[ORAL ARGUMENT NOT SCHEDULED]

No. 17-5259

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RHEA LANA, INC., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

Of Counsel:

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

DEAN A. ROMHILT
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue NW
Room N-2716
Washington, DC 20210

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

MARK B. STERN
SYDNEY FOSTER
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5374

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiffs-appellants are Rhea Lana, Inc., and Rhea Lana's Franchise Systems, Inc. The defendant-appellee is the United States Department of Labor. There were no intervenors or amici in district court, and no intervenors or amici have appeared in this Court to date.

B. Rulings Under Review

The rulings under review (issued by Judge Christopher R. Cooper) are: (1) the order filed on December 6, 2016, Joint Appendix ("JA") 33-36; and (2) the memorandum opinion and order filed on September 26, 2017, JA 81-97. The memorandum opinion is published at 271 F. Supp. 3d 284. There are no official citations for the orders.

C. Related Cases

This case was previously before this Court. *See Rhea Lana, Inc. v. Department of Labor*, No. 15-5014 (D.C. Cir.). The case has not, however, been before any other court except the district court. Counsel for the government are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Sydney Foster
Sydney Foster

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GLOSSARY

APA	Administrative Procedure Act
Br.	Opening Br. of Appellants
FLSA	Fair Labor Standards Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

Plaintiffs' complaint invoked the district court's jurisdiction under 28 U.S.C. 1331, 5 U.S.C. 701-706, and 29 U.S.C. 201 *et seq.* JA 16. The district court entered final judgment for the government on September 26, 2017. JA 81. Plaintiffs filed a timely notice of appeal on November 14, 2017. JA 98; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Plaintiff Rhea Lana, Inc. ("the company"), is a for-profit corporation that runs week-long consignment sales events. The company relies on certain individuals it refers to as "consignor/volunteers" to organize merchandise before, during, and after its sales events, to assist customers during the sales events, and to perform other similar tasks. To induce consignor/volunteers to perform this work, the company offers them the opportunity to shop its sales events early, when the best deals and merchandise may be available; the more five-hour shifts a consignor/volunteer works, the earlier he or she can shop. After an investigation, the Department of Labor determined that the company's consignor/volunteers are its "employees" within the meaning of the Fair Labor Standards Act. The issues presented are:

1. Whether the district court correctly concluded that the Department of Labor's determination was not arbitrary or capricious.

2. Whether the district court abused its discretion in denying plaintiffs' motion to strike a declaration by the final agency decisionmaker explaining the contemporaneous basis for his decision.

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.*, guarantees non-exempt "employees" a federal minimum wage, 29 U.S.C. 206, and/or specified overtime pay, 29 U.S.C. 207. *See also* 29 U.S.C. 213 (exemptions from 29 U.S.C. 206 and 207). Except in circumstances not present here, an "employee" is defined as "any individual employed by an employer." 29 U.S.C. 203(e)(1). The term "employ," in turn, "includes to suffer or permit to work." 29 U.S.C. 203(g). The Supreme Court has explained that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

"The test of employment under the [FLSA] is one of 'economic reality.'" *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 301 (1985) ("*Alamo*") (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)). "No single economic realities test, however, applies to all FLSA questions. Rather, a court must identify, from the totality of circumstances, the economic (and other) factors most relevant to

the issue in dispute." *Brown v. New York City Dep't of Educ.*, 755 F.3d 154, 170 (2d Cir. 2014); *see also id.* at 167-68.

This case concerns whether certain workers are "employees" under the FLSA or volunteers outside the scope of the statute. In *Alamo*, the Supreme Court explained that one factor that is critical to resolving that question is whether the workers expect compensation in return for their labor. Indeed, *Alamo* held that workers who view themselves as volunteers may be "employees" protected by the statute when the circumstances establish that they "must have expected to receive in-kind benefits . . . in exchange for their services." 471 U.S. at 301.

