20-3806(L)

20-3815(CON)

To Be Argued By:
NATASHA W. TELEANU

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 20-3806(L), 20-3815(CON)

STATE OF NEW YORK, COMMONWEALTH OF PENNSYLVANIA, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEW

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF WASHINGTON, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs-Appellees,

—v.—

EUGENE SCALIA, ESQ., SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA,

Defendants-Appellants,

INTERNATIONAL FRANCHISE ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, NATIONAL RETAIL FEDERATION, ASSOCIATED BUILDERS AND CONTRACTORS, and AMERICAN LODGING AND HOTEL ASSOCIATION,

Intervenor Defendants-Appellants.

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BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

The Fair Labor Standards Act ("FLSA") was enacted to provide protections for employees—namely, a federal minimum wage and overtime pay for covered workers. Some employees may have two or more employers who are jointly and severally liable for the wages due to the employee—*i.e.*, "joint employers." To assist in determining whether a joint employer relationship exists, the Department of Labor (the "Department") promulgated an interpretive rule (the "Joint Employer Rule") that sets forth a non-exclusive four-factor balancing test for scenarios when an employer employs an employee for one set of hours in a workweek and that work simultaneously benefits another person. Sixteen states and the District of Columbia ("the states") challenged that interpretive rule, and the district court vacated substantial portions of it.

That judgment should be reversed. To begin with, the states that brought this action lack standing, as the injuries they allege will result from the Joint Employer Rule are not tied to any legally cognizable interest at stake. Nor may they sue under a *parens patriae*

theory on behalf of their residents to challenge an action of the federal government. And even if they did have a cognizable injury, it is far removed from the zone of interests protected by the FLSA.

If the Court reaches the merits, it should uphold the Joint Employer Rule. The Rule tethers its multifactor balancing test to the FLSA's definition of "employer," the part of the statute that is most pertinent to whether an employee has another employer for his or her work, and in doing so is consistent with both the FLSA and Supreme Court precedent. While numerous courts, including this one, have adopted other tests for joint employer status, the Department correctly concluded that no definition would be consistent with all of those tests, and reasonably sought to promote uniformity in the enforcement of an important national statute. The Joint Employer Rule passes the deferential standard of review under the Administrative Procedure Act (the "APA"), and the district court's judgment should be reversed.

Jurisdictional Statement

As explained below, the district court lacked jurisdiction over this action, which the plaintiff states invoked under 28 U.S.C. § 1331. (Joint Appendix ("JA") 31). On September 8, 2020, the district court entered final judgment. (Special Appendix ("SPA") 89-90). The Department timely filed a notice of appeal on November 6, 2020. (JA 682-83). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether this action should have been dismissed at the outset, either because the states have not suffered an injury in fact sufficient to establish standing to sue, or because the interests they assert are outside the zone of interests protected by the FLSA.

2. Whether the Department's Rule should be upheld, because its reliance on section 3(d) of the FLSA —which defines "employer"—as the sole textual basis for its multi-factor balancing test to determine whether a potential joint employer is liable under the FLSA and its interpretation of that multi-factor balancing test were reasonable, and because its revision of its approach was not arbitrary and capricious.

Statement of the Case

A. Procedural History

The states commenced this action on February 26, 2020. (JA 28-82). On May 11, 2020, the Department moved to dismiss the complaint. (JA 16-17; Dist. Ct. ECF Nos. 62-63). In an order dated June 1, 2020, the district court (Gregory H. Woods, J.) denied the Department's motion. (SPA 1-26); 464 F. Supp. 3d 528 (S.D.N.Y. 2020). On September 8, 2020, the district court granted in part and denied in part the parties' cross motions for summary judgment, held that the Joint Employer Rule conflicted with the FLSA and was arbitrary and capricious, vacated portions of the Rule, and severed the remaining portion of the regulation. (SPA 27-88). The Department appealed the district court's judgment on November 6, 2020. (JA 682-83).

B. The Fair Labor Standards Act and Prior Joint Employer Regulation and Guidance

The FLSA requires covered employers to pay their non-exempt employees at least the federal minimum wage for every hour worked, and overtime pay for every hour worked over forty in a workweek. 29 U.S.C. §§ 206(a), 207(a). The FLSA defines "employee" as "any individual employed by an employer," *id.* § 203(e)(1), and "employer" to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee," *id.* § 203(d). The statute provides that the term "'[e]mploy' includes to suffer or permit to work." *Id.* § 203(g).

Since the enactment of the FLSA in 1938, the Department has recognized that an employee may have two or more employers who are jointly and severally liable for the employee's wages. In 1939, the Department's Wage and Hour Division issued an interpretive bulletin that addressed, among other things, whether two or more companies could be jointly and severally liable for a single employee's hours worked under the FLSA. *See* Interpretative Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation under the Fair Labor Standards Act of 1938." (SPA 91-97).

In 1958, the Department published a regulation that expounded on the 1939 interpretive bulletin. 23 Fed. Reg. 5905 (Aug. 5, 1958), *codified at* 29 C.F.R. Part 791; (SPA 98-99). The regulation stated that joint employer status depends on whether multiple persons are "not completely disassociated" or "acting entirely

independently of each other" with respect to an employee's employment. 29 C.F.R. § 791.2(a) (1958); (SPA 99). It explained that "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek," the employers are generally considered joint employers, and provided three examples:

> (1) where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Id. § 791.2(b) (1958) (footnotes omitted);[1] (SPA 99).

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[1] In 1961, the Department amended a footnote in the regulation to clarify that a joint employer is also jointly liable for overtime pay. *See* 26 Fed. Reg. 7730, 7732 (Aug. 18, 1961).

In 2014, the Department issued Administrator's Interpretation No. 2014-2 (the "Home Care AI"), which addressed joint employer status in the home care worker context. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2014-2, "Joint Employment of Home Care Workers in Consumer-Directed, Medicaid-Funded Programs by Public Entities under the Fair Labor Standards Act" (June 19, 2014); (SPA 126-38). Citing the breadth of the FLSA definitions of "employer" and "employ," the Home Care AI opined that "the focus of the joint employment regulation is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers." (SPA 127, 137). In addition, the Home Care AI opined that "a set of [joint employer] factors that addresses only control is not consistent with the breadth of employment under the FLSA" because section 3(g)'s "suffer or permit" language reaches more broadly. (SPA 127, 137). The Home Care AI applied the four factors enumerated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), as part of a larger multi-factor analysis that provided specific guidance about joint employers in the home care industry. (SPA 131-34). The Department rescinded the Home Care AI shortly before the Joint Employer Rule took effect. *See* https://go.usa.gov/xAyMG.

In 2016, the Department issued Administrator's Interpretation No. 2016-1 (the "Joint Employer AI"), which addressed joint employer status generally under the FLSA. U.S. Dep't of Labor Wage & Hour Div., WHD Administrator's Interpretation No. 2016-1,

"Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" (Jan. 20, 2016); (SPA 139-49). Intending the Joint Employer AI to be "harmonious" and "read in conjunction with" the Home Care AI's discussion of joint employers, the Joint Employer AI described section 3(g)'s "suffer or permit" language as determining the scope of joint employer status. (SPA 139-41, 148). Recognizing the "expansive definition of 'employ' " in the FLSA, which "rejected the common law control standard," the Joint Employer AI concluded that "the scope of employment relationships and joint employment under the FLSA . . . is as broad as possible." (SPA 141). The Department rescinded the Joint Employer AI effective June 7, 2017. *See* https://go.usa.gov/xAyM7.

C. The Joint Employer Rule

On April 9, 2019, the Department published a Notice of Proposed Rulemaking ("NPRM") setting forth proposed revisions to the regulation (29 C.F.R. Part 791) to update and clarify its interpretation of joint employer status under the FLSA. 84 Fed. Reg. 14,043; (SPA 158-90). The NPRM explained the Department's concern that the existing regulation did not provide adequate guidance for the most common joint employer scenario under the FLSA: where an employer suffers, permits, or otherwise employs an employee to work for one set of hours in a workweek, and another person simultaneously benefits from that work (sometimes referred to as a "vertical" joint employer scenario). 84 Fed. Reg. at 14,044; (SPA 159). Specifically, the Department explained that Part 791's focus on the

association or relationship between potential joint employers (which is helpful for the other joint employer scenario—where multiple employers suffer, permit, or otherwise employ the employee to work separate sets of hours in the same workweek and the association or relationship between the employers determines their status as joint employers—a scenario sometimes referred to as "horizontal joint employment") was not necessarily helpful to determine whether the other person benefitting from the employee's work is the employee's employer too, especially considering the text of section 3(d) of the FLSA and Supreme Court precedent determining joint employer status based on the degree of control exercised by the potential joint employer over the employee. *See* 84 Fed. Reg. at 14,048-49; (SPA 165-66).

