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' REPLY TO OPPOSITION OF STATE PLAINTIFFS' AND IN SUPPORT OF CROSS- MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The State Plaintiffs' opposition fails to address significant defects in their premature claims of harm, and they fare no better with regard to the merits of the Department's Final Rule. The Final Rule should therefore be upheld on summary judgment as a permissible interpretation of the FLSA.

A. The State Plaintiffs' claims founder on two threshold requirements. *First*, the State Plaintiffs cannot satisfy the pre-enforcement criteria for facial challenges to interpretative rules. Under the "no set of circumstances" test of *Reno v. Flores,* 507 U.S. 292, 301 (1993), which the opposition disregards, the State Plaintiffs must establish that there is no set of circumstances in which the multi-factor guidance contained in the Final Rule can be lawfully applied. They failed to do so. In fact, there are myriad circumstances in which employers may still be found to be joint employers under the Final Rule's fact-specific guidance. And in the absence of any specifically disputed enforcement action, the State Plaintiffs' theoretical facial challenge cannot succeed. For similar reasons, this pre-enforcement challenge to the Final Rule is not ripe for review. *See Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013).

Second, the State Plaintiffs cannot establish standing. The opposition ignores the gross deficiencies in their speculative claims of injury, which would remain insufficient to establish standing at the summary judgment stage even if this were not a facial, pre-enforcement challenge to an interpretive rule. The Second Circuit's recent decision in *XY Planning Network, LLC v. SEC*, 963 F.3d 244, 2020 U.S. App. LEXIS 20078 (2d Cir. June 26, 2020), together with other cases previously cited by the Defendant-Intervenors, compels a finding that the State Plaintiffs' standing claims are too "attenuated" to survive summary judgment. This is particularly so here because the growth in jobs fostered by the Final Rule, along with "countless other variables" (*Id.*, 2020 U.S. App. LEXIS 20078, at **16) undermines any claims of injury to the State Plaintiffs.

B. The State Plaintiffs' claims against the Final Rule are also deficient on the merits. *First*, the State Plaintiffs fail to show that the Final Rule is contrary to the FLSA. Instead, they continue to mischaracterize the history of the joint employment doctrine under the FLSA, as well as the text of the Final Rule and the Administrative Record. In particular, the State Plaintiffs ignore the numerous comments in the Administrative Record approving of and agreeing with the Department's view that the Final Rule will bring greater clarity and uniformity to the question of joint employment. The Department is entitled to update and clarify the joint employment standard, and it is not required to adopt the State Plaintiffs' differing vision(s) of what the standard should be.

Second, the State Plaintiffs fail in their efforts to cast the Final Rule as arbitrary and capricious. They fault the Department for not agreeing with the disputed and empirically unsupported cost assessments that they favor. But the State Plaintiffs cite no case which required the Department to credit speculative cost claims and they ignore the case law the Defendant-Intervenors cited to the contrary. Although the State Plaintiffs also accuse the Department of disregarding the impact of the Final Rule, they have no answer to the Department's undisputed assertion that its impact cannot be measured in the absence of any data on the number of joint employer relationships that currently exist or would cease to exist under the Final Rule.

II. ARGUMENT

A. The State Plaintiffs Have Failed To Meet The Established Criteria For A Pre-Enforcement Facial Challenge To An Interpretative Rule.

As explained in the Defendant-Intervenors' opening brief, at 16-17, the State Plaintiffs' facial challenge to the Department's Rule is premature. They cannot prove that "no set of circumstances exists under which the [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 (2d Cir. 2004); *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). Indeed, the State Plaintiffs do not dispute that joint employment will continue to be found in many appropriate circumstances, consistent with the text of the FLSA, under the interpretive guidance provided by the Final Rule. See 85 Fed. Reg. at 2,853.[1]

Rather than address this fatal defect, the State Plaintiffs have chosen to ignore the "no set of circumstances test" in their opposition, and thus effectively concede the Defendant-Intervenors' argument. *See Texas v. United States*, 798 F.3d 1108, 1110 (D.C. Cir. 2015) ("[I]f a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded."); *see also Jackson v. Federal Exp*., 766 F.3d 189, 198 (2d Cir. 2014). Either way, the law is clear that a pre-enforcement, facial challenger must show there are no circumstances under which the challenged rule could be validly enforced. The State Plaintiffs have not—and cannot—satisfy this requirement, and summary judgment in favor of the Department's Final Rule is warranted on that basis alone.

