No. 20-11179

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DATA MARKETING PARTNERSHIP, L.P.; L.P. MANAGEMENT SERVICES, L.L.C.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

Plaintiffs' so-called limited partners perform just one task for the partnership: they install software on their personal electronic devices that tracks their internet usage, and then use the internet as they ordinarily would for at least 500 hours a year. The only appreciable benefit that the limited partners receive from the partnership is access to health-insurance coverage, whose cost the limited partners must pay entirely out of pocket. Accordingly, in response to plaintiffs' advisory-opinion request, Department of Labor advised plaintiffs that their healthcare-benefits plan is not governed by ERISA. That opinion was based exclusively on the facts set forth in plaintiffs' request; it did not involve any independent investigation. And in offering plaintiffs advice, the Department did not forego its authority to conduct follow-up inquiries or to exercise its other regulatory powers. Nevertheless, plaintiffs persuaded the district court to enter a permanent injunction compelling the Department to treat their plan as an ERISA plan in all circumstances and for all time.

As a threshold matter, plaintiffs have failed to show that the challenged opinion is final agency action. Their principal contention is that the opinion subjects them to state enforcement by depriving them of the protection of ERISA's preemption clause. But an advisory opinion cannot preempt state law of its own force. And the fact that courts accord respectful deference to the Department's views is not a legal consequence that renders advisory opinions final. Plaintiffs also contend that the opinion deprives them of the ability to rely on a favorable determination in any enforcement proceeding that the agency might initiate in the future. But this Court has already rejected the premise that interests of this sort can transmute informal advice into final agency action. *Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991). The district court failed to address this holding, and plaintiffs offer no plausible basis for distinguishing it.

Plaintiffs' merits arguments are insubstantial. ERISA only covers plans arising from a genuine employment relationship. And the Department reasonably concluded that plaintiffs' limited partners are no different from the customers of a commercial-insurance company. Plaintiffs' contrary view depends on a misreading of *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004), which—their assertions notwithstanding—did not define the term "working owner." Plaintiffs' suggestion that the Department unreasonably departed from prior opinions is flawed for the same reason. And even if plaintiffs' understanding of *Yates* and the earlier opinions were correct, that would not advance their position.

The extraordinary relief ordered by the district court underscores the court's erroneous application of administrative-law principles. The court's injunction forever bars the Department from refusing to acknowledge the ERISA status of plaintiffs' plan. By its terms, this prohibition applies even if the facts posited in plaintiffs' request—which have never been tested—prove inaccurate. No authority supports short-circuiting the administrative process in this manner.

ARGUMENT

I. The Advisory Opinion, Which Is Based On Hypothetical Facts, Is Not Final Agency Action.

The challenged advisory opinion is premised on hypothetical facts that plaintiffs submitted to the agency. Because the advisory-opinion process is not intended to result in final agency action, it assumes the accuracy of the facts submitted and does not subject them to investigation. The opinion does not compel plaintiffs to alter their behavior or corporate organization, and it does not threaten plaintiffs with any enforcement action or contain any penalty for noncompliance. Thus, the opinion neither "mark[s] the consummation of the agency's decisionmaking process" nor constitutes an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation marks omitted). It simply offers the Department's view on whether a plan with the characteristics set forth by the request is a plan covered by ERISA. Such advice is "classically non-final" because of its "hypothetical" nature. *See Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004) (holding that opinion letters explaining to regulated entity why its conduct did not comply with agency regulations were not final agency action because they stated tentative conclusions based on limited information).

1. Plaintiffs assert (Br. 22) that the challenged advisory opinion is not hypothetical because the facts set forth in their request accurately represent the facts on the ground. That argument encapsulates the error of plaintiffs' analysis. In rendering an advisory opinion, the agency is required to assume that the request's representations are accurate. The informal process leaves no room for the Department to verify plaintiffs' assertions. The Department must instead accept all of those assertions as true, 41 Fed. Reg. 36,281, 36,283 (Aug. 27, 1976), as plaintiffs acknowledge, Br. 34. Because the Department could not assess the accuracy of plaintiffs' request as part of the advisory-opinion process, there is no administrative record that would permit this Court to verify the assertions that plaintiffs now characterize as uncontested facts.

