IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al*,	)	
	)	
Plaintiffs,	)	**Civil Action No. 20-cv-1689 (GHW)**
	)	
vs.	)	
	)	
EUGENE SCALIA, *et al*,	)	
	)	
Defendants.	)	

DEFENDANT-INTERVENORS' MEMORANDUM OF LAW IN OPPOSITION TO STATE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS- MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Defendant-Intervenors in this action, International Franchise Association ("IFA"), the Chamber of Commerce of the United States of America ("U.S. Chamber"), HR Policy Association ("HRPA"), the National Retail Federation ("NRF"), Associated Builders and Contractors ("ABC"), and the American Hotel and Lodging Association ("AHLA"), hereby submit this consolidated memorandum of law in opposition to the State Plaintiffs' motion for summary judgment and in support of Defendant-Intervenors' cross-motion for summary judgment.

As further discussed below, the Final Rule[1] of the U.S. Department of Labor ("the Department") is entirely consistent with the Fair Labor Standards Act ("FLSA" or "Act") and is neither arbitrary nor capricious under the Administrative Procedure Act ("APA"). The Department properly updated a 60-year-old interpretive rule and provided much-needed clarification of joint employer liability under the FLSA. The Final Rule is solidly grounded in the text of the Act, supported by long-standing precedent, and brings uniformity and clarity to an area of law that has become riddled with inconsistencies in recent years.

Contrary to the State Plaintiffs' allegations, the Final Rule constitutes a return to previously settled joint employer principles under the FLSA, not a departure from such principles. Indeed, it is the State Plaintiffs' proposal for adoption of their overbroad approach that would constitute a departure from established joint employment standards.

As an initial matter, the State Plaintiffs have failed to support their attenuated claims of standing with the additional proof that is required at the summary judgment stage. Their motion is based on the unproven (and incorrect) premise that the Department's return to the joint employer

[1] *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820 (January 26, 2020), codified at 29 C.F.R. §§ 791.1-791.3 ("the Rule" or "the Final Rule").

standard that long prevailed in the majority of state and federal jurisdictions will somehow reduce the State Plaintiffs' tax revenues, increase their administrative costs, or both. In making these claims, the State Plaintiffs ignore their own published jobs and tax revenue data. That data (prior to the pandemic) showed that the rise of franchising, subcontracting, and temporary staffing directly correlated with increased numbers of jobs, which in turn increased the number of workers receiving wages instead of unemployment checks and therefore increased the tax revenues of each of the State Plaintiffs.

In making their facial challenge, the State Plaintiffs also have failed to establish that no set of circumstances exists under which the Final Rule can be validly applied. Indeed, as the Department correctly noted in the Rule, none of the State Plaintiffs' studies provides the number of existing joint employment relationships or the extent to which such numbers will be affected by the Rule. Nor is that something the State Plaintiffs could show, given that the Rule itself is merely a guidance document: it identifies relevant facts and leaves open consideration of the "totality of circumstances" in each individual case. In any event, the Department was entitled to rely on the evidence in the Administrative Record establishing that the inconsistencies and overbreadth of recent joint employer rulings threaten to stifle job growth and require correction from the agency charged with primary responsibility for interpreting and enforcing the FLSA.

II. STATEMENT OF FACTS[2]

A. Corrections To The State Plaintiffs' History Of Joint Employment Under The FLSA

The State Plaintiffs' complaint and memorandum in support of summary judgment present an incorrect picture of how the Department and the courts have historically defined joint employers for purposes of the FLSA. Several corrections to their statement of facts are required in order for the Court to properly evaluate the Final Rule.

1. The Joint Employment Standard From 1939 Through The Early 2000s

As the Court recognized in ruling on the motion to dismiss, the words "joint employment" do not appear in the FLSA. (MTD Op. at 4). There are three provisions in the Act that use the word "employ": Sections 203(d), 203(e), and 203(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]

As explained in the Final 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

[2] Pursuant to Rule 56.1, a separate statement of undisputed material facts ("SMF") is attached to Defendant-Intervenors' motion, along with a statement disputing the material facts put forward by the State Plaintiffs.

[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.

indirectly, the other company."[4] This was also the first occasion in which the Department used the "not completely disassociated" test, albeit only in a 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* 85 Fed. Reg. at 2,821-82; SMF ¶10.

The State Plaintiffs in their motion make much of *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), incorrectly asserting that the Supreme Court in that case broadly defined joint employment under the FLSA and did so by invoking the language of all three statutory provisions using the word "employ." (State Pl. Mem. at 21). To the contrary, as explained in the Final Rule, (85 Fed. Reg. at 2,827), *Rutherford Food* invoked the text of Sections 203(e) and (g) only in connection with its determination that the workers in question were employees and not independent contractors, 331 U.S. at 726-27, 728, n.6. And the Court made no broad pronouncement regarding joint employment when it found that the meat boners at issue could be employed both by the subcontractor that directly employed them and by a slaughterhouse operator who supervised and controlled their daily work. SMF ¶ 20.