The NPRM proposed a four-factor balancing test derived from *Bonnette* for determining joint employer status in the scenario where another person benefits from the employee's work, and proposed additional guidance regarding how to apply the test. 84 Fed. Reg. at 14,048; (SPA 165-66). The NPRM also proposed that additional factors may be relevant to the joint employer analysis, but only if they are indicia of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or otherwise acting directly or indirectly in the interest of the employer in relation to the employee. 84 Fed. Reg. at 14,049; (SPA 166-67). For the other joint employer scenario—"horizontal" joint employment—

the Department proposed non-substantive revisions.[2] 84 Fed. Reg. at 14,045, 14,051-52; (SPA 160, 169-70).

Following the receipt and review of over 57,000 comments, *see* https://go.usa.gov/xAyM6, on January 16, 2020, the Department adopted as a final rule the analyses set forth in the NPRM largely as proposed. 85 Fed. Reg. 2820; (SPA 191-258). For the joint employer scenario where another person benefits from the employee's work, the Joint Employer Rule articulates a four-factor balancing test that assesses whether the other person "(1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records." 85 Fed. Reg. at 2820; *see* 29 C.F.R. § 791.2(a)(1); (SPA 192).

In issuing the Joint Employer Rule, the Department's primary purpose was to "offer guidance explaining how to determine joint employer status where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work." 85 Fed. Reg. at 2823; (SPA 196). The Department "sought to revise and clarify the standard for joint employer status in order to give the public more meaningful, detailed, and uniform guidance of who is a joint employer under the

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[2] The states do not challenge those revisions to Part 791. (JA 50).

[FLSA]." 85 Fed. Reg. at 2823; (SPA 196). The Department's decision to adopt, with modifications, the four-factor balancing test proposed in the NPRM was intended "[t]o promote greater uniformity in court decisions and predictability for organizations and employees." 85 Fed. Reg. at 2823; (SPA 197). Specifically, the Department was cognizant that "circuit courts currently use a variety of multi-factor tests to determine joint employer status, which have resulted in inconsistent treatment of similar worker situations, uncertainty for organizations, and increased compliance and litigation costs." 85 Fed. Reg. at 2823; (SPA 196-97).

The Joint Employer Rule explains that no single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances. 85 Fed. Reg. at 2820; (SPA 192). In addition, the Rule provides that satisfaction of the fourth factor, maintenance of employment records, alone does not demonstrate joint employer status. *Id.* Moreover, while application of the four enumerated factors should determine joint employer status in most cases, the Department recognizes that additional factors may be relevant for determining joint employer status, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work. 85 Fed Reg. at 2821; (SPA 193).

The Department explained that it believes the balancing test is consistent with the FLSA's definition of "employer," at 29 U.S.C. § 203(d), to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 85 Fed. Reg. at

2820; (SPA 192). The Joint Employer Rule provides additional guidance on how to apply the balancing test and identifies certain business models, business practices, and contractual agreements as not making joint employer status more or less likely under the FLSA. 85 Fed. Reg. at 2821; (SPA 192-93). Thus, the Department anticipated that the Rule will allow parties to make business decisions and enter into business relationships with more certainty and clarity regarding what actions will result in liability under the FLSA. 85 Fed. Reg. at 2821; (SPA 193).

Lastly, the Joint Employer Rule contains a severability provision, which provides that if any provision is held to be invalid or unenforceable, any such provision would be "severable from part 791 and shall not affect the remainder thereof." 85 Fed. Reg. at 2862; (SPA 251).

D. The States' Lawsuit

The states commenced this action under the APA, alleging that the Joint Employer Rule is contrary to law and is arbitrary and capricious. (JA 28-82). Specifically, the states alleged that the Rule is inconsistent with the text of the FLSA and its broad remedial purpose. (JA 30). The states also alleged that in promulgating the Joint Employer Rule, the Department failed to justify its departure from the agency's longstanding interpretation of joint employer status, and failed to consider and adequately quantify the harms and costs to workers. (JA 30).

In support of their standing, the states alleged four harms inflicted by the Joint Employer Rule: the Rule

will lower wages and decrease compliance with worker protection laws, harming workers living in the states; the states' tax revenue will decrease because of the diminished wage base; the Joint Employer Rule will impose administrative and regulatory costs on the states; and the states will need to incur increased costs from investigation and enforcement of state labor laws. (JA 64-76).

E. The District Court's Opinions and Orders

In an opinion and order dated June 1, 2020, the district court denied the Department's motion to dismiss. (SPA 1-26). The district court held that the states plausibly pleaded that the Joint Employer Rule would reduce worker wages, leading to a reduction in the states' tax revenues. (SPA 15-19). In so holding, the district court concluded that the states identified a specific revenue stream directly linked to the Joint Employer Rule, and this "straightforward link" was sufficient to allege that the decrease in the tax revenue base was fairly traceable to the Rule. (SPA 17). In addition, the district court held that the states plausibly alleged that the Joint Employer Rule would cause them to incur increased administrative and enforcement costs that were not self-inflicted. (SPA 19-20). Because the district court held that the states established constitutional standing based on their asserted economic injuries, the court declined to decide whether the states also adequately alleged *parens patriae* standing, since the issue of whether states can sue the federal government under the APA on behalf of their citizens is, according to the district court, an "unsettled issue of law." (SPA 21-23). Finally, the district

court held that the states' claims fell within the APA's and the FLSA's zones of interests. (SPA 24-26).

After five trade organizations intervened in the action as defendants (JA 21-22; Dist. Ct. ECF No. 99), the district court partly granted summary judgment to the states (JA 25-26; Dist. Ct. ECF No. 135). The district court held that the Joint Employer Rule is unlawful because by ignoring the FLSA's broad definitions, it conflicts with the FLSA, and is arbitrary and capricious because the Department failed to adequately justify its departure from prior interpretations and account for some of its possible costs. (SPA 27-88). However, because the provisions of the Joint Employer Rule pertaining to the scenario where multiple employers employ the employee for separate sets of hours in the same workweek, *i.e.*, "horizontal" joint employment, are severable, the district court concluded that those provisions, 29 C.F.R. § 791.2(e), remain in effect, and vacated the remainder of the Rule. (SPA 86-87).

In support of its holding that the Joint Employer Rule is contrary to law, the district court held that the Department's exclusive reliance on the FLSA's definition of "employer" in crafting the joint employer analysis was contrary to the FLSA. (SPA 56-57). In addition to concluding that the Department's interpretation "runs afoul of the FLSA's text," the district court held that Supreme Court and other FLSA case law failed to support the Department's interpretation. (SPA 66-72). The district court concluded that the Joint Employer Rule incorrectly applied different tests for "primary" and joint employment, when they "must be the same." (SPA 57-60).

In addition, the district court held that the Joint Employer Rule is arbitrary and capricious because the Department failed to provide a reasoned explanation for why it departed from its prior interpretations contained in two Administrator's Interpretations and guidance regarding the Migrant and Seasonal Agricultural Workers Protection Act ("MSPA"), and also failed to adequately consider the "conflict" between the Department's MSPA regulations and the Joint Employer Rule. (SPA 81-83). Finally, the district court also reasoned that the Department did not properly consider the costs to employees created by the Joint Employer Rule. (SPA 83-86).