2. Plaintiffs argue (Br. 23) that the advisory opinion has legal consequences because it has the "practical effect of exposing" their plan "to state, rather than federal, regulation." This is so, plaintiffs contend, because a plan that is subject to ERISA is not subject to state insurance regulations. *Id.* Plaintiffs misunderstand the opinion's significance. As our opening brief explained, no State is required to investigate plaintiffs because an advisory opinion concluded that plaintiffs' plan is not covered by ERISA. Opening Br. 19-20. By the same token, an advisory opinion concluding that plaintiffs' plan was covered by ERISA would not preclude a State from investigating the plan anyway. *Id.* The opinion thus places plaintiffs in no different position than if plaintiffs had not requested it.

Plaintiffs respond (Br. 24-25) that, had the Department concluded that their plan was subject to ERISA, they could have relied on that conclusion to defend themselves in litigation against state regulators by arguing that state law was preempted. Plaintiffs believe (Br. 25) that, by stating that their plan was not subject to ERISA, the Department's advisory opinion "increase[d] their exposure" to state liability. Plaintiffs do not dispute, however, that advisory opinions cannot themselves preempt state law. They merely assume (Br. 25 n.4) that the deference accorded to advisory opinions is a legal consequence sufficient to establish an opinion's finality.

That assumption is mistaken. Advisory opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see Wisconsin Educ. Ass'n Ins. Tr. v. Iowa State Bd. of Pub. Instruction*, 804 F.2d 1059, 1065 (8th Cir. 1986) (extending *Skidmore* deference to ERISA advisory opinion). But they are "too informal" to warrant deference as a matter of law under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See Air Brake Sys.*, 357 F.3d at 643; *accord Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). Because "'legal consequences' do not flow from the *Skidmore* doctrine," "its application does not assist a court in determining that an agency's action is final under the APA." *Air Brake Sys.*, 357 F.3d at 643.

Plaintiffs' reliance (Br. 23-24, 25 n.4) on *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430 (D.C. Cir. 1986), is misplaced. That case involved an agency letter that was entitled to *Chevron* deference as the Supreme Court applied that doctrine at the time. *See Air Brake Sys.*, 357 F.3d at 642 (explaining that *Ciba-Geigy* predated decisions such as *Christensen*, which explained that *Chevron* does not apply to agency pronouncements in advisory opinions). Because the *Chevron* doctrine requires courts to give "reasonable agency interpretations controlling weight as *a matter of right*," *see id.* at 643 (emphasis in original), the D.C. Circuit held that the agency letter in *Ciba-Geigy* had sufficient legal effect for purposes of finality, 801 F.2d at 437. The D.C. Circuit's reasoning does not avail plaintiffs here. As *Christensen* makes clear, ERISA advisory opinions do not receive *Chevron* deference. 529 U.S. at 587. Such opinions must instead "*earn* the weight given to [them] by the courts," in light of the Department's "expertise and ability to persuade." *Air Brake Sys.*, 357 F.3d at 643 (emphasis in original). Because agency opinions that are entitled only to *Skidmore* deference do not control judicial determinations, they do not have legal consequences and are not final agency action. *Id.*

The Supreme Court's decision in *Frozen Food Express v. United States*, 351 U.S. 40 (1956), is even further afield. That case involved an order announcing an agency's conclusive interpretation of a statutory term, which the agency issued after it instituted an investigation, received evidence, and held a public hearing. *Id.* at 41-42. The order applied to every regulated entity in the market, and threatened those who violated it with criminal and civil penalties. *Id.* at 44. By contrast, the challenged advisory opinion was not issued after any comparable process and does not threaten any comparable legal consequences.

3. Plaintiffs note (Br. 24) that a requester can rely on an advisory opinion "to the extent that the request fully and accurately contains all the material facts and representations necessary to [the] issuance of the opinion." 41 Fed. Reg. at 36,283. But in *Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991), this Court rejected the argument that this measure of reliance can render an advisory opinion final. Plaintiffs have failed to distinguish that holding from the circumstances here.

Taylor-Callahan-Coleman concerned two opinion letters that the Department issued in response to questions from regulated entities about the Fair Labor Standards Act (FLSA). Like ERISA advisory opinions, FLSA opinion letters are "limited to the factual situation presented by the requesting party," 948 F.2d at 957; are "subject to change by the [Department]," *id.*; and "do not have the status of law with penalties for noncompliance," *id.* at 959. This Court held that those letters were non-final because, "[r]ather than constituting agency action which is definite, broadly applicable[,] and demanding of compliance by all employers," the letters only "respond[ed] to particularized inquiries." *Id.* at 958.

