**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 United States District Court
for the Northern District of Texas

# OPENING BRIEF FOR APPELLANTS

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# CERTIFICATE OF INTERESTED PERSONS

*Data Marketing Partnership, L.P., et al. v. U.S. Department of Labor, et al.*

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

Plaintiffs-appellees:

Data Marketing Partnership, L.P.
L.P. Management Services, L.L.C.

Defendants-appellants:

U.S. Department of Labor
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## STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument would be helpful because this case involves novel questions about the application of the Employee Retirement Income Security Act of 1974.

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Cases:** **Page(s)**

**Statutes:**

**Regulations:**



**Rule:**



**Other Authorities:**

## INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to regulate benefit plans "established or maintained by an employer," "for the purpose of providing [certain benefits] for its participants or their beneficiaries, through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). Healthcare benefit plans that satisfy this definition are regulated under ERISA by the Department of Labor (Department). By contrast, healthcare coverage obtained outside an employment relationship—such as coverage that consumers purchase from commercial-insurance companies—is principally regulated by the States. By restricting ERISA to plans arising from genuine employment relationships, Congress preserved the States' longstanding authority over "plans [that] are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others." *See MDPhysicians & Assocs. v. State Bd. of Ins.*, 957 F.2d 178, 184 (5th Cir. 1992) (quotation marks omitted).

Plaintiff L.P. Management Services, L.L.C., sells health insurance to people designated as limited partners of plaintiff Data Marketing Partnership, L.P. According to plaintiffs, anyone can become a limited partner simply by signing an agreement with the partnership. The limited partners perform only one service for the partnership: they must install software on their personal electronic devices that tracks their internet usage, which the partnership then sells to third parties. After installing this software, the limited partners simply use the internet as they ordinarily

would. The partnership does not supervise the limited partners and does not appear to pay them any money. The only benefit that the limited partners receive is health-insurance coverage provided by plaintiffs' plan—the cost of which the limited partners must pay out of pocket.

Plaintiffs asked the Department for an advisory opinion stating that, by providing health insurance to their limited partners, they created an employee benefit plan subject to ERISA. The Department concluded, however, that plaintiffs' so-called limited partners are not engaged in any kind of business endeavor with respect to the partnership—a prerequisite for ERISA status. Instead, the limited partners appear no different from ordinary consumers purchasing healthcare coverage from a commercial-insurance company. The Department thus advised plaintiffs that their plan is not an ERISA plan and likely falls within the jurisdiction of the States.

Plaintiffs sued the Department under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, and the district court entered summary judgment in plaintiffs' favor. The court also entered a permanent injunction prohibiting the Department from "refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of [plaintiffs' partnership]." ROA.903. That judgment was erroneous in three principal respects.

First, the court mistakenly concluded that the advisory opinion was final agency action subject to APA review. ERISA advisory opinions bear even fewer hallmarks of finality than the Department of Labor opinion letters that this Court held were not

final in *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991).

Second, the court mistakenly concluded that plaintiffs' limited partners are "working owners." Working owners "wear two hats, as an employer and employee," and can participate in an employee benefit plan under certain circumstances. *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6, 20-21 (2004). The Department cogently explained why the limited partners are not akin to working owners such as medical doctors who own their own medical company or law partners who own their own law practice. The court's alternative ruling—that plaintiffs' limited partners are "bona fide partners" entitled to participate in certain employee benefit plans under ERISA—is flawed for similar reasons.

Finally, the court abused its discretion by entering an injunction that permanently forbids the Department from "refusing to acknowledge" the Plan's ERISA status. ROA.903. The Department issued its opinion based on facts as represented by plaintiffs. The Department did not investigate the structure of the partnership or the role of the limited partners, nor did it conduct a hearing or require substantiation of the facts as represented. The court's order is thus without basis, and reflects its error in undertaking review of non-final agency action.

## STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. As discussed below, *infra* pp. 17-24, the challenged advisory opinion is not final agency action subject to APA review. Under this Court's precedent, the district court thus lacked subject-matter jurisdiction. *See Texas v. EEOC*, 933 F.3d 433, 440 n.8 (2019). The court entered final judgment on September 28, 2020. ROA.904. The government timely appealed. ROA.906-07; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

**1.** Whether the Department of Labor's advisory opinion on whether plaintiffs' healthcare plan qualifies as an employee benefit plan under ERISA is final agency action under the APA.

**2.** Whether, assuming the advisory opinion is subject to review, the Department reasonably opined that plaintiffs' plan does not qualify as an employee benefit plan because its limited partners are not "participants" under ERISA.

**3.** Whether the district court erred in permanently enjoining the Department to treat plaintiffs' plan as an employee benefit plan under ERISA.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

#### 1. ERISA's Definition of "Employee Benefit Plan"

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Such benefits can include healthcare coverage. Because employee benefit plans arise from an employment relationship, they are principally regulated by the Department of Labor under ERISA. *See* 29 U.S.C. § 1132(a)(2), (a)(5). By contrast, healthcare coverage obtained outside an employment relationship—for example, coverage that consumers have purchased from commercial-insurance companies—is principally regulated by the States under the laws that govern the health-insurance market. *See MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 184-85 (5th Cir. 1992).

To qualify as an employee benefit plan under ERISA, a plan that offers healthcare benefits must be "[1] established or maintained by an employer . . . [2] for the purpose of providing [healthcare benefits] for its participants or their beneficiaries, [3] through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). ERISA defines "employer" as "any person acting directly as an employer . . . in relation to an employee benefit plan." *Id.* § 1002(5). ERISA defines "participant" as "any employee or former employee of an employer" who is eligible to receive benefits under the plan,

as well as any "person designated by a participant" who is eligible to receive such benefits. *Id.* § 1002(7)-(8). And ERISA defines "employee" as "any individual employed by an employer." *Id.* § 1002(6).