B. Factual Background

1. Rhea Lana, Inc.

Plaintiff Rhea Lana, Inc., is a for-profit corporation that hosts "semi-annual, short-term consignment sales for children's clothes, toys, and related items." JA 17, 82, 121, 299. Consignors provide the company with merchandise for its sales but are not required to be present—or perform any work—at the sales events, which last approximately one week. *See, e.g.*, JA 17, 124, 143, 163, 171, 226-27. Consignors generally keep 70% of the sale price of their items; the company keeps the remaining amount. *See, e.g.*, JA 124, 222. The scope of these consignment sales may be extensive. For example, according to the company, one such sale involved 95,000 pieces of merchandise. *See* JA 283; *see also, e.g.*, JA 137, 145, 168.

The company requires personnel to perform many tasks, including organizing merchandise before, during, and after the sales events; checking out customers who wish to purchase merchandise; providing security; and transporting items to shoppers' vehicles. The company addresses this staffing need, in part, by relying on certain consignors the company refers to as "consignor/volunteers." *See, e.g.*, JA 18, 141, 151-52, 156, 161, 171, 223, 263; *see also, e.g.*, JA 241-50. So-called "[m]anagers" and "[o]ps [m]anagers" also perform these same tasks and a few others, including directing the work of consignor/volunteers. JA 223; *see also, e.g.*, JA 133, 152, 156, 159, 167.

The company pays managers and ops managers, but not consignor/volunteers, cash wages in exchange for their work at the sales events. JA 222-23. Rather than paying consignor/volunteers cash wages for their work, the company "[r]emunerat[es]" them by granting them the right to shop early at its consignment sales. JA 222 (email from representative of company).

In general, how early a consignor/volunteer can shop depends on how many five-hour "shifts" he or she works. JA 222. The company refers to consignors who "work 1 five hour shift" as "Worker[s]," and "Worker[s]" have the right to shop at the company's sales events before the general public. JA 222. Consignors who "work 2 five hour shifts" are called "Early Worker[s]" and earn the right to shop before "Workers." Consignors who "work 3 five hour shifts" are called "Super Mom[s]" and earn the right shop before "Early Workers." And consignors who "work 4 five hour shifts" are called "Primo Mom[s]" and earn the right to shop before "Super Moms."

JA 222; *see also, e.g.*, JA 156 (statement of consignor/volunteer) (explaining that "volunteer[ing]" at an event is "in exchange for early shopping"); JA 137-38, 141-42 (similar). During the period covered by the Department of Labor's investigation, the company also granted "[m]anager[s]" the right to shop before "Primo Moms" if they chose to forgo their hourly wage ($8-9 per hour) for their first 12.5 hours of work. JA 223; *see also, e.g.*, JA 228-240 (examples of deducting 12.5 hours of work from manager pay).

Shopping early at the company's sales events allows consignor/volunteers the opportunity to make purchases when the best deals and merchandise may be available. The company explained during the investigation that consignor/volunteers' "primary motivation" for participating is to "get an early selection o[f] high quality items and save hundreds of dollars for their family's budget." JA 226; *see also, e.g.*, JA 137-38, 142, 149, 156, 162-63 (similar statements by consignor/volunteers and managers).

Consignor/volunteers are required to sign up for their work shifts ahead of time on the company's website. *See, e.g.*, JA 133, 152, 194, 225; *see also, e.g.*, JA 241-50 (sample sign-up list). When consignor/volunteers work those shifts, they sign in and out on a time sheet. *See, e.g.*, JA 133, 138, 149, 152, 156, 161, 167, 171-72, 194. The consignor/volunteers report to managers, who "tell [them] what to do." JA 133; *see also, e.g.*, JA 152, 156, 159, 162, 167, 171. At least on occasion, if the company needed additional help with tasks that are typically performed by consignor/volunteers, the

company offered to pay hourly cash wages to consignors (and perhaps others) in exchange for the work. *See* JA 287.

2. Rhea Lana's Franchise Systems, Inc.

The other plaintiff in this case—Rhea Lana's Franchise Systems, Inc.—is a for-profit corporation that "offers franchise opportunities to enterprises that operate in substantial conformity with Rhea Lana[, Inc.'s] business model." JA 18; *see also* JA 15. As particularly relevant here, each franchisee relies upon consignors to "volunteer" to work at consignment sales. JA 18, 121.

