MARGARET LITTMAN and JENNIFER CHESAK	)	
	)	
PLAINTIFFS,	)	
	)	
V.	)	
	)	**Case No. 3:24-cv-00194**
UNITED STATES DEPARTMENT OF LABOR; JULIE SU, as the acting U.S. Secretary of Labor; ADMINISTRATOR JESSICA LOOMAN, as head of U.S. Department of Labor's Wage and Hour Division; and U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION	)	
	)	
DEFENDANTS.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Margaret Littman and Jennifer Chesak are freelance writers with many publications and roughly 40 years of experience as freelancers. They challenge a Department of Labor Independent Contractor Rule that threatens their right to earn a living. Animated by a desire to classify more workers as employees, the Department of Labor's 2024 Rule replaces a two-factor test that it issued just three years ago with a vague and confusing test containing six non-exclusive factors. The Department failed to provide a reasoned explanation for its course reversal, and so the 2024 Rule is arbitrary and capricious under the Administrative Procedure Act. The Department also went beyond its statutory authority under the Fair Labor Standards Act (FLSA) in issuing the Rule, and any contrary argument would present significant nondelegation concerns. The 2024 Rule

will formally go into effect on March 11, and it's already imposing compliance costs on freelancers. This Court should issue preliminary relief.

STATEMENT OF FACTS

I. The Department of Labor's 2024 Independent Contractor Rule

Enacted in 1938, the Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, and recordkeeping requirements affecting employees in the private sector and in Federal, State, and local governments. *See* 29 U.S.C. § 203 *et seq.* Covered employers that fail to abide by the requirements set forth in the FLSA are subject to civil liability and criminal penalties. 29 U.S.C. § 216.

The text of the FLSA doesn't draw a clear line between employees, who are covered under the Act, and independent contractors, who are not covered under the Act. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (observing that the FLSA provides "no definition that solves problems as to the limits of the employer-employee relationship under the Act"). The Act defines "employers" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and "employee" as "any individual employed by an employer." *Id.* § 203(e)(1). The Act's definition of "employ" as "to suffer or permit to work," *Id.* § 203(g), offers no more guidance in defining the contours of an employment relationship under the FLSA. Worse yet, the Act does not define "independent contractor." Although courts trying to decipher whether a worker is an employee or independent contractor typically look to whether the worker is "dependent upon the business to which [he or she] render[s] service" as "as a matter of economic reality," *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984), courts often differ in the factors they use to reach that conclusion.

Between 1938 and 2021, DOL didn't engage in rulemaking to distinguish between employers and independent contractors. The Department instead provided opinion letters and fact sheets that applied open-ended multi-factor tests for deciphering whether an employment relationship existed under the FLSA. 86 Fed. Reg. 1168, 1171. On January 7, 2021, however, the Department of Labor issued a Final Rule entitled "Independent Contractor Status Under the Fair Labor Standards Act" (the 2021 Rule) that attempted to promote certainty for stakeholders navigating the FLSA. The 2021 Rule focused on two "core factors" when determining whether to classify an individual as an employee or independent contractor: (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. *Id.* The 2021 Rule explained that, although other factors could be relevant, the Rule emphasized the two core factors because they were "the most probative of whether workers are economically dependent on someone else's business or are in business for themselves." 86 Fed. Reg. 1171.

After a change in presidential administration in 2021, DOL changed course. The Department first sought to delay the 2021 Rule, 86 Fed. Reg. 12,535 (Mar. 4, 2021) (Delay Rule), and then tried to withdraw the 2021 Rule altogether. 86 Fed. Reg. 24,303 (May 6, 2021) (Withdrawal Rule). Those decisions prompted a federal lawsuit, and in March 2022, the United States District Court for the Eastern District of Texas held that both the Delay and Withdrawal Rules violated the Administrative Procedure Act. *See Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 U.S. Dist. LEXIS 68401, at *49 (E.D. Tex. Mar. 14, 2022). The court vacated both the Delay and Withdrawal Rules and reinstated the Department's 2021 Independent Contractor Rule. *See id.*

