December 12, 2022

The Honorable Martin J. Walsh
Secretary, U.S. Department of Labor
200 Constitution Avenue NW, Room S-3502
Washington, D.C. 20210

Re: RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Secretary Walsh,

We are submitting this public comment in strong opposition to the U.S. Department of Labor's proposed rule to redefine independent contractors. This rule is written in a way that will misclassify millions of legitimate independent contractors as employees, damaging our incomes and, in some cases, destroying our entire livelihoods.

In 2019, New Jersey-based freelance writers and editors founded Fight For Freelancers, a nonpartisan, self-funded, ad hoc coalition of solopreneurs, small business owners, freelancers and other independent contractors who want to protect our chosen careers. We all were alarmed by the enactment of California's Assembly Bill 5 (AB5), which included regulatory language that, like your proposed new rule, also promised to help stop misclassification, but instead misclassified legitimate independent contractors as employees, causing them financial harm. Our founders helped block the passage of a similar bill in New Jersey. Fight For Freelancers then expanded to a national focus because of threats to our livelihoods that now include federal legislation based on AB5, and this proposed U.S. Department of Labor rule, which bears eerie similarities to it.

All of the Fight For Freelancers founders and leaders are women, and its membership is 87 percent female, with a heavy concentration in the prime earning ages of 35 to 54 years old. Fight For Freelancers USA members specialize in professions that include, but are not limited to: physical therapy, graphic design, illustration, psychiatry, beauty and wellness, photography, stand-up comedy, opera singing and production, makeup artistry, ESL teaching, translating, interpreting, kitchen design, popular music performance, journalism, ghostwriting, copywriting, marketing, editing, proofreading, book indexing, speech coaching and website development.

We are among the people you claim you want to protect with this newly proposed rule. We are telling you that your actions will instead cause us harm.

ATTEMPTS TO HIDE OVERWHELMING PUBLIC OPPOSITION

We would first like to make clear for the public record that opposition among legitimate independent contractors to this proposed rule change has been widespread and overwhelming—just as it has been with regard to state and federal legislative attempts to limit the choice of self-employment since 2019.

U.S. Department of Labor leadership is well aware of this widespread public opposition to anti-independent contractor policies. The department's leadership includes Julie Su, who was a labor official in California when its anti-independent contractor law, AB5, led to such fierce backlash that the California Legislature had to pass an emergency measure, Assembly Bill 2257, less than a year later. Nikki McKinney, also now among U.S. Department of Labor leadership, personally led a phone meeting with leaders of Fight For Freelancers USA about the Protecting the Right to Organize Act (PRO Act) and its anti-independent contractor language when she was working with the office of U.S. Senator Patty Murray. Fight For Freelancers USA leaders clearly explained to McKinney how anti-independent contractor language would destroy our careers.

The fact that U.S. Department of Labor leadership knew opposition to this rule-making would be widespread is the reason the department has intentionally attempted to limit and outright exclude the participation of legitimate independent contractors from this rule-making process.

Public hearings

First, the department scheduled public hearings about its plans to change the independent contractor rule but announced only two forums: an "employer forum" and a "worker forum." There was no forum created for independent contractors, who are neither employers nor workers but instead small business owners.

Nonetheless, independent contractors registered for and testified in opposition to this rule-making at both those public forums, in such great numbers that some independent contractors from our group did not even have time to speak. So many independent contractors registered to attend that, at the last minute, the U.S. Department of Labor split one of the forums into two separate Zoom video-meeting rooms. Hands were still raised, with independent contractors trying to express opposition, when the department ended at least one of those forums.

The department also intentionally failed to record any of these public forums, and in one forum told participants (including members of our group) that they were not allowed to record either. This was yet another intentional step to try and keep widespread opposition out of the public record.

Invitation-only meetings

The U.S. Department of Labor also held private, invitation-only meetings about this rule-making process—but did not schedule a single meeting with legitimate independent contractors in the vast majority of affected professions, including most of the more than 100 professions that the California Legislature ultimately had to exempt from its anti-independent contractor law.

Instead, according to the Office of Information and Regulatory Affairs, the U.S. Department of Labor scheduled a private meeting exclusively for representatives of the union-backed think tank National Employment Law Project; a meeting exclusively for union organizers focused on app-based independent contractors such as Uber and Lyft drivers (even though app-based independent contractors comprise only 8.6% of America's total population of independent contractors, according to Internal Revenue Service research); and meetings with a handful of individuals from organizations representing the construction, retail and financial services industries.

Once again, the department took intentional action to ignore the widespread opposition to its proposed rule-making among legitimate independent contractors in many of the professions that would be most affected by the proposed change to the current rule.

