NO. 20-11179

IN THE 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 U.S. District Court
for the Northern District of Texas
Civil Action No. 4:19-cv-00800-O

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal stems from an agency opinion addressing the legal implications of certain undisputed facts. Although the issues are narrow and the overarching framework is well-established, this Court has yet to address some of the contentions that the Department of Labor has raised. As a result, Plaintiffs-Appellees Data Marketing Partnership, L.P. and L.P. Management Services, L.L.C. maintain that oral argument could be helpful to the Court's decisional process. FED. R. APP. P. 34(a).

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Statutes

Page(s)

Rules

Regulations and Regulatory Opinions

Page(s)

Other Authorities

INTRODUCTION

Today's gig economy has spawned novel businesses that capitalize on acquiring and selling information. One of the most profitable types of information is personal internet usage data. Companies have earned billions of dollars acquiring and selling that data to third-parties that wish to target consumers with advertising tailored to their interests. Until recently, individuals who generate that valuable data had no means to utilize that data for their own gain. That is where Data Marketing Partnership, L.P. ("DMP") comes in.

DMP, along with other, similar limited partnerships managed by the same general partner, L.P. Management Services, LLC ("LPMS"), provides individuals an opportunity to join as limited partners, take control of their internet usage data, and contribute it to the partnership for aggregation and sale. These limited partners acquire a voice in the business, including about how their data is sold or used. And because the success of DMP's business depends on its ability to acquire large amounts of data, DMP needs to attract and incentivize large numbers of limited partners. To advance that goal, DMP decided to offer a single-employer, self-funded group health plan that covers its common-law employees and is also open to all limited partners who generate at least 500 hours of data each year.

LPMS, on behalf of DMP and the other similar partnerships it manages, asked the Department of Labor for a determination that the plan is governed by the

Employee Retirement Income Security Act ("ERISA"). The Department of Labor, however, issued an Advisory Opinion concluding the opposite.

The Advisory Opinion refused to recognize the ERISA status of DMP's plan by adopting new requirements that cannot be squared with existing law. At its core, the Advisory Opinion disparages and minimizes the critical services that the limited partners provide to DMP. As the district court concluded, this approach both fails to recognize the innovative nature of DMP's business and hinges on value-laden judgments that are not for the Department of Labor to make. These and other errors bear all the hallmarks of arbitrary and capricious agency action, and they have serious ramifications for both DMP's plan and, ultimately, its business.

The district court rightly concluded that DMP's plan falls within ERISA's purview and enjoined the agency from holding otherwise. This Court should affirm.

STATEMENT OF JURISDICTION

Subject-matter jurisdiction exists. This suit involves federal questions concerning the Department of Labor's determination that the single-employer self-insured group health plan sponsored by DMP is not governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* As the district court correctly concluded—but the Department of Labor disputes, DOL.Br.4, that determination constitutes a final agency decision that is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 702, 704. ROA.883-90; *see infra* Part II. As a result, this Court has jurisdiction under 28 U.S.C. § 1331. *See, e.g.*, *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997); 29 U.S.C. § 1132(k).

Appellate jurisdiction also exists. The district court entered final judgment on September 28, 2020. ROA.904. The Department of Labor timely appealed. ROA.906-07. Jurisdiction is therefore proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the Department of Labor's Advisory Opinion is a reviewable, final agency action, when:
   a. the Advisory Opinion determined, as a matter of law, that ERISA does not govern DMP's single-employer self-insured group health plan;
   b. agency procedures provide that DMP and LPMS, which requested the Advisory Opinion, are bound by and can rely on it; and
   c. the determination affects DMP's rights or obligations and creates legal consequences by opening the floodgates to state regulation of its plan.
2. Whether the district court properly concluded that DMP's plan falls within ERISA's scope, when:
   a. the plan covers both DMP's common-law employees and its limited partners who provide services indispensable to DMP's core business of gathering and selling internet usage data to third-party marketers; and
   b. the relevant case law, regulations, and administrative decisions confirm that DMP's limited partners are self-employed individuals and working owners entitled to participate in an ERISA plan.
3. Whether the district court properly enjoined the Department of Labor from denying the plan's ERISA status, when remanding to the agency would be futile and the traditional equitable factors further support injunctive relief.

STATEMENT OF THE CASE

A. *LPMS manages limited partnerships, including DMP, whose business gives limited partners an opportunity to monetize their internet usage data together.*

LPMS serves as the general partner of DMP and other similar limited partnerships. ROA.400. Like the other LPMS-managed partnerships, DMP's business captures, aggregates, and sells electronic data to third-party marketing firms. ROA.401; ROA.448.

In today's economy, internet usage data is a valuable commodity. The average American spends nearly four hours each day using digital platforms on electronic devices. ROA.141 (citing *Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media*, Nielsen (July 31, 2018), *available at* https://www.nielsen.com/us/en/insights/article/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media/). Many companies—like Facebook and Google—profit handsomely from that data by mining consumers' internet usage and selling it to third parties. *Cf.* Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, Guardian (Mar. 30, 2018), *available at* https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy (discussing extent of mined data); ROA.618-26. The data-sales business has exploded in recent years, with annual revenue exceeding $19 billion. *U.S. Firms to Spend Nearly $19.2 Billion on Third-*

Party Audience Data & Data-Use Solutions in 2018, Up 17.5% from 2017, Interactive Advert. Bureau (Dec. 5, 2018), *available at* https://www.iab.com/news/2018-state-of-data-report/; ROA.628.

DMP differs from those mainstream businesses in several ways. Whereas traditional companies take and sell users' internet data for their own profit, DMP provides individuals an opportunity to control, share, and eventually profit from that data themselves. ROA.401. Individuals who want to participate must sign a joinder agreement to become a limited partner of DMP. ROA.400-01. Each limited partner must install certain proprietary software on electronic devices of their choosing. ROA.401. The software, in turn, tracks and captures the limited partners' internet usage data, which they provide to DMP. *See* ROA.401. DMP then aggregates the data contributed by all limited partners, which can then be marketed and sold. ROA.401. The resulting revenue is shared with limited partners through income distributions. ROA.400; *see also* ROA.399 (guaranteed payments).

Like any legitimate limited partnership—but unlike a typical company that sells consumer internet usage data—DMP ensures that every limited partner has a voice in the business. ROA.400-01. DMP's limited partners have the right to vote on global management issues. ROA.400; *see also* ROA.449. These critical issues include deciding how their aggregated data will be sold or used, as well as other

partnership matters. ROA.401. Thus, the limited partners, together with LPMS, control and operate DMP. ROA.400.

B. *DMP offers an employer health insurance plan to attract and retain personnel, including limited partners, and incentivize their contribution of data-generation services.*

To succeed, DMP's business must compile large pools of data that will attract clients seeking to utilize that data for marketing purposes. ROA.448. That need, in turn, requires attracting large numbers of limited partners. ROA.448. Indeed, DMP's viability depends on its ability to recruit and retain sufficient numbers of limited partners who can generate and provide the data that is critical to DMP's business. ROA.448. To achieve that objective, DMP decided to offer a quality, single-employer self-insured group health plan (the "Plan"). ROA.399. The Plan is intended to be an "employee welfare benefit plan" under ERISA, 29 U.S.C. § 1002(1). ROA.450.

Although DMP's limited partners are not "employees" in the traditional, common-law sense, the Supreme Court has nonetheless recognized that self-employed "working owners," including partners, are "employees" entitled to participate in an ERISA plan if that plan also covers at least one common-law employee. *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16-18, 20-21 (2004). This is because self-employed business owners wear two hats: one, as the "employer," and the other, as the "employee." *Id.* at 16. In

reaching this conclusion, the Court relied in part on a provision of the Internal Revenue Code that defines the term "employee" to include "self-employed individual[s]" who receive "net earnings" from providing "personal services" to a business that "are a material income-producing factor" to that business. 26 U.S.C. § 401(c)(1)(B), (2)(A); *see Yates*, 541 U.S. at 14 (quoting 26 U.S.C. § 401(c)(1)(A)). The Department of Labor ("DOL") has also defined the term "working owner" broadly, 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 ...." Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Advisory Opinion No. 99-04A, 1999 WL 64920, at *2 n.3 (Feb. 4, 1999) ("Opinion 99-04A"); ROA.582 n.3.

To distinguish passive partners from active limited partners, LPMS and DMP imposed a requirement that all limited partners who wish to participate in the Plan must generate and contribute at least 500 hours of usage data to DMP's business each year.[1] ROA.449; *see also* ROA.393. The Plan also covers at least one common-law employee of DMP. ROA.401. Consistent with this Court's analysis

[1] DOL incorrectly asserts that the 500-hour-per-year requirement is a condition of becoming a limited partner of DMP. DOL.Br.10-11. Instead, that requirement distinguishes active from inactive limited partners. Only active limited partners who satisfy the 500-hour threshold can participate in the Plan.

of analogous ERISA plans, DMP pays the premiums for common-law employees, and its limited partners pay their own premiums. *See House v. Am. United Life Ins. Co.*, 499 F.3d 443, 452 (5th Cir. 2007) (per curiam) (holding ERISA governed multi-class plan under which "partners paid their own premiums"); ROA.402.

