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' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, the Coalition for Workforce Innovation ("CWI"), Associated Builders and Contractors of Southeast Texas, Inc. ("ABCST"), Associated Builders and Contractors, Inc. ("ABCN"), and the Financial Services Institute, Inc. ("FSI"), hereby move for summary judgment on all counts of their Amended Complaint challenging the U.S. Department of Labor's ("Department's") rules delaying and then withdrawing the final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" ("Independent Contractor Rule"), 86 Fed. Reg. 1,168 (Jan. 7, 2021). More specifically, Plaintiffs are challenging the final rule promulgated by the Department on March 4, 2021 entitled, "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date," (hereafter the "Delay Rule"), 86 Fed. Reg. 12,535 (Mar. 4, 2021); as well as the Final Rule entitled "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal," 86 Fed. Reg. 24,303 (May 6, 2021) (the "Withdrawal Rule"). Plaintiffs are challenging both rules under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*., and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. As further grounds for their Motion, and as more fully explained below, Plaintiffs state as follows:

1. The Department's Independent Contractor Rule identified and addressed a great need in the regulated community for clarification and greater uniformity as to the classification of independent contractors under the FLSA. The Department reconciled inconsistent and confusing court rulings causing great harm to businesses and independent contractors, by providing clearer guidance to the regulated community and a safe harbor from costly litigation, thereby promising to reduce Plaintiffs' costs and encouraging economic growth.

2. By delaying and then withdrawing the Independent Contractor Rule, the Department left in place and failed to address the chaotic and costly state of affairs with regard to independent contractor classification previously identified in the Department's Rule, directly harming Plaintiffs' members and many other businesses and independent contractors.

3. The Delay Rule unlawfully purported to "freeze" the Independent Contractor Rule by failing to engage in adequate notice and comment as required by the APA, and by imposing an arbitrary and capricious decision to delay the Rule without engaging in reasoned decision making.

4. The Withdrawal Rule compounded the Delay Rule's failure to address the serious problems identified and corrected by the Independent Contractor Rule. The Withdrawal Rule also ignored or mischaracterized substantial data supporting the Independent Contractor Rule, and reversed course without any adequate explanation or identification of new factors that the Department previously failed to consider. The Withdrawal Rule also relied on an erroneous legal standard for interpreting the FLSA. For the reasons detailed below, the challenged rules should be declared invalid and the Independent Contractor Rule should be allowed to go into effect.

STATEMENT OF ISSUES

I. Whether the Department's decision to delay the effective date of the Independent Contractor Rule violated the Administrative Procedure Act's notice and comment requirements, or was otherwise arbitrary, capricious, or contrary to law.

II. Whether the Department's decision to withdraw the Independent Contractor Rule was arbitrary, capricious, or otherwise contrary to law in violation of the Administrative Procedure Act.

STANDARD OF REVIEW

This case presents purely legal questions of statutory authority and administrative law that may be resolved at the summary judgment stage based upon the administrative record before the agency. *Bishop v. Bostick*, 2015 U.S. Dist. LEXIS 128305, at *11 (E.D. Tex. 2015) ("The summary judgment mechanism is particularly appropriate for the review of a decision of a federal administrative agency.") *See also Girling Health Care v. Shalala*, 85 F.3d 211, 214 (5th Cir. 1996).

The Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Vacatur is called for where the agency has unlawfully purported to pause, delay or rescind a final rule. *See Puget Soundkeeper All. v. Wheeler*, 2018 U.S. Dist. LEXIS 199358, at *19-20 (W.D. Wash. 2018).

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012); *see also Brackeen v. Haaland*, 994 F.3d 249, 356 (5th Cir. 2021) (*en banc*).

As stipulated by the parties (ECF #12), and in accordance with this Court's scheduling order (ECF #16), no discovery is required in the case because the Court's APA review is generally confined to the Administrative Record. All material excerpts from the Administrative Record cited in this Motion will be included in the Joint Appendix ("JA") which will be jointly submitted by the parties following conclusion of the briefing on the parties' cross-motions. (ECF #16).

STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

A. The Independent Contractor Rule Under the Fair Labor Standards Act

1. On September 25, 2020, the Department published a Notice of Proposed Rulemaking ("NPRM") through which it proposed to amend title 29 of the Code of Federal Regulations by adding a new part 795 setting forth and clarifying the standards by which the Department will deem workers to be statutory "employees" or independent contractors under the FLSA. *See generally* 85 Fed. Reg. 60,600. During the 30-day comment period on the NPRM, the Department received more than 1,800 comments from interested stakeholders. 86 Fed. Reg. 1,171.

2. On January 7, 2021, the Department issued the final Independent Contractor Rule. *See generally* 86 Fed. Reg. 1,168. The Rule included an extensive review of the comments received during the rulemaking process and offered the Department's reasoned basis for adopting some changes suggested by commenters, while declining to adopt others. *Id*.