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.

[4] 85 Fed. Reg. at 2,821 n.13 (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 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. SMF ¶ 22.

In 1973, when the Supreme Court decided *Falk v. Brennan*, 414 U.S. 190, the Court relied 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 State Plaintiffs' now contend in their motion are "essential" to conform to the requirements of the FLSA. (Compl. ¶ 90).

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] adopting a four-factor test under Section 3(d), to determine whether the alleged 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*.

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

This test became the most common baseline standard for joint employment under the FLSA. *See* 85 Fed. Reg. at 2,822, n. 27. It was followed by a majority of the circuits considering the issue (including the First, Third, Fifth, Sixth, Seventh and Tenth circuits) with some minor variations, for several decades,[6] and a number of circuits and state courts continue to follow *Bonnette*'s common-sense test today.[7] SMF ¶ 27.

2. Under the Joint Employment Standard Reflected in *Bonnette*, The Industries Represented By The Defendant-Intervenors Greatly Expanded Job Creation And Increased Wages To Employees.

As noted above, franchising was in its infancy when the Department issued its 1958 joint employment rule. But during the latter part of the 20th century, the industry grew to the point that there are now 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 the economies of every State plaintiff.[8] 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.[9] Other industries represented by Defendant-Intervenors greatly expanded during the same time period, creating millions of new jobs in construction, retail, and hospitality. SMF ¶ 48-53, Ex. C, D, F.

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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* SMF ¶ 48, Def.-Int. Ex. A, IFA comments on NPRM at 1. One of the State Plaintiffs' own exhibits asserts that franchising has created even more jobs, 8.85 million in 2018. *See, e.g.*, Shierholz Decl. ¶ 9 (ECF No. 68-1).

[9] Shierholz Decl. (ECF No. 68-1).

The State Plaintiffs' exhibits in support of their motion contain few references to this dramatic job growth. But some of those references are telling. The State Plaintiffs' memorandum concedes that franchising, contracting, and staffing agencies were responsible for 94 percent of all employment growth between 2005-2015. (State Pl. Mem. at 29, citing State Pl. Ex. 14 at 4; *see also* State Pl. Ex. 2, 7, and 11). Yet none of the State Plaintiffs' studies or affidavits acknowledges the direct correlation between job growth and state tax revenues, or the many other benefits to the State Plaintiffs' economies resulting from the basic fact that the industries represented by Defendant-Intervenors have created millions of jobs that otherwise would not exist, and have done so primarily under the *Falk*/*Bonnette* joint employment standard.

That there is a direct correlation between job growth and State tax revenues cannot be disputed. To take but one example from the lead State Plaintiff State of New York, state payroll tax revenues grew from $11 billion in 1990 to more than $41 billion in 2019.[10] These revenue increases, fueled by the expansion of jobs created by the industries represented by Defendant-Intervenors, more than offset the claimed (and exaggerated) losses attributable to wage theft or small business insolvencies. Similar data connecting increased jobs to increased tax revenues can be found with regard to all of the State Plaintiffs. SMF ¶ 59-60.

3. In Recent Years, Some Courts Began Expanding The Joint Employment Standard

Only in recent years has a different view of the longstanding joint employment standard emerged, in which some circuits (including the Ninth) have broadened the joint employment test. Given that the 1958 rule did not directly address the newer industries, it is perhaps understandable

[10] NY Tax Statistics, Table 3. *2018-2019 New York State Tax Collections*, New York State Dep't of Taxation and Finance, Table 3, https://www.tax.ny.gov/pdf/2018-19_collections/FY_18_19_Collections_Report.pdf (August 2019). SMF ¶ 59.

that courts struggled. But that struggle produced misguided results. Some appellate courts improperly conflated the question of whether the workers at issue were employees or independent contractors under Section 203(e) or (g), together with the previously separate question of whether the workers were jointly employed by two otherwise separate employers.[11] 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.[12]

Most recently, with the advent of Dr. Weil's article on so-called fissured industries in 2011,[13] followed by his confirmation as the Department's Wage Hour Administrator in 2014, a new expansion of the joint employer standard began. SMF ¶ 30. In the 2016 Administrator's Interpretation,[14] which was subsequently revoked by the Department,[15] the Administrator advocated an overbroad 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 Interpretation applied

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[11] *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).

[12] *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).

[13] 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.

[14] 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).

[15] *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.*

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 … which looks to the amount of control that an employer exercises over an employee."[16] 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."[17] SMF ¶ 33.

