IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MARGARET LITTMAN and JENNIFER CHESAK, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	No. 3:24-cv-00194 Chief District Judge Waverly D. Crenshaw, Jr. Magistrate Judge Barbara D. Holmes

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT AND PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Fair Labor Standards Act (FLSA) provides important minimum wage, overtime, and other protections to "employees," and vests authority in the Wage and Hour Administrator, a Department of Labor (DOL) official, to administer the law. Since the FLSA's enactment in 1938, disputes have arisen over whether certain workers are employees, who are protected by the statute, or are instead "independent contractors," who are not. And since 1949, DOL has issued numerous documents informing the public how it interprets the statutory definitions of "employ" and "employee." Those interpretations guide DOL's enforcement of the FLSA's substantive provisions and provide guidance to which employers and workers can look to ensure proper classification.

Nonetheless, employers continue to misclassify employees as independent contractors, and thus deny workers the wages and benefits to which they are statutorily entitled. An interpretive rule promulgated by DOL in 2021 exacerbated this problem. The rule departed from the "economic reality" considerations that both courts and DOL had long applied to determine whether a worker is an employee. Accordingly, in 2024, after considering input from interested parties, DOL issued a new interpretive rule setting forth its understanding of the statute. *See* DOL, Final Rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024), *codified at* 29 C.F.R. parts 780, 788, 795.

Plaintiffs, two freelance writers, seek a preliminary injunction against the 2024 Rule. NELP and Public Citizen submit this amicus brief in opposition to that motion to emphasize two points. First, misclassification of employees as independent contractors is a serious problem that causes real harm to workers across the country, particularly low-wage workers. By returning to a statutory interpretation more consistent with long-standing judicial and agency interpretations of the statute,

and providing guidance to employers and workers as to proper classification, DOL's 2024 Rule will help protect employees from misclassification. Plaintiffs' assertion that the 2024 Rule is inconsistent with such longstanding DOL interpretations and court rulings is wrong.

Second, as an interpretation of rights and duties that exist under the FLSA, the 2024 Rule is an interpretive rule, not a legislative rule. DOL acts firmly within its authority by interpreting a statute that Congress charged it to administer. And because the Rule simply reflects how DOL will exercise the executive authority conferred on it by Congress, the nondelegation doctrine—which limits the delegation of *legislative* authority—has no application. Moreover, the FLSA provides sufficiently "intelligible principles" to guide the agency's administration of the statute.

INTERESTS OF AMICI CURIAE

Amicus curiae National Employment Law Project (NELP) is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP seeks to ensure that all employees receive the workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws, including the child labor, minimum wage, and overtime protections of the FLSA. NELP has litigated directly on behalf of workers misclassified as "independent contractors," submitted amicus briefs in numerous independent contractor cases, testified to Congress regarding the importance and scope of the FLSA's employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. NELP submitted comments in the rulemaking at issue in this case.

Amicus curiae Public Citizen, Inc., a non-profit organization with members in all 50 states, appears before Congress, agencies, and courts on a wide range of issues. Among other things, Public Citizen works for enactment and enforcement of laws to protect workers, consumers, and

the public, including federal agency efforts to administer and enforce worker protection statutes such as the FLSA. Public Citizen frequently appears as amicus curiae to address issues of statutory interpretation and administrative law.

ARGUMENT

As the agency charged by Congress with implementing the FLSA, DOL issued the 2024 Rule to set forth its understanding of the scope of workers covered by the statute's broad protections. The Rule is an important step towards alleviating the problem of worker misclassification, and it is wholly consistent with judicial interpretations of the FLSA. Because plaintiffs are not likely to prevail on their merits arguments, their motion for a preliminary injunction should be denied. *See Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (holding that "most important part of [the preliminary injunction] analysis" is whether a plaintiff is likely to prevail on the merits).

I. DOL's guidance to prevent misclassification is important and consistent with decades of case law.

A. Misclassification is a serious problem.

Congress enacted the FLSA to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Misclassification of workers as independent contractors has proven to be a serious problem in effectuating this statutory goal by wrongfully denying workers the minimum wage and overtime protections of the FLSA and imposing on the workers certain financial burdens that should rest with employers. Workers misclassified as "self-employed" earn significantly less than their employee counterparts and are less likely to have health insurance or

a retirement plan.[1] They are also more likely to be the victims of wage theft. DOL has found that wage theft is prevalent in the agricultural, retail, food service, hotel, construction, janitorial, landscaping, and beauty and nail salon industries where misclassification is common.[2]

Misclassification of employees as independent contractors also places law-abiding businesses at a competitive disadvantage, in direct contravention of the statute's purpose to combat unfair competition, 29 U.S.C. § 202(a).[3] Businesses that misclassify their employees pocket between 20 to 40 percent of the payroll costs that they would otherwise incur for unemployment insurance, workers compensation premiums, the employer share of social security, and health insurance premiums.[4] Misclassification also imposes huge costs on federal and state governments, which lose billions of dollars each year in unreported payroll taxes and unemployment insurance contributions.[5]