3. The Administrative Record in support of the Rule included many comments from businesses and independent contractors, including comments from the Plaintiffs and organizations representing similar interests, describing great uncertainty as to how to classify individuals under the existing morass of federal and state court decisions and conflicting standards. CWI Comments Regarding Independent Contractor Rule, at 7; ABC Comments Regarding Independent Contractor Rule, at 2, 4; FSI Comments Regarding Independent Contractor Rule, at 3. Plaintiffs and other businesses reported significant increases in litigation costs and the adverse impact of the *status quo* on business growth, business valuation, and innovation, as well as the adverse impact on freelance contractor business opportunities. *See, e.g.*, ABC Comments Regarding Independent

[1] All statements of undisputed material facts are derived from the Administrative Record ("AR"), as certified by Defendants. (ECF #17).

Contractor Rule, at 1, 3; CWI Comments Regarding Independent Contractor Rule, at 31.

4. The Independent Contractor Rule thoroughly analyzed the chaotic state of the FLSA's application to independent contractor classifications, focusing on the longstanding economic reality test under the Act, while sharpening the factors used to update and apply that test to the modern business environment. 86 Fed. Reg. 1172. Based on this analysis of extant case law, the Department found that "control" over work performance and the opportunity for profit or loss are the most probative of whether workers are economically dependent on another business or are in business for themselves, exhaustively citing cases to this effect. 86 Fed. Reg. 1,168.

5. The Independent Contractor Rule also included a robust economic analysis of the costs and benefits of the Independent Contractor Rule's standard. *See generally* 86 Fed. Reg. 1,168. Specifically, the Independent Contractor Rule concluded that "The Department estimates cost savings due to increased clarity to be $447.1 million per year, and cost savings due to reduced litigation to be $48.7 million per year." 86 Fed. Reg. 1211.

6. The final Rule amended the Code of Federal Regulations by adding a new part 795, 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). The Rule directly benefitted Plaintiffs' member companies and independent contractors (and many others) by thus creating a "safe harbor" from some aspects of the confused and conflicting litigation arising under the FLSA in recent years. *See id*.

7. The Independent Contractor Rule reflected consideration of relevant facts and statutory and other legal considerations, including consideration of contrary facts and arguments. *See, e.g.*, 86 Fed. Reg 1180-85 (discussing comments). The Rule included an exhaustive description and citations to the hundreds of authorities, facts, data and other analyses on which the Department relied. The Department cited numerous commentators with whom it agreed and those with whom it disagreed, and the Department explained its reasoning throughout the Final Rule. *See* 86 Fed. Reg. at 1168-1175, 1178-1196, 1209-1234.

B. The Delay Rule

8. On January 20, 2021, the Assistant to the President and Chief of Staff, on behalf of newly-inaugurated President Biden, published a "Memorandum for the Heads of Executive Departments and Agencies" titled "Regulatory Freeze Pending Review" ("Regulatory Freeze Memorandum"). 86 Fed. Reg. 7,424.

9. The Regulatory Freeze Memorandum directed heads of executive departments and agencies to "consider postponing the rules' effective dates for 60 days from the date of this memorandum...for the purpose of reviewing any questions of fact, law, and policy the rules may raise," without citing statutory authority for its directive. *Id*.

10. The Regulatory Freeze Memorandum further directed heads of executive departments and agencies to "consider opening a 30-day comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules, and consider pending petitions for reconsideration involving such rules," but did not authorize a delay in a final rule's effective date beyond 60 days after Inauguration Day. *Id*.

11. Also, on January 20, 2021, the Office of Management and Budget ("OMB") published OMB Memorandum M-21-14, Implementation of Memorandum Concerning

Regulatory Freeze Pending Review ("OMB Memorandum").[2] The OMB Memorandum declared that agency decisions whether to postpone the effective date of published rules not yet in effect "should include consideration" of eight specific factors set forth therein. *See id.* The OMB Memorandum, like the Regulatory Freeze Memorandum, did not authorize a delay in a final rule's effective date beyond 60 days after Inauguration Day. *Id*.

12. On February 5, 2021, the Department proposed to delay the effective date of the Independent Contractor Rule until May 7, 2021, well beyond the 60-day delay authorized by the White House. 86 Fed. Reg. 8,326. The proposal indicated that the sole purpose of the delay was for the Department to "review and consider the rule as the Regulatory Freeze Memorandum and OMB Memorandum M-21-14 contemplate," specifically the "legal, policy, and/or enforcement implications of adopting that standard." 86 Fed. Reg. 8,327.

13. According to the Department, the Independent Contractor Rule "would adopt a new legal standard for determining employee and independent contractor status under the FLSA." 86 Fed. Reg. 8,327. The Department further asserted that the proposed delay was reasonable and would not be disruptive since the "independent contractor final rule is not yet effective, and [the Department] has not implemented the rule." *Id.*

14. The NPRM required comments to be submitted by February 24, 2021, *i.e*., only 19 days from the date of the notice, and stated that the Department "[would] consider only comments about its proposal to delay the rule's effective date." *Id*.

15. On February 22, 2021, Plaintiff ABC filed a request for extension of time to file

[2] *See* OMB Memorandum M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf (last visited Aug. 1, 2021).

comments and further protested the Department's restriction on the nature of comments which could be filed. *See* ABC Request for Extension of Time; ABC Comments on Delay Rule. CWI and FSI also filed comments criticizing the Department's truncated comment period and the unauthorized delay of the March effective date. *See* CWI Comments on Delay Rule; FSI Comments on Delay Rule. The Department denied the extension request on February 24, 2021. *See* Department's Feb. 24, 2021 Response to Extension Requests.