We make particular note of the U.S. Department of Labor's disproportionate deference to union organizers focused on reclassifying app-based workers, whom the Internal Revenue Service study refers to as OPEs (workers in the online platform economy). The IRS study found that most such people are *already classified as employees* for purposes of their primary income source: "We find that the exponential growth in labor OPE work is driven by individuals whose primary annual income derives from traditional jobs and who

supplement that income with platform-mediated work." This IRS study from 2019 is directly in line with Pew Research Center findings from December 2021: "A majority of Americans who've earned money through a gig platform over the past year say they either spent less than 10 hours in a typical week performing these tasks or don't do these jobs most weeks."

It is at best capricious to center the nation's independent contractor policy around people who barely do independent contractor work at all, while simultaneously refusing to even speak with legitimate career professionals during the rule-making process.

Public comment period

Legitimate independent contractors again attempted to interact with the U.S. Department of Labor during the filing of public comments in the *Federal Register,* but a clearly identifiable spam/bot attack hijacked and corrupted the process.

Prior to October 25, 2022, there were more than 2,100 public comments filed, the vast majority stating that they opposed the proposed rule change. This overwhelming opposition matched the ratio of people who spoke during the U.S. Department of Labor's public hearings in summer 2022. These public comments filed through October 25 appeared to be from real people, either written in original language or with people's names and affiliations stated at the beginning, including numerous members of easily verifiable professional organizations such as the National Court Reporters Association.

Then, on October 26, a "comment bomb" began to attack the public-comment system. The number of public comments jumped from about 2,100 to more than 4,200 by 9 p.m. According to Regulations.gov, as of 9:40 p.m. Eastern on October 26, more than 2,009 public comments had been filed *that day*, after about 2,100 comments had been filed *during the entire rest of the comment period of nearly two weeks*.

These new comments were almost all the same copied-and-pasted form letter with signatures that included names, street addresses and emails. An online search of this personal information revealed that many of these names and email addresses have appeared for years in bulk lists at the bottom of petitions; on federal, state and local policy public comments; and on similar efforts on behalf of environmentalists regarding issues such as nuclear reactors, refineries, public utilities regulations in multiple states, and the like. Some of the email addresses had been used to sign previous documents in relation to a name that is different from the name on the U.S. Department of Labor public comment. In some cases, names and email addresses of commenters, when searched online, indicated that the people lived in states other than the ones listed in the U.S. Department of Labor

public comments. Some of the public comments were signed by individuals who lived outside the United States.

This "comment bomb" attack continued to hijack the public-comment process well after October 26 and into December 2022, despite numerous members of our group publicly and repeatedly alerting the department about the problem, including posting screen shots of some of these clearly falsified "comment bomb" submissions and tagging the department on Twitter. We documented as many as 10 of these form-letter comments filed by the same individual. One of these comments, filed November 21, was signed, "RE EWE, test@test.com, 3224 TEST, TESTCITY, District of Columbia, 20564."

The department took no action to correct the problem. Thus, going forward, if the U.S. Department of Labor invokes any information about the number of comments filed in support of this rule-making process, the department will be relying on hopelessly corrupted data.

U.S. Small Business Administration meeting

Legitimate independent contractors yet again attempted to have meaningful interaction with the U.S. Department of Labor on November 9, 2022, during a meeting about the proposed rule organized by the U.S. Small Business Administration. Jessica Looman and Seema Nanda from the U.S. Department of Labor both spoke at the top of the video call. They both said they wanted to make sure employees were not misclassified as independent contractors, and they both said they looked forward to hearing from us all.

Two leaders of Fight For Freelancers USA—Debbie Abrams Kaplan and Kim Kavin—spoke first and second, immediately after Looman and Nanda. Kavin said it was equally wrong for the U.S. Department of Labor to misclassify independent contractors as employees, and asked when Looman and Nanda would be holding even a single meeting with legitimate independent contractors to discuss how the proposed rule would misclassify us.

The U.S. Small Business Administration representative, Janis Reyes, then said Looman and Nanda had already left the call, within the first five minutes of independent contractors even being given a chance to speak. Looman and Nanda had not bothered to listen to even the first two speakers, let alone the more than 150 other people who were logged on and trying to be heard.

Kavin then asked for any remaining members of the U.S. Labor Department on the call to turn on their cameras and identify themselves by name. None did. It is unclear if anyone from the department remained on the call at all.

The call lasted for two hours. Not a single participant spoke in favor of the department's proposed rule.

From the start, this rule-making process has been conducted in a way that intentionally minimized, excluded and ignored widespread opposition from the vast majority of legitimate independent contractors. It is therefore unsurprising how much information the department got entirely wrong about us when attempting to define us in its proposed rule.

