IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COLT & JOE TRUCKING LLC,

Plaintiff,

v. Case No. 1:24-cv-00391

U.S. DEPARTMENT OF LABOR; JULIE SU, Acting Secretary, U.S. Department of Labor, in her official capacity; JESSICA LOOMAN, Administrator, Wage and Hour Division, U.S. Department of Labor, in her official capacity;

Defendants.

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF AND JURY DEMAND

INTRODUCTION

Plaintiff Colt & Joe Trucking LLC is a family-owned trucking company that routinely hires owner-operator truck drivers as independent contractors as part of its business. In January 2021, the U.S. Department of Labor ("DOL" or "Department") announced a clear standard for when an individual hired by Plaintiff may be classified as an independent contractor, as opposed to an employee subject to the Fair Labor Standards Act's ("FLSA" or "the Act") wage and hour requirements. Under that 2021 rule, a business generally can classify as independent contractors workers who exercise independent judgment and control over the work and have an opportunity to profit from such independent judgment and control. The Department has abruptly and arbitrarily reversed course with a new rule, published in January 2024, that makes clear that control over the work and an opportunity for profit are not generally sufficient to enable a business to classify workers as independent contractors under the Act. The new rule further replaces the simple and

objective control-and-opportunity standard with an open-ended balancing test that obscures the distinction between contractors and employees, making it impossible for businesses like Plaintiff to hire independent contractors without risking FLSA liability.

The new rule's vague test provides no objective direction and would enable the Department and trial lawyers to deem anyone performing services for another company an "employee" under essentially any circumstance. It unlawfully broadens FLSA's definition of employee to include workers who exercise independent control over the work and have an opportunity to profit based on their exercise of such control. And it improperly expands retroactive liability to businesses like Plaintiff that relied on the clear 2021 standard to make worker classification decisions based on control and opportunity for profit.

The Department's sole justification for abandoning a worker's independent control and opportunity for profit as the lodestars of independent contractor classification is the assertion that emphasizing these commonsense considerations is inconsistent with judicial precedent. This assertion is arbitrary and capricious because no precedent prohibits focusing on control and opportunity as the most probative factors in determining whether a worker is in business for himself as a matter of economic reality.

Even if all of these defects were not fatal, the Department's new rule would still be invalid because Acting Secretary of Labor Su lacked authority to promulgate it. She has purported to exercise the powers of the Secretary for over a year without the advice and consent of the Senate, and the President intends for her to do so indefinitely. This scheme violates the Appointments Clause. Su therefore lacks authority to exercise the Secretary's powers, including the issuance of the challenged rule.

PARTIES

1. Plaintiff Colt & Joe Trucking LLC is a family-owned business located, and with its principal place of business, in Albuquerque, New Mexico. It routinely hires owner-operator truck drivers as independent contractors to perform services. Plaintiff is a small business under the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq.

2. Defendant United States Department of Labor is the federal agency within the Executive Branch responsible for issuing the challenged rule.

3. Defendant Julie Su is the Acting Secretary of Labor, and pending nominee for the position of Secretary of Labor for over a year.

4. Defendant Jessica Looman is the Administrator of the Wage and Hour Division, an agency within the DOL that promulgated the challenged rule.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. §§ 702 and 703 and 28 U.S.C. §§ 1331, 1361, and 2201.

6. This Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, 28 U.S.C. §§ 1361 and 2201–2202, and under its inherent equitable powers.

7. Venue is proper within this district pursuant to 28 U.S.C. § 1391. Defendants are United States agencies or officials sued in their official capacities. Plaintiff has its principal place of business in this judicial district and substantial parts of the events or omissions giving rise to the Complaint occurred within this district.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

8. The FLSA requires covered employers to pay non-exempt employees a minimum hourly wage and overtime pay. *See* 29 U.S.C. §§ 206, 207. Employers who fail to comply with these requirements are subject to criminal penalties and civil liability. *See id.* §§ 215−216.

9. The FLSA is enforced by the Department's Wage and Hour Division. *Id.* § 204. It also provides a private right of action that allows employees to files suit against their employers. *Id.* § 216(b).

10. FLSA's wage and hour requirements apply only to employees as defined by the Act. They do not apply to individuals who are hired to perform work as independent contractors..

11. The Act's definition for "employee," however, is "circular" and "unhelpful." *See Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021). It defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The term "employer" is likewise defined circularly to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" *Id.* § 203(d). Finally, "employ" is unhelpfully defined to "include[] to suffer or permit to work." *Id.* § 203(g).

12. Other statutory schemes, including the Migrant and Seasonable Agriculture Worker Protection Act and the Family Medical Leave Act, incorporate by reference FLSA's circular and unhelpful definitions for employment. *See* 29 U.S.C. §§ 1802(5), 2611(3). They also authorize the Secretary of Labor to promulgate regulations to define vague terms like "employee." *See Id.* §§ 1861, 2654.

13. The traditional common law rule dividing employees from independent contractors

was based on a "control test," under which an employee is "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Restatement (Second) of Agency § 220 (Am. Law Inst. 1958). The FLSA's definitions concerning employment would have been well understood if they were based on this common-law understanding.

