No. 20-11179

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DATA MARKETING PARTNERSHIP, L.P.;
L.P. MANAGEMENT SERVICES, L.L.C.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; MARTIN WALSH,
SECRETARY, U.S. DEPARTMENT OF LABOR;
UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division, No. 4:19-cv-0800-O
Hon. Reed O'Connor

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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April 7, 2021

AMICUS CURIAE PUBLIC CITIZEN'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULES 28.2.1 AND 29.2

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Pursuant to this Court's Rules 28.2.1 and 29.2, amicus curiae Public Citizen submits this supplemental certificate of interested persons to fully disclose all those with an interest in this matter and provide the required information as to amicus's corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Undersigned counsel certifies that amicus curiae **Public Citizen, Inc.**, is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. Amicus curiae is represented by **Nandan Joshi** and **Allison M. Zieve** of **Public Citizen Litigation Group**, which is a non-profit, public interest law firm that is part of **Public Citizen Foundation, Inc**., a non-profit, non-stock corporation that has no parent corporation and in which no publicly traded corporation has an ownership interest of any kind.

C. The parties and their counsel are:

Plaintiffs-appellees and their counsel

- Data Marketing Partnership, L.P.
- L.P. Management Services, L.L.C.
- Jonathan D. Crumly, Sr.
- Bryan Francis Jacoutot
- Reginald L. Snyder
- Taylor English, a law firm.

Defendants-appellants and their counsel

- U.S. Department of Labor
- Martin Walsh, Secretary, U.S. Department of Labor
- United States of America
- Mark B. Stern
- Michael Shih

Respectfully submitted,

/s/ Nandan M. Joshi
Nandan M. Joshi
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INTEREST OF AMICUS CURIAE[*]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in opposing improper invocation of federal preemption by companies seeking to avoid compliance with state laws designed to protect consumers, workers, or the general public. Public Citizen has accordingly participated as amicus curiae to address preemption issues involving a range of industries. *See*, *e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (prescription drugs); *Jones v. Medtronic, Inc.*, 745 Fed. App'x 714 (9th Cir. 2018) (medical devices); *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (restaurant menus). In this case, Data Marketing Partnership (DMP) seeks to offer health insurance to the general public without complying with state laws that regulate insurance companies, by designating its customers as participants in an employee benefit plan that is subject to exclusive federal control. Public Citizen is concerned that, if accepted by this Court, DMP's

[*] The brief was not authored in whole or part by counsel for a party. No party, counsel for a party, or any other person (excluding amicus curiae, its members, and its counsel) contributed money intended to fund the brief's preparation or submission.

gambit would provide a roadmap for entities to use the Employee Retirement Income Security Act of 1974 (ERISA) to do an end run around obligations imposed by state insurance laws.

In addition, Public Citizen advocates for regulations and other actions to protect consumers from harmful products and practices. It therefore also has a strong interest in proper application of the Administrative Procedure Act (APA) to ensure agency accountability without unduly constraining an agency's ability to carry out its statutory responsibilities. Here, even assuming that the district court was correct in determining that the Department of Labor (DOL) failed to satisfy APA standards, the court overstepped its role as a reviewing court by permanently enjoining the agency from adopting a different position, rather than remanding to allow the agency to exercise its authority under ERISA to address the court's concerns.

SUMMARY OF ARGUMENT

I. Under ERISA, only a past or present employee of an employer may be a plan participant, and, as a general matter, only common-law employees are considered employees. In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 12 (2004), however, the Supreme Court held that a participant can include the "working owner" of a business if the plan also

covers a common-law employee. *Yates* holds that the sole owner of a medical practice qualifies as a "working owner," but it does not otherwise define that term.

The district court incorrectly held that DMP's limited partners qualify as working owners under *Yates*. The court reached that conclusion by applying footnote 3 of a 1999 DOL advisory opinion, which describes a working owner as an individual with "an equity ownership right" in a business "who is actively engaged in providing services to that business." *Yates*, however, did not adopt the footnote 3 description as the applicable standard. Moreover, the footnote 3 "test" applied by the district court is irreconcilable with *Yates*'s analysis of ERISA and related provisions of the tax code, which contain qualifications not found in footnote 3, such as a minimum level of equity in a business or the provision of professional services by the business owner.