Plaintiffs mistakenly suggest (Br. 26) that *Taylor-Callahan-Coleman* is distinguishable because, unlike ERISA advisory opinions, FLSA opinion letters do not confer any reliance interests. As our opening brief explained, that is not the case. *See*

Opening Br. 23-24. The FLSA provides that "no employer shall be subject to any liability or punishment" for FLSA violations if he acted "in good faith in conformity with and in reliance on any" FLSA opinion letter. 29 U.S.C. § 259(a). This statutory defense is available even if the letter is later "modified or rescinded," and even if the letter "is determined by judicial authority to be invalid or of no legal effect." *Id.* And the defense is available not just to the requester but to every other employer who reasonably relied on the opinion letter. *Id.* But although the reliance interests conferred by FLSA opinion letters are greater than those conferred by ERISA advisory opinions, this Court nevertheless held that FLSA opinion letters do not constitute final agency action. *Taylor-Callahan-Coleman*, 948 F.2d at 957. That holding applies *a fortiori* to ERISA advisory opinions.

Plaintiffs find significance in the fact (Br. 25) that the entity seeking review in *Taylor-Callahan-Coleman* had not requested the FLSA opinion letters at issue. But the Court did not deem that fact dispositive. To the contrary, the Court suggested that the FLSA opinion letters did not have the force of law even with respect to the requesting entities because "it is the regulations, not the opinion letters, which fix rights," and because the Department was free to revise its tentative opinions at any point. *Taylor-Callahan-Coleman*, 948 F.2d at 957-58.

Western Illinois Home Health Care, Inc. v. Herman, 150 F.3d 659, 663-64 (7th Cir. 1998), on which plaintiffs rely (Br. 26), further highlights the error in plaintiffs' analysis. That case did not involve an FLSA opinion letter. The challenged letter resulted from a full investigation into the labor practices of two companies; threatened the companies with penalties of up to $1,000 per violation; and informed the companies that the agency would conduct a follow-up investigation to confirm that the companies were complying with the letter. *Id.* at 661. The court held that the letter was final because it had "immediate legal consequences for the regulated party." *Id.* at 663. And the court expressly distinguished the letter from the opinion letters at issue in *Taylor-Callahan-Coleman*, which "did not purport to establish any legal consequences for disregarding the agency's position"—not even for the employers that had requested the opinion letters to begin with. *Id.* at 664. The court thus observed that even the requesting employers likely could not have obtained review of the letters in *Taylor-Callahan-Coleman*. *Id.*

The D.C. Circuit's decision in *Unity08 v. Federal Election Commission*, 596 F.3d 861 (D.C. Cir. 2010), is also inapposite. In that case, the Federal Election Commission conceded both that "the issuance of an advisory opinion marks the conclusion of" its process, and that the Commission's "refusal to issue a favorable advisory opinion . . . deprive[d]" the requester "of a legal reliance defense which it could otherwise receive." *Id.* at 864 (quotation marks omitted). Here, the Department has made no such concession. To the contrary, the Department has consistently explained that ERISA advisory opinions create no reliance defense sufficient to confer finality, as confirmed by this Court's precedent.

4. Plaintiffs unsuccessfully attempt (Br. 27) to defend the district court's reliance on *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019). Plaintiffs emphasize the Supreme Court's statement in *Hawkes* that an agency's ability to revise its views "does not make an otherwise definitive decision nonfinal." 136 S. Ct. at 1814. The critical distinction, however, is that the "definitive decision" at issue in *Hawkes* was an "approved jurisdictional determination" by the Army Corps of Engineers, which differs from an ERISA advisory opinion in several significant respects—not least the Corps' own acknowledgment that such determinations constitute "final agency action." Opening Br. 21-22 (citations omitted).

With respect to *Texas*, plaintiffs emphasize this Court's recognition that a document is final if it has "practical binding effect such that affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Texas*, 933 F.3d at 442 (quotation marks omitted). Plaintiffs have failed to point to any such consequence here. Moreover, the *Texas* Court held that guidance "dictat[ing] how [the agency] must assess [certain] claims" was final because, among other things, it did "not merely comment on a single employer's practices; it [told agency] staff and all [regulated entities] what sort of policy is unlawful." *Id.* at 445. The Court contrasted the guidance with "statements directed at an individual entity 'expressing [the agency's] view of the law' with respect to that entity," which are not final under the APA. *Id.* at 445 n.23 (alteration in original). The challenged advisory opinion falls into that latter category.

