IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DATA MARKETING PARTNERSHIP, LP, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	Civil Action No. 4:19-cv-00800-O

DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiffs' claims fail at the threshold because they have not challenged a final agency action reviewable under the Administrative Procedure Act (APA), and they have failed to support their novel theories for direct review under the Employee Retirement Income Security Act of 1974 (ERISA). The U.S. Department of Labor (Department) acted well within its authority in issuing the Advisory Opinion requested by Plaintiffs. The Advisory Opinion did not trigger legal consequences permitting immediate judicial review. Instead, Plaintiffs simply fear the practical effects that may flow from the independent actions of state and territorial regulators, which do not give rise to reviewable agency action. Accordingly, this case should be dismissed for lack of subject matter jurisdiction.

Even if judicial review were available, the Department is entitled to summary judgment because the Advisory Opinion persuasively addresses the relevant considerations and is entitled to deference. Plaintiffs have failed to establish arbitrary and capricious action here. To the contrary, the Department has thoroughly and logically explained its conclusion that Plaintiffs' business scheme does not establish an employment relationship with their limited partners. Despite differences in their analytical approaches, Plaintiffs and the Department agree that the limited partners cannot be "working owners" unless they "work," and thus must perform services for the partnership. The Department reasonably concluded that, under Plaintiffs' proffered facts, these individuals do not work for the partnership. Instead, they appear to join the partnership primarily to purchase health insurance, and the only "service" they provide to the business is to download software on their personal electronic devices that allows the partnership to track their personal activities on the Internet. In addition, the Department's analysis is consistent with its past pronouncements, it has expertise in interpreting and managing ERISA's complex regulatory scheme, and its conclusions do not reflect mere litigation posturing. For all these reasons, the

Advisory Opinion is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Finally, Plaintiffs are not entitled to the declaratory and injunctive relief they seek. On this limited review of agency action, any defect in the agency's reasoning should—at most—lead to remand of the action to the agency. And here, Plaintiffs have not carried their burden to show that any such defect exceeds harmless error. Moreover, Plaintiffs appear to have abandoned much of their requested declaratory and injunctive relief, as the only response they offer to the Department's arguments is to defend their request for a preliminary injunction pending the Court's summary judgment ruling.

For all these reasons, the Department is entitled to summary judgment and Plaintiffs' motions for summary judgment and preliminary injunctive relief should be denied.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Claims

A. Plaintiffs' Claim Is Not Cognizable Under the APA

Plaintiffs fail to state a claim for "final agency action" reviewable under the APA, *see* 5 U.S.C. § 704, because the Department's advisory opinion does not satisfy both conditions set forth in *Bennett v. Spear*, 520 U.S. 154 (1997).

First, the Department has shown that its advisory opinion does not "mark the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (1997) (quotation marks omitted).[1] *See* Defs.' Combined Br. in Opp'n to Mot. for TRO/PI, in Opp'n to Mot. for Summ. J., and in Supp. of Cross-Mot. for Summ. J. (Defs.' Br.) at 10-11, ECF No. 28. Plaintiffs argue that it is sufficient that the Department has completed its "advisory opinion process." Pls.' Am. Consolidated Reply Br. in Supp. of Summ. J. and Inj. as well as Opp'n to

[1] Hereinafter, internal quotations, alterations, and citations omitted unless otherwise noted.

Defs.' Cross-Mot. for Summ. J. (Pls.' Reply) at 21, ECF No. 30. But courts have not treated opinion letters as the consummation of an agency's process where the agency has not exercised its investigatory or enforcement authority. As the Sixth Circuit has concluded, "agency letters based on hypothetical facts *or facts submitted to the agency*, as opposed to fact-findings made by the agency, are classically non-final for this reason." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004) (emphasis added) (citing *Nat'l Res. Def. Council v. FAA*, 292 F.3d 875, 882 (D.C. Cir. 2002) and *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780-81 (9th Cir. 2000)). Because the Advisory Opinion is based on "facts submitted to the agency," not agency fact-finding after an investigation, *see* ERISA Procedure 76-1 § 10, the agency has not taken final action concerning Plaintiffs. *See, e.g.*, *Nat'l Res. Def. Council*, 292 F.3d at 881-82 (holding FAA advisory opinion not to be final action where "the FAA's determination of the applicability of the Act flowed solely from [the requester's] description of its proposed flights" and the agency's "interpretation of the Act was not based upon a factual determination"). Indeed, such an advisory opinion is farther from finality than the notice of violation that was found not to be final in *Luminant Generation Co. v. EPA*, 757 F.3d 439 (5th Cir. 2014), even though that notice asserted violations of law after a twelve-year investigation. *See id.* at 441-42. That notice initiated a thirty-day period for the agency to issue an order, assess an administrative penalty or bring a civil action, but the Fifth Circuit concluded that it did not meet *Bennett*'s consummation prong because the notice "does not commit the [agency] to any particular course of action." *Id.* at 442. Likewise here, the Department is not committed to any particular course of action merely by answering Plaintiffs' request for an opinion. The Department remains free to investigate Plaintiffs' circumstances, or to take no action at all.[2]

[2] Plaintiffs err in claiming that "[i]f ERISA does not apply, DOL has no authority to investigate

None of the cases Plaintiffs point to require a different result here. As Plaintiffs recognize, in *American Airlines, Inc. v. Herman*, 176 F.3d 283 (5th Cir. 1999), the Fifth Circuit addressed an intermediate administrative ruling in an ongoing agency adjudication. *See id.* at 289 (holding that orders "remand[ing] to an administrative law judge for further proceedings are not final orders subject to judicial review"). This case does not undermine the Department's argument because it did not address whether the conclusion of an agency advisory opinion process inherently satisfied *Bennett*'s "culmination" prong. Indeed, the Department cited this case, not because it involved analogous facts, but merely to show that the Fifth Circuit requires dismissal of cases that fail to satisfy *Bennett*'s culmination prong. *See* Defs.' Br. at 10. In *Unity 08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010), the D.C. Circuit did not address the culmination prong because that prong was conceded by the Federal Election Commission (FEC). *See id.* at 864.[3] And the D.C. Circuit's footnote, written in 1984, characterizing older cases as reviewing "final and authoritative statements of position by the agencies . . . [tasked with] interpreting the underlying statutes," *Am. Fed'n of Gov't Emps., AFL-CIO v. O'Connor*, 747 F.2d 748, 753 n.10 (D.C. Cir. 1984), must be tempered by more recent D.C. Circuit decisions outside the FEC context recognizing that advisory

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the Plaintiffs' plans[.]" Pls.' Reply at 9. The Department retains authority under 29 U.S.C. § 1134(a) to conduct its own investigation to determine whether an ERISA plan does in fact exist and whether a violation occurred. *See, e.g.*, *Chao v. Koresko*, No. 04-3614, 2005 WL 2521886, at *3 (3d Cir. Oct. 12, 2005) ("lack of coverage is not a defense to enforcement" of an administrative subpoena issued in an ERISA investigation); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982) (explaining that "the authority to investigate the existence of violations includes the authority to investigate coverage").

