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

COALITION FOR WORKFORCE INNOVATION, *et al*,	§	
Plaintiffs	§	
vs.	§	**CASE NO. 21-CV-00130-MAC**
MARTY WALSH, *et al*,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF ARGUMENT

The Department's consolidated Cross-Motion/Response (hereafter the Department's "Motion") fails to justify the numerous violations of the Administrative Procedure Act the Department committed in arbitrarily delaying and then withdrawing the Independent Contractor Rule. The Department has repeated its mischaracterization of the Rule's stated purpose of clarifying the existing independent contractor standards and, by withdrawing the Rule, has left the regulated community in a litigation quagmire.

Contrary to the Department's claims, the Delay Rule failed to follow mandatory notice and comment procedures and otherwise ignored the rule of law in preventing the Independent Contractor Rule from taking effect. In arrogating to itself the power to prevent a final, much needed rule from being implemented, the Department failed to address the serious litigation cost problems identified and corrected by the Rule, a strong indicator of arbitrary and capricious decision making.

The Department's Motion also fails to address the serious problems identified and corrected by the Independent Contractor Rule, which the Withdrawal Rule exacerbates. The Department certainly does not justify the Withdrawal Rule's lack of compliance with the Supreme Court's *State Farm* standard of review. Instead, the Department again relies on an erroneous "anti-contractor" legal standard in interpreting the FLSA. The Department also ignores or unfairly minimizes substantial data supporting the Independent Contractor Rule; and the Department fails to justify the Department's reversal of course without adequate consideration of the regulated community's reliance interests. For these and other reasons detailed below, the challenged rules should be declared invalid and the Independent Contractor Rule should be allowed to go into effect.

RESPONSE TO DEFENDANTS' COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

1. No response is required to Defendants' first counter-statement. The FLSA speaks for itself. The Act's mandates specified in Defendants' counter-statement are not material to the resolution of the pending motions for summary judgment.
2. It is disputed that the Supreme Court has "steadfastly rejected common law control as the determining factor under the FLSA."
3. It is undisputed that courts have said no single factor may predominate a multi-factor economic realities test; but Plaintiffs' strongly dispute the Department's claim that the Independent Contractor Rule created a "novel" new standard or gave "controlling" weight to the two factors identified as being at the "core" of dozens of court decisions. Contrary to the Department's counter-statement, the Rule is not in conflict with any of the cases cited, but rather explains and reconciles them by showing the important role played by the two core factors in the outcomes of virtually all classification cases, while staying true to the non-exhaustive nature of the economic realities test applied in every case. *See* 85 Fed. Reg. 60,618-60,620.
4. It is undisputed that, in the fall of 2020, the Department issued a notice of proposed rulemaking and request for comments for the Independent Contractor Rule, and that the Final Rule was published with the original effective date of March 8, 2021. It is disputed that the rule made any significant changes to the Department's longstanding analysis of who is an employee or independent contractor under the FLSA. The Independent Contractor Rule relies upon factors

[1] As noted in Plaintiffs' motion, all statements regarding material facts are derived from the Administrative Record ("AR"), as certified by Defendants. (ECF #17).

of the long-standing economic realities test and the results reached in myriad court decisions applying those factors. *See id.*

5. The factors applied by the Department and "most courts" speak for themselves. The Independent Contractor Rule was derived from the results reached in these decisions.
6. Disputed. The Independent Contractor Rule did not apply economic reality factors in a novel fashion because the Rule is derived from an exhaustive review of federal courts of appeals case decisions and how those courts applied the factors to reach the results achieved.
7. Disputed. The Independent Contractor Rule did not narrow the economic reality factors.
8. Disputed. Independent Contractor Rule did not erase any elements of the analysis, but merely highlighted factors courts have regularly and consistently pinpointed in their analysis.
9. Disputed. The Independent Contractor Rule did not "renege" on the promise to adhere to "Supreme Court instruction." Rather, the Rule expressly relied on Supreme Court decisions, and other case law, which indicated that control and opportunity for profit and loss are core concepts of economic dependence. 85 Fed. Reg. 60,618-60,620.
10. Disputed. As indicated above in response to Defendants' statement 4, the Independent Contractor Rule relied upon factors of the long-standing economic realities test and the results case law has reached applying those factors. The authority the Department cites in its counter-statement confirms there are core factors that tend to be more indicative of independent contractor status, as the Department's Rule properly found. *See, e.g.*, *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 145-147 (3rd Cir. 2020) (focusing on the "right to control" and "opportunity for profit or loss" factors to determine there were genuine disputes of material fact preventing summary judgment); *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 242–44 (4th Cir. 2016)

(focusing on the control and opportunity for profit and loss, to evaluate independent contractor status, finding the other factors "more peripheral").