As this Court has observed, "[t]he identification and classification of persons and plans covered [by ERISA] requires a considerable degree of dedicated expertise." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993). Thus, when determining whether a plan is an employee benefit plan under ERISA, courts accord deference to the views of the Department of Labor, which Congress vested with authority to interpret and enforce these statutory provisions. *See* 29 U.S.C. §§ 1132(a)(2), (a)(5), 1135.[1]

**2. ERISA's Applicability to Limited Partners**

As relevant here, limited partners can qualify as "participants" within the meaning of ERISA if they satisfy at least one of three conditions set forth by the statute and its implementing regulations.

First, limited partners can qualify as "participants" if they meet ERISA's definition of "employee." *See* 29 U.S.C. § 1002(1), (6)-(7). Because ERISA's "nominal definition of 'employee' as 'any individual employed by an employer' is

[1] Other ERISA provisions are administered by the Internal Revenue Service (IRS). *See* Reorganization Plan No. 4 of 1978, § 102, 92 Stat. 3790 (reproduced at 5 U.S.C. app. at 231-33). When IRS's authority overlaps with the Department of Labor's, both agencies work together to administer the provisions at issue. *See* 29 U.S.C. § 1204(a).

completely circular and explains nothing," the Supreme Court has adopted a multi-factor test for employee status. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (citation omitted). That test, which derives from the common law, turns on the "hiring party's right to control the manner and means" in which a particular individual performs tasks. *Id.* (quotation marks omitted). "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (quotation marks omitted). Relevant factors include whether and to what extent an individual is paid by the entity maintaining the plan; whether and to what extent an individual receives benefits from the entity; whether an individual is required to possess any work-related skills; and whether and to what extent an individual is actively providing services to the entity. *Id.* at 323-24.

Second, certain partners can participate in "group health plans" sponsored by the partnership. 29 U.S.C. § 1191a(d); *see generally id.* §§ 1191-1191c. Such plans are regulated as employee benefit plans under ERISA "to the extent that the plan provides medical care . . . to employees or their dependents . . . directly or through insurance, reimbursement, or otherwise." *Id.* § 1191b(a)(1).[2] To qualify as a "partner" capable of participating in a group health plan, mere job titles are insufficient. A person must instead be a "bona fide partner." 29 C.F.R. § 2590.732(d)(2). To

[2] When regulating group health plans, the Department of Labor coordinates with the Department of Health and Human Services and the Treasury Department. *See* 64 Fed. Reg. 70,164, 70,165 (Dec. 15, 1999).

determine whether someone is a bona fide partner, the Department examines "all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership." *Id.* § 2590.732(d)(2).

Finally, the Supreme Court has held that "working owners"—that is, people who "wear two hats, as an employer and employee"—can qualify as "participants" in an ERISA plan if the plan covers at least one other person who satisfies the common-law definition of "employee." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16-18, 20-21 (2004). In reaching that conclusion, the Court accorded "respectful consideration" to the Department's longstanding view that "a plan that covers as participants one or more common law employees[] in addition to the self-employed individuals will be included in the definition" of an ERISA plan. *Id.* at 20-21 (quotation marks omitted). The Court did not otherwise define the term "working owner."

In 2018, the Department issued a regulation related to working owners in another ERISA context. The regulation defined "working owner" as someone who:

> (1) "has an ownership right of any nature in a trade or business";
>
> (2) "is earning wages or self-employment income from the trade or business for providing personal services to the trade or business"; and
>
> (3) "[w]orks on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business," or whose wages from that trade "at least equal[] the working owner's cost of coverage for participation" in the health plan "in which the individual is participating."

83 Fed. Reg. 28,912, 28,964 (June 21, 2018).[3] The Department adopted this definition to ensure that only "persons . . . genuinely engaged in a trade or business" qualified for working-owner status. *Id.* at 28,931; *see id.* ("The rule is intended to cover genuine work relationships, . . . not to permit individual coverage masquerading as employment-based coverage.").

**3. Advisory Opinions**

It is the practice of the Department of Labor to answer inquiries from potentially regulated entities "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). The Department responds to these requests "whenever appropriate, and in the interest of sound administration of [ERISA]." *Id.* at 36,282.

One type of response is an advisory opinion, defined as a "written statement issued to an individual or organization, or to [their] authorized representative . . . that interprets and applies [ERISA] to a specific factual situation." 41 Fed. Reg. at 36,282. An advisory opinion "assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described" in the request. *Id.* at 36,283. The requester "may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations

[3] A district court vacated the regulation in 2019. *New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019). The government's appeal of that decision is currently in abeyance. *New York v. U.S. Dep't of Labor*, No. 19-5125 (D.C. Cir. argued Nov. 14, 2019).

necessary to issuance of the opinion," and to the extent that "the situation conforms to the situation described in the request." *Id.* These "agency view[s] . . . reflect[] a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Yates*, 541 U.S. at 18 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

### B. Factual Background

Plaintiff L.P. Management Services, L.L.C. is the general partner of several entities structured as limited partnerships, including plaintiff Data Marketing Partnership, L.P. ROA.104. L.P. Management Services is also the plan administrator and fiduciary of a healthcare benefits plan maintained for the partnership's common-law employees and limited partners. ROA.107.

Plaintiffs asked the Department of Labor for an advisory opinion on whether, under ERISA, their plan would qualify as an "employee welfare benefit plan" and whether their limited partners would qualify as "participants" in such a plan. *See* ROA.399-412. Plaintiffs' request represented that the partnership's business is the "capture, segregation, aggregation, and sale . . . of electronic data" generated by its limited partners. ROA.401. Individuals become limited partners of the partnership by agreeing to install tracking software on their personal electronic devices (such as computers, cell phones, and televisions). ROA.401. This software monitors individuals' online activities and provides that information to the partnership, which then sells it to third-party marketing firms. ROA.401. Limited partners commit to

providing the partnership with more than 500 hours' worth of data every year, which involves no action other than the use of their electronic devices. ROA.106.