The 2016 Interpretation is also noteworthy because it contradicts the State Plaintiffs' claim that the Department historically has deferred to judicial interpretations of joint employer status under the FLSA. In the 2016 Interpretation, the Administrator acknowledged that his interpretation of the joint employer standard under the FLSA conflicted with the First and Third Circuits' approach of "applying factors that address only or primarily the potential joint employer's control." *Id.*

In fact, most circuit courts historically have deferred to the Department's interpretation of joint employment under the FLSA. A prominent example is *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017), in which the Fourth Circuit expressly purported to defer to the views expressed in the Department's 1958 rule, specifically the "completely disassociated" test for horizontal joint employment. *Id.* at 133-34. Unfortunately, the court misinterpreted the 1958 standard, lifting the "disassociated" test from its limited context dealing with "horizontal" joint employment and improperly extending the test to "vertical" employment, *i.e.*, subcontracting in

[16] *See* WHD Administrator's Interpretation No. 2016–1, *supra* n.14.

[17] 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 text FLSA should not be given anything but a "fair" reading, as opposed to the most expansive one.

the construction industry. Based upon this misguided interpretation of the Department's previous rule, the Fourth Circuit then rejected the *Bonnette* standard altogether and adopted a new, six-part test for joint employment that disregards "traditionally recognized" subcontracting relationships throughout the construction industry. *Id.* at 143-44 (internal quotations omitted). The *Salinas* decision highlights the confusion among the circuits caused by attempts to apply the Department's 1958 regulation to the 21st century workplace, which has left employers in many industries without any clear guidance on how to interact with other businesses.

4. The Expansion Of The Joint Employer Standard Threatened The Industries Represented By The Defendant-Intervenors, And Highlighted The Need For The Fairness And Clarity Promised By The Final Rule.

The Administrative Record in this case establishes that continued growth of jobs in the Defendant-Intervenors' industries, even before the pandemic, was being jeopardized by the recent expansion of and inconsistencies in the joint employer standard under the FLSA. The Department was entitled to rely on that record, which demonstrated the following:

Franchising

As explained more fully in IFA's comments on the NPRM, franchising has significantly contributed to the growth of the economy, expanded small businesses, and created jobs. But recent expansion of the joint employer tests imperils that growth. The diversity of standards and factors employed inconsistently by regulators and courts around the country has "bewildered and frustrated employers seeking to operate franchise businesses efficiently and profitably, without inadvertently creating joint employment." SMF ¶ 61, Ex. A, IFA Comments on NPRM at 8-9.

Particularly in recent years, government regulators' and some courts' interpretations (and misinterpretations) of the prior joint employer rule have hindered franchisors' efforts "to maintain[] a brand's reputation" without potentially exposing them to joint employer liability. *Id.*

at 8. The Lanham Act, the federal law regulating trademarks, service marks, and unfair comp[etition], mandates that owners of trademarks, such as franchisors, "maintain[] sufficient control of the licensee's use of the mark to assure the nature and quality of foods or services that the licensee distributes under the mark." *See id.* at 2 (quoting 15 U.S.C. § 1064(5)(A)). The overbroad interpretations of the prior joint employer rule 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 trademark if they exerted too little control over their brand.

Expansion of the joint employer standard imposed under the old rule has also forced 84 percent of franchisors to eliminate or curtail vital training and support to franchisees. *Id*. at 11-12. The previous lack of regulatory guidance similarly forced franchisors to compromise or restrict their relationships with new, disadvantaged franchisees. *Id*. at 13-14. Such reductions in training due to fears of a joint employer finding brings harm to the small business franchisees, as it increases the possibility they will make wage payment errors.[18] SMF ¶ 67.

A recent study of the economic impact of expanded joint employer standards reported that 92 percent of franchisors had engaged in "distancing" behavior from their franchisees. The study concluded that the 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. SMF ¶ 65, Ex. A, at 16; *see also* Ex. B at 2 (U.S. Chamber comments reporting "significant reduction of franchise-related job opportunities."). By making clear that the mere use of the franchise model does not make a joint

[18] Almost three-quarters of franchisors surveyed (74%) indicated that changes in behaviors around guidance, training, performance standards, and other policies impacted their bottom line. Perhaps more troubling, over three out of four franchisors (77%) indicated that the threat of joint employer liability had directly increased their legal costs, including defending joint employer claims and adapting policies and operations to minimize the risk of joint employer liability. Ex. A, at 12-13.

employer finding more likely, the Final Rule mitigates this output cost, increases job opportunities and wages for employees.

The Hospitality Industry

The hotel industry is largely built on the franchising model, where franchisees own and operate their own businesses, and are responsible for their own business decisions. SMF ¶ 52, Ex. F. at 3. Franchisors, in turn, provide support for the brand through standards regarding quality and uniformity. *Id.* As a result, prior to the pandemic the industry supported $1.1 trillion in U.S. sales, generating nearly $170 billion in taxes to local, state, and federal governments. *Id.* at 1. Equally important, the hotel industry provides $75 billion in wage and salaries to nearly 8 million workers across the country. *Id.* Absent the clear guidance to franchised hotels that the Final Rule provides, the threatened expansion of joint employer standards under the FLSA advocated by the State Plaintiffs will "undeniably discourage entrepreneurship and create considerable uncertainty between employers and employees across the [hospitality] industry." *Id.* at 3.