16. On March 4, 2021, the Department published the final Delay Rule, which stated that "[a]s of March 4, 2021, the effective date of the Independent Contractor Rule...is delayed until May 7, 2021." 86 Fed. Reg. 12,535.

C. The Withdrawal Rule

17. On March 12, 2021, within eight days after purporting to extend the effective date of the Independent Contractor Rule, the Department published a proposed "withdrawal" of the Independent Contractor Rule. 86 Fed. Reg. 14,027. In explaining its proposal to withdraw the Independent Contractor Rule, the Department highlighted that the Independent Contractor Rule "ha[d] not yet taken effect" (86 Fed. Reg. 14,031), and that accordingly, the Department "[did] not believe that withdrawing it would be disruptive." 86 Fed. Reg. 14,035.

18. Though numerous parties asked for extensions of time to file comments, the Department again denied all such requests. AR, Department's Apr. 10, 2021, Response to Extension Requests.

19. On May 6, 2021, the Department issued the Withdrawal Rule purporting to withdraw the Independent Contractor Rule, after concluding that the Department had "good cause to make this rule effective immediately upon publication." 86 Fed. Reg. 24,303, 24,320.

20. The Withdrawal Rule entirely failed to address the main problem that the Independent Contractor Rule was enacted to resolve, *i.e.*, the costly, conflicting, and confusing state of litigation over this issue under the morass of standards embraced by different courts. *Id*. The Department conceded in the Withdrawal Rule that the "ongoing costs of complying with the FLSA...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.

21. The Department contended that the Independent Contractor Rule improperly "elevat[ed] two factors" above other factors recognized by the Department, claiming that the Rule thereby conflicted with the FLSA, congressional intent, and precedent interpreting the FLSA. 86 Fed. Reg. 24,309. The Department rejected the Independent Contractor Rule's exhaustive discussion of case law supporting its analysis as "incomplete" because it "did not provide full documentation or citations for its case law review;" though the Withdrawal Rule failed to cite any contrary authority regarding the relative importance of the factors. *See* 86 Fed. Reg. 24,309-310.

22. The Department also asserted, contrary to record evidence, that it was "inappropriate to conclude independent contractors generally earn a higher hourly wage than employees do," even though the Department acknowledged that "[a] simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees do." 86 Fed. Reg. 24,325 (noting that 2017 data show that independent contractors earn approximately $3 more per hour than employees).

23. Finally, in discussing the costs associated with the Withdrawal Rule, the Department concluded 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. But the Department conceded the ongoing costs to the business community "may be higher under the

current interpretation of the FLSA than under the interpretation contained in the Independent Contractor Rule." *Id.*

24. The Department further concluded that withdrawing the Independent Contractor Rule would not be disruptive, because the Rule did not go into effect, thereby ignoring the reduced costs and safe harbor that had been promised by the Rule, which benefits would now be lost. 86 Fed. Reg. 24,319.

25. In response to comments arguing that the Department should have awaited the outcome of this lawsuit challenging the Delay Rule, on which the Withdrawal Rule as proposed was premised, the Department for the first time asserted in contradiction to its own proposed rule that "the Department would withdraw the Independent Contractor Rule even if it were currently in effect." *Id*. at 24,319-320.

D. Injury to the Plaintiffs and Their Members

26. Plaintiffs CWI, ABC, and FSI represent businesses in Texas and around the country who utilize the skills of independent contractors, as well as many independent contractors themselves. CWI Comments at 1-4; ABC Comments at 2; FSI Comments at 1-2. Because Plaintiffs' members include many businesses using the services of independent contractors and/or whose members are independent contractors themselves, Plaintiffs' members are direct objects of the Independent Contractor Rule, Delay Rule, and Withdrawal Rule. Plaintiffs each filed comments in the Administrative Record opposing the Delay Rule and the Withdrawal Rule, and explaining the harms incurred by their members due to the Delay Rule and the Withdrawal Rule, as did many other similar business organizations.

27. Plaintiff CWI represents a diverse array of workers, small businesses, start-ups, entrepreneurs, technology companies, as well as traditional businesses and associations in the

media, transportation, distribution, retail and service industries. CWI Comments Regarding Withdrawal Rule, at 1.[3] CWI supported the Independent Contractor Rule, and opposed its Delay and Withdrawal, because the Rule is urgently needed to provide clarity and a safe harbor to CWI's members and their constituents attempting to cope with the chaotic case law dealing with classification of workers under the FLSA. *Id*. Without the Rule, CWI members and the businesses they represent will continue to suffer from increased costs, liabilities, and uncertainty in the current litigation environment, discouraging investment and growth opportunities for businesses and independent contractors alike. *Id*. at 7.

28. Similar direct injuries are imposed by the Delay and Withdrawal Rules on Plaintiff ABC and its Southeast Texas Chapter, a national and local construction industry trade association that helps its members work safely, ethically, and profitably. As set forth in ABC's comments in the Administrative Record, construction contractors are increasingly being placed in jeopardy from expensive and time-consuming litigation and less efficient performance of construction work due to classification costs and confusion. ABC Comments On Withdrawal Rule, at.7.