14. The Supreme Court, however, has said that the Act's purpose is "correction of economic evils . . . which were unknown at common law" and based on that purpose, the Court interpreted the Act's definitions concerning employment to be broader than the common law agency relationship in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). But the Court did not say how much broader. Instead, it said the scope of FLSA employment should be based on "underlying economic realities." *Id.*

15. In *United States v. Silk*, 331 U.S. 704, 713 (1947), which considered the scope of employment under the Social Security Act, the Court likewise said the SSA's then definition of employee "included workers who were such as a matter of economic reality." It suggested five guiding factors, such that the "Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision." *Id.* at 716.

16. *Rutherford* said that *Silk*'s approach was "persuasive in the consideration of a similar coverage under the [FLSA]." 331 U.S. at 723. In addition to the *Silk* factors, *Rutherford* found it relevant that the butcher in that case "work[ed] as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment." *Id*. at 729. The Court emphasized that "the determination of the relationship does

not depend on such isolated factors but rather upon the circumstances of the whole activity." *Id.* at 730.

17. With circular statutory definitions and unhelpful Supreme Court guidance to consider "the circumstances of the whole activity" based on "economic realities"—as opposed to falsities—businesses who wished to hire independent contractors had to rely on 70-plus years of tangled, case-by-case adjudications from lower courts to determine whether a worker would be covered by the FLSA. Court decisions from this era generally applied an "economic realities" test, which examined a non-exhaustive list of five to seven factors in an open-ended balancing inquiry.

18. "In applying this test, the courts generally focus on five factors [from *Silk*]: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work." *Doty v. Elias*, 733 F.2d 720, 722–23 (10th Cir. 1984) (collecting cases). "An additional commonly considered factor is the extent to which the work is an integral part of the alleged employer's business." *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir.1989) (collecting cases).[1] This last, "integral part" factor is based on the consideration in *Rutherford*, 331 U.S. at 729, of whether workers are "part of the integrated unit of production." Of course, the meaning of *integral—i.e.*, important—is different from that of *integrated—i.e.*, functioning a whole—even if the two words bear cosmetic resemblance.

[1] There is considerable variation among the circuits. For example, the Second Circuit analyzes opportunity for profit or loss and investment (the second and third factors listed above) together as one factor. *See, e.g.*, *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988). The Fifth Circuit has not adopted the sixth "integral part" factor listed above. *See, e.g.*, *Usery v. Pilgrim Equip. Co.*, 527 F.2d at 1308, 1311 (5th Cir. 1976).

19. The application of judge-made multi-factor balancing tests led to inconsistent results across and even within circuits, making it impossible for businesses to know how to classify workers they hire. *Compare, e.g.*, *Cromwell v. Driftwood Elec. Contractors, Inc*., 348 F. App'x 57 (5th Cir. 2009) (cable splicers hired by Bellsouth to perform post-Hurricane Katrina repairs were employees), *with Thibault v. BellSouth Telecomm.*, 612 F.3d 843 (5th Cir. 2010) (cable splicer hired by same company to perform the same work was an independent contractor); *compare also Carrell v. Sunland Constr., Inc.,* 998 F.2d 330, 334 (5th Cir. 1993) (rig welders hired by natural gas pipeline construction company were independent contractors) *with Baker v. Flint Eng'g & Constr. Co*., 137 F.3d 1436, 1443 (10th Cir. 1998) (rig welders hired by natural gas pipeline construction company were employees).

20. To give direction to an otherwise roving multifactor balancing test, the Tenth Circuit focuses the analysis on "whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself." *Doty*, 733 F.2d 722-23 (cleaned up). Thus, the "final step is to review the finding on each of the [*Silk*] factors and determine whether [workers], as a matter of economic fact, depend upon [the putative employers'] business for the opportunity to render service, or are in business for themselves." *Baker*, 137 F.3d at 1443. This final analysis into whether workers are "in business for themselves" focuses on two core inquiries.

21. The first core inquiry considers whether workers are "free to exercise their judgment in completing their work." *Id.* Even workers who are "highly skilled" are not independent contractors if "they are not free to exercise those skills in any independent manner" and are instead "specifically told when and where to [work] and have no authority to override those

decisions." *Id*.; *see also id*. at 1444 ("Although plaintiffs are the most skilled workers on the job site, they are not asked to exercise their discretion in applying their skills; they are told what to do and when to do it."). This first core inquiry corresponds to the first *Silk* factor, the "degree of control," with the analysis taking place from the workers' perspective instead of the putative employer's perspective.

22. The second core inquiry considers whether the putative "independent contractor has the ability to make a profit or sustain a loss due to the ability to bid on projects . . . and to complete projects as it sees fit." *Id.* This second core inquiry corresponds to the second *Silk* factor, "opportunity for profit or loss."

23. Together, the two core inquiries in *Baker* focused on the first factors in *Silk* to create a simple and commonsense test for determining whether workers are in business for themselves: do they have an opportunity for profit (or a risk of loss) based on their ability to exercise independent judgment and control?