Later that year, DOL announced rulemaking to replace the 2021 Rule. 87 Fed. Reg. 62,218. After over a year, the Department issued a Final Rule, entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," (2024 Rule) in January 2024. Acting Secretary of Labor Julie Su explained the Department's view that the 2024 Rule, which will go into effect on March 11, "will help protect workers . . . facing the greatest risk of exploitation." News Release, U.S. Department of Labor announces final rule on classifying workers as employees or independent contractors under the Fair Labor Standards Act (Jan. 9, 2024).[1] Acting Secretary Su announced that the Rule seeks to combat "the serious issue" of "[m]isclassifying employees as independent contractors." *Id.*

The 2024 Rule replaces the 2021 Rule's emphasis on core factors of control and opportunity for loss and profit with a multi-factor balancing test. The enumerated factors listed in the 2024 Rule are "opportunity for profit or loss depending on managerial skill"; "investments by the worker and the employer"; "degree of permanence of the work relationship"; "nature and degree of control"; "extent to which the work performed is an integral part of the employer's business"; and "skill and initiative." 89 Fed. Reg. 1742–43. The 2024 Rule further states, without specification, that "additional factors may be relevant" if they "in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work." *Id.* at 1743. In response to calls for "additional guidance regarding how to weigh the factors," the Department stressed that the 2024 Rule "does not assign any of the factors a predetermined weight." *Id.* at 1669–70. The Department asserted that "weighting the factors in a predetermined manner undermines the very purpose of the test, which is to consider—based on

[1] https://www.dol.gov/newsroom/releases/whd/whd20240109-1

the economic realities—whether a worker is economically dependent on the employer for work or is in business for themself." *Id.* at 1670.

DOL garnered comments from many freelancers who were worried that the 2024 Rule "would 'misclassify' independent contractors as employees." *Id.* at 1670. Several other stakeholders expressed concern "that the Department's proposal would deter businesses from engaging with independent contractors, which in turn would have disruptive economic consequences." *Id.* Those concerns have only grown larger. A recent article stated that the 2024 Rule "is widely expected to increase labor costs for businesses in industries that rely on contract labor or freelancers, such as trucking, manufacturing, healthcare and app-based 'gig' services." Daniel Wiessner, Biden administration issues rule that could curb 'gig' work, contracting (Reuters, Jan. 9, 2024).[2]

II. Freelance Writers Margaret Littman and Jennifer Chesak

Plaintiffs Margaret Littman and Jennifer Chesak are highly regarded freelance writers based in Nashville, Tennessee. **Margaret Littman** has been a freelance writer for three decades. *See* Verified Complaint (VC) ¶ 38. As her long and successful freelancing career suggests, Ms. Littman has chosen to be a freelancer rather than an employee. *See* VC ¶ 39. Ms. Littman wishes to continue to freelance because it gives her greater control over her business, clients, time, and work structure. *Id.* For instance, Ms. Littman can pursue stories that she finds interesting and can choose the clients with whom she works.

[2] https://www.reuters.com/world/us/biden-administration-issues-rule-that-could-curb-gig-work-contracting-2024-01-09/

The Department's 2024 Rule threatens to bring Ms. Littman's three decades of freelance work to an end. Ms. Littman shares the concerns (stated by several individuals and organizations in public comments) that the Rule would deter businesses from engaging with freelancers. *See* VC ¶ 41. Ms. Littman currently works with over 20 companies, VC ¶ 40, and the 2024 Rule has left her with a great deal of uncertainty about her future as a freelancer.

Jennifer Chesak has been a freelance writer since 2010. Freelance work provides Ms. Chesak with both the flexibility she needs over her schedule and much higher pay than her previous work as a full-time employee. VC ¶ 44. The 2024 Rule threatens Ms. Chesak's ability to earn a living as a freelancer. The Rule increases the risk that companies will classify Ms. Chesak as an employee or no longer work with her at all. *Id.* ¶ 46.