29. Plaintiff FSI advocates on behalf of independent financial advisors and financial services firms and works to improve the regulatory environment impacting its members. As stated in FSI's comments, the Independent Contractor Rule is "critical to FSI members who are and wish to remain independent contractors without the uncertainties and costs associated with [the current standard without the Rule]." FSI Comments Regarding Withdrawal Rule, at.2. Expressing the view of the independent contractors they represent, FSI identified in the Administrative Record the disruptive effect of the Delay and Withdrawal Rules on their members' independent contractor

[3] A detailed listing of CWI's member associations and businesses represented is provided in the comments in the Administrative Record, attached as exhibits.

status. *Id*.

30. In issuing the Independent Contractor Rule, the Department explained that "prior articulations of the test [to determine independent contractor status] have proven unclear and unwieldy," increasing business costs and uncertainty. 86 Fed. Reg. 1172. The Delay Rule and the Withdrawal Rule—by preventing the Independent Contractor Rule from going into effect—have exposed Plaintiffs' members to heightened litigation and compliance costs. *See, e.g.*, FSI Comments Regarding Delay Rule; ABC Comments Regarding Withdrawal Rule. The Department itself has conceded that covered businesses and contractors' costs can be expected to be higher as a result of the Withdrawal of the Rule. 86 Fed. Reg. 24,319.

STANDING

Based on the undisputed facts in the Administrative Record set forth above, Plaintiffs plainly represent businesses and contractors who are the objects of and directly injured by the challenged Delay and Withdrawal Rules, and therefore have standing to sue under Article III. They have certainly "present[ed] (1) an actual or imminent injury that is concrete and particularized, (2) fairly traceable to the defendant's conduct, and (3) redressable by a judgment in [their] favor." *Contender Farms, LLP v. USDA*, 779 F.3d 258, 264 (5th Cir. 2015). "If [an entity] is an object of a regulation there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)).

It is also well settled that trade associations may demonstrate standing to sue on behalf of their members, regardless of whether the trade associations themselves have standing, where (1) the plaintiffs' members are injured and so would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to the plaintiffs' organizational purposes; and (3)

neither the claims asserted nor the relief requested requires the participation of the plaintiffs' individual members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 343 (5th Cir. 2012).

Here, Plaintiffs CWI, ABC, and FSI are state or national trade associations representing businesses in Texas and around the country who utilize the skills of independent contractors, and Plaintiffs also represent many independent contractors themselves. SOF ¶¶ 26-30. Plaintiffs' members were therefore the "objects" of the Independent Contractor Rule, Delay Rule, and Withdrawal Rule. *See Contender Farms, LLP*, 779 F.3d at 264. Plaintiffs' member businesses and independent contractors were intended beneficiaries of the clarified guidance, safe harbor and reduced costs of litigation derived from the Independent Contractor Rule. They are consequently injured by the Delay Rule and the Withdrawal Rule, which purport to prevent the Independent Contractor Rule from going into effect, thereby exposing Plaintiffs' members to heightened uncertainty and increased likelihood of misclassification liabilities and litigation costs, including loss of the safe harbor promised by the Independent Contractor Rule. *See, e.g.*, SOF ¶¶ 26-30.

Plaintiffs organizational purposes include protection of their members from costly litigation, which in turn allows members to focus their resources on their business goals, and this suit is clearly germane to Plaintiffs' organizational purposes in support of their business and independent contractor members. *See Hunt*, 432 U.S. at 344. Finally, because Plaintiffs seek "declaratory and injunctive relief" based on the Administrative Record, Plaintiffs' claims do not "require[] individualized proof and...are thus properly resolved in a group context." *See Hunt*, 432 U.S. at 344. Accordingly, Plaintiffs have demonstrated that they have associational standing here to challenge the Department's actions here relating to both the Delay Rule and Withdrawal Rule.

SUMMARY OF ARGUMENT

In promulgating the Independent Contractor Rule in January 2021, the Department addressed widespread confusion, increased liabilities and litigation costs arising out of the chaotic application of the Department's seven-part economic realities test for contractor status. As attested by businesses and independent contractors alike, the Rule provided much-needed clarity and a safe harbor to reduce litigation costs and bring greater certainty to the classification process. The Department's sudden and unjustified actions in first delaying and then withdrawing the Rule by May 2021 violated both the procedure and the substance of the APA.

As further explained below, the Department's Delay Rule failed to follow mandatory notice and comment procedures and failed to address the serious litigation cost problems identified and corrected by the Rule, a strong indicator of arbitrary and capricious decision making. While claiming to have avoided "disruption" by stopping the Rule from going into effect, the Department ignored the record evidence that returning to the *status quo* imposes higher costs on the regulated community and chills economic growth. In so doing, the Department has exhibited an improper bias against independent contracting, contrary to the FLSA.

The Withdrawal Rule compounded the Delay Rule's failure to address the serious problems identified and corrected by the Independent Contractor Rule. The Withdrawal Rule again relied on an erroneous "anti-contractor" legal standard in interpreting the FLSA. The Withdrawal Rule also ignored or mischaracterized substantial data supporting the Independent Contractor Rule, and reversed course without adequate consideration of the reliance interests in support of independent contracting. 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.