Yates' discussion of "self-employed individuals" likewise does not support the decision below because footnote 3 ignores the criteria that a limited partner must satisfy to be considered a self-employed individual under the tax laws: (1) the limited partner must have earned income from the partnership, (2) the earned income must be in the form of a guaranteed payment determined without regard to the partnership's income, (3) the

guaranteed payment must be for services actually rendered to or on behalf of the partnership, and (4) personal services must be a material income-producing factor in the trade or business. Instead, footnote 3 considers only whether the limited partner is "actively engaged" in the partnership. The footnote is, therefore, not synonymous with the test for a "self-employed individual" under the tax code.

In any event, nothing in *Yates* indicates that qualifying as a self-employed individual is sufficient to make an individual a working owner. To the contrary, *Yates* made clear that no single provision of ERISA in isolation was sufficient to justify its holding that working owners may be plan participants. Here, the record does not support the district court's assumption that DMP's limited partners are self-employed individuals. The limited partners do not appear to have received earned income from DMP. And the data they furnish to DMP for resale is more aptly viewed as capital provided to DMP for its use in data marketing, rather than services rendered by the limited partners to the partnership. For similar reasons, the limited partners' personal services are unlikely to be a material income-producing factor in DMP's data-marketing business. And it is questionable whether DMP even operates a "trade or business" under the tax code, given that the primary purpose of the partnership appears to be facilitating the sale of

health insurance to the general public (and thereby avoid state insurance laws), rather than generating income from data marketing.

Because the district court erred in relying footnote 3, its decision should be reversed.

II. The APA authorizes a reviewing court to hold unlawful and set aside agency action found to be arbitrary and capricious. 5 U.S.C. § 706(2). As a general rule, once a court determines that agency action should be set aside for a failure of reasoned decisionmaking, its role is at an end. The court should generally remand to allow the agency to exercise its authority.

Here, after faulting DOL for failing to apply footnote 3 to DMP's request for an advisory opinion, the district court did not give DOL an opportunity to reassess DMP's request under what the court viewed as the proper standard; it enjoined DOL to regulate DMP's plan under ERISA. DMP did not rely on footnote 3 in its request to DOL, however; and DOL had not considered it in issuing its advisory opinion to DMP. Had the court remanded, DOL could have explicated its understanding of footnote 3, gathered additional information to inform its decision as to DMP's request, and addressed the court's concern about agency inconsistency in its approach to working owners. More significantly, a remand would have provided DOL the opportunity to consider whether footnote 3 adequately

distinguishes between federally regulated employee benefit plans and state-regulated health insurance sold to the general public, and to consider changes to the standard if it does not. By enjoining DOL to regulate DMP under ERISA, instead of remanding to allow DOL to determine the appropriate outcome under the standard the court identified, the district court improperly resolved a question that, under longstanding principles of administrative law, should have been left to the expert agency.

ARGUMENT

In the decision under review, the district court concluded that DOL failed to engage in reasoned decisionmaking when the agency concluded that DMP's 50,000 "limited partners" are not "employees" eligible to participate in DMP's employee benefit plan. Rather than remand the matter so that DOL could address the purported errors identified by the court, the district court conducted a *de novo* review, concluded as a matter of law that DMP's limited partners are "working owners" who must be treated as DMP's employees, and permanently enjoined DOL from refusing to recognize their status as plan participants. The court's reasoning, coupled with ERISA's preemption provision, endorses DMP's effort to sell health insurance to the general public without complying with state insurance laws. For the reasons set forth below and in DOL's brief, the district court's analysis of the merits is flawed,

and its decision to enjoin DOL rather than remand is inconsistent with its limited role as a reviewing court. This Court should reverse.

I. The district court erred in concluding that DMP's limited partners are participants in an employee benefit plan.

A. Only an "employee" may be a "participant" in an ERISA benefit plan.

Congress enacted ERISA to "protect … the interests of participants in employee benefit plans." 29 U.S.C. § 1001(b). Employee benefit plans are either pension plans or welfare benefit plans (or both). *Id.* § 1002(3). Welfare benefit plans include plans that provide health insurance to plan participants. *Id.* § 1002(1). Only an "employee or former employee" of an employer may be a "participant" in an employee benefit plan. *Id.* § 1002(7).