Construction Industry

Nor is this phenomenon limited to the franchise business model. As shown in the Administrative Record, the construction industry for decades has relied on specialized, separate employers who come together on specific projects. Typically, a general contractor or construction manager schedules and coordinates the work of numerous subcontractors, who perform their work simultaneously or in sequence. SMF ¶ 71, *See* Ex. E at 2. The general contractor directs the work on the site, controls the schedule, and exercises a certain amount of control over its subcontractors and their employees to ensure safe, timely and efficient performance of the project. *Id.* This does not, however, equate in any meaningful way to direct control over the developers, design firms, construction managers, general contractors, subcontractors, and staffing agencies, each of whom

typically remain separate entities that direct their own workforces. *Id.* Nevertheless, newly expansive judicial interpretations of the Department's 1958 Rule, in the absence of correction by the Department's Final Rule, such as the *Salinas* decision, threaten to destabilize this important industry. *Id.*

Retail Industry

Retailers, too, regularly contract with third-party business partners to conduct their business. The retail sector is the nation's largest private-sector employer, supporting one in four Americans in U.S. jobs—42 million working Americans—and contributing $2.6 trillion to the nations' GDP. SMF ¶ 50, Ex. D at 1. To maintain these jobs, retailers widely rely on many different third-party businesses to support their business in a variety of fashions A benchmarking survey of its members conducted by Defendant-Intervenor NRF indicated that more than 70 percent of retailers use temporary personal supply services; more than 35 percent use transportation and shipping contractors; more than 35 percent use facilities or equipment maintenance and service contracts; 50 percent use contractors at distribution centers and warehouses; more than 70 percent use contractors to service their IT networks, website, or help desk; and more than 35 percent use customer call service centers or online customer assistance center contractors. *Id*. at 2-3. This same study indicated that the uncertainty surrounding joint employer liability has discouraged retailers from entering into beneficial contractual relationships with third-party businesses, thus inhibiting business-to-business collaboration and job growth. *Id.* at 3. More to the point, to the extent these business relationships are threatened by the lack of certainty the Final Rule otherwise provides with respect to liability, their economic vitality is threatened.

B. The Department's Final Rule Returns To And Clarifies The Joint Employer Standard Which Prevailed For Many Years In A Majority Of Jurisdictions Under the FLSA.

As noted above, the Final 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 various multi-factor tests adopted and utilized in the various circuits. By setting a uniform, nationwide standard for determining joint-employer status under the FLSA, the Rule provides greater certainty to all stakeholders as to their obligations under the Act. The Rule provides clarity and "more meaningful, detailed, and uniform guidance of who is a joint employer under the Act." 85 Fed. Reg. at 2,823.

In examining these factors, the Rule makes clear that the putative joint employer must actually exercise—directly or indirectly—one or more of these indicia of control, while still allowing consideration of the potential ability or reserved right to exercise this control. 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 realities" and the "totality of circumstances" remain appropriate considerations. *Id.* at 2,830, 2,834. At the same time, the Rule properly clarifies that whether an employee is "economically dependent" on a potential joint employer is not relevant for determining joint employer liability under the Act. *Id.* at 2,838. 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.*

By bringing clarity to the joint employment standard, the Final Rule enables employers across industries to determine how to meet it and reduce litigation costs. *Id.* at 2,820, 2,823, 2,831, 2,851, 2,853, 2,854. The Administrative Record makes clear that this objective can be met if the Rule stands. As noted by the U.S. Chamber in 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 *Bonette*. 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.

SMF ¶ 54, Ex. B, at 2.

Clear, predictable legal standards relating to joint employment liability will allow businesses of all sizes to operate and grow, creating more jobs at an acutely critical time. SMF ¶ 54, *See* Ex. C at 3 (comment of HRPA 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."). In sum, the Final Rule draws on well-established principles of joint employer jurisprudence, modifying and clarifying the joint employer doctrine to adapt to the contemporary realities of the modern workforce. It "promote[s] certainty for employers and employees, reduce[s] litigation, promote[s] greater uniformity among court decisions, and encourage[s] innovation in the economy." 85 Fed. Reg. at 2820. Finally, it does so in a manner consistent with the text of the FLSA and reflects the Department's reasoned analysis of the statute, the comments it received, and prior case law. The Final Rule is lawful—and certainly not arbitrary and capricious—under the APA.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Many of the facts alleged in the State Plaintiffs' complaint are disputed, are not part of the Administrative Record, and do not support their motion for summary judgment. However, summary judgment in favor of the Department and Defendant-Intervenors is justified on the purely legal questions of statutory authority and administrative law. Such questions may be resolved at the summary judgment stage based upon the administrative record before the agency. *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 541 (S.D.N.Y. 2012).[19]

B. The State Plaintiffs Lack Standing To Challenge The Final Rule

In denying the Department's motion to dismiss, this Court properly observed that at the pleading stage, a party invoking federal jurisdiction need only "allege facts demonstrating each element of standing." MTD Op., ECF No. 74, at 14. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the summary judgment stage, however, "the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which show "actual", "imminent", or "concrete" risk of harm *See Lujan*, 504 U.S. at 561 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 & n. 31 (1979)). And because the State Plaintiffs bring a facial challenge to the Department's Rule (Compl. ¶ 9), they must meet the additional requirement of establishing that "no set of circumstances exists under which the

[19] A court reviewing an agency decision "is confined to the administrative record compiled by the agency when it made the decision." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)).

