RECORD NO.

20-3806(L)

20-3815(CON)

In The

United States Court of Appeals

For The Second Circuit

STATE OF NEW YORK, COMMONWEALTH OF PENNSYLVANIA, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF WASHINGTON, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA,

Plaintiffs – Appellees,

(*Caption continued on inside cover*)

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

REPLY BRIEF OF INTERVENOR - APPELLANTS

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RECORD NO.

20-3806(L)

20-3815(CON)

v.

MARTIN J. WALSH, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES OF AMERICA,

Defendants – Appellants,

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

Intervenors Defendants - Appellants.

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SUMMARY OF ARGUMENT

The State Plaintiffs' brief fails to justify the District Court's decision either as to standing, ripeness, or the merits of the Joint Employer Rule ("Rule"). Contrary to their brief, the State Plaintiffs never demonstrated any injury in fact, because the Rule exclusively interpreted the federal Fair Labor Standards Act ("FLSA") and therefore imposed no "concrete" requirements or harms on any state government. *See XY Planning Network, LLC v. U.S. Securities and Exchange Comm'n*, 963 F.3d 244, 252-53 (2d Cir. 2020). The District Court should in any event have found that the State Plaintiffs' attenuated claims fell well outside the prudential zone of interests of the FLSA and the APA. *See Match-E-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

The State Plaintiffs further fail to establish ripeness for the District Court's review, because the Rule has not been relied upon or applied to support any agency action in a particular case. *See Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013). The State Plaintiffs improperly rely on arguments they never presented to the District Court in attempting to establish that no set of circumstances exist in which the Rule could be lawfully enforced. Their new arguments fail, and for this reason as well, the District Court decision must be reversed. *See Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 128 (2d Cir. 2004); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993).

On the merits, the State Plaintiffs wrongly contend the Rule violates the FLSA. To the contrary, the Rule constitutes a return to previously settled joint employer principles under the FLSA, not a departure from such principles. *See Falk v. Brennan*, 414 U.S. 190, 191 n.2 (1973); *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465, 1469 (9th Cir. 1983). The State Plaintiffs, like the District Court, also improperly interpret the FLSA to achieve the "broadest remedial purpose," based upon case law predating the Supreme Court's holding in *Encino Motor Cars v. Navarro*, 138 S. Ct. 1134, 1142 (2018)*; see also Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d 492, 514 (2d Cir. 2017). To the contrary, the Department properly gave the statute a "fair reading," as the foregoing court decisions require.

Finally, the State Plaintiffs err in arguing the Rule is arbitrary and capricious, ignoring the narrow standard of judicial review of agency actions which prohibits a court from "substituting its judgment" for agency decision making. *Fed. Commc'n Comm'n v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009). Also contrary to the State Plaintiffs' brief, the Department considered the interests of employees during its rulemaking, including a study by the Economic Policy Institute ("EPI") on which the State Plaintiffs heavily relied. The Department was entitled to disagree with the unsupported conclusions of the EPI and other speculative or anecdotal data on which

the State Plaintiffs relied. For all of the foregoing reasons, the District Court erred in vacating the Rule, and its decision should be reversed.

ARGUMENT

A. The State Plaintiffs Lacked Standing to Challenge the Rule

1. The State Plaintiffs' Brief Fails to Demonstrate "Injury in Fact" Under Article III of the Constitution

The opening brief of Intervenors-Appellants, together with the Department's brief, asked this Court to apply its recent precedent in *XY Planning Network, LLC v. U.S. Securities and Exchange Comm'n*, 963 F.3d 244, 252-53 (2d Cir. 2020), to find that the State Plaintiffs here lacked standing to challenge a federal rule in the absence of a "direct link" to concrete harms caused to them by the Rule. (Int.-App. Br. 19; DOL Br. 24-25). *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (requiring showing of "actual," "imminent," or "concrete" risk of harm to justify standing).

In their brief on appeal, the State Plaintiffs have narrowed their standing argument to the claim that the Department's purported changes aimed exclusively at interpreting a federal statute somehow will "force" states to expend additional funds to enforce and administer *state* wage laws. The State Plaintiffs' Brief, however, does not dispute the Appellants' showing that the District Court improperly relied on out-of-circuit cases decided on different facts. (Int.-Appellants Br. 24; DOL Br. 21-22). The inapposite cases on which the State Plaintiffs now rely do not support the

District Court's decision on standing.