The State Plaintiffs do briefly contest the Defendant-Intervenors' additional argument that this case is not "ripe for review;" but their opposition misses the point in contending they can prevail merely by showing the Final Rule constitutes "final agency action." State Pl. Mem. at 17, n. 13. The only case cited by the State Plaintiffs, *Pharm. Rsch. & Mfrs. of Am. v. HHS*, 138 F. Supp. 3d 31, 40 (D.D.C. 2015), does not stand for that proposition and is factually inapposite. In

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[11] Among many possible examples, the State Plaintiffs do not contend that that any of the cases cited on page six of the Defendant-Intervenors opening brief, each of which applied the *Bonnette* standard, would have reached different results under the Department's Final Rule. *See, e.g., Imbarrato v. Banta Mgmt. Servs*., 2020 U.S. Dist. LEXIS 49740 (S.D.N.Y. Mar. 20, 2020).

that case, the agency issued a new rule that categorically applied to all manufacturers of specified drugs and placed them in immediate jeopardy of violating the law. Moreover, the rule imposed a "significant burden on pharmaceutical manufacturers and other regulated entities alike." *Id*. at 43-44. On top of that, the agency sent enforcement letters to manufacturers threatening them with violations of the rule. In this case, by contrast, the Department's Final Rule has not led to enforcement action against any known entity.

The State Plaintiffs also failed to address or distinguish the ripeness case cited by the Defendant-Intervenors, *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013), which is directly on point. (Def.-Int. Mem. at 17). 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. 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."). Because no agency enforcement action has yet occurred under the Department's Final Rule, it is not ripe for review by this Court.

B. The State Plaintiffs Have Not Established They Are Entitled To Judgment On Their Article III Standing.

Even if this case were ripe for judicial review, the State Plaintiffs have not satisfied their burden to establish standing for purposes of a final judgment. Contrary to the State Plaintiffs' opposition, neither the "reduced tax revenues" nor the "administrative costs" theory of harm is sufficiently "concrete" to establish standing on summary judgment.

1. The State Plaintiffs Cannot Establish Standing Based Upon Speculation That The Rule Will Adversely Affect State Tax Revenues.

As explained in the Defendant-Intervenors' opening brief, the Second Circuit's recent decision in *XY Planning Network, LLC v. U.S. Securities and Exchange Commission*, 963 F.3d 244 (2d Cir. June 26, 2020), fatally undermines the State Plaintiffs' unproven claims of injury from decreased tax revenues supposedly caused by the Final Rule. The State Plaintiffs attempt to brush aside *XY Planning*, claiming that the facts are "different." (State Pl.'s Mem. at 18-19). But the States in *XY Planning*—many of the same States, led again by New York—argued the same "decreased tax revenue" theory of standing they advance here. 963 F.3d at 252-53. The Second Circuit found the causal chain between the regulation and the states' collection of taxes to be "too attenuated and speculative" because the "annual pool of taxable gains in a state is driven by countless variables," ranging from the broader economy to individual investor portfolios. *Id*. Just so in the present case. The State Plaintiffs' collection of payroll taxes is driven by countless variables—including the job growth that the Final Rule will facilitate and the myriad business arrangements that will be affected by the Final Rule in ways that are, at this stage, unpredictable.

