No. 24-13505

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KARON WARREN, DEBORAH KAPLAN,
KIMBERLY KAVIN, and JENNIFER SINGER,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; JULIE SU, as the acting U.S. Secretary of Labor; ADMINISTRATOR JESSICA LOOMAN, as the head of the U.S. Department of Labor's Wage and Hour Division; and U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Gainesville Division,
No. 2:24-CV-0007-RWS
The Honorable Richard W. Story

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-2, the following are the trial judge(s), attorneys, and persons, associations of persons, etc., that have an interest in the outcome of this case or appeal:

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DATED: January 2, 2024.

/s/ Wilson C. Freeman
WILSON C. FREEMAN

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants Karon Warren, Deborah Kaplan, Kimberly Kavin, and Jennifer Singer respectfully request oral argument pursuant to 11th Cir. R. 28-1(c). Oral argument is warranted given the important livelihood interests and likelihood of continued, irreparable harm to Appellants.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE COURT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered its order and judgment dismissing Appellants' complaint on October 7, 2024. Appellants filed their appeal on October 23, 2024. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii) and 4(a)(4)(A)(iv). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether freelance writers have standing to challenge a Department of Labor rule which threatens their livelihoods and forces them to make significant changes to their businesses.

2. Whether the Department of Labor's 2024 Rule, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," should be set aside under the Administrative Procedure Act.

INTRODUCTION

The Appellants are freelance writers. Their businesses, and therefore their livelihoods, depend on being classified as independent contractors. And one Appellant, Jen Singer, has employed subcontractors in the past. For this reason, they have closely followed the Department of Labor's (the "Department") back-and-forth rulemaking defining and redefining *their* independent contractor status. For decades, the line between independent contractor and employee status has been clouded because the courts of appeals have employed a wide variety of different balancing tests. But in 2021, the Department expressly sought to make things easier for independent contractors by announcing a uniform test that placed the primary focus on two factors (the "2021 Rule"). As intended, the 2021 Rule provided clarity, reduced legal risk, and minimized administrative burden for Appellants.

In 2024, the Department reversed course, however, and announced a new rule (the "2024 Rule"). The 2024 Rule withdrew the 2021 interpretation and imposed a new never-before-seen test. The new test considers seven factors and mandates that no factor can be viewed as more important than any other. As intended, this freeform, indeterminate 2024 Rule disincentivized independent contracting arrangements between commercial actors, and has left Appellants in an untenable position. Accordingly, Appellants brought this lawsuit to challenge the legality of the Department's efforts to withdraw and replace the 2021 Rule.

Unfortunately, the district court dismissed Appellants' case. It never grappled with the fact that Appellants are the very object of the Department's 2024 Rule. Instead, it viewed the Appellants as bystanders with amorphous fears about uncertain enforcement actions against third parties. This is plainly wrong. The Department's actions to turn a certain test into an uncertain one directly and intentionally affect Appellants' commercial arrangements. And Appellants have reasonably responded to protect their businesses. They were not acting based on speculative fears of future enforcement; they simply aimed to ensure continued classification as independent contractors in so far as possible under the new rule.

STATEMENT OF THE CASE

I. Factual and Legal Background

A. History of the Economic Reality Test

The Fair Labor Standards Act (FLSA), established in 1938, governs every employment relationship in the country. The FLSA provides that nonexempt employees are entitled to at least $7.25 per hour for their labor, 29 U.S.C. § 206(a), and to overtime pay at 1.5 times their hourly wage after working 40 hours in a workweek. 29 U.S.C. § 207(a).

Employers who fail to provide these benefits to their employees are subject to substantial civil liability and potentially even criminal penalties. 29 U.S.C. §§ 201–219. Employers may be required to pay back wages, liquidated damages, and interest on back wages. If these failures occur repeatedly or are willful, the employer is

subject to penalties of $1,000 per violation. Criminal liability includes fines up to $10,000 and even incarceration.

As such, a critical question arises whenever anyone contracts for labor: Is the worker an "employee" subject to mandatory wage and hour benefits under the FLSA—or is she an independent contractor who is free to negotiate the terms on which she will perform the contracted service?

The FLSA does not expressly say; it doesn't even mention "independent contractors." Yet, the Supreme Court has long recognized that not every person providing a service is an employee, and there is a place for independent contracting outside the scope of the FLSA. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). But Congress has only provided circular definitions for "employee" and "employer," and there is no definition at all for "contractor." *See* 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee … but does not include any labor organization"); 29 U.S.C. § 203(e)(1) ("Except as provided [in certain specified contexts] the term 'employee' means any individual employed by an employer.").

Nor has the Supreme Court articulated a clear test for determining whether a worker is an employee or an independent contractor. The Court's lone opinion squarely addressing the line between the employer-employee relationship and legitimate independent contracting is *Rutherford*. *Rutherford* was built on two prior

cases, *United States v. Silk*, 331 U.S. 704 (1947), and *NLRB v. Hearst*, 332 U.S. 111 (1944), which analyzed the definition of "employee" under the Social Security Act and the NLRA. Congress promptly rejected the Court's interpretation of those statutes. *See NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (recognizing abrogation of *Hearst*) and 42 U.S.C. § 410(j) ("The term 'employee' [under the SSA] means ... any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."). *Rutherford* itself does not give clear direction for determining who is an independent contractor. Rather, there, the Court determined that assembly line meat boners were employees under the FLSA through a heavily fact-specific analysis. It ultimately held that the workers were part of an "integrated unit of production" and that the "circumstances of the whole activity" suggested they were employees, not independent contractors. 331 U.S. at 729–30. Although the Court relied expressly on *Hearst* and *Silk*, *Rutherford* did not announce any particular test.

