RECORD NO.

20-3806(L)

20-3815(CON)

In The

United States Court of Appeals

For The Second Circuit

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

Plaintiffs – Appellees,

(***Caption continued on inside cover***)

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

BRIEF OF INTERVENORS - DEFENDANTS - APPELLANTS

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RECORD NO.

20-3806(L)

20-3815(CON)

v.

EUGENE SCALIA, ESQ., SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, 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, AMERICAN LODGING AND HOTEL ASSOCIATION,

Intervenors - Defendants - Appellants.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenors-Defendants-Appellants (hereafter "the Associations") provide the following Corporate Disclosure Statement: International Franchise Association, the Chamber of Commerce of the United States of America, the HR Policy Association, the National Retail Federation, the Associated Builders and Contractors, and the American Hotel and Lodging Association are non-profit, non-stock trade associations who have no parent companies.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes

Federal Regulations

TABLE OF AUTHORITIES

Page(s)

Rules

Other Authorities

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York (the "District Court") exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1331 on the basis that the claims asserted in the Complaint presented a federal question. As set forth below, the Associations dispute that the District Court ever had subject matter jurisdiction due to the lack of Article III standing of Plaintiffs-Appellees State of New York, *et al* (the "State Plaintiffs").

The Associations, as Intervenors-Defendants in the District Court, filed this appeal on November 6, 2020 from the judgment of the District Court entered on September 8, 2020 in favor of the State Plaintiffs, consistent with Federal Rule of Appellate Procedure 4(a)(1)(B). This appeal was consolidated with the appeal filed the same date by the Defendant Department of Labor (the "Department"). This Court has appellate jurisdiction over the consolidated appeal, pursuant to 28 U.S.C. § 1291, as an appeal of right following the entry of a final order and judgment of a United States District Court.

The Associations have standing to file this appeal from the District Court's action invalidating the Rule, regardless of whether the government defendant continues to defend the regulatory action, because they and their members will otherwise suffer "an injury in fact that is fairly traceable to the challenged action and that is likely to be redressed by the relief requested." *Schulz v. Williams*, 44 F.3d 48,

52 (2d Cir. 1994) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)); *see also Beck v. Dep't of Commerce*, 982 F.2d 1332, 1337, 1341 (9th Cir. 1992) (holding that intervenor on behalf of the government had standing to appeal district court's decision to strike down an amendment to a regulation).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that the State Plaintiffs had standing to file their pre-enforcement challenge to the Department's interpretive Rule ("the Rule"), which seeks only to provide federal enforcement guidance as to joint employer standards under the Fair Labor Standards Act ("FLSA");

2. Whether the District Court erred in concluding that the State Plaintiffs' facial, pre-enforcement challenge to the Rule's guidance was ripe for review;

3. Whether the District Court erred in concluding that the Rule violates the FLSA;

4. Whether the District Court erred in concluding that the Rule is arbitrary and capricious under the Administrative Procedure Act ("APA").

STATEMENT OF THE CASE[1]

A. Nature of the Case

This case is before the Court on appeal of a Decision and Order ("Order") vacating all but one provision of the Department's Rule. (JA 26-JA 27; SPA 87). The Rule was published in the *Federal Register* on January 16, 2020. *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (codified at 29 C.F.R. §§ 791.1-791.3) (Jan. 16, 2020), with an effective date of March 16, 2020. (SPA 191).[2]

B. Relevant Procedural History

The State Plaintiffs filed a Complaint on February 26, 2020, requesting that the District Court vacate the Rule. (JA 77). On May 11, 2020, the Department filed a motion to dismiss for lack of jurisdiction, which the State Plaintiffs opposed and the District Court denied. (JA 16-18). On June 10, 2020, the Associations answered

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[1] References to the Joint Appendix and Special Appendix are designated as "JA - [page number]" and "SPA [page number]." The Special Appendix, filed on this date by the Department and hereby incorporated by reference, contains all regulatory sections and court orders in this proceeding on which the Department and the Associations rely.

[2] The Rule was preceded by a Notice of Proposed Rulemaking published in the *Federal Register* on April 9, 2019. *Joint Employer Status Under the Fair Labor Standards Act*, 84 Fed. Reg. 14,043 (Apr. 9, 2019). Public comments were submitted to the Department, which are recorded in the public docket of the rulemaking proceeding. WAGE & HOUR DIVISION, JOINT EMPLOYER STATUS UNDER THE FAIR LABOR STANDARDS ACT, WHD-2019-003, www.regulations.gov. *See also* SPA 158.

the State Plaintiffs' Complaint and filed a motion to intervene in support of the Department's Rule, which the State Plaintiffs opposed but the District Court granted. (JA 18-19). On June 15, 2020, the Department answered the State Plaintiffs' Complaint. (JA-19). On June 22, 2020, the State Plaintiffs filed a motion for summary judgment. (JA 20-21). On July 17, 2020, the Department and the Associations each filed cross motions for summary judgment and in opposition to the State Plaintiffs' motion for summary judgment. (JA 22-23).

C. Disposition Below

On September 8, 2020, Judge Gregory H. Woods issued his memorandum opinion and order granting in part and denying in part the parties' cross motions for summary judgment. (JA 25-26; SPA 87). Specifically, Judge Woods determined that one provision of the Rule was severable and remains in effect, but vacated the rest of the Rule. (JA 25-26; SPA 87). *See also New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498 (S.D.N.Y. Sept. 8, 2020). The consolidated appeals followed. (JA 26-27).

STATEMENT OF FACTS

A. The Joint Employment Standard Under the FLSA

Since the FLSA's enactment, the Department has recognized that "an employee can have two or more employers who are jointly and severally liable for the wages due the employee." SPA 191. Where the employee has two or more such employers, those employers are "joint employers." *Id.* As the District Court

recognized, however, the FLSA "does not separately define a 'joint employer.'" SPA 58. Notably, "[t]he joint employment doctrine addresses only from whom [an] employee may collect" wages; the joint employment doctrine does not impact the amount of wages due to an employee. SPA 34-35.

There are three provisions in the Act that use the word "employ": Sections 203(d), 203(e), and 203(g). 29 U.S.C. § 203(d), (e), (g). But only one of those provisions imposes any obligation to satisfy the minimum wage and overtime requirements of the Act by more than one employer at a time. That is Section 203(d), which defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[3] *Id.* § 203(d).

As explained in the Rule, the Department interpreted the Act in 1939 to impose joint employer liability only "if the employers make an arrangement for the interchange of employees or if one company controls, is controlled by, or is under common control with, directly or indirectly, the other company."[4] The Department also declared that joint employers could be found where they were "not completely

[3] Section 203(e) defines an "employee" to mean "any individual employed by an employer," adding nothing to the joint employer analysis. Section 203(g) defines the term "employ" to include "to suffer or permit to work," which likewise says nothing about *for whom* the employees are deemed to work.

[4] SPA 194 (citing Interpretive Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938," ¶ 17).

disassociated" in the limited situation where an employee worked 40 hours for company A and 15 hours for company B during the same business week, *i.e.*, a "horizontal" joint employment setting. *See* SPA 194-95 (citing Interpretive Bulletin No. 13, "Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the fair Labor Standards Act of 1938," ¶17).

In the early case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), the Supreme Court found joint employment under the FLSA, when it found that meat boners could be employed both by the subcontractor that directly employed them and by a slaughterhouse operator who supervised and controlled their daily work. But the Court made no broad pronouncement as to the factors or statutory provisions leading to the joint employer finding in that case. To the contrary, as explained by the Department in the Rule (SPA 202), *Rutherford Food* invoked the text of Sections 203(e) and (g) only in connection with its separate determination that the workers in question were "employees" and not "independent contractors," 331 U.S. at 726-27, 728, n.6.