[3] Regardless, the FEC's statutory advisory opinion process differs from the Department's in relevant ways—the FEC's requires a public comment process and provides a safe harbor against liability in governmental or private litigation for anyone whose activity is "indistinguishable in all its material aspects" from the activity addressed by the opinion. *See* 52 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). Here, by contrast, Department advisory opinions are not issued after a public comment process, offer no protection—statutory or otherwise—from private litigation, and cannot be relied upon by other parties. *See* Defs.' Br. at 6-7; ERISA Procedure 76-1.

opinions relying on proffered facts may not be reviewable agency action. *See, e.g.*, *Nat'l Res. Def. Council*, 292 F.3d at 881-82.

Second, and most importantly, the Advisory Opinion is not "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78. Legal consequences do not generally flow "when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *Luminant*, 757 F.3d at 442 n.7 (quoting *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)). The Fifth Circuit has rejected "suits for declaratory judgment upon mere informal, advisory, administrative opinions" where the agency opinions "do not have the status of law with penalties for noncompliance" and "do not require immediate compliance by the [plaintiff]." *Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991); *see also Dow Chemical v. EPA*, 832 F.2d 319, 324 (5th Cir. 1987) (holding that agency letter enclosing statement of its legal view did not "fix a legal relationship" and was not "final action"); *City of Miami v. ICC*, 669 F.2d 219, 221-22 (5th Cir. 1982) (holding that ICC declaratory order was "advisory ruling" without legal consequences and therefore lacked finality). The Department has shown that the Advisory Opinion states the agency's view of the law, as requested by Plaintiffs. *See* Defs.' Br. at 11-14. Such agency statements that "merely express[] the agency's opinion about the legality of the plaintiff's conduct" but do "not commit the administrative agency to a specific course of action should the plaintiff fail to comply with the agency's view" do not trigger legal consequences or obligations, and therefore are not final agency actions reviewable under the APA. *Texas v. EEOC*, 933 F.3d 433, 445 (5th Cir. 2019) (characterizing *Luminant*, 757 F.3d at 442).

Plaintiffs do not address any of these Fifth Circuit authorities. Instead, their counterargument largely depends on their distorted characterization of how ERISA preempts state

law. They claim that "DOL has taken away ERISA preemption under which the plans were designed," Pls.' Reply at 48, which "immediately causes these plans to be subject to [state] criminal and civil penalties," *id.* at 22, and "automatically opens Plaintiffs and the plans to legal peril that did not exist prior to the AO Response," *id.* at 25. This argument is mistaken for three reasons. First, Plaintiffs themselves have acknowledged that any "legal peril" from state enforcement efforts existed before the Advisory Opinion and this litigation. *See* Renfro Decl. ¶ 17, ECF No. 11-1. Second, the Department's advisory opinions "lack the force of law," *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014), and cannot have preemptive effect. The Advisory Opinion does not bind Plaintiffs, let alone state insurance regulators, *see* ERISA Procedure 76-1, § 10, and thus can neither extend nor rescind statutory preemption.[4]

Finally, Plaintiffs do not reckon with the fact that under ERISA, "preemption serves as a defense to a state action," and generally does not prevent the state action altogether. *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337-38 (5th Cir. 1999).[5] ERISA created a scheme of dual regulation under which states have the right to bring actions to enforce their own insurance laws, even when anticipating ERISA preemption as a defense. *See Franchise Tax Bd. of State of Ca. v. Constr. Laborers Vacation Tr. For S. Ca.*, 463 U.S. 1, 21 (1983) ("[States] have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the preemption questions such enforcement may raise are tested there."); *Texas v. Travis Cty., Tex.*,

[4] Plaintiffs took pains to argue that Department advisory opinions should not even receive *Chevron* deference in federal court, *see* Pls.' SJ Mem. at 16-18, ECF No. 24, so how could a favorable opinion preempt state law or an adverse opinion "immediately" subject them to state regulation?

[5] ERISA does completely preempt some types of claims, such as any effort to enforce the terms of ERISA in state court. *See Giles*, 172 F.3d at 336-37 (explaining that ERISA Section 502, 29 U.S.C. § 1132, "by providing a civil enforcement cause of action, completely preempts any state cause of action seeking the same relief"). But such field preemption is not at issue here.

910 F.3d 809, 812 (5th Cir. 2018) (same). Even where ERISA may ultimately preempt the state's regulatory effort, a state court action "is not itself preempted by ERISA." *Franchise Tax Bd.*, 463 U.S. at 26. While either Plaintiffs or state regulators could cite one of the Department's advisory opinions for its persuasive value in such a case, *see Raymond B. Yates, M.D. P.C. Profit Sharing Plan v. Hendon* ("*Yates*"), 541 U.S. 1, 18 (2004) (quoting *Skidmore*, 323 U.S. at 140), it would have no other role in the litigation. Thus, the Court need not explore the complexities of ERISA preemption to recognize the emptiness of Plaintiffs' argument.[6]

For these reasons, the Department's advisory opinion does not "immediately trigger[] definite rights and obligations." *BNSF Railway Co. v. EEOC*, 385 F. Supp. 3d 512, 521 n.8 (N.D. Tex. 2018). The Department has explained how no possible response to Plaintiffs' request for an advisory opinion would have created a safe harbor for Plaintiffs that could be construed as a legal consequence. *See* Defs.' Br. at 13. This distinguishes *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016)—an unfavorable advisory opinion does not subject Plaintiffs to "the risk of significant criminal and civil penalties" by the Department, *id.* at 1815, and a favorable