[challenged rule] would be valid," *Reno v. Flores*, 507 U.S. 292, 301 (1993); *see also Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 128 (2d Cir. 2004);[20] *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). 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).

As an initial matter, this case is not ripe for review. The Final Rule is an interpretive rule, which is not binding on the State Plaintiffs in any way; and the Department has taken no enforcement action, either against the states or against any employer, on which the State Plaintiffs can base their claims of injury. *See Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013).

Even if this case was ripe, however, the State Plaintiffs cannot satisfy their burden to establish standing for purposes of summary judgment. To establish standing at this stage, the State Plaintiffs have relied on the some of the same affidavits and testimony previously attached to their opposition to the Department's motion to dismiss, and others to the same effect, purporting to show that: (1) the Rule will decrease the State Plaintiffs' tax revenue; or (2) the Rule will impose administrative and enforcement costs on the State Plaintiffs. Neither theory of harm is sufficiently "concrete" to establish standing on summary judgment. In particular, Defendant-Intervenors have disputed the State Plaintiffs' speculative studies and anecdotal evidence about so-called "fissured workplaces", as to which a noted labor economist has declared there is no "credible, empirical evidence." SMF ¶ 37, Ex. G ¶ 8. As Dr. Bird also points out, the State Plaintiffs' declarations and

[20] 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).

studies ignore the *economic growth* (and increased tax revenues) generated by the expansion of franchising, subcontracting, and temporary staffing under the previous narrower definition of joint employment, to which the Rule seeks to return. At a minimum, the State Plaintiffs fail to show that they will inevitably be harmed under "all" sets of circumstances in which the Final Rule is validly enforced. *See Reno*, 507 U.S. at 301. In fact, as further discussed below, the State Plaintiffs more likely will benefit economically from the Rule's application. [21]

1. The State Plaintiffs Have Not Met Their Burden of "Concretely" Establishing That Application of the Rule Will Impair State Tax Revenues In All Circumstances.

This Court ruled at the pleading stage that the State Plaintiffs have "plausibly pleaded that the Final Rule will reduce the total amount of wages paid to employees in their jurisdictions and lead to a corresponding reduction in the State Plaintiffs' tax revenues" * * * "[T]he State Plaintiffs have identified a specific revenue stream that they plausibly link directly to the Final Rule." (MTD Op. at 17). But after this Court's ruling, the Second Circuit rejected a similar claim that impairment of state tax revenues constituted a sufficient injury to support state standing claims. *See XY Planning Network, LLC v. U.S. Securities and Exchange Commission*, __ F.3d __, 2020 WL

[21] The State Plaintiffs cite the inapposite cases of *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) and *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019), for the proposition that an allegation of "future injury" may satisfy standing requirements. In *Susan B. Anthony List*, the plaintiffs proved that their own intended "future conduct" (protected political speech) was "arguably...proscribed by [the] statute" they wished to challenge." *See* 573 U.S. at 150. No such facts are present here. Similarly, the Supreme Court found that state respondents had standing in *Department of Commerce v. New York*, because the Court found a census question asking whether individuals are American citizens had the "predictable effect" of causing non-Americans to decline to answer. *Dep't of Commerce*, 139 S. Ct. at 2566. Here, the Final Rule does not impose any predictable "yes or no" test to determine joint employer status, and the State Plaintiffs have produced no data on the number of businesses currently holding that status who would no longer be considered joint employers under the Final Rule, absent which no predictable effects can be measured. *See* 85 Fed. Reg. at 2853.

3482869, at *5 (2d Cir. June 26, 2020). Like the state petitioners in *XY Planning*, the State Plaintiffs "have not shown a direct link" between the Final Rule and their tax revenues, "relying instead on a causal chain that is too attenuated and speculative to support standing." *Id.*

Indeed, missing from the State Plaintiffs' studies and testimony is any evidence ruling out the link between the Rule and *job growth*, which should predictably *increase* state tax revenues. In addition, the speculative studies and declarations submitted by the State Plaintiffs for purposes of proving standing are further disputed by the affidavit submitted by Dr. Bird.[22]

It cannot reasonably be disputed that the franchising, subcontracting, and temporary staffing jobs have dramatically increased in numbers over the decades since 1960, during the period of time when the standard of joint employment exemplified by the 1983 *Bonnette* test held sway.[23] The expansion of jobs in so-called fissured workplaces has necessarily increased the total wages paid to workforces in all of the Plaintiff states, and thereby increased the tax revenues in every one of them.[24]

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[22] SMF ¶ 37, Exhibit G; *see also* Def.-Int. Responses to State Plaintiffs' 56.1 Statement.

