NELP Comments at 6–7.

"anything but a fair reading," *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88 (2018), the statutory purpose is an appropriate guidepost for DOL to look to when construing the statute. *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010) (holding that, under the Administrative Procedure Act (APA), a reviewing court must determine if "the agency act bears a rational relationship to the statutory purposes"); *see also Tyler Reg'l Hosp., LLC v. Dep't of Health & Hum. Servs.*, 673 F. Supp. 3d 849, 856 (E.D. Tex. 2023) (noting that an agency must consider "all of the relevant factors" to comply with the APA).

Second, DOL's conclusion that the 2021 Rule created "an increased risk of FLSA-covered employees being misclassified as independent contractors," 89 Fed. Reg. at 1647, was well-supported by the record. *See also* 89 Fed. Reg. at 1657–58 (summarizing comments). By shifting the focus away from the totality of the circumstances, and focusing on two narrow factors, the 2021 Rule made it easy for employers to exclude workers from coverage with minor, cosmetic changes to the employer-employee relationship—changes that would not have been enough under the broader multi-factor test long applied by courts. The 2021 Rule's focus on control in particular created opportunities for evasion; "[i]n many low-wage industries, it is common for businesses to delegate or relinquish direct or 'actual' control in order to create the illusion of independent contractor status, while maintaining authority over the important terms of the working relationship."[8] As DOL noted, "elevating the importance of control in every FLSA employee or independent contract analysis brought the 2021 Rule closer to the common law control test that courts have rejected when interpreting the Act." 89 Fed. Reg. at 1652–53; *see also Walling v.*

[8] Lawyers' Committee for Civil Rights Under Law and the Washington Lawyers' Committee for Civil Rights and Urban Affairs (Lawyers' Committee), Comments on RIN 1235-AA43: Employee or Independent Contractor Classification under the Fair Labor Standards Act" at 4 (Dec. 13, 2022), https://www.regulations.gov/comment/WHD-2022-0003-52420; *see also* 89 Fed. Reg. at 1652 (discussing comments raising this concern).

Portland Terminal Co., 330 U.S. 148, 150 (1947) ("[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance."); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985) (holding that it "is not essential that the [employers] have control over all aspects of the work of the laborers or the contractor" to satisfy the FLSA's definition of employment).

DOL also explained that "[b]y elevating certain factors, devaluing other factors, and precluding the consideration of certain relevant facts," the 2021 Rule "may have led employers to believe the test no longer includes as many considerations." 89 Fed. Reg. at 1658. Indeed, as DOL noted, this conclusion was supported by the fact that employer commenters who were *in favor* of the 2021 Rule themselves expressed different understandings of what it meant. *See id.* at 1656. For example, some commenters viewed the 2021 Rule as not requiring consideration of factors other than the two factors identified by the agency as "core," except where those two factors pointed in different directions; others viewed the Rule as not requiring consideration of the other factors at all. *See* 89 Fed. Reg. at 1656 (discussing comments). In addition, some commenters viewed the 2021 Rule as codifying the common law test, contrary to the statute and despite DOL's insistence in the 2021 Rule that its "standard for employment remains broader than the common law." 86 Fed. Reg. at 1201; *see* 89 Fed. Reg. at 1656. This confusion continues in this litigation, where employers take DOL to task for stating in the 2024 Rule that the six factors are "not exhaustive"—although the 2021 Rule contained that same "not exhaustive" disclaimer. 86 Fed. Reg. at 1246 (§ 795.106(c) (2021)); *see* Amicus Br. of Am. Hotel & Lodging Ass'n, et al. (ECF 58) at 6. The employers' "confusion and misapplication of [the 2021 Rule] could deprive many workers of protections they are entitled to under the FLSA." 89 Fed. Reg. at 1658.

DOL's concern was validated by stakeholders who, based on their experiences and knowledge, believed that the 2021 Rule would result in increased misclassification. Commenters identified several specific industries where the 2021 Rule posed such risks. *See* 89 Fed. Reg. at 1657 (discussing such comments). For one, farmworkers were particularly vulnerable to misclassification under the 2021 Rule, as their employment status is particularly dependent on "special skill" and "integral part of the employer's business" factors.[9] "De-emphasizing them in favor of the 'core factors,'" as the 2021 Rule did, "would make it more difficult to determine the status of farmworkers and incentivize farm operators to adopt more exploitative working arrangements like sharecropping."[10] The 2021 Rule also posed an increased risk of misclassification for construction workers, as explained by both employer and worker groups based on their knowledge of the industry as employers were likely to seize upon the 2021 Rule's departures from the broader multi-factor test "to gain or solidify a competitive advantage."[11] In addition to these industry-level concerns, commenters provided specific examples of workers who would be harmed by the 2021 Rule and its focus on isolated factors. Commenters also provided specific examples of workers who would be more likely to be misclassified under the 2021 Rule.[12]

Plaintiffs suggest that DOL nonetheless should have stayed its hand because that 2021 Rule was issued "just three years ago and [DOL] almost immediately started attempting to scrap it."

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[9] Center for Law and Social Policy (CLASP) and Governing for Impact (GFI), Comments Regarding DOL's Notice of Proposed Rulemaking on the Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43, at 5 (Dec. 12, 2022), https://www.regulations.gov/comment/WHD-2022-0003-53600.

[10] *Id.* (citation omitted), *quoted in* 89 Fed. Reg. at 1657.

[11] SWACCA Comments at 6; *see also* United Bhd. of Carpenters & Joiners of Am., Comments, Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN 1235-AA43), at 4–5 (Dec. 1, 2022), https://www.regulations.gov/comment/WHD-2022-0003-44589 (explaining how 2021 Rule would lead to increased misclassification in the construction industry).

[12] *See, e.g.*, Lawyers' Committee Comments at 4–5.

ECF 52 at 13. But "[a]n agency does not engage in arbitrary or capricious decision-making by making predictive judgments or even by relying on incomplete data." *New York v. U.S. Nuclear Regul. Comm'n*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) (cleaned up) (citations omitted)); *cf. Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."). "To the contrary, such judgments are entitled to deference, and a challenge to the agency's assumptions must be more than an effort by a [plaintiff] to substitute its own analysis for the agency's." *New York*, 824 F.3d at 1022. Here, DOL's predictions as to the impacts of the 2021 Rule on worker misclassification were reasonable based on the agency's expertise and the record and thus provided a valid rationale for the 2024 Rule.

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' opposition and cross-motion, Plaintiffs' motion for summary judgment should be denied, and Defendants' cross-motion for summary judgment should be granted.

Dated: May 28, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document was electronically filed in this matter with the Clerk of Court, using the ECF system, which sent notification of such filing to all counsel of record.

/s/ *John E. Wall, Jr.*
John E. Wall, Jr.

May 28, 2024