[6] Though the contours of ERISA preemption are not at issue here, a brief explanation may be helpful. ERISA's express preemption clause provides that ERISA is to "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C. § 1003(a)]." 29 U.S.C. § 1144(a). ERISA's preemptive reach, however, has limits. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). The most relevant limitation on ERISA preemption is that it applies only where an "employee benefit plan" exists, which is not the case here. 29 U.S.C. § 1144(a); *see, e.g., Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 7, 12 (1987); *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 180-81 (5th Cir. 1992). Even if an ERISA plan were present, ERISA does not preempt state laws that regulate health insurance companies that insure a plan's benefits. 29 U.S.C. § 1144(b)(2); *see John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 98 (1993) ("ERISA leaves room for complementary or dual federal and state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated."). It does, however, prohibit employee benefit plans from being deemed an insurance company for purposes of state regulation. *See* 29 U.S.C. § 1144(b)(2)(B). Nevertheless, contrary to Plaintiffs' claims, § 1144(b)(2) "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans." *Franchise Tax Bd.*, 463 U.S. at 25.

opinion would not "narrow[] the field of potential plaintiffs [or] limit[] the potential liability," *id.* at 1814. Plaintiffs entirely fear state enforcement actions, which are not controlled by the Department or preempted by the Advisory Opinion. While Plaintiffs speculate that if the Department had issued a favorable advisory opinion, "states most certainly would not seek to regulate the plans," Pls.' Reply at 25, they offer no support for that assertion. And regardless, any influence the Advisory Opinion might have on other governments' choices does not rise to the level of a "legal consequence" sufficient to make agency action reviewable. *See, e.g.*, *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 168 (6th Cir. 2017) ("[H]arms caused by agency decisions are not legal consequences if they stem from independent actions taken by third parties."); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 860-61 (4th Cir. 2002) (rejecting argument that "agency actions producing only pressures on third parties were reviewable under the APA"); *Nat'l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727, 736 (E.D. Va. 2015) ("[M]ere agency influence over third parties is not sufficient to create rights, obligations, or legal consequences for purposes of judicial review under the APA."). Instead, as in *Luminant*, any rights, obligations and legal consequences flow not from the Advisory Opinion but from existing state and federal law. *See Luminant*, 757 F.3d at 442; *see also Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011). Individuals cannot force judicial review simply by asking an agency for an advisory opinion and then running to federal court if they dislike the agency's response even though it imposes no direct effect on them or any legal consequences. The Court should reject Plaintiffs' implication that judicial review is available every time a federal agency issues an advisory opinion. *See Dow Chem.*, 832 F.2d at 324 (warning against discouraging such opinions). Accordingly, there is no final agency action subject to judicial review under the APA.

B. Plaintiffs' Claim Is Not Cognizable Under ERISA

Nor is Plaintiffs' claim cognizable under ERISA's limited waiver of sovereign immunity

and cause of action for certain suits against the Secretary of Labor. *See* 29 U.S.C. § 1132(k); *Shanbaum v. United States*, 32 F.3d 180, 182 n.2 (5th Cir. 1994).[7] Plaintiffs have not carried their burden to prove that Congress "waiv[ed] sovereign immunity in the specific context at issue." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232 (5th Cir. 2015).

The Department has shown that Plaintiffs do not seek "to review a final order of the Secretary," 29 U.S.C. § 1132(k), both because the Advisory Opinion is not an "order" resulting from an adjudication, *see* Defs.' Br. at 16-17, and because it is not "final" for the reasons discussed above, *see id.* at 17-18. The Department has also shown that Plaintiffs do not seek "to restrain the Secretary from taking any action contrary to the provisions of this chapter." 29 U.S.C. § 1132(k). This seldom-litigated provision is best understood to allow suit where the Secretary is taking an action that ERISA expressly prohibits. *See* Defs.' Br. at 18-19 (demonstrating that the provision incorporates the limited review of *ultra vires* action permitted by *Leedom v. Kyne*, 358 U.S. 184 (1958)). Plaintiffs' novel interpretation would swallow up the other § 1132(k) prongs along with APA review and must be rejected. *See* Defs.' Br. at 20-21. Here, Plaintiffs' arguments plainly cannot meet the *Kyne* standard because they do not dispute the Department's authority to issue advisory opinions; they cannot manufacture an *ultra vires* claim by disputing the Department's reasoning and conclusions. *See id.* at 19-20; *cf. Exxon Chems. Am. v. Chao*, 298 F.3d 464, 468 (5th Cir. 2002) (concluding that court lacked jurisdiction under *Kyne* where agency had "not exceeded the scope of its congressionally delegated authority or its clear statutory mandate").

Plaintiffs offer no meaningful response to the Department's arguments. Instead they

[7] Plaintiffs have never defended their complaint's assertion that 29 U.S.C. § 1132(a)(3) permits suit against the Department, and that argument should be considered waived. *See* Defs.' Br. at 14 n.6; *Tammy B. v. Berryhill*, No. 3:18-cv-1659-K, 2019 WL 2107564, at *13 n.7 (N.D. Tex. Apr. 24, 2019) ("Arguments not presented in an initial brief are waived.").

suggest that their perfunctory assertions made *before* the Department's filing provide a "thorough debunking" of these detailed § 1132(k) arguments. Pls.' Reply at 26 n.7 (citing Pls.' SJ Mem.). Plaintiffs have therefore waived the issue by inadequately briefing it. *See Crane v. Napolitano*, No. 3:12-cv-3247-O, 2013 WL 1744422, at *19 (N.D. Tex. Apr. 23, 2013). Plaintiffs' only new assertion in reply is that the Department conceded jurisdiction under § 1132(k) and the APA in 1983 in a challenge to the denial of an ERISA prohibited transaction exemption. *See* Pls.' Reply at 17 (discussing *Huff v. Donovan*, No. H-82-1369, 1983 BL 473 (S.D. Tex. Apr. 7, 1983)). That opinion has no relevance to the finality or § 1132(k) issues here for multiple reasons: (i) conceding jurisdiction in a single case 37 years ago does not bar the Department from contesting jurisdiction now;[8] (ii) the *Huff* decision contains no analysis of its assertion of jurisdiction and therefore has little persuasive value, *see Deas v. River West, L.P.*, 152 F.3d 471, 477 (5th Cir. 1998); *Switzer v. Wachovia Corp.*, No. H-11-1604, 2012 WL 3685978, at *3 (S.D. Tex. Aug. 24, 2012); (iii) *Huff* does not characterize the denial of a prohibited transaction exemption as a "final order," as Plaintiffs allege, Pls.' Reply at 17; and (iv) the prohibited transaction exemption process at issue in *Huff* is quite different from the advisory opinion process—it is expressly provided for by statute, requires specific findings that may be subject to judicial review, and requires a public notice and