B. The 2024 Rule is consistent with longstanding judicial interpretations of the FLSA.

As DOL explained when it issued the 2024 Rule, the test it sets forth for determining whether a worker is an independent contractor or an employee comports with decades of case law applying a multifactor, totality-of-the-circumstances "economic reality" test, which asks whether

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[1] NELP, Comments on RIN 1235-AA43: Employee or Independent Contractor Classification Under the Fair Labor Standards Act at 4 (Dec. 13, 2022), https://www.regulations.gov/comment/WHD-2022-0003-53881 (citing sources).

[2] DOL, Wage and Hour Div., "Low Wage, High Violation Industries," https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

[3] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1, 2018-IC-R002 (Feb. 20, 2018), https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf; *see* 2024 Rule, 89 Fed. Reg. at 1646–47.

[4] Françoise Carré, *(In)Dependent Contractor*, Econ. Pol'y Inst. at 5 (Jun. 8, 2015), https://files.epi.org/pdf/87595.pdf.

[5] NELP Comments at 6–7.

the individual is running an independent business or is dependent on another entity for work. As noted in the Rule, "[t]here is significant and widespread uniformity among federal courts of appeals in the adoption and application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed." 89 Fed. Reg. at 1638; *see id.* at 1642 n.52 (citing cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits). The 2024 Rule collects the relevant considerations and sets them forth as six factors: opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative. *See id.* at 1640. DOL also notes that additional factors may also be considered if they are relevant to the overall question of economic dependence. *Id.*

Plaintiffs (at 9–10) seek to fault DOL for listing separately two factors that the Second and D.C. Circuits have listed as one: investments and opportunity for profit or loss. *See* 89 Fed. Reg. at 1679 & n.276. To begin with, plaintiffs' argument—that DOL's interpretation "exceeds its statutory authority" because it lists as two factors considerations that those courts (but not others) list as one—is unsupported by case law or common sense. Further, as the Rule explains, "the consideration of investments may be related to the consideration of the opportunity for profit or loss," *id.* at 1679, and nothing in the Rule "forecloses consideration, in an appropriate case, of investments as they relate to the worker's opportunity for profit or loss," *id.* at 1680. The decision to treat them separately, moreover, "is consistent with the overwhelming majority of federal appellate case law and the Department's practice prior to the 2021 IC Rule." *Id.* at 1679. In

addition, variation in how the factors are organized and enumerated is not substantive, and it does not demonstrate a material conflict between the Rule and the case law of any circuit.

Plaintiffs also mistakenly argue that the Rule conflicts with the Supreme Court's rejection in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), of the argument that exemptions to the FLSA should be construed narrowly. *Encino* addresses the question whether service advisors are salespeople exempt from the FLSA's overtime pay requirement. Resolving the question based on the text of the exemption, the Court rejected a narrow-construction principle that does not appear in the text. 138 S. Ct. at 1142. *Encino* does not address the issue that is the subject of the 2024 Rule, and the 2024 Rule does not address whether FLSA exemptions should be construed narrowly. Rather, the Rule sets forth a multifactor economic reality test to determine whether a worker is an employee or independent contractor. The Rule notes that the FLSA uses a definition of "employee" that sweeps more broadly than the common law to encompass all workers who are "suffered or permitted'' to work. 89 Fed. Reg. at 1668. And it explains that *Encino* is inapposite "because the broad scope of who is an employee under the FLSA comes from the definitions themselves and not any 'narrow-construction' principle." *Id.* at 1668 n.221.

II. The Rule is a proper exercise of DOL's statutory authority to administer the FLSA.

Plaintiffs' arguments (at 10–12) that the 2024 Rule exceeds DOL's statutory authority and that the FLSA violates the nondelegation doctrine both rest on the incorrect assertion that the Rule is a legislative rule. Because the Rule does not create rights and obligations, but rather "advise[s] the public of the agency's construction of the statutes and rules which it administers," it is an interpretive rule. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). And issuance of an interpretive rule for that purpose is well within DOL's statutory authority and poses no nondelegation doctrine problem.

A. The Rule is an interpretive rule.

Agency rules can generally be described as either "legislative" or "interpretive." The key difference between legislative rules and interpretive rules is that the former have the "force and effect of law" and the latter do not. *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022). More specifically, "[l]egislative rules impose new rights or duties and change the legal status of regulated parties; interpretive rules articulate what an agency thinks a statute means or remind parties of pre-existing duties." *Id.* (citing *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018)). Although interpretive rules are not binding on parties, they are nonetheless valuable to give regulated entities and the public an understanding of how agencies administer and enforce the statutes that they are charged with implementing.