The partnership allows limited partners to participate in the healthcare benefits plan, but the limited partners must pay their own insurance premiums out of pocket. ROA.107. According to the request, the limited partners do not appear to receive any other compensation. The request does state that any "[i]ncome distributions . . . to the [limited partners] . . . will be reported as guaranteed payments and will be subject to employment taxes." ROA.891 (quotation marks omitted). But the request does not state that the partnership has ever made any distributions to any limited partner.

The Department issued an advisory opinion advising plaintiffs that their plan was not an employee benefit plan under ERISA. The Department explained that, to qualify as such a plan, the limited partners must qualify as "participants" under ERISA. Based on the hypothetical facts set forth in plaintiffs' request, the Department opined that the people whom plaintiffs designated as limited partners are not employees of the partnership, bona fide partners in the partnership, or working owners of the partnership. As the Department explained, the limited partners are not "meaningfully employed by the partnership" and perform no meaningful "services on its behalf." ROA.393. The limited partners do not "report to any assigned 'work' location"; they do not "notify the partnership that they are commencing their work"; and they do not need to "possess any particular work-related skills." ROA.393. The only service that the limited partners perform for the partnership is to "permit[]

tracking of the limited partner's use of the Internet on a personal device . . . in much the same way that visitors to websites generate value for the entities that track consumer [web] traffic every day for marketing and advertising purposes." ROA.393. This service does not "differ[] in any meaningful way from the personal activities individual limited partners would otherwise engage in while using their personal devices." ROA.393.

The Department instead advised plaintiffs that their so-called limited partners are "simply purchasers of health coverage who, like other purchasers of individual health insurance, are responsible for paying all of the health care premiums for their coverage under the limited partnership arrangement." ROA.396. "To treat [the limited partners] as employee participants in an ERISA-covered plan would effectively read the employment-based limitations on ERISA coverage out of the statute." ROA.396.

### C. Prior Proceedings

Plaintiffs challenged the advisory opinion in district court under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*[4] The court granted summary judgment to plaintiffs.

[4] Plaintiffs filed their lawsuit before the opinion was issued, *see* ROA.392, and amended their complaint upon receiving the Department's advice, *see* ROA.98-128. The Department based its opinion "on the materials [plaintiffs] submitted in support of [their] request as well as the information alleged" in the original complaint. ROA.392.

At the threshold, the district court ruled that the advisory opinion was final agency action subject to APA review. Despite the fact that the opinion is based entirely on plaintiffs' representations, that the opinion is by its very terms advisory, and that the Department is free to revisit the opinion, the court concluded that the opinion "marked the consummation" of the agency's decision-making process. ROA.886.

The court then concluded that, as a matter of law, plaintiffs' limited partners must be treated as "participants" for purposes of ERISA. The court did not dispute the agency's conclusion that the limited partners are not "employees" of the partnership. Instead, the court determined that the limited partners are "working owner[s]," which the court defined as anyone with an "equity ownership right of any nature in a business enterprise" who is "actively engaged in providing services to that business." ROA.893 (emphases omitted) (quotation marks omitted). The court found that the limited partners have an ownership interest because the partnership accords them unspecified "management responsibilities." ROA.898. The court further found that the limited partners actively provide services to the partnership by installing software on their personal devices and browsing the internet as they usually would. ROA.900.

The court concluded, in the alternative, that plaintiffs' limited partners qualify as "bona fide partners" under ERISA's group-health-plan provisions. ROA.901. The court stated, without citation, that bona fide partner status "simply requires a more-

than-pretextual relationship between the employer and employee"—a "lower threshold" than that required to qualify as a working owner. ROA.901. Because the court believed that the limited partners are working owners, the court concluded that the limited partners must be bona fide partners as well.

The court permanently enjoined the Department "from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners" of the partnership. ROA.903.

## SUMMARY OF ARGUMENT

The district court erred in undertaking review of an advisory opinion that is plainly not final agency action within the meaning of the APA. The court compounded this error by issuing a permanent injunction that precludes the Department from denying that plaintiffs' plan is an ERISA plan. The injunction effectively prohibits the Department from conducting a full investigation into the nature of the relationship between the partnership and its so-called limited partners.

**I.** Advisory opinions premised on assumed facts are "classically non-final" because of their "hypothetical" nature. *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004). This Court has previously held that opinion letters issued by the Department of Labor in a different statutory context are not final. *See Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991). Although ERISA advisory opinions bear even fewer hallmarks of finality than the

opinion letters at issue in *Taylor-Callahan-Coleman*, the district court failed to cite this Court's holding or address this Court's reasoning—which applies with full force here.

The district court mistakenly believed that the advisory opinion is final agency action because it denies plaintiffs the safe harbor of ERISA preemption and subjects plaintiffs to burdensome State regulations. But advisory opinions have no inherent preemptive effect and cannot require or forbid States from undertaking any regulatory action. The court also emphasized that requesters can rely on ERISA advisory opinions to the extent that their requests "fully and accurately" set forth all material facts and representations. 41 Fed. Reg. at 36,283. That was at least equally true of the opinion letters at issue in *Taylor-Callahan-Coleman,* which this Court held were not final agency action.

**II.** Assuming that the advisory opinion is subject to APA review, the district court erred in rejecting the Department's cogent explanation that plaintiffs' so-called limited partners are not "participants" under ERISA. As the Department explained, the limited partners do not actively provide any services to plaintiffs. They simply agree to install software on their personal electronic devices that tracks their internet browsing habits. The limited partners do not need to have any work-related skills; do not need to report to any assigned work location or submit to supervision by the partnership; and do not appear to be compensated in any way for their labor. The only benefit they receive from the partnership is health-insurance coverage through plaintiffs' plan—and the limited partners must pay the entirety of their own premiums

out of pocket. Thus, the limited partners are no different from ordinary consumers purchasing healthcare coverage from a commercial-insurance company.