In 1958, the Department codified its interpretation of joint employment in its rules. Section 791.2 presented alternative situations where joint employer status could apply, as follows:

> [(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.

SPA 194. In publishing this interpretive rule, the Department gave no indication that it intended to sweep within the scope of the joint employment standard any business-to-business relationships that did *not* involve shared control of employees, directly or indirectly. Moreover, many business models, such as the franchising industry and the temporary staffing industry, were at early stages when the 1958 rule was promulgated and were not discussed in that rulemaking.

In 1973, the Supreme Court decided *Falk v. Brennan*, 414 U.S. 190, another joint employer case. There, the Court relied only on Section 203(d) to find that an apartment management company was a joint employer of employees working at the apartment buildings the company managed. *Id.* at 191 n.2, 195. The Court again applied a straightforward test to make this determination, finding that the management company was a joint employer because it exercised substantial control over the terms and conditions of the employees' work. *Id*. at 195. The Court considered none of the additional factors which the District Court now contends are "the crux of the joint employment inquiry." SPA 78.

The Ninth Circuit expressly relied on *Falk* and *Rutherford* when it decided *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983).[5] In *Bonnette*, the Ninth Circuit adopted a widely accepted four-factor test to determine joint employer status under Section 3(d), based on whether the putative joint employer:

> (1) had the power to hire and fire the employees, (2) supervised and controlled employees work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Id. at 1470. As the *Bonnette* court made clear, each joint employment case is different and the factors are not "etched in stone." *Id*. The Ninth Circuit further held that the determination of joint employer status depends on the circumstances of the whole activity. *Id*.

The foregoing test became the most common baseline standard for joint employment under the FLSA, over the next several decades. SPA 194-95, 252. *Bonnette* was followed by a majority of the circuits considering the issue (including the First, Third, Fifth, Sixth, Seventh and Tenth circuits) with some minor

[5] *Abrogated on other grounds, Garcia v. San Antonio Metro Transit Auth*., 469 U.S. 528 (1985).

variations,[6] and a number of circuits and state courts continue to follow *Bonnette*'s common-sense test today.[7] *Id.*

B. Recent Expansion of the Joint Employment Standard

In recent years a different view of the longstanding joint employment standard emerged in some circuits construing the FLSA. Some courts improperly conflated the question of whether the workers at issue were employees or independent contractors under Section 203(e) or (g) of the Act, together with the previously separate question of whether the workers were jointly employed by two otherwise separate employers.[8] Some courts added additional factors, which do not appear in the text of the Act or the Department's 1958 regulation, but can be viewed as addressing different sets of facts presented in particular case settings.[9]

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[6] *See, e.g.*, *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998); *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990); *Skills Dev. Servs., Inc. v. Donovan*, 728 F.2d 294, 300-01 (6th Cir. 1984).

[7] *Imbarrato v. Banta Mgmt. Servs.*, 2020 U.S. Dist. LEXIS 49740 (S.D.N.Y. Mar. 20, 2020); *Copeland v. C.A.A.I.R., Inc.*, 2019 U.S. Dist. LEXIS 154619, at *12 (N.D. Okla. Sept. 11, 2019); *Gutierrez v. Galiano Enters. of Miami*, 2019 U.S. Dist. LEXIS 95654, at *8 (S.D. Fla. June 7, 2019).

[8] *See, e.g.*, *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997); *Antenor v. D&S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

[9] *See, e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003); *In re Enter. Rent-A-Car. Wage & Emp't Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012); *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1178-81 (11th Cir. 2012); *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997); *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017).

During the Obama Administration, the Department itself adopted a more expansive view of joint employment than it had previously, specifically in so-called "fissured industries," based upon a 2011 article written by the future Administrator of the Department's Wage and Hour Division, Dr. David Weil.[10] After Dr. Weil became the Department's Administrator in 2014, at his direction the Department (without public notice and comment) issued new guidance in the form of a 2016 Administrator's Interpretation (AI).[11] In that AI, subsequently revoked by the Department,[12] the Administrator advocated an extremely broad definition of joint employment under the FLSA, in order to hold franchisors and other larger employers responsible for the perceived failures of some smaller franchisees or temporary agencies to properly pay their workers.

Among other departures from the historical treatment of joint employer status discussed above, the 2016 AI applied the "suffer or permit" language of Section 203(g) to the joint employment definition, which the Interpretation declared should be "defined expansively" and in a manner "notably broader than the common law

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[10] Weil, D. (2011). *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, THE ECONOMIC AND LABOUR RELATIONS REVIEW, *22*(2), 33–54. https://doi.org/10.1177/103530461102200203; *see also* Weil, D., The Fissured Workplace, Harvard Univ. Press, 2014.

[11] SPA 139.

[12] *See* News Release, U.S. Dep't of Labor, U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), *available at https://www.dol.gov/newsroom/releases/opa/opa20170607.*

… which look[s] to the amount of control that an employer exercises over an employee."[13] In sum, the 2016 Interpretation declared the Department's intent to interpret the scope of joint employment under the FLSA to be as "broad as possible."[14] The Administrator acknowledged that his 2016 interpretation of the joint employer standard under the FLSA conflicted with the approach of some circuit courts of appeals in "apply[ing] factors that address only or primarily the potential joint employer's control."[15]

C. The Threat to Job Growth And Need For Greater Clarity and Uniformity Under the Joint Employer Standard.

During the period in which the Department consistently applied the "right of control" factors identified with the *Bonnette* test of the Ninth Circuit, significant job growth took place in the industries represented by the Associations. Specifically, the franchising industry grew to the point that, prior to the COVID-19 pandemic, there were more than 733,000 franchise establishments supporting nearly 7.6 million jobs and generating $674.3 billion of economic output for the U.S. economy, including

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[13] SPA 162.

[14] *Id.* The 2016 AI claimed support for this expansive view of the FLSA from Supreme Court descriptions of different provisions of the Act. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (construing the Act "liberally" and "broadly" to achieve remedial purposes). The Supreme Court departed from this view subsequent to the AI's revocation. In *Encino Motor Cars v. Navarro*, 138 S. Ct. 1134, 1142 (2018), the Court declared that the FLSA's text should not be given anything but a "fair" reading, as opposed to the most expansive one.

[15] SPA 146.

the economies of every State Plaintiff.[16] Likewise, the temporary staffing industry expanded its numbers of employees, according to the Bureau of Labor Statistics, to upwards of 2 million jobs created during this time period.[17] Other industries represented by the Associations similarly expanded during the same time period, creating millions of new jobs in construction, retail, and hospitality. *See, e.g.*, JA 274, 302.

The Administrative Record in this case establishes that continued growth of jobs in the industries represented by the Associations, even before the pandemic, was being jeopardized by the recent expansion of and inconsistencies in the joint employer standard enforced by the Department and the courts under the FLSA.[18] As explained in Comments filed by the International Franchise Association, the overbroad interpretations of the joint employer standard placed franchisors in the virtually impossible position of either incurring joint employer liability if they exerted too much control over their brand, or abandoning their trademarks if they exerted too little control over their brand. JA 279. For this reason, 84 percent of surveyed franchisors believed they needed to eliminate or curtail vital training and

[16] *See* JA 272. One of the State Plaintiffs' own exhibits asserts that franchising has created even more jobs, 8.85 million in 2018. JA 89.
[17] JA 88.
[18] *See, e.g.*, JA 283-84; JA 293.

support to franchisees and to restrict their relationships with new, disadvantaged franchisees. *Id*. at 11-14.