ARGUMENT

I. THE DELAY RULE VIOLATED THE APA'S REQUIREMENTS.

A. The Department Failed to Satisfy the APA's Mandatory Notice and Comment Requirements Prior to Issuing The Delay Rule.

Under the APA, absent exceptions not present here, agency rules must "undergo notice and comment" prior to taking effect. *See Texas v. United States*, 2021 U.S. Dist. LEXIS 33890, at *120-22 (S.D. Tex. Feb. 23, 2021); *see also Dialysis Patient Citizens v. Burwell*, 2017 U.S. Dist. LEXIS 10145, at 10 (E.D. Tex. Jan. 25, 2017) ("The 'APA's notice and comment exemptions must be narrowly construed.'") 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 *6-7 (W.D. Tex. May 15, 2018) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015)). Indeed, an agency's efforts to comply with the APA's notice and comment requirements "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).

Here, the Independent Contractor Rule contains numerous hallmarks of "legislative" and "substantive" rulemaking, starting with the use of notice and comment rulemaking itself. *Perez*, 575 U.S. at 96 ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules.'"). 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. *Compare* 86 Fed. Reg. 1,246, *with Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015).

Where notice and comment procedures are otherwise required, an agency does not have inherent authority to stay a rule as it reconsiders it. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). Rather, an agency's action in delaying a rule's effective date is "tantamount to amending or revoking a rule," and accordingly, is not "merely an interim procedural step." *Nat'l Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 n.5, 113 (2d Cir. 2018); *Clean Air Council*, 862 F.3d at 6. A delay of a legislative rule's effective date, accordingly, is subject to the APA's notice and comment requirements. *See Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 162-63 (D.D.C. 2017); *see also Pineros Y Campesinos Unidos v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018).

Under the APA, the "opportunity for comment must be a meaningful opportunity." *Rural Cellular Association v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). Courts have concluded that the express exclusion of substantive commentary with respect to the underlying subject matter of a proposed suspension violates the APA's notice and comment requirements. *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 769-70; *Puget Soundkeeper All.,* 2018 U.S. Dist. LEXIS 199358, at *13-14. Courts have additionally concluded that an agency must use the same procedures when enacting and repealing a rule. *See Colliot*, 2018 U.S. Dist. LEXIS 83159, at *6-7 (quoting *Perez*, 575 U.S. at 101).

Here**,** the Department only considered comments concerning a delay of the Independent Contractor Rule. 86 Fed. Reg. 8,327 ("[The Department] will consider only comments about its proposal to delay the rule's effective date."). To the contrary, the Department was required to consider comments covering the same topics that the Department considered in enacting the Independent Contractor Rule. *See Colliot*, 2018 U.S. Dist. LEXIS 83159, at *6-7 (quoting *Perez*, 575 U.S. at 101); *see also Puget Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *13-14.

In addition, the APA specifically requires agencies to provide at least 30-days notice in promulgating a rule, unless the agency can demonstrate good cause for a shorter period. *See* 5 U.S.C. § 553(d)(3). Comment periods of less than thirty days have been found to violate the APA. *See Prometheus Radio Project v. FCC,* 652 F.3d 431, 453 (3d Cir. 2011) (noting 28-day comment period did not provide "sufficient time" for commenters); *see also Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (noting that "[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment"); 86 Fed. Reg. 7,424 (calling for agencies to allow a "30-day" comment period prior to delaying final rules).

Courts have held that reducing the number of days for comments below thirty days requires good cause and substantial exigent circumstances to justify what is otherwise an unreasonably short period of time for public comments. *See, e.g.*, *Omnipoint Corp v. FCC*, 78 F.3d 620, 629 (D.C. Cir. 1996) (finding 15-day comment period permissible only "given the 'urgent necessity for rapid administrative action under the circumstances'"); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1984) (finding 15-day comment period sufficient where Congress imposed a deadline for agency action).

An agency does not automatically demonstrate good cause for dispensing with the APA's 30-day notice requirement by stating that a rule's effects are limited or that the rule only provides interim relief. *See Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992). Indeed, "[w]ere the opposite true, agencies could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency. Should this be allowed, the good cause exception would soon swallow the notice and comment rule." *See id.* Moreover, "[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 of the APA. *Id., see also Pineros Y Campesinos Unidos*, 293 F. Supp. 3d at 1067.

Here the Department set the period for submission of comments on the Delay Rule at nineteen days. 86 Fed. Reg. 8,327. The Department failed to demonstrate good cause to justify such a truncated comment period. The Department's arbitrary desire to prevent the Rule from going into effect as scheduled on March 8 certainly did not constitute good cause, since the Department could have started the rulemaking more than 30 days beforehand. *See* 86 Fed. Reg. 12,537; *See Nat'l Resources Def. Council*, 894 F.3d at 114 (rejecting an agency's argument that it had good cause to suspend a rule's effective date without notice and comment because the effective date of the rule was "imminent," explaining that "[a]ny imminence was [the agency's] own creation"); *see also Tennessee Gas Pipeline Co.*, 969 F.2d at 1145.