Until 2021, the Department of Labor never undertook a rulemaking to clarify the distinction between independent contractors and employees. Instead, circuit courts were left to chart their own way. Over 70 years of iteration, courts generally settled on an "economic reality test," which is a multi-factor balancing test relying on factors extrapolated and evolved from the factors listed by the Supreme Court in

Silk. Various courts articulate different variations on this test. But the Eleventh Circuit test is emblematic; it relies on six factors:

> (1) the nature and degree of the alleged employer's control …;
> (2) the alleged employee's opportunity for profit or loss …;
> (3) the alleged employee's investment in equipment or materials required for his task …;
> (4) whether the service rendered requires a special skill;
> (5) the degree of permanency and duration of the working relationship;
> (6) the extent to which the service rendered is an integral part of the alleged employer's business.

Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1312 (11th Cir. 2013). Courts often recite that these factors are "not exclusive," and mere "guides" to the underlying question of whether a worker is "in business for himself." *Id.*

B. The Department of Labor's Rules

Recognizing that the regulated public needed definitive guidance, in early 2021, the Department promulgated a final rule after notice and comment. *See* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1172 (Jan. 7, 2021) (the "2021 Rule"). The test adopted by the agency was based on a thorough review of case law and sought to "clarify and sharpen" the focus of the economic reality test. *Id.* The purpose of this test was to assist independent contractors and those who worked with them, by providing them with a stable, clear test they could use to structure their conduct and conform with the law. *Id*.

Based on an analysis of the statute, the Supreme Court's prior opinions, and decades of circuit court cases, the Department determined that two "core" factors—the nature and degree of control over work and the worker's opportunity for profit or loss—were the "most probative" of whether a worker was truly independent. *Id.* at 1246–47. Several considerations led the Department to reach that conclusion. First, the Department reviewed every circuit court case since 1975 and determined that where these two factors pointed in the same direction, courts uniformly had concluded that was the accurate classification. *Id.* at 1196–97. Second, the Department determined that such an interpretation was actually the best way of reading the statute and Supreme Court caselaw. *Id.* at 1200–01. Third, the Department observed that such an interpretation, which put the focus on two factors would provide uniform, nationwide guidance on this critical question, helping stakeholders conform their conduct to the law. *Id.* at 1173–75.

Throughout, the Department made clear that this prioritization on the core factors in no way discarded the need to look at the totality of the circumstances, consistent with *Rutherford*'s command to consider the "circumstances of the whole activity." *Id.* at 1201. Thus, the Department listed three other factors—skill, permanence, and whether the work is part of an "integrated unit of production"—but indicated these factors were generally less probative, and, in some cases, not probative at all. *Id.* at 1196. The Department further stated that "[t]hese factors are

not exhaustive, and no single factor is dispositive." *Id.* at 1246. The ultimate inquiry, the Department explained, was whether the worker was, "as a matter of economic reality, in business for him- or herself." *Id.* Accordingly, when both pointed in the same direction, the core factors created "a substantial likelihood that is the individual's accurate classification." *Id.* The Department expressly rejected the use of a rebuttable presumption and rejected the idea of discarding other factors in favor of the core factors only.

Although the Department's efforts to clarify the line between independent contractors and employees were widely supported by independent contractors, following the change in administrations, the Department nonetheless sought to reverse course. At first, the Department postponed the effective date of the 2021 Rule and then issued a final rule, without notice and comment, attempting to withdraw the 2021 Rule. Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24,303, 24,303 (May 6, 2021). This withdrawal rule was vacated by a court in Texas because "[the Department] failed to consider important aspects of the problem." *See Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *18–19 (E.D. Tex. Mar. 14, 2022). In particular, the Department failed to consider the extent to which the rule provided clarity and certainty for regulated parties. *Id.*

Following this defeat, the Department issued a notice of proposed rulemaking in late 2022, seeking to withdraw the 2021 Rule and impose a new multi-factor framework in its place. *See* Employee or Independent Contractor Classification Under the FLSA, 87 Fed. Reg. 62,218, 62,218 (Oct. 13, 2022). The Department's final 2024 Rule was published on January 10, 2024, and became effective on March 11, 2024. The new test rejects the "core factor" approach of the 2021 Rule, and instead pronounces that independent contractor (IC) classification is to be governed by a freewheeling, totality-of-the-circumstances test that employs seven factors—six numbered factors and one catchall factor. Employee or Independent Contractor Classification Under the FLSA, 89 Fed. Reg. 1638, 1742–43 (Jan. 10, 2024) (29 C.F.R. § 795.110) (the "2024 Rule").

C. Effect of the 2024 Rule on Appellants

Appellants are independent contractors whose businesses have been, and will continue to be, disrupted by the Department's abrupt reversal from the 2021 Rule, which had previously offered clarity and certainty. Appellants vocally opposed the 2024 Rule because it mandated an uncertain and volatile policy. Appellants are cofounders of Fight for Freelancers, a nonpartisan, self-funded, ad hoc coalition of solopreneurs, small business owners, freelancers, and other independent contractors seeking to protect their ability to operate their businesses. Under that name, Appellants filed a comment in the administrative record voicing numerous concerns

with the proposed rule's effect on their business. They are the very businesses the 2024 Rule was designed to affect.