During part of the period covered by the investigation (January 2011-January 2013, JA 311), at least one franchisee required "volunteers" at its sales events to accept a "[b]artering [a]greement" "acknowledg[ing]" that "[their] labor is worth the federally mandated minimum wage," and they were "bartering [their] labor" for the "valuable opportunity [to shop early]." JA 286. Rhea Lana, Inc., and other franchisees used a similar "bartering agreement" at times prior to January 2012. JA 105.

C. Procedural Background

1. Administrative Proceedings

The Department of Labor conducted an investigation of Rhea Lana, Inc., covering the two-year period from January 28, 2011, through January 27, 2013. JA 297, 311. In August 2013, Robert Darling, who was then a District Director in the agency's Wage and Hour Division, sent a letter to the company explaining that the agency had concluded that the company was violating the FLSA's minimum-wage

and/or overtime-pay provisions with respect to two groups of workers—managers and consignor/volunteers. JA 311.

Earlier in the investigation, agency officials had determined that the statutory violations with respect to the company's managers had resulted from the company's practice of not paying managers for the first 12.5 hours of their work when managers chose to avail themselves of the opportunity to shop at the company's sales events early. *See, e.g.*, JA 307-09. Darling's letter noted that the company had agreed to (1) begin complying with its statutory obligations regarding its managers; and (2) pay over $6,000 in back pay to 39 managers. JA 311; *cf.* JA 186-87.

With respect to the company's consignor/volunteers, Darling's letter observed that the company had "refuse[d] to comply" with its statutory obligations to pay those workers minimum wage and/or overtime pay. JA 311. The agency did not, however, initiate judicial or administrative enforcement proceedings against the company, and it closed the case. JA 311, 316.

2. District Court Proceedings

Plaintiffs filed an action in district court under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, to challenge the Department of Labor's "decision . . . to classify 'consignor/volunteers' as employees" under the FLSA. JA 15-16. The district court dismissed the case for lack of final agency action. *Rhea Lana, Inc. v. U.S. Dep't of Labor*, 74 F. Supp. 3d 240, 244-47 (D.D.C. 2014). This Court reversed and remanded, holding that Darling's August 2013 letter to Rhea Lana, Inc.,

constituted final agency action. *Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023, 1026-33 (D.C. Cir. 2016).

On remand, the government filed an index of the administrative record, together with a declaration by Darling "describ[ing] how the record contemporaneously supported the challenged agency determination," JA 99 (Darling Decl.). *See* JA 99-102, 108-15. Plaintiffs moved to supplement the administrative record with, *inter alia*, a declaration by David Riner, the Vice President of the two plaintiff companies, JA 103-07. *See* JA 33. In denying that request, the district court contrasted the Darling and Riner declarations, explaining that the Darling Declaration "belongs in the administrative record because it 'furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review.'" JA 35 (quoting *Olivares v. TSA*, 819 F.3d 454, 463-64 (D.C. Cir. 2016)).

The district court subsequently granted summary judgment in favor of the government, and it denied plaintiffs' related motion to strike the Darling Declaration, reaffirming the reasoning set forth in its prior order, JA 89 n.1. *See* JA 81-97.

On the merits, the district court held that the Department of Labor "applied the proper legal test" when determining whether the company's consignor/volunteers are "employees," JA 92, noting that the agency "looked to a variety of factors that courts have determined are relevant to th[e] inquiry." JA 90; *see also* JA 88-92 (citing Darling Declaration and documents in the administrative record). The court further explained that, in conducting its analysis, the agency "hewed to the Supreme Court's

instruction in *Alamo* that those who 'expect[] to receive in-kind benefits . . . in exchange for their services' are employees, not volunteers." JA 89 (alterations in original) (quoting *Alamo*, 471 U.S. at 301).