The Supreme Court has twice considered who may qualify as a plan participant. First, in *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court stated that courts should use the "common-law test" for determining who is an employee where ERISA does not provide "specific guidance on the term's meaning." 503 U.S. 318, 323 (1992). Under *Darden*, for example, an independent contractor cannot be a plan participant because he or she would not be a common-law employee. *Id.* at 327. Then, in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,* the Court found "'specific guidance'" in "multiple indications" in "ERISA's text" that

"Congress intended working owners to qualify as plan participants" without regard to the common-law test, 541 U.S. 1, 12 (2004), if the plan covers "non-owner employees," *id.* at 21 & n.6. *Yates* "does not clearly define who exactly makes up this class of 'working owners.'" *Id.* at 25 n.* (Thomas, J., concurring). The decision confirms only that the term "working owners" encompasses a medical doctor who is "the sole shareholder and president of a professional corporation." *Id.* at 6.

B. DMP's limited partners are not participants in DMP's plan.

DMP alleges that its nearly 50,000 limited partners qualify as plan participants because they are working owners. ROA.106, 451. According to DMP, individuals can become limited partners of DMP "for free." ROA.449. Afterwards, they may participate in DMP's health plan if they furnish DMP with "more than [500] hours of work per year through the generation, storage, transmitting, and sharing of their data" using "proprietary software for computers and/or mobile applications for mobile devices." ROA.449–50. Limited partners who obtain health insurance through DMP "are 100% responsible for paying their own premiums." ROA.107.

The district court held that DMP's limited partners qualify as working owners. That conclusion rests on two premises: (1) that under *Yates*, "working owners categorically may participate in an ERISA plan as an

'employee,'" and (2) that the test for whether an individual is a working owner is set forth in footnote 3 of DOL's Advisory Opinion 99-04A, 1999 WL 64920 (Feb. 4, 1999). ROA.897. The second premise is incorrect. Footnote 3 describes a working owner as "any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business." *See id.* (quoting Advisory Op. 99-04A, at n.3) (emphasis removed). As DOL observes (DOL Br. 29–30), the agency did not adopt footnote 3 as its own definition of working owner. And as explained below, the district court's application of footnote 3 in this case is incompatible with *Yates*.

1. Although *Yates* holds that working owners can be plan participants (if the plan covers non-owner employees), the decision neither cites footnote 3 nor endorse footnote 3's description of working owner as the applicable standard. Indeed, in his separate concurrence, Justice Thomas specifically remarked that the Court's opinion left "working owner" undefined. 541 U.S. at 25 n.*. The Court's silence on footnote 3 is especially conspicuous because the Court endorsed Advisory Opinion 99-04A's bottom-line conclusion that working owners "qualify as participants in ERISA-protected plans." *Id.* at 17.

Moreover, the Court's reasoning in *Yates* is irreconcilable with footnote 3's description of "working owner." Because *Yates* involved a

pension plan, the Court examined various ERISA provisions and corresponding provisions of the Internal Revenue Code (IRC) providing for favorable tax treatment to deferred-compensation plans. *See id.* at 13 (stating that "Congress'[s] objective was to harmonize ERISA with longstanding tax provisions"). The "'specific guidance'" that the Court found by examining these provisions "[i]n combination," *id.* at 16 n.5 (quoting *Darden*, 503 U.S. at 323), shows that the class of individuals who qualify as working owners is more limited than the district court's application of footnote 3 would require.