FALSE ASSUMPTIONS ABOUT THE NUMBER OF U.S. INDEPENDENT CONTRACTORS

The first false assumption in the newly proposed rule is the total number of Americans who would be impacted. Your assertion that there are only 22.1 million independent contractors differs wildly from the latest research about self-employed Americans.

Your primary research for determining the number of independent contractors is at odds with the very definition of an independent contractor. You relied on general data from the U.S. Bureau of Labor Statistics, which estimated the number of independent contractors to include: "[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers." You also state that your "estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data."

Newer studies and surveys focused specifically on determining the number of independent contractors (not wage and salary workers) all find the number of self-employed Americans to be far higher than your estimate.

MBO Partners, in November 2022, reported that there "are 64.6 million independent workers in 2022, up 26% over 2021. The number of Full-Time Independents, those regularly working more than 15 hours per week, soared 27% to 21.6 million—up from 15.3 million in 2019. … The number of Occasional Independents—people who earn money periodically by working at least monthly as an independent—rose from 15.8 in 2020 to 31.9 million in 2022, more than doubling." Similarly, McKinsey and Company found in August 2022 that there are 58 million independent contractors in the United States. In 2021, Upwork found that freelancers comprise 36% of the U.S. workforce. In 2020, Upwork's estimates were about 59 million Americans.

Your assumption that this new rule will only reclassify a percentage of 22.1 million Americans is, quite simply, wrong. This proposed rule has the potential to reclassify as much as one-third of the U.S. workforce—making it one of the most widespread, far-reaching attempts in U.S. history to reclassify and misclassify self-employed people.

FALSE ASSUMPTIONS ABOUT INDEPENDENT CONTRACTOR GENDER AND RACE

The second false assumption in your proposed rule is the description of independent contractors as being primarily white men. You are creating a false impression that changing the U.S. Department of Labor's rule will primarily affect white men. This assumption, also based on 2017 data, is wildly out-of-date and at odds with the most current research about self-employed Americans—particularly following the Covid-19 pandemic.

Independent contractors often operate what the government characterizes as "nonemployer businesses," or businesses with no employees. The U.S. Small Business Administration Office of Advocacy wrote in 2018: "Compared to employer owners, owners of nonemployer businesses are younger and more diverse in terms of race, ethnicity, and gender. About one third of nonemployer businesses are owned by minorities, and four in ten are owned by women."

As of 2018, according to the U.S. Small Business Administration, a full 72% of nonemployer business owners were women and/or minorities. In 2019, American Express looked at data from the U.S. Census Bureau Survey of Business Owners and found that for women—and especially women of color—part-time entrepreneurship, or "sidepreneurship," was providing additional options to traditional employment: "Over the last five years, growth in the number of women sidepreneurs has grown at a rate that is nearly twice as fast as the overall growth in female entrepreneurship: 39% compared to 21%, respectively. Minority women are responsible for a large portion of that growth from 2014-2019 where we see sidepreneurship among minority women-owned businesses two times higher than all businesses: 65% compared to 32%, respectively."

The trend of women and people of color increasingly choosing self-employment was happening before the Covid-19 pandemic. Since the pandemic began in 2020, this trend has only accelerated.

As Vice President Kamala Harris wrote in 2021, the millions of women who left traditional jobs during the Covid-19 pandemic was a "national emergency." Where did they all go? That same year, MBO Partners found that 55% of new independent contractors were women, and Gusto reported that "in 2021, 49% of entrepreneurs were women, a dramatic increase from the 28% seen in 2019."

As of November 2022, MBO Partners reported that women outnumbered men among all independent contractors, by a margin of 50-49%.

Gusto also noted in its 2022 report that "34% of Black or African American business owners started a business in order to improve their financial stability." The Center for

Economic and Policy Research, in 2022, reported "very large increases in the share of Black and Hispanic workers who report being incorporated self-employed. The shares for both increased by roughly 45 percent. … If it is sustained, it will imply substantial gains in business ownership for Blacks and Hispanics."

Your assertion that most independent contractors are white men, based on 2017 data, simply is not an accurate reflection of the current state of the U.S. workforce.

Protecting the right to choose self-employment is, in many ways, a women's issue at its core. It has been for generations. When feminist icon Gloria Steinem testified before the U.S. Senate about the Equal Rights Amendment in 1970, she made the point clear: "As a freelance writer, I don't work in the male-dominated hierarchy of an office. … I haven't had to brave the sex bias of labor unions and employers, only to see my family subsist on a median salary 40% less than the male median salary."

Fast forward a half century: The Center for Economic Policy and Research found in August 2022 that "the increase in self-employment is disproportionately a story of women, especially non-white women, opting to become self-employed. This also seems to be tied to having young children at home." In 2022, Gusto found that "the portion of entrepreneurs who started a business due to child care responsibilities was highest among female business owners who indicated that they have school-aged children at home: 28% of these new business owners created their business in response to increased child care responsibilities, the most-commonly cited reason among this group of entrepreneurs."