24. Some other courts have adopted similar methods to focus the otherwise indeterminate multi-factor balancing test based on the *Silk* factors. The Second Circuit, for instance, referenced the *Silk* factors but "caution[ed] against their 'mechanical application.'" *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 140 (2d Cir. 2017). Instead of factor-by-factor analysis, the Second Circuit considered whether workers were "in business for themselves" by analyzing their contractual arrangements, entrepreneurial opportunities, investment and return, and work flexibility. *Id.* at 140–48. Like the Tenth Circuit's "final analysis," the Second Circuit's *Saleem* decision focused on whether workers control the work and have an opportunity for profit. Other *Silk* factors, such as skill, permanence, and whether workers were "integral" were listed in

a footnote but not analyzed because their probative value was limited. *Id.* at 139 n.19.

II. THE PRIOR 2021 RULE

25. Until 2021, the Department's Wage and Hour Division, charged with enforcing the FLSA, issued only intermittent case-by-case opinion letters, fact sheets, and other informal guidance on this issue, exacerbating an already confusing situation for businesses like Plaintiff who hire independent contractors.

26. To provide clarity for workers and businesses, in January 2021, the Department finalized a legislative rule after notice and comment, entitled *Independent Contractor Status Under the Fair Labor Standards Act*. 86 Fed. Reg. 1168 (Jan. 7, 2021) (2021 Rule); *see also Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *6 (E.D. Tex. Mar. 14, 2022) (recognizing that "the [2021] Independent Contractor Rule is a legislative rule and was promulgated using the notice-and-comment procedure.").

27. This rule was the first formal rulemaking that DOL undertook on the scope of the employment relationship under the FLSA.

28. The preamble to the 2021 Rule thoroughly analyzed the confusion around the FLSA's application to worker classifications, focusing on the longstanding economic reality test under the Act. That Rule clarified the relevant classification factors to reflect contemporary business arrangements.

29. The 2021 Rule set forth a formal interpretation of the *Silk* standards, following established legal precedent to provide clarity to employers regarding the distinction between employees and independent contractors.

30. The 2021 Rule identified five factors for evaluating whether an individual is an

employee or independent contractor under the FLSA. Of these, it designed two "core factors" that are "most probative": (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. 86 Fed. Reg. 1246-47. These two core factors correspond to the first two *Silk* factors. They also correspond to the two core inquiries that the Tenth Circuit has focused on to answer the ultimate question of whether workers are "in business for themselves." *Baker*, 137 F.3d at 1443-44.

31. The 2021 Rule specified that the other three factors—the amount of skill required for the work; the degree of permanence of the working relationship between the individual and the potential employer; and whether the work is part of an integrated unit of production—were "less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors." 86 Fed. Reg. at 1246.

32. The Department's determination that "control" over work performance and the opportunity for profit or loss are the most probative of classification was based on a thorough review of caselaw. *See* 86 Fed. Reg. at 1196-1203. The Department reviewed appellate cases since 1975 and found that:

> [W]henever the control factor and the opportunity factor both pointed towards the same classification—whether employee or independent contractor—that was the worker's ultimate classification. Put another way: In those cases where the control factor and opportunity factor aligned, had the courts hypothetically limited their analysis to just those two factors, it appears to the Department that the overall results would have been the same.

Id. at 1198. No commenter identified an exception to this claim. *Id.*

33. The 2021 Rule thus focused on the worker's control over the work and his or her

opportunity for profit based on the exercise of that control as core factors. If the control and opportunity factors give a clear answer, that is the end of the analysis. If the two key two factors point in disparate directions, then it would consider the three additional factors: the amount of skill required for the work; the degree of permanence of the working relationship; and whether the work is part of an integrated unit of production.[2] These correspond to the remaining *Silk* factor and to the considering in *Rutherford* of whether workers are part of an integrated unit.

34. The 2021 Rule also clarified that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible." *Id.* at 1247. The Department explained that "unexercised powers, rights, and freedoms are not irrelevant," but "are merely *less* relevant than powers, rights, and freedoms which are actually exercised," because "[a]ffording equal relevance to reserved control and control that is actually exercised . . . would ignore the Supreme Court's command to focus on the 'reality' of the work arrangement." *Id.* at 1204 (quoting *Silk*, 331 U.S. at 713).

35. The 2021 Rule provided clarity for stakeholders to create bona fide independent contractor relationships. 86 Fed. Reg. at 1207.

36. The 2021 Rule economic analysis of the costs and benefits determined that businesses would benefit from the "improved clarity" provided by the 2021 Rule, which would "increase the efficiency of the labor market, allowing businesses to be more productive and

[2] The 2021 Rule also announced that the Department would "consider investment as part of the opportunity [for profit or loss] factor." 86 Fed. Reg. at 1186. Although some lower courts had considered investment as a separate factor, distinct from the opportunity for profit or loss, the Department determined that merging those factors best served the goal of creating a "clear and non-duplicative analysis for determining employee versus independent contractor status" and to avoid "unnecessary and duplicative analysis of the same facts under two factors." *Id.*

decreasing their litigation burden." *Id.* at 1209. And workers would benefit because of reduced compliance costs, decreased misclassification, increased creation of independent contractor jobs, and likely conversion of some existing positions from employee to independent contractor status. *Id.* at 1209–10. The Department therefore concluded that the 2021 Rule would "improve the welfare of both workers and businesses." *Id.* at 1209.