The district court did not dispute that the limited partners are not employees of the partnership, but it ruled that the limited partners are working owners of the partnership. That conclusion was erroneous in all respects. The court applied a definition of "working owner" that it mistakenly believed had been adopted by the Department. And in any event, the limited partners would not qualify as working owners even under that definition. The court's contrary analysis notwithstanding, the limited partners neither perform active services for the partnership nor possess meaningful ownership interests in the partnership.

The court's alternative conclusion—that the limited partners are "bona fide partners" eligible to participate in certain ERISA plans because they bear more than a pretextual relationship to the partnership—is flawed for similar reasons. The court's definition of "bona fide partner" is unmoored from that adopted by the Department. And for the reasons explained, the Department reasonably opined that the limited partners' title is a sham to obscure their status as consumers purchasing insurance on the open market.

**III.** Even assuming that the court properly exercised review and correctly ruled that the advisory letter was erroneous, the court abused its discretion by permanently enjoining the Department from "refusing to acknowledge the ERISA-status of the [plaintiffs'] Plan or refusing to recognize the Limited Partners as working

owners of [the partnership]." ROA.903. The point of an advisory opinion is to give the requester an opportunity to obtain an agency's initial view without a formal decision-making process taking place. The injunction not only concludes that the Department erred on the basis of assumed facts, but bars the Department from changing its view even if a full investigation reveals that plaintiffs' plan is not in fact an ERISA plan. That result is contrary not only to foundational principles of administrative law but also to the factors cabining a court's equitable discretion.

## STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, 846 F.3d 99, 105 (5th Cir. 2017). A decision to issue a permanent injunction is reviewed for abuse of discretion. *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238 (5th Cir. 2007). The Department's actions may be set aside only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

## ARGUMENT

### I. The District Court Erroneously Concluded That The Advisory Opinion Is Final Agency Action.

For agency action to be "final" and reviewable under the APA, the action in question must both (1) "mark the consummation of the agency's decisionmaking process," and (2) constitute an action "by which rights or obligations have been

determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation marks omitted). Neither prerequisite is satisfied here.

### A. The Advisory Opinion Is Not the Consummation of the Department's Decision-Making Process and Carries No Significant Legal Consequences.

The advisory opinion does not represent the consummation of the Department's decision-making process with respect to the question whether plaintiffs' plan is an employee benefit plan under ERISA. Before issuing the opinion, the Department conducted no investigation and made no findings. Its advice turned entirely on facts supplied by plaintiffs. *See* 41 Fed. Reg. at 36,283 (explaining that, when the Department issues an advisory opinion, it "assumes that all material facts and representations set forth in the request are accurate"). The Department remains free to alter its view if it initiates an investigation into plaintiffs' plan and finds that the facts are different than represented. *Id.* at 36,283.

This advisory opinion, like other advisory opinions issued by the Department and by other agencies, is merely an "agency letter[] based on hypothetical facts." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004). Such letters are "classically non-final" because of their "hypothetical" nature. *Id.*; *see Natural Res. Def. Council v. FAA*, 292 F.3d 875, 882 (D.C. Cir. 2002) (holding that an opinion letter "based on a hypothetical factual scenario" was "not appropriate for review" because the agency remained free to come to a contrary conclusion upon conducting its own investigation). As this Court has explained, permitting judicial review of "informal,

advisory, administrative opinions" would "discourage" agencies from "giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which would accrue." *Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991).

Even assuming that the advisory opinion marked the culmination of the Department's decision-making, it would not be final because it does not have any legal consequence and does not create any legal rights. The opinion merely states that, assuming plaintiffs' hypothetical facts are accurate, the Department would not regard plaintiffs' plan as an employee benefit plan under ERISA. ROA.397. The opinion does not preclude the Department from regulating plaintiffs' plan under ERISA in the future—for example, if the Department determines, after a full investigation, that plaintiffs' factual representations were inaccurate and that the plan is in fact subject to ERISA. *See* 29 U.S.C. § 1134(a) (granting the Department authority to investigate "whether any person has violated or is about to violate any provision of" ERISA). The opinion likewise does not preclude plaintiffs from seeking reconsideration of the Department's decision by, for example, submitting a new advisory-opinion request.

The opinion *does* inform plaintiffs that States might take enforcement action against plaintiffs if the States determine that plaintiffs' plan is subject to State insurance laws. ROA.397. That possibility, however, has always existed. And the opinion does not—and could not—commit any State to any particular future

enforcement action. The opinion thus places plaintiffs in no different position than if plaintiffs had not requested it.

This Court in *Taylor-Callahan-Coleman* applied these principles in a manner that controls the resolution of the finality question here. That case concerned opinion letters interpreting the Fair Labor Standards Act (FLSA), which the Department of Labor issues in response to requests from regulated entities. FLSA opinion letters "are expressly limited to the factual situation presented by the requesting party," *Taylor-Callahan-Coleman*, 948 F.2d at 957; are "subject to change by the [Department]," *id.*; and "do not have the status of law with penalties for noncompliance," *id.* at 959. The Court deemed these letters to be non-final because, "[r]ather than constituting agency action which is definitive, broadly applicable[,] and demanding of compliance of all employers," the letters only "respond to particularized inquiries." *Id.* at 958. That holding governs this case. Like FLSA opinion letters, ERISA advisory opinions respond only to a particularized inquiry and do not establish any broadly applicable guidance. ERISA advisory opinions also do not demand compliance from plaintiffs or from any other regulated entity.