[23] As discussed above at p. 6, the State Plaintiffs' own exhibits concede that franchising jobs increased from essentially none in 1960 to 8.85 million in 2018. *See, e.g.*, Shierholz Decl. ¶ 9 (ECF No. 68-1). Contract firms and temporary help agency jobs similarly increased from very low numbers to roughly 2 million. *Id.* Primarily because of the job growth in these industries, the number of workers employed in the State of New York, to take just one example mirrored by the other State Plaintiffs, increased from 8.2 million to 9.8 million between 1990 and 2019. *See Seasonally Adjusted Employment Data for New York State and Metro Areas*, New York State Dep't of Labor, https://labor.ny.gov/stats/lscesmaj.shtm (last visited July 10, 2020). Another State Plaintiffs' exhibit concedes that 94% of this job growth resulted from the increased jobs created by franchising, contracting, and temporary staffing. *See* Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, 7 (Working Paper No. 22667) (2016), https://www.nber.org/papers/w22667.

[24] The increased number of jobs in New York, again mirrored in the other states, resulted in the state's payroll tax revenues increasing from $11 billion in 1990 up to $41 billion in 2019. NY Tax Statistics, Table 3. *supra* n.10. SMF ¶ 58.

In addition, undisputed testimony in the Administrative Record, including the comments filed by the Defendant-Intervenors and other business groups, also establishes that the recent expansion of the joint employer standard, together with the accompanying uncertainty created by its conflicting judicial interpretations, has threatened job growth in the industries represented. The Final Rule seeks to restore business confidence by creating a more certain joint employer standard, leading to a return to job growth which will in the aggregate provide net wage increases to workers and increased tax revenues nationwide (including to all of the State Plaintiffs). Such increases potentially far exceed the claimed losses from anecdotal and speculative claims of isolated wage underpayments or insolvencies referred to in the State Plaintiffs' evidence.

The State Plaintiffs' evidence of harm also fails to account for the many benefits accruing to each state from the expansion of small business opportunities that is promoted by the Final Rule. *See* 85 Fed. Reg. at 2854. Whereas the State Plaintiffs' claims of reduced tax revenues are based in part on the assumption that small businesses are more likely to commit "wage theft" and to become insolvent, *see* Compl. ¶ 6, the State Plaintiffs ignore the tax revenues generated by the *expansion* of small businesses, who are strongly represented among franchisees, subcontractors, and temporary staffing agencies. The State Plaintiffs also ignore the Administrative Record evidence that fears of expanded joint employment claims have caused larger employers such as franchisors to "distanc[e]" themselves from engaging in training and other forms of guidance to smaller businesses, potentially leading to more wage payment errors by the smaller employers. SMF ¶ 65-66, Ex. A at 11-12.

Finally, none of the State Plaintiffs' evidence provides meaningful or substantiated data regarding the number of joint employers in existence, now or in the past, in the country as a whole or in any particular state. For this reason alone, the Department properly declined to rely on the

speculative assumptions contained in the State Plaintiffs' exhibits. In the absence of data on the actual number of joint employers, and the number of joint employer situations that would in fact be affected by the Rule, it is impossible to determine the cost increases to the State Plaintiffs, if any, attributable to the Rule. 85 Fed Reg. at 2853 (considering and rejecting EPI's speculative quantitative analysis due to the absence of supporting data).

The purported injury to the State Plaintiffs is particularly speculative here because, as the Rule makes clear, the Department's new standard is an Interpretive Rule setting forth a multi-factor test, for guidance purposes only, that allows consideration of numerous additional factors and expressly considers the totality of circumstances in each individual case. It cannot therefore be said that "no set of circumstances" exist in which regulated businesses who the State Plaintiffs maintain are joint employers will in fact be found to be such under the Final Rule. *Reno*, 507 U.S. at 301; *see also Coke*, 376 F.3d at 128 ("[B]ecause there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face."); *Jindeli Jewelry, Inc.*, 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).

2. The State Plaintiffs Fail To Establish That The Final Rule Imposes Any Obligation On Them To Increase Administrative Costs

The Court found standing at the pleading stage on the additional ground that the State Plaintiffs alleged they would incur administrative and enforcement costs. (MTD Op. at 19). As purported proof of such costs, in their Rule 56-1 Statement, the State Plaintiffs declare that they will need to prepare new guidance as a result of the Final Rule, or in the case of Illinois, to "correct the problems" with the Final Rule. *See* Pl. R. 56.1 Stmt. ¶¶ 21-35. But these claims are similarly

too speculative and not sufficiently traceable to the Rule to demonstrate standing at the summary judgment stage. SMF ¶ 37, Ex. G, Bird Declaration.[25]

The Court's opinion denying the Department's motion to dismiss on this ground relied on district court decisions from other circuits. (MTD Op. at 19-20). But the Second Circuit has held on analogous facts that standing is not available to plaintiffs who claim only a "hypothetical future harm." *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 State Plaintiffs have failed to establish that the public will require state guidance of any kind, beyond the Final Rule itself, or that any state enforcement problems will arise from enforcement of the Final Rule. As such, the costs of the State Plaintiffs' issuing such guidance would be merely "self-inflicted" injuries, as the Department correctly argued in its motion to dismiss, which are insufficient to establish standing. *See Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013).