Summary of Argument

The Court should reverse the district court's judgment. As a threshold issue, the district court should have held that the states lack standing to bring their APA challenge. Neither of the states' theories of direct injury implicate any legally cognizable interest. First, the states assert that they have standing to challenge the Joint Employer Rule because they will be forced to incur administrative and enforcement costs in connection with their own statutory and regulatory wage-and-hour schemes to address what they perceive as shortcomings with the Joint Employer Rule. But these harms are entirely self-inflicted: neither the FLSA nor the Joint Employer Rule requires the states to do anything in connection with the Rule, and each state retains complete decisionmaking authority to change (or not change) its own workplace regulations as it sees fit. *See infra* Point I.A. Second, the states allege the

Joint Employer Rule will result in diminished tax revenues due to a reduction of aggregate wages paid to employees and contributions to workers' compensation and unemployment funds, as well as increased fissuring of workplaces. But to be legally cognizable, any injury from lost tax revenue must be directly linked to the challenged action; no such link exists here, as the Rule does not directly affect any state taxes and the states' theory of injury relies on a lengthy chain of conjecture. *See infra* Point I.B. The states' final theory that they have standing in a *parens patriae* capacity—which the district court did not address—likewise falls short: the Supreme Court has held that states do not have such standing to sue the federal government. *See infra* Point I.C. Lastly, the states' claims should be dismissed as they do not fall within the FLSA's zone of interests. *See infra* Point I.D.

If this Court reaches the merits, the Rule should be upheld, and the district court's vacatur of the relevant portions of the Joint Employer Rule should be reversed. The Department's reliance on the FLSA's definition of "employer" as the sole textual basis to craft a multi-factor balancing test to determine whether a potential joint employer "is acting directly or indirectly in the interest of the employer in relation to the employee," 29 C.F.R. § 791.2(a)(1) (citing 29 U.S.C. § 203(d)), is consistent with both the FLSA's statutory framework and Supreme Court precedent. The joint employer analysis at issue here focuses on whether an additional employer is liable under the FLSA for wages owed to an employee who already has an employment relationship with one employer; therefore,

the inquiry is properly focused on the FLSA's definition of "employer." *See infra* Points II.A, II.B. And the test adopted by the Department, focused on a potential joint employer's control of the terms of an employee's employment, is consistent with the approach taken by the Supreme Court and several courts of appeals, even as it differs from the earlier tests adopted by this Court and others, which did not have the benefit of the Department's current analysis. *See infra* Point II.C. The district court further erred in rejecting the Joint Employer Rule as arbitrary and capricious. The Department applied comprehensive and thorough reasoning that reflected an awareness of the Department's need to revise its joint employer analysis under the FLSA. *See infra* Point II.D.

Accordingly, the district court's judgment should be reversed.

ARGUMENT

Standard of Review

This Court reviews *de novo* a district court's ruling that it has subject matter jurisdiction. *Carter v. Healthport Techs., LLC*, 822 F.3d 47, 56-57 (2d Cir. 2016). The Court also reviews *de novo* the administrative record and the district court's summary judgment ruling involving a claim brought under the APA. *Bellevue Hospital Ctr. v. Leavitt*, 443 F.3d 163, 173-74 (2d Cir. 2006).

POINT I

The States' Lawsuit Should Have Been Dismissed at the Threshold

The states lack standing to challenge the Joint Employer Rule because they failed to identify any legally cognizable injury linked to the Rule. The states broadly allege that there will be increased administrative and enforcement costs, but these are not harms inflicted by the federal government. The states also allege—relying on layers of conjecture—that they will experience decreased tax revenues, but that purported harm is not judicially cognizable as the states do not directly link it to the Rule. In addition, the states do not assert any interest within the zone of interests protected by the FLSA.

The doctrine of constitutional standing requires that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1974). To establish standing under Article III of the Constitution, a plaintiff must prove that he or she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The injury alleged must be "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). And it "must be 'legally and judicially cognizable.'" *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct.

1945, 1953 (2019) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). The "causal connection between the injury and the conduct complained of" must be attributable to the defendant "and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560.

Generally, a state may bring suit in federal court "in one of three standing capacities: (1) proprietary suits in which the State sues much like a private party suffering a direct, tangible injury; (2) sovereignty suits requesting adjudication of boundary disputes or water rights; or (3) *parens patriae* suits in which States litigate to protect 'quasi-sovereign' interests" in the "well-being of its populace." *Connecticut ex rel. Blumenthal v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000) (citations and quotation marks omitted).

The district court held that the states adequately alleged standing on two different bases: that they would incur administrative and regulatory costs to revise guidance under state FLSA analogues that currently incorporate federal standards and to increase enforcement under those state-law analogues to compensate for the expected decrease in employees' ability to collect damages under the FLSA; and that they would suffer decreased tax revenues due to diminished payroll taxes on depressed wages, increased non-compliance with the payment of workers' compensation premiums and unemployment insurance contributions, and an increase in the "fissuring" of workplaces, leading to generally lower wages paid to employees.

(SPA 15-23).[3] The district court's basis for finding standing based on increased administrative and enforcement costs is incorrect because that injury is not cognizable and is self-inflicted. As for the district court's conclusion that the states established standing due to decreased tax revenues, that injury is also not legally cognizable or sufficient for standing because the states failed to plead a direct link between the Rule and any purported diminishment of revenues, and instead relied on a lengthy and speculative chain of conjecture about harms caused by the Rule. Lastly, although the district court did not address the states' *parens patriae* theory, this alternative theory is foreclosed by Supreme Court precedent.

A. The States' Choices to Incur Administrative and Enforcement Costs Are Insufficient to Establish Standing

The district court accepted the states' allegations that they would need to review current state guidance that incorporates FLSA joint employer jurisprudence and either retract or issue new or revised guidance to explain the state law standards for joint employer liability; and would be forced to increase their enforce-

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[3] With respect to the states' theory of standing based on decreased tax revenues, upon revisiting the issues on summary judgment, the district court declined to decide whether the states established standing under this theory in light of disputed issues of material fact. (SPA 49-51).

ment of state-law analogues of the FLSA to compensate for the gap created by the Joint Employer Rule. (SPA 19). Yet these injuries are entirely self-inflicted; they are not caused by the Rule, which imposes no burdens on the states.

In attempting to establish an injury in fact, the states "cannot manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 416. Rather, the appropriate inquiry is whether the federal action at issue requires states to change their own laws. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) ("[O]nly when a federal law interferes with a state's exercise of its sovereign power to create *and enforce* a legal code does it inflict on the state the requisite injury-in-fact." (quotation marks omitted)). Voluntary decisions to undertake changes to the states' statutory and regulatory schemes cannot support standing because nothing in the Joint Employer Rule requires or imposes any such obligations on the states.

The FLSA is an expressly non-preemptive statute, and states are free to craft their own statutory and regulatory schemes. *See* 29 U.S.C. § 218(a). The states' complaint shows that they have done so (JA 72-76), and they have the power to change or not change those schemes in response to any interpretation by the Department of joint employer status under the FLSA, or in response to anything else. But just as a state's enactment of its own statutory and regulatory schemes is its own decision, any change to those schemes is the state's own decision too, and any alleged cost of making such voluntary alterations is thus a self-inflicted

injury. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. . . . No State can be heard to complain about damage inflicted by its own hand.").

The fact that certain states chose to mirror the FLSA in their own statutory and regulatory schemes, but now claim that, to maintain their policy preferences in light of the Joint Employer Rule, they must revise those schemes, is immaterial for purposes of standing. No matter the effects of the Rule, and no matter the relationship between the Rule and the FLSA, the states remain free to craft and amend wage-and-hour state laws—and are free to link or not link these state laws to the FLSA. But their choice to do so is a cost they have inflicted on themselves. *See Pennsylvania*, 426 U.S. at 664 (state had no standing where its injury resulted from a tax credit under its own law linked to another sovereign's taxes, as "nothing prevents Pennsylvania from withdrawing [the] credit"). Thus contrary to the district court's assertion (SPA 20), the increased administrative and enforcement costs are not "caused" by the Department's changes to its joint employer regulation merely because the states chose to "directly and explicitly tie[ ]" their wage and hour statutes "to another sovereign's laws." *California v. Azar*, 911 F.3d 558, 574 (9th Cir. 2018).

The district court characterized the states' harm as "the kind of 'pocketbook' injury" sufficient for standing, citing *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018). (SPA 19). But the injuries in

Air Alliance were significantly different. The plaintiff states in that case challenged an EPA decision to delay the effective date of a regulation issued to prevent the accidental release of hazardous substances; the states had previously incurred expenditures, and expected to incur future expenditures, responding to accidental releases of hazardous materials during EPA's period of delay. It was those "[m]onetary expenditures to mitigate and recover from harms that could have been prevented absent the Delay Rule" that the court concluded were sufficient for standing. 906 F.3d at 1059-60. Nothing similar will occur here.