### B. The District Court's Analysis Disregarded Governing Principles of Finality.

In deeming the advisory opinion to be final agency action, the district court stated that, because Department regulations prevent plaintiffs from withdrawing their request for advice now that they have received an adverse opinion, 41 Fed. Reg. at

36,283, the opinion represents the Department's final word on the question whether plaintiffs' plan is an employee benefit plan under ERISA. ROA.885. But nothing in the advisory opinion "commit[s] the [agency]" to its conclusion that plaintiffs should not be regulated by the Department or to take "any particular course of action." *Luminant Generation Co. v. U.S. EPA*, 757 F.3d 439, 442 (5th Cir. 2014). As noted, the Department retains discretion to investigate plaintiffs' plan and to reach a different conclusion; and plaintiffs retain discretion to request a different opinion.

The district court also mistakenly relied on the Supreme Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016). In *Hawkes*, the Court held that an "approved jurisdictional determination"—an action setting forth the conclusive view of the Army Corps of Engineers as to whether a given property is subject to the Clean Water Act—is final agency action subject to APA review. *Id.* at 1814 (quotation marks omitted). This determination is different from an ERISA advisory opinion in several significant respects. An approved jurisdictional determination is issued only "after extensive factfinding" and "is typically not revisited" by the agency. *Id.* at 1813-14. Indeed, the Corps itself characterizes such determinations as "final agency action." 33 C.F.R. § 320.1(a)(6). An approved jurisdictional determination is also "binding on the Government and represent[s] the Government's position in any subsequent Federal action or litigation" for five years. *Hawkes*, 136 S. Ct. at 1814 (quotation marks omitted). ERISA advisory opinions share none of these features. Such opinions are issued after no fact-finding whatsoever, are

subject to revision by the Department at any point after they are issued, are not treated as final by the Department, and have far less binding force.

The district court reasoned that, if the Department had "opined that [plaintiffs'] Plan was covered by ERISA, the Plan would have the safe harbor of federal preemption, removing the Plan determinatively" from the coverage of state insurance regulations. ROA.887. By advising plaintiffs that their plan was not in fact covered by ERISA, the Department allegedly "removed the safe harbor of federal preemption" and "creat[ed] new obligations for [plaintiffs] to conform to complex state regulatory schemes." ROA.888. The Department, however, did no such thing. The Department's opinion as to whether a plan is an employee benefit plan under ERISA is entitled to deference in litigation. *See Wisconsin Educ. Ass'n Ins. Tr. v. Iowa State Bd. of Pub. Instruction*, 804 F.2d 1059, 1065 (8th Cir. 1986). But because the opinion does not—and cannot—bind a court, it has no inherent preemptive effect. *See id.* at 1065; *see also Bank of New York v. Janowick,* 470 F.3d 264, 269 (6th Cir. 2006); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 908 (9th Cir. 2001). The advisory opinion thus does not create a safe harbor analogous to the one at issue in *Hawkes*.

This Court's decision in *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), is even further afield. That case concerned an agency guidance document that threatened regulated entities with Title VII liability unless they took certain actions. *Id.* at 438. The Court held that the guidance was final because it "committ[ed] the agency . . . to a view of the law that . . . forces [regulated parties] either to alter [their] conduct, or

expose [themselves] to potential liability." *Id.* at 446 (quotation marks omitted). Here, by contrast, the Department has not irrevocably committed itself to any particular view of the ERISA status of plaintiffs' plan. Nor has the Department forced plaintiffs to alter their conduct or risk exposing themselves to an enforcement action initiated by the Department. The opinion merely gives plaintiffs additional information to determine whether to conform their operations to ERISA as opposed to applicable State insurance laws.

The district court also stated that ERISA advisory opinions confer a different kind of safe harbor on requesters. The court noted that requesters can rely on such opinions "to the extent that the request fully and accurately contains all the material facts and representations necessary to [the] issuance of the opinion." ROA.884 (quoting 41 Fed. Reg. at 36,283). But even greater reliance interests were created by the FLSA opinion letters at issue in *Taylor-Callahan-Coleman Counties*. By statute, an employer cannot be held liable for violating the FLSA if "he pleads and proves" that the alleged violation was "in reliance on" an FLSA opinion letter. 29 U.S.C. § 259(a). "Such a defense . . . shall be a bar to the action" even if the Department later "modifie[s] or rescind[s]" the letter, and even if the letter "is determined by judicial authority to be invalid or of no legal effect." *Id.* This defense can be invoked not only by the requesting employer but also by similarly situated employers. The Court nevertheless held that the FLSA opinion letters at issue were not final because "reliance on an opinion letter is not valid for any period after the [Department] has

announced a change in policy. Thus, opinion letters have only an interim function." *Taylor-Callahan-Coleman Counties*, 948 F.2d at 957 (citation omitted). Moreover, "it is the regulations [implementing the FLSA], not the opinion letters [themselves], which fix rights." *Id.* at 958. The same is true for ERISA advisory opinions, which create comparatively less significant reliance interests.

## II. Assuming That The Advisory Opinion Was Reviewable, The District Court Erroneously Concluded That Plaintiffs' Plan Covers "Participants" Under ERISA.

To qualify as an employee benefit plan subject to ERISA, every person covered by plaintiffs' plan must qualify as a "participant" under ERISA. The Department reasonably concluded, based on plaintiffs' representations, that the people whom plaintiffs label "limited partners" are not "participants." Instead, the limited partners are no different from consumers purchasing insurance from commercial-insurance companies, and their limited-partner designation is a sham designed to allow plaintiffs to evade State insurance regulations. Because the Department "examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action," its judgment that plaintiffs' plan is not an employee benefit plan subject to ERISA warrants deference. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

### A. Plaintiffs' So-Called Limited Partners Are Not "Participants" Under Any Theory.

As relevant here, plaintiffs' so-called limited partners could qualify as "participants" under ERISA in one of three ways. First, the limited partners could satisfy ERISA's definition of "employee." *See* 29 U.S.C. § 1002(1), (6)-(7). Second, the limited partners could satisfy the definition of "bona fide partner" in ERISA's group-health-plan provisions. *See* 29 C.F.R. § 2590.732(d). And third, the limited partners could qualify as working owners, who can participate in an ERISA plan with at least one other common-law employee. 29 C.F.R. § 2510.3-3(b); *see Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004). The Department persuasively explained why the limited partners satisfy none of these definitions.