[8] *See, e.g.*, *Cooper v. McDermott Int'l, Inc.*, 62 F.3d 395 (5th Cir. 1995) (Table) (rejecting contention that "voluntary submission as a defendant to personal jurisdiction in other Texas cases somehow 'judicially estops' or operates as a prospective waiver forever preventing [the defendant] from again contesting personal jurisdiction" in new cases); *Westfield Ins. Co. v. Interline Brands, Inc.*, No. 12-6775, 2013 WL 6816173, at *20 n.23 (D.N.J. Dec. 20, 2013) (noting the absence of "authority holding that a party's decision in prior litigation not to contest jurisdiction prevents it from doing so subsequently"). Plaintiffs rely exclusively on *Huff*'s first conclusion of law: "[t]he Court has jurisdiction of this action pursuant to §502 of ERISA, 29 U.S.C. §1132(k) and 5 U.S.C. § 704," Pls.' Reply at 17 (quoting *Huff*, 1983 BL 473, at *4), and baldly assert that that the court's order was "drafted by DOL," Pls.' Reply at 17, because the court had asked the Department to "submit proposed findings of fact and conclusions of law." *See Huff*, 1983 BL 473, at *1. The Department is not foreclosed from contesting jurisdiction here, even if it conceded jurisdiction in *Huff*, which has not been clearly established.

comment process, *see* 29 U.S.C. § 1108(a); *see also Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152, 200-01 (N.D. Tex. 2017), *rev'd on other grounds*, *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). Accordingly, *Huff* does not undermine the Department's showing that Plaintiffs have not stated a viable claim under § 1132(k).

II. To the Extent Judicial Review Is Available, the Advisory Opinion Persuasively Addresses the Relevant Considerations And Is Entitled to Deference

The Advisory Opinion is a reasonable exercise of the Department's interpretive authority under ERISA. The Department has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sierra Club v. EPA*, 939 F.3d 649, 663-64 (5th Cir. 2019) (ultimately quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Accordingly, the Department has satisfied the "narrow" review authorized under the APA's arbitrary and capricious standard. *Id.* at 664.

The Court's task is simplified because it is well established that ERISA advisory opinions are entitled to *Skidmore* deference. *See Yates*, 541 U.S. at 18 (recognizing that ERISA advisory opinions "reflect[] a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting *Skidmore*, 323 U.S. at 140)); *MDPhysicians & Assocs.*, 957 F.2d at 186 n.9 (stating that the court "consider[ed] the [advisory] opinions of the Department of Labor of persuasive value in making our decision"); *cf. Baylor Cnty. Hosp. Dist. v. Price*, 850 F.3d 257, 261 (5th Cir. 2017) (stating that the Fifth Circuit "accords *Skidmore* deference to agency interpretations of statutes they administer that do not carry the force of law"). Here, the Advisory Opinion is entitled to significant weight due to "'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

and all those factors which give it power to persuade.'" *Baylor Cnty. Hosp. Dist.*, 850 F.3d at 261 (quoting *Skidmore*, 323 U.S. at 140). Thus, under both persuasive deference and the APA's reasonableness standard, the Department is entitled to summary judgment.

A. The Department's Reasoning Is Valid

This Court has noted that the validity of an agency's reasoning is the "most salient of the factors that inform an assessment of persuasiveness." *Baylor Cnty. Hosp. Dist. v. Burwell*, 163 F. Supp. 3d 372, 380 (N.D. Tex. 2016) (quoting *Doe v. Leavitt*, 552 F.3d 75, 82 (1st Cir. 2009)), *aff'd*, 850 F.3d 257 (5th Cir. 2017); *see also De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005) (assessing "validity" under *Skidmore* by examining "whether an agency pronouncement is well-reasoned, substantiated, and logical"). The Department's reasoning in the Advisory Opinion is straightforward and logical. It draws on relevant considerations to conclude that Plaintiffs' limited partners are not "working owners" eligible to participate in an ERISA plan.

First, ERISA applies only to employee benefit plans where an employment-based relationship exists. *See* Defs.' Br. at 3-6, 25; *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 243 (5th Cir. 1990) (concluding that, where an "employer-employee-plan relationship" existed, ERISA applied). To be a "participant" in a plan, one must be an "employee or former employee of an employer," 29 U.S.C. § 1002(7), and an "employee" is "any individual employed by an employer," *id.* § 1002(6). These definitions, while circular, only reinforce how central employment is to the regulatory scheme. *See, e.g.*, 29 U.S.C. § 1001(a) (ERISA's goals include the "well-being and security of millions of employees" and "the stability of employment").

Second, without compromising ERISA's requirement of an employment relationship, the statute also demonstrates that "working owners" can be "participants" of ERISA plans, an interpretation developed by the Department and followed by the Supreme Court in *Yates*. *See* Defs.' Br. at 25-27; *Yates*, 541 U.S. at 16 (favorably citing Advisory Opinion 1999-04A (link)).

However, *Yates* did not explicitly define "working owner" or address how that question would be resolved in close cases. *See* Defs.' Br. at 27-29; *see also Yates*, 541 U.S. at 16 (going no farther than characterizing a working owner as an individual who "wear[s] two hats, as an employer and employee"). *Yates* neither quoted nor adopted the functional definition the Department used in its 1999 advisory opinion. *See id.* at 28-29. Nor did *Yates* adopt the Internal Revenue Code definitions regarding self-employment. *See id.* at 27-28 (discussing 26 U.S.C. § 401(c)); *see also* Pls.' Reply at 37 (acknowledging that *Yates* cited "for illustrative purposes only" the isolated ERISA provisions that incorporate 26 U.S.C. § 401(c)).

Third, in seeking to distinguish working owners—i.e., those who can be considered to have an employment relationship with the business—from other types of contributors to a business, the Department considered both the textual clues ERISA provides and common law (and common sense) factors regarding employment and work. *See* Defs.' Br. at 26-27, 36-37. Unlike the narrow question at issue in *Yates*, 541 U.S. at 6, ERISA's text is not itself definitive regarding how to make this distinction. *See* Defs.' Br. at 29-33. The treatment of "bona fide partners" within the meaning of ERISA § 732(d), 29 U.S.C. § 1191a(d); 29 C.F.R. § 2590.732(d), and the treatment of "self-employed" individuals under certain ERISA provisions that incorporate 26 U.S.C. § 401(c), while informative, do not directly establish how partners may also be considered "employees" for purposes of participating in ERISA plans. *See* Defs.' Br. at 30-33.