The district court also held that the agency did not act arbitrarily or capriciously in applying these legal principles to the facts of this case, emphasizing the agency's conclusions regarding three key factors. JA 92-96. First, the court explained that consignor/volunteers "expected to receive 'in-kind benefits' for their work"—here, the opportunity to "obtain early access to shop the merchandise." JA 92; *see also* JA 93. Second, the court noted that the company "received an 'immediate advantage' from [its] volunteers' labor[,] and that labor was integral to [the company's] business." JA 94. Third, the court observed that the company "exercised a degree of control over the consignor/volunteers," including by, *inter alia*, (1) "posting the shift schedule for volunteers to sign up for beforehand"; (2) "tracking when volunteers worked"; and (3) "employing managers [who] directed consignor/volunteers on their tasks." JA 94-95.

SUMMARY OF ARGUMENT

I. Plaintiff Rhea Lana, Inc., is a for-profit corporation that runs week-long consignment sales events. After an investigation, the Department of Labor concluded that certain consignors who perform labor for the company—so-called "consignor/volunteers"—are "employees" protected by the minimum-wage and

overtime-pay protections of the Fair Labor Standards Act. The district court correctly held that the agency's determination was not arbitrary or capricious.

The Department of Labor properly based its determination that the consignor/volunteers are "employees" on three factors. First, as the company explained during the investigation, the company "[r]emunerat[es]" consignor/volunteers for their labor by granting them the right to shop early at its sales events, when the best deals and merchandise may be available. JA 222. Under the company's "[r]emuneration" scheme, the more "five hour shifts" a consignor/volunteer "work[s]," the earlier he or she can shop. JA 222. Because consignor/volunteers "expected to receive in-kind benefits . . . in exchange for their services," they are employees. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 301 (1985). Plaintiffs argue that early-shopping benefits are insignificant or intangible. But the record establishes that early-shopping benefits are valuable to consignor/volunteers. Moreover, accepting plaintiffs' argument would thwart a key purpose of the statute—"insur[ing] that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

Second, the agency identified several ways in which the company exercises control over consignor/volunteers, including by (1) determining the dates, times, and nature of each work shift; and (2) employing "managers" to, *inter alia*, supervise the

work of consignor/volunteers. Third, the agency explained that the tasks a consignor/volunteer performs—*e.g.*, organizing merchandise before, during, and after the sales events—are for the benefit of the company's general sales operations, are not for the benefit of any individual consignor, and are integral to the company's business of running sales events. The agency also noted that its decision was "further support[ed]" by its "longstanding position that, with very limited exceptions, for-profit companies cannot treat workers as volunteers instead of employees under the FLSA." JA 102. Given the nature of for-profit companies and the circumstances in which individuals are generally willing to work for them, that position is eminently reasonable and entitled to respect.

Plaintiffs argue that the Department of Labor looked to a different set of factors that are relevant to determining whether a worker is an independent contractor rather than an employee, and they argue that the agency based its conclusion on "the conclusory premise that individuals cannot volunteer with for-profit companies." Opening Br. of Appellants ("Br.") 20. Plaintiffs' argument is contradicted by the declaration of Robert Darling, the final agency decisionmaker in this case, who explained that the agency's final decision was based on the factors identified in the paragraphs above. In any event, the record documents upon which plaintiffs rely for their argument—two interim documents authored by Darling's subordinate and a letter from a high-level agency official to a member of Congress—contain analysis that is consistent with the analysis in the Darling Declaration.

II. The district court did not abuse its discretion in concluding that the Darling Declaration belongs in the record. It is well established that where, as here, a final agency decision does not elaborate on the rationale for the agency's conclusion, a court may rely on a declaration by the final agency decisionmaker that "furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review." *Olivares v. TSA*, 819 F.3d 454, 464 (D.C. Cir. 2016). Such declarations must not contain any "new rationalizations," *id.* (internal quotation marks omitted), and the Darling Declaration does not do so—it simply describes the agency's "reasoning at the time of the decision," relies upon factual material that was before the agency at the time of the final decision, and is "consistent with the administrative record," *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 673 n.6 (D.C. Cir. 1986). As a result, "[n]othing whatever would be gained" by ignoring the Darling Declaration and instead remanding to the agency "for an explanation that is already before [this Court]." *Id.*