II. The Challenged Advisory Opinion Is Both Reasonable And Reasonably Explained.

Assuming that the advisory opinion were subject to review, plaintiffs have failed to show that it is arbitrary or capricious. Plaintiffs do not dispute that their so-called limited partners are not common-law employees under *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992). Thus, the limited partners can only be "participants" in an ERISA plan if they qualify as "working owner[s]," *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004), or as "bona fide partner[s]," 29 C.F.R. § 2590.732(d). The Department concluded, based on plaintiffs' representations, that the limited partners satisfy neither definition. Instead, the limited partners' title appears to be a sham to obscure their status as consumers purchasing healthcare insurance. That conclusion was both reasonable and reasonably explained. *See generally* Opening Br. 27-37.

A. Plaintiffs Have Failed To Show That Their So-Called Limited Partners Are Working Owners.

In *Yates*, the Supreme Court held that working owners—defined as individuals who "wear two hats, as an employer and employee"—are "employee[s] entitled to participate" in an ERISA plan. 541 U.S. at 16. Beyond that, however, the Court did not "define who exactly makes up th[e] class of 'working owners.'" *Id.* at 25 n.* (Thomas, J., concurring in the judgment). Plaintiffs' advisory-opinion request presented the Department with the novel question of how the term "working owner" should be defined.

To answer that question, the Department deployed the traditional tools of statutory interpretation. A working owner can only participate in an ERISA plan if he or she qualifies as a "participant." *Yates*, 541 U.S. at 7. Although ERISA's definition of "participant" does not contain the term "working owner," its text—and the text of ERISA more broadly—is "replete with references to the employment relationship." ROA.394. Congress used these references to distinguish between the "employment-based . . . plans" that it intended to be covered by ERISA and insurance sold "to individuals outside the employment context" that it intended to be regulated mainly by the States. ROA.397. *Yates* described working owners in similar terms: as people who are both "employer[s]" and "employee[s]." 541 U.S. at 16. It was therefore reasonable for the Department to consult the common law of employment when assessing whether someone is a working owner.

As the Department explained, and as plaintiffs do not dispute, plaintiffs' limited partners have none of the common-law indicia of employee status. ROA.393. Indeed, the limited partners do not appear to have any meaningful employment relationship with the partnership whatsoever. ROA.393. The Department thus declined to classify the limited partners as working owners—that is, as people who are simultaneously "employers" and "employees." ROA.397. The contrary conclusion would "read the employment-based limitations on ERISA coverage out of the statute," ROA.396, and improperly expand ERISA at the expense of the States' regulatory powers.

1. Plaintiffs' main response (Br. 30-34) is that, in *Yates*, the Supreme Court allegedly defined "working owner" as anyone who satisfies the Internal Revenue Code's definition of "self-employed individual," 26 U.S.C. § 401(c)(1)(A). But plaintiffs fail to grapple with the fact that, in *Yates*, the issue of who constituted a "working owner" was not before the Court. The Court took for granted that a "sole shareholder and president of a professional corporation" was a working owner. *Yates*, 541 U.S. at 6. The only question presented was whether that "working owner . . . qualif[ied] as a 'participant'" in an ERISA plan. *Id.* The Court had no occasion to adopt—and did not in fact adopt—a definition of "working owner." *See* Opening Br. 28.

The Court's reasoning reinforces this conclusion. The Court held that § 401(c) was one of several structural clues indicating that "Congress intended working owners to qualify as plan participants." *Yates*, 541 U.S. at 16. But the Court declined to "suggest that each provision . . . in isolation[] would compel [its] reading." *Id.* at 16 n.5. With respect to § 401(c) itself, the Court took care to note that the definition of "self-employed individual" merely "encompasses" working owners, *id.* at 14—thus confirming that the two terms are not coextensive.