37. This economic analysis is supported by comments received. Not only did business interests support the 2021 Rule, but the vast majority of commenters who identified themselves as independent contractors supported it. *Id.* at 1171.

38. In 2021 DOL published proposals to delay and withdraw the 2021 Rule, attributing its decisions to concerns about the rule's consistency with the FLSA and its potential impact on workers and businesses. *See* 86 Fed. Reg. 12,535 (Mar. 4, 2021); 86 Fed. Reg. 24,303 (May 6, 2021).

39. In March 2022, the Eastern District of Texas ruled that DOL's delay and withdrawal of the legislative 2021 Rule violated mandatory procedures, thereby reinstating that rule. *See Coal. for Workforce Innovation*, 2022 WL 1073346, at *3, 6.

40. Plaintiff and countless other businesses relied on the 2021 Rule's emphasis on a worker's control and opportunity for profit to conform their business practice when hiring independent contractors.

III. THE CHALLENGED 2024 RULE

41. On October 13, 2022, DOL announced a rulemaking to replace the 2021 Rule. 87 Fed. Reg. 62,218. This rule was finalized on January 10, 2024, and went into effect on March 11, 2024. *See* 89 Fed. Reg. 1638 ("2024 Rule").

42. The 2024 Rule eliminates the "core factors," thus denying that control over the work and opportunity for profit are more important than other consideration in determining whether workers are employees or in business themselves. DOL insisted that focusing on control and opportunity improperly "predetermines" the analysis, and that the *Silk* factors under an economic reality test must be entirely unweighted as a matter of law.

43. The 2024 Rule adopts a new multi-factor balancing test. 89 Fed. Reg. at 1742 (29 C.F.R. § 795.110). These factors include "opportunity for profit or loss depending on managerial skill"; "investments by the worker and the potential 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." *Id.*[3] The 2024 Rule also includes a seventh, catch-all factor, stating that "[a]dditional factors may be relevant . . . if the factors in some way indicate whether the worker is in business for themsel[ves]." *Id.*

44. The Department offered two reasons for the 2024 Rule. It asserted that the 2021 Rule "depart[ed] from case law" and that the new standard would "reduce[] confusion." 89 Fed. Reg. at 1639, 1647.

45. The preamble of the 2024 Rule insists that, as a matter of law, no individual *Silk* factor can be more probative than any other, and instead they must be balanced along with any other relevant considerations based on the totality of circumstances. *See, e.g.*, 89 Fed. Reg. at 1675, 1678, 1685. However, the Department provides no guidance regarding how the actual balancing

[3] These are the traditional *Silk* factors plus the "integral part" factor that some courts consider, except that the Department changed the order in which the factors are listed so "control" and "opportunity for profit" are no longer listed first, as they had been in *Silk* and subsequence cases applying the *Silk* factors.

takes place, instead insisting that recognizing some factors to be more probative than others would unlawfully predetermine the analysis. *See, e.g.*, *id.* at 1670.

46. The result is an indeterminate rule which embraces a multiplicity of factors and deliberately refuses to state what is important to the inquiry. The 2024 Rule, although it purports to be providing "consistent guidance," gives stakeholders no useful information whatsoever about how to structure their relationships. Stakeholders are effectively being told that anything about their business could be relevant, and the Department or a court are the only ones who can properly weigh the factors after the fact.

47. The Department relied on the FLSA's purported "remedial" purpose to justify replacing the 2021 Rule with the 2024 Rule. 89 Fed. Reg. 1668 n. 221.

48. The Department's conclusion that no factors may be emphasized, and the test must be a limitless, black box inquiry, is based on pure legal reasoning that the FLSA mandates an indeterminate approach, and that the 2021 Rule was impermissible as a matter of law. As the Department claimed in the preamble to the notice of proposed rulemaking (NPRM): "Regardless of the rationale for elevating two factors, there is no legal support for doing so." 87 Fed. Reg. at 62,226; *see also* 89 Fed. Reg. at 1650 ("[T]he Department continues to believe that the 2021 IC Rule was in tension with the Act, judicial precedent, and congressional intent. As the Department explained in the NPRM, there is no statutory basis for such a predetermined weighting of the factors . . . .").

49. The Department concluded that the 2024 Rule would benefit workers who had been classified as independent contractors under the 2021 Rule. 89 Fed. Reg. at 1737. However, it acknowledged that "most commenters who identified as independent contractors, . . . and

commenters affiliated with those constituencies generally expressed opposition to the NPRM, criticizing the Department's proposed economic reality test as ambiguous and biased against independent contracting." 89 Fed. Reg. 1646. In other words, the very workers whom the Department purports to help believe the 2024 Rule hurts them.

50. While the 2021 Rule was a forward-looking legislative rule that affected individuals' rights and obligations, the Department issued the 2024 Rule as an interpretive rule. *See id.* at 1741-42 (29 C.F.R. § 795.100) (citing *Skidmore v. Swift*, 313 U.S. 134, 138 (1944)).