Fourth, the text, structure, and purposes of ERISA suggest a broad facts-and-circumstances test that centers on whether the owner provides "services" to the business. *See* Defs.' Br. at 30-33, 36-37. It is here that the parties' understandings of the core question significantly overlap. Plaintiffs agree that they need to show that their limited partners provide services to the partnership. *See* Pls.' Reply at 3 (arguing that the "analysis hinges on whether a person with equity

ownership of a business renders services to a business" (quotation marks omitted)); *see also id.* at 36, 43. As Plaintiffs acknowledge, "[o]f course, working owners work." Pls.' Reply at 36. The parties diverge regarding Plaintiffs' insistence that one should look only to 26 U.S.C. § 401(c) to identify a working owner. *See* Pls.' Reply at 33, 36, 38. Plaintiffs' approach discounts two relevant considerations. The Department has explained that the treatment of "bona fide partners" within the meaning of ERISA § 732(d) is a relevant textual clue regarding how partners may be working owners alongside § 401(c). *See* Defs.' Br. at 30-32.[9] In addition, the Department has explained that "many of the [common law] factors go to the nature of work itself" and "illuminate the employment relationship," Defs.' Br. at 36-37 (referring to *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)), and therefore "remain helpful," alongside the clues derived from statutory provisions. *See id.* at 33. Plaintiffs have not shown that the *Darden* factors are irrelevant to whether an owner is actually working.[10]

Fifth, the Department reasonably concluded that under Plaintiffs' explanation of their business arrangement, the limited partners do not provide services to the partnership. *See* Defs.' Br. at 35-36, 39-41. Allowing one's electronic data to be tracked, collected, and marketed is not

[9] While Plaintiffs now insist that the "bona fide partner" provision does not apply to their plans, *see* Pls.' Reply at 41-42, their request relied on it. *See* Pls.' Request, Pls.' App. 014-015, ECF No. 24-2 (arguing that the partners "satisfy the definition of a 'bona fide partner'"). The Advisory Opinion addressed the facts-and-circumstances test for "bona fide partners" because Plaintiffs raised it in their request. *See* Opinion, Pls.' App. 004-005 (addressing requester's claim "that ERISA section 732(d) supports LP Management's position" without determining whether 29 U.S.C. § 1191a(d) directly applied). Additionally, that provision's reiteration that self-employed individuals can participate alongside common law employees, 29 U.S.C. § 1191a(d)(3)(B), to which Plaintiffs now cling, *see* Pls.' Reply at 42, is not determinative because it offers no guidance regarding how to identify the self-employed. *Cf.* Defs.' Br. at 30 n.15; Opinion, Pls.' App. 004.

[10] Indeed, Plaintiffs mischaracterize the Department's approach rather than meaningfully engaging with it. *See, e.g.*, Pls.' Reply at 1, 29 (inaccurately claiming the Department argues that "a 'working owner' also must be an 'employee' in a common law sense to be a plan participant"); *id.* at 34 (erroneously claiming the Department argues working owners are identified "by solely looking at *Darden*'s common law employee analysis").

"work" or "performing any services." Opinion, Pls.' App. 002. While Plaintiffs dress up the steps of data collection—claiming that the partners "control and manage the capture, segregation, aggregation, and sale of their own data," Pls.' Reply at 2, they cannot mask the fact that the partners are not employing any skill or providing anything other than the data itself. For this reason, Plaintiffs' newfound interest in calling this "data mining," *see id.* at 2-5, 39-40, 46, is unwarranted. That term implies that the partners are doing something productive or transformative with the data,[11] when in fact Plaintiffs merely allege that the partners' personal activities produce data for the *ultimate buyer* to mine for useful connections. The Department's additional consideration of the absence of earned income or the other attributes of employment further support this central conclusion about services. *See* Defs.' Br. at 35-39; Opinion, Pls.' App. 001-006.[12]

Plaintiffs also miss the mark in analogizing limited partners to a "self-employed ride sharing driver" who transports a paying passenger to a destination that the driver also wants to reach. *See id.* at 46 (suggesting that the Department denigrates "performing work that one is already inclined to do"). The difference here is that transporting a paying passenger is actually performing a business task, while passively allowing one's internet surfing data to be collected requires no performance of a service at all. Plaintiffs' own comparison of "internet moguls" to

[11] *See, e.g.*, *Oxford English Dictionary*, 3d ed. 2012 ("**data mining** *n.* the process or practice of examining large collections of data in order to generate new information, typically using specialized computer software"); *Am. Heritage Dictionary of the English Language*, 5th ed. ("**data mining** *n.* The extraction of useful, often previously unknown information from large databases or data sets.").

[12] Plaintiffs repeatedly assert that this business model gives partners "control of their internet data usage assets." Pls.' Reply at 45. It appears, however, that the monetization of the partners' data by existing internet companies remains largely unchanged. Plaintiffs' business, if successful, would just monetize that data in an additional way. Even taking Plaintiffs' representation that partners can control how their data is used, this control ostensibly serves the partners' own interests, not the partnership's. The business would appear to benefit most if collection and aggregation of data were unrestricted by partners' individual decisions, so it is difficult to understand how allowing partners to control their own data serves the business.

19th century "robber barons" is instructive. *See id.* at 45. Data is essential to internet businesses, as land was for railroads and oil production. But just as leasing or selling land does not make the landowner an employee of an oil firm, so too crafting an arrangement where a person might receive some payment for his data does not make that person an employee. Here, profit distributions would be akin to oil royalties or partnership dividends, not earned income. *See* Defs.' Br. at 41.[13]

The Court need not explore hypotheticals that *would* constitute the performance of services for a business to recognize the reasonableness of the Department's conclusion that these limited partners are not "employed" or "self-employed" with regard to the partnerships. *See* Opinion, Pls.' App. 001-006. Plaintiffs resort to simply repeating that "it cannot be disputed that Plaintiffs' partners actually perform services for the partnership," Pls.' Reply at 43, and casting the Department's thoughtful analysis as an egregious mischaracterization of fact. *See id.* at 3-7.[14] But the Department did not err in rejecting Plaintiffs' conclusory allegations and unwarranted deductions in favor of a realistic understanding of Plaintiffs' proposal.