Here, the 2024 Rule, which contains only DOL's "general interpretations for determining whether workers are employees or independent contractors under the FLSA," 89 Fed. Reg. at 1741–42 (29 C.F.R. § 795.100), falls into the interpretive category. Employers' and employees' rights and duties with respect to the FLSA derive from the statute, not the Rule. *See, e.g.*, 29 U.S.C. § 206(a) (requiring employers to pay employees a specified minimum wage). Congress charged DOL, through the Wage and Hour Administrator, with the power to investigate working conditions and bring judicial enforcement actions for violations of the statute. *See, e.g.*, 29 U.S.C. § 204 (establishing office); § 209 (granting subpoena authority); § 211(a) (authorizing investigations and inspections); § 216(c) (authorizing judicial actions and supervision of payment of wages owed). In so doing, DOL necessarily applies its interpretation of the FLSA. And the Rule "help[s] workers and businesses better understand the Department's interpretation of their rights and responsibilities under the law" as it carries out these statutory duties. 89 Fed. Reg. at 1659. And, to be clear, in any DOL enforcement action (or in any private litigation), DOL's interpretation is "not controlling

upon the courts," but is relevant only for its persuasive value. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Chao v. Double JJ Resort Ranch*, 375 F.3d 393, 397–98 (6th Cir. 2004) (considering DOL interpretation as persuasive authority); *Justice v. Metro. Gov't of Nashville, Davidson Cnty., Tenn.*, 4 F.3d 1387, 1393 (6th Cir. 1993) (applying *Skidmore* to DOL interpretative regulations); *cf. Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 765–68 (6th Cir. 2018) (in enforcement action, rejecting agency's argument that certain workers were "employees"). In such cases, "it is the courts that ultimately interpret the FLSA." *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 535 (8th Cir. 1993).

Arguing to the contrary, Plaintiffs point to the since-vacated decision in *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022), *vacated* (5th Cir. Feb. 19, 2024), which held that the 2021 Rule was legislative "because it would have affected existing individual rights." *Id*. at *6. The Sixth Circuit, however, has repeatedly held that a rule does not "lose its interpretative nature because of its substantial impact." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 681 (6th Cir. 2005) (collecting cases). The contrary reasoning adopted in *Coalition for Workforce Innovation* that only insignificant rules could be interpretive, finds no support in the text of the Administrative Procedure Act or the Supreme Court's cases applying it.

Indeed, courts have long recognized that DOL's interpretive rules under the FLSA have such a substantial impact. *See, e.g.*, *Skidmore*, 323 U.S. at 140 (noting that "courts and litigants may properly resort [to DOL's interpretive rules] for guidance"); *Jones v. Producers Serv. Corp.*, __ F.4th__, 2024 WL 959084, at *3 (6th Cir. Mar. 6, 2024) (looking to DOL's interpretive regulations under the FLSA). Rather, what makes a rule legislative is whether it has a "binding" effect on parties and courts. *Dismas Charities*, 401 F.3d at 680. And nothing in DOL's rule purports

to have a binding effect. To the contrary, DOL placed the Rule in subchapter B of its FLSA regulations, entitled "Statements of General Policy or Interpretation Not Directly Related to Regulations," all of which "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1. The text of the Rule confirms that it is a "'practical guide to employers and employees' as to how the Department will seek to apply the Act." 89 Fed. Reg. at 1742 (29 C.F.R. § 795.100) (quoting *Skidmore*, 323 U.S. at 138); *see also* 89 Fed. Reg. at 1649 (characterizing rule as "interpretive guidance"). Again, as explained above, employers' and employees' rights and duties derive from the FLSA, not the six-factor test that DOL uses to consider whether a worker is an "employee" under the FLSA.

The fact that DOL undertook notice-and-comment rulemaking before issuing the 2024 Rule does not transform it into a legislative rule. Although an agency is not required to use notice-and-comment rulemaking when issuing interpretive rules, it is free to do so. *See Perez*, 575 U.S. at 102 (noting that it "may be wise policy" to engage in notice-and-comment rulemaking in issuing certain interpretive rules). And, as the Supreme Court has recognized, the choice to do so does not convert an interpretive rule into a legislative one. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003) (holding regulations issued pursuant to notice-and-comment rulemaking were no "more than a general statement of policy designed to inform the public of [the agency]'s views on the proper application of [a statute]" (cleaned up)); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (noting that "courts have long looked to the *contents* of the agency's action" to determine whether it is legislative or interpretive); *Harris v. Diamond Dolls of Nev., LLC*, No. 3:19-cv-00598, 2022 WL 4125474, at *2 (D. Nev. July 26, 2022) (disagreeing with *Coalition for Workforce Innovation* and holding the 2021 Rule was interpretive based on its "very terms," despite use of notice-and-comment rulemaking).