The State Plaintiffs' standing arguments on this point find no support in the authorities this Court cited in ruling against the Department's motion to dismiss. (MTD Op. at 20). In *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.* (*USCIS*), even though the court found that some state parties properly alleged standing, it held that others did not. The District of Columbia's alleged injury of "need[ing] to train staff was too vague, and Maine's alleged costs were too speculative. *See USCIS*, 408 F. Supp. 3d 1057 1124 (N.D. Cal. 2019). The State Plaintiffs here rely on similarly vague language on the need to provide additional guidance. *See, e.g.*, ECF

[25] *New York v. United States DOL*, 363 F. Supp. 3d 109, 122 (D.D.C. 2019), upon which this Court relied in finding standing sufficient at the pleading stage, likewise ruled only on a motion to dismiss and did not address the additional burden of proof on standing at the summary judgment stage.

No. 68-2 (noting "new training" for Colorado division staff); ECF No. 68-3 (noting that Delaware's joint employer guidance "may" need revision). *See also* Def.-Int.'s Ex. G. [26]

3. The Court Should Reconsider Its Finding That the State Plaintiffs Have Prudential Standing Based Solely on the APA.

The Department properly moved for dismissal of this action on the basis that the State Plaintiffs did not assert interests falling within the "zone of interests" protected by the FLSA. The Court denied the motion primarily on the ground that the State Plaintiffs' claims fell within the zone of interests underlying the APA. (MTD Op. at 23-24). But the case on which the Court relied, *Match-E-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012), did not authorize standing based upon the APA considered in a vacuum. Just as the APA does not serve as an independent basis of jurisdiction in the absence of a federal statutory or constitutional cause of action, so too the APA alone cannot support zone-of-interests standing without any consideration of the zone of interests underlying the substantive federal statute at issue. Thus, in *Patchak*, which involved a provision of the Indian Reorganization Act authorizing the acquisition of property, the Court's analysis of prudential standing was grounded in the rights of a nearby property owner to redress under that law. *See id.*

Here the State Plaintiffs' claims must identify rights falling within the zone of interests encompassed by the FLSA, as channeled through the APA. It is undisputed that Congress expressed no intent in the FLSA to increase state tax revenues, nor is the FLSA concerned with state enforcement of this federal law. Indeed, Congress expressed the opposite view by leaving the states free to enact and enforce their own wage and hour laws. Because the State Plaintiffs' claims

[26] *California v. Azar* is similarly distinguishable. There, the states demonstrated an injury by showing that because of an agency action, more individuals would take advantage of a state public benefits programs. *See* 911 F.3d 558, 573 (9th Cir. 2018). The State Plaintiffs have alleged no such injury here.

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) ("the 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) (noting that a party's claim fell outside the zone of interests of the Clean Air Act even though the zone of interests test under the APA is not "especially demanding").

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

Turning to the merits of the State Plaintiffs' APA challenge, they have failed to demonstrate that the Rule conflicts with the FLSA or is arbitrary and capricious.

1. The Rule's Interpretation Of The FLSA Is A Permissible One.

As noted above, the FLSA does not define (or even mention) "joint employment." The closest the text comes to such a definition appears in Section 203(d), which the Department adopted as its "touchstone" in crafting the Rule. 85 Fed. Reg. at 2,831, n.58. The gravamen of the State Plaintiffs' textual argument is that the Rule nevertheless violates Sections 203(e) and (g); but that argument is not supported by the text of either provision for the reasons set forth above and in the Rule itself.[27] As has already been explained, *Rutherford* certainly does not compel a joint

[27] The most that can be said of 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* 85 Fed. Reg. at 2,823. 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) (concluding that the various standards and factors in the court's decisions ultimately "state no rigid rule for the identification of an FLSA employer…" but rather provide a "nonexclusive and overlapping set of factors to ensure an economic realities test….").

application of all three sections to the joint employment issue. Nor does *Nationwide Mutual Insurance Co. v. Darden*, a non-FLSA case which the State Plaintiffs also misapply. *See* 85 Fed. Reg. at 2,828.[28] The Department was entitled to rely on the Supreme Court's holding in *Falk v. Brennan* and the Ninth Circuit's holding in *Bonnette* in deciding to clarify a uniform standard for joint employment under the FLSA. 85 Fed. Reg. at 2824, 2853.

The State Plaintiffs further argue (Mem. at 24) that the Final Rule "flouts the purpose of the FLSA," which State Plaintiffs describe as "remedial" in nature and warranting an "expansive interpretation." As the Department has explained, however, the State Plaintiffs' interpretation of the FLSA "is based in older Supreme Court case law." 85 Fed. Reg. at 2,824. The Rule 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'"); *U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) ("[A] fair reading of the FLSA, neither narrow nor broad, is what is called for.").