A recent study of the economic impact of expanded joint employer standards concluded that an expanded standard had a significant adverse impact on the US. Economy, equivalent to a loss of output of $17.2 billion to $33.3 billion annually for the franchise business sector and likely multiple times that for all sectors affected. JA 287; *see also* JA 293 (U.S. Chamber of Commerce comments reporting "significant reduction of franchise-related job opportunities."). Similar concerns regarding threats to job growth in hospitality, retail and construction were also submitted into the NPRM record. *See, e.g.*, JA 316, 322, 327.

As further noted by the U.S. Chamber in its comments to the Department on the NPRM:

> Collective actions under the FLSA are expensive, time- and resource-consuming endeavors that can take years to resolve. If an employee or plaintiff's attorney can simply name a large business in a complaint and survive a motion to dismiss based on a vague or uncertain joint employer test, an entity may be tied up in litigation even when it is clearly not a joint employer under a test like *Bonnette*. The Proposed Rule's simplicity and clarity will reduce this risk and ensure that employers do not suffer liability merely because they use one of the myriad productive, arms-length business relationships that make the economy thrive.

JA 293; *see also* JA 302 (explaining that clarity as to joint-employer standard will "increase employment opportunities and promote economic growth in an era where, increasingly, businesses rely on contracting for specialized services.").

D. The Department's Rule.

As explained by the Department, the primary goals of the Rule are to set a uniform, nationwide standard for determining joint-employer status under the FLSA, and to provide greater certainty to all stakeholders as to their obligations under the Act. SPA 196-97. To achieve these goals, the Rule provides "more meaningful, detailed, and uniform guidance of who is a joint employer under the Act." *Id*.

As noted above, the Rule adopts a non-exclusive four-factor balancing test that is grounded in the history of the joint employment standard. The Rule's test is based on the plain language of section 203(d), draws on seminal case law, *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), and substantively includes many of the key elements of the multi-factor tests adopted and utilized in the various circuits.

The Rule also makes clear that while the four factors of *Bonnette* are the primary touchstones of the joint employer analysis, additional factors may be relevant in determining joint employer status, and that "economic reality" and the "totality of circumstances" remain appropriate considerations. SPA 206, 211. At the same time, the Rule clarifies that whether an employee is "economically dependent" on a potential joint employer is not relevant for determining joint employer liability under the Act. SPA 216. As the preamble explains, because an employee is typically "economically dependent" upon his/her job regardless of the identity of the

employer, the economic dependence analysis is misplaced in determining who is the true employer of an individual already deemed to be an employee (and not an independent contractor). *Id*. The Rule distinguishes irrelevant factors pointing to "employee" status from those factors bearing on who the employee's "joint employers" are. *Id.*

As further stated in the Rule, by bringing clarity to the joint employment standard, the Department has sought to enable employers across industries to determine how to meet the standard and thereby reduce litigation costs. SPA 191, 196-97, 207, 233, 237, 238. The Administrative Record makes clear that this objective can be met if the Rule stands.

E. The State Plaintiffs' Challenge to the Rule and the Associations Intervention in Support of the Rule.

On February 26, 2020, the State Plaintiffs filed suit to vacate the Rule and enjoin its implementation. (JA 30). Alleging that the Rule was unlawful under the APA, the State Plaintiffs asserted first that the Rule conflicted with the FLSA's plain language and purpose, as well as the Supreme Court and appellate precedent interpreting the FLSA. (JA 52). Specifically, the State Plaintiffs alleged that the Rule's interpretation of "employer" is too narrow (JA 53), that it runs counter to congressional intent expanding employer liability under the FLSA beyond common law agency relationships (JA 54), and that it disregards the Supreme Court's decision in *Rutherford* (and appellate decisions interpreting it) that compels courts to consider

"the circumstances of the whole activity" when analyzing joint employer status (JA 55- JA 56). The State Plaintiffs further alleged that the Rule was arbitrary and capricious under the APA because the Department did not justify its departure from prior interpretations of the joint employer standard, (JA 56), and did not consider the Rule's effect on workers (JA 63).

The State Plaintiffs alleged that the Rule would harm them in various ways. (JA 64). First, the State Plaintiffs alleged that the Rule would decrease their tax revenues because the Rule would allow "fissured" employers to shirk their responsibilities to pay wages and premiums, meaning that employees and regulators will be less able to collect unpaid back wages from fissured employers. (JA 66-67). The State Plaintiffs next alleged that the Rule would require them to incur administrative expenses to revise current joint employment guidance, though the State Plaintiffs did not identify any aspect of the federal rule that requires or permits state government "guidance". (JA 73). Finally, the State Plaintiffs alleged the Rule would cause them to incur increased enforcement costs and burdens because states "will bear the burden of...increased wage theft." (JA 76).

As noted above, the Department moved to dismiss the Complaint because none of the foregoing claims of harm were sufficient to establish the State Plaintiffs' standing to sue. (JA 16-17). The District Court denied the Department's motion (JA 18), at which point the Associations intervened (JA 18-19), and cross-moved for

summary judgment (JA 22), raising ripeness concerns as well as disputing factually the highly speculative basis for the State Plaintiffs' claims of harm from the Rule. (JA 677-81). In addition, the Associations established through submission of Administrative Record comments that their members' would be threatened with imminent harm if the Rule were declared invalid, resulting in continued expansion of the joint employment standard. (JA 272-330). The Associations and the Department also disputed the State Plaintiffs' challenge to the Rule on its merits.

F. The District Court's Decision Vacating Part of the Rule.

In granting the State Plaintiffs' motion for summary judgment, the District Court concluded the State Plaintiffs had standing to challenge the Rule solely on the basis that some of the states would incur administrative and enforcement costs relating to the Rule, notwithstanding that the Rule's scope is limited to compliance with federal law. SPA 44, 48.[19] The District Court concluded that the State Plaintiffs'

[19] The Court had previously found the State Plaintiffs had standing sufficient to survive the Department's motion to dismiss on the additional ground that the Rule would "predictably" cause decreased state tax revenues. (SPA-15). In ruling on the summary judgment cross-motions, however, the Court correctly declined to rely on the States' tax revenue decrease argument, acknowledging the Associations' evidence that the Rule would actually *increase* state tax revenues by promoting job growth. The District Court also acknowledged but purported to distinguish this Court's recent ruling in *XY Planning Network, LLC v. U.S. Securities and Exchange Comm'n*, 963 F.3d 244, 252-53 (2d Cir. June 26, 2020), rejecting a similar tax revenue-based state claim as a basis for standing. The District Court also declined to find standing on the basis of *parens patriae*. SPA 49, 52 n.11.

interests in "protecting their tax base," and their "overlapping interest in protecting workers" fell within the zone of interests encompassed by the FLSA, as channeled through the APA, together with "secondary economic injuries." SPA 54.

The District Court also concluded the State Plaintiffs' challenge to the Rule was ripe because the Rule was in effect and therefore final, though no evidence was presented that the Rule's interpretive guidance had as yet been relied upon or applied to support any agency action in a particular case. SPA 52, 53. The District Court also made no findings requiring the State Plaintiffs to establish that no set of circumstances exist under which the Rule could be lawfully applied.