In summer 2022, AARP surveyed women nationwide, 40 and older, who had started businesses since January 2020. "The results revealed that 'want' rather than 'need' most often motivated women's decisions to become entrepreneurs. About one quarter (26%) of women said they always wanted to start a business, and 19% said they did it to follow their passion; another 15% were pursuing additional income, and 15% wanted flexible work options." The AARP survey also found "most women were optimistic about their entrepreneurial path. AARP discovered that almost all of these women (98%) agreed that they made the right decision in starting their business and 39% said that their business was doing much better or slightly better than expected."

In addition, women who choose self-employment generally have better health than women who are forced to remain in a W2 workplace. Boston Medical Center Women's Health found in July 2022 that women choosing self-employment had a 34% decrease in the odds of reporting obesity, a 43% decrease in the odds of reporting hypertension, a 30% decrease in the odds of reporting diabetes, and a 68% increase in the odds of reporting participation in

at least twice-weekly physical activity. BMI for self-employed women was on average 1.79 units lower than it was for women working for W2 wages.

Also, Indeed found in 2022 that "48% of women who switched to contract work reported improved mental health, and of the women who changed to gig work, one-third (38%) reported improved mental health." Even before the pandemic, in 2019, research showed that 73% of self-employed women say they have a better work-life balance; 68% earn the same or more money than in a traditional job; 59% say they have less stress; and 57% say they are healthier.

We also point to the federal government's own research: In 2019, the Internal Revenue Service and U.S. Treasury Department found that since 2001, the shift to independent contractor work "may represent a structural shift in the labor market, particularly for women." This shift in the type of work women are choosing was occurring prior to the pandemic, which amplified it.

You relied primarily on 2017 data to state that most independent contractors are white men. This is cherry-picking data to create false assumptions about which Americans your proposed rule will harm.

As a basic matter of fact, you are targeting millions of self-employed women and people of color for reclassification and misclassification as employees against our will. You are attempting to limit and deny us the right we currently enjoy to choose self-employment—a choice that lets us improve our financial stability as well as our physical and mental health.

FALSE ASSUMPTIONS ABOUT EXPLOITATION AND VULNERABILITY

The third false assumption in your proposed rule is that most independent contractors are exploited and vulnerable, and that widespread reclassification of the U.S. workforce into employee status is required to resolve existing problems.

In fact, the vast majority of independent contractors are satisfied with self-employment and do not want to be reclassified as employees—and the U.S. Department of Labor *already has the ability* to crack down on employers that misclassify vulnerable workers.

Current ability to prosecute misclassification

In announcing the department's reasoning for the newly proposed independent contractor rule, U.S. Labor Secretary Marty Walsh stated: "While independent contractors have an important role in our economy, we have seen in many cases that employers misclassify their employees as independent contractors, particularly among our nation's most vulnerable workers."

It's true that the department has identified cases of misclassification—but it's also true that the department continues to prosecute those cases, routinely and effectively, with the current independent contractor rule in place.

As *Bloomberg Law* reported on November 22, 2022:

> "Over at DOL, the Wage and Hour Division has had the care industry in its crosshairs. The wage division's ongoing enforcement initiative has netted $28.6 million in back wages and damages for nearly 25,000 workers since launching the effort last year. … The DOL's wage arm said common citations included violations of overtime or minimum wage requirements and the misclassification of employees as independent contractors.
>
> "Last week alone, the WHD issued four press releases touting nearly $2 million total in back wages and damages for at least 917 workers who were misclassified or shorted of overtime pay at nursing and home health care firms in Texas, Louisiana, and Pennsylvania."

Just two weeks later, on December 6, 2022, the U.S. Department of Labor issued a press release stating that it had "recovered $503,053 in back wages and liquidated damages for 227 workers of a Panama City Beach hotel staffing agency that denied them full wages and benefits when the employer misclassified them as independent contractors," and a separate press release stating that it had recovered $28,162 in back wages for 36 workers at a restaurant in St. Petersburg, Florida. That restaurant, according to the department, "illegally paid kitchen staff, dishwashers, and servers as independent contractors."

These are just a handful of similar press releases that the department has issued since the current independent contractor rule was put in place, including a September 30, 2022, press release detailing the recovery of $575,000 for 62 drivers of a Massachusetts courier service "to resolve allegations of independent contractors' misclassification" and a September 28, 2022, press release that announced the recovery $103,979 for 55 current and former employees of an Oklahoma security company "after investigation finds employer misclassified workers."

Clearly, there is no need to change the current independent contractor rule in order to prosecute cases of misclassification in a wide swath of industries nationwide. The U.S. Department of Labor is already doing that work on a regular basis.