Indeed, the 2024 Rule has already spurred companies to saddle Ms. Chesak with the cost of compliance. One company has begun requiring Ms. Chesak to spend several *unpaid* hours documenting precise tasks she performs as a freelancer. *Id.* ¶ 45. Another company has limited the number of hours Ms. Chesak can work with it as a freelancer. *Id.* Yet another required Ms. Chesak to indemnify the company if it were found liable for misclassifying Ms. Chesak. *Id.*

Ms. Littman and Ms. Chesak (the Freelancers) filed suit in this Court. The lawsuit named as Defendants the federal agencies that were responsible for issuing the 2024 Rule: The U.S. Department of Labor and the Wage and Hour Division of the same department. The lawsuit also named Acting Secretary of Labor Julie Su and head of the Wage and Hour Division Jessica Looman, in their official capacities. The Freelancers' complaint alleges that the 2024 Rule violates the Administrative Procedure Act and seeks a court order setting aside the rule along with injunctive

and declaratory relief. The Freelancers now file this Motion for Preliminary Injunction to halt Defendants' enforcement of the Rule pending a final judgment on the merits.

STANDARD OF REVIEW

A court considers four factors in determining whether to issue a preliminary injunction: (1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). The first factor is the most important. *Kentucky v. Biden*, 57 F.4th 545, 550 (6th Cir. 2023).

ARGUMENT

I. The Freelancers are Likely to Succeed on the Merits

a. The 2024 Rule is Arbitrary and Capricious

The Freelancers are likely to prevail on their claim that the 2024 Rule is arbitrary and capricious. The Administrative Procedure Act calls on courts to set aside rules that are "arbitrary, capricious or . . . other not in accordance with law." 5 U.S.C. § 706(2)(A). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Although agencies may change their existing policies, they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (*Encino I*). An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox I*)). That's because individuals may have reliance interests created by the previous policy, and "a reasoned explanation is needed for

disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 222 (quoting *Fox I*, 556 U.S. at 515–16). As a result, unexplained inconsistency in agency policy is a reason for holding a new agency rule to be an arbitrary and capricious change from previous agency practice. *Id.*

The Department's shift from the 2021 Rule to the 2024 Rule flunks this standard. The 2024 Rule contends that the 2021 Rule was deficient because it "increased the risk of worker misclassification by adding considerable confusion and uncertainty over the proper analysis for distinguishing between FLSA-covered employees and independent contractors." 89 Fed. Reg. 1657–58. Yet as many who submitted public comments on the 2024 Rule have pointed out, it is the 2024 Rule that "reduce clarity and certainty" and "undoes the 2021 Rule's clarifying efforts to articulate an appropriately weighted test with less overlapping redundancy." 89 Fed. Reg. 1655. The 2024 Rule replaces the 2021 Rule's focus on two core factors with a test that contains six enumerated factors and a seventh catch-all provision stating that more factors may be relevant if they "in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work." 89 Fed. Reg. 1742–43. What's more, the Department expressly refuses to "assign any of the factors a predetermined weight" because, in its view, doing so would "undermine[] the very purpose of the [economic realities] test." 89 Fed. Reg. 1669–70.

Yet multi-factor tests give rise to confusion, uncertainty, and arbitrary results. As the Supreme Court recently explained, a test featuring "a variety of open-ended" factors leads to a "freewheeling inquiry [that] provides little notice of their obligations under the [statute]." *Sackett v. EPA*, 143 S. Ct. 1322, 1342 (2023); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551–52

(2010) (rejecting a 12-factor test that "gave very little actual guidance" and "produced disparate results" in favor of a clear rule to "produce[] reasonably predictable results"). In sum, although DOL contends that its change to the 2024 Rule was prompted by the need for clarity and certainty, the 2024 Rule will exacerbate—rather than alleviate—confusion and uncertainty about the status of employees and independent contractors.