The Plan includes robust safeguards to ensure its solvency and reliability. ROA.402-04. Its primary reinsurance policy covers all benefits, without limitation. ROA.402-03. That policy is backed by well-funded layers of reinsurance policies issued by entities with more than $7 billion in assets to cover risks regarding the Plan. ROA.402. The reinsurance policies must be approved by regulators and maintain sufficient reserves to cover all Plan obligations. ROA.403-04.

LPMS serves as the named fiduciary and plan administrator, although it appointed an independent fiduciary to assist with fiduciary obligations and administrative matters. *See* ROA.401. LPMS also obtained a fiduciary liability policy, in addition to the fiduciary insurance coverage that ERISA requires. ROA.402.

C. *DOL was initially receptive to the Plan, but changed course after LPMS pressed for a determination about the Plan's ERISA status.*

Before forming DMP, representatives of LPMS met with DOL in October 2018 to discuss the intended Plan. *See* ROA.206-07. The Assistant Secretary of DOL, Preston Rutledge, who also headed the Employee Benefits Security Administration, attended the meeting. ROA.207. After hearing about DMP's

structure, potential similar partnerships managed by LPMS, and the Plan itself, Mr. Rutledge explained that a request for advisory opinion was the best route to ensure DOL's approval of the Plan. ROA.207. LPMS promptly submitted a request for an advisory opinion. ROA.207.

DOL's advisory-opinion procedure for employee benefits plans resolves inquiries from individuals and organizations "as to their status under [ERISA] and as to the effect of certain acts and transactions." 41 Fed. Reg. 36,281, 36,281 (Aug. 27, 1976); *see also* ROA.552-59. An advisory opinion represents DOL's "opinion ... as to the application of one or more sections of [ERISA]" and any relevant regulations. 41 Fed. Reg. at 36,283 § 10. Whereas DOL now asserts that an advisory opinion is based on "hypothetical facts," *e.g.*, DOL.Br.11, its own rules generally prohibit issuing opinions for "hypothetical situations," 41 Fed. Reg. at 36,282 § 5.

Notably, DOL can refuse to issue an advisory opinion. *Id.* It can choose to issue a non-binding information letter—or nothing at all. *Id.* But if DOL does issue an advisory opinion, then a requesting party is entitled to rely on it, to the extent that its request "fully and accurately" states the pertinent material facts and its situation continues to conform with those facts. *Id.* at 36,283 § 10. Moreover, a party cannot withdraw its request for an advisory opinion once informed that DOL intends to issue an adverse determination. *Id*. at 36,283 § 9.

Despite inviting LPMS to initiate this advisory-opinion process, DOL later equivocated about issuing one. In particular, Mr. Rutledge told LPMS's representatives that he saw no reason for issuing an advisory opinion because ERISA already allows partners to be treated as "employees" for purposes of plan eligibility. ROA.208. He recommended that LPMS go ahead and implement the Plan instead of waiting for an advisory opinion. ROA.208. Nonetheless, LPMS revised its request to address DOL's questions and comments, culminating with the final version that it submitted in February 2019. ROA.208; *see also* ROA.399-412.

LPMS's request provided all material facts about DMP's business structure and the structure of its Plan. ROA.400-04. LPMS maintained that the Plan is governed by Title I of ERISA because the limited partners who join and contribute their internet data to DMP are self-employed working owners eligible to participate alongside DMP's common-law employees. ROA.399; ROA.404-12.

The Attorneys General of Louisiana, Arkansas, Georgia, Indiana, Nebraska, South Carolina, and Texas submitted a letter supporting LPMS's request, noting that its legal arguments were "well-reasoned and thorough." ROA.150. These Attorneys General urged DOL to provide guidance that would give "much needed direction to states assessing applicability of their own insurance regulations in similar circumstances." ROA.150. They further explained that "[a]n [advisory opinion] confirming the validity of the structure described in [LPMS's] request would add

much-needed health coverage options" for more than fifteen million uninsured or underinsured Americans who are self-employed or work for small businesses and earn too much to qualify for health-insurance subsidies. ROA.150-51.

A few weeks later, DOL's chief of staff, Nicholas Geale, met with LPMS. ROA.208. He told LPMS that, although the LPMS structure was "ingenious" and that he "wished he'd thought of it," DOL could not respond to the request for advisory opinion because of potential conflicts with ongoing litigation over a new ERISA regulation governing multiple-employer association health plans. ROA.208-09. Mr. Geale proposed that, if LPMS were to withdraw its request, then he would "look [LPMS's representatives] in the eye" and promise that DOL would refrain from investigating or otherwise interfering with any LPMS-managed partnership plans. ROA.209.

LPMS, however, was concerned that DOL's verbal representations would not protect the plans from the potential burdens of state insurance regulations. ROA.209. LPMS therefore pressed for an advisory opinion that would provide a definitive ruling on the Plan's ERISA status. DOL then changed course in its dealings with LPMS, going silent for months. ROA.209.

D. *After LPMS and DMP filed this suit, DOL issued the Advisory Opinion concluding that the Plan is not governed by ERISA.*

Hearing nothing more, LPMS and DMP filed this suit in October 2019, seeking a declaration that the Plan is a single-employer group health plan under

ERISA and related injunctive relief. ROA.8-24. Instead of filing an answer, DOL issued an advisory opinion in January 2020 that refused to recognize the Plan's ERISA status (the "Advisory Opinion"). ROA.144-49; *see also* ROA.392-97.

The Advisory Opinion concluded that the limited partners are neither "working owners" nor "bona fide partners" of DMP who qualify as "employees" under ERISA. ROA.392-97. According to the Advisory Opinion, the limited partners are not "meaningfully employed by the partnership" and do not "perform any services on its behalf" in key part because the data-generation services they provide to DMP do not "differ[ ] in any meaningful way from the personal activities" they "would otherwise engage in while using their personal devices." ROA.392-93. DOL thus made a value-laden judgment that individuals who use technology to parlay their regular activities into a business enterprise do not perform legitimate "work" for that business. *See* ROA.393; ROA.396. In doing so, DOL ignored the innovative nature of DMP's business model, which provides limited partners a unique opportunity to capitalize on, and retain control of, the data generated by their internet usage. *Compare* ROA.393, *and* ROA.396, *with* ROA.401.

The Advisory Opinion also injected a requirement that the limited partners possess a "material ownership interest in the partnership" and "earn[] income for work that generated material income for the partnership." ROA.396. But DOL's own definitions of "working owner," from prior opinions and a new rule governing

multiple employer welfare arrangements, contain no such materiality requirement. *See* Opinion 99-04A, 1999 WL 64920, at *2 n.3; 29 C.F.R. § 2510.3-5(e). In addition, the Advisory Opinion invoked a common-law test for employment by emphasizing that DMP does not control the limited partners' activities. ROA.393 (noting that the limited partners "do not appear to report to any assigned 'work' location or otherwise notify the partnership that they are commencing their work; and they are not required to possess any particular work-related skills"). The Supreme Court, however, rejected these same common-law factors in *Yates* when holding that "working owners" are entitled to participate in an ERISA plan alongside other, common-law employees. 541 U.S. at 12 & n.3, 16 n.5, 21-22.

Further downplaying the limited partners' role as partners, the Advisory Opinion violated DOL's own procedures by contradicting facts stated in LPMS's request. *See* 41 Fed. Reg. at 36,283 § 10 (advisory opinion "assumes that all material facts and representations set forth in the request are accurate"). For instance, the Advisory Opinion claims that limited partners lack a "meaningful equity interest" because there was "no information" on the limited partners' participation in managing the business. ROA.393; ROA.396. Yet the request detailed how limited partners regularly vote on important issues, including DMP's core business decisions about when and how the data contributed by limited partners will be sold or used. ROA.400-01.

The Advisory Opinion (like DOL's brief here) also claims that limited partners receive no income for their services to DMP. ROA.392; DOL.Br.11. But the request explains that limited partners do receive income distributions. ROA.401; *see also* ROA.400 (noting these "guaranteed payments"). And despite the Advisory Opinion's contention that the "primary reason" for the limited partners' participation is the acquisition of health coverage, ROA.394, the request emphasizes that the availability of such coverage is collateral to DMP's business, ROA.401. DMP offers health insurance solely to attract limited partners who will contribute the data that DMP aggregates and sells. ROA.401.

Because of DOL's prior representations, LPMS had already begun accepting partners into the limited partnerships it manages, including by forming ERISA-subject health plans for DMP and other entities. ROA.451. By the time the Advisory Opinion was issued, nearly 50,000 Americans had become partners in those partnerships and had begun participating in their group health plans. ROA.451. The adverse Advisory Opinion thus threatens the viability of these plans.

The Advisory Opinion also threatens DMP's viability as a business. DMP's business model turns on its ability to recruit significant numbers of limited partners from whom it can collect and sell statistically meaningful user data. *See* ROA.200, 448. The Plan is a key recruitment tool for DMP. ROA.450. When DOL issued its Advisory Opinion, however, DMP (and LPMS's other partnerships) stopped

enrolling new partners into their plans to avoid regulatory penalties and state enforcement actions. *See* ROA.417; ROA.452. This enrollment freeze has "drastically reduced" DMP's ability to recruit new partners, which has resulted "in a failure to grow DMP's revenue and the potential closure of the business." ROA.452.