Regarding the merits of the State Plaintiffs' challenge to the Rule, the District Court concluded that the Department erred in relying on Section 3(d) of the FLSA, which defines "employer," as the sole textual basis for the Rule. The Court held instead that the Department should have read the FLSA's definitions of "employer," "employee," and "employ" (Sections 3(d), 3(e), and 3(g)) together in analyzing joint employer status. SPA 55. According to the District Court, the Department's interpretation of the FLSA was inconsistent with the FLSA's history, as well as Supreme Court and circuit court precedent interpreting the FLSA. SPA 63, 66-73. The District Court also faulted the Rule for selecting "control" as the touchstone for joint employer liability and prohibiting courts from considering factors besides

control, such as whether an employee is economically dependent on a potential joint employer. SPA 78.

Finally, the District Court also determined that the Rule was arbitrary and capricious because the Department did not explain why it changed its interpretation of the joint employer standard, giving short shrift to the explanation the Department in fact gave. SPA 81. The District Court also faulted the Department for failing to consider an alleged conflict between the Rule and the Department's Migrant and Seasonal Agricultural Worker Protection Act ("MSPA") Regulations, and for failing to consider the costs of the Rule to workers, notwithstanding the speculative nature of such costs. SPA 83. Accordingly, the District Court severed the portions of the Rule it determined unlawful, leaving in effect only the Department's changes to 29 C.F.R. § 791.2(e). SPA 87-88.

SUMMARY OF ARGUMENT

The District Court improperly found the State Plaintiffs had standing to challenge the Rule. The State Plaintiffs never demonstrated injury in fact, nor can they do so, because the rule imposes no "concrete" requirements or harms on any state government. *See XY Planning Network, LLC v. U.S. Securities and Exchange Comm'n*, 963 F.3d 244, 252-53 (2d Cir. June 26, 2020). The District Court should in any event have found the States' attenuated claims fell well outside the prudential

zone of interests of the FLSA and the APA. *See Match-E-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

The District Court also erred by finding the State Plaintiffs' pre-enforcement facial challenge to the Rule was ripe for review, notwithstanding that the rule merely constitutes interpretive guidance that has not been relied upon or applied to support any agency action in a particular case. *See Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013). The District Court did not even attempt to address the failure of the State Plaintiffs to establish that no set of circumstances exist in which the Rule could be lawfully enforced, as required by this Court in a pre-enforcement facial challenge. *See Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 128 (2d Cir. 2004); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993).

On the merits, the District Court erred in concluding that the Rule violates the FLSA. The Rule constitutes a return to previously settled joint employer principles under the FLSA, not a departure from such principles. *See Falk*, 414 U.S. at 191 n.2; *Bonnette*, 704 F.2d at 1469. The District Court also improperly interpreted the FLSA to achieve the "broadest remedial purpose," based upon case law predating the Supreme Court's holding in *Encino Motor Cars v. Navarro*, requiring the Act to be given a "fair reading," as the Department did. 138 S. Ct. 1134, 1142 (2018)*; see also Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d 492, 514 (2d Cir. 2017).

The District Court further erred in finding the Rule to be arbitrary and capricious, ignoring the narrow standard of judicial review of agency actions which prohibits a court from "substituting its judgment" for agency decision making. *Fed. Commc'n Comm'n v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009). Also contrary to the District Court's findings, the Department considered the interests of employees during its rulemaking, including a study by the Economic Policy Institute ("EPI") on which the State Plaintiffs heavily relied. Contrary to the District Court's holding, the Department was entitled to disagree with the unsupported conclusions of the EPI and other speculative or anecdotal data on which the State Plaintiffs relied. For all of the foregoing reasons, the District Court erred in vacating provisions of the Rule, and its decision should be reversed.

STANDARD OF REVIEW

This Court's review is *de novo* on the Administrative Record, and the District Court's decision is entitled to no deference. *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 173-74 (2d Cir. 2006). The standing of plaintiffs to sue is also subject to *de novo* review, requiring plaintiffs to prove Article III injury in fact, and that such injury lies within the zone of interests protected by the statute at issue, the FLSA. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Patchak*, 567 U.S. at 225.

The question of ripeness must also be reviewed *de novo*, in connection with a facial, pre-enforcement challenge. *See Am. Tort Reform Ass'n*, 738 F.3d at 394. The

Court must review whether plaintiffs have proved no set of circumstances exist under which the Rule could be lawfully enforced. *Reno*, 507 U.S. at 301.

On the merits, the Rule is an interpretive rule and is therefore subject to review under the deferential standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). As the Supreme Court further held in *Encino*, the FLSA should be given a "fair reading," not to achieve the "broadest remedial purpose." 138 S. Ct. at 1142.

Finally, the Rule is subject to arbitrary and capricious review under the APA, 5 U.S.C. § 706. The Supreme Court has described arbitrary and capricious review of agency actions as a "narrow" standard, under which the "court is not to substitute its judgment for that of the agency." *Fox*, 556 U.S. at 513.

ARGUMENT

A. The State Plaintiffs Lacked Standing To Challenge The Rule

1. The District Court Should Have Held The State Plaintiffs Suffered Insufficient "Injury in Fact" Under Article III of the Constitution

In its Opinion, the District Court acknowledged that the State Plaintiffs were required at the summary judgment stage to set forth by affidavit or other evidence "specific facts," showing "actual," "imminent," or "concrete" risk of harm. *Lujan*, 504 U.S. at 561 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 & n. 31 (1979)). As the Supreme Court has also held: "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S.

149, 158 (1990) (internal quotations omitted). Most recently, this Court held that states seeking to challenge a federal rule must show a "direct link" to concrete harms caused to them by the rule. *XY Planning Network, LLC*, 963 F.3d at 252-53. The Court found that state plaintiffs lacked standing to challenge a federal rule where they "rel[ied] instead on a causal chain that is too attenuated and speculative to support standing." *Id.*

In the present case, though the State Plaintiffs claimed to have standing on three separate grounds, the District Court found that only one form of "concrete" harm was sufficiently proven by "undisputed facts" to support summary judgment: namely that the Rule somehow imposed "administrative and enforcement" costs on the State Plaintiffs. (SPA 43). This finding by the District Court was clearly wrong and contrary to precedent in this Circuit. The Rule offers only a federal agency's interpretive guidance of a federal statute for federal enforcement purposes; it imposes no obligations whatsoever on the State Plaintiffs. The State Plaintiffs' summary judgment evidence as to state actions incurring nominal—and largely unspecified—administrative costs indicated that such actions were entirely self-inflicted. Such evidence should have been found inadequate to permit the State Plaintiffs to seek an injunction interfering with a federal interpretive rule.[20] *See*

[20] As purported proof of such costs, in their Rule 56-1 Statement, some of the State Plaintiffs declared that they needed to prepare new guidance as a result of the Rule,

Arpaio v. Obama, 27 F. Supp. 3d 185, 202-03 (D.D.C. 2014), *aff'd*, 797 F.3d 11, 20, (D.C. Cir. 2015), *cert. denied* 136 S. Ct. 900, (2016) (noting that the standing doctrine "is not so limp" to permit standing based on the "simple generalized grievance[s]" of state officials who "disagree with how many—or how few—[f]ederal resources are brought to bear on local interests"). [21]

In making its erroneous determination of State Plaintiffs' standing, the District Court cited no precedent in this Circuit, relying instead on distinguishable cases that conflict with this Court's standing doctrine.[22] Such cases in any event do not support the District Court's findings in the present case, because each of them involved administrative burdens directly attributable to the challenged rules in ways that are

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or in the case of Illinois, to "correct[] the problems" with the Rule. *See* JA 138. No such state responsibility is compelled by the Rule.