Also unavailing is the Department's explanation that the 2024 Rule "is aligned with longstanding case law." 89 Fed. Reg. 1659; *id.* at 1658 (asserting that the 2021 Rule "injected a new framework for analyzing whether workers are employees or independent contractors under the FLSA that is inconsistent with decades of case law interpreting the Act"). That's because federal courts vary in which factors they consider in determining whether there's an employment relationship under the FLSA. Indeed, the Department itself cites contradictory case law in issuing the 2024 Rule. *See* 89 Fed. Reg. at 1679 & n.276 (noting that "the Second and D.C. Circuits consider investments and opportunity for profit or loss as one factor" while most other appellate courts "consider investments as a separate factor."). In the end, the 2024 Rule doesn't reflect judicial precedent; it reflects the Department's decision to adopt the view of some courts over the view of others.

b. The 2024 Rule Exceeds the Limits of the Fair Labor Standards Act or Would Otherwise Violate the Non-Delegation Doctrine

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As a result, a rule that exceeds statutory authority must be set aside. 5 U.S.C. § 706(2)(C). The Department's 2024 Rule exceeds the statutory authority Congress gave DOL for three reasons. ***First***, as stated above, the 2024 Rule goes beyond the text of the FLSA and is plainly

inconsistent with precedent from the D.C. and Second Circuits. *See* 29 U.S.C. § 203(g) (defining "employ" as "to suffer or permit to work."); *see* 89 Fed. Reg. at 1679 & n.276 (acknowledging that the test adopted by the Second and D.C. Circuits differ from the test adopted in the 2024 Rule because those circuit courts "consider investments and opportunity for profit or loss as one factor"). The 2024 Rule also conflicts with the principles that the Supreme Court articulated in *Encino Motorcars* v. *Navarro,* 584 U.S. 79 (2018) (*Encino II*). DOL repeatedly presses the argument that its expansive multi-factor test is "grounded in the Act's broad understanding of employment." 89 Fed Reg. 1638. Yet the Supreme Court recently rejected the "flawed premise that the FLSA pursues its remedial purpose at all costs." *Encino II*, 584 U.S. at 89 (internal quotations omitted); *see also McKay* v. *Miami-Dade Cnty.,* 36 F.4th 1128, 1133 (11th Cir. 2022) (noting that *Encino II* rejected the Court's earlier view that FLSA exceptions "must . . . be narrowly construed" to give effect to the FLSA's "humanitarian and remedial" purposes).

Second, and perhaps more fundamentally, the FLSA gives the Department no authority to issue legislative rules to determine whether there's an employment relationship under the FLSA. When Congress wants the Department to engage in rulemaking to provide a clearer definition of a term, it does so in the statutory text. 29 U.S.C. § 213 (noting that terms of the statute will be "defined and delimited from time to time by regulations of the Secretary"). This is no comparable delegation in the statutory text here.

Nor can the Department classify the 2024 Rule as anything but a legislative rule that requires a congressional delegation of power to DOL. *See Mann Constr., Inc., v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022) ("Legislative rules have the force and effect of law; interpretive rules do not.") (quotation marks omitted). The "classification of a worker as either an employee or

independent contractor changes the rights that he or she has under the FLSA." *See Coal. for Workforce Innovation*, 21-CV-130, 2022 U.S. Dist. LEXIS 68401, at *14. Because the 2024 Rule changes "the analysis of who is an employee or independent contractor—and potentially what rights each worker has—would have," the 2024 Rule affects "existing individual rights and obligations and is, thus, legislative." *Id.* at *14–15. More to the point, the "fact that the Independent Contractor Rule was promulgated using the notice-and-comment process suggests that the DOL believed that notice-and-comment was required and, further, that the Independent Contractor Rule was a legislative rule." *Id.* at *15. In all, the FLSA does not give the Department the authority to issue legislative rules to determine whether there's an employment relationship under the FLSA, and that is perhaps why the Department did not do so for over 80 years after Congress enacted the FLSA. VC ¶ 45.