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, 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." *Compare* 86 Fed. Reg. 12,535, *with*, *California v. BLM*, 286 F. Supp. 3d 1054, 1064-65 (N.D. Cal. 2018). The Department claimed a sudden need to allow more consideration of "significant and complex" issues (86 Fed. Reg. 12,536), but the Department did not address the fact that each of the aforementioned issues had *already been considered* and decided by the Department prior to adoption of the Independent Contractor Rule. *See also Louisiana v. Biden*, 2021 U.S. Dist. LEXIS 112316, at **8, 52-53 (finding "pause" in implementing regulation likely to be arbitrary and capricious).

The Department's citations to the Regulatory Freeze Memorandum and OMB Memorandum certainly do not justify the Department's decision to change course; indeed, the Department's failure to adhere to the factors identified in the OMB Memorandum constitutes further evidence of arbitrary and capricious decision making. *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); *see also 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).

Even if the Department's justifications for promulgating the Delay Rule did not exceed the scope of the OMB Memorandum, moreover, the Department violated the APA by improperly relying 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. To the contrary, the Independent Contractor Rule retained 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 applied this test across different circuits. *See* 86 Fed. Reg. 1,168. 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 41-43 (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").

The Department also incorrectly justified 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*, 862 F.3d at 7 ("[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 used the procedurally deficient Delay Rule to justify the subsequent Withdrawal Rule. *See* 86 Fed. Reg. 14,036 ("If this withdrawal rule goes forward as proposed, the [Independent Contractor] Rule will never have been in effect."). Of course, had the Department adhered to the APA's requirements, the Independent Contractor Rule would have gone into effect. *See* 86 Fed. Reg. 12,537 ("Had the Department allowed for a longer comment period, the Independent Contractor Rule would have taken effect before the delay could begin."). 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 in its proposed Withdrawal Rule. *See* 86 Fed. Reg. 14,035. As a result, the Department cannot 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).

The Department's after-the-fact contention that it would have "withdraw[n] the Independent Contractor Rule even if it were currently in effect," was inconsistent with the argument that it presented in its proposed Withdrawal Rule, specifically stating 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) ("[A]n agency's statements are unpersuasive when they are 'internally inconsistent' and 'fail to provide clear direction to regulated parties.'"). 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 764-65; *Puget Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *13-14. In both cases the court vacated the agencies' purported suspension of the effective dates of the rules at issue. The same result should occur here.

II. INDEPENDENT OF THE UNLAWFUL DELAY RULE, THE WITHDRAWAL RULE IS ITSELF ARBITRARY, CAPRICIOUS, OR OTHERWISE CONTRARY TO LAW IN VIOLATION OF THE APA

As noted above, a change in presidential administration does not license an agency to disregard the APA's requirements. *See, e.g.*, *Pineros Y Campesinos Unidos*, 293 F. Supp. 3d at 1067; *Nat'l Resources Def. Council*, 894 F.3d at 114. Rather, an agency "must...provide good reasons" for suspending or rescinding a rule. *State Farm*, 463 U.S. at 44; *California v. BLM*, 286 F. Supp. 3d at 1064-65. Indeed, the agency "must provide … a 'detailed justification' to explain why it is changing course" and an agency may not "casually ignor[e]" its previous findings and

"arbitrarily chang[e] course." *California v. BLM*, 286 F. Supp. 3d at 1064, 1068; *see also Connecticut Light & Power Co. v. Nuclear Regulatory Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982).

The Supreme Court has repeatedly held that agencies act arbitrarily when they change course without dealing with the important aspects of the problem addressed by the rule they purport to reconsider. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *State Farm*, 463 U.S. at 43 (1983) ("An agency's action is arbitrary and capricious, … where it fails to consider important aspects of the problem…."). Agency reversals have also been vacated where they rely on factors that they should not have considered, and where they offer explanations for new rules that run counter to the evidence. *Id.*; *see also FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009). The use of internally contradictory reasoning also indicates arbitrary action. *See Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th Cir. 2019) ("[T]he agency's rationales contradict themselves...and therefore cannot stand."). The agency must also consider costs to regulated parties, as well as the reliance interests of the regulated parties. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*). An agency must also consider such costs even where the agency action at issue merely continues the *status quo*. *See Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 387 (5th Cir. 2021). All of these defects are evident in the Withdrawal Rule, as further discussed below.

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

In promulgating the Withdrawal Rule, the Department failed to consider (other than in the most cursory way) 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. As noted above, 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,* 140 S. Ct. at 1910, citing approvingly *State Farm*, 463 U.S. at 43, each of which struck down sudden agency reversals of direction that failed to address important aspects of the problems dealt with by rescinded rules. *See also*, *East Bay Sanctuary v. Garland*, 994 F.3d 962, 991 (9th Cir. 2021); *New York v. Dep't of Health & Human Servs.,* 414 F. Supp. 3d 475, 555 (S.D.N.Y. 2019). *Compare Brackeen*, 994 F.3d 249 (where this factor was not present).

Here, the Independent Contractor Rule, and the plaintiffs in their comments, repeatedly explained that 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* SOF ¶¶ 3-7, 21-31, and Administrative Record comments cited therein. The Independent Contractor Rule described at length the costs associated with the existing state of confusion over the proper application of the seven-factor test; and the Rule squarely addressed the existing state of confusion by clarifying the existing standards. *See* 86 Fed. Reg. 1172. And although the Department contended in the Withdrawal Rule that the Independent Contractor Rule would not have created added clarity (86 Fed. Reg. 24,316), this conclusion gave short shrift to the overwhelming view of the regulated business community, *i.e.*, those whose job it is to interpret and comply with the Department's rules in an increasingly litigious society.