Most independent contractors are properly classified
Meanwhile, study after study shows that 70% to 85% of legitimate independent contractors want to remain self-employed (in some professions, such as insurance and financial advisers, it's 96%). These studies showing immense satisfaction with self-employment date to at least 2015 and include the federal government's own research, by the U.S. Government Accountability Office, the U.S. Bureau of Labor Statistics, and the Internal Revenue Service and U.S. Treasury Department, which also found that "the largest share of workers with independent contractor income are those in the top quartile of earnings."

In November 2022, MBO Partners reported that: "Overwhelmingly, independents say they want to work in this way. In 2022, 64% of independents said working this way was their choice entirely. Satisfaction and confidence remained high, with the number of independents who say they feel more secure independently virtually unchanged from last year at 67%. The proportion who see independent work as less risky than a traditional job rose from 29% in 2021 to 33% in 2022."

And, one of the fastest-growing segments among independent contractors is not America's most vulnerable, but instead America's highest-skilled workers. Also in November 2022, MBO partners found: "The number of independents who reported high incomes is growing rapidly, up 16% from last year, and it comes on the heels of a 27% increase in 2021. Now, nearly 20% of Full-Time independents earns more than $100,000 annually."

Earlier in 2022, in a different study, MBO Partners found that 82% of organizations report that skilled contingent workers make up half or more of their contingent labor force. Also in 2022, McKinsey and Company found that "a third of self-employed respondents earn more than $150,000 a year, including lawyers, accountants, successful actors, writers and other creatives, influencers, traveling nurses, and a variety of advisers and specialists." Additionally in 2022, Upwork found that 85% of hiring managers say that working with independent talent allows them to access specialized skills or expertise.

Most independent contractors are not being forced into a classification we do not want. We are *choosing* to be self-employed, and have been for years.

Studies have shown this since at least 2016, when McKinsey and Company found that those who choose self-employment report greater satisfaction, a finding that held true across countries, ages, income brackets and education levels. In 2020, Contently found that "lawmakers may view freelancing as a last resort, but 75 percent of respondents chose to freelance because they prefer it to full-time work." Also in 2020, ADP Research found that more than 70% were working independently by their own choice, not because they could not find a traditional job.

Even when polled at the height of the pandemic's economic problems, 61% of independent contractors told MBO Partners they would not go back to a traditional job. Some 60% that same year told Upwork that no amount of money would convince them to take a traditional job, while Gallup found that "self-employed workers with only one job … rate their work situation higher than workers in one traditional full-time job as an employee."

The majority of independent contractors remain in favor of self-employment post-pandemic, as well. In 2022, McKinsey and Company found that independent contractors "are far more optimistic, both about their own futures and the outlook for the economy, than the average American worker. More than a third of them say that in 12 months they expect to have more economic opportunities, compared with a fifth of workers overall who say the same. More than 40 percent of independent workers say that they think it's more likely in five years that there will be continuous economic growth, compared with about a third of all respondents." Fiverr found in 2022 that "a full three-quarters (75%) of these workers are highly satisfied with their work this year, significantly higher than last year (70%). More than eight in 10 (83%) believe they are also more satisfied than they would be in traditional employment. These workers are also more satisfied with their independent work compared to their employed counterparts, of whom only six in 10 (61%) are highly satisfied with their traditional employment."

The vast majority of independent contractors are not, as Secretary Walsh suggested, "our nation's most vulnerable workers"—and the department already has the ability to protect those in the minority who are vulnerable.

Most of us independent contractors are, in fact, satisfied with our choice of self-employment, and are optimistic about our futures if we are allowed to continue to choose to earn income as independent contractors. There is no good reason to misclassify us as employees.

FALSE ASSUMPTION ABOUT HOW MUCH OF OUR TIME YOU ARE WASTING

Particularly galling is the proposed rule's statement that each independent contractor will need just 15 minutes to review the rule, based on the department's belief that "independent contractors are likely to rely on summaries of the key elements of the rule change published by the department, worker advocacy groups, media outlets, and accountancy and consultancy firms."

The assumption that those of us who earn a living as independent contractors would not be keenly interested in rule-making that could wipe out our small businesses and careers is ignorant, condescending and offensive.

The department knows very well that independent contractors have been acutely aware of details about the "misclassification" issue since the passage of California's AB5 in 2019, including testifying for hours and hours at hearings everywhere from the New Jersey Senate Labor Committee (Senate Bill 4204, December 5, 2019) to the more recent U.S. Commission on Civil Rights Hearings about the impact of AB5. Many of us have taken the time to write op-eds, articles and entire national-award-winning series of articles about the need to stop misclassifying us as employees. We have taken the time to research and write extensive, footnoted amicus briefs that we filed with the National Labor Relations Board and U.S. Supreme Court in defense of our choice of self-employment. We routinely reply on the social media accounts of U.S. Labor Secretary Marty Walsh and the U.S. Department of Labor, trying to get the department to engage in conversation with legitimate independent contractors about the independent contractor issue.