***Third*,** allowing the Department to promulgate legislative rules on this topic would raise significant constitutional concerns. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988) (courts must construe statutes to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent). A reading of the FLSA that allows the Department from different presidential administrations to set forth different tests in defining the critical question of whether workers are employees or independent contractors would "raise a nondelegation problem." *See Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021). Here, even if the FLSA had given DOL the authority to promulgate legislative rules, the Act provided the Department with no standards by which to cabin its discretion. Such a delegation of power would violate the nondelegation doctrine because it allows the Department to exercise

Congress's legislative power to declare entirely "what circumstances . . . should be forbidden" by law. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

II. The Freelancers Satisfy the Remain Factors for a Preliminary Injunction

The Freelancers satisfy the remaining factors for this Court to issue a preliminary injunction. ***First***, the Freelancers will suffer irreparable harm absent a preliminary injunction. The loss of constitutional freedoms "for even minimal periods of time . . . unquestionably constitutes irreparable injury." *BST Holdings LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (citation omitted).

More to the point, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (citations omitted). As stated above, the 2024 Rule has already prompted companies to require Ms. Chesak to spend unpaid hours performing administrative duties and limit the number of hours she may work as a freelancer. VC ¶ 45. The 2024 Rule similarly threatens to upend Ms. Littman's long and distinguished freelance career. *Id.* ¶¶ 38–39. The proposed 2024 Rule garnered significant concerns that the 2024 Rule would "deter businesses from engaging with independent contractors," and "upend millions of legitimate, productive independent contractor relationships." 89 Fed. Reg. 1648. "When an agency action has a predictable effect . . . on the decisions of third parties, the consequences of those third party decisions may suffice to establish [harm]." *New York v. Dep't of Homeland Security*, 969 F.3d 42, 59 (2d Cir. 2020). It therefore makes no difference that DOL is prompting businesses to classify independent contractors as employees rather than doing so itself. *See* VC ¶¶ 40–41 (Ms. Littman works with over 20 companies nationwide as a freelance writer and the 2024 Rule increases the risk that companies with which Ms. Littman works will cease to work with Ms. Littman).

The Freelancers also face irreparable harm because they cannot seek monetary relief after a final decision on the merits. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The Administrative Procedure Act contains a waiver of sovereign immunity, but only in cases that "seek[] relief other than money damages." 5 U.S.C. § 702. The Freelancers suffer irreparable harm because they can't later seek to recover money damages from DOL.

Second, the balance of hardships tips in favor of issuing a preliminary injunction. In stark contrast to the irreparable harm that the Freelancers would suffer absent a preliminary injunction, no serious harm would befall DOL if this Court grants preliminary relief. Such relief would temporarily put in place DOL's 2021 Rule, which has been in place for most of the last three years. ***Third,*** the "public interest is served by compliance with the APA." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). This Court should grant the Freelancers' Motion for Preliminary Injunction.[3]

CONCLUSION

The Motion for Preliminary Injunction should be granted.

DATED: March 1, 2024

Respectfully submitted,

s/ Wencong Fa
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[3] Federal Rule of Civil Procedure 65(c) states that a court "may issue a preliminary injunction" only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The amount required "is within the discretion of the trial judge" and no bond should be required in this case because the Department can make no showing that it would suffer "costs or damages if an injunction is ordered." *PMP-Romulus, Inc. v. Valyrian Mach., LLC*, 23-cv-10822, 2023 U.S. Dist. LEXIS 194203, at *15–16 (E.D. Mich. Oct. 30, 2023).

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CERTIFICATE OF CONFERRAL

The parties have been unable to confer on the relief requested in this motion because Defendants have not made an appearance. Plaintiffs presume that their motion will be opposed and intend to confer with Defendants once they have appeared.