[21] In concluding that the State Plaintiffs established standing through their alleged administrative costs, the District Court noted the Department's acknowledgement that local governments would spend time reviewing the Rule. SPA 44. Any such time spent reviewing the Rule, however, cannot demonstrate standing. *See Criswell College v. Sebelius*, 2013 U.S. Dist. LEXIS 56694, at *18-19 (N.D. Tex. 2013) (noting, in the similar ripeness context that, "[t]ime spent considering the impact of a law or regulation ... is an insufficient hardship" because "[o]therwise, any such challenge would necessarily be ripe once a plaintiff filed suit").

[22] *See* SPA 43 (*citing California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018)); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.* (*USCIS I*), 408 F. Supp. 3d 1057, 1124 (N.D. Cal. 2019), *aff'd*, *USCIS II*, 2020 U.S. App. LEXIS 37602 (9th Cir. Dec. 2, 2020); *New York v. DOL*, 363 F. Supp. 3d 109 (D.D.C. 2019).

not present here.[23]

In *California v. Azar*, the states demonstrated injury by showing that because of a federal agency action, more individuals would take advantage of state public benefits programs, directly impacting the states' costs of administering such programs. *See* 911 F.3d at 573. The State Plaintiffs have alleged no such injury here. Likewise, in *USCIS I*, the court enjoined implementation of an immigration rule expanding the definition of "public charge" in such a way as to cause individuals to dis-enroll from public benefits, an outcome which the court found would directly increase state costs due to the rise in uncompensated care. 408 F. Supp. 3d at 1122-23. The federal agency in that case also agreed in its rulemaking that state and local governments would incur costs related to the rule changes. *Id.* at 1122; *see also USCIS II*, 2020 U.S. App. LEXIS 37602, at *31 ("The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs and a corresponding reduction in Medicaid payments of over one billion dollars per year."). Even so, the district court found no standing as to several states whose allegations of injury (such

[23] In its ruling on the Department's Motion to Dismiss, the District Court also compared the State Plaintiffs' administrative costs to the costs that the State of California incurred in *California v. Ross* when it increased its outreach efforts in response to the federal government's decision to add a citizenship question to the 2020 U.S. Census. *California v. Ross*, 358 F. Supp. 3d 965, 1004 (N.D. Cal. 2019). There, however, the State of California's decision to increase its outreach was based on a "substantial risk" (a 49.9 percent chance) that California would lose at least one congressional seat. *Id.* The State Plaintiffs face no such risk.

as "need to train staff") were too vague or speculative. *USCIS I*, 408 F. Supp. 3d at 1124; *see also USCIS II*, 2020 U.S. App. LEXIS 37602, at *55 (affirming the order of the Northern District of California).[24]

In any event, unlike the foregoing cases, the State Plaintiffs' concerns of increased administrative and enforcement costs here are merely "hypothetical" and speculative, just like the harms cited in *Robinson v. Sessions*, 721 Fed. App'x 20, 24 (2d Cir. Jan. 18, 2018). In *Robinson*, the Second Circuit declined to find that the plaintiffs demonstrated standing where their alleged harm was dependent on "'a highly attenuated chain of possibilities' that could, in combination with a number of unpled facts, perpetrate the alleged...harm." *See id.* (noting that the plaintiffs injury depended *first* on the plaintiffs' information appearing in one particular database, *second* on the plaintiffs information appearing in a second database, *third* on someone cross-referencing the two databases, and *fourth* on the plaintiffs' transactions being delayed or denied); *see also New York v. Dep't of Labor*, 363 F. Supp. 3d 109, 127 (D.D.C. 2019) (citing *Arpaio*, 27 F. Supp. 3d at 202-03) ("[I]njuries related to a purported regulatory burden did not confer standing where

[24] The State Plaintiffs here relied on similarly vague language on the need to provide additional guidance. *See, e.g.*, ECF No. 68-2 (noting "new training" for Colorado division staff); ECF No. 68-3 (noting that Delaware's joint employer guidance "may" need revision). Even under the lax standard of *USCIS I*, such evidence should have been insufficient to establish standing at the summary judgment stage.

the alleged injury was largely speculative and based on attenuated predictions of future illegal third-party conduct."). [25]

Although the District Court held that "a predictable effect of the Rule is that fewer employees will be able to recover back wages legally owed to them under the FLSA" (SPA 48), this "predictable effect" is contingent *first* on a significant number of employers failing to pay their employees all wages owed, *second* on a significant number of such employers being unable to pay the wages owed in the event of a lawsuit, *third* on the presence of other solvent employers in potential joint employer relationships with the first employers, *fourth* on a finding that the solvent second employers would have qualified as joint employers with the original employers under the District Court's preferred joint employer standard, and *fifth* that such second employers would not qualify as a joint employer under the Rule. No empirical data was provided by the State Plaintiffs or cited by the District Court – indeed none exists – regarding any of the foregoing speculative links in the causation chain. In the absence of any enforcement to date of the Rule, there is no support for

[25] This Court also held that standing is not available to plaintiffs who claim only a "hypothetical future harm" in the case of *Oneida Indian Nation v. United States DOI*, 789 Fed. App'x 271, 276 (2d Cir. 2019) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)). The District Court erred in concluding that *Oneida Indian Nation* is inapplicable because it concerns facts different from the facts here. SPA 46-47. The Second Circuit's conclusion—that parties cannot satisfy Article III standing based on "hypothetical future harm" is equally applicable here.

the District Court's finding of "concrete" harm to the State Plaintiffs in the form of increased administrative or enforcement costs.[26]

Also contrary to the District Court's opinion, SPA 46, because the State Plaintiffs could easily avoid the administrative and enforcement costs they allege they will incur, any such costs are merely "self-inflicted" injuries. *See Bandler v. Town of Woodstock*, 2019 U.S. Dist. LEXIS 188820, at *17-18 (D. Vt. Oct. 31, 2019), *aff'd*, 2020 U.S. App. LEXIS 34255 (2d Cir. Oct. 29, 2020) (finding that a party's alleged injury was self-inflicted where the party could have avoided its alleged injury, but chose not to do so); *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006) (same); *Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F. Supp. 2d 62, 71 (E.D.N.Y. 2006) (noting party's injury was self-inflicted when it resulted from its own business decision). *See also Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013).

[26] The State Plaintiffs' additional claims of causal links between the Rule and any alleged loss of state tax revenues were factually disputed and insufficiently proven at the summary judgment stage to allow a finding of standing. (SPA 49-50). Any such "attenuated and speculative" claims, which ignored the likely *growth* in tax revenues predictably resulting from the increased job growth engendered by the Rule, are plainly foreclosed by this Court's holding in *XY Planning Network, LLC*, 963 F.3d at 252-53.

Seeking to avoid the foregoing law of this Circuit, the District Court improperly found the Rule imposed a "forced choice" on the State Plaintiffs. SPA 48. But in both of the out-of-Circuit cases the District Court cited, state and local governments would have incurred injuries *regardless* of how they proceeded following federal regulatory actions. *See Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2019) (explaining that Texas could have only avoided the injury it alleged by incurring other costs); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017) (explaining that the counties had to choose between complying with an allegedly unconstitutional order or risk losing grants). The District Court wrongly concluded the State Plaintiffs' situation was comparable. To the contrary, the costs that the District Court assumed the State Plaintiffs would incur through inaction are wholly speculative. The State Plaintiffs, and the District Court, have failed to establish that the public will require state guidance or enforcement activity of any kind, beyond the Rule itself.

Indeed, contrary to the District Court's opinion, the State Plaintiffs opting to follow the Rule can simply rely on the Rule; the State Plaintiffs opting to rely on broader state laws can leave their current guidance intact.[27] Similarly, the State

[27] Even if the State Plaintiffs issued new guidance, it is unclear how this would increase administrative costs; presumably, state employees (who the states are already paying regardless of whether the Rule goes into effect) would edit the guidance documents.