First, with regard to so-called "enforcement" costs, the State Plaintiffs newly rely on this Court's recent holding in *New York v. Department of Homeland Security*, 969 F.3d 42, 59-60 (2d Cir. 2020). (Appellees Br. 23-24). There, this Court unremarkably recognized state standing to challenge a rule that would have deterred immigrants from obtaining certain public benefits, resulting in an overall increase in healthcare costs borne by public hospitals. The Court held that the states "sufficiently established actual imminent harms." *Id*. Indeed, the Court observed that the Department of Homeland Security itself "anticipate[d] that a significant number of non-citizens [would] disenroll from public benefits as a result of the Rule's enactment," and further acknowledged that the expected disenrollment would result in "decreased federal funding to states, decreased revenue for healthcare providers, and an increase in uncompensated care." *Id*.

Unlike *Homeland Security*, the State Plaintiffs here do not (and cannot) claim "actual imminent harms." Instead, they argue only that their unspecified costs of enforcing state wage laws will go up should the federal government not adequately enforce a more robust federal joint employer standard. But *Homeland Security* says nothing about allowing state standing solely on the basis of alleged costs of state enforcement of any federal law, which is the sole basis for the State Plaintiffs' standing claim in this appeal.

Along the same lines, the State Plaintiffs mistakenly rely on *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018). (Appellees Br. 24, 26-27). There, the court held a state had standing to challenge an EPA rule that weakened safety standards for industrial facilities, due to the demonstrated higher costs necessarily imposed on states to respond to industrial accidents. *Air Alliance Houston*, 906 F.3d at 1059-60. Notably, the state in that case presented evidence that it had already spent $370,000 in responding to an industrial accident. *Id.* Not so here. The State Plaintiffs have offered no proof of monetary "enforcement costs" resulting from the Rule (which itself has not yet been enforced). And they have identified no rational reason why the states need to enforce their wage laws any differently than they always have as a result of the Department's exclusively federal clarification of the joint employment standard under the federal FLSA.

For similar reasons, the State Plaintiffs fail to justify the District Court's holding that they have standing merely because the Rule imposes "administrative costs" on state governments in the form of state "reviews" of the Rule and issuance of (unnecessary) state guidance on a federal standard. (Appellees Br. 27). Contrary to the State Plaintiffs' brief, their summary judgment evidence as to supposed state administrative costs confirmed that any such actions and costs are entirely self-inflicted. Such evidence should have been found inadequate to permit the State Plaintiffs to seek an injunction interfering with a federal interpretive rule. *See Arpaio*

v. Obama, 27 F. Supp. 3d 185, 202-03 (D.D.C. 2014), *aff'd*, 797 F.3d 11, 20, (D.C. Cir. 2015).

The State Plaintiffs further cite to *Texas v. United States,* 787 F.3d 733, 748-49 (5th Cir. 20190, in arguing that their alleged injuries are not self-inflicted, but the plaintiff's injuries in that case were quite dissimilar from the alleged injuries here. In *Texas*, the plaintiff state suffered a "forced choice" because it would either need to incur costs from subsidizing licenses or change its state laws. *Id*. In contrast here, the only "forced choice" the State Plaintiffs can muster is that they "either [] surrender to the weaker standard imposed by the Rule or else [] change their existing regulations to preserve their own laws' more protective scope." (Appellees Br. 29-30). But in reality, the Department's federal rule does not force the States to make *any* changes in their existing laws. And the State Plaintiffs fail to show how they would suffer any harm from "surrender[ing] to the weaker standard imposed by the Rule" (which they are not required to do) in interpreting their state laws.

The State Plaintiffs do not dispute any of the cases cited by the Intervenor-Appellants, in which courts have repeatedly rejected claims of standing based upon self-inflicted costs. (*See* Int.-App. Br. 29). And as both Appellants have previously argued, the States who opt to follow the new federal Rule can simply rely on the Rule; while those States who choose to rely on their broader state laws can leave

their current guidance intact.[1] Similarly, the State Plaintiffs need not hire additional employees to assist with enforcement at this time; the State Plaintiffs could avoid these costs by waiting to determine whether they will need to issue additional guidance or hire more employees. Because the State Plaintiffs could avoid the administrative and enforcement costs they allege they will incur, any such costs are merely "self-inflicted" injuries. *Bandler*, 2020 U.S. App. LEXIS 34255 (2d Cir. Oct. 29, 2020); *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.,* 710 F.3d 71, 85 (2d Cir. 2013).

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

In addition to the required proof of concrete injury for purposes of Article III standing, the State Plaintiffs were required to show that their asserted injuries fell within the "zone of interests" of the FLSA. The District Court wrongly asserted that the State Plaintiffs' purported interest in "protecting their tax base" and "overlapping" interest in protecting workers is the "sort of interest that the FLSA was enacted to protect." (SPA 54). The State Plaintiffs' Brief goes a step further, arguing that the zone of interests analysis should focus on both the APA and the FLSA. (Appellees Br. 32-33). Neither argument succeeds.