Unsurprisingly then, the 2024 Rule has caused Appellants to renegotiate contracts, change business practices, terminate freelancers, and undertake other expenses to protect themselves and their clients from liability under the FLSA. *See, e.g.*, App. 92–113. The 2024 Rule was *designed* to chill Appellants' businesses by adopting a deliberately vague and indeterminate standard for distinguishing between independent contractors and employees. It forces freelancers who wish to protect their independent status and to attract clients to adopt an ultra-cautious business structure. Otherwise, they risk classification into an unwanted employer-employee relationship.

Appellants' businesses previously benefitted from the more certain and clear 2021 Rule. This prior rule's emphasis on core factors—particularly its presumption of independent contractor status for those who met the first two factors—provided predictability for their businesses and their clients. And the new test is, for Appellants, even worse than the status quo ante before the 2021 rulemaking. Appellants seek a return to the 2021 Rule.

II. Legal Proceedings

On January 16, 2024, Appellants filed suit in the Northern District of Georgia challenging the 2024 Rule. App. 007–023. Their complaint raised constitutional and

Administrative Procedure Act (APA) claims, arguing that the 2024 Rule was arbitrary and capricious because it is based on a mistaken view of the law, that it conflicts with the FLSA, and that it is unconstitutionally vague. *Id.* at 019–022.

On April 29, 2024, Appellants filed their motion for summary judgment. App. 056–113. The government's consolidated brief in opposition to the motion for summary judgment, in support of a motion to dismiss, or alternatively for summary judgment, was filed on May 28, 2024. App. 114–158. All issues in the case were fully briefed and presented to the district court in these dueling motions, and there are no disputed questions of fact.

On October 7, 2024, the district court granted the government's motion and denied the Appellants' motion, dismissing the complaint with prejudice. App. 024–045. Appellants timely appealed on October 24, 2024. App. 006.

SUMMARY OF ARGUMENT

The 2024 Rule makes it more difficult for the Appellants to maintain their status as independent contractors and to contract their labor on their terms. The 2024 Rule withdrew the 2021 Rule—a rule that had the intended effect of simplifying and clarifying how independent contractors can structure their relationships and manage their affairs to maintain their status. By contrast, the 2024 Rule disclaimed any ability to clarify and abandoned the historical and textual reasoning of the 2021 Rule. Instead, the 2024 Rule adopted a new, never-before seen test, which gives the agency

total ad hoc discretion to deem workers "employees," even where businesses undertake extreme efforts to maintain independent contractor status.

The Appellants, four independent writers, one of whom has a practice of hiring freelancers herself, have had to make significant changes to their business in response to the 2024 Rule. They brought this lawsuit to enjoin the 2024 Rule and to return to the clarity of the 2021 Rule. As explained in the complaint, the Department's 2024 Rule is based on a false legal premise, lacks meaningful justification, and violates constitutional vagueness principles. App. 007–023.

Despite the obvious importance of the regulation to the Appellants' businesses, the lower court dismissed the case; the district court reasoned that because the 2024 Rule was "inherently unpredictable," App. 044, this very unpredictability rendered Appellants' fears subjective and speculative and therefore nonjusticiable. *Id.* (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232 (11th Cir. 2019)). As a result, the court concluded that the Appellants' injuries were speculative and dismissed the case.

The district court was, of course, right that the 2024 Rule is hopelessly indeterminate. But it was wrong in concluding that this regulatory uncertainty deprives the Appellants of standing. The Rule inflicts a concrete injury because this injection of uncertainty affects every facet of Appellants' contracting business.

This Court should reverse for three reasons: First, as the Department recognized when it promulgated the rules in question, independent contractors like Appellants are the very object of the Rules. The 2021 Rule expressly sought to protect and assist independent contractors by helping them know how to structure their affairs to avoid an unwanted employer-employee relationship. The withdrawal of the 2021 Rule and the agency's choice to disavow clarity leaves the Appellants scrambling to adjust their businesses to ensure they remain independent. These injuries are the direct—and intended—consequences of the Department changing its regulation governing their freelance business model.

Second, the lower court failed to consider Appellants' *ongoing* concrete injuries because of the 2024 Rule. These injuries include many changes to their business practices, time spent reviewing rules and conforming their relationships to the requirements of the rules, and losses of clients. And further, the 2024 Rule impedes their freedom to subcontract work to other freelancers. These facts confirm that Appellants have responded reasonably to the injection of regulatory uncertainty under the new rule. Contrary to the district court's opinion, these injuries are concrete—not speculative.

Third, even if Appellants are not the object of the regulation, there is nothing speculative about their injuries; their actions, taken in response to the rule, were reasonable precautions to mitigate the rule's effects on their business and their

clients. The purpose and effect of the 2024 Rule is to limit independent contracting. The 2021 Rule was explicit in stating that its goal was to encourage and assist independent contractors; that those same contractors must now modify their businesses in response to its withdrawal under the 2024 Rule is not speculative. Rather, that is the predictable consequence of the 2024 Rule: As profit-seeking businesses, the Appellants—and their clients—are guided by basic economic rationality and are responding to the Department's changes in economic incentives in their industry.