Plaintiffs contend that the Darling Declaration offers an impermissible "new rationalization" because its analysis assertedly diverges from the analysis conducted by Darling's subordinate in two interim documents. But the only type of "new rationalization" that is prohibited is a rationalization that diverges from the analysis conducted by the final agency decisionmaker at the time of his or her decision, and plaintiffs do not—and cannot—argue that any such divergence is present here. In any

event, the analysis of the "employee" question in the Darling Declaration is consistent with the analysis conducted by Darling's subordinate.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo and must uphold the judgment as long as the agency's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). *Pinnacle Health Hosps. v. Sebelius*, 681 F.3d 424, 426 (D.C. Cir. 2012). This Court reviews the district court's denial of plaintiffs' motion to strike the Darling Declaration for abuse of discretion. *See Patchak v. Jewell*, 828 F.3d 995, 1007 (D.C. Cir. 2016), *aff'd*, 138 S. Ct. 897 (2018).

ARGUMENT

I. The Department of Labor's determination that the company's consignor/volunteers are "employees" within the meaning of the FLSA was not arbitrary or capricious.

A. Determining whether a worker is an "employee" requires evaluating the totality of the circumstances to determine the "economic realities" of the situation.

Except in circumstances not present here, the FLSA defines an "employee" as "any individual employed by an employer" and specifies that the term "employ" "includes to suffer or permit to work." 29 U.S.C. 203(e)(1), (g). The Supreme Court has explained that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). Indeed, the definitions in the FLSA are "comprehensive enough to require its

application to many persons and working relationships which, prior to th[e] Act, were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

"The test of employment under the [FLSA] is one of 'economic reality.'" *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 301 (1985) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)); *see also, e.g.*, *Henthorn v. Department of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994). "No single economic realities test, however, applies to all FLSA questions. Rather, a court must identify, from the totality of circumstances, the economic (and other) factors most relevant to the issue in dispute." *Brown v. New York City Dep't of Educ.*, 755 F.3d 154, 170 (2d Cir. 2014). For example, in *Morrison v. International Programs Consortium, Inc.*, 253 F.3d 5 (D.C. Cir. 2001), this Court evaluated whether a consultant for a company was an independent contractor or an "employee" by examining numerous factors relevant to that context, such as whether the worker had the "opportunity for profit or loss." *Id.* at 7, 11 (quoting *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988)).

This case concerns whether certain workers are volunteers outside the scope of the general statutory definition of "employee."[1] In *Alamo*, the Supreme Court explained that a critical factor in resolving that question is whether the workers expect

[1] The question of whether "volunteers" for certain public agencies and private non-profit food banks are "employees" is governed by separate statutory provisions—29 U.S.C. 203(e)(4), (5).

compensation in exchange for their labor. Indeed, *Alamo* held that even workers who view themselves as volunteers may be "employees" if circumstances establish that they "must have expected to receive in-kind benefits . . . in exchange for their services." 471 U.S. at 301; *see also id.* at 300-03. Remuneration in the form of benefits, rather than cash, simply constitutes "wages in another form." *Id.* at 301. By contrast, "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the Act." *Id.* at 295 (quoting *Walling*, 330 U.S. at 152); *see also id.* at 300.

B. The Department of Labor's application of these legal principles to the facts of this case was not arbitrary or capricious.

As the district court held, JA 92-96, the Department of Labor did not act arbitrarily or capriciously in applying these legal principles to conclude that consignors who work shifts for Rhea Lana, Inc., are "employees" under the FLSA. The agency looked to three principal factors in making its determination. First, the consignor/volunteers "expected to receive 'in-kind benefits' for their work"—the opportunity to "obtain early access to shop the merchandise." JA 92. Second, the company "exercised a degree of control over the consignor/volunteers" by, among other things, establishing shift schedules, tracking work hours, and employing managers to supervise the consignor/volunteers. JA 94-95. Third, the company "received an 'immediate advantage' from [its] volunteers' labor[,] and that labor was

integral to [the company's] business." JA 94. As the district court concluded, the agency's determination with regard to all three factors was fully supported by the record. JA 92-96.