For instance, the Court observed that "Congress enacted ERISA against a backdrop of IRC provisions that permitted corporate shareholders, partners, and sole proprietors to participate in tax-qualified pension plans." *Id.* at 12 (citing Revenue Act of 1942, ch. 619, § 165(a)(4), 56 Stat. 798, 862, and Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809). That "backdrop" does not correspond to footnote 3's description of a working owner: The 1942 Revenue Act addressed "employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." § 165(a)(4), 56 Stat. at 862. Footnote 3 does not mention these classes of employees. And the 1962 statute extended favorable tax treatment to "self-employed individuals" and "owner-employees." 76 Stat. at 811

(formatting altered). To be a self-employed individual, the 1962 statute required a taxpayer to have "earned income" from "wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered." *See* 26 U.S.C. §§ 401(c)(1), (2)(A); 911(b) (1964). And the statute limited an "owner-employee" of a partnership to "a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership." 76 Stat. at 812. In contrast, footnote 3 does not include or acknowledge either of these limitations.

The Court in *Yates* also noted that ERISA's fiduciary requirements do not apply to unfunded plans "for a select group of management or highly compensated employees," which encompasses individuals owning five percent of a business. 541 U.S. at 13–14 (quoting 29 U.S.C. § 1101(a)(1) and citing 26 U.S.C. §§ 414(q)(1)(A) & 416(i)(1)(B)(i)). Those requirements also do not apply to agreements "described in" 26 U.S.C. § 736, *Yates*, 541 U.S. at 13 (quoting 29 U.S.C. § 1101(a)(2)), which addresses "[p]ayments made in liquidation of the interest" of retired or deceased partners, 26 U.S.C. § 736. Footnote 3 says nothing about highly compensated employees or liquidation interests.

Looking beyond the tax code, the Court in *Yates* considered Title IV of ERISA, which governs insolvent plans. The Court observed that Title IV

"covers plans in which substantial owners participate *along with* other employees," and defines "substantial owner" to "include[] sole proprietors and shareholders and partners with a ten percent or greater ownership interest." 541 U.S. at 15 (citing 29 U.S.C. § 1322(b)(5)(A), (B) (2005)). In addition, Title IV deals specifically with "professional service employer[s]," *id.* (quoting 29 U.S.C. §§ 1321(c)(2)(A))—the type of employer at issue in *Yates*. Footnote 3's description of "working owner," however, does not contain an equity threshold and does not limit working owners to "professional individuals" engaged in "the performance of professional services." 29 U.S.C. § 1321(c)(2)(A).

Despite these differences, the district court apparently believed that *Yates*'s discussion of self-employed individuals required application of footnote 3. *Yates* observes that ERISA exempts plans whose participants are self-employed individuals from the requirement that plan assets be held in trust. 541 U.S. at 14 (quoting 29 U.S.C. § 1103(b)(3)(A)). And as the Court explained, ERISA treats a partnership "as the employer of each partner who is an employee" under IRC § 401(c)(1), which defines "employee" to include a self-employed individual. *Id.* at 16 (quoting 29 U.S.C. § 1301(b)(1)). The district court appears to equate a limited partner "actively engaged" in the

partnership's business for purposes of footnote 3 with the limited partner's status as a self-employed individual. *See* ROA.898–900.

As noted above (*supra* pp.10–11), however, footnote 3's description of a "working owner" does not include the elements of a self-employed individual under the tax code, which requires the individual to have "earned income" for a taxable year. 26 U.S.C. § 401(c)(1)(B). Beyond that basic requirement, for a limited partner to be a self-employed individual, such "earned income" must take the form of "guaranteed payments … for services actually rendered to or on behalf of the partnership," *id.* §§ 401(c)(2)(A) & 1402(a)(13), which, in turn, must be "determined without regard to the income of the partnership," *id.* § 707(c). In addition, the earned income can come only from a "trade or business in which personal services of the [individual] are a material income-producing factor," *id.* § 401(c)(2)(A)(i), such as a trade or business in which "customers pa[y] fees for [the individual's] skill and effort," *Van Kalker v. Comm'r*, 804 F.2d 967, 970 (7th Cir. 1984). Footnote 3 does not address any of these elements. For this reason as well, the district court erred in assuming that satisfying footnote 3 is sufficient to make DMP's limited partners "working owners" under *Yates*.

2. When footnote 3 is put aside, the only remaining argument that DMP's limited partners are working owners rests on the erroneous

propositions that (1) under *Yates*, self-employed individuals automatically qualify as working owners and (2) DMP's limited partners qualify as self-employed individuals.