51. An interpretive rule is backwards looking and sets forth the Department's view of what the FLSA has always required, including during the time that the 2021 Rule was in effect. Thus, a business that relied on the 2021 Rule to classify workers who controlled the work and had an opportunity for profit as independent contractors could be retroactively liable in a DOL enforcement action or private suit under the 2024 Rule, which makes clear that control and opportunity are not sufficient to classify a worker as an independent contractor instead of an employee.

IV. EFFECT ON PLAINTIFF

52. Plaintiff is a family-owned trucking company based in Albuquerque, New Mexico. It has twelve employees, including eight drivers. It also currently has arrangements with four independent owner-operators to transport cargo.

53. Plaintiff is an employer subject to the FLSA, the 2021 Rule, and now the 2024 Rule.

54. Plaintiff routinely contracts with independent drivers who own and operate their own trucks, decide which loads to carry or not, and who are paid a flat percentage of the shipping fee for a given load, plus reimbursable expenses such as fuel which are passed on to the client.

55. Plaintiff's use of independent owner-operators is beneficial to both Plaintiff, who is able to operate more efficiently and reduce excess costs, and to Plaintiff's contractors, who assume more responsibility for their own business operations and gain autonomy and the opportunity to derive greater profit from their work.

56. The owner-operator drivers with whom Plaintiff contracts exercise independent judgment and control over the work, including whether to take an assignment, what kind of vehicle to drive, and whether to work for other companies. They also have an opportunity to earn profits through the exercise of such independent judgment and control. As such, they are easily classified as independent contractors under the 2021 Rule.

57. However, the 2024 Rule makes clear that owner-operator drivers cannot be classified as independent contractors based solely on their independent control and opportunity for profit. Rather, Plaintiff must, for each owner-operator driver it hires, also analyze the driver's skill, permanency of the relationship, investment compared to Plaintiff, whether the driver's work is an "integral part" of Plaintiff's business, and any "[a]dditional factors [that] may be relevant." 89 Fed. Reg. at 1743. Plaintiff must make classification decisions based on quite literally all factors that may be relevant under the totality of circumstance without knowing how the Department (or a court) would weigh those factors or even which non-listed factors are relevant. It must sort through decades of case law and indecipherable guidance instead of asking a simple, commonsensical question: do owner-operator drivers have an opportunity for profit based on their ability to exercise independent judgment and control over the work?

58. The 2024 Rule upends Plaintiff's business operations, increasing costs, increasing potential liability, depriving truckers of the opportunity to operate independently within their own

business, and potentially driving many of the contractors Plaintiff relies on out of business, or into different lines of business than Plaintiff's, depriving Plaintiff of needed manpower to deliver cargo. In short, the 2024 Rule has caused and will continue to cause harm to Plaintiff.

V. ACTING SECRETARY'S LACK OF AUTHORITY

59. The Secretary of Labor is an officer of the United States. As such, he or she may be appointed only with the advice and consent of the Senate.

60. In March 2023, then-Secretary of Labor Marty Walsh resigned. In his place, President Joe Biden nominated Deputy Secretary of Labor Julie Su.

61. The Senate held initial hearings on Su's nomination. The Senate did not, however, vote to confirm or reject her. Su's nomination expired with the end of Congress's 2023 session. The administration failed to put forward a different, more acceptable candidate; it instead renominated Su in January 2024. It did so despite public opposition from senators of both parties and a consensus that Su did not have sufficient support to be confirmed. *See* Letter from Sen. Bill Cassidy, Ranking Member, to Sen. Bernie Sanders, Chair, U.S. Senate Comm. on Health, Education, Labor, and Pensions (Feb. 13, 2024) (Cassidy Letter to Sanders) (observing that both Democratic and Republican senators opposed Su's nomination and raising concerns that her renomination was an attempt to circumvent the constitutionally required advice-and-consent process). She was not confirmed in large part because of her desire to limit opportunities for independent contractors. *Ranking Member Cassidy's Floor Speech on Julie Su's Stalled Nomination, Calls on Biden to Withdraw* (Sep. 5, 2023) ("As Acting and Deputy Secretary of Labor, Ms. Su would oversee the Biden administration's new regulation that would strip 21 million individuals of their ability to be independent contractors and to enjoy the flexibility this

provides.");[4] *see also* Burgess Everett, et al., *Machin Opposes Julie Su for Labor Secretary, Jeopardizing Nomination,* Politico (July 13, 2023) ("But Su has faced a barrage of criticism for . . . her policy positions on hot-button subjects like rules governing independent contractors and franchise businesses."); Owen Tucker-Smith, *With Key Democratic Senators Undecided, Julie Su's bid for Labor Secretary Languishes*, LA Times (June 14, 2023) (Objectors to her nomination have "tied her to Assembly Bill 5, a California law that requires companies to classify most workers as employees, not independent contractors. They argue that, if confirmed, Su would advance similar policies on a national level[.]").

62. Since then, Su has continued to act as the Secretary of Labor. She has now served for over a year without being confirmed—the longest such period of any nominee from a president whose party holds a majority in the Senate. And in the meantime, she has purported to exercise all the powers of that office, including the power to direct subordinate civil servants in the Department of Labor. In particular, the 2024 Rule was issued while she purported to lead the Department and wield the Secretary's powers.