The State Plaintiffs also wrongly argue that the Department was required to include in the Rule consideration of factors that are relevant to independent contractor, but not joint employer, analysis. As discussed above, the State Plaintiffs are incorrect in arguing (Mem. at 26) that the

[28] Moreover, while some courts have read all three definitions together in their joint employer analysis, those courts have mistakenly interpreted the Department's 1958 rule to reach that conclusion. *See* 85 Fed. Reg. at 2,824 ("Moreover, the Department notes that some of the tests used by the circuit courts (including the standard articulated by the Fourth Circuit in *Salinas*) are based in part on the ambiguous guidance provided in the Department's existing part 791 regulation.") (citing *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 135 (4th Cir. 2017), and *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (relying on the Department's 1958 regulation)).

Final Rule misinterprets *Rutherford*, or that *Rutherford* is a "seminal decision on joint employment." To the contrary, *Rutherford*'s main focus was on the separate question whether the individuals working as de-boners for the two companies 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).

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). The 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.

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

Next, the State Plaintiffs incorrectly claim (Mem. at 27) that the Final Rule errs in "exclud[ing] from consideration whether the employee is economically dependent on the potential joint employer, including whether the employee is in a specialty job or a job that requires special skill, initiative, judgment, or foresight." Nothing in the text of the FLSA requires such consideration. And 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 State Plaintiffs are also wrong in their contention (Mem. at 28) that the Rule is contrary to the FLSA because it conflicts with circuit court decisions applying their preferred analysis of *Rutherford*. Under this argument, the Department could never issue a rule where circuits apply the law inconsistently. As the Department has pointed out, however, "the Department has ...promulgated interpretive guidance regarding joint employer liability that overtly conflicts with the approach taken in a particular federal circuit." *See* 85 Fed. Reg. at 2,824.

In sum, the State Plaintiffs have failed to carry their burden of showing 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.

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 TV Stations, Inc.*, 556 U.S. 502 513 (2009). "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).

The State Plaintiffs primarily base their arbitrary and capricious argument on the claim that the Department erred procedurally by failing to consider "overwhelming evidence that the Final Rule will harm workers by depressing wages and increasing wage theft," relying particularly on a

study conducted by EPI. (State Pl. Mem. at 33-34). But as discussed extensively above, there is no "overwhelming" evidence in the Administrative Record that the Rule will, on balance, harm workers at all. First, as explained by the Department, the EPI study 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* 85 Fed. Reg. at 2,853. In addition, 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.

The present Rule also differs greatly from the rules at issue in the cases on which the State Plaintiffs rely. In *State Farm*, for example, the Supreme Court determined the agency's rule to be arbitrary and capricious after it "gave no consideration" to a major policy consideration. *See Motor Vehicles Mfrs. Ass'n v.State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46, 52 (1983). Another case that the State Plaintiffs cite, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), held that an agency's rulemaking was arbitrary and capricious where it "gave cost no thought *at all*." *Id.* at 2706.

In contrast, the Department in the present case *did* consider employees' interests and the various studies presented by the State Plaintiffs during its rulemaking. 85 Fed. Reg. at 2,853. 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.").[29] In addition, the Department properly rejected the highly speculative EPI study relied on by the State Plaintiffs because, as the Department stated, the EPI study failed to identify any data "accurately quantify[ing] the impact of this rule." 85 Fed. Reg. at 2,853.

The Department was plainly correct in its assessment. As discussed at length above, the studies and anecdotal statements entered into the record by the State Plaintiffs failed to provide the full picture of the economic impact of the Rule on employers, employees, or state economies. The Department was 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.").

Finally, the State Plaintiffs mistakenly argue the Department erred in not considering all comments it received, but the Department's Rule demonstrates that all of the substantive comments submitted by the State Plaintiffs and other like-minded commenters were in fact considered and addressed. *See, e.g.*, 85 Fed. Reg. at 2824, 2842, 2853-55. In any event, the Department was under no obligation to consider every comment or respond to such comments in a more substantive manner than it did. *See Louisiana Forestry Ass'n v. DOL*, 745 F.3d 653, 679

[29] Moreover, to the extent that 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. In any event, the Department did give costs (to all parties) careful consideration and has met (and exceeded) its procedural rulemaking requirements.

(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.") (internal citations omitted); *cf. Little Sisters of the Poor v. Pennsylvania*, __ S. Ct. __ 2020 WL 3808424, *13 (2020) (rejecting "judge-made procedures in addition to the APA's mandates").

IV. CONCLUSION

For each of the reasons set forth above, Defendant-Intervenors respectfully request that the Court deny the State Plaintiffs' motion for summary judgment, grant this cross motion for summary judgment, and hold the Final Rule lawful.

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Respectfully submitted,

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