Yates dispels the first proposition by making clear that the decision did not rest on any single provision "in isolation." Rather, only "[i]n combination" do "the provisions supply 'specific guidance' adequate to obviate any need to expound on common law." 541 U.S. at 16 n.3 (quoting *Darden*, 503 U.S. at 323); *see also id.* at 12 ("these [multiple] indications *combine*" to eliminate need to "resort to common law" (emphasis added)). The Court's statements are incompatible with the district court's apparent assumption that being a self-employed individual under the tax code automatically makes the individual an "employee" under ERISA.

Moreover, the record in this case refutes the district court's assumption that the DMP's limited partners are self-employed individuals. *See* ROA.900. At the outset, the limited partners lack the required earned income. The district court did not find that DMP has made guaranteed payments to its limited partners, and the record suggests that it has not. ROA.450. Without having received earned income, an individual can qualify as self employed only if the "trade or business carried on by such individual did not have net profits for the taxable year." 26 U.S.C. § 401(c)(1)(B)(i). That exception does

not apply here because DMP is not a "trade or business carried on" by the limited partners. *See id.* § 1402(a) (distinguishing between a business "carried on" by an individual and one "carried on by a partnership of which he is a member"). That exception also would not excuse the failure for a limited partner to earn guaranteed payments, which must be made regardless of whether a partnership has income. *Id.* §§ 707(c), 1402(a)(13).

Even if the limited partners had received guaranteed payments from DMP, such payments would likely not be "for services actually rendered to or on behalf of the partnership"—as required for a self-employed individual. *Id.* § 1402(a)(13). Instead, such payments would be more aptly viewed as for "use of capital," *id.* § 707(c)—namely, DMP's use of limited partners' "electronic data … for sale to third parties," ROA.107; *see also* ROA.448. *See Veterans Found. v. Comm'r*, 38 T.C. 66, 74 (1962) (holding that "contributions of used clothing" constituted "capital in the form of inventory"), *aff'd*, 317 F.2d 456 (10th Cir. 1963).

For similar reasons, the limited partners are unlikely to satisfy the requirement that their "personal services" be a "material income-producing factor" in DMP's trade or business. 26 U.S.C. § 401(c)(2)(A)(i); *see also Friedlander v. United States*, 718 F.2d 294, 297 (9th Cir. 1983) ("personal services … cannot be separated from the inventory"); *see also Gord v.*

Comm'r, 93 T.C. 103, 107 (1989) (holding that taxpayer did not render "any personal services" in a business in which she "bought and sold cigarettes").

Indeed, DMP's data-marketing business might not even qualify as a "trade or business" under the tax code because its "primary purpose" does not appear to be producing "income or profit" from the sale of data. *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987); *see also Portland Golf Club v. Comm'r*, 497 U.S. 154, 164 (1990) ("an intent to profit" must "be[] shown"). As DOL observed, the "primary reason" an individual would become a limited partner in DMP "appears to be to acquire health coverage." ROA.394. If DMP's primary purpose is to facilitate the sale of health insurance under ERISA (and thereby avoid state insurance laws), the limited partners are not "self-employed with respect to the partnership, but rather are merely consumers purchasing health coverage." ROA.395; *see also Green v. Comm'r*, 507 F.3d 857, 871 (5th Cir. 2007) (holding that businesses that "had no independent purpose beyond the payment of … legal expenses" to collect on a personal judgment did not qualify as a "trade or business").

In sum, the district court erred in applying footnote 3 to extend ERISA's reach to individuals who bear no resemblance to "the sole shareholder and president of a professional corporation" at issue in *Yates*, 541 U.S. at 6, or to the other categories of business owners examined in that

decision. Its conclusion that DMP's limited partners are working owners as a matter of law should be reversed.

II. If DOL committed error, the appropriate remedy under the APA would be to set aside the advisory opinion and remand to the agency.

After faulting DOL for not applying footnote 3 of Advisory Opinion 99-04A in examining DMP's request for an advisory opinion on the status of its limited partners, the district court applied footnote 3 itself, concluded that the limited partners qualified as working owners, and permanently enjoined DOL to regulate DMP's plan under ERISA. Even if the district court had been correct in concluding that DOL's advisory opinion lacked reasoned decisionmaking, the appropriate APA remedy would have been to vacate the advisory opinion and remand for further consideration by DOL.