[1] As previously noted in the Intervenor-Appellants' Brief, no extra costs accrue to states who choose to issue new and unnecessary guidance on the federal joint employer standard, because the States are already paying their employees to edit guidance documents. (Int.-App. Br. 29, n.27).

Contrary to the States' Brief (and the District Court's opinion), this Court in *Federal Defs. of New York, Inc. v. Federal Bureau of Prisons*, 954 F. 3d 118, 128 (2d Cir. 2020), expressly held that "[t]he relevant zone of interests for an APA claim is defined by 'the statute that [the plaintiff] says was violated," rather than by the APA itself. For purposes of this appeal that means the zone of interests protected by the FLSA must control the question of standing. *See also AICPA v. IRS*, 199 F. Supp. 3d 55, 73 (D.D.C. 2016), *aff'd* 2018 U.S. App. LEXIS 22583 (D.C. Cir. Aug. 14, 2018).

The State Plaintiffs' cite to Section 218 of the FLSA as somehow including state governments in the zone of interests protected by the Act. (Appellees Br. 33). But the section cited has exactly the opposite effect, excluding any state law or municipal ordinance from the FLSA's coverage where they choose to set higher standards. *See* 29 U.S.C. § 218(a). As further noted in the Intervenor-Appellants' Brief (at 31), and not contested by the State Plaintiffs, Congress certainly expressed no intent in the FLSA to increase state tax revenues, nor is the FLSA concerned with state enforcement of the federal law.

Neither the State Plaintiffs nor the District Court have cited any FLSA case authority for the novel zone of interest identified by them in this case. And the State Plaintiffs do not dispute that the case primarily relied on by the District Court, *Bank of America Corp. v. City of Miami*, 1367 S. Ct. 1296, 1303 (2017), found prudential

standing only because the city's cited injury—lost tax revenue and additional municipal costs—allowed the city to qualify as an "aggrieved person" under the Fair Housing Act, an entirely different statute – with entirely different interests - from the FLSA. Finally, because the State Plaintiffs' claims fall outside the zone of interests of the FLSA, they also fall outside the FLSA and APA considered together. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1300 (D.C. Cir. 2015).

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

The Intervenors-Appellants' Brief demonstrated that the District Court erred in concluding that the State Plaintiffs' challenge to the Rule was ripe for review. (Int.-App. Br. 19-20). Notably, the State Plaintiffs never addressed this argument in their filings below, and they specifically did not challenge the Intervenor-Appellants' citation to *American Tort Reform Association v. OSHA*, 738 F.3d 387, 394 (D.C. Cir. 2013). Though they now attempt to distinguish *American Tort Reform* (States Br. 34-35), their efforts fail, because that case is directly on point. The D.C. Circuit 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,

731-33 (D.C. Cir. 2003); *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 938 (D.C. Cir. 1998).

The State Plaintiffs never previously contested that the Joint Employer Rule is an interpretive rule, and they cannot be heard to do so for the first time on appeal. *See Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015) ("It is well settled that arguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal."); *see also Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 389 (2d Cir. 2018).

For similar reasons, the State Plaintiffs have failed to establish ripeness of their facial challenge because the Rule on its face uniquely identifies many factual scenarios under which the proposed, "totality of the circumstances"-based standard results in lawful joint employer findings by any measure. (SPA 248-251). Just as this Court found in *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d at 128, "because there are many possible applications of the regulation that are consistent with the [FLSA], the court "cannot declare the rule invalid on its face." (*See* Int.-App. Br. 20).

The State Plaintiffs were well aware that the Rule in the present case involved many different applications to different industries and fact-based scenarios invoking the totality of circumstances, many of which are undeniably lawful interpretations

of the FLSA. (SPA 248-251). Yet, the State Plaintiffs never even attempted to meet the *Reno/Coke* test, and they cannot do so now. The District Court committed clear error in proceeding to the merits without even considering this question, squarely presented by the Intervenor-Appellants below, and the decision should be reversed on this ground alone.

C. The Rule Is Consistent With, and a Permissible Construction of, the Text of the FLSA

Turning to the merits, the State Plaintiffs repeatedly mischaracterize the Rule as "radical" and "unprecedented." (Appellees Br. 38-39, 53). But it is the State Plaintiffs, and the District Court, who are misreading the text of the Act and the Supreme Court and circuit precedent, and in doing so, preventing the Department from restoring clarity and uniformity based on the longstanding *Bonnette* standards.