#### 1. The limited partners are not "employees."

The Department reasonably concluded that plaintiffs' limited partners are not "employees" under ERISA. To qualify as an employee, a person must satisfy the "common-law test" for employment. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). This test is governed by a host of factors that illuminate the extent to which the "hiring party[]" can "control the manner and means" in which the person in question performs tasks. *Id.* (quotation marks omitted).

The Department explained that all of the relevant factors militate against the conclusion that plaintiffs' limited partners are employees under ERISA. Most significantly, the limited partners do not actively provide any services to plaintiffs.

The limited partners' sole responsibility is to "install on their personal electronic devices specific software which . . . captures the data tracking of other companies as [they] use their devices and surf the Internet . . . as [they] see[] fit." ROA.393. The limited partners thus "generate economic value for the partnership in much the same way" as Facebook users generate value for that company, which also "track[s] consumer traffic every day for marketing and advertising purposes." ROA.393. There is no reasonable dispute that, even though all Facebook users agree to allow Facebook to track their browsing habits, Facebook's users are not Facebook's employees.

The remaining factors support the Department's conclusion as well. Plaintiffs do not require the limited partners to have "any particular work-related skills." ROA.393. Plaintiffs do not require the limited partners "to report to any assigned 'work' location or otherwise notify the partnership that they are commencing their work." ROA.393. Indeed, plaintiffs do not supervise the limited partners in any way. Plaintiffs do not appear to pay the limited partners for their purported labor, and plaintiffs submitted no evidence indicating that the limited partners can "expect any appreciable financial benefit for their participation in the partnership." ROA.393. The only concrete benefit that the limited partners receive from plaintiffs is health-insurance coverage through plaintiffs' plan. ROA.393. Even then, the limited partners must pay their own premiums out of pocket, just like consumers who buy healthcare coverage from commercial-insurance companies. ROA.393.

For these reasons, the Department reasonably concluded that, "as a matter of economic reality," the limited partners are not employees. ROA.393. They are "merely consumers purchasing health coverage in exchange for premiums and an agreement that the partnership can track their personal activities on their electronic devices." ROA.395.

**2. The limited partners are not "bona fide partners."**

For similar reasons, the Department reasonably concluded that the limited partners are not bona fide partners. The limited partners "do not work or perform services for the partnership." ROA.396; *see supra* pp. 25-26. They "do not earn income based on work performed for or through the partnership." ROA.396; *see supra* pp. 25-26. And "they have only a nominal (at best) ownership interest in the partnership." ROA.396.

In reaching that conclusion, the Department acknowledged plaintiffs' representation that the limited partners can "participate in global management issues through periodic votes of all partners." ROA.393. But the Department noted that plaintiffs had failed to provide any "information on such votes," including their frequency or their content. ROA.393. The Department thus determined that the limited partners' "ownership interests do not appear to have economic or operational substance." ROA.396.

### 3. The limited partners are not "working owners."

Finally, the Department reasonably concluded that the limited partners are not "working owners" under the Supreme Court's decision in *Yates*. That case presented the question whether ERISA's definition of "participant" extended to a medical doctor who was the sole shareholder and president of a professional corporation bearing his name, and who practiced medicine under the auspices of that corporation. *Yates*, 541 U.S. at 6 (quotation marks omitted). The Court held that working owners—defined as individuals who "wear two hats, as an employer and employee"—are "employee[s] entitled to participate" in an employee benefit plan. *Id.* at 16. Because there was no dispute that the doctor was both an employer and an employee, the Supreme Court did not further "define who exactly makes up th[e] class of 'working owners.'" *Id.* at 25 n.* (Thomas, J., concurring in the judgment).

The limited partners stand in a far different position than the doctor at issue in *Yates*. The limited partners lack any employment relationship with plaintiffs because they perform no "work for or through the partnership." ROA.393. The partners merely install software on their personal electronic devices that tracks their internet usage while they browse. ROA.393. They then proceed to use the internet in a manner no different from the way they normally would. ROA.393. The limited partners also lack any of the traditional indicia of employee status.

The Department thus rejected plaintiffs' suggestion that the limited partners are working owners. ROA.397. Any other conclusion, the Department explained, would

"read the employment-based limitations on ERISA coverage out of the statute." ROA.396. If accepted, any insurance company could evade state insurance regulation by calling their customers limited partners and requiring them to allow the company to track their internet activity. *Id.* The Department reasonably declined to countenance this dramatic expansion of ERISA at the expense of State insurance regulators.

### B. The District Court Provided No Sound Basis for Setting Aside the Department's Opinion.

The district court did not dispute that plaintiffs' limited partners are not employees. But the court mistakenly ruled that the limited partners must be treated as "participants" under ERISA as a matter of law.

**1.** The district court chiefly relied on a Department of Labor advisory opinion addressing the concept of working owners. ROA.893 (discussing Dep't of Labor, Advisory Op. No. 99-04A, 1999 WL 64920, at *1-2 (Feb. 4, 1999)). The court believed that Opinion 99-04A defined "working owner" as "any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business." ROA.893 (emphasis omitted) (quotation marks omitted). Applying this definition, the court ruled that plaintiffs' limited partners are working owners as a matter of law.

This analysis is mistaken in all respects. To begin with, Opinion 99-04A did not adopt the definition that the district court applied. That opinion involved

electricians who had "started their own electrical businesses" but who continued to employ themselves as electricians. 1999 WL 64920, at *2. Because the electricians' status as working owners was undisputed, the Department did not need to define the term—just as the Supreme Court declined to define the term in *Yates*, which involved an identical self-employment relationship. The quoted language merely clarifies the Department's understanding of what the requester meant by its use of the term "working owner." *Id.* at *2 n.3 ("By the term 'working owner,' you apparently mean any individual who has an equity ownership right . . . in a business . . . and who is actively engaged in providing services to that business."). In any event, the limited partners would not qualify as working owners even under the district court's erroneous interpretation of Opinion 99-04A. As the Department noted, the limited partners do not have meaningful equity rights and do not actively perform services for plaintiffs.