11. This counter-statement by Defendants constitutes speculative argument not based in fact and is thus not material.

12. Disputed. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947), does not support the proposition in Defendants' counter-statement that elevating control as a core factor is contrary to Supreme Court precedent. As indicated, the Independent Contractor Rule expressly relied on Supreme Court decisions, and other case law, which indicate that control is one of two core concepts of economic dependence. 85 Fed. Reg. 60,618-60,620.

13. Undisputed. However, whether agencies were "encouraged" to use a comment period does not alleviate agencies from using a notice-and-comment period where required.

14. Undisputed.

15. Undisputed to the extent that the Delay Rule was not issued until Feb. 5, 2021. As set forth in the opening brief, the Delay Rule issued was not consistent with the factors identified in the OMB Memorandum. Furthermore, the Independent Contractor Rule did not adopt a novel legal standard and the delay was disruptive as well as tantamount to a withdrawal.

16. Disputed. The Department's own delay in publishing its Delay Rule was the cause of the need for a shortened comment period, and the Department improperly failed to seek comments on the underlying substance of the Independent Contractor Rule.

17. Undisputed.

18. Undisputed.

19. Disputed. The Department did not provide sufficient justification for its "concerns" about the Independent Contractor Rule, given that any such concerns were previously addressed by the

Rule's exhaustive analysis. Moreover, the Independent Contractor Rule is derived from Supreme Court and other legal precedent and is expressly based upon the economic realities test.

20. Undisputed to the extent that the Department withdrew the Independent Contractor Rule.

ARGUMENT

I. THE DEPARTMENT'S MOTION FAILS TO EXCUSE THE DELAY RULE'S NUMEROUS VIOLATIONS OF THE APA'S REQUIREMENTS.

A. The Department Was Required to Comply With the APA's Mandatory Notice and Comment Requirements Prior to Issuing The Delay Rule.

The Department's Motion contends that the Department was not required to engage in public notice and comment at all prior to issuing the Delay Rule because – the Department claims – the Independent Contractor Rule is an "interpretive" rule. (Def. Motion at 16). The Department makes this claim notwithstanding the notice and comment that preceded issuance of the Independent Contractor Rule, and notwithstanding the truncated notice and comment period that preceded the Delay Rule. Contrary to the Department's Motion, notice and comment in compliance with the APA was required here, for the following reasons.

First, as noted without contradiction in Plaintiffs' Motion, when an agency issues a final rule after engaging in notice and comment procedures, it must "use . . . the same procedures when [it] amend[s] or repeal[s] a rule." *United States v. Colliot*, 2018 U.S. Dist. LEXIS 83159, at *6 (W.D. Tex. May 15, 2018) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015)). In addition, an agency's efforts to comply with the APA's notice and comment requirements, as occurred here, "suggest that the agency believed [those notice and comment procedures] to be applicable" and "support the conclusion that 'those procedures [are] applicable.'" *N.C. Growers'*

Ass'n, 702 F.3d 755, 765 (4th Cir. 2012) (quoting *Manufactured Housing Inst. v. EPA*, 467 F.3d 391, 299 (4th Cir. 2006)).

Second, in making its interpretive rule argument, Defendants' Motion relies entirely on cases involving the modification or withdrawal of guidance letters or manuals stating administrative policy, none of which were issued as regulations implementing the law after notice and comment proceedings. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015) (addressing the 2010 Administrator's Interpretation withdrawing a 2006 opinion letter interpreting the 2004 regulations);[2] *Cath. Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010) (considering only whether the Provider Reimbursement Manual, which "contains 'guidelines and policies to implement Medicare regulations which set forth principles for determining the reasonable cost of providers,' but [] 'does not have the effect of regulations,'" was an interpretive rule); *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982) (finding an unemployment insurance program letter was an interpretive rule).

The Department wrongly claims it is "fatal" to Plaintiffs' argument that Plaintiffs fail to cite a provision of the FLSA delegating legislative rulemaking power to the Department. (Def. Motion 16). The Supreme Court long ago settled this question by holding, in *United States v. Mead Corp*., 533 U.S. 218, 229 (2001), that "'[s]ometimes the legislative delegation to an agency on a particular question is implicit.'" (quoting *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984)). "[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force

[2] In citing *Perez*, Defendants ignored the Supreme Court's statement that "[r]ules issued through the notice-and-comment process are often referred to as 'legislative rules." 575 U.S. at 96.

of law when it addresses ambiguity in the statute . . . ." *Id.*; *see also Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 267 (5th Cir. 2000).