63. It is clear that Su will not receive the Senate's consent. She has acted as the Secretary for over a year without receiving a vote. And public reports have confirmed that key senators will not vote to confirm her. As a result, leading senators have called on the President to withdraw her nomination and submit an acceptable candidate. *See* Letter from Sen. Bill Cassidy

[4] Available at: https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-delivers-floor-speech-on-julie-sus-stalled-nomination-calls-on-biden-to-withdraw (last visited Apr. 16, 2024).

to President Joseph Biden (July 19, 2023)[5] (Cassidy Letter to Biden); Cassidy Letter to Sanders, *supra*.

64. The President has refused to do so. Instead, he allows Su to run the Department without the Senate's consent. He has no intent to submit a new, acceptable nominee. He intends to circumvent the advice-and-consent requirement by leaving Su in office indefinitely. *See* Cassidy Letter to Biden. ("White House officials have communicated to the press that your administration does not have the votes in the Senate to confirm Julie Su's nomination."); *see also* Sahil Kapur and Liz Brown-Kaiser, *Biden to Keep Julie Su on Indefinitely as Labor Chief Despite Lack of Senate Votes*, NBC News, July 21, 2023 ("The White House plans to use a little-known law to keep acting Labor Secretary Julie Su in the job even if she fails to win Senate approval, a White House official told NBC News.").

65. The Department has relied on 29 U.S.C. § 552, which defines the duties of the Deputy Secretary of Labor, as the basis for her indefinite Acting status. Among those duties is to serve as the acting Secretary of Labor during vacancies resulting from "death, resignation, or removal from office."

66. That statute, however, allows the Deputy Secretary to exercise the Secretary's powers only on a temporary basis. It does not purport to allow the Deputy Secretary to serve as Acting Secretary indefinitely with no good-faith effort to fill the position with a permanent nominee whom the Senate would confirm.

67. Because Su has not received the consent of the Senate, she has not been confirmed

[5] Available at: https://www.help.senate.gov/imo/media/doc/julie_su_nomination_letter1.pdf (last visited Apr. 23, 2024).

as the Secretary of Labor. She cannot continue to exercise the powers of that office indefinitely. She cannot continue to direct the Department's functions, including its regulatory functions. She has no constitutional authority to continue leading the Department. And because she lacks constitutional authority, she cannot license, direct, or approve the 2024 Rule.

CLAIMS FOR RELIEF

Count One
Arbitrary and Capricious

68. Plaintiff incorporates the preceding paragraphs by reference.

69. Courts must set aside agency action that is "arbitrary, capricious, an abuse of direction, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

70. An agency violates the APA when it fails to provide "good reasons" for changing positions, including when rescinding rules and reversing policies. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Where, as here, an agency "chang[es] position," it must "show that there are good reasons for the new policy" and "provide a more detailed justification than what would suffice for a new policy." 556 U.S. at 515.

71. The Department fails to provide good reasons for the 2024 Rule because it does not "reduce[] confusion," as the Department claims. 89 Fed. Reg. 1647. Rather, it exacerbates the confusion concerning the classification of workers as employees or independent contractors.

72. Where an agency makes a rule based on its mistaken view of the law, the agency action must be set aside. *Id*.

73. The 2024 Rule must be set aside because it is based on Department's mistaken view that the 2021 Rule's emphasis on the two core factors—a worker's control and opportunity for

profit—is somehow inconsistent with the FLSA and the Supreme Court's approach based on "economic reality."

74. For reasons explained by the Department in the 2021 Rule, the use of core factors to evaluate the scope of the FLSA is entirely consistent with the FLSA and the Supreme Court's approach.

75. Indeed, the Tenth Circuit's precedent emphasizes whether workers are "free to exercise their judgment in completing their work" and have "the ability to make a profit or sustain a loss" based on that judgment to answer the ultimate question of whether they are "in business for themselves." *Baker*, 137 F.3d at 1443–44. Other courts have likewise focused on workers' control and opportunity for profit to the exclusion of other, less probative factors. *See Saleem*, 854 F.3d 139–48.

76. It is arbitrary and capricious for an agency to purposefully obscure the regulatory standard to prevent a regulated entity from knowing what it must do to conform to the law.

77. The 2024 Rule is also arbitrary and capricious because it negates regulatory clarity brought about by the 2021 Rule.

78. An agency that replaces a prior regulation with a new regulation is arbitrary and capricious if it fails to consider the reliance interest on the prior regulation.

79. The Department failed to consider the reliance interest that businesses like Plaintiff had in the clear standard provided by the 2021 Rule before replacing it with the 2024 Rule.

80. The 2024 Rule is arbitrary and capricious and therefore must be set aside.

Count Two
Excess of Statutory Authority

81. Plaintiff incorporates the preceding paragraphs by reference.

82. Courts must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right." 5 U.S.C. § 706(2)(C).

83. Congress did not intend to classify workers who exercise independent control over their work and have an opportunity for profit based on the exercise of that control as employees under the FLSA.