Plaintiffs could not prevail even if *Yates* had equated "working owner" with the definition of "self-employed individual." A "self-employed individual" must have "earned income." 26 U.S.C. § 401(c)(1)(B). The term "earned income" means "the net earnings from self-employment . . . with respect to a trade or business in which personal services of the taxpayer are a material income-producing factor." *Id.* § 401(c)(2)(A). The term "net earnings from self-employment" excludes "any item of income or loss of a limited partner," "other than guaranteed payments . . . for services actually rendered to or on behalf of the partnership." *Id.* § 1402(a)(13). And the term "guaranteed payments" means "payments . . . determined without regard to the income of the partnership." *Id.* § 707(c). Together, these provisions demonstrate that, to be a "self-employed individual," a limited partner must receive "guaranteed payments"—that is, payments that do not vary with the amount of money that the partnership makes.

As the Department explained, however, "there is no basis to conclude [that] the limited partners will derive any income from the partnership for the performance of services," ROA.396, much less the "guaranteed payments" necessary for the limited partners to qualify as "self-employed individuals" under 26 U.S.C. § 401(c). Plaintiffs' request does not state that limited partners are guaranteed to receive payments for the services that they provide. It instead states that, to the extent that the partnership ever issues "[i]ncome distributions," such distributions "will be reported as guaranteed payments and subject to employment taxes." ROA.400. Because the partnership has yet to "generate[] profits or substantial revenue," Br. 34 (quoting ROA.212), it does not appear that any limited partner has ever been paid.

Moreover, plaintiffs have failed to show how these distributions could qualify as "guaranteed payments" under 26 U.S.C. § 707(c) notwithstanding the payments' characterization. As noted, guaranteed payments cannot vary with the partnership's profits. But according to plaintiffs, the partnership does not "pay wages" to its limited partners. ROA.411. Any money that the limited partners receive is instead linked to the partnership's "[i]ncome." ROA.400; *accord* Br. 37 (stating that "limited partners have the right to share in [the partnership's] profits through income distributions"). Plaintiffs' general partner has confirmed that these distributions are based on "[p]rofit generated" by the partnership. ROA.214. Because these hypothetical distributions would not be "guaranteed payments" under § 707, plaintiffs' limited partners are not "self-employed individuals" under § 401(c).

2. Plaintiffs alternatively argue (Br. 34-39) that the advisory opinion conflicts with a definition of "working owner" that the Department allegedly adopted in two prior opinions. Plaintiffs' understanding of the opinions, like their understanding of *Yates,* does not bear scrutiny. The first opinion concerned journeyman electricians who "acquired ownership interests" in their employers or who "started their own electrical businesses" but continued to work as electricians. Dep't of Labor, Advisory Op. No. 99-04A, 1999 WL 64920, at *2 (Feb. 4, 1999). It proffered a definition of "working owner" to describe what the Department thought the requesters "apparently mean[t]" by the term. *Id.* at *2 n.3. The second opinion likewise concerned an electrician who started his own business but continued to work for the company that he owned. Dep't of Labor, Advisory Op. No. 2006-04A, 2006 WL 1401678, at *1 (Apr. 27, 2006). And it quoted the definition to explain what the Department thought "working owner" meant "[i]n that [prior] opinion." *Id.* at *3.

Like the self-employed doctor in *Yates*, these electricians' status as working owners was clear. Thus, neither opinion squarely presented the question whether a given person qualified as a working owner. Still less did either opinion adopt a categorical definition of "working owner" to govern all contexts for all time. Plaintiffs' assertion (Br. 41) that *Yates* endorsed Opinion 99-04A's alleged definition misses the mark. The Supreme Court accorded "respectful consideration" to that opinion's conclusion that an ERISA plan can "cover[] as participants 'one or more common-law employees, in addition to the self-employed individuals.'" 541 U.S. at 20-21. The Court did not cite or discuss the definition—an unsurprising omission given that *Yates* did not present the question of how the term "working owner" should be defined.

Plaintiffs have failed to show how the limited partners would qualify as working owners even accepting plaintiffs' interpretation of the prior opinions. The opinions' definition of "working owner" covers "any individual who has an equity ownership right" in a "business" and "who is actively engaged in providing services to that business." 1999 WL 64920, at *2 n.3. But as the Department explained, the limited partners do not have genuine equity ownership rights and are not actively engaged in providing services to the partnership. *See* Opening Br. 27-32.