Here, as previously noted, the Independent Contractor Rule contains numerous hallmarks of "legislative" and "substantive" rulemaking, including the fact that the Rule was issued only after engaging in notice and comment rulemaking. *See N.C. Growers' Ass'n*, 702 F.3d at 765. The Independent Contractor Rule, moreover, "impose[d] . . . rights" on regulated parties by adding a new part to the Code of Federal Regulations, with the expressed intent that regulated parties could rely on this new part "in accordance to section 10 of the Portal-to-Portal Act, 29 U.S.C. 251-262," which allows parties to establish a good faith defense in FLSA litigation. *See* 86 Fed. Reg. 1,246 (Citing 29 U.S.C. §§ 251-262). *See also Texas v. United States*, 809 F.3d 134, 171-76 (5th Cir. 2015) (finding a likelihood of success that the DAPA Memo would be found a substantive rule where it limited an agency's exercise of discretion and thus effectively imposed rights and obligations).

The Department's Motion also mistakenly relies on the placement of the Independent Contractor Rule in 29 C.F.R. subchapter B, which the Department maintains is reserved for interpretive rules, and various additional references by the Department to the Rule as being "interpretive" in nature. Contrary to the Department's claim, numerous courts have held that neither titles nor labels are controlling on the "interpretive" vs "legislative" question. "The Court is not bound by an agency's choice of label for its action." *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1184 (W.D. Tex. 2020) (citing *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984)); *see also Wiggins v. Wise*, 951 F. Supp. 614, 619 (S.D.W.V. 1996) ("An agency's 'characterization of its statement as an exposition of its policy or interpretation of the standard does not preclude a finding that it is something more.'"). Indeed, in *Cargill*, 502 F. Supp. 3d at

1184-85, similar rules, which defined terms and were promulgated after notice and comment, were found to be "legislative" rules, and thus subject to rulemaking procedures.

Finally, the Department's Motion fails to reconcile its "interpretive" rule claim with the fact that the Independent Contractor Rule expressly created a safe harbor for businesses pursuant to 29 U.S.C. § 259. Regardless of whether an opinion letter could also create such a safe harbor, it is settled law in this Circuit that rules should be considered "legislative" in nature when they "produce [ ] significant effects on private interests." *Gulf Restoration Network v. McCarthy*, 783 F. 3d 227, 236 (5th Cir. 2015); *see also Cargill*, 502 F. Supp. 3d at 1184.

Not only were public notice and comment required before promulgating the Delay Rule, but because the delay was tantamount to amending or revoking the rule – clearly a substantive change – the attempt to delay the Independent Contractor could not lawfully occur without complying with the APA's 30-day notice and comment requirements. *See* Plaintiffs' Motion at 19-20; citing, *inter alia*, *Prometheus Radio Project v. FCC,* 652 F.3d 431, 453 (3d Cir. 2011) (28-day comment period did not provide "sufficient time"); *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 162-63 (D.D.C. 2017); *Pineros Y Campesinos Unidos v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018).

In their Motion, Defendants seek the shelter of the "good cause" exception to the APA's 30-day notice requirement, but there is no basis for applying that exception here. Defendants could have started the rulemaking process more than 30 days before the effective date of the Independent Contractor Rule, but they failed to do so.[3] The Department's reliance on *Omnipoint Corp. v. FCC*,

[3] The Department's claim that it needed an "additional opportunity to review and consider the rule" (Def. Response 20) also is unavailing because, as previously discussed, "[a] new administration's simple desire to have time to review, and possibly revise or repeal, its predecessor's regulations falls short" of the good cause standard. *Pineros Y Campesinos Unidos*, 293 F. Supp. 3d at 1067.