In sum, the Department has shown that its Advisory Opinion thoroughly addressed the

[13] Indeed, Plaintiffs offer no response to the Department's demonstration that their "guaranteed payment" claims do not appear to conform to applicable tax law. *See* Defs.' Br. at 38 n.21.

[14] For the third time, Plaintiffs have included a table that purports to highlight the Department's factual errors, repetitively arguing that contributing data constitutes services and that the distribution of profits would be earned income. *See* Pls.' Reply at 3-7. The Department has thoroughly responded to these arguments, showing that the parties' disagreement is not a factual error. *See* Defs.' Br. at 39-43. Plaintiffs also bury in their table an argument that the Department's facts-and-circumstances analysis of whether Plaintiffs' limited partners are working somehow suggests that the Department would "cancel all ERISA plans" for people working from home, along with an assertion that Plaintiffs' business model "could literally save lives" during the current pandemic. *See* Pls.' Reply at 7. Such sensational claims are not only unsupported but also misplaced in this litigation, which is limited to review of the Advisory Opinion under the APA and ERISA, if subject to judicial review at all. The few *Darden* factors Plaintiffs single out for mockery, *see* Pls.' Reply at 6-7, 39-40, were not dispositive to the Department's analysis and Plaintiffs have not shown that mere consideration of any single factor constituted prejudicial error. *See* Defs.' Br. at 42-43.

questions raised in Plaintiffs' request, including the relevant statutory and regulatory provisions and their applicable standards. *See* Defs.' Br. at 21-43. The Department's straightforward logic is reasonable and satisfies both the arbitrary and capricious and *Skidmore* deference standards.

B. The Department's Reasoning Is Consistent With Its Prior Positions

Plaintiffs spend much of their reply brief attempting to show that the Advisory Opinion is inconsistent with the Department's prior statements regarding working owners. *See* Pls.' Reply at 30-41. In particular, Plaintiffs argue that the Department previously treated *Darden*'s common law principles as irrelevant to all questions concerning working owners. For the reasons discussed above, Plaintiffs' fixation on this analytical question is a sideshow. It is also inaccurate. While the Department has consistently explained that ERISA's statutory text sufficiently answers the question of *whether* working owners can be participants in ERISA plans, it has generally had no need to address *how* to distinguish working owners from non-working owners, i.e. owners who are not also employed by the business. There is no inconsistency when common law factors are used to assist in answering this second question (i.e., whether someone is actually working).

1. Advisory Opinion 1999-04A

In its 1999 advisory opinion, the Department found "ample guidance in ERISA as to Congress' specific intent to treat 'working owners' as 'participants'" and therefore stopped at *Darden*'s first analytical step of looking to the statute's terms for resolution of the question presented. *See* Advisory Opinion 1999-04A, Pls.' App. 179. The requester of the 1999 advisory opinion used the term "working owner," including any "owner that earns wages or self-employment income from a company." *See id.* In response, the Department used the requester's term and further described it functionally in a footnote: "[y]ou apparently mean any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business as distinguished from a 'passive owner,' who . . . is

not otherwise involved in the activities in which the business engages for profit." *Id.* at 181. Because the owners in question were obviously working, the Department did not need to adopt a specific definition, explain how it derived its functional definition, or explore the potential boundaries of the concept. *See* Defs.' Br. at 29. This does not constitute an "original definition [that] must stand," Pls.' Reply at 36, and even assuming that definition directly applied here, nothing in that opinion suggests that common law factors would be irrelevant to determining whether an owner was "working" or "providing services."

2. Brief for the United States as Amicus Curiae in *Yates*

While *Yates* was pending before the Supreme Court, the United States submitted an amicus brief encouraging the Court to adopt the reasoning set out in the Department's 1999 advisory opinion. *See* Amicus Br. of United States, *Yates v. Hendon*, No. 02-458, 2003 WL 21953912, at *9-10 (Aug. 11, 2003). The amicus brief argued that the text of ERISA and related statutes demonstrated that working owners were not "categorically excluded" but instead "may be plan participants." *Id.* at *9. Accordingly, the amicus brief proposed that there was no need to proceed to *Darden*'s "second step . . . to use common-law principles to resolve the question." *Id.* at *12.

Plaintiffs point to the brief's statement that the statutory text "establish[es] that Congress intended that working owners of all types may be participants in ERISA plans." *Id.* at 14. A later section of the brief made clear that it was referring to "all three types of working owners"—corporate shareholders, partners, and sole proprietors. *Id.* at *19-20. The brief was not concerned with further clarifying the nature of a working ownership interest. Contrary to Plaintiffs' assertion, the amicus brief did not quote or rely on the 1999 advisory opinion's functional definition of working owner. It simply was not important to the question presented.

Plaintiffs also point to a footnote distinguishing *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003), which addressed working owners for purposes of the Americans

with Disabilities Act of 1990. *See* Pls.' Reply at 30-31. The footnote argued that, to the extent the Court considered common law principles, the purposes of ERISA should produce a different result than *Clackamas* because even "controlling shareholders" should be able to participate in ERISA plans. *See* Amicus Br., 2003 WL 21953912, at *13 n.6. Thus, the brief was not distinguishing *Darden*, but *Clackamas* and its "EEOC control test" that did not "precisely mirror the common law." *Id.* This reasoning does not render common law principles irrelevant to assessing whether an owner is actually working.

Lastly, Plaintiffs attempt to derive a "two-step process" from the amicus brief, claiming that it "first relies on remuneration in exchange for services, and then relies on a common law review." Pls.' Reply at 33. The context clearly establishes that the amicus brief's shorthand reference to a working owner as "someone who provides services to a business in exchange for remuneration," 2003 WL 21953912, at *12, was not a "step" in the Department's analysis. *See also id.* at *1 (describing working owners "such as a shareholder, sole proprietor, or partner who renders services to a business"). Instead, the Department was straightforwardly applying the *Darden*/*Yates* methodology of examining the statutory text before turning to common law principles. *See id.* at *11-12. Regardless, that brief characterization of a working owner is consistent with the Department's analysis in the Advisory Opinion, which examines whether the limited partners are performing services to the partnership and receiving income for services.

3. Association Health Plan Rule

Finally, Plaintiffs argue that portions of the Department's rule related to association health plans contradict the Department's position here. *See* Pls.' Reply at 38-41. But that rule only underscores the reasonableness of the challenged Advisory Opinion.