E. *The district court granted summary judgment for LPMS and DMP, concluding that the Advisory Opinion is arbitrary, capricious, and contrary to law.*

Faced with these imminent threats, DMP, together with LPMS, amended the complaint to challenge the Advisory Opinion under the Administrative Procedure Act and ERISA, 29 U.S.C. § 1132(k), and obtain declaratory and injunctive relief. ROA.98-127. They also filed a motion for a temporary restraining order and a preliminary injunction. ROA.169-204.

Before that motion was resolved, LPMS and DMP moved for summary judgment, arguing that the Advisory Opinion is arbitrary, capricious, and contrary to law. ROA.332-87. Among other things, the summary-judgment motion highlighted irreconcilable inconsistencies between the Advisory Opinion's analysis and the Supreme Court's decision in *Yates*, as well as DOL's own prior positions and opinions. ROA.351-87. DOL responded and cross-moved for summary judgment. ROA.642-703; *see also* ROA.768-821; ROA.841-72.

The district court granted LPMS and DMP's summary-judgment motion, concluding that the Advisory Opinion constituted final agency action, and its conclusion arbitrarily and capriciously deviated from *Yates* and prior DOL authority. ROA.874-903. The court further granted injunctive relief and denied DOL's cross-motion for summary judgment. ROA.903; *see also* ROA.905 (correction). DOL appealed the final judgment. ROA.906-08.

SUMMARY OF THE ARGUMENT

The district court faithfully adhered to the Supreme Court's precedent in *Yates*, DOL's own prior positions and rulings, and other governing principles. The court's decisions to exercise judicial review, reject the Advisory Opinion, and enjoin DOL from denying the Plan's ERISA status should be affirmed.

First, the Advisory Opinion satisfies both requirements for a final, reviewable determination. The Advisory Opinion declares, as a matter of law, that the Plan is not governed by ERISA. DOL's own procedures reflect that the Advisory Opinion is binding because LPMS and DMP can rely on it and cannot withdraw their request. The adverse Advisory Opinion also affects DMP's rights or obligations, with serious legal consequences. It deprives DMP of the ability to invoke ERISA as a shield against state enforcement actions. Indeed, multiple State Attorneys General supported LPMS's request for advisory opinion precisely to obtain "much needed

direction" regarding the "applicability of their own insurance regulations under similar circumstances." The Advisory Opinion is final and reviewable.

Second, the Advisory Opinion arbitrarily and capriciously refused to recognize that the Plan falls within ERISA's scope. Under the Supreme Court's and DOL's prior decisions, DMP's limited partners are self-employed individuals and "working owners" entitled to participate in the Plan alongside DMP's common-law employees. These limited partners must download DMP's proprietary data, use the internet for the required number of hours, and contribute their data to DMP. The data from each limited partner is critical to DMP's business, which aggregates and sells that data to third parties—with the input of the limited partners—to generate revenue and pay income distributions to each partner. Thus, the limited partners fit the definitions of "self-employed individual" and "working owner." And given the rights that DMP's limited partners enjoy and the services they provide, each is a "bona fide" partner under DOL's alternative regulatory definition as well.

The pertinent authorities do not authorize DOL's qualitative judgments about the value of the limited partners' contributions, much less permit DOL to question the legitimacy of DMP's business. Nor can DOL justify relying on common-law employment paradigms that the Supreme Court held were inapposite in this context. The district court correctly concluded that the Advisory Opinion is arbitrary, capricious, and contrary to law.

Third, the district court did not abuse its discretion by enjoining DOL from refusing to acknowledge the Plan's ERISA status. The Advisory Opinion made a legal determination based on a specific set of facts. Because that determination was wrong on its face, there is nothing more for the agency to resolve. Moreover, the traditional equitable factors highlight the appropriateness of injunctive relief. The Advisory Opinion irreparably injures DMP's business by depriving DMP of its ability to use the Plan as an important recruitment tool, which, in turn, impairs its ability to attract enough limited partners to sustain its data-generation business. That real harm far outweighs the injunction's impact on DOL, whose job it is to regulate the Plan under ERISA. An injunction also serves the public interest by safeguarding the limited partners' access to health coverage. All the factors thus support the district court's grant of injunctive relief.

ARGUMENT

I. The District Court's Summary-Judgment Ruling Under the Administrative Procedure Act Is Reviewed De Novo, But the Injunctive Relief Is Reviewed for Abuse of Discretion.

This Court reviews the district court's grant of summary judgment de novo, and its issuance of a permanent injunction for abuse of discretion. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001); *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 234 (5th Cir. 2014). In reviewing DOL's underlying opinion under the Administrative Procedure Act, this Court must determine whether DOL's

decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Shell Offshore*, 238 F.3d at 627 (quoting 5 U.S.C. § 706(2)(A)).

If DOL changed its position on an issue without "display[ing] awareness that" it was doing so and without "show[ing] that there are good reasons for the new policy," this Court may consider DOL's new interpretation to be arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). So while DOL claims its opinion is entitled to deference, *see* DOL.Br.6, 22, 24, its decision to change positions without explanation or to "disregard rules that are still on the books" merits no deference. *See Fox Television Stations*, 556 U.S. at 515.

II. The District Court Correctly Concluded that DOL's Refusal to Classify the Plan as Governed by ERISA Is Final and Reviewable.

This Court should reject DOL's attempts to short-circuit judicial review by claiming that the Advisory Opinion does not constitute final agency action. The opinion's "advisory" label does not render it unreviewable. *See, e.g.*, *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986) (agency's "description of … guidelines as 'informal' is not definitive"). Because the Advisory Opinion bears all the indicia of final agency action, the district court properly exercised judicial review. ROA.889-900.

A. *The Advisory Opinion satisfies the two conditions that make agency action "final."*

The district court properly held that DOL's Advisory Opinion constituted final agency action because it: (1) "mark[ed] the consummation of the agency's decision making process"; and (2) determined "rights or obligations," or created "legal consequences," for LPMS and DMP. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted); ROA.883; ROA.889-90.

1. The Advisory Opinion marks the consummation of DOL's decision making process.

The Advisory Opinion reflects DOL's final determination that the Plan is not an "ERISA plan[] at all." ROA.397. As the district court concluded, that determination satisfied the first condition for finality. ROA.884-86.

An agency's determination marks the consummation of its decision making process if it is not "tentative or interlocutory." *See W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662 (7th Cir. 1998) (quoting *Bennett*, 520 U.S. at 178). When, as here, the agency's issuance of an opinion marks the end of its "advisory opinion procedure," the resulting opinion is anything but tentative. *See Unity08 v. Fed. Election Comm'n*, 596 F.3d 861, 864-65 (D.C. Cir. 2010).

DOL's procedures demonstrate this point. The Advisory Opinion binds LPMS and DMP, as the requesting parties. They could not withdraw the request once DOL decided to issue an adverse opinion, and DOL's rules provide no means

to administratively appeal that opinion. 41 Fed. Reg. at 36,283 § 9.[2] Without judicial review, LPMS and DMP are stuck "rely[ing] on the [Advisory] [O]pinion." *See id.* at 36,283 § 10. Because of that, LPMS and DMP are entitled to challenge it under the APA. *See Unity08*, 596 F.3d at 864-65.

DOL counters that the Advisory Opinion cannot mark the consummation of its decision-making process because it is based on "hypothetical facts." *See, e.g.*, DOL.Br.11, 14, 18-19. But there is nothing hypothetical about the facts here, as they represent the Plan's actual organization.[3] Beyond that, the relevant facts for an advisory opinion—per DOL's rules—are those presented in the request. *See* 41 Fed. Reg. at 36,283 § 10. Taking those facts as true, as DOL must, *see id.*, DOL made a firm legal determination that the Plan is not governed by ERISA. ROA.397. If DOL believed that LPMS and DMP had presented "hypothetical" facts, or that additional

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[2] DOL's regulations do not indicate that LPMS and DMP can seek reconsideration "by, for example, submitting a new advisory-opinion request," when the relevant facts have not changed. DOL.Br.19.

[3] The Advisory Opinion is not, as DOL contends, a "classically non-final," hypothetical opinion. DOL.Br.18. The cases DOL cites for this proposition are inapposite. *See Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 636-37, 639-40 (6th Cir. 2004) (agency's opinion letter was non-final when a non-requesting party challenged it in court, and the agency's "advice" arose "outside of the customary setting for determining … compliance" with the agency's regulations); *Nat. Res. Def. Council v. Fed. Aviation Admin.*, 292 F.3d 875, 881-82 (D.C. Cir. 2002) (agency's letters were non-final when the governing statute implicitly required the agency to make factual findings before reaching a decision); *see also infra* at 25-26.

facts were necessary, DOL should not have issued the Advisory Opinion. *See* 41 Fed. Reg. at 36,282 § 5.

That DOL *did* issue the Advisory Opinion bolsters the finality of that decision. DOL could have issued an information letter, which would be "informational only and … not binding," in response to the request for an advisory opinion. *See id.* at 36,282-83 §§ 5, 11. DOL, however, opted to issue a formal Advisory Opinion and to bind LPMS and DMP to its decision. *See id.* at 36,283 § 10.