Accordingly, the lower court's judgment should be reversed. Appellants have standing to challenge the 2024 Rule. And since they have standing to challenge this regulation, this Court should reach the merits and set the 2024 Rule aside. The issues were fully briefed below, and there is no reason to remand the case—especially where, as here, the Appellants are experiencing ongoing hardship from the uncertainty created by the rule, which would only be exacerbated by lengthy delay. *See Blue Martini Kendall, LLC v. Miami Dade Cnty. Fla.*, 816 F.3d 1343, 1349 (11th Cir. 2016) (affirming that the Court of Appeals is more likely to exercise its inherent discretion to decide issues not resolved below where "the appeal stems from a summary judgment ruling"). This Court should conclude that the Department had no power to withdraw the 2021 Rule or put in the 2024 replacement. The Department

lacked good reasons for its changes, and in fact, relied almost exclusively on an incorrect understanding of the FLSA to justify its actions.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Appellants Have Standing to Challenge the 2024 Rule

Appellants can establish Article III standing by demonstrating (1) an injury in fact (2) that is fairly traceable to Defendant's conduct and (3) that is redressable by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "To establish an injury in fact, the plaintiff must demonstrate that [s]he suffered 'an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.'" *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1113 (11th Cir. 2021) (quoting *Lujan*, 504 U.S. at 560). A "concrete" injury must be "real, and not abstract[,]" but can be either "tangible" or "intangible." *See id*. (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). To be particularized, an injury must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. However, a plaintiff "need not 'expose [her]self to liability' to have standing[.]" *W. Virginia by & through Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1137 (11th Cir. 2023) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, (2007)).

A. Appellants Are the Object of Regulation

The district court's reasoning never considers Appellants and their livelihoods[1] as the objects of the regulation. This was an error. Appellants have a "personal stake in the outcome" of this controversy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Supreme Court has recognized that standing exists where "the regulation is directed at [the plaintiff] in particular; it requires them to make significant changes in their everyday business practices." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 154 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 (1977). When the plaintiffs themselves are the "object of the action ... there is ordinarily little question that the action … has caused [them] injury …." *Lujan*, 504 U.S. at 561–62. When a regulation "require[s] [or] forbid[s] any action" by plaintiffs, they are the object of government action. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (reasoning that the regulated object was that entity whose conduct was governed by the challenged regulation).

[1] The Supreme Court has long recognized an individual's interest in their livelihood. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) ("First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood."); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 243 (1988) ("Appellee's interest in continued employment is without doubt an important interest that ought not be interrupted without substantial justification"); *Kerry v. Din*, 576 U.S. 86, 91 (2015) (enumerating the "underlying rights" protected by due process, which include being "put from [one's] livelihood without answer").

The Appellants' businesses are the objects of the 2024 Rule—they are directly targeted by the Rule. The district court's holding assumes independent contractors are mere passengers, conducting their business with indifference to the FLSA and the Department's rules, while the requirements and prohibitions fall entirely on employers. And the district court, seeing the Appellants as mere passengers, failed to grapple at all with the Appellants' declarations, which repeatedly show how Appellants were affected and their conduct governed by the 2024 Rule. This is not realistic and does not reflect the world faced by the Appellants. In reality, Appellants, as with many other independent contractors, have to be aware of and structure their business around their classification. They care deeply about the Department's interpretation of the FLSA because it is of existential importance to their businesses.

Indeed, outside of the context of litigation, the Department has never questioned whether independent contractors are the object of its independent contracting regulations. Both the 2021 Rule and the 2024 Rule are expressly directed at independent contractors; the Rules regulate their interest in their freedom to contract and govern their conduct in those contracts. The express purposes of both the 2021 Rule and 2024 Rule are to determine the status of a worker, and thus whether the FLSA's requirements are germane. *See* 2021 Rule, 86 Fed. Reg. 1168, and 2024 Rule, 89 Fed. Reg. 1638. And while it is true that FLSA sanctions flow to employers, as the Department recognizes throughout both rules, it is nonetheless

frequently incumbent on contractors to know the rules they are subject to under the law so that they can appropriately structure their affairs to maintain their independent status.

The very purpose of the 2021 Rule was to help independent contractors by providing them with clarity and certainty through the use of core factors, simplifying the Department's analysis under the FLSA. As the Department recognized, this clarity would help contractors "structure their work relationships to comply with the law." 86 Fed. Reg. at 1215. The core factors thus sought to make it easier for contractors—not just businesses that used contractors—by assisting them in correctly presenting themselves as independent workers. *Id.* at 1209.

The Department's analyses of the impacts of both of the rules confirms that independent contractors are the object of these regulations. For example, the Department explicitly recognizes in the 2024 Rule that independent contractors, as a group, will incur costs simply to learn about and understand the new rule. The analysis estimates that each independent contractor would spend about 30 minutes to 1 hour reviewing the regulation. 89 Fed. Reg. at 1733–34. The Department quantifies this as $259 million in aggregate rule familiarization costs for independent contractors. Similarly, the 2021 Rule recognized significant benefits for independent contractors from the clarity and simplicity provided by the two core factors, including more job opportunities, more flexibility and autonomy, more job

satisfaction, and fewer regulatory burdens in ensuring they remain independent. 86 Fed. Reg. at 1233–38. Accordingly, withdrawing the 2021 Rule governs independent contractors directly—their businesses' right to exist is the very subject of the regulation.[2]

The "ordinary rule" is that objects of a regulation "may challenge it." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015). There is no reason to depart from that standard in this case.