84. The 2024 Rule is not supported by the FLSA because it allows workers who exercise independent control over their work and who have an opportunity to profit from the exercise of such control to be classified as employees under the Act.

85. Congress did not—and could not—intend the definition of employee under the FLSA to be amorphous and indeterminable.

86. The 2024 Rule is not supported by the FLSA because it defines "employee" under Act in an amorphous and indeterminable manner.

87. The 2024 Rule impermissibly relied on the proposed "remedial" purpose of the FLSA. 89 Fed. Reg. 1668 n.221. This was clear error because the Supreme Court has rejected the FLSA's "remedial" purpose as an interpretive principle. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

88. The 2024 Rule reframes each of the *Silk* factors to expand the scope of FLSA employment beyond the Supreme Court's interpretation of that statute.

89. The 2024 Rule's interpretation of "employee" under the FLSA is broader than and

inconsistent with the original meaning of the statute as intended by Congress and as interpreted by the Supreme Court.

90. The 2024 Rule exceeds DOL's statutory authority and therefore must be set aside.

Count Three
Violation of the Constitution, Due Process Clause

91. Plaintiff incorporates the preceding paragraphs by reference.

92. The Due Process Clause of the Fifth Amendment prohibits the imposition of penalties for violation of the law when the law does not specify what conduct is punishable.

93. The FLSA carries serious penalties for violations of its minimum wage and maximum hour requirements, up to and including criminal penalties. 29 U.S.C. §§ 215–16.

94. To understand whether its conduct is lawful or not under the FLSA, a regulated employer must be able to determine whether an individual he hires to perform a service is an employee under the Act or an independent contractor who is not subject to the Act's requirements.

95. However, the FLSA's definition of "employee" is vague, circular, and fails to specify what conduct is punishable unless the Department provides a clearer definition through regulatory power delegated to it by Congress. Nor does the common law define the scope of employment under the Act. *Rutherford*, 331 U.S. at 728.

96. If the statute does not delegate such power to the Department, then the FLSA itself is void for vagueness.

97. If it does delegate such power, then the Department's regulation must specify the contours of employment under the Act such that businesses can understand what practices are subject to punishment.

98. The 2024 Rule fails to specify what conduct is punishable by failing to provide meaningful guidance regarding which workers are employees versus independent contractors under the FLSA.

99. The Due Process Clause is also violated by the retroactive expansion of liability. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964).

100. The 2024 Rule replaces the legislative 2021 Rule with an interpretive rule having retroactive impact.

101. Businesses, including Plaintiff, relied on the 2021 Rule to classify workers who controlled their work and had an opportunity for profit as independent contractors. The 2024 Rule provides that control and opportunity for profit have *never* been sufficient to classify workers as independent contractors, even before the 2024 Rule came into effect, because it is a backwards-looking interpretive rule.

102. Thus, businesses that relied on the 2021 Rule to make classification decision in 2022 and 2023 based on the control and opportunity factors may be retroactively liable in an enforcement action brought by the Department or in private action brought by workers whom they classified as independent contractors in accordance with the 2021 Rule.

103. Such imposition of retroactive liability violates the due process of law. *Bouie*, 378 U.S. at 352–53.

104. The 2024 Rule violates the Constitution's prohibition against vague and retroactive punitive laws and is therefore invalid.

Count Four
Violation of the Constitution, Appointments Clause

105. Plaintiff incorporates the preceding paragraphs by reference.

106. Article II of the U.S. Constitution empowers the President to appoint "Officers of the United States." This power is significant, as officers wield significant governmental power. Among other things, they lead federal agencies, develop national policy, and direct federal civil servants. The founders therefore placed strict limits on the appointment power. Most important, they required the President to obtain the advice and consent of the U.S. Senate. See U.S. Const. art. II § 2.

107. The advice-and-consent requirement acts as a check on presidential favoritism. It also prevents the President from appointing unfit candidates. And it lends stability and predictability to the administration of government. It is not a mere formality; it is a foundational pillar in the Constitution's scheme for protecting private liberty. See The Federalist No. 76 (A. Hamilton); *Bullock v. BLM*, 489 F. Supp. 3d 1112, 1124 (D. Mont. 2020).

108. Courts must reject efforts to circumvent the advice-and-consent requirement. They have allowed the President to appoint "acting" officials only under procedures authorized by Congress itself—and even then, only temporarily. They have refused to allow the President to appoint acting officials outside of approved channels. And they have never allowed the President to circumvent the requirement by appointing such acting officials indefinitely. See *Bullock*, 489 F. Supp. 3d at 1126.

109. The Secretary of Labor is an officer of the United States. As such, he or she may be appointed only with the advice and consent of the Senate. Julie Su has purported to wield the

powers of the Secretary since March 2023, when then-Secretary Walsh resigned.

110. The President nominated Su to be Secretary on February 28, 2023, but the Senate has refused to confirm her. Instead of nominating someone the Senate might approve, he renominated her in January 2024 despite it being clear that she will not receive the Senate's consent.