As mentioned above, this past summer, independent contractors spent hours dominating the department's own public hearings about this proposed rule change, overwhelming those hearings with requests for the department to stop attacking our choice of self-employment. We also dominated the two-hour meeting organized by the U.S. Small Business Administration about the proposed change to the independent contractor rule.

Furthermore, this proposed rule is 184 pages long, and numerous members of our group have combed through it in its entirety. In order to read all 184 pages in 15 minutes, we would need to be able to read more than 12 pages per minute. The average person reads at a speed of two minutes per page. For technical material such as this proposed rule, that reading rate drops to five or six minutes per page. Thus, just reading this highly technical proposed rule once—not even doing additional research to understand it or respond to it—requires 920 to 1,100 minutes, or 15 to 18 hours, of independent contractors' time.

You valued our time to address this proposal at just $21.35, when in fact, the hours upon hours that this rule-making process alone has cost us in research, testimony and written responses amounts to thousands of dollars per skilled independent contractor, based on our usual hourly rates.

You may send those checks for thousands of dollars apiece to us at Fight For Freelancers USA, 95 W. Main St., Suite 5-139, Chester, N.J. 07930. Please let us know if you need our thousands of members to provide invoices for your records.

HOW THE RULE WILL MISCLASSIFY LEGITIMATE INDEPENDENT CONTRACTORS

The way that you explain your plans to interpret the six factors of the proposed rule makes clear that it is your intent to misclassify legitimate independent contractors as employees.

Factor 1

You write that in determining managerial skill, you will consider "whether the worker accepts or declines jobs or the order in which they are completed." However, you also note that "the decision to work more hours or take more jobs generally do[es] not reflect the exercise of managerial skill indicating independent contractor status."

Well, which is it? You are telling us that even the U.S. Department of Labor itself cannot define the meaning of managerial skill that forms the basis for the test's first factor. How on earth can a legitimate independent contractor or her clients ensure that she is satisfying this factor when there is no clear way to define it?

Furthermore, you write that in determining managerial skill, you will consider "whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work." However, you do not define what constitutes marketing and advertising. What, specifically, must we do to satisfy your definition of marketing and advertising?

In states such as New Jersey, where similar attempts to restrict self-employment are underway, state officials have sent letters to independent contractors demanding to see phone-book advertisements as evidence of advertising—as if the internet does not even exist. Years ago, studies showed that more than half of Americans had replaced their phone books with online searches, and that 70% of Americans who have phone books don't even open them. And yet, labor officials who, like you, claim to be targeting "misclassification" are asking for evidence of phone-book ads to prove that an independent contractor's business is legitimate in the year 2022.

This, like your own department's assumptions noted above, is old-fashioned thinking that does not represent the reality of independent contractor work in the United States today. It is unclear how anyone could actually satisfy your interpretation of what constitutes marketing and advertising, given this entire outdated approach to independent contractors in general.

Factor 2

You state that you will consider investments made by the worker and the employer, and that even purchasing or leasing a whole vehicle will not be indicative of independent contractor status.

Again, this statement shows pure ignorance about how most independent contractors actually earn a living. Countless freelance careers—including writing, editing, graphic design, computer coding, video-game design, animation, architecture and more—require equipment far less expensive than a vehicle.

Many such independent contractors earn a great living with nothing more than a laptop computer, a cell phone and some specialized software. Given your definition of a meaningful investment, it seems impossible for many legitimate independent contractors to pass Factor 2 of the proposed rule.

Will the investment in a computer, a cell phone and some specialized software constitute a meaningful enough investment to indicate independent contractor status under Factor 2? If so, for which professions?

Factor 3
You state that you will consider the degree of permanence in the work relationship, and that if services are provided under a contract that is "routinely or automatically renewed," it indicates employee status.

Please, tell us: How is any small business owner supposed to succeed without repeat clients?

According to the U.S. Small Business Administration, more than 80% of America's small businesses are nonemployer firms. We are individuals in business for ourselves. And many of us—including freelance writers, editors, graphic artists, illustrators, computer coders, and consultants in fields as wide-ranging as forestry and animal sheltering—have clients that return to us for services on a regular basis.

If clients only come to a small business once, the small business does not survive. Earning repeat business is the way that most small businesses thrive. This is known in the business world as building a satisfied client base, and it is the foundation of every small business in America.

The U.S. Department of Labor's refusal to recognize returning, satisfied clients as a cornerstone of any successful small business is a significant problem for professions where the majority of people are self-employed, including writing, photography, special-effects artists and animators, attorneys, real-estate agents and others.