The Joint Employer Rule does not interfere with the states' ability to craft their own laws, determine joint employer status for their own laws, and set their own enforcement priorities, and any costs incurred by the states to do so amount to self-inflicted harms insufficient to establish an injury in fact. As in *Pennsylvania*, the states have been and continue to be free to make and change their rules, but the costs of doing so are not cognizable for standing purposes.

B. The States' Theory of Diminished Tax Revenues Lacks a Direct Link to the Joint Employer Rule

Nor does the states' attenuated theory of decreased revenues support standing. The states allege their tax revenues would decrease because the Joint Employer Rule would result in a reduction of aggregate wages paid to employees and contributions to workers' compensation and unemployment funds, including by limiting the number of employers liable under the FLSA;

they also allege there will be an increase in the "fissuring" of workplaces,[4] which will result in lower wages to employees. (JA 66-67). All of that will, the states claim, result in lower tax receipts. (JA 66-67). But the states have not alleged a legally cognizable injury as they have failed to establish any direct link between the Joint Employer Rule and their assertions of diminished tax revenues. Moreover, this lengthy and implausible chain of conjecture leading to purported tax loss is not sufficient to show a cognizable injury to the states.

"Standing is not an ingenious academic exercise in the conceivable"; it requires more than "pure speculation" to establish a constitutionally sufficient injury to invoke the jurisdiction of the federal courts. *Lujan*, 504 U.S. at 566 (quotation marks omitted). To suffice under Article III, an injury must be "'certainly impending'"; "'allegations of *possible* future injury'" are too speculative. *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), and *Lujan*, 504 U.S. at 565 n.2). A plaintiff who offers only a conjectural chain of possibilities that it alleges will lead to an actual injury has not established its standing. *Whitmore*, 495 U.S. at 156-58; *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974). Moreover, standing is

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[4] As the states describe it in their complaint, "[f]issuring includes a variety of different forms, including subcontracting, outsourcing, and franchising, in which the main or 'lead' business sheds certain business functions to other 'subsidiary' businesses." (JA 47-48).

"substantially more difficult" for a plaintiff to establish when its theory of harm depends on the actions of third parties. *Lujan*, 504 U.S. at 561-62 (quotation marks omitted).

"'[I]mpairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing.'" *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 252 (2d Cir. 2020) (quoting *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 671-72 (D.C. Cir. 1975)); *accord Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) ("Lost tax revenue is generally not cognizable as an injury-in-fact for purposes of standing."). To establish a sufficient cognizable harm, a state must allege a "direct injury in the form of a loss of specific tax revenues." *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *accord Kleppe*, 533 F.2d at 672 (requiring "fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged," *quoted in XY Planning*, 963 F.3d at 252). Absent such a direct link, in light of the "unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers," the state's allegation is nothing more than "the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." *Kleppe*, 533 F.2d at 671-72.

The state's claims here do not fit the narrow *Wyoming* exception. In that case, the Court permitted a suit by Wyoming to proceed where Oklahoma's action,

effectively capping the amount of coal that could be bought from neighboring states, reduced the "specific tax revenues" Wyoming gained through taxes on the sale of coal—taxes "directly linked" to and "demonstrably affected" by Oklahoma's action. 502 U.S. at 448-50. Without such a direct link, the injury to the states is not judicially cognizable.

Moreover, the states rely on not only "a causal chain that is too attenuated and speculative to support standing," *XY Planning*, 963 F.3d at 252-53, but also on the types of "conclusory statements and speculative economic data" that are insufficient to demonstrate injury resulting from a "specific loss of tax revenue," *Wyoming v. Dep't of Interior*, 674 F.3d 1220, 1233-35 (10th Cir. 2012). The Joint Employer Rule does not itself reduce workers' hours or pay, cause lower wages due to workplace fissuring, reduce contributions to workers' compensation and unemployment funds, or dictate any other outcome; it simply applies a balancing test depending on the facts of each situation to determine who is considered a joint employer. Without any such direct effect, the states rely on speculative assumptions that the Rule will have those effects (and that those effects will cause harms to their fiscs). (JA 67-72). But they provide no specific economic data to support those assumptions. They rely on an estimate from the Economic Policy Institute ("EPI"), which describes itself as a think tank, that says that the Joint Employer Rule will cost workers "more than $1.0 billion annually." (JA 30, 371-80). But that estimate relies on extrapolated calculations that are not explained, and is not persuasive for the reasons the Department cited in declining to accept that estimate. *See infra* Point

II.B. Prominently, after calculating the number of workers EPI estimates to be in "fissured" workplaces and the amount of wage theft those workers incur, the institute then applies "an increase in domestic outsourcing of just 2 percent as a result of the rule"—but does not explain why two percent is a reasonable estimate of the effect of the Rule. (JA 376 (EPI Comment Letter on Proposed Rule: Joint Employer Standards Under the Fair Labor Standards Act (June 25, 2019) (emphasis omitted)).[5] Without a cogent or supported explanation for their calculations, the states' estimate of reduced wages is no more than conjecture.

Further hampering the states' theory of lost tax revenues is the lack of any plausible inference that the Joint Employer Rule is causing the states' alleged injuries. Although the Rule could potentially reduce the number of persons liable for the payment of an employee's wages, it does not reduce the amount of wages due the employee under the FLSA. *See* 85 Fed. Reg.

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[5] Other aspects of the EPI analysis are equally conclusory. For instance, the large majority of the jobs EPI characterizes as "fissured" are those where workers are "working for franchises." (JA 375 (8.85 million out of 13.8 million employees, or 64%)). But EPI never explains why simply working for a franchise will mean lower wages or higher risk of wage theft, and as the Department has observed, "[o]perating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely under the Act." 29 C.F.R. § 791.2(d)(2). (SPA 220).

2853; (SPA 236-37). The states imply that the Joint Employer Rule will incentivize potential employers to manipulate the Rule's factors to secure a favorable outcome. (JA 61, 64). Setting aside the speculative and uncertain nature of this premise, the states themselves acknowledge that many of the harms alleged were already occurring before the issuance of the Joint Employer Rule. (JA 47 (the "fissuring" of the workplace has been increasing over "the past several decades"); JA 69 (worker misclassification, which has been "a significant and increasing problem for Plaintiffs," will be "exacerbated" by the Rule)). The district court summarily accepted the states' allegations that the Joint Employer Rule will "exacerbate" these problems, but that alone is inadequate because the states fail to allege or explain how the increase in pre-existing problems are specifically attributable to the Rule. *See Wyoming v. Dep't of Interior*, 674 F.3d at 1233-35. These historical and ongoing problems, as well as the states' reliance on speculation regarding numerous actions third parties will supposedly undertake (and in the case of employee misclassification and noncompliance with minimum wage and overtime laws, illegal actions), render the states' allegations of harm caused by the Joint Employer Rule "pure speculation."[6] *Lujan*, 504 U.S. at 567.

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[6] It is difficult to square the states' allegations that the Joint Employer Rule will prompt potential employers to change their business practices, with the fact that many statutory and regulatory schemes that

To accept the states' theory of decreased revenues also requires the acceptance of a lengthy chain of conjecture "that is too attenuated and speculative to support standing." *XY Planning*, 963 F.3d at 252-53; *accord Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (rejecting injury theory that due to federal action, "agriculture production will suffer, which will dislocate agriculturally-based industries, forcing unemployment up and state tax revenues down" as too attenuated), *cited in Wyoming*, 502 U.S. at 448; *Stewart v. Kempthorne*, 554 F.3d 1245, 1254 (10th Cir. 2009) (rejecting claim that federal agency's decision about grazing permits would cause "decrease in livestock grazing [which] decreases the tax revenues generated through sales and property taxes, thus injuring the Counties"). The states allege that the implementa-

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the states have chosen to enact contain allegedly more stringent definitions of joint employer status, which would presumably deter employers from undertaking the illegal and improper actions hypothesized by the states. Similarly, states control the parameters for contributions made to workers' compensation and unemployment funds. For example, the New York Court of Appeals recently held that Postmates, Inc. couriers are employees, rather than independent contractors, thus Postmates is required under state law to contribute to the New York unemployment insurance fund. *See, e.g.*, *Vega v. Comm'r of Labor*, 35 N.Y.3d 131, 134-35 (2020). The Joint Employer Rule has no impact on this ruling or result.

tion of the Joint Employer Rule will increase the prevalence of subcontracting and outsourcing. (JA 64). In turn, the states allege that such "fissured workplaces" pay lower wages than direct employers and have "dramatically higher rates of wage theft and noncompliance with minimum wage and overtime laws." (JA 66). Further in turn, the states allege, if an employee challenges a violation under the FLSA, and receives a determination that back wages are owed, the result of the Joint Employer Rule is that the employee would only be able to collect from subsidiary employers. (JA 65, 66-67). And further in turn, these employers "are more transient and undercapitalized, and more likely to go out of business for lack of funds or otherwise to elude regulators." (JA 65). Because "countless variables" and assumptions underpin this chain, the states cannot establish standing. *XY Planning*, 963 F.3d at 253.