B. Appellants Are Concretely Harmed by the 2024 Rule

Unsurprisingly, as objects of regulation, Appellants have suffered concrete harms. Even if the district court is right that there is a forward-looking element to the Appellants' claims, the court was wrong to paper over all of the concrete evidence of the Appellants' efforts to remain independent and protect themselves from liability. These actions show the importance of the Rules to the Appellants and show that their concerns were not speculative. For example, Appellants undertook significant efforts to change their businesses in response to the regulation, and those efforts are ongoing. *See, e.g.*, App. 097–100, Warren Decl., ¶¶ 12–13 (discussing

[2] As confirmed by empirical data from the National Federation of Independent Business Research Center, regulatory uncertainty is an inherent problem for small businesses. *See* Holly Wade, *Small Business Problems & Priorities*, Nat'l Fed. of Ind. Bus. (11th ed., 2024), *available at* https://nfib.com/wp-content/uploads/2024/10/2024-Small-Business-Problems-Priorities.pdf (finding that "Uncertainty over Government Actions" consistently ranks as a top 10 concern for small businesses).

changes to their businesses in response to 2024 regulation); App. 101–104, Kaplan Decl. ¶¶ 10–12 (same); App. 105–109, Kavin Decl. ¶¶ 15–17 (same); App. 110–113, Singer Decl. ¶ 7 (same). And Appellants are required to continuously evaluate each new contract to ensure that they are comporting their business practices to avoid an undesirable legal classification. App. 098, Warren Decl. ¶ 12; App. 102, Kaplan Decl. ¶ 11. Appellants have even lost work because of the 2024 Rule and expect to lose more in the future. App. 107–108, Kavin Decl. ¶ 14 ("I have already lost opportunities for projects"); App. 103, Kaplan Decl. ¶ 10 ("One client has already told me she will not use my editing services for fear of running afoul of the new Rule"); App. 112, Singer Decl. ¶ 10 (stating she will not use freelancers under the 2024 Rule). *See also* App. 108, Kavin Decl. ¶ 15 (had to renegotiate her contracts with two clients). Appellant Singer, in particular, is both a hiring entity and a worker subject to (mis)classification. As a result of the 2024 Rule, and concerns about liability risk, she has had to suspend work with other independent contractors to avoid liability under the 2024 Rule. App. 112, Singer Decl. ¶ 10.

These facts, compared with the facts in the cases cited by the district court, also illustrate how different the Appellants' situation is from an ordinary bystander or third-party victim. In *Lyons*, the main case relied on by the Court, the plaintiff sought an injunction against the City of Los Angeles against the use of chokeholds by the Los Angeles Police Department. 461 U.S. at 98–100. The Supreme Court

dismissed for lack of standing, concluding that it was no more than speculation that Lyons would, in the future, be arrested "and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury." *Id.* at 108. Similarly, in *Corbett*, the other case relied on by the district court, the court dismissed a challenge to a Transportation Security Administration (TSA) policy requiring that some random passengers be subject to advanced imaging technology scanning. This court there explained that Corbett lacked standing because he also could not show that he was likely to be subjected to random screening in the future. 930 F.3d at 1238. In both of these cases, the key factor was that the plaintiff could not show that, in the future, the rule would certainly cause him harm. Unknown certainties lay between the plaintiff and that harm, such as the likelihood that Lyons would be arrested in the future, or the possibility of being subjected to another random TSA search.

Here, however, there is no chain of third parties or unknowable uncertainties between Appellants and the 2024 Rule or between Appellants and their precautions. The changes that Appellants have had to make to their business are not usefully thought of as "manufactured standing" based on uncertain fears, *Corbett*, 930 F.3d at 1239. Instead, those actions appear naturally to be the reactions of regulated parties trying to conform to an uncertain regulation or the "predictable effect of Government action on the decisions of third parties." *Dep't of Com. v. New York*, 588

U.S. 752, 768 (2019). *See Bennett v. Spear*, 520 U.S. 154, 169 (1999) (affirming standing can be based on "injury produced by determinative or coercive effect upon the action" of a third party). Either way, the district court erred in dismissing the case.

C. Appellants' Injuries Are the Predictable Effect of the 2024 Rule

The district court acknowledged that the 2024 Rule makes it impossible to say whether a particular independent contractor is correctly classified in any given situation. App. 044. The court reasoned that this very uncertainty made it impossible for Appellants to demonstrate a nonspeculative injury. *Id.* ("By definition, the 2024 Rule's fact-specific approach cannot pose a realistic danger to Plaintiffs' ability to operate as independent contractors because the ultimate classification may change from case-to-case."). If this were right, agencies would be able to shield regulations from APA challenges simply by making them indeterminate, leaving the stakeholders rudderless. This would be a twisted result.

However, as the Supreme Court has explained, even unregulated stakeholders may meet the standing burden by showing that "third parties will likely react in predictable ways." *Dep't of Com.*, 588 U.S. at 768. Plaintiffs may "thread[] the causation needle" when the decisions of third parties are "guided by basic economic rationality." *Nat'l Infusion Ctr. Ass'n v. Becerra*, 116 F.4th 488, 500 (5th Cir. 2024). As the owners of "profit-seeking business[es]," Appellants' responses to the

Department of Labor's "changing economic incentives simply requires determining the direction in which" the Department changed the incentives. *Id*.