Unforeseen events such as the current pandemic also may disrupt the causal link the State Plaintiffs allege, rendering that link even more attenuated than the claims found wanting in *XY Planning*.[2]

The State Plaintiffs nevertheless continue to rely on their disputed studies and testimony, unsupported by any credible empirical evidence, purporting to show that the Final Rule will cause increases in wage misclassification or wage "theft," which will somehow drive down state tax revenues.[3] There remains no data whatsoever as to how many joint employer relationships currently exist nor how many will be changed as a result of the Final Rule. Nor do the State Plaintiffs provide any data disputing the Defendant-Intervenors' comments in the Administrative Record asserting that many franchisees, subcontractors, and temporary agencies will *improve* their records of wage payments and *avoid* insolvencies because of the Final Rule. According to the undisputed comments in the Administrative Record, smaller firms will have access to greater assistance from larger firms who no longer need to "distance" themselves for fear that helpful guidance will be viewed as an exercise of joint employer "control." *See, e.g.*, Def. – Int.'s Ex. A. - IFA Comments, pp. 11-13. These are among the "countless variables" which the Second Circuit

[2] The recent decision in *New York v. U.S. Department of Labor*, No. 20-cv-3020, 2020 U.S. Dist. LEXIS 137116 (S.D.N.Y. Aug. 3, 2020), is of no help to the State Plaintiffs. In that case, the court found that the state plaintiff did not rely on indirect causal links of the type claimed here but on an undisputed elimination of aspects of paid leave to employees which directly reduced state revenues. *See id.* at **7-13. The result of that case is questionable in light of *XY Planning*, but the causal links in the present case remain much more attenuated.

[3] The State Plaintiffs have "doubled down" with another affidavit from Dr. Shierholtz. ECF No. 119-1. This affidavit does not remove the cloud over the State Plaintiffs' data. Dr. Shierholtz again mischaracterizes the Final Rule as having a predictable impact on joint employment in so-called fissured industries, without establishing any basis for predicting whether (or how many) employers will in fact lose their joint employer status, and in the absence of any enforcement of the Final Rule's fact-specific guidance. The affidavit and the studies it cites also assume without support that employees in so-called fissured industries would have higher wages and fewer misclassifications if they were not "outsourced," but fails to address the real prospect that many such employees would otherwise have no jobs at all.

requires this Court to consider on summary judgment before accepting the State Plaintiffs' unproven (and unprovable) causal links. *Cf. XY Planning*, 963 F.3d at 253.

The State Plaintiffs claim that benefits outweighing injuries do not "negate" standing (Opp. at 20), but that contention mischaracterizes the Defendant-Intervenors' argument.[4] The States cannot claim to be injured by declining tax revenues caused by the Final Rule if the tax revenues are more likely to go up than down, or if there are too many variables—job growth promotion among them—to tell what impact the Final Rule will have. This is particularly so when the fact-dependent Final Rule has yet to be enforced against any entity. *See 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.").

In claiming that the Defendant-Intervenors' assertions are unsupported, the State Plaintiffs ignore undisputed testimony in the Administrative Record, including the comments filed by the Defendant-Intervenors and other business groups. These comments supported the Final Rule because many in the business community believe the Final Rule is essential to remove threatened restrictions on job growth and restore business confidence and investment. Such restoration of business confidence and investment is more essential than ever in the current pandemic.

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[4] The opposition relies on dicta from inapposite cases such as *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (class action plaintiffs alleged direct harms from negligent and fraudulent tax advice), and *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (states incurred significant costs in issuing driver's licenses to DAPA beneficiaries, which were not offset by unrelated benefits). Here, the State Plaintiffs have claimed as their "injury" that tax revenues will decline under the Final Rule; but they cannot prove any such injury without taking into account the *increased* tax revenues likely to result from job growth promoted by the rule, along with other variables. All of this "ar[i]se[s] out of the same transaction" as the injury the State Plaintiffs claim and thus has a direct nexus to it, of the sort acknowledged by the *Texas* court to defeat standing. *Id.* (citing *Henderson v. Stalder*, 287 F.3d 374, 381 (5th Cir. 2002)).