C. The States Lack Standing as *Parens Patriae* to Bring an APA Challenge Against the Federal Government

The states also invoked the *parens patriae* theory of standing, alleging that the Joint Employer Rule will cause "quasi-sovereign harms" because it negatively impacts workers in the states, a theory that was not addressed by the district court. (SPA 21-23). But with limited exceptions, under the so-called *Mellon* bar, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). That is because a state

has no "duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Mellon*, 262 U.S. at 486; *accord South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Nor does a State have standing as the parent of its citizens to invoke . . . constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."); *Florida v. Mellon*, 273 U.S. 12, 18 (1927) ("[I]t is the United States, and not the State, which represents [the State's citizens] as *parens patriae*, when such representation becomes appropriate . . . ."). While the Supreme Court has recognized *parens patriae* suits by states, these actions have been brought against other states or private parties. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

In light of the prudential *Mellon* bar, which is "designed to prevent a State from encroaching on the federal government's power," states can only sue the federal government in a *parens patriae* capacity when Congress creates an explicit statutory grant of authority. *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019); *see also Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art[icle] III, thus permitting litigation by one who otherwise would be barred by prudential standing rules." (quotation marks omitted)). But the APA does not confer such authority upon the states: as the D.C. Circuit recently held in addressing a similar standing claim, the "*Mellon* bar applies to litigation that a State, using the APA, seeks to pursue

against the federal government." *Manitoba*, 923 F.3d at 181.[7] The APA, as a "general" cause of action, "is not

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[7] In *Carey v. Klutznick*, a suit brought by state and local officials as well as private voters and taxpayers, this Court stated that New York had standing based on direct injuries, and upheld entry of an injunction against the Census Bureau on the basis of private voters' claims. 637 F.2d 834, 836, 839 (2d Cir. 1980). While the *Carey* court also stated in passing—without explanation—that "New York has standing in its capacity as *parens patriae*" to sue the Census Bureau, the statement cited as support two cases involving *parens patriae* claims against other states and private companies, not the federal government. *Id.* at 838 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257-59 (1972); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). *Carey* did not cite or mention *Mellon*, and was decided before the Supreme Court's decision in *Alfred L. Snapp & Son*, which states a clear and broad rule: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610 n.16. At least one other court of appeals has held its earlier narrow reading of the *Mellon* bar "must . . . give way to the Supreme Court's clear statement in *Snapp*." *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990). And this Court has since acknowledged *Mellon* and declined to reach the question of *parens patriae* standing against the federal government. *Connecticut v. Dep't of Commerce*, 204 F.3d 413, 414 n.2 (2d Cir. 2000).

linked to any particular statutory scheme and . . . does not create an inference that the Congress intended a wholesale imprimatur allowing a State as *parens patriae* to sue the federal government." *Manitoba*, 923 F.3d at 180-81. The APA's judicial review provision indicates no intent by Congress to recognize any interest by the states in protecting their citizens from federal laws, nor is it analogous to the judicial review provisions found in many federal civil enforcement statutes. *See Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 120 (2d Cir. 2002) (recognizing various federal statutes that grant states *parens patriae* standing where they contain broad civil enforcement provisions permitting suit by any person injured or aggrieved).[8] And the FLSA provides a right of action to

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[8] The district court did not reach this question, deeming the question "'unclear.'" (SPA 15 (quoting *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271, 284 (S.D.N.Y. 2019))). But *Vullo* relied on *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984), which in turn relied on *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142, 1153 (9th Cir. 1975), which held that a state may sue as *parens patriae* when it seeks to vindicate a federal statute, and only a challenge to a federal statute is barred by *Mellon*. But the Ninth Circuit has since overruled *Washington Utilities* in light of *Snapp*, *see Nevada v. Burford*, 918 F.2d at 858, undercutting the logic of *Vullo* and *Abrams*. *Snapp* provides a "clear

affected employees, not states. *See* 29 U.S.C. § 216(b). The states therefore lack *parens patriae* standing to bring this action.

D. The States' Alleged Injuries Do Not Fall Within the FLSA's Zone of Interests

Even assuming the states could establish a cognizable injury, the states' claims do not fall within the zone of interests protected by the FLSA. A statute is presumed to provide a claim "only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quotation marks omitted). The test "requires [a court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim," that is, whether a plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue" under the sub-

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statement" that a *parens patriae* suit like this one is barred. *Id.*

Nor is *Massachussetts v. EPA*, 549 U.S. 497, 520 n.17 (2007), to the contrary. As the D.C. Circuit explained, that was not a *parens patriae* suit at all, and the Court's discussion of that doctrine was brief and tangential to its conclusion that when a state sues based on its own injury, it may be accorded "'special solicitude in the standing analysis.'" *Manitoba*, 923 F.3d at 181-82 (quoting *Massachusetts v. EPA*, 549 U.S. at 520 (alteration omitted)).

stantive law invoked. *Id.* While the test is "not especially demanding," and an APA claim need only "arguably" fall within the substantive statute's zone of interests, if "a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute [allegedly violated] that it cannot reasonably be assumed that Congress authorized that plaintiff to sue," the suit is foreclosed. *Id.* at 130 (quotation marks omitted).

The district court held that the states also satisfied the prudential zone-of-interests test of standing because their challenge to the Joint Employer Rule falls within the broad interests protected by the APA, as well as the FLSA's protection of workers' interests in receiving wages. The district court first erred by focusing on "the APA's zone of interests," rather than the FLSA's. (SPA 25). As this Court has stated, the "relevant zone of interests for an APA claim is defined by 'the statute that the plaintiff says was violated,' rather than by the APA itself." *Federal Defenders of N.Y., Inc. v. BOP*, 954 F.3d 118, 128 (2d Cir. 2020) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (alteration omitted)); *see id.* at 131 ("when an aggrieved party invokes the APA's right to sue an agency for failing to adhere to its own valid regulations, the zone-of-interests inquiry . . . should focus on the regulations that were allegedly violated").

The relevant zone of interests is that of the FLSA, whose purpose is " 'to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' "

Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)). The FLSA itself states that it is intended "to correct and as rapidly as practicable to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202; *see Lexmark*, 572 U.S. at 131 (looking to statute's own statement of its purposes to identify zone of interests it protects). That worker-focused interest protected by the statute is far removed from the interests asserted by the states, which are premised on derivative effects the Rule purportedly has on the states' citizens, as employees and employers. The states' interests in maximizing their revenue streams and pursuing their own wage-and-hour schemes do not arguably "mirror the interests" of workers that the FLSA seeks to protect, nor does the states' claim "directly advance[ ]" the FLSA's objective of fair pay for workers. *Federal Defenders*, 954 F.3d at 131. Indeed, Congress expressly excluded states' own wage-and-hour schemes from the FLSA's interests, *see* 29 U.S.C. § 218(a), and there is no reason to believe that when Congress enacted the FLSA, it was concerned with states' revenue streams.