The Department even anticipated that independent contractors would need to change their businesses. Both rules spoke extensively about misclassification and reclassification. The 2021 Rule predicted that many more workers could choose to classify as independent thanks to the clarity of the core factors. 86 Fed. Reg. at 1224–27. Conversely, the 2024 Rule claimed it would "reduce misclassification" and result in at least some reclassification of workers. 89 Fed. Reg. at 1736–38. And as the agency anticipated, the 2024 Rule has in fact prompted companies to err on the side of classifying workers as employees—and to shy away from using independent contractors. App. 094–095.

The 2024 Rule makes enforcement easier and compliance nearly impossible. Basic economic realities indicate that independent contractors—at least those who wish to remain independent—must make significant changes to their businesses. Similarly, businesses who use independent contractors will reduce usage and put constraints on their existing contractors. Independent contractors who use subcontractors will cut back or stop altogether. All of this is the natural result of regulation and economics; it is not speculative. Appellants' affirmative steps to protect their businesses in response to the predictable reaction of their clients are

therefore the foreseeable outcome of the 2024 Rule and should have been considered.

II. The Court Should Set Aside the 2024 Rule

Since Appellants have standing, this Court should address the important issues raised by this case. The central legal issue—whether the Department of Labor's multi-factor test is impermissibly vague under the FLSA and the Constitution—is purely legal and requires no further factual development. Both sides have exhaustively briefed the merits, and the record is more than sufficient for this Court to render a decision at this stage. *See Narey v. Dean*, 32 F.3d 1521, 1526–27 (11th Cir. 1994) (a court may address issues not considered below if the record is fully developed).

Deciding the case in this manner promotes judicial economy, ensuring that the parties—who have already devoted substantial resources to briefing these issues—will not endure another round of costly and time-consuming litigation. This is especially important here, since the Appellants remain subject to an uncertain and amorphous regulatory environment while this litigation continues.

Even as the standing question was litigated, the 2024 Rule's ambiguity has imposed real, ongoing burdens on Appellants' businesses—forcing them to navigate their relationships and operations without guidance. By addressing the merits now, this Court can remove the existing cloud of uncertainty, thereby enabling Appellants'

and similarly-situated parties to reliably structure their arrangements and comply with the law.

A. The 2024 Rule Was Based on a Mistaken View of the FLSA

The Department's withdrawal of the 2021 Rule was almost entirely justified with reference to a legal assertion—that the 2021 Rule's use of "core factors" violated the FLSA. However, this complete legal about-face from the Department's 2021 position is never adequately justified and is simply incorrect as a matter of law. This legal error is fatal to the 2024 Rule. *See, e.g.*, *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017) (explaining that a court cannot uphold agency discretion when the agency disavows its discretion); *Safe Air For Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1101 (9th Cir. 2007) (holding that an agency's statutory interpretation is arbitrary and capricious if it is founded on the agency's legally erroneous conclusions); *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) (holding that a regulation cannot be based on an incorrect view of the law).

1. The Department Errantly Justified the Withdrawal as Legally Required by the FLSA

The agency's justification for withdrawing the 2021 Rule is based on a legal conclusion that the Rule's use of core factors violates the FLSA. As the Department stated in the NPRM announcing the withdrawal, "giving extra weight to two factors

cannot be harmonized with decades of case law and guidance from the Department." 87 Fed. Reg. at 62,226; *see also* 89 Fed. Reg. at 1647 ("[T]he Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose"). The Department was explicit that this legal conclusion overrode any other considerations: "[R]egardless of the rationale for elevating two factors, there is no legal support for doing so." 87 Fed. Reg. at 62,226. This legal conclusion was repeatedly reaffirmed throughout the final 2024 Rule. *See, e.g.*, 89 Fed. Reg. at 1638–39, 1647, 1663–64.

This aspect of the 2024 Rule's justification is a complete reversal from the Department's position in the 2021 Rule, which was carefully articulated and justified. When an agency does this kind of legal about-face, it must show an awareness of the change and adequately justify the shift. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Here, the Department's explanations are thin and circular, and utterly fail to rebut its own prior analysis.

2. The 2021 Rule Was Consistent with the FLSA

The core question then, is whether the Department is right that the use of "core factors" violates the FLSA. If the FLSA permits the use of core factors, then the Department's repeated assertions that placing emphasis on such factors "improperly narrow[s]" the scope of the FLSA, potentially depriving workers of the protection

of the Act, is false. 89 Fed. Reg. at 1650. There are several problems with the Department's assertion.