Plaintiffs point to two features of the partnership to prove that the limited partners have equity ownership rights. First, they argue (Br. 36-37) that the limited partners have the right to vote on "global management issues." This argument fails to recognize that an "equity ownership right" is typically assessed by reference to a person's financial interests in, or capital contribution to, a business. *See Owners' Equity*, Black's Law Dictionary (11th ed. 2019). None of plaintiffs' limited partners contributes any money or capital to the partnership; their "limited partnership interest" is received "for free." ROA.449. Moreover, plaintiffs have supplied no information about the frequency or content of these votes. *See* Opening Br. 27. Plaintiffs merely state (Br. 37) that the votes address how the partnership manages and sells internet data. That contention gives no insight into the significance of the issues presented for consideration. Nor does it explain the extent to which the partnership will credit the outcome of the vote, or the frequency at which these votes occur.

Second, plaintiffs state (Br. 37) that the limited partners have the right to share in the partnership's profits. To date, however, no limited partner seems to have been paid. *See supra* p. 14. Plaintiffs have also not disclosed how much money each partner might receive. The only indication of these hypothetical payments' magnitude is plaintiffs' suggestion that the amount distributed to each limited partner may well be "insufficient to pay" the cost of that person's healthcare premiums—which the person must pay out of pocket. ROA.411. Given the paucity of plaintiffs' representations, the Department reasonably declined to credit these unspecified payment rights as evidence of equity-ownership status. ROA.394 ("[T]he revenue that a limited partner could reasonably expect from the limited partnership will typically be approximately zero.").

Even if the limited partners did have a genuine "equity ownership right" in the partnership, plaintiffs have still failed to show that the limited partners are actively performing work for the partnership. Plaintiffs' main argument (Br. 36-37) is that, in the modern economy, people who surf the internet while a tracking program logs their browsing activity are actively working for whomever is doing the tracking. This activity, they suggest, is indistinguishable from the activities performed by law firm partners on behalf of their law firms. Plaintiffs cite no authority for that common-sense-defying assertion. Indeed, if plaintiffs were correct, the millions of people who use Facebook and Google products are actively working for those companies without compensation every day. *See* ROA.393 (noting that the limited partners "generate economic value for the partnership in much the same way" as users of Facebook or Google products generate economic value for those companies); Br. 30 (equating plaintiffs' tracking of internet usage with the tracking performed by Facebook and Google). Plaintiffs also analogize (Br. 32 n.5) the "work" their limited partners perform to that performed by rideshare drivers. But rideshare drivers do not "cho[o]se to pick up a passenger along a route that [they] had already planned to drive," as plaintiffs assert. *Id.* Such drivers are directed to their passengers' locations by the software they have installed, and are instructed to drive to destinations that their passengers' specify.

Plaintiffs also argue (Br. 35) that the Opinion 99-04A defined "working owner" by reference to the Internal Revenue Code's discussion of "material participation," 26 U.S.C. § 469. But nothing in Opinion 99-04A indicates that the Department intended to incorporate that concept into the meaning of "working owner." Opinion 99-04A does not cite that statute, and the statute's implementing regulations make clear that it applies only in a narrow income-tax context. *See* 26 C.F.R. § 1.469-1T(d)(1).

Plaintiffs could not prevail even under their misreading of Opinion 99-04A because the work performed by plaintiffs would not satisfy the definition of "material participation." The Department of Treasury's regulations define "participation" as "any work done by an individual . . . in connection with an activity in which the individual owns an interest at the time the work is done." 26 C.F.R. § 1.469-5(f). The regulations further define "material participation" as "participat[ing] in the activity for more than 500 hours during [the tax] year." *Id.* § 1.469-5T(a)(1). Plaintiffs cite no authority for their theory that people who permit themselves to be tracked while they use the internet are doing "work" within the meaning of these regulations. And as explained above, the Department reasonably concluded that the limited partners do not own any genuine interest in the partnership.

3. Plaintiffs assert (Br. 39-40) that, by referring to the common law of employment to determine whether someone is a working owner, the Department contravened *Yates*. To reiterate, however, the sole question presented in *Yates* was whether a person who was indisputably a working owner could participate in an ERISA plan. 541 U.S. at 6. The Court held that "ERISA's text contains multiple indications that Congress intended working owners to qualify as plan participants." *Id.* at 12. Accordingly, the Court found "no cause" to consult common law. *Id.*

Plaintiffs have identified no textual basis for concluding that Congress intended the concept of "working owner" to be shorn of any reference to the employment relationship. And there are many textual indications that Congress intended to limit ERISA to genuine employer-employee relationships. *See supra* p. 12. The Department's reference to the common law was thus entirely proper. *See Darden*, 503 U.S. at 323; *accord Clackamas Gastroenterology Assocs, P.C. v. Wells*, 538 U.S. 440, 447, 448 (2003) (holding that, in the face of congressional silence, courts should refer to the common-law "definition of the master-servant relationship" to assess the legal status of "a new type of business entity that has no exact precedent in the common law").