In concluding otherwise, the district court analogized the limited partners to partners in a law firm. ROA.900. But law partners' relationship to their law practice is not limited to installing software to monitor their internet browsing habits, and their remuneration is not limited to the opportunity to buy health insurance by paying for it themselves. Instead, law partners generally "participat[e] in the management and control of" their firm, "control the manner and means by which the firm provide[s] legal services," and "share[] in the firm's profits." *Lain v. UNUM Life Ins. Co. of Am.*, 27 F. Supp. 2d 926, 932 (S.D. Tex. 1998), *cited approvingly by House v. American United*

*Life Ins. Co.*, 499 F.3d 443, 451 (5th Cir. 2007). They are therefore self-evidently working owners, just like the medical doctor in *Yates* and the electricians in Opinion 99-04A. Plaintiffs' limited partners perform no analogous duties and enjoy no analogous benefits.

The district court also analogized limited partners to drivers for rideshare services such as Uber or Lyft. ROA.899. The court did not cite, and we are not aware of, any authority suggesting that rideshare drivers are "working owners" of these companies under ERISA. The court's analysis is therefore erroneous even assuming that it accurately described the work that rideshare drivers perform. But contrary to the court's suppositions, rideshare drivers do not "generate income" simply by "driving the same routes" that they would be driving "in [their] personal time." ROA.899. Drivers receive ride requests from people nearby, drive to where those people are, and deliver their passengers to destinations that the passengers specify. *Chamber of Commerce of the U.S. v. City of Seattle*, 890 F.3d 769, 776 (9th Cir. 2018). Thus, rideshare drivers are far more actively engaged in providing services to Uber or Lyft than plaintiffs' limited partners are engaged in providing services to the partnership. The limited partners' "work" consists entirely of browsing the internet in any way that they see fit. ROA.393.

Finally, the district court mistakenly questioned the Department's observation that "the revenue the limited partner could reasonably expect from [plaintiffs] will typically be zero." ROA.891 (discussing ROA.394). The court believed that this

statement was in tension with plaintiffs' representation that any "[i]ncome distributions . . . to the [limited partners] . . . will be reported as guaranteed payments and will be subject to employment taxes." ROA.891 (quotation marks omitted). That representation merely indicates that any money plaintiffs pay their limited partners is taxable. It does not indicate that plaintiffs have ever paid anything to any limited partner.

**2.** The district court believed that the Department's analysis is foreclosed by the Supreme Court's decision in *Yates,* which the court incorrectly interpreted to prohibit the Department from consulting the common-law definition of "employee" to assess whether plaintiffs' limited partners are working owners. ROA.897-98. The question in *Yates* was whether working owners can participate in employee benefit plans notwithstanding their ownership stake in the business. Because ERISA's text and structure "contain[] multiple indications that Congress intended working owners to qualify as plan participants," the Court saw "no cause . . . to resort to common law." *Yates*, 541 U.S. at 12. The Court did not preclude the Department from consulting the common law of employment to analyze the threshold question of who qualifies as a working owner—a question neither presented in nor answered by *Yates*.

The Department's decision to consult common-law criteria was entirely consistent with ERISA. The text of ERISA is "replete with references to the employment relationship, and ERISA's coverage expressly turns on the provision of benefits in the employment context." ROA.394. Congress adopted this language to

distinguish "between offering and maintaining employment-based . . . plans, on the one hand, and the mere marketing of insurance and benefits to individuals outside the employment context, on the other." ROA.397. Plans that too closely resemble "plans . . . established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others" are not governed by ERISA. *MDPhysicians & Assocs. v. State Bd. of Ins.*, 957 F.2d 178, 184 (5th Cir. 1992) (quotation marks omitted). The Department reasonably concluded that the common law of employment sheds light on whether a given plan arises from a genuine employment relationship or from a commercial-insurance arrangement in disguise.

The district court suggested that the advisory opinion's reasoning cannot be reconciled with the Department's arguments in *Yates*. ROA.892 (discussing Br. of United States as Amicus Curiae, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 2003 WL 21953912 (S. Ct. No. 02-458) (filed Aug. 11, 2003)).[5] But the cited amicus brief merely explained why courts should not consult common-law principles to determine whether people who are indisputably working owners can be participants in ERISA plans—as the *Yates* Court subsequently held. The brief did not address the entirely distinct question at issue here: whether the Department reasonably consulted common-law factors to determine whether plaintiffs' limited partners are working owners to begin with.

[5] The district court erroneously stated that the brief was filed in *New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

The court's allegations of inconsistency are further undermined by the definition of "working owner" that the Department adopted in a different ERISA context. *See* 83 Fed. Reg. at 28,964. That definition limits working-owner status to people who perform economically meaningful work by excluding people who merely engage in "de minimis 'commercial activit[y].'" *Id.* at 28,931. The definition thus restricts the rule's working-owner provisions to healthcare benefits provided in "genuine work relationships," as opposed to "individual [healthcare] coverage masquerading as employment-based coverage." *Id.* The Department's opinion is fully consistent with that definition.

Finally, the district court's judgment cannot be sustained even assuming that the Department's advisory opinion somehow conflicts with *Yates* or with the Department's prior positions. "The APA demands that courts reviewing agency decisions under the Act '[take] due account . . . of the rule of prejudicial error.'" *United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011) (alterations in original) (quoting 5 U.S.C. § 706). As explained, plaintiffs' limited partners would not qualify as working owners even under the district court's mistaken understanding of what working-owner status entails. Because the Department's alleged error does not "bear[] on . . . the substance" of its decision, the district court should not have entered judgment against the Department on this basis. *See Johnson*, 632 F.3d at 930 (quotation marks omitted).