78 F.3d 620, 629 (D.C. Cir. 1996), is misplaced. In that case, there was a Congressional mandate to act quickly. Here, no such mandate exists. The decision in *Florida Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1984), similarly does not support the Department's use of a shortened comment period because, similarly, in that case Congress imposed the agency deadline.[4]

B. The Delay Rule Was Arbitrary, Capricious, or Otherwise Contrary to Law in Violation of the APA.

In addition to failing to allow an adequate notice and comment period prior to promulgating the Delay Rule, Plaintiffs' Motion (at 18) argues the Department failed to provide a "detailed justification" for its change in course, relying instead on the vague assertion that the Delay Rule was justified because "questions involving law, fact, or policy have been raised." 86 Fed. Reg 12,353. Under the law, such a conclusory assertion is insufficient as a justification. *See California v. BLM*, 286 F. Supp. 3d 1054, 1064-68 (N.D. Cal. 2018) (explaining an agency must offer the "requisite good reasons and detailed justification" for a suspension rule, and finding the purported rationales asserted insufficient to meet that standard). And, further to this point, the Department's Motion fails to address the fact that each of the aforementioned questions had *already been considered* and decided by the Department prior to adoption of the Independent Contractor Rule, and thus, there were no further "questions involving law, fact, or policy" to consider.

In this regard, the Department does not even attempt to distinguish the decision in *Louisiana v. Biden*, 2021 U.S. Dist. LEXIS 112316, at **8, 52-53, which found a "pause" in implementing a regulation likely to be arbitrary and capricious. Here as in that case, the APA did

[4] *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) also is distinguishable. The unique facts in that case show that requiring a shortened notice period for flight allocations was necessary to preserve the interest of the traveling public on the eve of the winter holiday season and the national interest in the efficient utilization of navigable airspace.

not allow the Department to delay the Independent Contractor Rule in order to perform a "comprehensive review" of issues already previously addressed.

The Department's Motion also fails to justify its claimed reliance on the OMB Memorandum when the reasons given for the delay were based on factors not authorized by the Memorandum, which is further evidence of the Rule's arbitrary or capricious nature. *See Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41-43 (1983) (noting that an agency rule may be arbitrary and capricious where the agency relies on factors it was not supposed to consider); *Nat'l Res. Def. Council v. Abraham*, 355 F.3d 179, 189-90, 206 (2d Cir. 2004) (noting that an agency's reliance on a freeze memorandum from the White House does not free the agency from compliance with the APA). It likewise fails to justify its reliance on mischaracterizations of the Independent Contractor Rule. In particular, the Delay Rule wrongly claimed the Independent Contractor Rule had adopted a wholly "new legal standard" for determining employee and independent contractor status under the FLSA. 86 Fed. Reg. 12,535.[5] Yet, the Independent Contractor Rule expressly explains that it is retaining the long-standing "economic reality" test for determining employee or contractor status, while clarifying and harmonizing the confusing and oft-conflicting methods of analysis used to apply this test across

[5] That the Department's premise is false can be seen by comparing the parenthetical descriptions of the cases cited in the Defendants' Motion - which the Department claims to be in conflict with the Independent Contractor Rule - with the text of the Rule itself. (Def. Motion 29-30). Contrary to the Department's Motion, the Rule does not say that any one factor is "controlling," nor that any factor is assigned a "specific and invariably applied weight," nor that the "presence or absence of any particular factor is dispositive." 86 Fed. Reg. 1168, 1182, 1199. Instead, the Independent Contractor Rule examined all of the cases cited in the Motion, and many others, and found that the presence of the "core" factors of control and opportunity for profit and loss empirically increased the likelihood of a finding of independent contractor status, *i.e.*, that these factors are predictive – not determinative. *See* 86 Fed. Reg. 1198-99.

different circuits. *See* 86 Fed. Reg. 1,168. On this point, the Department's erroneous finding will be discussed in more detail in connection with the Withdrawal Rule; but suffice it to say here that even at the Delay stage the Department's reasoning was arbitrary and capricious. *See State Farm.*, 463 U.S. at 43 (noting that an agency rule may be arbitrary and capricious where the agency has "offered an explanation for its decision that runs counter to the evidence before the agency").

Finally, the Department attempted – incorrectly – to justify the Delay Rule on the ground that it would not be "disruptive" because the Independent Contractor Rule "[was] not yet effective." 86 Fed. Reg. 12,536. The Department's reasoning ignores completely the reality of the costs of compliance preparation many businesses had already undertaken in anticipation of the rule becoming effective as scheduled, as well as the continuing cost that the prior lack of clarity continues to wreak on businesses. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 7 (D.C. Cir. 2017) ("[T]his one-sided view of final agency action ignores that, by staying the rule's effective date and its compliance duties, [the agency] has determined 'rights or obligations . . . from which legal consequences will flow.'). Thus, in asserting that the Delay Rule would not be disruptive, the Department improperly failed to consider important aspects of the problem and offered unsupported explanations for the Delay Rule. *See State Farm,* 463 U.S. at 41-43.