The district court disagreed, reasoning that the states' "interest in protecting their tax base perfectly coincides" with the interest in fair compensation of workers. (SPA 25). But that is little more than saying that the alleged reduction in tax revenue will be caused by the reduction in workers' pay—logic that ignores the fact that the zone-of-interests test precludes suits because of "the potential for disruption inherent

in allowing every party adversely affected by agency action to seek judicial review," *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 397 (1987), and instead focuses on whether Congress intended to allow that type of plaintiff to sue, *Lexmark*, 572 U.S. at 128; *see Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 927 (D.C. Cir. 1989) (Wald, J., dissenting) ("courts do not entertain suits that seek to 'vindicate' interests that Congress had no intention of protecting or regulating"). The secondary harms the states allege are merely "a derivative interest in someone else's rights," *Moya v. Dep't of Homeland Security*, 975 F.3d 120, 131 (2d Cir. 2020)—that is, "so marginally related to" the FLSA's purposes "that it cannot reasonably be assumed that Congress authorized" states asserting those harms to sue, *Lexmark*, 572 U.S. at 130.

The district court further erred in relying on *Bank of America Corp. v. City of Miami* to conclude that "under the APA . . . claims of 'lost tax revenue and extra municipal expenses' are enough to confer prudential standing." (SPA 26, quoting 137 S. Ct. 1296, 1303 (2017)). The *Bank of America* Court assessed the zone of interests of the Fair Housing Act, noting that by permitting any "aggrieved person" to sue, that statute was intended to "confer standing broadly," "as broadly as is permitted by Article III of the Constitution." 137 S. Ct. at 1303 (quotation marks omitted). The district court reasoned that the APA also allows suits by "aggrieved" persons—but, again, it is the FLSA, not the APA, that defines the relevant zone of interests. And the FLSA has no such broad conferral of a right to sue

—to the contrary, it provides a right of action specifically "to the employee or employees affected." 29 U.S.C. § 216(b).

For those reasons, the states' lawsuit should have been dismissed at the threshold, and the district court's judgment should be reversed.

POINT II

The Joint Employer Rule Should Be Upheld

If the Court reaches the merits of this action, it should reverse the district court's vacatur of the Joint Employer Rule. The Rule was promulgated by the Department to be used by the Department's Wage and Hour Division and by employers, employees, and courts to understand employers' obligations and employees' rights under the FLSA. *See* 29 C.F.R. § 791.1; *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (interpretive rules "are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers" (quotation marks omitted)). The Rule is consistent with the FLSA, and is a reasoned and reasonable agency action.

Under the APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *NRDC v. National Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018). As an interpretive agency rule, the Joint Employer Rule is "eligible to claim respect according to its persuasiveness" under the deference standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v.*

Mead Corp., 533 U.S. 218, 234-35 (2001); *accord Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 488 (2004). Longstanding precedent recognizes that "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quotation marks omitted). Thus, the Rule must be given weight in accordance with its "thoroughness, validity, consistency, and power to persuade." *De La Mota v. Dep't of Education*, 412 F.3d 71, 80 (2d Cir. 2005) (quotation marks omitted); *accord Mead*, 533 U.S. at 228 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes and citation omitted)).

A. The Joint Employer Rule Is Consistent with the FLSA

The Joint Employer Rule is consistent with the FLSA's statutory framework. Although the FLSA does not use or define the term "joint employer," it nevertheless contemplates that two or more employers may be jointly liable for an employee's wages. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973). In evaluating vertical joint employer status, the inquiry is whether an additional employer is liable under the FLSA for the wages of an employee who already has an employment relationship with one employer. Section 3(d) of the

statute, which defines "employer," expressly contemplates such an additional employer. 29 U.S.C. § 203(d) (" 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."). The Joint Employer Rule hews to the FLSA's statutory language by using a multi-factor balancing test to determine whether a potential joint employer qualifies as an employer under section 3(d). 29 C.F.R. § 791.2(a)(1) (citing 29 U.S.C. § 203(d)).

The district court's criticism that the Department relied exclusively on the definition of "employer," and "thus determined that the FLSA's definition of 'employ' and 'employee' are irrelevant to the joint employment analysis," is flawed. (SPA 56). Contrary to the district court's assessment, the Department recognized that the three definitions "work in harmony." 84 Fed. Reg. at 14,050; (SPA 168). Sections 3(e)(1) (defining "employee") and 3(g) ("employ") determine the contours of an employment relationship and whether an individual worker is an employee under the FLSA. 29 U.S.C. § 203(e)(1), (g). Section 3(d) defines "employer," and is therefore the key definition regarding whether an existing employment relationship has a "joint employer." *See id.* § 203(d). Because an inquiry into whether a person is a joint employer only occurs where the status of an employee and a primary employer is already established, it is section 3(d), not the other definitions, that underpins that inquiry. As the Department explained: "A person who is, under 3(d), acting 'in the interest of an employer in relation to an employee' is, by definition, a second employer. Another person can become a joint employer of an employee un-

der 3(d) only if an employer is already suffering, permitting, or otherwise employing that employee to work under sections 3(e)(1) and 3(g)." 84 Fed. Reg. at 14,050 (footnotes omitted); *accord* 85 Fed. Reg. at 2827 ("This language from section 3(d) makes sense only if there is an employer and employee with an existing employment relationship and the issue is whether another person is an employer."); (SPA 168, 201-02). Accordingly, where one employer suffers or permits to work, or otherwise employs, an employee, whether another person is a joint employer depends only on whether that person is acting directly or indirectly in the interest of the employer in relation to the employee, as provided in section 3(d). *See* 84 Fed. Reg. at 14,050; (SPA 168).

As a specific point of criticism, the district court concluded that given the broad "suffer or permit to work" definition of "employ," as well as the "circular" definitions of "employer" and "employee," the Department's exclusive reliance on the "employer" definition in crafting the joint employer test contradicted the FLSA and congressional intent. (SPA 64-65). While the definitions of employer, employee, and employ are intertwined and interrelated—which the Department recognized—section 3(d) specifically contemplates multiple employers. By focusing on section 3(d) in crafting the test for joint employers, the Department reasonably tethered its analysis to the FLSA. And nothing in the Rule affects the broad scope of who is an employee under the FLSA.

Because the district court misconstrued the fundamental concept underlying a joint employer inquiry—

that is, whether a second employer is also liable for the payment of wages owed to an employee—it incorrectly concluded that the Joint Employer Rule "applies different tests for 'primary' and 'joint' employment" and proceeded to attack a test the Rule did not adopt. (SPA 57-58). The Rule makes no such distinction, and instead outlines one test to determine joint employer status, rooted in the FLSA's definition of "employer." The district court's criticism, which is mistakenly premised on its belief that "joint employment" can exist so long as each person or entity independently satisfies the FLSA's definition of "employer," ignores the critical inquiry in any joint employer situation—whether some *additional* person or entity should also be liable for wages. (SPA 58).

The district court also observed that the "employer" in section 3(d) "includes" another person acting in the interest of an employer, and therefore the definition may be broader. (SPA 61). But while it is true that the FLSA's use of "includes" means that the definition is not exhaustive, nothing in the Rule is inconsistent with that. Indeed, the definition of "employer" must also include any person who suffers, permits, or otherwise employs an employee to work even though it is not spelled out in section 3(d). The "any person acting directly or indirectly in the interest of an employer" language shows Congress intended to include joint employers, and there was nothing unlawful about the Department's decision to base its test on that language.

B. The Joint Employer Rule Is Faithful to Supreme Court Precedent

Not only is the Rule consistent with the text of the FLSA, it accords with the Supreme Court's case law interpreting the statute as well.

The Department's reliance on section 3(d) as the sole textual basis in formulating the Joint Employer Rule tracks the Court's analysis in *Falk v. Brennan*, where the Court relied on section 3(d) to determine that a management company was an additional, joint employer of maintenance workers who worked for building owners. 414 U.S. 190, 192, 195 (1973). Recognizing "[t]he expansiveness of the [FLSA's] definition of 'employer' and the extent of [the management company's] managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees," the Court held that the management company was "under the statutory definition, an 'employer' of the maintenance workers." *Id.* Thus, the Supreme Court acknowledged the maintenance workers' status as employees of one employer and then analyzed whether another person was also their employer for the work. It did not mention section 3(g)'s definition of "employ." While it quoted the definition of "employee" in section 3(e), the Court turned back to section 3(d) to reach the conclusion that the management company was a joint employer. *Id.*

The Rule "uses the same reasoning as *Falk* to determine joint employer status under section 3(d)." 85 Fed. Reg. at 2831; (SPA 206). While the district

court focused on the Court's brief reference to the definition of employee (SPA 69), the focus of the *Falk* decision was the definition of "employer" in section 3(d) and the potential joint employer's "substantial control" over its employees' work—essentially the same as the Department's focus in the Rule. *See* 29 C.F.R. § 791.2(a)(1)(ii); 85 Fed. Reg. 2830-31; (SPA 206).