**3.** The district court separately stated that the Department improperly "impos[ed] some imprecise . . . ratio requirement" between working owners and common-law employees. ROA.902. But the Department has consistently maintained that, as long as a plan covers at least one common-law employee, any number of working owners can also participate in that plan. 29 C.F.R. § 2510.3-3(b). And the Supreme Court accorded "respectful consideration" to that regulation, *Yates*, 541 U.S. at 20-21, when it held that "working owner[s] may participate" in an employee benefit plan as long as "the plan covers one or more employees other than" the working owner, *id.* at 6.

The advisory opinion does not contradict these principles. The Department opined that plaintiffs' limited partners were not working owners because they did not perform any meaningful work for plaintiffs and because their relationship to plaintiffs lacked any indicia of traditional employment status. The Department did not conclude that the limited partners were not working owners because they were too numerous relative to the number of common-law employees in plaintiffs' plan. Indeed, the opinion referred to the ratio between working owners and common-law employees only once: when rejecting plaintiffs' argument that the presence of a single common-law employee confers ERISA status on a healthcare-benefits plan, whether the other individuals covered by the plan are "participants" or not. ROA.394; *see* ROA.407. If that were correct, any insurance company could convert its commercial plans into ERISA plans—and thereby avoid State insurance regulation—simply by

selling a policy to one of its employees. Nothing in *Yates* or the Department's regulations compels that perverse result.

**4.** The district court was likewise mistaken to conclude, in the alternative, that plaintiffs' limited partners are "bona fide partners" of the partnership who may participate in a group health plan under ERISA. ROA.901. The court stated, without citation, that the "bona-fide partner analysis simply requires a more-than-pretextual relationship between the employer and employee." ROA.901. The court then concluded that the limited partners cleared this minimal threshold.

The court's definition of "bona fide partner" cannot be reconciled with the Department's regulations. The regulations make clear that the bona-fide-partner inquiry is a holistic one that turns on "all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership." 29 C.F.R. § 2590.732(d)(2). This inquiry is informed by the Internal Revenue Code's longstanding approach to determining the bona fides of a partnership. *Yates*, 541 U.S. at 12-13 (recognizing that Congress intended "to harmonize ERISA with longstanding tax provisions"). Under the Code, a partnership is created "when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade . . . and when there is community of interest in the profits and losses." *Commissioner v. Tower*, 327 U.S. 280, 286 (1946). The key question is whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Commissioner v. Culbertson*, 337 U.S. 733, 742 (1949). In

opining that the limited partners are not bona fide partners, the Department reasonably applied this proper—and more rigorous—test. ROA.396.

## III. The District Court Erred By Permanently Enjoining The Department To Regulate Plaintiffs' Plan Under ERISA.

The district court compounded its errors by issuing an injunction that permanently requires the Department to regulate plaintiffs under ERISA. Such an injunction would have been improper even if the court were reviewing final agency action. The Supreme Court has admonished that, "[i]f the record before the agency does not support the agency action, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *accord O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238-39 (5th Cir. 2007); *Northern Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) (explaining that, "[w]hen a district court . . . determines that the agency acted unlawfully," the issuance of an injunction is "anomalous"). In ignoring this foundational principle of administrative law, the court has precluded the Department from issuing a new opinion that might respond to the district court's concerns. The court has also prevented the Department from ever creating a record and responding to plaintiffs' legal arguments. The court's order even requires the Department to continue regulating plaintiffs under ERISA if further factual developments undermine the injunction, which is premised on hypothetical facts.

The court's order does not merely depart from general APA principles. The order also cannot be reconciled with the factors cabining a court's equitable discretion. The court did not cite or discuss any of the equitable factors that determine whether such a remedy is warranted—including whether plaintiffs would be irreparably injured in the absence of an injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006). The court also did not explain why vacatur of the advisory opinion is insufficient to redress any injury that the opinion might have caused or how an injunction could remedy such injury. Indeed, the injunction does not even accomplish its notional purpose of protecting plaintiffs against State regulation. *See* ROA.888. States remain free to investigate and initiate enforcement actions against plaintiffs for violating State insurance laws.[6]

[6] The district court also declared that plaintiffs' plan was not a "multiple employer welfare arrangement" under ERISA. ROA.896 n.23; *see* 29 U.S.C. § 1002(40)(A) (defining such arrangements). That declaration was inappropriate, not least because the issue was not properly before the court. Plaintiffs did not ask the Department to opine on whether their plan qualified as such an arrangement, and the Department expressly declined to address that issue in its opinion. ROA.397 n.6.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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March 2021

## CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

*/s/ Michael Shih*
MICHAEL SHIH

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,136 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Michael Shih*
MICHAEL SHIH

# ADDENDUM

# TABLE OF CONTENTS

**29 U.S.C. § 1002**

**§ 1002. Definitions**

For purposes of this subchapter:

**(1)** The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * *

**(5)** The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

**(6)** The term "employee" means any individual employed by an employer.

**(7)** The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * * *

# *United States Court of Appeals*

**FIFTH CIRCUIT**
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April 01, 2021

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U.S. Department of Justice
Civil Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

No. 20-11179 Data Marketing Partnership v. LABR
USDC No. 4:19-CV-800

Dear Mr. Shih,

Within 14 days, counsel must separately file a copy of the Record Excerpts in Portable Document Format (PDF) file, as required by 5TH CIR. R. 30.1.2, by using the docket event "Record Excerpts Filed," which is found under the "Briefs" category. Failure to do so may result in the dismissal of the appeal.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc:
Mr. Jonathan D. Crumly Sr.
Mr. Bryan Francis Jacoutot
Mr. Reginald L. Snyder
Mr. Mark Bernard Stern