A routine example of such a relationship among independent contractors is a freelance writer who produces a column every month for the same magazine. No rational person

believes that spending a day or less writing a column for the same magazine every month—from a home office, on our own equipment, on our own time—is indicative of employee status. We offer a specialized skill and perspective that the magazine does not have on staff. But the way you are choosing to interpret Factor 3, even having a single magazine client where we write a column every month will now be held against us and our clients in terms of determining independent contractor status.

How, exactly, do you intend to distinguish between what you call a "routinely or automatically renewed" contract and repeat business with the same client? How could this factor be satisfied for freelance writers with monthly magazine columns or weekly blog posts? Or for photographers who regularly send images to stock agencies? Or for freelance editors who take on various projects with preferred clients at publishing companies? Or for any other type of routine, repeat-client business?

Further, under Factor 3, you also state that you intend to "include exclusivity as an additional consideration under the permanency factor." You state that people will be more likely to be classified as employees if they "are economically dependent on each employer for work." In other words, if an independent contractor has only one client, and that client is providing her only documented income, then the person would be far more likely to be deemed an employee.

Please, tell us: How is any independent contractor supposed to start her own business with this interpretation?

Nearly every independent contractor starts out by landing her first client. There is usually just one at the start. For generations, small businesses have kept and framed and hung on the wall the very first dollar they made from their very first client. Securing that first client is a memorable, celebratory occasion for entrepreneurs.

The way you propose to interpret Factor 3, that single dollar could now constitute economic dependency and exclusivity, because the independent contractor's business would not exist without that single dollar from her first client. With this interpretation, millions upon millions of small businesses that are thriving today would never even have been able to open at all—because no client would risk being the first company to pay that first dollar and engage in a business relationship with the independent contractor.

You are not merely proposing to misclassify millions of legitimate independent contractors as employees with this interpretation. You are outright proposing to end the ability of Americans to create small businesses as independent contractors.

In a nation where more than 80% of America's small businesses have no employees, you are doing nothing short of threatening the existence of small business itself.

Factor 4
You state that you will consider the nature and degree of the business's control over the worker. And, you state that "control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control."

This is a clear break with legal precedent, including in sectors such as freelance writing, where independent contractors routinely agree to contracts that include a commitment not to engage in acts of libel or theft of copyrighted material. These are basic legal obligations for anyone involved in publishing. They are not indicative of a business's control over how, when and where an article is written, or whether the person writing it is a legitimate independent contractor.

Are you suggesting that a contract with a client that includes clauses pertaining to libel and copyright may now constitute an act of control in determining independent contractor status? What, exactly, are the standards under Factor 4 that would indicate control?

Again, your proposed interpretation will misclassify legitimate independent contractors as employees.

Factor 5
This factor is the most likely to misclassify legitimate independent contractors as employees, because it is so similar to the B-prong of the ABC Test. This B-prong harmed so many legitimate independent contractors' livelihoods in California under AB5 that the state's legislature had to pass an emergency measure, AB2257, less than a year later, ultimately exempting more than 100 professions.

Prong B of the ABC Test states: The service is performed outside the usual course of the business of the employer.

In your proposed rule, you say that you will consider the extent to which the work performed is an integral part of the employer's business. You say you will look at whether the work is "critical, necessary, or central to the employer's principal business," and if it is, then you will weigh in favor of employee status.

Please, tell us: Where can we find companies that pay independent contractors for anything that is unneeded, unnecessary or irrelevant to their business? Which companies spend their limited budgets on projects and services they do not actually need?

How, exactly, will your interpretation of Factor 5 differ in any way from B-prong of the ABC Test that destroyed so many legitimate independent contractors' income and careers? What is the difference between "usual course of business" and "central to the employer's principal business"?

Companies of all kinds look to independent contractors to provide services and materials that are critical, necessary and central to the company's success. In 2022, MBO Partners found that saving money ranked a distant ninth among reasons that companies choose to work with independent contractors. The more common reasons are the need to improve business productivity, workforce flexibility and access to highly skilled labor. Also in 2022, Upwork found that "nearly 80% of hiring managers who engage skilled freelancers say they are confident (78%) in their ability to find the talent they need, compared to just 63% of those who don't engage freelancers." Upwork also found that "when asked about how confident they are in their company's ability to respond to a disruption, 84% of those who use independent talent say they are confident compared to just 69% who do not use independent talent." And, "85% say that working with independent talent allows them to access specialized skills or expertise. Seventy-nine percent agree that working with independent talent has enabled their business to be more innovative."

The suggestion that an independent contractor can only be legitimate if her work is unneeded, unnecessary or irrelevant to a business shows a startling lack of understanding about how independent contractors function across all sectors of the U.S. workforce.