C. Because the Delay Rule Was Defective and Void, the Withdrawal Rule Was Flawed From the Outset and Violated the APA.

The Department's Motion glosses over the essential role played by the procedurally defective Delay Rule to justify the subsequent Withdrawal Rule. As explained in Plaintiffs' Motion, had the Department adhered to the APA's requirements, the Independent Contractor Rule would have gone into effect. *See* 86 Fed. Reg. 12,537 (conceding as much). Had the Department complied with the APA and permitted the Independent Contractor Rule to go into effect, the

Department could not credibly have contended that the Withdrawal Rule would not be "disruptive," as it subsequently argued. *See* 86 Fed. Reg. 14,035. As a result, the Department's Motion fails to demonstrate here that its procedurally deficient comment period for the Delay Rule "had no bearing on the procedure used or the substance of decision reached." *U.S. Steel Corp v. EPA,* 595 F.2d 207, 215 (5th Cir. 1979).

As Plaintiffs previously have noted, the Department's claim that it would have "withdraw[n] the Independent Contractor Rule even if it were currently in effect," is inconsistent with the argument that it presented in its proposed Withdrawal Rule. That Rule specifically stated that withdrawal would not be "disruptive" because the Independent Contractor Rule was not in effect. *Compare* 86 Fed. Reg. 24,320, *with* 86 Fed. Reg. 14,035; *see also Emplr. Solutions Staffing Grp., II, LLC v. Office of the Chief Admin. Hearing Officer*, 833 F.3d 480, 490 (5th Cir. 2016) Under similar circumstances courts have held in favor of plaintiffs challenging agency actions to withdraw rules after improperly purporting to delay them without adequate notice and comment, concluding that such agency actions are arbitrary and capricious. *See N.C. Growers' Ass'n*, 702 F.3d at 764-66; P*uget Soundkeeper All. v. Wheeler*, 2018 U.S. Dist. LEXIS 199358 at *13-14 (W.D. Wash. Nov. 26, 2018).

II. DEFENDANTS' MOTION FAILS TO JUSTIFY THE WITHDRAWAL RULE, WHICH REMAINS ARBITRARY, CAPRICIOUS, OR OTHERWISE CONTRARY TO THE APA.

A. The Withdrawal Rule Failed to Consider Important Aspects of the Problem Addressed by the Independent Contractor Rule.

Defendants' primary defense of the Withdrawal Rule, like the Rule itself, fails to deal with the main problem the Independent Contractor Rule addressed, namely, the chaotic state of litigation under the previously existing Department guidance on classifying independent contractors under the FLSA. The arbitrary result of Defendants' Withdrawal Rule is to let chaos prevail. As explained in Plaintiffs' Motion, failure to deal with the problem addressed by a rule being rescinded is a primary indicator of arbitrary decision making. *See U.S. Dep't of Homeland Security v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1910 (2020), citing approvingly *State Farm*, 463 U.S. at 43. In each of these cases, the Supreme Court struck down sudden agency reversals of direction that failed to address important aspects of the problems dealt with by their rescinded rules.

Here, the Department's Motion gives only lip service to those portions of the Independent Contractor Rule, and Plaintiffs' comments, which explained why much clearer guidance was needed under the FLSA to assist businesses, independent contractors, and the courts in the classification process. *See* 86 Fed. Reg. 1172; *see also* Plaintiffs' SOF ¶¶ 3-7, 21-31, and the Administrative Record comments cited therein. Contrary to Defendants' Motion, the Independent Contractor Rule addressed at length the costs associated with the existing state of confusion over the proper application of the seven-factor test (86 Fed. Reg. 1172); while the Withdrawal Rule offers no meaningful alternative. And although the Department's Motion contends that the Independent Contractor Rule would not have created added clarity (86 Fed. Reg. 24,316), this conclusion, as in the Withdrawal Rule itself, ignores the overwhelming view of the regulated

business community, *i.e.*, those whose job it is to interpret and comply with the Department's rules.

Plaintiffs' Motion pointed out that the Withdrawal Rule did not even mention the safe harbor for businesses attempting to classify independent contractors, *see* 86 Fed. Reg. 1,246 (citing 29 U.S.C. §§ 251-262), which in and of itself promised reduced litigation costs. The Department's Motion mentions the safe harbor only in connection with the notice and comment issue (Dept. Motion 17), but ignores the significance of the safe harbor with regard to the harm caused by eliminating the good faith defense in the Withdrawal Rule. Again, this demonstrates the Department's failure to consider or address an important aspect of the Independent Contractor Rule, in violation of *State Farm* and similar cases.