As previously explained in the Intervenors-Appellants' Brief (at 35), the Department was fully entitled to adopt as its "touchstone" the textual portion of the Act that expressly addresses issues of joint employment (albeit without using that term), *i.e.*, Section 203(d). (SPA 205-07, 254). Like the District Court, the State Plaintiffs improperly argue against the Department's firmly grounded textual basis for the Rule by conflating the question of who is an *employee* - the independent contractor question - with the separate issue of who are the employee's *employer(s)* - the joint employer question. (Appellees Br. 57). This Court has long recognized

the distinction between these two concepts under the FLSA. *See, e.g.*, *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 68 (2d Cir. 2003).

To overcome the plain language Section 203(d), the State Plaintiffs rely on a distorted view of the FLSA's legislative history, claiming Congress intended to apply the "suffer or permit to work" definition of employees to "broadly covered entities" in its "broadest possible" sense so as to expand the Act to joint employers. (Appellees Br. 43-44). But the Supreme Court now requires the Act to be read "fairly," not to achieve the broadest remedial purpose "at all costs." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018)*; see also Catskill Mts. Chptr. of Trout Unlimited, Inc.*, 846 F.3d 492, 514. The State Plaintiffs claim *Encino* is "inapposite." (Appellees Br. 44 n.7). But they ignore the Third Circuit's decision in *U.S. Dept. of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019), interpreting the "regular pay" provisions of the FLSA, in which that court found *Encino* to require a "fair reading of the FLSA, neither narrow nor broad."

The State Plaintiffs also wrongly accuse the Appellants of "fundamentally misconstruing" *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947), by contending it "did not involve joint employers." (Appellees Br. 45). To the contrary, neither the Department nor the Intervenor-Appellants have ever so stated. Both Appellant briefs accurately pointed out that the Supreme Court in *Rutherford* found joint employment based on direct supervision and control of the employees' daily

work - factors entirely consistent with the Rule - and that the Supreme Court engaged in no in-depth analysis of the joint employer issue, because the case focused on the question of whether the "de-boners were … independent contractors." (Int.-App. Br. 38).

As has already been explained, *Rutherford* certainly does not compel a joint application of all three sections to the joint employment issue. Nor does *Nationwide Mutual Insurance Co. v. Darden,* a non-FLSA case. *See* SPA 202. The Department was entitled to rely on the Supreme Court's holding in *Falk* and the Ninth Circuit's holding in *Bonnette* in deciding to clarify a uniform standard for joint employment under the FLSA. (SPA 197-98, 237). The State Plaintiffs wrongly ignore the Department's explanation that, although the FLSA's definition of "employer" includes the word "employee," neither the definitions of "employee" nor "employ" address the possibility of two employers. (SPA 199). Only Section 203(d), in referencing an individual acting "indirectly in the interest of an employer," contemplates the existence of two joint employers. *Id.*

Also like the District Court, the State Plaintiffs wrongly claim the Rule creates "two separate standards for identifying employers under the FLSA." (Appellees Br. 47). As explained in Intervenors-Appellants' Brief (at 36-38), the Rule does not create an imaginary distinction between a "primary" employer and a "joint" employer. The Rule simply recognizes the difference between joint employer and

independent contractor analyses. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d at 68; *see also Salinas v. Commercial Interiors*, 848 F.3d 125, 138 (4th Cir. 2017).[2]

Also notwithstanding the State Plaintiffs' claims, the Rule's analysis is consistent with precedent in several circuits. The *Bonnette* case itself cited only to Section 203(d) in discussing joint employer liability, and most circuits continue to follow that case's tests for joint employment in a manner consistent with the Department's Rule. *See Bonnette*, 704 F.2d at 1469; *see also Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998); *In re Enterprise Rent-A-Car Wage & Emp't Practices Litig.*, 683 462 (3d Cir. 2012); *Gray v. Powers*, 673 F.3d 352 (5th Cir. 2012); *Moldenhauer v. Tazewell Pekin Consol. Communs. Ctr.*, 536 F.3d 640 (7th Cir. 2008). It is the State Plaintiffs and the District Court who seek to impose a "radical" regime on the Department and the entire regulated community under the FLSA, contrary to long held understandings of the joint employer standard.

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[2] The State Plaintiffs are also wrong to contend the Rule cannot be upheld because it conflicts with circuit court decisions applying varying and inconsistent joint employer standards of their own. (Appellees Br. 46). The Department's response to this claim remains true: "The Department has . . . [previously] promulgated interpretive guidance regarding joint employer that overtly conflicts with the approach taken in a particular federal circuit." (SPA 197). Under the State Plaintiffs' reasoning, the Department could never issue an interpretive rule on joint employment, because no rule can completely reconcile the different circuits' interpretations of the FLSA.