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

The State Plaintiffs continue to claim standing on the additional ground that they will incur administrative and enforcement costs because of the Final Rule. (Opp. at 21-23). But the States are not direct objects of the Final Rule—that is, they are not subjected to enforcement or required to do anything. They suffer injury only if they decide to react to the Rule. And they fail to establish that the public *requires* state guidance (or action of any kind) or that any state enforcement problems will arise from the Final Rule's merely interpretive guidance. As such, any costs to the State Plaintiffs of issuing their own guidance remain entirely "self-inflicted," and are not caused by the Final Rule. *Nat. Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 85 (2d Cir. 2013).

Contrary to the State Plaintiffs' opposition, their claims of administrative costs are significantly less concrete than those in *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.* (*USCIS*), 408 F. Supp. 3d 1057, 1124 (N.D. Cal. 2019). The opposition ignores the context of that case, which involved *direct and irreparable* harm to state and local governments caused by a rule that threatened loss of federal funding for state aid programs to immigrants. *Id*. at 1124. Because they were directly related to the rule, the increased operational costs were "predictable, likely, and imminent." *Id.* Here, by contrast, the State Plaintiffs have not identified any concrete impact of the Final Rule. It is thus irrelevant that a few of the State Plaintiffs have imposed *upon themselves* the costs of engaging in premature and unnecessary guidance or rulemaking efforts.[5] The question for standing purposes is whether such efforts were imposed on

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[5] *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 state public benefits programs. *See* 911 F.3d 558, 573 (9th Cir. 2018). The State Plaintiffs have alleged no such injury here.

them by the Final Rule. They were not; the Final Rule does not regulate the State Plaintiffs' activities in the slightest.

3. The APA Alone Does Not Confer Zone-Of-Interest Standing On The State Plaintiffs.

It remains clear that the State Plaintiffs are not within the zone of interests under the FLSA's joint-employer doctrine, nor can they rely solely on the APA for statutory standing under the Supreme Court's holding in *Match-E-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). That decision did not authorize standing based upon the APA alone, but required a showing that the plaintiffs fell within the zone of interests of the underlying substantive federal statute at issue. That is not the case here, as the states were not the intended beneficiaries of the FLSA's joint employer doctrine, and they are not the intended beneficiaries of the Final Rule. *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); *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 is not "especially demanding").

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

In challenging the merits of the Final Rule, the State Plaintiffs' opposition largely repeats previous arguments. (Opp. at 2-9). They criticize the Department's reliance on the text of Section 203(d), even though the Supreme Court adopted the same approach in *Falk v. Brennan*, 414 U.S. 190 (1973). *See* 85 Fed. Reg. at 2,831, n. 3. The State Plaintiffs' continue to overemphasize *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947), which the Supreme Court (and others) have acknowledged to be primarily an independent contractor case, providing no material

guidance on joint employment beyond its ultimate holding that the manufacturer "controlled" the workplace. *See Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992); *Salinas v. Commercial Interiors,* 848 F.3d 125, 139 (4th Cir. 2017). *See also* 85 Fed. Reg. at 2,823. In any event, *Rutherford* does not compel a joint application of all three FLSA employment sections to the joint employment issue. *See* 85 Fed. Reg. at 2,828. The Department was entitled to clarify a uniform standard for joint employment under the FLSA based upon Section 203(d)'s text; and in doing so, it appropriately relied on the Supreme Court's holding in *Falk* and the Ninth Circuit's holding in *Bonnette*. *See* 85 Fed. Reg. at 2,824, 2,853.

The State Plaintiffs continue to argue that the Final Rule "flouts the purpose of the FLSA," which they describe as "remedial" in nature and warranting an "expansive interpretation." (Opp. at 3). The opposition acknowledges, as it must, that the Supreme Court has most recently declared that the FLSA should be interpreted "fairly," not to achieve the broadest remedial purpose "at all costs." *Encino Motor Cars v. Navarro,* 138 S. Ct. 1134, 1142 (2018). But the opposition maintains without support that this directive applies only to the FLSA's "exemptions." (Opp. at 3, n.1). There is no support for so restrictive a reading of *Encino*, and indeed, the Third Circuit recently rejected it 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." [citing *Encino Motorcars*, 138 S. Ct. at 1142]. Indeed, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (per curiam). "[A] fair reading" of the FLSA, neither narrow nor broad, is what is called for. *Encino Motorcars*, 138 S. Ct. at 1142. 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) (cited in Def.-Int. Mem. at 25). The opposition's view of legislative interpretation also runs counter to that of the Second Circuit outside the FLSA exemption context. *See Catskill Mountains Ch. Of Trout*