The Department's Motion does not deny – nor can it – that the Independent Contractor rulemaking proceeding "compiled a record that contained extensive evidence" of the confusion that regulated parties face while classifying individuals as employees or independent contractors, and the resulting costs from this confusion. 86 Fed. Reg. 1,246; *see also* 86 Fed. Reg. 1168-1175, 1178-1196, 1209-1234. The Department therefore erred when it did not "meaningfully engage with the critical question" of how to reduce such costs while clarifying the undisputed right of businesses to utilize independent contractors under the FLSA. 86 Fed. Reg. 1,246; *see also New York v. United States HHS*, 414 F. Supp. 3d 475, 555 (S.D.N.Y. 2019) (agency's decision to address important considerations only "in passing and in a conclusory manner" found to be "quintessentially arbitrary and capricious"). As Plaintiffs' stated in their Motion, by withdrawing the Independent Contractor Rule without addressing important aspects of the problem the Rule sought to resolve, the Department has left the regulated business community in the same chaotic state that existed prior to issuance of the Rule. The Department's action (or failure to act) constitutes arbitrary and capricious rulemaking as defined by the Supreme Court. *State Farm*, 463

U.S. at 43; *U.S. Dep't of Homeland Security,* 140 S. Ct. at 1910.

B. The Withdrawal Rule Wrongly Concluded That the Independent Contractor Rule Creates a "New Legal Standard" for Determining Independent Contractor Status Under the FLSA.

As noted above, the Department's Motion repeats the Withdrawal Rule's mischaracterization of the content and purpose of the Independent Contractor Rule. Contrary to the Department's Motion, however, the Independent Contractor Rule did not create a "new" standard. Rather, the Rule exhaustively identified the core factors that would allow the many conflicting court decisions on this issue to be reconciled, notwithstanding the courts' inconsistent application of myriad different factors under the guise of applying a single standard. Through its rigorous empirical analysis, the Rule provided clearer and more uniform guidance to businesses and independent workers that would better enable them to understand and apply the existing standard, in a manner consistent with the core values expressed in the court decisions. *Razak*, 951 F.3d at 145-147 (focusing on the "right to control" and "opportunity for profit or loss" factors to determine there were genuine disputes of material fact preventing summary judgment); *McFeeley*, 825 F.3d at 242–44 (focusing on the control and opportunity for profit and loss, to evaluate independent contractor status, finding the other factors "more peripheral"). *See also Saleem v. Corporate Transp. Group, Ltd*., 854 F.3d 131 (2d Cir. 2017).

The Department's Motion ignores the conflicting and inconsistent nature of the case authority from which it claims the Independent Contractor Rule "departed." And the Department wrongly claims that the holdings of the cases it cherry picks are in "conflict" with the Independent Contractor Rule. (Def. Motion 29-30). Contrary to the Motion, the Rule does not say that any one factor is "controlling" in alleged conflict with *Silk*; nor does the Rule state that any factor is assigned a "specific and invariably applied weight" in alleged conflict with *Parrish v. Premier*

Directional Drilling, L.P., 917 F.3d 369, 380 (5th Cir. 2019); nor does the Rule say that the "presence nor absence of any particular factor is dispositive" in alleged conflict with *Martin Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) or *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989). Instead, the Independent Contractor Rule examined all of the cases cited in the Department's Motion, and many others, and correctly found that the presence of the "core" factors of control and opportunity for profit and loss increased the likelihood of a finding of independent contractor status, *i.e.*, that these factors are predictive – not determinative.

The Independent Contractor Rule's core factor analysis is certainly consistent with the results achieved in past Fifth Circuit cases, even though different panels of that court - like most others - reached their results by a variety of analytical methods. *See, e.g.*, *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344 (5th Cir. 2008) (finding no independent contractor status in large part because the evidence showed the putative employer controlled all meaningful aspects of the business model, along with the opportunity for profit); *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 334 (5th Cir. 1993) (concluding that welders were independent contractors largely because of their opportunity for profit, and the putative employer had no control over the methods or details of the welding work); *Diggs v. Harris Hosp.--Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988) (stating that the courts emphasize the "latter control factor" when evaluating the factors of employee status, and concluding the plaintiff was not an employee because the putative employer lacked control); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987) (reversing the district court's finding of independent contractor status and stating that the employer "controls the salient aspects of the operation, the operators, the terms of the operators' compensation, and the degree to which the operators could independently affect profit and loss."); *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) (finding no support for employee status where, most

significantly, the manufacturer's sales representative "was largely independent of [ ] control" and "[t]he opportunities for profit were significant"). Likewise in *Parrish,* 917 F.3d 369, which the Department claims to be in conflict with the Rule, the Fifth Circuit vacated a worker's judgment finding employee status largely because it found the district court's conclusion regarding control and the opportunity for profit and loss were erroneous. *See id.* at 381-82, 384-85. Conversely, in *Hobbs v. Petrolex Pupe & Constr., Inc.*, 946 F.3d 824, 830-31, 833-34 (5th Cir. 2020), the court found employee status primarily because the individual lacked control and the opportunity for profit and loss.[6]