111. The President intends to allow Su to run the Department indefinitely as Acting Secretary without the Senate's consent. This scheme violates the Appointments Clause by circumventing the advice-and-consent process. If allowed, it would license the President to appoint officers with no external check. The President could choose acting officers—who would wield all the powers of confirmed officers—and simply leave them in place for the duration of the administration, renominating them periodically. Such artifice threatens individual liberty and mocks the Constitution's design. *See Bullock*, 489 F. Supp. 3d at 1126 ("The President cannot shelter unconstitutional 'temporary' appointments for the duration of his presidency through a matryoshka doll of delegated authorities.").

112. Since Su's nomination, the Department has relied on 29 U.S.C. § 552, which defines the duties of the Deputy Secretary of Labor. Among those duties is to serve as the acting Secretary during vacancies resulting from "death, resignation, or removal from office." That statute, however, allows the Deputy Secretary to exercise the Secretary's powers only on a temporary basis. It does not purport to allow the Deputy Secretary to serve as Secretary indefinitely with no good-faith effort to fill the position with a permanent replacement.

113. Nor, indeed, could the statute authorize such a scheme. If the statute licensed such behavior, it would have effectively created a new appointment mechanism—an appointment by

default. Such an appointment is alien to the Constitution, which allows indefinite appointments only by advice and consent. Congress could not license the administration to dispense with advice and consent any more than it could license the administration to write its own budget. The Senate may not waive its duty to provide advice and consent. *Cf. Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (holding that Congress could not license the president to veto individual line items of a budget bill because Congress, not the president, was responsible for authorizing federal appropriations).

114. Because Su has not received the Senate's consent, she has not been confirmed as the Secretary of Labor. She cannot continue to exercise the powers of that office indefinitely. She cannot continue to direct the Department's functions, including its regulatory functions. She has no constitutional authority to continue leading the Department. And because she lacks constitutional authority, she cannot license, direct, or approve binding rules on the Department's behalf.

115. The 2024 Rule was issued under Su's purported authority. Because she has no such authority, it is invalid. *See Bullock*, 489 F. Supp. 3d at 1130 (granting declaratory and injunctive relief against agency actions taken under acting official improperly put in office without the advice and consent of the Senate).

116. Because the 2024 Rule was issued without valid authority, it is void in its entirety. Its provisions are not severable because they all suffer the same constitutional infirmity. They should be set aside in their entirety. See 5 U.S.C. § 706(2)(B) (requiring a court to set aside final agency action that violates the Constitution); *Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021) (vacating entire rule issued under purported authority of acting secretary not

properly appointed in accordance with Federal Vacancies Reform Act).

Count Five
Violation of the Regulatory Flexibility Act

117. Plaintiff incorporates the preceding paragraphs by reference.

118. The Regulatory Flexibility Act requires agencies issuing rules under the Administrative Procedure Act to publish a regulatory flexibility analysis assessing the negative impact of the rule on small businesses and to consider less burdensome alternatives. The agency must respond to "any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule." 5 U.S.C. § 604(a)(3).

119. The Department violated the RFA and APA by failing to consider important and obvious costs, including, among others, loss of independent contractors in the workforce, increased litigation costs due to a standardless test, recordkeeping requirements under the FLSA, increased safety and health hazards due to incentivizing businesses to not oversee their contractors' compliance with safety and health standards.

120. SBA's Office of Advocacy's submitted a comment letter in response to the 2022 NPRM expressing concern that "DOL's Initial Regulatory Flexibility Analysis is deficient for this rule," and providing a list of reasons. Comment Letter of SBA Office of Advocacy (Dec. 12, 2022).[6] The letter concluded that DOL "severely underestimates the economic impacts of this rule to small businesses and independent contractors," that it "may be detrimental and disruptive to millions of small businesses that rely upon independent contractors as part of their workforce,"

[6] Available at, https://advocacy.sba.gov/wp-content/uploads/2022/12/Comment-Letter-DOL-Independent-Contractor-508c.pdf (last visited Apr. 23, 2024).

and that it also may cause independent contractors to "lose work," and therefore urged DOL to reconsider the proposed rule.

121. The 2024 Rule acknowledged SBA's concerns but failed to respond in a good-faith, meaningful manner as required by 5 U.S.C. § 604(a)(3). *See* 89 Fed. Reg. 1739.

122. The Department's failure to adequately consider costs also violates the APA. *Allied Loc. & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000) (a court "may consider" Regulatory Flexibility Act requirements "in determining whether [the agency] complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious").

123. By failing to properly consider costs and benefits, the 2024 Rule violates the RFA and the APA. The Rule is therefore arbitrary, capricious, not in accordance with the law, and should be set aside.

RELIEF REQUESTED

Plaintiff respectfully requests that the Court grant it relief as follows:

A. Enjoin Defendants from enforcing the 2024 Rule, pursuant to 5 U.S.C. § 705;

B. Declare the 2024 Rule unlawful and set it aside, pursuant to 5 U.S.C. § 706(2) and 28 U.S.C. § 2202;

C. Award attorneys' fees and costs to Plaintiff as a prevailing party, pursuant to 28 U.S.C. § 2412; and

D. Award Plaintiff any additional relief that the Court deems just, proper, or equitable.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

April 25, 2024.

Respectfully submitted,

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