Plaintiffs need not hire additional employees to assist with enforcement at this time; the State Plaintiffs could avoid these costs by waiting to determine whether they will need to issue additional guidance or hire more employees. Because the State Plaintiffs could avoid the administrative and enforcement costs they allege they will incur, any such costs are merely "self-inflicted" injuries. *Bandler*, 2020 U.S. App. LEXIS 34255 (2d Cir. Oct. 29, 2020); *Nat. Res. Def. Council*, 710 F.3d at 85 (2d Cir. 2013).

2. The District Court Erred in Finding the State Plaintiffs Had Prudential Standing.

In addition to the required proof of concrete injury for purposes of Article III standing, the State Plaintiffs were required to show that their asserted injuries fell within the "zone of interests" of the statute being interpreted by the Department in the Rule, *i.e.*, the FLSA. The District Court asserted that the State Plaintiffs' purported interest in "protecting their tax base" and "overlapping" interest in protecting workers is the "sort of interest that the FLSA was enacted to protect."[28]

[28] In ruling on the Department's motion to dismiss, the District Court held the zone of interests test could be met exclusively by reference to the APA, without regard to the the FLSA. SPA 25. But the case on which the Court relied, *Patchak*, 567 U.S. at 225, does not authorize standing based upon the APA considered in a vacuum. The District Court's ruling on summary judgment appears to no longer rely on the APA alone.

To the contrary, Congress expressed no intent in the FLSA to increase state tax revenues, nor is the FLSA concerned with state enforcement of this federal law; and the District Court cited no FLSA case authority for the novel zone of interest identified in its opinion. Instead the case relied on by the District Court, *Bank of Am. Corp. v. City of Miami*, 1367 S. Ct. 1296, 1303 (2017), found prudential standing only because the city's cited injury—lost tax revenue and additional municipal costs—allowed the city to qualify as an "aggrieved person" under the Fair Housing Act, the entirely different statute at issue. Congress expressed the opposite intent under the FLSA by leaving the states free to enact and enforce their own wage and hour laws. Because the State Plaintiffs' claims fall outside the zone of interests of the FLSA, they also fall outside the FLSA and APA considered together. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("[T]he Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute'"); *see also Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1300 (D.C. Cir. 2015) (finding a party's claim fell outside the zone of interests of the Clean Air Act).

B. The District Court Should Have Held The State Plaintiffs' Challenge to the Rule Was Not Ripe for Review

The District Court further erred in concluding that the State Plaintiffs' challenge to the Rule was ripe for review. Notably, the Rule is an interpretive rule,

which is not binding on the State Plaintiffs in any way; and the Department has taken no enforcement action on which the State Plaintiffs can base their claims of injury. *See Am. Tort Reform Ass'n*, 738 F.3d at 394. In addition, because the State Plaintiffs brought a facial, pre-enforcement challenge to the Department's Rule (JA 30- JA 31), they were required to demonstrate that "no set of circumstances exists under which the [challenged rule] would be valid." *Reno*, 507 U.S. at 301; *see also Coke*, 376 F.3d at 128;[29] *Jindeli Jewelry, Inc. v. United States*, 2016 U.S. Dist. LEXIS 59202, at *10-11 (E.D.N.Y. May 4, 2016); *Chamber of Commerce of the United States v. NLRB*, 118 F. Supp. 3d 171, 184 (D.D.C. 2015).

The District Court failed to address any of the above cited cases, though the Associations expressly referred to them in both their Motion for Summary Judgment Memorandum and in their Reply to the State Plaintiffs' Opposition.[30] Instead, the District Court agreed with the State Plaintiffs that the suit was prudentially ripe because the State Plaintiffs would suffer a harm from delayed review, the rule was final, and no additional factual development was needed. (SPA 52-53). The District

[29] Vacated on other grounds, *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006) (remanding case for further consideration in light of agency advisory memorandum).

[30] The District Court Opinion inexplicably ignores the cases cited and extensive discussion of ripeness in the Associations' Summary Judgment Reply. (SPA 52, referring only to a "two-sentence paragraph" in the Associations' Motion Memorandum).

Court reached this conclusion by citing *New York v. Department of Commerce*, a case not involving an interpretive guidance rule, but instead addressing the Commerce Department's inclusion of a citizenship question on the 2020 U.S. Census. 351 F. Supp. 3d 502, 573 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded sub nom.*, 139 S. Ct. 2551 (2019). Ignoring the distinction between an interpretive rule and the specific agency action at issue in the census case, the District Court concluded that the State Plaintiffs would also suffer a hardship from delayed review, sufficient to show ripeness for judicial review. SPA 53.

The District Court failed to address the case cited to it by the Associations, *American Tort Reform Association*, 738 F.3d at 394, which is directly on point. In that case, the D.C. Circuit declared that finality of agency action is not the sole determinant of whether an agency action is ripe for review when an interpretive rule is at issue. As the court held: "[A]n interpretive rule is subject to review only when it is relied upon or applied to support an agency action in a particular case." *Id*; *see also Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, at 731-33 (D.C. Cir. 2003) (finding agency challenge unreviewable where agency "has not yet made any determination or issued any order imposing any obligation….or denying any right or fixing any legal relationship."); *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 938 (D.C. Cir. 1998) ("to the extent that [petitioner] wishes to challenge the substance of the regulatory

guidance, it must wait until the Administration actually applies it in a concrete factual situation.").

Finally, neither the State Plaintiffs nor the District Court addressed the Supreme Court's holding in *Reno*, or this Court's adherence to *Reno* in *Coke*, 376 F.3d at 128 ("[The plaintiff] has specifically refused to challenge the regulation 'as applied' to any particular class of employees. We do not rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face."). In both of those cases the courts rejected facial challenges to administrative rules that had not yet been enforced, pursuant to the "no set of circumstances" test described above. The Associations repeatedly referred the District Court to this binding precedent, but the court ignored the law. The State Plaintiffs' failure to meet their burden of proving the absence of any circumstances under which the Department's interpretive rule could be lawfully enforced – and the District Court's failure to require such proof – compels reversal in and of itself.

C. The Rule Is Consistent With, And A Permissible Construction Of, The Text Of The FLSA

Turning to the merits of the State Plaintiffs' APA challenge, the District Court erred in concluding that the Rule conflicts with the FLSA.

1. Section 203(d) Provides A Permissible Textual Basis For The Rule

As noted above, the FLSA does not define (or even mention) "joint employment." (SPA 4). The closest the text comes to such a definition appears in Section 203(d), the only definition in Section 203 that contemplates the existence of a joint employment relationship; accordingly, the Department adopted Section 203 as its "touchstone" in crafting the Rule. SPA 205-07, 254.