The Department's Motion (at 30) claims without support that the Independent Contractor Rule's focus on the results of these and many other federal cases somehow "minimizes the significant changes that [the Rule] would have made to the longstanding legal standard actually applied by the courts." The Department has failed to support its exaggerated claims in this regard, which are supported by no empirical evidence. And the Department's Motion identifies no factual or legal errors in the Independent Contractor Rule's thorough discussion of case law identifying the "core factors" applied by many courts within the rubric of the overall "economic realities" test. Contrary to the Department's Motion, the Independent Contractor Rule is firmly grounded in the results achieved by the courts and reaffirms throughout that it is *not* changing the standard.

In arbitrarily dismissing its own previous findings in this regard, the Department's Motion

[6] This is not to suggest, any more than the Rule does, that the core factors are "dispositive," but only that they are predictive of classification outcomes; and there is no single "standard" approach in the case law compelling any desired outcome. Indeed, the Department's Motion (at 29, n.6), is compelled to acknowledge that the Fifth Circuit applies a different set of factors than some other circuits, *i.e.*, generally not applying the "integral" factor. But the Department fails to appreciate how this difference from other circuits refutes the Department's claim that there is any clear judicial "standard" from which the Independent Contractor Rule somehow "departed."

again improperly treats independent contractor status as inherently harmful to workers, contrary to the Supreme Court's longstanding recognition of independent contractor status under the FLSA. *See Walling v. Portland Terminal Co*., 330 U.S. 148, 152 (1947) ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees."). The Department has thus reversed course without any adequate explanation or identification of new factors that the Department previously failed to consider.

The Department's Motion (at 31) attempts to walk back the Withdrawal Rule's reliance on the FLSA's "broad remedial purpose," which conflicts with *Encino Motor Cars v. Navarro,* 138 S. Ct. 1134, 1142 (2018). But the Department's *post hoc* rationalization cannot substitute for the text of the Withdrawal Rule itself, which relies on an erroneous legal standard, by seeking to achieve the broadest remedial purpose regardless of cost. *See also U.S. Dep't of Labor v. Bristol Excavating, Inc*., 935 F.3d 122, 135 (3d Cir. 2019) ("[A] fair reading of the FLSA, neither narrow nor broad, is what is called for.").

C. The Withdrawal Rule Fails to Refute Extensive Data in the Factual Record That Supports the Independent Contractor Rule.

As argued in Plaintiffs' Motion, the Withdrawal Rule relies on explanations for withdrawing the Independent Contractor Rule that run counter to the evidence before it, another strong indicator of arbitrary and capricious reasoning. *See FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009). The Department's Motion again ignores or mischaracterizes the substantial data supporting the Independent Contractor Rule contained in the Administrative Record, including but not limited to comments and studies submitted for the Record by the Plaintiffs and other business and public policy organizations. (Pl. Motion at 27-29).

For example, the Department relies upon 86 Fed. Reg. 24,324-25 to argue in its brief (at

32), that the Withdrawal Rule addressed rather than ignored the data about the earnings of independent contractors contained in the 2017 Contingent Worker Supplement (CWS) of the Bureau of Labor Statistics (BLS). But the Withdrawal Rule cited different, previously unidentified "micro" data re-calculated for purposes of the Withdrawal Rule by Department staff in order to claim for the first time that independent contractors earn less. (Defendants' Motion 32). *Compare* 86 Fed. Reg. 14,037 n. 145 *with* 86 Fed. Reg. 24,324 n. 206. In other words, the Department's Withdrawal Rule (and Motion) failed to deal with the *actual* 2017 CWS study published by the BLS, and instead created new data more to their liking out of whole cloth. In any event, it remains true that the 2017 CWS data shows the median hourly rate for independent contractors is $21.27 per hour ($851 weekly earnings/40 hours), significantly more than that guaranteed by the FLSA, contradicting the Department's claim that independent contractors are harmed by being excluded from coverage under the FLSA.