Virtually every business entity and many independent contractors who commented on the Rule(s) said the Independent Contractor Rule provided clearer guidance that would reduce litigation costs and provide greater certainty needed for investment. Conversely, the regulated businesses and independent contractors overwhelmingly asserted that the Withdrawal Rule would

deny businesses any safe harbor from such litigation, leaving only the chaotic *status quo*.[4] The Withdrawal Rule does 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.

In nevertheless withdrawing the Rule, the Department made no substantive effort to address the problem it had previously identified therein, *i.e.*, the confusion and resulting litigation costs arising from the current standard. Accordingly, the Department, like the agencies in *State Farm* and its progeny, used its concerns over some aspects of the Independent Contractor Rule to justify reverting back to the previously existing deficient standard, without meaningfully addressing the Department's own previous finding that the *status quo* did not effectively guide regulated parties or the courts.

As such, because the Department "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, the Department 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. *Id., see also New York*, 414 F. Supp. 3d at 555 (noting an agency's decision to address important considerations only "in passing and in a conclusory manner" to be "quintessentially arbitrary and capricious"). By withdrawing the Rule without addressing important aspects of the problem

[4] *See* 86 Fed. Reg. at 24,315-16, in which the Department cited (but chose to ignore) the testimony in this regard from the Plaintiffs and numerous additional business groups incorporated here by reference, including the Workplace Policy Institute, U.S. Chamber of Commerce, the American Trucking Association, the Society for Human Resource Management, the National Retail Federation, and the Competitive Enterprise Institute.

which 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.

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

Like the Delay Rule, the Withdrawal Rule mischaracterized the Independent Contractor Rule's content and purpose in identifying the core factors at the heart of the economic realities test described by the Supreme Court and many court decisions. Contrary to the Withdrawal Rule, the Independent Contractor Rule did not create a "new" standard, but rather provided clear and uniform guidance to businesses and independent workers that will better enable them to avoid misclassifications while providing entrepreneurial opportunities for millions of workers.

In arbitrarily dismissing its own previous findings in that regard, the Department's Withdrawal Rule improperly treated 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.").[5]

The Department's contention that "the Rule did not identify any court opinion that states that control and opportunity for profit or loss should be invariably prioritized over other factors," ignores the Independent Contractor Rule's explanation that "[f]ocusing on control and opportunity

[5] Contrary to the Supreme Court's holding, the Withdrawal Rule concludes that "to the extent the Rule would result in the reclassification … of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers." 86 Fed. Reg. 24,317 (emphasis added).

for profit or loss is further supported by the *results* of federal courts of appeals cases weighing the economic reality factors since 1975." *Compare* 86 Fed. Reg. 24,310 *with* 85 Fed. Reg. 60,619 (emphasis added).

The Department has thus reversed course without any adequate explanation or identification of new factors that the Department previously failed to consider. Indeed, the Department's attempt to justify withdrawing the Independent Contractor Rule by mischaracterizing it as a new standard is similar to agency reasoning that the district court rejected in *California v. Bureau of Land Management*, 286 F. Supp. 3d at 1065. There, an agency sought to suspend a rule based on a "newfound concern" about the rule's effects. The court rejected this argument because the agency "provide[d] no analysis or factual data to support this concern." *Id.*

Certainly, the Department has identified no factual or legal errors in the Department's thorough discussion of case law identifying the "core factors" applied by many courts within the rubric of the overall "economic realities" test. Instead, the Department now contends without support that its own previous analysis was an "oversimplifi[cation]," and "incomplete." 86 Fed. Reg. 24,309. To the contrary, like the deficient rule in *California v. BLM* that contained no "analysis or factual data" to support the agency's position (*see* 286 F. Supp. 3d at 1065), the Withdrawal Rule fails to cite any authority refuting the Independent Contractor Rule's exhaustive approach. The Independent Contractor Rule properly recognized the importance of the control and opportunity factors, within the scope of the extant case law applying a "multifactor test." *See, e.g.*, 86 Fed. Reg. 1,175.

Indeed, it is the Withdrawal Rule—and not the Independent Contractor Rule—that relies on an erroneous legal standard, by seeking to achieve the broadest remedial purpose regardless of cost. 86 Fed. Reg. 24,309. To the contrary, the Supreme Court requires the FLSA to be interpreted

"fairly," not to achieve the broadest remedial purpose, as the Department previously discussed in the Independent Contractor Rule. 86 Fed. Reg. 1,200, 1,207-08. *See Encino Motor Cars v. Navarro,* 138 S. Ct. 1134, 1142 (2018); *see also Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d 492 at 514 (observing that "the Supreme Court has noted, however, 'no law pursues its purpose at all costs'"); *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."). For this reason as well, Plaintiffs are entitled to summary judgment.