Plaintiffs' reliance (Br. 41-42) on *House v. American United Life Insurance Co.*, 499 F.3d 443, 451 (5th Cir. 2007), evinces the same error. In *House* as in *Yates*, nobody disputed that the person at issue—a trial attorney and founding partner of a law firm—was a working owner. The Court held, in a straightforward application of *Yates*, that the individual was a "plan 'participant' governed by ERISA." *Id.* at 450. The Court did not address the question of how "working owner" should be defined.

4. Finally, plaintiffs echo (Br. 42-43) the district court's suggestion that the challenged advisory opinion is inconsistent with the Department's amicus brief in *Yates*. But as we have explained, *Yates*—and the Department's brief in *Yates*—had nothing to do with the question presented here. *See* Opening Br. 33. Plaintiffs' selective quotations confirm the point. The Department's brief argued—and the Supreme Court agreed—that, in light of the text and structure of ERISA, the Court did not need to examine "common-law distinctions between master and servant" to determine whether ERISA plans can cover working owners. ROA.566. The brief did not disclaim any reliance on the common law when determining whether someone is a working owner or not.

As further evidence of the Department's consistent interpretation of "working owner," the Department cited a definition that it promulgated in the separate but related context of group health plans. *See* Opening Br. 34 (discussing 83 Fed. Reg. 28,912, 28,931 (June 21, 2018)). Contrary to plaintiffs' assertions (Br. 43), the Department is not arguing that that regulation applies here. Nor are plaintiffs correct to claim (Br. 43-44) that the regulation undermines the advisory opinion's reasoning. The regulation defines working owner as a person who has an "ownership right of any nature in a trade or business, . . . including a partner and other self-employed individual." 83 Fed. Reg. at 28,964. That plainly excludes plaintiffs' limited partners, whose ownership rights the Department reasonably deemed illusory. The regulation also limits working owners to people in "genuine work relationships" by excluding people who perform "de minimis" commercial activities (such as people who "register[] with a ride sharing service" by installing an application on their phone). *Id.* at 28,931. These limitations are consistent with the advisory opinion, which—like the regulation—excludes "individual coverage masquerading as employment-based coverage" from ERISA's scope. *Id.*; *see* ROA.396.

Plaintiffs mistakenly suggest (Br. 44) that the regulation measures "de minimis commercial" solely by reference to the number of hours worked. But the regulation applies only to "[w]ork[] . . . providing personal services" to the partnership. 83 Fed. Reg. at 28,964. The limited partners' internet browsing would not qualify under this standard. *See* ROA.392-93. And even if it did, the limited partners would still have to work for at least 960 hours per year, 83 Fed. Reg. at 28,964—nearly twice the amount that plaintiffs require, ROA.393.

B. Plaintiffs Have Failed To Show That Their So-Called Limited Partners Are Bona Fide Partners.

For similar reasons, plaintiffs have failed to show that their so-called limited partners are bona fide partners. Their main argument (Br. 45) is that a bona fide partner is anyone who bears more than a pretextual relationship to the partnership. That argument ignores the Department's regulations making clear that the bona-fide-partner inquiry is a holistic one that turns on "all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership." 29 C.F.R. § 2590.732(d)(2); *see* Opening Br. 36-37.

Regardless, plaintiffs' limited partners would not qualify as bona fide partners under any standard. Here too, plaintiffs emphasize (Br. 45) the voting rights and income distributions to which the limited partners are notionally entitled. But the Department reasonably concluded that those privileges are illusory. Plaintiffs also contend (Br. 46) that the partnership is genuine because the limited partners agree to "provide labor by generating and transmitting their internet usage data to the partnership." The Department reasonably rejected that characterization as contrary to "economic reality." ROA.393. Instead, the Department found that, "in operation, the primary reason for an individual . . . to participate as a 'limited partner' in the arrangement appears to be to acquire health coverage." ROA.394. Plaintiffs disagree with the Department's assessment. But their disagreement supplies no basis for second-guessing the Department's expert judgment.