The Department's Motion also failed to show how the Withdrawal Rule gave any proper consideration to the many other studies identified in the Independent Contractor Rule, identifying the numerous benefits earned by independent contractors. These additional benefits are not compelled by the FLSA but often outweigh the value of the FLSA's requirements - increased pay for overtime and/or the minimum wage. The plaintiff Coalition for Workforce Innovation's "National Survey of 600 Self-Identified Independent Contractors," found that a large majority of those surveyed had healthcare coverage, enjoyed wage transparency, had a retirement savings plan, and enjoyed paid time off. *See* 86 Fed. Reg. 1,212 n. 77 (citing Coalition for Workforce Innovation. "National Survey of 600 Self-Identified Independent Contractors" (January 2020), https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf). The Department's argument that the Independent

Contractor Rule did not account for "the cost of losing FLSA rights" or other employee protections (*see* Defendants' Motion at 32; 86 Fed. Reg. 24,324) is thus incorrect. The Defendants' Motion, like the Withdrawal Rule itself, ignores other, non-wage benefits independent contractors enjoy. *See* 86 Fed. Reg. at 1,219.

Because of its erroneous characterization of the Independent Contractors Rule's impact, Defendants' Motion also overstates the likely conversion of employees into independent contractors. (Def. Motion at 31). Moreover, the Department's Motion does not substantively defend the much-criticized studies on which the Withdrawal Rule relied, and which the Independent Contractor Rule found to be inadequate. In any event, contrary to the Department's Motion, and as explained above, the studies referenced by Plaintiffs in the Administrative Record showed that independent workers overwhelmingly prefer remaining independent and do not "benefit" from being treated as "employees" where the law does not require such treatment. *See* 86 Fed. Reg. 1222.

Thus, the Department's Motion, like the Withdrawal Rule, simply disregards the data demonstrating that independent contractors tend to earn more than employees earn and prefer their independent work arrangements. The law clearly establishes that such disregard of data previously relied on is evidence of arbitrary decision making. *See Defs. Of Wildlife v. U.S. Dep't of Interior*, 931 F.3d 339, 357-60 (4th Cir. 2019).

D. In Withdrawing the Independent Contractor Rule, the Department Significantly Understated the Costs to Regulated Parties.

The Department's Motion also fails to justify the Department's conclusion that "[t]he Rule's withdrawal does not impose new compliance costs on the regulated community[] because it imposes no new requirements." 86 Fed. Reg. 24,319. Defendant's Motion fails to address the

Fifth Circuit's holding in *Texas Ass'n of Mfrs. v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 376, 387 (5th Cir. 2021), cited in Plaintiffs' Motion. As previously stated, the Fifth Circuit has held that agency action may be arbitrary and capricious for failing to consider costs, *even where agency action merely extends requirements already in place*, as the Department has done here. *Id*.

As in the Withdrawal Rule itself, the Department's Motion ignores the Independent Contractor Rule's intention to *reduce* the costs of compliance under the FLSA (*see* 86 Fed. Reg. 1211), which the Department continues to agree "may be higher under the current interpretation of the FLSA than under the interpretation contained in the Independent Contractor Rule." 86 Fed. Reg. 24,319. Yet the Department proceeded with the Withdrawal Rule without substantively addressing this critically important factor motivating the Department's adoption of the Independent Contractor Rule in the first place.

The fundamental defect in the Withdrawal Rule, not addressed in the Department's Motion, is that the current standard, as applied by the courts, has failed to provide adequate guidance and has thereby increased the costs to the regulated community, which the Independent Contractor Rule addressed, but the Withdrawal Rule (and Defendant's Motion) does not. The extension of the status quo is itself harmful due to its failure to address the reliance interests of businesses and independent contractors. *See Encino Motorcars*, 136 S. Ct. at 2125-26; *see also Tex. Ass'n of Mfrs.*, 989 F.3d at 376; *Clean Air Council*, 862 F.3d at 7. That harm can only be remedied by an injunction reinstating the Independent Contractor Rule.

CONCLUSION

For each of the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and deny Defendants' Cross-Motion. The Court should hold both the Delay Rule and Withdrawal Rule unlawful, and vacate and set aside each rule, together or separately, under 5 U.S.C. § 706.

Dated: September 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, the foregoing Opposition and Reply to Defendants' Cross-Motion for Summary Judgment and Opposition was electronically filed with the Clerk of the Court, utilizing the ECF system, which sent notification of such filing to counsel for Defendants:

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