From the outset, the District Court improperly rejected the Department's selection of Section 203(d) as the textual basis for its Rule. First, the District Court insisted that the definitions of "employer," "employ," and "employee," must be read together because the definition of "employer" in turn includes the definition of "employee." (SPA 56-57). That conclusion, however, is not supported by the text of either provision for the reasons set forth above and in the Rule itself.[31] As has already been explained, *Rutherford* certainly does not compel a joint application of all three

[31] The most that can be said of the District Court's and the State Plaintiffs' contention in this regard is that courts around the country have developed inconsistent tests to assess joint employer status, in part because of their confusion over whether to read the various FLSA definitions separately or together. *See* SPA 196-97. Even within this Circuit, different panels of the appeals court have disagreed over how to determine joint employer status, and which sections of the FLSA are most relevant in this regard. *See Barfield v. v. N.Y. City Health & Hosps. Corp*., 537 F. 3d 132 (2d Cir. 2008) (citing divergent cases and concluding there is "no rigid rule for the identification of an FLSA employer…").

sections to the joint employment issue. Nor does *Nationwide Mutual Insurance Co. v. Darden,* a non-FLSA case. *See* SPA 202. The Department was entitled to rely on the Supreme Court's holding in *Falk* and the Ninth Circuit's holding in *Bonnette* in deciding to clarify a uniform standard for joint employment under the FLSA. SPA 197-98, 237.[32]

Indeed, although the definition of "employer" includes the word "employee," neither the definitions of "employee" nor "employ" address the possibility of two employers. SPA 199. Rather, as the Department explained, only Section 203(d), in referencing an individual acting "indirectly in the interest of an employer" contemplates the existence of two employers. *Id.*

The District Court's remaining concerns with Section 203(d) as the textual basis for the Rule are similarly unfounded. The District Court improperly rejected the Rule on the grounds that it creates different tests for a "primary employer" and a "joint employer," explaining this created an inconsistency between the Rule and

[32] The District Court wrongly concluded that *Falk* undermines the Department's choice of Section 3(d) as the textual basis of joint employment because it mentioned both Section 3(d) and Section (e). SPA 69. As the Department explained, "although [the Supreme Court in *Falk*] referenced section 3(e), it squarely focused on section 3(d) and whether the other person was an 'employer' as determining the inquiry." SPA 202.

the FLSA. SPA 57.[33] The District Court further held that because Section 203(d) uses the word "includes" rather than "means," the Department erred in creating two separate tests for "primary" employment and joint employment. SPA 61.

By arguing that the FLSA only permits one test for employment, however, the District Court improperly conflated joint employer and independent contractor analyses. Indeed, the District Court specifically held that "[i]n accord with the weight of circuit authority other than *Salinas*, the Court does not agree that 'employee-independent contractor inquiry' is 'separate' from the 'joint employment inquiry.'" SPA 67. This conclusion, however, ignores the fact that the Second Circuit has specifically recognized the "distinction between joint employment cases and independent contractor cases." *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 68 (2d Cir. 2003). This Court further articulated why two separate tests are necessary for the two separate concepts:

> The *Superior Care* factors...have been used primarily to distinguish independent contractors from employees, because, unlike the *Carter* factors, they do not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer. Instead, they help courts determine if particular workers are independent of *all* employers.

[33] The District Court cites no language in the Rule that identifies any employer as "primary" or creates a distinction between "primary" and "joint" employers. The court improperly created this distinction on its own.

See id. at 67-68 (quoting *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996)).

The State Plaintiffs wrongly argued, and the District Court wrongly held, that the Department was required to include in the Rule consideration of factors that are relevant to independent contractor, but not joint employer, analysis. SPA 78. As discussed above, the District Court incorrect held that the Rule misinterprets *Rutherford*, or that *Rutherford* is a "seminal decision on joint employment." Although the facts before the Court in Rutherford touched on a joint employer scenario, *Rutherford*'s main focus was on the separate question whether the individuals working as de-boners were employees or independent contractors. *Rutherford*, 331 U.S. at 726; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326-27 (1992) (discussing *Rutherford* exclusively in the independent contractor context); *Salinas*, 848 F.3d at 138 (noting that *Rutherford* is primarily an independent contractor case).

Blurring these separate standards together would effectively make the joint employment inquiry irrelevant. When a person is clearly an employee of one business, using misclassification factors to determine employment status with a second employer is tautological and essentially turns the inquiry into a presumption of joint employment.

The District Court also incorrectly held (SPA 78) that the Rule errs in "[e]xcluding economic dependence as irrelevant to joint employer status." Nothing in the text of the FLSA, however, requires consideration of economic dependence to determine whether joint employment exists. The Second Circuit has found the economic dependence factor to be primarily relevant in determining independent contractor status, not joint employer status. *See Zheng*, 355 F.3d at 67-68.

The District Court is also wrong in its conclusion (SPA 66) that the Rule is contrary to the FLSA because it conflicts with circuit court decisions applying the State Plaintiffs' preferred analysis of *Rutherford*. Under this argument, the Department could never issue an interpretive rule where different circuits apply different interpretations. As the Department pointed out, however, "the Department has ... [previously] promulgated interpretive guidance regarding joint employer liability that overtly conflicts with the approach taken in a particular federal circuit." *See* SPA 197.

Finally, despite the District Court's conclusions to the contrary, the Rule's analysis is consistent with precedent in several circuits. The District Court holds that *Bonnette* itself fails to support the Rule's interpretation, even though *Bonnette* cited only to Section 203(d) in discussing joint employer liability. *Bonnette*, 704 F.2d at 1469. According to the District Court, the Department's reliance on *Bonnette*, *Baystate*, *Gray v. Powers*, *Enterprise*, and *Moldenhauer* is flawed because those

cases did not use the *Bonnette* factors as an exhaustive list in evaluating joint employment. *See* SPA 76-78. The Rule, however, does permit the consideration of factors beyond the four primary factors borrowed from *Bonnette*. SPA 205-06, 210-11.

The Department explicitly stated its intent to include economic realities as a consideration. SPA 202, 208. Yet, the District Court appears to conflate economic realities with the "economic dependence" test, which as discussed above, the Department correctly excluded from its analysis. *Compare* SPA 79 (faulting the Department for excluding economic dependence factors from the joint employer analysis as inconsistent with *Rutherford*), *with* SPA 29 (noting that the Supreme Court "distilled *Rutherford* into an 'economic reality' test). Indeed, as the Second Circuit has held, economic dependence is primarily relevant in determining independent contractor status, not joint employer status. *See Zheng*, 355 F.3d at 67-68.

In sum, the District Court erred in finding that the text of the FLSA dictates a different joint employer analysis than the text-based standard adopted by the Department in the Rule. *See Stryker v. SEC*, 780 F.3d 163 165 (2d Cir. 2014). For the reasons explained above, the Department's construction of the FLSA was clearly a permissible one.

2. The Rule Is Consistent with the FLSA's Purpose

The District Court further concluded that the FLSA's definition of employ, and the history behind it, "must be relevant to the joint employer inquiry," because "Congress adopted section 3(g) to expand joint employer liability," in the child-labor context. SPA 62, 63. The District Court's interpretation of the FLSA, however, "is based in older Supreme Court case law." The District Court rejected the Rule's reliance on a recent Supreme Court case, *Encino*, in part because the Supreme Court repeatedly held in the past that courts should construe the FLSA liberally. SPA 98. The Rule, however properly emphasizes that the Supreme Court now requires the FLSA to be interpreted "fairly," not to achieve the broadest remedial purpose "at all costs." *Encino*, 138 S. Ct. at 1142*; 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'"). That prior cases held otherwise is inconsequential, particularly considering that *Encino* is not the only recent case calling for a fair reading of the FLSA; indeed, the Third Circuit recently rejected the District Court's crabbed reading of *Encino* by applying *Encino* to interpret the "regular pay" provisions of the FLSA:

> [I]t is a "flawed premise" to think "that the FLSA pursues its remedial purpose at all costs." Indeed, "no legislation pursues its purposes at all costs." "[A] fair reading" of the FLSA, neither narrow nor broad, is what is called for. And that is as should be expected, because employees' rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests.

U.S. Dept. of Labor v. Bristol Excavating, Inc., 935 F.3d 122, 135 (3d Cir. 2019) (internal citations omitted).