B. The Rule is within DOL's statutory authority.

There is no question that issuing an interpretive rule setting forth DOL's understanding of the term "employee" in the FLSA is within DOL's statutory authority. When an agency issues an interpretive rule, it is not exercising delegated "law-making" authority but rather "law-interpreting" authority. *Dismas Charities*, 401 F.3d at 679. An interpretive rule is "simply another kind of interpretive choice that an agency must necessarily make when applying a statute." *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560, 566–67 (6th Cir. 2014) (quotation marks omitted). The authority to issue "interpretations to guide the performance of [DOL's] duties under the Act," 89 Fed. Reg. at 1742 (29 C.F.R. § 795.100), is inherent in the power that Congress granted DOL to administer the FLSA. *See Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 267 (5th Cir. 2000); *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir. 1993).

Indeed, the Wage and Hour Administrator's power to issue interpretive rules has been specifically recognized by the Supreme Court. In *Skidmore*, the Supreme Court explained that, in "provid[ing] a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply [the FLSA]," 323 U.S. at 138, DOL acted "in pursuance of [an] official duty" of administering the statute, *id.* at 139. Likewise, here, DOL acted in pursuance of its official duties of administering the FLSA by providing employers and employees with a practical guide as to how the agency would seek to apply the statute.

C. The Rule does not present a nondelegation problem.

Plaintiffs also suggest that recognizing DOL's authority to issue the Rule would create "a nondelegation problem." Pls. Mem. 11. Decades of well-established precedent belie that argument.

"The nondelegation doctrine is rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). "The Constitution vests all legislative power in

Congress and, under the nondelegation doctrine, bars Congress from 'transferring to another branch powers which are strictly and exclusively legislative.'" *Consumers' Rsch. v. FCC*, 67 F.4th 773, 787 (6th Cir. 2023) (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality)) (cleaned up). At the same time, the Constitution allows Congress to "confer substantial discretion on executive agencies to implement and enforce the laws." *Id.* (quoting *Gundy*, 139 S. Ct. at 2123). So long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries" of the agency's "authority," there is no constitutional concern. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). The touchstone inquiry that has governed nondelegation challenges for nearly a century, then, is whether Congress has "la[id] down by legislative act an intelligible principle to which the person or body authorized" to execute the legislation "is directed to conform." *J.W. Hampton Jr., & Co., v. United States*, 276 U.S. 394, 409 (1928).

As a preliminary matter, the 2024 Rule raises no delegation problem because it is not an exercise of substantive rulemaking authority. As explained above and illustrated throughout the Rule, it is an exercise of Article II authority, explaining how the agency understands its executive investigatory and prosecutorial functions. In light of the definitions of legislative and interpretive rules, "[i]t follows that only legislative rules are subject to the nondelegation doctrine." Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 Ariz. L. Rev. 769, 798 (1988).

Moreover, the standards provided by Congress in the FLSA "comfortably fall[ ] within the ambit of delegations previously upheld by the Supreme Court." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 760 (6th Cir. 2023); *see id.* at 761–62 (discussing Supreme Court precedent). Under the intelligible principle test, the Supreme Court has "over and over upheld even

very broad delegations." *Gundy*, 139 S. Ct. at 2129. "Only twice in this country's history" has the Court "found a delegation excessive—in each case because Congress had failed to articulate *any* policy or standard to confine discretion." *Id.* (quotation marks omitted). No similar situation exists here, where Congress has limited DOL's discretion in interpreting who qualifies as an "employee" under the statute. For one, Congress defined the word "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). Any interpretation DOL uses in determining, for its enforcement purposes, who is or is not an employee must be tethered to that statutory definition. In addition, as part of the FLSA, Congress prescribed a general policy of "correct[ing] and ... eliminat[ing]" the "existence ... of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. This policy itself provides DOL a sufficiently intelligible principle in administering the FLSA. *See Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944); *Mayfield v. U.S. Dep't of Lab.*, No. 1:22-CV-792, 2023 WL 6168251, at *9 (W.D. Tex. Sept. 20, 2023); *see also Opp Cotton Mills v. Adm'r of Wage & Hour Div. of Dep't of Lab.*, 312 U.S. 126, 149 (1941) (holding that the authority to set minimum wages conferred by FLSA was not an unlawful delegation). Any discretion afforded to DOL, guided by the statutory definition and statement of policy, "nowhere near approaches the line where the scope of [DOL's] power is too great for the standard imposed." *Allstates Refractory Contractors*, 79 F.4th at 768; *see also Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, 51 F.4th 616, 635 (5th Cir. 2022) (holding that the statutory "purpose, objectives, and definitions to guide the [agency]'s discretion" were sufficient to satisfy nondelegation doctrine).

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' opposition, Plaintiffs' motion for a preliminary injunction should be denied.

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Respectfully submitted,

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