The APA authorizes federal courts reviewing agency action to "hold unlawful and set aside agency action, findings, or conclusions found to be— … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA also preserves a reviewing court's authority to issue injunctions in appropriate circumstances. 5 U.S.C. § 702. For example, this Court has held that a reviewing court may enjoin an agency from enforcing an "invalid regulation," *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 702 (5th Cir. 2011), or

taking action that would "overstep[] its statutory authority," *Texas v. EEOC*, 933 F.3d 433, 451 (5th Cir. 2019).

In addressing an APA violation, however, a "judicial judgment cannot be made to do service for an administrative judgment." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). "[I]f an agency decision cannot be affirmed on the basis of the administrative record, then 'the matter should be remanded to the agency for further consideration.'" *Louisiana Env't Action Network v. EPA*, 382 F.3d 575, 587 (5th Cir. 2004) (brackets removed) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power*, 470 U.S. at 744. Thus, the general rule in administrative law is that "the function of the reviewing court ends when an error of law is laid bare," and a court should not "usurp[] an administrative function" by exercising the agency's authority itself. *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

The remedy ordered by the district court strayed from these foundational principles. The court did not conclude that ERISA unambiguously required that DMP's limited partners qualify as plan

participants. Rather, the court concluded that DOL failed to engage in reasoned decisionmaking because DOL did not apply footnote 3 to DMP's request for an advisory opinion and, instead, applied a standard that the court believed was inconsistent with DOL's prior pronouncements. ROA.891–92, 897–900; *see* DOL Br. 32–34 (addressing inconsistency argument). The proper remedy for this type of error is to set aside the agency decision and remand the matter for "a more reasoned explanation from the agency." *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1142 (D.C. Cir. 2014) (remanding where the "statutory definition provide[d] little guidance" and the agency "retains substantial discretion in considering the question anew on remand").

A remand would be particularly appropriate here because DOL had no prior opportunity to consider the import, if any, of footnote 3 prior to the district court's decision. DOL does not interpret footnote 3 as a binding regulatory standard for the definition of "working owner." *See* DOL Br. 29–30. Indeed, DMP itself did not rely on footnote 3 in its request to DOL, and it cited Advisory Opinion 99-04A only for the basic proposition that working owners, including partners, may be plan participants. ROA.407; *see also* ROA.19, 20 (DMP's original complaint citing Advisory Opinion 99-04A without mentioning footnote 3).

Thus, having found that footnote 3 established a binding standard, the district court should have permitted DOL the opportunity to address the court's analysis in the first instance. A remand would have allowed DOL to provide its considered views on what it means to for an individual to have an "equity ownership of any nature in a business enterprise" and to be "actively engaged in providing services to that business." Advisory Op. 99-04A, 1999 WL 64920, at *2 n.3; *see also* DOL Br. 30. A remand would also have enabled DOL to gather additional facts to guide its inquiry and to address any inconsistencies identified by the district court. More significantly, a remand would permit DOL to consider whether footnote 3 adequately effectuates ERISA's purpose of distinguishing between federally regulated employee benefit plans and state-regulated health insurance sold to the general public, and to consider changes pursuant to its "broad policy-making discretion" if footnote 3 does not serve that purpose. *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993); *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

In short, the question whether DMP is entitled to a DOL advisory opinion that its limited partners qualify as plan participants "is an administrative, not a judicial decision." *Idaho Power*, 344 U.S. at 21. By

choosing to decide that question in the first instance, the district court improperly "exercise[d] an essentially administrative function." *Id*.

CONCLUSION

This Court should reverse the judgment of the district court.

April 7, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 7, 2021, I electronically filed this Brief for Amicus Curiae Public Citizen, Inc. in Support of Defendant-Appellants and Reversal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4472 words, as calculated by Microsoft Word 365, less than half the number of words permitted by the rules for the brief of a party.

This amicus brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Georgia, 14 point) using Microsoft Word 365.

/s/ Nandan M. Joshi
Nandan M. Joshi