We also note that former U.S. Labor Secretary Eugene Scalia, in creating the independent contractor rule that you are now attempting to replace, specifically warned about the negative effects of imposing the California standard nationwide. He correctly explained that freelance translators, event planners, people with disabilities, single mothers and others needed protection against the negative outcome that such an overly restrictive standard creates, and added of the current U.S. Department of Labor rule: "Critically, our rule doesn't redraw boundaries to reclassify many more workers as employees as AB-5 did."

Your proposed rule, and particularly Factor 5, is written with clear intent to redraw those boundaries in ways that will harm millions of us by misclassifying us as employees.

Factor 6
You state that you will consider whether a worker uses specialized skills in performing the work, but you also state that you intend to define those skills narrowly. You propose that having specialized skills is irrelevant unless the work actually requires those skills.

Here is how that interpretation becomes problematic for a successful freelance graphic artist. Let's say she is highly skilled and able to create complex graphics, illustrations and charts for clients ranging from advertising agencies to newspapers to annual corporate reports. But, one of her regular clients has a need for a task that requires far less skill, such as converting jpg files into PDF files. This independent contractor would now have to tell her client—with whom she likes to work—that she cannot provide what the client needs for this particular project, because it does not make use of her more specialized skills.

That is ridiculous. The graphic artist should be able to take on, or refuse, whatever projects come her way, especially for repeat clients who can have all kinds of unique needs.

And, for some people, the level of skill required to convert jpg files into PDF files is beyond their abilities. Does a skill that an experienced graphic artist finds low-level suddenly become a high-level skill when assessing the independent contractor status of a beginner graphic artist? When, exactly, does a skill meet the definition of specialized under Factor 6?

Again, the way you are proposing to interpret this factor will misclassify legitimate independent contractors as employees.

THIS ATTEMPT AT WIDESPREAD RECLASSIFICATION IS RADICAL POLICY-MAKING
Self-employment has been a legal option for U.S. citizens since the nation's founding. Indeed, being self-employed was the norm prior to the Industrial Revolution and advent of large-scale factories. Some of the nation's best-known historical figures chose to earn income independently by opening their own businesses. Paul Revere was an artisan who worked in gold and silver. Benjamin Franklin's credits as a writer include *Poor Richard's Almanac*. John Adams, before being elected U.S. president, established his own law practice.

U.S. law, throughout the years, has routinely *strengthened* the protections afforded to Americans who choose to perform independent contractor work, based on the understanding that one of the nation's core founding principles is affording citizens the opportunity to become whatever they choose to be.

Just in the field of freelance writing, Article I, Section 8 of the U.S. Constitution states that to promote the progress of science and useful arts, Congress shall have the power to secure for authors and inventors "the exclusive right to their respective writings and discoveries."

The second session of the first U.S. Congress passed the Copyright Act of 1790, creating a set of exclusive rights for individual authors to copy, print and sell their expressive works.

Self-employment was so ubiquitous in the 1800s that "hang out one's shingle" became a common colloquialism, with independent lawyers, doctors and business concerns using shingles for signboards. The 1099 IRS tax form to track independent contractor income dates to 1918. The Taft-Hartley Act of 1947 explicitly protected the right of independent contractors to remain a part of the workforce, separate from employees. The long-standing precedent throughout the nation's history has been to err on the side of *protecting* the choice of self-employment. As recently as 2017, the courts have rebuked the National Labor Relations Board for attempting to limit self-employment options.

It is of paramount importance to maintain this protection of independent contractors, who comprise an increasing share of the U.S. workforce today. Misclassifying us as employees is not protecting us. It is attacking us and attempting to destroy our chosen careers.

PLEASE LEAVE THE EXISTING INDEPENDENT CONTRACTOR RULE IN PLACE
As countless independent contractors in myriad professions have now told you in public hearings, in press releases, on social media and in comments submitted to the *Federal Register* about what you are doing: Please stop.

Implementing this new rule will cause harm by misclassifying us as employees, thus destroying our income and careers. Your rule-making and the pain it causes will have a disproportionate effect on women, who have been flocking to independent contractor work in recent decades, and especially since the Covid-19 pandemic.

Perhaps worst of all, you are knowingly taking this anti-independent contractor action against the clearly expressed will of the majority of independent contractors in America. You are appointed officials in the U.S. government. You are supposed to represent us all.

We strongly urge you to leave the current U.S. Department of Labor independent contractor rule in place. It is a rule that actually does protect our right to choose self-employment.

Sincerely,

Kim Kavin, Jen Singer, Debbie Abrams Kaplan and Karon Warren
Co-leaders, Fight For Freelancers USA
www.fightforfreelancersusa.com