2. The Advisory Opinion determined rights or obligations or created legal consequences.

The district court also properly found that the Advisory Opinion met the second condition for finality "by creating new obligations for LPMS to conform to complex state regulatory schemes." ROA.888-90. The Advisory Opinion states DOL's "unequivocal position" that the Plan does not qualify under ERISA. *See Ciba-Geigy Corp. v. U.S. Env't Prot. Agency*, 801 F.2d 430, 436 (D.C. Cir. 1986); ROA.149. This position has the practical effect of exposing the Plan to state, rather than federal, regulation. *See* 29 U.S.C. § 1144(a) (ERISA preempts "any and all State laws" relating to single-employer benefit plans).

LPMS and DMP designed the Plan to comply solely with ERISA. *See* ROA.402. Had DOL confirmed the Plan's ERISA status, it would have upheld the Plan's legal foundation and protected the participants' coverage. But DOL did the opposite, opening the door to state regulation. "The fact that the advisory opinion

… deprive[d] [LPMS and DMP] of a legal right ... which [they] would enjoy if [they] had obtained a favorable resolution in the advisory opinion process"—*i.e.*, federal regulation—"denies a right with consequences sufficient to warrant review." *Unity08*, 596 F.3d at 865 (internal quotations and citations omitted).

Further, DOL knew that "States might take enforcement action against" LPMS and DMP based on its opinion. DOL.Br.19. DOL also knew that LPMS and DMP could legally rely on the Advisory Opinion. *See* 41 Fed. Reg. at 36,283 § 10. It thus should have "expect[ed] [LPMS and DMP] to alter their primary conduct to conform to [DOL's] position." *See Ciba-Geigy Corp.*, 801 F.2d at 436. In issuing that conduct-altering opinion, DOL "voluntarily relinquished the benefit of postponed judicial review." *See id.*

DOL's challenges to finality disregard the Advisory Opinion's effects. First, DOL argues it can still investigate the Plan and change its mind. DOL.Br.19, 21. That position cannot be squared with DOL's own rules, which entitled LPMS and DMP to rely on the Advisory Opinion until their factual circumstances changed and barred them from withdrawing their request. *See* 41 Fed. Reg. at 36,283 §§ 9, 10.

Second, DOL mischaracterizes the Advisory Opinion as inconsequential because it does not bind the States. DOL.Br.19-20. Yet the Advisory Opinion deprives LPMS and DMP of the right to rely on an authoritative decision—from the agency tasked with administering and enforcing ERISA, *see* 29 U.S.C. §§ 1132,

1135—holding that the Plan is exempt from state regulation.[4] Depriving LPMS and DMP of this shield increases their exposure to threats of state criminal and civil penalties. *Cf. Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956) (agency's order had "a practical impact" when it subjected parties to penalties). LPMS and DMP need not "violate [DOL's] legal position and risk an enforcement proceeding" before seeking judicial review. *Unity08*, 596 F.3d at 865.

B. *The district court properly applied principles of finality.*

DOL next contends that the district court relied on inapplicable case law and ignored precedent in assessing the Advisory Opinion's finality. *See* DOL.Br.20-24; *see* ROA.883-90. In doing so, DOL makes those exact errors.

For example, DOL touts *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953 (5th Cir. 1991). DOL.Br.19-20, 23-24. But the opinion letters in that case, and the rules governing their issuance, bear no resemblance to the Advisory Opinion here. In *Taylor-Callahan*, several entities requested DOL opinion letters interpreting the Fair Labor Standards Act ("FLSA"). 948 F.2d at 955. After DOL issued the letters, a different employer challenged them in court. *Id.* at 955, 957. This Court held that the letters did not constitute final

[4] In fact, DOL claims that its opinion "is entitled to deference in litigation," DOL.Br.22, which acknowledges that the Advisory Opinion has legal consequences. *See Ciba-Geigy Corp.*, 801 F.2d at 437.

agency action, in part, because the plaintiff employer had not requested the opinion letters. *Id.* at 957-59.

Two critical distinctions separate *Taylor-Callahan* from this case. First, the regulations in *Taylor-Callahan* provide that FLSA opinion letters "serve only to indicate the construction of the law which w[ould] guide the [agency]" in performing its duties. *Id.* at 957 (quoting 29 C.F.R. § 775.1 (1990)). The letters were interim in nature and "issued subject to change by the" agency. *See id.* By contrast, DOL regulations here explicitly permit the requesting parties to "rely" on advisory opinions as long as "the situation conforms to the situation described in the request for opinion." *See* 41 Fed. Reg. at 36,283 § 10. The Advisory Opinion thus serves a final, rather than "interim," purpose. DOL.Br.23-24.

Second, the Fifth Circuit emphasized that the opinion letter in *Taylor-Callahan* was requested by entities *other than* the plaintiff-employer. 948 F.2d at 957-59 (stressing this fact). This was problematic because the letters were "expressly limited to the factual situation presented by the requesting party." *Id.* at 957. In contrast, LPMS and DMP are challenging DOL's "legal conclusion about their own status," based on their own facts about their own business. *See Herman*, 150 F.3d at 663-64 (distinguishing *Taylor-Callahan* on this basis; holding that an agency letter opining that plaintiffs were joint employers was "final and reviewable").

Additionally, DOL's attempts to distinguish *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), are untenable. For instance, DOL emphasizes that the jurisdictional determinations in *Hawkes* were binding on the government for five years. DOL.Br.21. The Supreme Court, however, acknowledged not only that the agency could legally revise its determinations, but also that such revision "is a common characteristic of agency action" that "does not make an otherwise definitive decision nonfinal." *Hawkes*, 136 S. Ct. at 1814.

DOL likewise mischaracterizes *Texas v. EEOC* by suggesting that it requires an agency to be "irrevocably committed" to a particular view to achieve finality. DOL.Br.22-23. But there, this Court laid out "what [really] matters" in assessing finality: "whether the document has practical binding effect such that affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Texas*, 933 F.3d at 442 (cleaned up). Under that standard, the Advisory Opinion is final and reviewable.

III. The District Court Also Correctly Concluded that DOL's Misapplication of ERISA Was Arbitrary, Capricious, and Contrary to Law.

A. *ERISA governs employee benefit plans that cover "working owners," including partners, and at least one common-law employee.*

As a starting point, DOL muddles the ultimate query in this case. DOL is correct that, to trigger ERISA, the covered individuals must qualify as "participants"

in the benefit plan. DOL.Br.24; 29 U.S.C. § 1002(3) (defining "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or … both"). Whereas DOL posits that a "participant" includes an "employee," *see* DOL.Br.25-27, ERISA actually treats a "participant" as synonymous with the term "employee," *see* 29 U.S.C. § 1002(7), which ERISA defines as "any individual employed by an employer." *Id.* § 1002(6).

Because these statutory definitions are "uninformative," *see Yates*, 541 U.S. at 12, the Supreme Court has developed two distinct tests for determining whether an individual qualifies as an "employee," and thus a "participant," under ERISA. The first test, which DOL addresses, DOL.Br.25-27, is irrelevant here. That "common-law test" analyzes the degree of control over the "manner and means" of the individual's work. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (internal quotations and citations omitted).

In contrast, the common-law factors governing traditional employment relationships have no place under the Supreme Court's second test from *Yates*, which applies to self-employed business owners—including partners. 541 U.S. at 12, 16. These individuals wear two hats: one, as their own "employer," and the other, as an "employee." *Id.* at 6 (rejecting contrary rulings). When examining a business owner's qualification as an "employee" under ERISA, the Court rejected the *Darden* factors, declaring "there is no cause in this case to resort to common law." *Id.* at 12

& n.3 (citing *Darden*); *see also id.* at 16 n.5. Rather, the Supreme Court held—categorically—that self-employed business owners, *i.e.*, "working owner[s]," "qualif[y] for the protections ERISA affords plan participants," so long as "the plan covers one or more employees other than the business owner and his or her spouse ...." *Id.* at 6. This is because ERISA's plain language, "by explicit inclusion or exclusion, assume[s] that working owners—shareholder-employees, partners, and sole proprietors—may participate in ERISA-qualified benefit plans." *Id.* at 15.

B. *Under* Yates *and DOL's prior decisions, the limited partners are self-employed individuals and "working owners."*

Based on *Yates* and DOL's own prior positions, the district court concluded that the limited partners qualify as self-employed "working owners" entitled to participate in an ERISA plan alongside at least one common-law employee. ROA.895-901. Much like the Advisory Opinion, DOL's contentions here cannot be squared with those authorities. Instead, they rely on improper qualitative judgments about the nature of the limited partners' contributions to the legitimate business of DMP. None of the established definitions authorizes that inquiry. The district court rightly concluded that the Advisory Opinion must be vacated.

1. The limited partners are self-employed individuals who earn income from DMP's business in which their services are a material income-producing factor.

DOL insists that *Yates* did not explain what individuals qualify as "working owners," *e.g.*, DOL.Br.28, 30, but it overlooks a definition that the Supreme Court

addressed. Although the district court did not reach this definition, it nonetheless confirms that the Advisory Opinion is arbitrary, capricious, and contrary to law. *See* ROA.383-84 (raising this argument); *see also, e.g.*, *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 438 (5th Cir. 2012) (summary judgment can be affirmed on any ground supported by the record).