Unlimited, Inc. v. EPA, 846 F.3d 492, 514 (observing that "the Supreme Court has noted, however, 'no law pursues its purpose at all costs,'" *quoting Rapinos v. United States,* 547 U.S. 715, 752 (2006) (plurality opinion).

The State Plaintiffs also persist in their claim that the Final Rule is unduly restrictive. Perhaps recognizing the futility of requiring the Department to produce a uniform rule that matches the widely divergent standards of every federal circuit court, the State Plaintiffs argue that "the FLSA's *outer* limits may vary by circuit, but the factor tests pursue the same inquiry (the "economic reality" or the "circumstances of the whole activity") through slightly different factors, and uniformly determine the FLSA's *floor* is broader than the Rule's interpretation." (Opp. at 8). But this argument only confirms that the Final Rule's interpretation of the statute is a permissible one. According to the State Plaintiffs' own parenthetical descriptions, the cases they cite to exemplify the FLSA's "floor" amount to a preference for analyzing joint employment according to the "totality of circumstances"—the analysis that the Department's Final Rule *explicitly endorses*. 85 Fed. Reg. at 2,830, 2,834.

The State Plaintiffs nevertheless claim that the Final Rule's "totality-of-the-circumstances inquiry" is deficient because it fails to "assess economic realities." (Opp. at 13) But the Department explicitly stated its intent to include economic realities as a consideration. 85 Fed. Reg. at 2,828, 2,832. The opposition appears to conflate economic realities with the "economic dependence" test, which the Department properly excluded from its joint employer analysis. 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.

Finally, although the State Plaintiffs accuse the Defendants of seeking to "have it both ways" by defending the Final Rule as both a fact-specific inquiry and one that will foster

uniformity (Opp. at 9), there is no inconsistency. An interpretive guide that instructs *which* facts are relevant may not dictate the result in any particular case but nevertheless will promote uniformity across similar fact patterns and enable affected parties to better predict the outcome. Such is the case here. The State Plaintiffs fail to address the numerous comments in the Administrative Record stating that the Final Rule achieves the Department's goals of increased clarity and uniformity, within a framework that allows for consideration of economic realities and totality of circumstances. Def.-Int.'s Ex. A-F, as quoted in Def.-Int's Mem. at 10-15. The Department was entitled to rely on those comments, and its construction of the FLSA is a permissible one which this Court should uphold.

D. The State Plaintiffs Fail To Show That The Final Rule Is Arbitrary And Capricious.

The State Plaintiffs' opposition begins its argument that the Final Rule is arbitrary and capricious by repeating the strawman choice between uniformity and totality of circumstances. (Opp. at 11). After improperly condensing the Department's multiple objectives in the rulemaking down to a single "good reason" for the rule (achieving greater uniformity and clarity), the opposition argues that the Final Rule must be deemed arbitrary because courts will ignore it and thus fail to make their rulings more consistent (presumably thanks to the State Plaintiffs' self-fulfilling efforts). (*Id*. at 11). The opposition again disregards the Administrative Record containing numerous comments supporting the Department's effort to stabilize and clarify the joint employment standard. And the State Plaintiffs cite no authority for curtailing an agency's decision making based solely on its opponents' determination to frustrate the agency's lawful objectives.