An association health plan ("AHP") is an ERISA group health plan sponsored by a bona fide group or association of multiple employers. *New York v. U.S. Dep't of Labor*, 363 F. Supp.

3d 109, 117 (D.D.C. 2019).[15] The AHP rule interpreted the definition of "employer" under 29 U.S.C. § 1002(5) to expand the number of employers eligible to participate in an AHP and clarified the circumstances under which a working owner may be an "employer" for these purposes. *See* 29 U.S.C. § 1002(5) (defining "employer" as "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"); 83 Fed. Reg. 28912-01 (June 21, 2018) (codified at 29 C.F.R. § 2510.3-5), *vacated by New York*, 363 F. Supp. 3d at 141.[16] And the AHP rule—just like the Advisory Opinion—defined "working owner" using a facts-and-circumstances test that focuses in particular on whether the alleged working owner is actually rendering services to the business.

Specifically, the AHP rule defined "working owner" as a person who "has an ownership right of any nature in a trade or business," "is earning wages or self-employment income from the trade or business for providing personal services to the trade or business," and who meets minimum hours of work or income levels. *Id.* § 2510.3-5(e)(2). Under the rule, plan fiduciaries were to reasonably determine whether someone qualifies as a "working owner" under all the "facts and circumstances," and fiduciaries "have an obligation under ERISA to take steps to ensure that only eligible individuals participate and receive benefits under the plan." 83 Fed. Reg. at 28931-32 (citing 29 U.S.C. § 1104(a)(1)(B)); 29 C.F.R. § 2510.3-5(e)(2). Indeed, the animating principle

[15] The portions of the AHP rule on which Plaintiffs rely, however, have been vacated and are not currently effective. *Id.* at 141. The Department has appealed the district court's decision and the case is currently *sub judice* to the U.S. Court of Appeals for the District of Columbia. *See New York v. U.S. Dep't of Labor*, No. 19-5125 (D.C. Cir.) (oral argument held Nov. 14, 2019).

[16] The rule explained how multiple employers with a "commonality of interest" may join together as an "employer" under 29 U.S.C. § 1002(5) to sponsor a single multiple-employer health benefits plan governed by ERISA. 29 C.F.R. § 2510.3-5(c); 83 Fed. Reg. at 28913. The relevant employment nexus addressed by the AHP rule was the nexus *among employers* acting as a unitary plan sponsor for their employees. 83 Fed. Reg. at 28913-14.

underlying the rule's "working owner" definition was to ensure that an AHP retains its employment-based character: "The rule is intended to cover genuine work relationships, including self-employment relationships, not to permit individual coverage masquerading as employment-based coverage." 83 Fed. Reg. at 28931. Eligibility to join an AHP as a "working owner" could not depend on "de minimis commercial activities." *Id.* Thus, the Department has employed a similar approach both for employer associations under the AHP rule and this Advisory Opinion.

Plaintiffs argue that the AHP rule's definition of a "working owner" conflicts with the Department's position here because the AHP rule does not "create a common law employment standard." Pls.' Reply at 40. As explained, the Advisory Opinion does not do so either. Indeed, Plaintiffs' reliance on the definition further undermines their argument because Plaintiffs' limited partners would not qualify as "working owners" for purposes of the AHP rule. They not only fail to "provid[e] personal services to the trade or business" or earn "wages or self-employment income," 29 C.F.R. § 2510.3-5(e)(2)(ii), but they also fail to meet other criteria required of working owners under the AHP rule. They do not "work[] on average at least 20 hours per week or at least 80 hours per month" nor is there any evidence that their income, if any, "equals the working owner's cost of coverage for participation . . . in the group health plan." *Id.* § 2510.3-5(e)(2)(iii).[17]

C. The Department's Expertise Is Worthy of Respect

Deference should also be accorded to the Department due to its expertise in administering

[17] Plaintiffs do not support their claim that the Department's AHP appellate briefs are "directly . . . at odds" with the Department's current "analysis of *Yates*." Pls.' Reply at 29; *id.* at 38 n.10 (claiming that the Department's AHP rule appellate briefs have "taken Plaintiffs' exact position on 'working owners'"). Those briefs argue that, under *Yates*, working owners are "employers" eligible to participate in an AHP; they did not address who qualifies as a working owner. *See, e.g.*, ECF No. 11-4 (May 31, 2019 AHP rule opening brief). And the Department's explanation of why ERISA distinguishes between employer-provided health plans and commercial-insurance-type health plans—although presented in a different context—is fully consistent with the Department's approach to the question of who qualifies as a working owner in the Advisory Opinion.

ERISA's complex regulatory scheme. *See, e.g., Baylor Cnty. Hosp. Dist.*, 163 F. Supp. 3d at 380, 384 (deferring in part because a "highly expert agency administers a large complex regulatory scheme in cooperation with many other institutional actors"). The Fifth Circuit has long recognized that "ERISA has produced a complex and highly technical regulatory program" and the "identification and classification of persons and plans covered requires a considerable degree of dedicated expertise." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993). The Department indisputably has the requisite expertise to interpret ERISA "with respect to the finite definition of employer and employee under the statute." *Id.*; *see also Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691 (7th Cir. 1986). Accordingly, the Department's interpretation of ERISA is worthy of weight similar to the Department of Health and Human Service's interpretation of Medicare. *Cf. Community Care LLC v. Leavitt*, 537 F.3d 546, 551 n.11 (5th Cir. 2008) (granting *Skidmore* deference to an agency's interpretation, even given "another reasonable way to harmonize [the regulatory] provisions," where the agency's interpretation was "reasonable and consistent with statutory and regulatory requirements" and court was "dealing with a complex and highly technical regulatory program").

D. The Department's Conclusions Are Not Convenient Litigation Posturing

Plaintiffs argue that deference to the Advisory Opinion should be denied because it is a "mechanism to achieve procedural advantages in this case." Pls.' Reply at 28. They allege "hypocrisy and bad faith," *id.*, because the Department observed that, to the extent Plaintiffs' plans are not employee benefit plans under ERISA, then Plaintiffs also lack standing to press a claim under § 1132(k). *See* Defs.' Br. at 15 n. 7. There is no substance to Plaintiffs' accusation. The Department did not footnote this standing issue to "create a Catch-22 to avoid judicial scrutiny," Pls.' Reply at 25, because the Court plainly can resolve intertwined merits and standing issues like this on summary judgment. *See* Defs.' Br. at 15 n. 7 (citing *Coleman v. Champion Int'l*

Corp./Champion Forest Prod., 992 F.2d 530, 535 (5th Cir. 1993); *Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219 (5th Cir. 1989)). Instead, the Department was merely flagging this limitation on judicial review of the § 1132(k) claim—the Court has no jurisdiction under § 1132(k) once the intertwined merits and standing issues regarding whether the limited partners are participants in an ERISA plan have been resolved.