In *Yates*, the Supreme Court's conclusion that "working sole proprietors and partners" may participate in an ERISA-qualified plan relied in part on the definition of "employee" in the Internal Revenue Code, which includes a "self-employed individual." 541 U.S. at 14 (quoting 26 U.S.C. § 401(c)(1)(A)); ROA.379-80; ROA.383-84. A "self-employed individual," in turn, is someone who has "earned income," a term that means "net earnings ... with respect to a trade or business in which personal services of the taxpayer are a material income-producing factor." 26 U.S.C. § 401(c)(1)(B), (2)(A)(i).

Under this definition, DMP's limited partners are "self-employed individuals" who qualify as "employees" (and thus "participants") under ERISA. DMP's business involves capturing, segregating, aggregating, and selling electronic data. ROA.401. Many companies—like Facebook and Google—have reaped huge profits doing just that, by tracking each individual's internet usage. *See* ROA.401; ROA.618-25; ROA.628-30.

Unlike those other companies, DMP empowers individuals to manage, control, and ultimately monetize their own internet usage. ROA.401. Individuals who join DMP as limited partners must install proprietary software on the computers, phones, televisions, or other electronic devices of their own choosing. ROA.401. DMP's proprietary software then captures the limited partner's internet usage data on those devices, which is provided to DMP. ROA.401. DMP aggregates all the limited partners' data, which DMP—with the input of all limited partners—then sells to third parties. ROA.401. As compensation, the limited partners receive "[i]ncome distributions" that "will be reported as guaranteed payments and subject to employment taxes." ROA.400; *see also* ROA.399 (emphasizing "guaranteed payments" to limited partners). Only those limited partners who generate and provide DMP at least 500 hours of usage data each year can participate in the Plan. *See* ROA.393.

DMP's limited partners thus provide "personal services" to DMP by downloading DMP's proprietary software, committing to and actually using the internet for the minimum required hours, and contributing their electronic data to DMP. Those services are also a "material income-producing factor" for DMP because the data generated by the limited partners dovetails squarely with DMP's business. That data, the work product DMP sells to third parties, is indispensable to

DMP's existence, and is the sole source of DMP's revenue and its income distributions to the partners.

Notably, this definition of "employee" forecloses DOL's qualitative judgments about the limited partners' services. For instance, DOL claims the limited partners "perform no 'work for or through the partnership'" because they "merely install software" that tracks their internet usage. DOL.Br.28. DOL downplays these services, characterizing the limited partners' activity as "us[ing] the internet in a manner no different from the way they normally would." *Id.*; *see also id.* at 30-31.

These value-laden assessments are nowhere in the definition of "self-employed individual" that ERISA incorporates—and *Yates* embraced. Whether an individual provides "personal services" to the business does not hinge on whether that individual was planning to engage in a particular activity anyway. Indeed, DMP's business model is designed to attract limited partners who want to parlay their internet usage into a business opportunity.[5]

[5] As the district court aptly noted, this unique opportunity to transform a personal activity into an income-generating venture is akin to a rideshare driver who chose to pick up a passenger along a route that he had already planned to drive. ROA.899. DOL misses the point of this comparison. DOL.Br.31. No one suggested that rideshare drivers are "working owners" under ERISA. *See* ROA.899. Instead, the analogy exposed the falsity of DOL's assumption that personal activities cannot double as income-generating business activities.

Nor does the term "personal services" depend on the degree of effort that a limited partner expends. In any event, as the district court noted, limited partners must take active steps to provide data to DMP's business. ROA.900. They must choose what electronic devices to use for this purpose and download the proprietary software on their chosen devices. ROA.900-01. At any time, they can elect to uninstall the software or change which device's data they wish to share. *See* ROA.900. But ultimately, they must actually generate and share a minimum number of hours of data every year. ROA.900. Those contributions, in turn, *are* a "material income producing factor" for the business because they are precisely what DMP aggregates and sells to third parties. This is all that ERISA requires.

DOL tries to defend the Advisory Opinion's false assertion that limited partners receive no revenue from the partnership. DOL.Br.31-32; ROA.394. But the stated facts—which DOL had to accept as true, *see* 41 Fed. Reg. at 36,283 § 10—say the opposite. LPMS's request unequivocally states that limited partners will receive income distributions. *See* ROA.400 ("[i]ncome distributions" to limited partners); ROA.401 (referring to these distributions as "guaranteed payments"). DOL claims that these statements "merely indicate[]" that any payments to limited partners are "taxable." DOL.Br.32. But the references to "guaranteed payments" are not limited to tax issues. In fact, the only way that tax consequences could arise

is *if* payments were actually made, so DOL's contention reinforces that limited partners will be paid.

More fundamentally, DOL's focus on whether limited partners have received payment as of this juncture is illogical. DMP had not yet been established when LPMS submitted the request for advisory opinion. That is why the request describes the partnership's compensation structure in forward-looking terms. *See, e.g.*, ROA.401 ("Income distributions by LP to LPartners ... will be reported as guaranteed payments and subject to employment taxes."). Like any business, payment of distributions will depend on the amount of revenue that DMP ultimately generates. No legal authority suggests that limited partners must first receive distributions before they can participate in an ERISA plan—for good reason. That approach would penalize start-up businesses like DMP that are working toward becoming profitable. *See, e.g.*, ROA.212 (explaining that DMP and other LPMS-managed entities "are startups" that have not "generated profits or substantial revenue yet"). Nothing in ERISA countenances that result.

2. The limited partners satisfy DOL's own definition of "working owner."

As the district court concluded, the Advisory Opinion conflicts with the agency's own definition of "working owner." ROA.893 (discussing Opinion 99-04A). In Opinion 99-04A, DOL recognized two simple requirements for working owners:

> 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, as distinguished from a 'passive' owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

1999 WL 64920, at *2 n.3 (emphasis added). That straightforward test bears no resemblance to DOL's value-laden assessment of the limited partners' rights and activities here. DOL's unjustified change of position—a change that it refuses to acknowledge—epitomizes arbitrary and capricious conduct. *See, e.g.*, *Fox Television Stations*, 556 U.S. at 515 (agencies cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books").

First, DOL evades its own definition of "working owner" in Opinion 99-04A by claiming that it "merely clarifie[d] [DOL's] understanding of what the requester meant by its use of the term 'working owner.'" DOL.Br.29-30. But the definition was material to DOL's analysis. The requester had asked whether journeyman electricians that either acquired an ownership interest in or started a business themselves—including in partnerships with others—could participate in an ERISA-sponsored plan. Opinion 99-04A, 1999 WL 64920, at *1-2. *DOL*—not the requester—crafted the definition of "working owner" and deemed the journeyman electricians to fit that definition.

Moreover, DOL embraced that definition of "working owner" in a subsequent opinion, quoting it in full and describing it as what the term "'working owner'

meant" in Opinion 99-04A. *See* Pension & Welfare Benefits Admin., U.S. Dep't of Labor, Advisory Opinion No. 2006-04A, 2006 WL 1401678, at *3 (Apr. 27, 2006). DOL cannot avoid that definition now.

Second, DOL defies its definition of "working owner" by claiming DMP's limited partners "do not have *meaningful* equity rights and do not actively perform services for plaintiffs." DOL.Br.30-31 (emphasis added). Yet the definition covers "any individual who has an equity ownership right *of any nature* in a business enterprise." Opinion 99-04A, 1999 WL 64920, at *2 n.3 (emphasis added). There is no room to question the value or extent of those ownership rights, as the Advisory Opinion tried to do. *See* ROA.396 (asserting limited partners have a "nominal" rather than "material ownership interest"); ROA.898 (rejecting materiality standard).

Regardless, the limited partners' ownership interest comes with a panoply of rights that DOL arbitrarily and unjustifiably ignores. For instance, DOL tries to distinguish DMP's limited partners from law firm partners who participate in management, control the manner and means in which the firm provides services, and share in the firm's profits. DOL.Br.30. But DMP's limited partners likewise participate in the management and control over DMP's business, by voting on global management issues. ROA.400-01; ROA.406. Moreover, contrary to the Advisory Opinion, those voting rights include determining how DMP operates its business of

using and selling aggregated internet usage data. *Compare* ROA.401, *with* ROA.393 (claiming "you provided no information on such votes"). Also contrary to the Advisory Opinion—and DOL's insistence here—limited partners have the right to share in DMP's profits through income distributions. *Compare, e.g.*, ROA.400-01, *with* ROA.392 (claiming that limited partners "do not receive income for performing services for or as partners of the partnership"), *and* DOL.Br.31-32.

Moreover, the limited partners *do* "actively perform services" for DMP, just as DOL's definition of "working owner" requires. *See supra* Part III.B.1. That requirement is not limited to a particular type of service, as DOL believes. *See* DOL.Br.30-31; ROA.900 ("The only distinction between the Limited Partners here and the law partners in *House* is the *type* of work performed."). After all, the nature of that service necessarily varies depending on the nature of the business itself. Indeed, DOL refrained from specifying parameters for qualifying services when defining a "working owner."