D. The Rule Is Neither Arbitrary Nor Capricious

The Supreme Court has described arbitrary and capricious review of agency actions as a "narrow" standard of review where the "court is not to substitute its judgment for that of the agency." *Fox*, 556 U.S. at 513.[34] "So long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned." *Karpova v. Snow*, 497 F.3d 262, 268 (2d Cir. 2007).

1. The Department Appropriately Explained Its Change In Position From Prior Interpretations

As the District Court acknowledged, "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." SPA

[34] Here, it is evident that the District Court disagreed with the Department's interpretation of the joint employer standard. *See e.g.*, SPA 65 ("[T]he most persuasive interpretation of section 3(d) is that it buttressed the 'suffer or permit to work' standard."); SPA 72 (describing the Department's interpretation as "crabbed" and "thin gruel"); SPA 84 ("This is silly."); SPA 86 ("[T]he Department must do better than this."). As noted above, however, the District Court cannot properly substitute its judgment for that of the Department. *Fox*, 556 U.S. at 513.

60 (brackets omitted) (citing *Encino Motorcars, LLC*, 136 S. Ct. at 2125). The District Court faulted the Department for changing its interpretation from its 1997 Guidance and its 2014 and 2016 Administrative Interpretations, concluding that the Department did not "satisfactorily explain why it departed" from those prior interpretations. SPA 82.

To the contrary, the Department comprehensively explained its departure from prior interpretations, and the District Court erred in discounting the Department's efforts. The Department specifically explained that the 1997 Guidance, as well as the 2014 and 2016 Administrator Interpretations, improperly rejected use of a control test for joint employer analysis. SPA 82; SPA 194-95. The Department further explained that it revised its Rule in order to provide additional clarity to the standard. As the Department stated, under the prior interpretation circuit courts used "a variety of multi-factor tests...which have resulted in inconsistent treatment of similar worker situations [and] uncertainty for organizations." SPA 196-97; *see also* SPA 86 ("To be clear, the Department's justifications for engaging in rulemaking are valid. Promoting uniformity and clarity given the...widely divergent tests for joint employment liability in different circuits is a worthwhile objective."). Indeed, in providing the need for rulemaking, the Department explained that the Rule "[r]educes the chill on organizations who may be hesitant to enter into certain relationships or engage in certain business practices

for fear of being held liable for counterparty employees over which they have insignificant control." SPA 233. In this way, the Department explained why it changed course, and particularly, why it changed course to a control-based test.

2. The Department Properly Considered the Interaction Between the FLSA and the MSPA

The District Court next concluded that the Rule is arbitrary and capricious because the Department "did not consider the conflict between it and the MSPA regulations." SPA 83. The Department, however, did consider its prior guidance in MSPA regulations, and specifically noted in its rulemaking that the Department would adhere to its prior interpretation "to determine joint employer status under [the] MSPA." SPA 203, 253. But nothing in the FLSA requires its enforcement guidance to be identical to the MSPA guidance.

Indeed, although the Rule is based upon the FLSA definition of "employer," the MSPA does not define "employer." SPA 29, 31. The MSPA, moreover, is a separate statutory scheme from the FLSA; and the two laws have different purposes.. 29 U.S.C. § 1801. "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.), *cert. denied*, 414 U.S. 819 (1973)," which is a case specifically discussing an agricultural employer. SPA 152 (italics added). Congress further indicated that in determining joint employer status under the MSPA that "it is expected that the special aspects of agricultural employment be kept in mind." SPA

152 (internal citations omitted). The District Court, accordingly erred in concluding that the Department's guidance under the FLSA must mirror its guidance under the MSPA. See also Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1177 (11th Cir. 2012).

The District Court also erred in finding that it was insufficient for the Department to "acknowledge" a comment about the alleged conflict between the Rule and MSPA regulations, because the Department did not "respond" to the comment. SPA 60. The Department, however, was under no obligation to respond to every comment in a more substantive manner than it did. *See Louisiana Forestry Ass'n v. DOL*, 745 F.3d 653, 679 (3d Cir. 2014) ("Appellants also take issue with the DOL's purported disregard of public comments 'urg[ing] DOL to make a more expansive view [of] . . . adverse impact on other American co-workers.' It is well established, however, that an 'agency need not address every comment' it receives."); *see also Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (rejecting "judge-made procedures in addition to the APA's mandates").

3. The Department Appropriately Considered Costs To Various Stakeholders

The District Court also concluded that the Rule is arbitrary and capricious because it did not "adequately consider the Rule's cost to workers." SPA 83. But as discussed extensively above, there is no empirical evidence in the Administrative Record – and certainly no "overwhelming" evidence - that the Rule will, on balance,

cause harm to workers. First, as explained by the Department, the EPI study relied on by the District Court failed to reach a meaningful conclusion because it provided no data (and none exists) on the number of current joint employers in so-called fissured industries or the number of such employers who would lose their "joint" status, if any, under the Rule. *See* SPA 237. The Department was therefore not required to counter EPI's study with an alternative study in order to reach this conclusion. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019); *California v. Azar*, 950 F.3d 1067, 1101 (9th Cir. 2020) ("HHS was not required to accept the commenters' 'pessimistic' cost predictions."). In addition, as the Associations' argued below, the undisputed evidence of job growth in the so-called fissured industries indicates that more workers will *benefit* from the Department's encouragement of such growth (and increased wages associated with such growth) than any amount of wages speculatively predicted to be lost or reduced because of the Rule, which remains in dispute.

In any event, the Department did not ignore the cost to employees or "effectively assume[] that the Rule would cost workers nothing" as the District Court concluded. SPA 85. The District Court's role, however, is not to craft policy, but to determine whether an agency's crafting of policy is arbitrary and capricious. *Fox*, 556 U.S. at 513. Here, the Department considered employees' interests and the various studies presented by the State Plaintiffs during its rulemaking. SPA 236. The

Department simply did not agree with the State Plaintiffs' conclusions. The Department noted that employees are unlikely to see any reduction in wages owed to them. *Id*. ("To the extent that this standard for determining joint employer status reduces the number of persons who are joint employers in this scenario, neither the wages due the employee nor the employer's liability for the entire wages due would change.").[35]

In this way, the Rule here differs from cases that the District Court cited to conclude that the Department failed to consider costs to employees. *See USCIS I*, 408 F. Supp. 3d at 1106-07 (determining that the rule's "overriding consideration...is a sufficient basis to move forward"); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (rejecting the agency's cost-benefit analysis where it "disregard[ed] [a particular] effect entirely") (emphasis omitted); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (finding an agency action arbitrary and capricious where the acting secretary

[35] Moreover, to the extent that The State Plaintiffs argue that Department erred in failing to consider costs to employees, the Second Circuit has emphasized, quoting the Supreme Court, that, "when Congress has intended that an agency engage in a cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Southeast Queens Concerned Neighbors, Inc. v. FAA*, 229 F.3d 387, 393 (2d Cir. 2000) (quoting *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 510, 69 L. Ed. 2d 185, 101 S. Ct. 2478 (1981)). The State Plaintiffs have not pointed to language in the FLSA requiring such a consideration.

"entirely failed to consider [an] important aspect of the problem"). Unlike these cases, the Department properly gave costs (to all parties) careful consideration and met all procedural rulemaking requirements. The Department did not act in an arbitrary or capricious manner and the Rule should be upheld.

CONCLUSION

In light of the foregoing, the judgment of the District Court should be reversed.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Local Rule 32.1 because it contains 11,684 words, as determined by the word count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2021, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

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