D. The Rule Is Neither Arbitrary Nor Capricious

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

The State Plaintiffs falsely claim that the Rule "entirely reverses course without adequate explanation," and that such reversal is arbitrary under the Supreme Court's holding in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (*Encino I*). (Appellees Br. 61). To the contrary, as both Appellants have previously shown (Int.-App. Br. 43; DOL Br. 51), the Department comprehensively explained its departure from prior interpretations, and the District Court erred in discounting the Department's efforts. The Department specifically explained that the 1997 Guidance, as well as the 2014 and 2016 Administrator Interpretations, improperly rejected use of a control test for joint employer analysis. (SPA 82, 194-95). The Department further explained that it needed to revise its Rule in order to provide additional clarity to the standard. (SPA 196-97; *see also* SPA 86, 233 (explaining that the Rule "[r]educes the chill on organizations who may be hesitant to enter into certain relationships or engage in certain business practices for fear of being held liable for counterparty employees over which they have insignificant control.")).

In light of the Department's detailed explanations of its actions, the State Plaintiffs' reliance on *Encino Motorcars I* is entirely misplaced. In that case the Department "said almost nothing" in changing its policy on the exempt status of service advisors under the FLSA. 136 S. Ct. 2127. In contrast here, the Department

spent pages analyzing and explaining why its selection of Section 203(d) as the textual basis for the joint employer standard was "more consistent with statutory language than alternative policies", and why the Administrative Record justified the need for greater clarity in order to maintain job growth in key industries. (SPA 82, 86, 194-95, and 233).

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

The State Plaintiffs' Brief (at 66) persists in asserting the Rule is arbitrary and capricious because the Department "did not consider that the Rule triggers conflict between the application of FLSA and MSPA to putative joint employers." But they cite nothing in the FLSA that requires the Department's enforcement guidance under the FLSA to be identical to the Department's MSPA guidance. In particular, the State Plaintiffs ignore the differences between the texts of the two laws and their different purposes. *See Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973). The Department properly relied on Congress's indication that in determining joint employer status under the MSPA "it is expected that the special aspects of agricultural employment be kept in mind." SPA 152. Contrary to the State Plaintiffs' argument, therefore, the District Court erred in concluding that the Department's guidance under the FLSA must mirror its guidance under the MSPA.

3. The Department Appropriately Considered Costs to Various Stakeholders

The State Plaintiffs also attempt to bolster the District Court's erroneous conclusion that the Rule is arbitrary and capricious because it did not "adequately consider [the Rule's] cost to workers." (SPA 83; Appellees Br. 18). But as discussed extensively in the Appellants' briefs, there is no empirical evidence in the Administrative Record – and certainly no "overwhelming" evidence - that the Rule will, on balance, cause harm to workers. (Int.-App. Br. 45-46; DOL Br. 55-56).

As previously explained, the EPI study relied on by the State Plaintiffs and the District Court failed to reach a meaningful conclusion because it provided no data (and none exists) on the number of current joint employers in so-called fissured industries or the number of such employers who would lose their "joint" status, if any, under the Rule. (*See* SPA 237). The Department was therefore not required to counter EPI's study with an alternative study in order to reach this conclusion. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019); *California v. Azar*, 950 F.3d 1067, 1101 (9th Cir. 2020); *see also City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (upholding agency's rejection of detailed study purporting to provide "new scientific evidence").

In any event, the Department did not ignore the cost to employees or "effectively assume[] that the Rule would cost workers nothing" as the State Plaintiffs contend and the District Court concluded. (SPA 85). The Department

considered employees' interests and the various studies presented by the State Plaintiffs during its rulemaking. (SPA 236). The Department was entitled to disagree with the State Plaintiffs' conclusions, and to consider as well the harms likely to accrue to employees in terms of jobs lost due to continuing uncertainty over joint employment, as strongly asserted by the business community in the Administrative Record. *See, e.g.*, JA 637-38, 659.

Contrary to the State Plaintiffs' claims, the Department properly gave costs (to all parties) careful consideration and met all procedural rulemaking requirements. The Department did not act in an arbitrary or capricious manner and the Rule should be upheld.

CONCLUSION

For the reasons stated in the Appellants' previous briefs and in this Reply, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Local Rule 32.1 because it contains 4414 words, as determined by the word count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2021, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin

Counsel for Appellant