Similarly, Plaintiffs attack the notion of *Skidmore* deference to an agency interpretation that is not subject to immediate judicial review. *See* Pls.' Reply at 28 n.8 (claiming the Department argues "either the AO Response means nothing, or it is unassailable"). But there is no conflict between those principles. *See, e.g.*, *Air Brake Sys.*, 357 F.3d at 646 (rejecting argument that agency was "trying to have it both ways-by simultaneously claiming (1) that the letters represent 'the definitive view of the agency' on their website and (2) that the letters may not be reviewed because they are non-final for APA purposes").

Moreover, the mere fact that the Department finalized its response to Plaintiffs' advisory opinion request after Plaintiffs filed suit does not make such a duly promulgated ruling "nothing more than an agency's convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Here, the Department is not advancing novel views in litigation filings, but instead is defending an advisory opinion promulgated in response to Plaintiffs' pre-litigation request. *Cf. Bowen*, 488 U.S. at 212 (addressing a litigation filing "wholly unsupported by regulations, rulings, or administrative practice"); *see also Brown v. United States*, 327 F.3d 1198, 1205-06 (D.C. Cir. 2003) (granting *Skidmore* deference to agency methodology "promulgated informally during the course of litigation"). The Department should not be deprived of deference merely because Plaintiffs filed suit before the Department finalized its response to Plaintiffs' request. *Cf. Sze v. INS*, 153 F.3d 1005, 1008 (9th Cir. 1998) (concluding that approval of

applications after litigation was filed did not occur "*because of* this litigation" where "it appears that [the agency] acted on these naturalization applications in due course, albeit significantly delayed due course"); *Gutierrez v. DHS*, No. 18-1958, 2019 WL 6219936, at *6 (D.D.C. Nov. 21, 2019) (holding that agency action that began before the litigation did not occur "because of the litigation" even though it was "*completed* . . . just after a hearing in this litigation").[18] Accordingly, neither the timing of the Advisory Opinion nor the Department's standing footnote undermine the reasonableness or weight that should be afforded to the Department's conclusions.

III. Plaintiffs Are Not Entitled to Any Relief, Let Alone a Preliminary or Permanent Injunction

For the foregoing reasons, the Department is entitled to summary judgment and Plaintiffs are not entitled to any relief. Moreover, even if Plaintiffs could have established that the Department made a minor mistake of fact or considered an irrelevant factor—neither of which has been shown—they have not carried their burden to show that any such error was prejudicial. *See* 5 U.S.C. § 706 (applying "rule of prejudicial error"); *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012). Plaintiffs cannot meet that standard because the Department plainly considered and rejected Plaintiffs' key argument—that "data generation" is not "personal services" necessary for an employment relationship. *See supra*, Arg. § II.A.

In addition, Plaintiffs have abandoned their pursuit of a permanent injunction, as their reply merely seeks a "preliminary injunction [to] preserve the status quo pending this Court's ruling on

[18] Indeed, the Fifth Circuit has held that *Skidmore* deference can be appropriate for interpretations presented during litigation. *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 (5th Cir. 2018) (recognizing that even "statutory interpretations [advanced] solely through litigation briefs" could be entitled to "respect" under *Skidmore*); *but see In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000) (declining to defer to interpretation "where an agency's interpretation occurs at such a time and in such [a] manner as to provide a convenient litigation position for the agency").

the cross motions for summary judgment." Pls.' Reply at 49.[19] Despite this Court's explanation that a "district court vacating an agency action under the APA should not issue an injunction unless doing so would have a meaningful practical effect independent of its vacatur," *Franciscan Alliance, Inc. v. Azar*, 414 F. Supp. 3d 928, 946 (N.D. Tex. 2019), Plaintiffs offer no justification for such a permanent injunction. *See* Defs.' Br. at 45-50. Their preliminary injunction arguments offer no justification for any kind of injunction. As discussed above, *see supra* Arg. § I.A, Plaintiffs are plainly wrong that the Advisory Opinion "has taken away ERISA preemption." Pls.' Reply at 48. They are equally wrong to suggest that a preliminary injunction against the Department "would effectively preempt any and all state-level insurance investigations," Pls.' Reply at 49, because those state entities are non-parties to this suit that would not be bound by an injunction. *See* Fed. R. Civ. P. 65(d)(2); *Texas v. Dep't of Labor*, 929 F.3d 205, 210-11 (5th Cir. 2019). Moreover, Plaintiffs have failed to address or distinguish the Fifth Circuit's holding that an investigation, such as the one initiated by Washington state, *see* ECF No. 31, or an administrative subpoena is not "an imminent, non-speculative irreparable injury" justifying a preliminary injunction. *See* Defs.' Br. at 48 (quoting *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016)). Nor have Plaintiffs explained how "prevent[ing] Defendants from taking any action regarding" the Advisory Opinion, Pls.' Reply at 50, would stop any injury.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to the Department and deny Plaintiffs' motions for summary judgment and for a preliminary injunction.

[19] Plaintiffs also appear to have abandoned their request for declaratory relief. The Department pointed out that in a record review case like this, the Court is in no position to determine the actual facts regarding Plaintiffs' business, let alone declare that Plaintiffs' limited partners in fact qualify for ERISA plans. *See* Defs.' Br. at 44-45. Plaintiffs cite no authority to the contrary.

Dated: April 24, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRAD P. ROSENBERG
Assistant Director
Civil Division, Federal Programs Branch

/s/ Galen N. Thorp
GALEN N. THORP (VA Bar # 75517)
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20530
Tel: (202) 514-4781 / Fax: (202) 616-8460
galen.thorp@usdoj.gov

Counsel for Defendants

Of Counsel:

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor

GLENN M. LOOS
Counsel for Litigation

KATRINA LIU
Trial Attorney
United States Department of Labor
Office of the Solicitor

CERTIFICATE OF SERVICE

On April 24, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties to this action electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Galen N. Thorp
GALEN N. THORP