First, nothing in the text of the FLSA, in *Rutherford*, or in any Supreme Court case precludes a more focused inquiry to determine who is an independent contractor. *Rutherford* did not adopt any particular test; it only declined to adopt the common law definition and announced that courts should consider the "circumstances of the whole activity." 331 U.S. at 730. There is no question that the withdrawn 2021 Rule is broader than the common law control test—on its face it considers as core both control and opportunity for profit, alongside three other factors. 86 Fed. Reg. at 1246–47. The 2021 Rule also leaves the door open to consider all the circumstances, 86 Fed. Reg. at 1246 ("[t]hese factors are not exhaustive, and no single factor is dispositive"), and instructs that the analysis is subsidiary to the overarching economic dependence inquiry. *Id.*

The Department's contrary argument relies on isolated language from various circuit court cases, many of which state something to the effect that "no one factor is determinative and … the factors should not be applied mechanically." 89 Fed. Reg. at 1651 n.133 (citing cases). But it takes a willful misreading of the 2021 Rule to believe that putting the focus on two factors makes any single factor determinative or operates "mechanically." Rather, the 2021 Rule sharpens the test and puts the focus on the two factors that historically and logically have been the most important

to the underlying question of who is an employee. It does this while expressly leaving the door open to the consideration of other factors and looking at the totality of the circumstances. 86 Fed. Reg. at 1179, 1246 ("These factors are not exhaustive, and no single factor is dispositive"; instructing that inquiry requires looking at "totality" and denying that core factors are determinative.).

In fact, the 2021 Rule's sharpened approach is the proper legal interpretation for at least two main reasons. First, the 2021 Rule represents an effort to synthesize the language of the FLSA with over 70 years of case law and the agency's obligation to produce an interpretation which has "sufficient definiteness that ordinary people can understand what conduct is prohibited" and in a way so as to discourage "arbitrary and discriminatory enforcement." *Sackett v. EPA*, 598 U.S. 651, 680–81 (2023). In *Sackett*, which concerned the scope of the Clean Water Act, the Supreme Court rejected the "hopelessly indeterminate" standard advanced by the EPA for determining the scope of the "waters of the United States." *Id.* at 681. Facing the threat of "severe criminal sanctions," the Court observed that landowners were left to "feel their way on a case-by-case basis" as to whether their waters were covered by the Act. *Id.* The Court observed that this interpretation ran up against the "background principle[] of construction" that statutes should be interpreted to avoid vagueness problems. *Id.* at 679. An untethered, free-floating balancing test would

absolutely run afoul of these principles—the Department was obligated in 2021 to provide a more coherent understanding, and it did so.

The second reason that the 2021 Rule has the better understanding of the FLSA is that the 2021 Rule correctly understands that the core question being asked is how to interpret statutory terms, in particular, the terms "employer" and "employee." The plain text of the FLSA uses the words "employee" and "employer" without further meaningful explication, suggesting that Congress meant to incorporate, in some way, the long-established understanding of those terms. *See Bond v. United States*, 572 U.S. 844, 857 (2014) ("Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." (citation omitted)). While *Rutherford* forbids courts from adopting the common law understanding of the employment relationship, it cannot discard the statutory language. Since the fundamental statutory question is whether a worker is "employed" or not, the presence or absence of facts which would suggest a common law employment relationship is clearly more relevant to that determination than most other factors. In the 2021 Rule, the Department acknowledged this, and explained its interpretation was based, in part, on "commonsense logic that, when determining whether an individual is in business for him- or herself, the extent of the individual's control over his or her work is more

useful information than, for example, the skill required for that work." 86 Fed. Reg. at 1199.

By contrast, the 2024 Rule makes no real effort to square its claim that the 2021 Rule violates the FLSA with that statutory language. Instead, the Department's counterargument focuses on cherry-picked language in subsequent circuit court decisions, along with the principle—rejected in *Encino Motorcars*—that the purpose of the FLSA requires a broad interpretation. *See* 89 Fed. Reg. at 1668 n.221; *see also id.* at 1640 (emphasizing importance of FLSA's purpose in withdrawal); 1647 (same); 1649 (same); 1661 (same); 1668 (same); 1724 (same); 1725 (same); 1726 (same). But neither scattered statements from circuit courts over 70 years nor an invented purpose driven reading of the statute can control the Department's understanding of the FLSA. Rather, the Department's role is to interpret the statute and provide guidance to the regulated community—and to that end, the 2021 Rule was lawful.

B. The 2024 Rule Ignores the Justifications of Clarity and Certainty for the 2021 Rule

The FLSA is a criminal statute which governs millions of employers and affects many millions more employees. By 2021, after seventy years of sprawling case law, with no clarity added by the Department or by the Supreme Court, the so-called economic reality test was creating unnecessary confusion and litigation. To correct this problem, the 2021 Rule placed the focus on two core factors—instead of

the unfocused inquiry into five, six, or seven contradictory and confusing factors often applied in case law. *See* 86 Fed. Reg. at 1172–75. It did not discard other facts as potentially important *in the right circumstance*, but it is axiomatic that prioritizing two factors is simpler than an unfocused and unweighted six-factor totality of the circumstances test. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014) (observing that "open-ended balancing tests[] can yield unpredictable and at times arbitrary results"). Unsurprisingly, therefore, the "overwhelming majority" of independent contractors who commented on the 2021 Rule supported it. 86 Fed. Reg. at 1171–72.

By contrast, the Department gave no weight to this clarity for stakeholders in deciding to withdraw the 2021 Rule. Instead, the Department asserted that the clarity of the 2021 Rule was outweighed by uncertainty in the extent to which federal courts would agree with the Department's interpretation. 89 Fed. Reg. at 1639 ("Because the 2021 IC Rule departed from legal precedent, it was not clear whether courts would adopt its analysis … resulting in more uncertainty as to the applicable test."). But this response is unavailing for at least three reasons.