The district court instead looked to the Supreme Court's earlier decision in *Rutherford Food Corp. v. McComb*, and after concluding that *Rutherford* was a joint employment case, observed that the Court said that the definitions of employer, employee, and employ "have some bearing" on the employer-employee relationship. (SPA 66-68). But this statement does not bear the weight placed upon it by the district court in light of the *Falk* Court's subsequent and exclusive reliance on section 3(d) to find an additional employer. Moreover, *Rutherford* focused on whether the workers were employees or independent contractors of another employer, rather than whether there were joint employers. *See* 331 U.S. 722, 727-29 (1947). Although *Rutherford* has been characterized by this Court as a joint employment case, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70 (2d Cir. 2003), the decision repeatedly discusses the issue of independent contractors but never analyzes the concept of joint employers. The *Rutherford* Court's recognition that the FLSA's definition of "employ" is broad was in support of its conclusion that the workers at issue were "not independent contractors," and were instead employees. 331 U.S. at 729. It was in this context, and in direct response to the argument that the workers were independent contractors, that the Supreme Court explained "that the

determination of the relationship [between workers and an employer] does not depend on such isolated factors but rather upon the circumstances of the whole activity." *Id.* at 730.

The district court (SPA 70-72) also criticized the Department's reliance on *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018). 85 Fed Reg. at 2824-25; (SPA 198). As the Department observed in the preamble to the final Rule, some courts of appeals have based their joint-employer tests on the principle that the FLSA must be "broadly interpreted" in light of its remedial purpose. (SPA 198). But *Encino* refused to give an FLSA exemption a narrow reading based on "the flawed premise that the FLSA pursues its remedial purpose at all costs." 138 S. Ct. at 1142 (quotation marks omitted). While the Joint Employer Rule does not concern an FLSA exemption, the Supreme Court's skepticism of that approach to interpreting FLSA exemptions also has relevance when interpreting the FLSA to determine the correct test for joint employer status, as the Department explained. (SPA 198).

C. The District Court's Criticism of the Joint Employer Rule's Focus on Control Was Unfounded

The district court also criticized the Joint Employer Rule's "emphasis on control as the touchstone of joint employer liability" as impermissibly narrow. (SPA 78). However, the Joint Employer Rule's evaluation of control by a potential employer over employees to determine joint employer status is both consistent with the

FLSA and reflects "the overarching concern" in determining whether someone is an additional employer when an employment relationship already exists. *Herman v. RSR Security Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). By tethering the Joint Employer Rule to the FLSA's definition of employer, the four articulated factors of the balancing test are consistent with section 3(d) of the FLSA—when another person exercises control over the terms and conditions of employment, that person is "acting . . . in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

In taking issue with the Joint Employer Rule's four control-based factors, the district court pointed to various circuit courts that have acknowledged that factors similar to those in the Rule are sufficient, but not necessary, to establish joint employer liability. (SPA 74). Indeed, this Court, in *Zheng*, has held that sole reliance on control factors would be improper under *Rutherford*, and that "the definition of 'employ' in the FLSA cannot be reduced to formal control over the physical performance of another's work." 355 F.3d at 69-70. The Rule thus adopts a test that differs from the open-ended list of non-exclusive factors that *Zheng* held should be used to determine joint employer status under the FLSA. *Id.* at 71-72.[9]

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[9] The test articulated in *Zheng* was established without the benefit of the Department's analysis provided in the Joint Employer Rule, and this Court has long recognized the persuasive value of a range of guidance. *See Barfield v. N.Y.C. Health & Hosps.*

But as the Department observed, the test for joint employer status differs from circuit to circuit; "it would not be possible to provide detailed guidance that is consistent with all of them." 85 Fed. Reg. at 2824; (SPA 197-98). Given that reality, and also in light of the "value of uniformity in [an agency's] administrative and judicial understandings of what a national law requires," *Mead*, 533 U.S. at 234, the Department acted reasonably in developing one, nationally uniform standard for joint employer status that takes into account the various circuits' tests. *See* 85 Fed. Reg. at 2831 ("by promulgating a clear and straightforward regulation, the Department hopes to encourage greater consistency for stakeholders"); (SPA 207). And, as the Department has long acknowledged, the standard it chose accords with "multiple circuit courts [that] have adopted multi-factor balancing tests derived from *Bonnette* in order to analyze potential joint employer scenarios." 85 Fed. Reg. at 2831 ("The First and Fifth Circuits apply the *Bonnette* test, which is very close to the Department's proposed test. . . . The Third Circuit also applies a similar four-factor test . . . ."); *see also* Joint Employer AI ("Some courts, however, apply factors that address only or primarily the potential joint employer's control"; citing *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998), and *In re Enterprise Rent-A-Car Wage*

Corp., 537 F.3d 132, 149 (2d Cir. 2008) ("[T]his court has 'often relied on DOL Opinion Letters for their persuasive value.'" (quoting *Gualandi v. Adams*, 385 F.3d 236, 243 (2d Cir. 2004))).

& Hour Emp't Practices Litig., 683 F.3d 462, 468-69 (3d Cir. 2012)); (SPA 146, 206-07). Moreover, as explained above, the Rule's articulation of the appropriate test reflects the approach taken by the Supreme Court in *Falk*, which also emphasized control. And regarding other courts of appeals applying different tests, the Department took these into consideration as well, observing in advancing its goal of promoting uniformity that "each of them applies at least one factor that resembles one of the factors from the Department's test." 85 Fed. Reg. at 2831; (SPA 207).

And the Department provided a reasoned explanation for why it believed additional factors would both complicate a joint employer analysis and increase the likelihood of inconsistent results. The Department reasoned that "the greater the number of factors in a multi-factor test, the more complex and difficult the analysis may be in any given case, and the greater the likelihood of inconsistent results in other similar cases." 85 Fed. Reg. at 2831; (SPA 207). Instead, the Department believed that "[b]y using factors that focus on the exercise of control over the most essential and common terms and conditions of employment," the Rule's test would "assist stakeholders, as well as courts, in determining FLSA joint employer status with greater ease and consistency," thereby providing certainty to both employers and workers, in an effort to avoid investigation or litigation. *Id.*

Neither this Court's precedent, nor any circuit court applying a joint employer analysis different from the Joint Employer Rule, requires this Court to reject

the Department's interpretation of FLSA joint employer status. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 82-84 (2d Cir. 2006) (acknowledging that prior precedent may be reconsidered in part based on the agency's subsequent interpretation of the statutory provision at issue). The Joint Employer Rule's guidance about how the Department will interpret the FLSA (and its reconsideration of prior determinations) is particularly warranted where the courts of appeals have offered conflicting assessments of the same statutory doctrine resulting in a patchwork of judicial decisions and legal uncertainty, even though the courts were all attempting to apply the same underlying law.

The district court also criticized the Rule's exclusion of factors evaluating economic dependence from consideration. (SPA 78-81). That criticism rests on the incorrect premise that the focus of any joint employer inquiry is the employer-employee relationship. Because the worker's status as an employee of an employer under the FLSA is already established, the joint employer inquiry instead focuses on whether liability extends to an additional potential employer.

While the economic reality is an "interpretive principle" in a joint employer analysis, *see* 85 Fed. Reg. at 2834; (SPA 211), the Rule does not consider an employee's economic dependence as relevant to the analysis. As the Department explained, "[e]conomic dependence is relevant when applying section 3(g) and determining whether a worker is an employee under the Act; however, determining whether a worker who is an employee under the Act has a joint employer for

his or her work is a different analysis that is based on section 3(d). Thus, factors that assess the employee's economic dependence are not relevant to determine whether the worker has a joint employer." 85 Fed. Reg. at 2821; (SPA 193). The Department explained that the factors related to economic dependence focus on whether the employee is correctly classified as an employee as opposed to an independent contractor, rather than on "whether the potential joint employer is acting in the interest of the employer in relation to the employee," making those factors not relevant for determining "whether additional persons are jointly liable under the Act to a worker whose classification as an employee has already been established." 85 Fed. Reg. at 2837 (citing *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176 (11th Cir. 2012)); (SPA 215). Because economic dependence goes to the separate issue of whether a worker is an employee in the first place, the Department was reasonable in concluding that it is not a factor in the joint employer analysis.