At bottom, DOL's attempts to minimize the quality or extent of these services cannot change the fundamental fact that they *are* active services that the limited partners provide to DMP's business. As the district court emphasized, these services render the limited partners wholly unlike the "passive" corporate shareholders that DOL excluded from its definition of working owners. ROA.900. This conclusion is reinforced by statutory and regulatory definitions under the Internal Revenue

Code. The statutory provision limits "passive activity" to activity "involv[ing] the conduct of any trade or business" in which an individual "does not materially participate." 26 U.S.C. § 469(c)(1). Under corresponding regulations, an individual's participation in the trade or business "for more than 500 hours" each year means that the individual is *not* engaging in "passive activity." 26 C.F.R. § 1.469-5T(a)(1). That is the exact same threshold for which the limited partners here must generate and provide their usage data to DMP. *See* ROA.393. Thus, the limited partners' contributions do not constitute "passive activity."

More broadly, DOL's dislike of DMP's business model—which it disparages as a "sham," DOL.Br.16, 24—cannot justify treating the limited partners disparately under ERISA. The Advisory Opinion scoffs that "browsers and social media companies[] already track consumers' activities on the Internet without claiming that the tracked consumers work for them." ROA.393. Yet that view highlights the significance of DMP's business. Historically, individuals were resigned to giving away their usage data for free to companies that aggregate and sell it for their own profit. What DMP provides is an opportunity for those same individuals to seize control of their valuable data, provide it to a company in which they acquire an ownership interest, and eventually profit from that data themselves. *See* ROA.401.

To downplay what these individuals provide to DMP, as the Advisory Opinion did, applies antiquated notions of work and service that fail to account for

technological advances. Developments in electronic communications have enabled individuals to harness the internet for their own gain. Thus, while the limited partners' services may differ from traditional jobs, they nonetheless constitute legitimate forms of work in today's gig economy. DMP's decision to offer health-care coverage to incentivize participation as limited partners, ROA.401—thereby increasing the amount of data obtained and maximizing distributions, *see* ROA.448—does not make its business illegitimate. Indeed, all types of employers adopt benefits plans to entice and retain employees.

In sum, DMP's limited partners are "working owners" who qualify as "employees" entitled to participate in an ERISA plan. The Advisory Opinion arbitrarily and capriciously deviates from DOL's own prior approach.

3. The Advisory Opinion imported common-law employment considerations that *Yates* rejected and DOL disavowed.

The district court astutely noted that the Advisory Opinion contravened *Yates* by invoking common-law concepts to conclude that the limited partners are not "working owners." ROA.896-97. For instance, the Advisory Opinion noted that the limited partners "do not appear to report to any assigned 'work' location or otherwise notify the partnership that they are commencing their work; and they are not required to possess any particular work-related skills." ROA.393. That analysis speaks to control over the means or methods of an individual's work. But the Supreme Court rejected those same common-law considerations when concluding that *all* self-

employed business owners, including partners, are "working owners" entitled to participate in an ERISA plan. *Compare Yates*, 541 U.S. at 12 & n.3 (declining to apply common-law considerations, citing *Darden*), *and id.* at 16 n.5, *with Darden*, 503 U.S. at 323-24 (detailing common-law employment factors, including "the skill required," "the location of the work," and "the extent of the hired party's discretion over when and how long to work" (internal quotations and citations omitted)).

DOL tries to justify importing common-law criteria in several ways. First, it claims that *Yates* did not address the "threshold question of who qualifies as a working owner," because "there was no dispute that the doctor [in *Yates*] was both an employer and an employee ...." DOL.Br.28, 32. That contention grossly understates the *Yates* decision. *Yates categorically* treated the doctor as a "working owner" qualified to be a "participant" in an ERISA-governed plan. 541 U.S. at 6. In doing so, the Court refused to apply a common-law analysis of whether such a self-employed individual is an "employee." *Id.* at 12 & n.3, 16 n.5. DOL cannot work an end-run around *Yates* by demanding that a "working owner" satisfy common-law employment factors that *Yates* deemed irrelevant.

Moreover, *Yates* did not leave the term "working owner" unaddressed, as DOL contends. *Yates* embraced the statutory definition of a "self-employed individual" in the Internal Revenue Code when concluding that ERISA applies to working owners. *See supra* Part III.B.1 (analyzing 26 U.S.C. § 401(c)(1)(B),

(2)(A)); *Yates*, 541 U.S. at 14 (quoting these provisions). That definition omits any common-law considerations.

In addition, *Yates* relied on Opinion 99-04A to support its conclusion that ERISA extends to working owners. 541 U.S. at 17-18. That is the same advisory opinion in which DOL crafted the definition of "working owner" that it disregards now. *See supra* Part III.B.2. And DOL's own definition in that opinion excludes any common-law criteria. The district court correctly foreclosed DOL's attempts to stray from this definition. ROA.893; ROA.897-901.

Second, DOL claims that ERISA's "references to the employment relationship" permit injecting common-law employment factors when assessing working owners. DOL.Br.32-33. But again, that position cannot be squared with *Yates*, nor with this Court's subsequent decision in *House*. Both opinions held that self-employed business owners and partners are employers *and* employees under ERISA, and are therefore entitled to participate in ERISA benefit plans. *See Yates*, 541 U.S. at 6 ("If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants."); *House*, 499 F.3d at 450-52 (ERISA authorizes law firm partners to participate in plan that covers common-law employees, even though partners pay their own premiums). And both opinions dispensed with any common-law analysis when reaching that conclusion. *See Yates*, 541 U.S. at 12 & n.3, 16 n.5;

House, 499 F.3d at 450 ("[A] plan covering both working-owner employers or shareholders as well as employees is governed by ERISA.").

DOL's further reference to the notion that garden-variety insurance products fall outside ERISA's scope is circular. DOL.Br.33 (citing *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 184 (5th Cir. 1992)). The inquiry is *whether* this particular plan is governed by ERISA under the pertinent statutory provisions and authorities construing them. DOL's mere distaste for DMP's business model does not justify ignoring those authorities. The notion that ERISA does not cover plans established for the purpose of marketing insurance coverage for profit is irrelevant here. Neither LPMS nor DMP is in the business of marketing insurance products. *See* ROA.401. If anything, DMP will lose money on the Plan because it covers premiums for all common-law employees who wish to participate. ROA.402.

Third, DOL cannot reconcile its invocation of common-law factors with its contradictory position in *Yates*. There, DOL asserted, without qualification, that "a test that focuses on the extent of the business's control over the working owner is not appropriate to resolve the ERISA coverage question." ROA.572 n.6 (DOL amicus brief); *see also* ROA.566 (proclaiming that in ERISA cases "there is no need to proceed to the second step of the *Darden* analysis and to develop a test based on common-law distinctions between master and servant"). DOL cannot arbitrarily change its stance by invoking the same factors it insisted were irrelevant. *See*

ROA.892 (faulting DOL for "contradict[ing] its own advocacy," quoting its amicus brief in *Yates*).

Fourth, DOL cites its newly-adopted definition of "working owner" in another context. DOL.Br.34 (citing 83 Fed. Reg. 28,912, 28,964 (June 21, 2018)). Notably, a federal court has invalidated that rule, and DOL's appeal remains pending. *New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 117 (D.D.C. 2019), *appeal filed*, No. 19-5125 (D.C. Cir. Apr. 30, 2019). Regardless, the definition of "working owner" in the new rule is limited to entities "without common law employees" who want to join with others in a group or association to establish a *multiple* employer health plan. 29 C.F.R. § 2510.3-5(a), (e)(1)-(2). It does not apply to DMP's *single* employer plan in which at least one common-law employee participates. *See* ROA.401.

Yet even this inapposite rule undermines DOL's importation of common-law criteria here because it includes none of the "control" factors that the Advisory Opinion improperly invoked. *See* 29 C.F.R. § 2510.3-5. Rather, several of the rule's requirements closely resemble the definitions addressed above. The first component is virtually identical to DOL's definition in Opinion 99-04A: it covers any individual "[w]ho has an ownership right *of any nature* in a trade or business, ... including a partner and other self-employed individual." *Id.* § 2510.3-5(e)(2)(i) (emphasis added). And the second component tracks key language in the Internal Revenue

Code provision addressed in *Yates*; it asks if the individual "is earning wages or self-employment income from the trade or business for *providing personal services* to the trade or business." *Id.* § 2510.3-5(e)(2)(ii) (emphasis added).

Although DOL proclaims that the new associations rule excludes "de minimis 'commercial activities,'" DOL.Br.34 (quoting 83 Fed. Reg. at 28,931), it ignores *how* the rule achieves that objective. Unlike the Advisory Opinion, the new rule does not demand that the employer-entity control the individual's activities, nor does it scrutinize the particulars of those activities. *Compare* 29 C.F.R. § 2510.3-5(e)(2), *with* ROA.393. It just specifies a certain number of hours for those services, whatever they entail. *See* 29 C.F.R. § 2510.3-5(e)(2)(iii). Nothing in this rule supports DOL's arbitrary, conflicting analysis of the limited partners' classification here.[6]

C. *In the alternative, the limited partners also qualify as "bona fide" partners under a different ERISA provision.*

The limited partners' status as self-employed "working owners" makes it unnecessary to resolve whether they also constitute "bona fide" partners under a

[6] DOL concedes that an unlimited number of working owners can participate in an ERISA plan so long as it also covers at least one common-law employee. DOL.Br.35-36. Thus, the Advisory Opinion is untenable to the extent it imposed a proportionality requirement between common-law employees and working owners. *See* ROA.394.

different ERISA regulation. DOL.Br.36-37 (discussing 29 C.F.R. § 2590.732(d)(2)). Regardless, the district court correctly concluded that the limited partners meet that alternative standard. ROA.901.