The State Plaintiffs revert to their claim that the Final Rule is arbitrary and capricious because the Department failed to address the "harm to workers" purportedly identified in the EPI and related comments. (Opp. at 14-16). As the Defendant-Intervenors (and the Department)

previously have argued, the Department was justified in considering the Administrative Record comments on which the State Plaintiffs rely, but ultimately finding no meaningful showing of harm to workers. Contrary to the opposition, there remains no credible, empirically supported data 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. Moreover, 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 it) than any amount of wages speculated to be lost or reduced because of the Rule.[6]

In any event, the Department did consider employees' interests and the various studies presented by the State Plaintiffs during its rulemaking. 85 Fed. Reg. at 2853. The opposition offers no case authority for compelling the Department to adopt the speculative conclusions of their preferred studies, which failed to connect misclassification and wage theft to the existence or non-existence of joint employment, and failed to measure joint employment at all. The Department therefore properly found that employees are unlikely to see any reduction in wages owed to them due to the Final Rule. *Id*. *See also Department 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.").

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[6] The State Plaintiffs' contend that the Defendant-Intervenors' claims of job growth are not supported by record evidence. (Opp. at 19-20). To the contrary, the comments submitted by the Intervenors all testify to the growth in their respective industries and how such growth has been threatened by the recent expansion of the joint employer tests by the previous Wage Hour Administrator and several circuit courts. *See* Def.-Int. Ex's A-G and other comments cited by the Department. 85 Fed. Reg. at 2,854. In addition, comments cited by the State Plaintiffs themselves acknowledge the job growth of previous decades, including the finding that 94% of all such growth occurred in so-called fissured industries. State Pl. Mem. at 29, citing Ex. 14, at 4.

The Department also considered and addressed all of the substantive comments submitted by the State Plaintiffs and other like-minded commenters. *See, e.g.*, 85 Fed. Reg. at 2,824, 2,842, 2,853-55. The Department was under no obligation to respond to such comments in a more substantive manner than it did. Indeed, the Supreme Court has recently rejected "judge-made procedures in addition to the APA's mandates," and reaffirmed "the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2020 U.S. LEXIS 3546, **36 (July 8, 2020); *see also City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (upholding agency's one sentence rejection of detailed study purporting to provide "new scientific evidence"). Again, the Defendant-Intervenors cited significant precedent on this point in their opening brief (at 29-30), which the State Plaintiffs failed to address in their opposition, thereby conceding the argument. *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.").[7]

In any event, the EPI study is a "red herring" in this case, as discussed above, in our opening brief, and in the Final Rule itself. 85 Fed. Reg. at 2,853. The Department expressly considered the comments of EPI and Dr. Shierholtz, along with similar speculative predictions of

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[7] The State Plaintiffs (Opp. at 15) cite cases stating the general proposition that agencies are required to examine the consequences of their actions and explain the "key assumptions" embedded in new regulations. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017); *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018). The Department did both things here, and the latter case specifically supports the Department's decision to reject the State Plaintiffs' studies. *See Hisp. Affs. Project.*, 901 F.3d at 392 (upholding Department's decision to reject a state survey on hours worked, as well as the Department's decision not to collect data deemed to be "very difficult and resource-intensive").

misclassifications and wage theft by other commenters. *Id*. But because none of the commenters connected their (disputed) findings to any data on the number of joint employers in any industry, before or after issuance of the Final Rule, the Department was entitled to decline to give credence to the studies on which the State Plaintiffs rely and to find that their concerns were outweighed by the Final Rule's potential benefits. [8]

III. CONCLUSION

For each of the reasons set forth above, the Defendant-Intervenors respectfully request that the Court grant the Defendant-Intervenors' cross motion for summary judgment.

Dated: August 5, 2020

Respectfully submitted,

/s/Maurice Baskin

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[8] The State Plaintiffs cite inapposite cases for their claim that more was required of the Department in response to the EPI and similar partisan studies. (Opp. at 17.) In *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 626 F.3d 84, 93-94 (D.C. Cir. 2010), MSHA ignored evidence submitted by the government's own safety expert, NIOSH, whose recommendations MSHA was statutorily required to consider. Two other cases dealt with statutes that expressly required the agency to engage in cost-benefit analyses. *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1221 (D.C. Cir. 2004); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373 (D.D.C. 2014).

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2020, a copy of the foregoing Memorandum in support of Motion for Summary Judgment and in opposition to the State Plaintiffs' motion was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/Maurice Baskin