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

In the Withdrawal Rule, the Department also offers 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 Withdrawal Rule has specifically ignored or mischaracterized 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.[6]

Contrary to the Withdrawal Rule, the studies referenced by Plaintiffs in the Administrative Record show that independent workers overwhelmingly prefer remaining independent and do not

[6] *See, e.g*., the numerous studies cited in the CWI comments, including the National Survey, the Research and Analysis Report, SAP Fieldglass, Oxford Economics, Freelance Forward Study, Consumer Attitudes and Entrepreneurship Study, the Wonolo survey, and Katz & Krueger. The Department in the Independent Contractor Rule found these studies credibly proved independent workers overwhelmingly prefer to be classified as such, due to both greater work flexibility and higher earnings. Yet the same agency in the Withdrawal Rule casually dismissed the same data as "lacking evidence that such opportunities have been restricted," notwithstanding myriad comments stating the opposite. 86 Fed. Reg. at 24,323.

want to be treated as "employees" where the law does not require such treatment. *See also* 86 Fed. Reg. 1222 (where the Department itself cited the 2017 Contingent Worker Supplement to the Current Population Survey and noted that the responses of independent contractors were "indicative of non-monetary value derived from independent contractor status"). At the same time, the Withdrawal Rule improperly credits and relies on studies previously found by the Department to be inadequate to justify withdrawing the Independent Contractor Rule, such as the much criticized Economic Policy Institute (EPI) study.[7] As Plaintiff FSI correctly observed in its comments on the Withdrawal Rule, at 5: "DOL's economic analysis is improperly framed based on the incorrect assumption that independent contractors are simply workers who are misclassified."

Elsewhere in the Withdrawal Rule, the Department also arbitrarily concluded without adequate explanation that it was "inappropriate to conclude independent contractors generally earn a higher hourly wage than employees do;" yet the Department continued to state in the Withdrawal Rule that "[a] simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees do." 86 Fed. Reg. 24,325. And the data relied on by the Independent Contractor Rule is supported by the Administrative Record. Faced with similar agency inconsistencies, courts have refused to "rubber stamp agency action[s]" that ignore current data, as the Department has done here by disregarding the data demonstrating that independent

[7] The EPI study was justifiably criticized by the Department in the Independent Contractor Rule for making a hyperbolic claim that billions of dollars in transfers from workers to employers would result from the Rule. 86 Fed. Reg. at 1222. While attempting without success to rehabilitate the EPI study in the Withdrawal Rule, the Department even now admits that the "magnitude of [EPI's] estimate may be overstated." 86 Fed. Reg. at 24,322. *See also* Administrative Record Comments of the Mercatus Institute, casting further doubt on both the EPI study and the Department's new analysis.

contractors tend to earn more than employees earn. *See Defs. Of Wildlife v. U.S. Dep't of Interior*, 931 F.3d 339, 360 (4th Cir. 2019). In any event, regardless of its finding that "independent contractors tend to earn more per hour than employees do," the Department's subsequent conclusion that "no statistically significant difference" existed between the pay of independent contractors and employees after "controlling for (unspecified) observable differences" supports – and certainly does not refute – the Independent Contractor Rule. 86 Fed. Reg. 24,325.

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

Equally arbitrary is 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. In contrast to the Department's position here, the Fifth Circuit has determined 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. In *Texas Association of Manufacturers*, an agency sought to extend an interim prohibition on the use on the use of a chemical. *See Tex. Ass'n of Mfrs.*, 989 F.3d at 376. The Fifth Circuit concluded, however, that the agency "erred by failing to take a hard look at the costs and benefits of continuing...the interim prohibition." *Id.* at 387.

The Department's statement that the Withdrawal Rule "imposes no new requirements," moreover, ignores the Independent Contractor Rule's intention to *reduce* the costs of compliance under the FLSA, 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 Department further erred by concluding that withdrawing the Independent Contractor Rule would not be disruptive, and that it would expect any costs that regulated parties incurred in preparing for the Independent Contractor Rule to be "minimal." 86 Fed. Reg. 24,319. This finding ignores the illegality of the Delay Rule itself, which businesses were entitled to believe would be vacated in court due to its multiple violations of the APA. The Department's unsupported statement that it would have withdrawn the Independent Contractor Rule even if it had taken effect, *Id*. at 24,320, contradicts the NPRM's assertion that the delay would not be disruptive *because* the Independent Contractor Rule had not gone into effect (*see* 86 Fed. Reg. 8,327). This contradiction further evidences the arbitrariness of the entire process by which the Department has purported to withdraw the Rule.

The Department has also ignored the costs that regulated parties have incurred, both from the Withdrawal Rule itself and from the continuing costs that regulated parties will experience from the Department's current interpretation of the FLSA. *See See Tex. Ass'n of Mfrs.*, 989 F.3d at 376; *see also Clean Air Council*, 862 F.3d at 7. The Withdrawal Rule fails to meaningfully address the reliance interests of business and independent contractors who were depending on the Independent Contractor Rule to mitigate the chaotic litigation environment which the Rule analyzed in exhaustive detail. *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016);

CONCLUSION

For each of the reasons set forth above, Plaintiffs respectfully request that the Court grant this motion for summary judgment, hold the Delay Rule and Withdrawal Rule unlawful, and vacate and set aside both the Delay Rule and the Withdrawal Rule under 5 U.S.C. § 706.

Dated: August 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, the foregoing Motion for Summary Judgment 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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