D. The Department's Promulgation of the Joint Employer Rule Was Neither Arbitrary nor Capricious

The APA's "deferential" standard of review requires the Court to "assess, among other matters, whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Guertin v. United States*, 743 F.3d 382, 385-86 (2d Cir. 2014) (citing *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013) (quotation marks omitted)). 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

As an initial matter, the reasonableness of the Rule is demonstrated by the fact that the Department made its determination after seeking and considering comments "on any aspect" of its detailed notice of proposed rulemaking (and thereafter revising certain aspects of the proposed rule to reflect and address commenters' concerns)—a process that is not required in connection with an interpretive rule. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (section 4 of the APA "specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules"); *see also* 84 Fed. Reg. at 14,044; (SPA 160). This transparency by the Department, as well as the comprehensive efforts to substantively address many of the comments received, demonstrate the Department's commitment to providing guidance that is faithful to the FLSA and informs the public how the Department will enforce the FLSA.

The reasoned and comprehensive explanations provided by the Department—based on sound analyses of both the FLSA and relevant case law, as well as the agency's experience and expertise—warrant upholding the Joint Employer Rule. The district court's con-

clusion that the Rule is arbitrary and capricious is erroneous. Contrary to the district court's assertion that the Department did not adequately explain why it departed from its prior interpretations, the Department did not ignore its prior FLSA guidance and interpretations regarding joint employers in promulgating the Joint Employer Rule. (SPA 81-83). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency must "display awareness that it *is* changing position" and "show that there are good reasons" for its new policy, but it need not show that "the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The Department has satisfied these requirements here. In addition to comprehensively explaining the Department's need to revise the 1958 joint employer regulation, the Joint Employer Rule provides a thorough and detailed chronology of the regulatory and judicial history regarding joint employer analyses, and explains why the Department chose a multi-factor balancing test for its new joint employer policy. Specifically, the Department believed that additional guidance on how to determine joint employer status where an employer suffers, permits, or otherwise employs an employee to work, and another person simultaneously benefits from that work, would be helpful, particularly because the Department was concerned that the 1958

regulation's "not completely disassociated" standard may suggest—contrary to the Department's longstanding position—that these situations always result in joint employer status. 84 Fed. Reg. at 14,046-47; (SPA 162).

In addition, the Department also believed it would be helpful to revise the 1958 regulation in light of the competing and inconsistent tests for joint employer status adopted by the courts. 84 Fed. Reg. at 14,047; (SPA 162-63). The Department posited that the revised four-factor balancing test "would provide guidance to courts that may promote greater uniformity among court decisions," which in turn "would promote fairness and predictability for organizations and employees." 84 Fed. Reg. at 14,047; (SPA 163). In addition, by providing more clarity about what circumstances and activities could result in joint employer status, and conversely reducing uncertainty about what could or could not result in joint liability, the Department believed that its revisions to its regulation "could promote innovation and certainty in business relationships," particularly in light of the modern economy that "involves a web of complex interactions filled with a variety of unique business organizations and contractual relationships." *Id.*

Revising the regulation also provided the Department with an opportunity to clarify two points that the prior regulation was silent on—that a business model does not make joint employer status more or less likely under the FLSA, and the statutory basis for FLSA joint employer status. *Id.* Lastly, the Department cited public interest in the issue, including "a tremendous

amount of attention, concern, and debate about joint employer status," which rulemaking could address. *Id.*

The district court faulted the Department for not adequately explaining why the Joint Employer Rule departed from MSPA regulations and the Department's 1997 guidance regarding MSPA, as well as Administrator's Interpretations issued in 2014 and 2016. (SPA 82-83). As explained in the Joint Employer Rule, the Department was only providing new standards for determining joint employer status under the FLSA, and "[t]he Department will continue to use the standards in its MSPA joint employer regulation, 29 C.F.R. 500.20(h)(5), to determine joint employer status under MSPA, and will continue to use the standards in its FMLA joint employer regulations, 29 C.F.R. 825.106, to determine joint employer status under the FMLA." 85 Fed. Reg. at 2828; (SPA 203, 253). And while the district court is correct that the Joint Employer Rule does not cite the 1997 MSPA guidance, it was for good reason. Although the MSPA uses the same definition of "employ" as the FLSA, it does not statutorily define "employer." (SPA 31). The MSPA is a different statutory scheme, which imposes distinct legal obligations from the FLSA's minimum wage and overtime pay requirements, and applies to specific employers and employees in an effort to provide safeguards for migrant and seasonal agricultural workers in their interactions with farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing. *See* 29 U.S.C. § 1801 ("It is the purpose of [the MSPA] to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to

register under this chapter; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers."). Moreover, unlike the FLSA, "Congress intended that the joint employer test under MSPA be the formulation as set forth in *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973)." *See* 29 C.F.R. § 500.20(h)(5)(ii); (SPA 152). There is no basis to conclude that the Department must be constrained by the MSPA or its regulations when determining joint employer status under the FLSA. *See Layton*, 686 F.3d at 1177 ("Although the [MSPA] defines joint employment by reference to the definition provided in the FLSA, that does not mean that the reverse holds true—that joint employment under the FLSA is invariably defined by [MSPA] regulations.").

The district court similarly took issue with the Department's failure to satisfactorily explain why it departed from the 2014 and 2016 Administrator's Interpretations. (SPA 82). As an initial matter, both of guidance documents were rescinded before the effective date of the Joint Employer Rule. In fact, the Joint Employer AI was rescinded on June 7, 2017, almost two years before the notice of proposed rulemaking regarding the Rule was issued. *See* https://go.usa.gov/xAyMF.

And while the Joint Employer Rule does not explicitly address the Department's departure from these earlier interpretations regarding joint employer status under the FLSA, the Department's summary of both interpretations in the Rule (SPA 195) reflects the agency's awareness of its prior interpretations. *See Fox*

Television Stations, 556 U.S. at 515. Moreover, the Department spent considerable time and effort comprehensively explaining why it ultimately selected the four factors that focused on the exercise of control as set forth in the Joint Employer Rule, including why the Department believed it was the most appropriate analysis for a joint employer inquiry. (SPA 203-12). Thus, it cannot be said that the Department "depart[ed] from a prior policy *sub silentio* or simply disregard[ed] rules that are still on the books." *Fox Television Stations*, 556 U.S. at 515-16 ("In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

The district court also incorrectly concluded that the Joint Employer Rule failed to adequately consider the costs to employees. (SPA 83-85). While the Department agreed that the Joint Employer Rule may reduce the number of businesses found to be joint employers, which in turn "may reduce the amount of back wages that employees are able to collect when their employer does not comply with the Act," the Department concluded that it "lack[ed] data on the current number of businesses that are in a joint employment relationship, or to estimate the financial capabilities (or lack thereof) of these businesses and therefore is unable to estimate the magnitude of a decrease in the number of employers liable as joint employers." 85 Fed. Reg. at 2853; (SPA 237). Similarly, the Department lacked data to quantify benefits to employees asserted by

other commenters. (SPA 238). Moreover, the Department examined the data presented by the EPI, but explained that it did not "believe there are data to accurately quantify the impact of this rule." 85 Fed. Reg. at 2853; (SPA 237). The district court's belief that the Department did not provide a "satisfactory explanation" fails to appreciate that the agency was unable to quantify the estimated costs due to the lack of concrete data. (SPA 84). By concluding that the Department "effectively assumed that the Final Rule would cost workers nothing" the district court incorrectly conflated the Department's inability to provide a meaningful estimate with failing to consider it altogether or concluding that it had no such costs. (SPA 85). And even assuming *arguendo* that the Department could theoretically obtain this data, the agency was not required to undertake an empirical economic analysis. *See Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d 492, 523 (2d Cir. 2017) (collecting Supreme Court decisions that "seem to establish that while an agency may support its statutory interpretation with factual materials or cost-benefit analyses, an agency need not do so in order for its interpretation to be regarded as reasonable").

CONCLUSION

The judgment of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,920 words in this brief.

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