First, the 2021 Rule bound the agency itself in its capacity as an enforcer of the FLSA and offered safe harbor to businesses who relied on its guidance. 86 Fed. Reg. at 1246. Accordingly, the 2021 Rule—by its very terms—offered at least some certainty and protection *to businesses*. If a court had chosen not to adopt the 2021

Rule's analysis, or even if a court were to set it aside, those businesses would still have been able to claim safe harbor and protection from the Department enforcement.

Second, the concerns about appellate court reactions to the 2021 Rule are baseless. No court meaningfully questioned the substance of its reasoning in the three years it was in effect—although the Department correctly notes that a handful of courts reacted to the Department's ongoing recission as a reason to doubt its validity. 89 Fed. Reg. at 1655 n.150. Indeed, the only court decision to address the substance of the 2021 Rule recognized that the rule was "consistent with the existing case law." *Coalition for Workforce Innovation*, 2022 WL 1073346, at *16–17. The Department does nothing to show that this hypothetical risk outweighs the benefits to stakeholders of a more concrete standard.

Third, any "uncertainty" that might exist from the possibility that courts would fail to adopt the 2021 Rule simply has no bearing on the Due Process-type concerns that the 2021 Rule is addressing. The Department has an obligation under the Constitution to promulgate an interpretation that allows parties to conform their conduct to the law. The Department cannot respond to this responsibility by pointing to hypothetical considerations about future court action. And this is especially true since the Department walked headlong into several serious legal challenges to its own 2024 Rule. If litigation over the scope of the FLSA was inevitable, the

Department cannot claim that avoiding litigation was a reason for its 2024 Rule, thereby abandoning the benefits of clarity.

C. The 2024 Rule Is Vague and Gives the Agency Arbitrary Enforcement Authority

Beyond the myriad problems with the withdrawal of the 2021 Rule, the Department's 2024 Rule—a novel, seven-factor totality of the circumstances test never before articulated by any court—rests on mistakes of law and inadequate justification and thus independently violates the APA. This test presents businesses and contractors with an impossible "know-it-when-we-see-it" inquiry that deprives stakeholders of any useful guidance. Simultaneously, the Department rewrites 70 years of FLSA precedent with its own preferred and cherry-picked story, all while claiming—without support—that the 2024 Rule will provide "clarity on the concept of economic dependence." 89 Fed. Reg. at 1649. This lack of internal consistency is the hallmark of arbitrary and capricious action. *See, e.g.*, *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) ("seemingly illogical" decisions are arbitrary and capricious).

The Department replaced the 2021 Rule with a rule that, like the rule overturned by the Supreme Court in *Sackett*, is "freewheeling" and forces regulated parties to feel their way "case-by-case." 598 U.S. at 681. The revised C.F.R. mentions the "totality of the circumstances" or "circumstances of the whole activity"

multiple times; it says "no one factor or subset of factors" is dispositive; the 2024 Rule gives no guidance on the weight to be given to particular factors even in particular circumstances; and the rule specifically has a seventh factor which opens the door to every other possible fact, stating that "[a]dditional factors may be relevant" if those factors "in some way" are relevant to the inquiry. 29 C.F.R. §§ 795.105–110. Stakeholders are left with no indication of how to balance these factors against each other or how to prioritize particular facts within the factors. The Department does not even try to explain or justify this approach, wrongly implying that a standardless balancing test is compelled by the FLSA. This is an utter abdication of the Department's duty to interpret the statute.

Furthermore, the Department engages in repeated misinterpretation and cherry-picking to artificially place a thumb on the scale against independent contractor status. For example, under the control factor, the Department makes major changes to the way courts and the Department previously understood the "control" factor, diminishing the importance of that factor and expanding the concept to increase the number of workers classified as employees. 89 Fed. Reg. at 1670. The 2024 Rule now states that control relates to the "the performance of the work and the economic aspects of the working relationship"—a phrase that appears nowhere in *Silk*, *Rutherford*, or any circuit court case. *Id.* at 1743.

Similarly, the Department warps the "integral" factor—previously the "integrated unit of production" factor—now stating that this factor weighs against independent contractor status if the work is "critical, necessary, or central" to the business. *Id.* Again, this language does not appear in any Supreme Court case—the Department relies on context-free references to circuit courts that used similar language, even if it was not essential to those courts' holdings. *Id.* at 1655. Justifications for major changes based solely on isolated, out-of-context circuit quotations are replete in the 2024 Rule and cannot be considered reasoned decision-making or statutory interpretation.

Agencies cannot promulgate "vague and open-ended regulations that they can later interpret as they see fit." *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). As discussed above, the Supreme Court has stated unequivocally that agency interpretations of criminal statutes must have "sufficient definiteness that ordinary people can understand what conduct is prohibited" and should discourage "arbitrary and discriminatory enforcement." *Sackett*, 598 U.S. at 680–81 (citation omitted). The 2024 Rule embraces arbitrary enforcement as a guiding principle of the FLSA, and it does so while stating its purpose is to increase clarity. This is simply not credible, particularly while the Department unilaterally discards all the precedent it does not like to erect its preferred, cherry-picked history of the FLSA.

CONCLUSION

This Court should reverse the district court and conclude that the Appellants have standing, and that the Department of Labor's 2024 Rule "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" should be set aside under the Administrative Procedure Act.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiffs-Appellants, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced roman font. The length of this brief is 8,174 words.

DATED: January 2, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2024, I filed the foregoing PLAINTIFFS-APPELLANTS' BRIEF with the Court via CM/ECF. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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