III. The District Court Exacerbated Its Departure From Governing Administrative-Law Principles By Issuing An Extraordinary Permanent Injunction.

In all events, plaintiffs have failed to justify the district court's chosen remedy. The court permanently enjoined the Department "from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of [plaintiffs]." ROA.903. By its terms, this injunction prevents the Department from ever conducting its own investigation into whether the plan is subject to ERISA. It even requires the Department to continue regulating plaintiffs under ERISA if further factual developments undermine the injunction—which the court based on the hypothetical facts submitted to the Department in plaintiffs' advisory-opinion request. The district court gave no reason for short-circuiting the usual administrative process. And its decision is in tension with this Court's recognition that, where an agency is entrusted with the "preliminary investigation into possible violations," injunctions that forestall those investigations are unwarranted. *See New Orleans Pub. Serv., Inc. v. Brown*, 507 F.2d 160, 165 (5th Cir. 1975).

Affirming the injunction would be particularly pernicious because plaintiffs' advisory-opinion request may have omitted facts relevant to the question presented here. *See* Patient Grps. Amicus Br. 9-12. For example, the State of Washington's investigation into one of plaintiffs' other partnerships suggests that some so-called limited partners "did not know [that] they were involved in a 'limited partnership' [that] required them to download software to their computers [or] phones" and that "none of [them] recalled doing so." Office of Ins. Comm'r, State of Wash., Final Investigative Report: Providence Ins. Partners, LLC/Providence Ins. Co. at 24, OIC No. 1609841 (Oct. 23, 2020), *available at* https://perma.cc/MB38-W9NK. Another partnership's joinder agreement stated that the partnership was a "non-profit entity," that each limited partner would have "a one millionth percent interest in the limited partnership," and that no limited partner would be "entitled to distributions of any kind." Office of Ins. Comm'r, State of Wash., Order at 1-2, *In re Data P'ship Grp.*, No. 21-0102 (Mar. 24, 2021), https://go.usa.gov/x6hAq. "There [wa]s no mention of data mining in this agreement." *Id.* at 2.

Plaintiffs do not attempt to defend the breadth of the injunction. Indeed, they acknowledge (Br. 51) that the Department should "not be enjoined from reevaluating the Plan's status" should the relevant facts change. They simply assert that the injunction cannot mean what it says. *Id.* But district courts do not excuse noncompliance with injunctions on such grounds.

Plaintiffs claim (Br. 49-50) that the injunction is justified because a remand to the Department would be futile. But the advisory opinion applied the Department's understanding of the terms "working owner" and "bona fide partner" to the hypothetical facts as presented by plaintiffs. If the Court holds that those terms have a different meaning, the appropriate remedy would be to remand the case so the agency can apply the law as clarified by this Court in the first instance. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). And if the Court agrees with the Department's interpretations but disagrees with how the Department applied them to plaintiffs' request, the appropriate remedy would be to vacate the opinion, which would redress all of plaintiffs' alleged injuries. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

Plaintiffs argue (Br. 53-54) that, absent an injunction, they will be forced to shutter their business. Plaintiffs attribute this consequence to uncertainty about the legal viability of their business model and to enforcement actions brought by state insurance regulators. *Id.* But the injunction does not redress these alleged harms. The uncertainty surrounding plaintiffs' business model predates the advisory opinion, and was the reason why plaintiffs asked the Department for advice to begin with. *See* ROA.209. The advisory opinion does not compel state regulators to investigate plaintiffs. And States may continue investigating plaintiffs notwithstanding any injunction against the Department. *See* State Ins. Depts. Amicus Br. 21-22.

Plaintiffs also assert (Br. 58) that, without an injunction, they would be forced to dissolve their plan "in anticipation of the regulations and investigations that [the] Advisory Opinion greenlighted." As noted, however, the opinion could not—and did not—compel States to initiate the investigations in question. And even if it did, plaintiffs have failed to explain both why that harm could not be remedied through vacatur of the opinion, and why a permanent injunction would "have a[] meaningful practical effect independent of [the opinion's] vacatur"—which are preconditions to permanent injunctive relief. *Monsanto*, 561 U.S. at 165.

CONCLUSION

For these reasons and for the reasons set forth in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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July 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

/s/ Michael Shih
MICHAEL SHIH

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,425 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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