Contrary to the Advisory Opinion, the limited partners *do* "perform services on behalf of the partnership." ROA.396. They choose the devices on which to install DMP's proprietary software and then generate and provide the data constituting the product that DMP sells. ROA.401. Limited partners also have a genuine partnership relationship with DMP, including the rights to vote on core business issues and to receive income distributions. ROA.400-01. The district court correctly noted that all these attributes are more than "pretextual," which is all that the term "bona fide" requires. ROA.901; *see, e.g.*, *Bona fide*, Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/bona%20fide (defining "bona fide" as "neither specious nor counterfeit") (last visited June 14, 2021).

Instead of addressing the limited partners' bona fide attributes, DOL pivots again to making value-laden judgments about the *partnership* itself. It cites cases that construe Internal Revenue Code provisions addressing *partnerships*, rather than authorities addressing the validity of a partner's relationship with the partnership. DOL.Br.36-37. Even DOL's cases recognize that the joining together of persons contributing their "labor" is sufficient to create a partnership "when there is community of interest in the profits and losses." DOL.Br.36 (quoting *Comm'r of*

Internal Revenue v. Tower, 327 U.S. 280, 286 (1946)). That is precisely what DMP does: it joins individuals who provide labor by generating and transmitting their internet usage data to the partnership, with the opportunity to obtain income distributions flowing from the sale of that data. *See* ROA.400-01. Moreover, there is an evident, good-faith business purpose behind DMP's enterprise, which aggregates and sells the limited partners' data contributions for profit. ROA.401. Nothing more is required. *See* Rev. Rul. 69-184, 1969 WL 19339 (1969) (a "[b]ona fide member[ ] of a partnership" is a partner "who devotes his time and energies in the conduct of the trade or business of the partnership").

D. *DOL's and the amici curiae's policy arguments are misplaced.*

DOL's appeals to policy are off base, and its amici curiae's positions are even further afield. As noted above, DOL attempts to cast DMP and the other LPMS-managed partnerships as "shams" to evade state insurance regulations. *See, e.g.*, DOL.Br.16, 24. DOL's amici parrot this theme. *See, e.g.*, Br. of Penn. Ins. Dep't, at 3, 19-22; Br. of Nat'l Ass'n of Ins. Comm'rs, at 4, 19, 24; Br. of Blue Cross Blue Shield, at 17-18; Br. of Leukemia & Lymphoma Soc'y, at 5-6; Br. of Dist. of Columbia, at 2, 12-18, 20. Apart from mischaracterizing DMP's legitimate business purpose, these contentions put the cart before the horse. Displacement of state insurance law is an intended *consequence* whenever ERISA governs a single-employer group health plan. *See* 29 U.S.C. § 1144(a). Thus, ERISA's preemptive

force does not and cannot inform whether ERISA *applies* to such a plan.[7] Because the Plan falls squarely within ERISA's ambit, ERISA—by design—displaces any otherwise-applicable state insurance law.

DOL's amici further resort to fear-mongering. They claim that treating this Plan as an ERISA plan could impact state-regulated insurance markets and that plans like this one could improperly exclude individuals, deny coverage, or engage in unsavory practices. *E.g.*, Br. of Penn. Ins. Dep't, at 4, 24-25; Br. of Leukemia & Lymphoma Soc'y, at 6-7; Br. of Blue Cross Blue Shield, at 8-18. With no supporting facts, their parade of horribles piles speculation upon assumption. Even the state insurance departments recognize that employers have every incentive to sponsor quality health coverage plans, and to ensure those plans are stable. *See* Br. of Penn. Ins. Dep't at 5-6. The same incentives apply to DMP. After all, DMP's business depends on attracting and retaining limited partners who will provide sufficient data to market and sell. *See* ROA.401; ROA.448. Providing a health insurance option,

[7] Several amici curiae emphasize the fact that state-regulation is not wholly preempted by ERISA for *multiple*-employer welfare arrangements, touting historical problems with those types of plans. *See, e.g.*, Br. of Blue Cross Blue Shield, at 7-8, 20-26; Br. of Penn. Ins. Dep't, at 10-19, 22-23. But Congress chose a different approach for ERISA-governed *single*-employer group health plans by exempting them from state regulation.

with all requisite protections, advances that objective and is a commonplace reason for sponsoring such coverage.

Critically, DOL's amici overlook a fundamental point by insinuating that recognizing the Plan's ERISA-governed status will encourage harmful or unfair practices. *See, e.g.*, Br. of Penn. Ins. Dep't, at 22-27. Classifying the Plan as an ERISA plan does not exempt it from regulation, as a few amici suggest. *E.g.*, Br. of Blue Cross Blue Shield, at 3. It just places that regulatory power in the hands of DOL. *See* Br. of Penn. Ins. Dep't, at 6 (noting DOL's "primary regulatory oversight" role). Indeed, ERISA already regulates and forbids much of the conduct that the amici decry. *Compare* Br. of Blue Cross Blue Shield, at 16 (warning about harm to individuals with pre-existing conditions), *with* 29 C.F.R. § 2590.715-2704(a) (forbidding group health plans from "impos[ing] any preexisting condition exclusion"). And, as several amici acknowledge, state law continues to regulate the insurance companies that cover ERISA plans. Br. of Dist. of Columbia, at 2; Br. of Nat'l Ass'n of Ins. Comm'rs, at 12; Br. of Blue Cross Blue Shield, at 6.

At bottom, if DOL believes that additional protections are warranted for plans sponsored by novel, gig-economy businesses like DMP, then DOL is free to undertake new rule-making. What neither DOL nor its amici can do is deprive *this* Plan of its rightful status under ERISA.

IV. The District Court Properly Exercised its Discretion by Enjoining DOL from Refusing to Recognize the Plan's ERISA Status.

The district court properly issued a permanent injunction requiring DOL to acknowledge the Plan's ERISA status and the limited partners' classification as working owners. ROA.903. Remanding the case to DOL would have been futile, and the relevant factors supported injunctive relief.

A. *Injunctive relief is appropriate when remand to the agency would be futile.*

ERISA expressly authorizes injunctive relief. *See* 29 U.S.C. § 1132(a)(3), (k). So such relief is hardly "anomalous," as DOL claims.[8] DOL.Br.37. Although DOL touts the general rule that "remand to the agency for additional investigation or explanation" is the proper remedy to correct agency action, it ignores that this case falls squarely within the "rare circumstances" where remand is unwarranted. *See id.* (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Indeed, remand is unwarranted—like here—when it would be futile. *Watson v. Geren*, 569 F.3d 115, 129 (2d Cir. 2009).

[8] DOL quotes *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852 (D.C. Cir. 2012), out of context. *See* DOL.Br.37. There, the court merely stated that issuance of an injunction was "anomalous" because the agency had not given a "complete and authoritative" interpretation of an ambiguous statute, and the agency still needed to determine whether a party met the statutory requirement. *Id.* at 861.

Remand is ordinarily appropriate if an agency failed to adequately explain its decision or if additional fact-finding is necessary to issue a reasoned decision. *See, e.g.*, *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 239-40 (5th Cir. 2007) (remanding because the record was insufficient to support the agency's decision); *N. Air Cargo*, 674 F.3d at 861 (remanding because the agency's decision "lacked any careful analysis or explanation," and the agency had an additional issue to resolve). But remand is futile when "there is no basis in fact to support the [agency's] decision," *Watson*, 569 F.3d at 129, or when "the evidence before the court demonstrates" that the agency's decision is wrong, *see O'Reilly*, 477 F.3d at 239 (internal quotations and citations omitted).

Such is the case here. LPMS's request gave the agency all the facts it needed to assess the Plan's status because DOL bases advisory opinions solely on facts provided by requesters. *See* ROA.399-412; 41 Fed. Reg. at 36,283 § 10. DOL then issued a detailed response that more than adequately explained its conclusions. ROA.392-97. On that complete "record," the district court properly decided that there was "no basis in fact to support" DOL's conclusion that the Plan did not qualify under ERISA. *See Watson*, 569 F.3d at 129; ROA.894-903.

Because the district court's answer to that determinative question is the only correct one, given the relevant facts, remanding the issue to DOL for additional investigation would serve no purpose. *See Moisa v. Barnhart*, 367 F.3d 882, 887

(9th Cir. 2004). There are no other issues for DOL to resolve because the only issue was the Plan's status. *See id.* And the injunction does not "create a potentially far-reaching legal precedent," as only LPMS-managed limited partnerships, including DMP, "may rely" on the Advisory Opinion. *See id.*; 41 Fed. Reg. at 36,283 § 10.

DOL also overstates the injunction's force. DOL.Br.37. The injunction is premised on the facts that LPMS and DMP provided in their request for advisory opinion. *See* 41 Fed. Reg. at 36,283 § 10. If those facts change, the agency will not be enjoined from reevaluating the Plan's status. But, until then, there is no need for DOL to take additional action because the district court has already considered the existing facts and concluded that DOL had erred. *See* DOL.Br.37; *O'Reilly*, 477 F.3d at 239. DOL cannot use remand as a second chance to change the court's mind. *See Moisa*, 367 F.3d at 887. And unlike in *Moisa*, where the Ninth Circuit remanded so that the agency could issue a new order consistent with the court's ruling, *see id.*, a similar remand here would be pointless. It would do nothing more than direct DOL to conclude—just as the district court held—that the Plan is a single-employer group health plan governed by ERISA.

B. *The equitable factors support the injunction.*

Because remand was futile, the district court properly considered—and granted—DMP's request for injunctive relief. *See, e.g.*, ROA.187-203; ROA.440-41; ROA.903-04. DMP is entitled to an injunction if: (1) it prevails on the merits;

(2) "it has suffered an irreparable injury"; (3) legal remedies cannot "compensate for that injury"; (4) "the balance of hardships" between DMP and DOL warrants an injunction; and (5) that relief would not "disserve[]" the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 847 (5th Cir. 2004). These factors favor DMP.

First, DMP prevails on the merits because its Plan qualifies as an ERISA plan. *See supra* Part III; ROA.903. Second, DOL's contrary conclusion inflicts an irreparable injury because it threatens DMP's business model. *See, e.g., Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 680 (7th Cir. 2012). DMP is in the business of collecting and selling data. *See* ROA.401. To successfully do so, DMP must attract large numbers of limited partners from whom it can collect statistically meaningful user data. ROA.448.

The Plan serves this purpose, as access to group health plans is a powerful recruitment tool. ROA.450. Indeed, DMP established the Plan "[t]o attract, retain, and motivate talent in support of [its] primary business purpose." ROA.450. The Plan works as a recruitment tool because it provides an affordable, ERISA-compliant alternative to health plans currently available under the Affordable Care Act to self-employed persons, *i.e.*, DMP's target demographic for limited partner recruits. *See* ROA.450-51.

But if ERISA does not cover the Plan, DMP will have to dissolve it to avoid an onslaught of regulatory penalties and state enforcement actions.[9] *See* ROA.417. Eliminating the Plan—which is instrumental to DMP's ability to attract limited partners who generate DMP's sellable data—represents a "significant change to [DMP's] business model" that "would negatively affect its revenue." *See Stuller*, 695 F.3d at 680. In fact, DMP is already suffering these impacts. After the Advisory Opinion was issued, DMP and LPMS's other partnerships "ceased enrolling new partners into any health plans, which has drastically reduced their ability to attract new partners to their data marketing programs." ROA.452.

LPMS and DMP must now reinvent their business to attract new partners and stay in business. That forced restructuring constitutes an "irreparable injury," especially given that LPMS originally "began accepting limited partners … and form[ing] the ERISA-subject health plans for them … [i]n reliance on communications received from DOL representatives." *See* ROA.451; *Stuller*, 695 F.3d at 680. Without the Plan, there will be fewer limited partners and, quite possibly, no DMP. *See* ROA.452 (decreased "ability to attract new partners" could

[9] The Washington State Insurance Commissioner's investigation of one of LPMS's other partnerships "for allegedly offering fraudulent ERISA … health benefit products" following the issuance of the Advisory Opinion evidences the certainty of this threat. ROA.755; ROA.831-32.

result in "closure of the business"). The "potential economic loss is so great as to threaten the existence of [DMP's] business," rendering DMP irreparably harmed. *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989).

Third, that harsh reality tips the adequate-legal-remedy factor in DMP's favor. Damages cannot compensate DMP for DOL wrongly forcing it out of business. *See id.* at 1179 (upholding injunction; opining that damages "acquired years after [a] business has been obliterated would not be a meaningful remedy"). Nor can damages remedy DOL's destruction of DMP's business model. *HR Staffing Consultants LLC v. Butts*, 627 F. App'x 168, 173-74 (3d Cir. 2015).

Fourth, the concrete hardships to DMP outweigh any conceivable hardship to DOL. Without the injunction, DMP will be forced to change its business model, dissolve the Plan, and face going under. *See* ROA.417; ROA.452. Its limited partners will lose their health coverage. On the flip side, the injunction just requires DOL to do its job and regulate DMP's Plan. *See* 29 U.S.C. §§ 1132, 1135. The district court did not harm DOL by "prevent[ing]" it from "creating a record," "responding to plaintiffs' legal arguments," or "issu[ing] a new opinion." DOL.Br.37. The Advisory Opinion request provided the "record," *see* 41 Fed. Reg. at 36,283 § 10; DOL responded to LPMS and DMP's legal arguments, *see*

ROA.392-97; and remanding the case for a new opinion would be futile, *see supra* Part IV.A. The balance of hardships favors an injunction.

Fifth, the public interest favors injunctive relief. Congress has recognized that employee benefit plans "directly affect[]" the "continued well-being and security of" employees and their dependents and "are affected with a national public interest." 29 U.S.C. § 1001(a). The injunction, which safeguards DMP's limited partners' health coverage, thus serves the public interest. That the injunction provided peace of mind to the approximately 50,000 partners of LPMS-managed partnerships with similar health plans reinforces that conclusion. *See* ROA.451; ROA.755.

DOL implies that requiring it to regulate the Plan based on "hypothetical facts" tilts the equities in its favor. *See* DOL.Br.37. But DOL's regulations state that parties to an advisory opinion "may rely on th[at] opinion," assuming "the situation conforms to the situation described in the request." 41 Fed. Reg. at 36,283 § 10. Allowing courts to remedy incorrect advisory opinions—upon which the parties have justifiably relied—serves the public interest by ensuring that good-faith uses of the advisory-opinion system do not leave parties irreparably injured. "The public interest is served by ensuring that governmental bodies," including agencies, "interpret and apply … statutes," like ERISA, "uniformly and fairly." *See Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010). An injunction effectuating that result does the same. The fact that LPMS formed the

Plan "[i]n reliance on the assurances provided ... by DOL officials, and the assumption that DOL would follow its own published rules regarding advisory opinion requests," bolsters this conclusion. ROA.451.

Without offering any meaningful response, DOL claims that the district court's order "cannot be reconciled" with the injunction factors and fails to "cite or discuss" them. DOL.Br.38. But nothing requires the district court to expressly address each factor. FED. R. CIV. P. 65(d) (requiring a court to "state the reasons why it issued" an injunction). When the district court does not make specific findings—or simply makes implicit findings—this Court "examines the record to determine if sufficient evidence supports the issuance of injunctive relief." *See ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 594, 596 (5th Cir. 2003) (cleaned up). As discussed above, ample evidence supports such relief here.

The district court implicitly found the same. The court emphasized that "ERISA is designed to protect 'participants'" and concluded that the Advisory Opinion improperly removed that protection by eliminating the ERISA "safe harbor" and subjecting the Plan to state regulation. *See* ROA.887-88; ROA.895. Those statements show that the court considered the relevant harms, the public interest, and the other injunction factors. *Cf. Realogy Holdings Corp. v. Jongebloed*, 957 F.3d 523, 530 (5th Cir. 2020) (deeming injunction findings sufficient because the court's statements gave "a clear understanding of the [decision's] factual basis," despite

making findings only on the success-on-the-merits factor (internal quotations and citations omitted)).

DOL's three-sentence challenge to the redressability of DMP's injury does not warrant a different result. DOL.Br.38. DOL is correct that the injunction does not prohibit the States from investigating or attempting to regulate the Plan. *Id.* Nonetheless, a federal court's determination that the Plan qualifies under ERISA carries persuasive weight in State proceedings. *Pidgeon v. Turner*, 538 S.W.3d 73, 83 (Tex. 2017). Numerous State Attorneys General made that point when supporting LPMS's request for advisory opinion. *See* ROA.150.

Regardless, the primary harm the injunction redresses is the destruction of DMP's business model. The Advisory Opinion essentially warned DMP that its Plan was "subject to state regulation." *See MDPhysicians & Assocs.*, 957 F.2d at 181. This warning was, "in substance, a 'declaratory'" order that DMP start adapting to state regulation. *Cf. Frozen Food Express*, 351 U.S. at 43-44 (agency order had "an immediate and practical impact" because it subjected parties to "civil and criminal risks" and was "the basis for [them] in ordering and arranging their affairs").

Because such adaptation means that DMP will have to dissolve the Plan, the Advisory Opinion has the practical effect of dooming DMP's business model. *See* ROA.417; ROA.452 (noting that DMP's cessation of enrolling new partners in the Plan to comply with the Advisory Opinion made it "drastically" harder to "attract

new partners"). So while the injunction does not "relieve [DMP of] *every* injury," *i.e.*, all State investigations, it will "relieve [the] discrete injury," of forcing DMP to dissolve its Plan in anticipation of the regulations and investigations that DOL's Advisory Opinion greenlighted. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (internal quotations and citations omitted). As a result, the district court did not abuse its discretion in issuing the injunction.

CONCLUSION

For these reasons, Data Marketing Partnership, L.P. and L.P. Management Services, L.L.C. request this Court affirm the district court's final judgment, and also pray for such further relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellees in electronic form on all counsel of record by filing it using the Court's CM/ECF system on June 15, 2021.

s/ *Warren W. Harris*
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volumes limitations of FED. R. APP. P. 32(a)(7)(B)(i) because this brief consists of 12,976 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

s/ *Warren W. Harris*
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