1. Consignor/volunteers expected and received in-kind compensation in exchange for their labor.

a. The Department of Labor properly "determined that [consignor/volunteers] were employees because [the company] offered and incentivized them to work in exchange for the opportunity to shop early at the sales," which was "valuable" because it enabled "the workers . . . to . . . buy items that may not have been available when the sales were open to the general public." JA 100 (Darling Decl.); *see also* JA 121, 259-61, 306-07 (interim agency documents making the same or similar points).

Indeed, the company itself recognized that early-shopping benefits "[r]emunerat[ed]" consignor/volunteers for their "work." JA 222. As the company explained, the more "five hour shifts" a consignor/volunteer "work[s]," the earlier he or she can shop at the sales event. JA 222; *supra* pp. 4-5; *see also, e.g.* JA 271-72, 283, 285. Interviews with the company's consignor/volunteers and managers confirmed that consignor/volunteers worked these shifts "in exchange for early shopping," which consignor/volunteers value because they can then "get the best deals" and merchandise. JA 156 ("I volunteer because I like to get there early."); *see also, e.g.*, JA 137-38 ("The benefit of volunteering and consigning is that you can come in [to shop] at 8 am versus coming in at 1 pm if you just consign."); JA 141 ("I picked which shift

worked best for me and in exchange for that I shopped early."); JA 142 ("The only reason I volunteered was to shop early on Saturday to get better stuff to buy."); JA 124, 148-49, 162-63. The company conceded during the investigation that consignor/volunteers' "primary motivation for participating in Rhea Lana's is to get an early selection o[f] high quality items and save hundreds of dollars for their family's budget." JA 226; JA 93 (district court decision noting this concession); *see also* JA 40, 267, 269.

The agency's findings—and its ultimate legal conclusion—are also supported by a "[b]artering [a]greement" that a franchisee required "volunteers" to accept, JA 286. *See* JA 93 & n.2. In the agreement, individuals "acknowledge[d]" that "[their] labor [wa]s worth the federally mandated minimum wage" and that they were "bartering [their] labor" for the "valuable opportunity [to shop early]." JA 286. Plaintiffs argue that the bartering agreement should be given little weight because it was used only by a franchisee and was "abandoned as [assertedly] misrepresenting the relationship between Plaintiffs and its consignors." Br. 31, 43. But plaintiffs acknowledged in a declaration submitted in district court that the company itself used a similar bartering agreement at times prior to January 2012, JA 105, within the January 2011-January 2013 period covered by the investigation, JA 311; *cf.* JA 18, 121 (noting that the company's volunteer practice is used by franchisees). Moreover, as the district court explained, the company's self-serving decision to cease use of the bartering agreement "does not negate [its] relevance." JA 93 n.2; *cf. Morrison*, 253 F.3d

at 11 (citing *Superior Care*, 840 F.2d at 1059, for the proposition that an "employer's admission that [an] individual was [an] employee is 'highly probative'").

Because the administrative record makes abundantly clear that consignor/volunteers "expected to receive in-kind benefits . . . in exchange for their services" working shifts for the company, it follows from *Alamo* that they are "employees" within the meaning of the FLSA. *Alamo*, 471 U.S. at 301; *cf. Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1231-32 (10th Cir. 2018) (holding that workers were "employees," not volunteers outside of the scope of the FLSA, because the conditions that *Alamo* stated are necessary for non-employee status were not present—there, because the workers did not work "solely for [their] personal purpose or pleasure" (alteration in original) (quoting *Alamo*, 471 U.S. at 295)).

b. Plaintiffs argue that *Alamo* is distinguishable, noting that (1) the workers in that case received "food, shelter, transportation, clothing, and medical benefits" from their employer; and (2) the workers were "dependen[t] 'on the [employer] for long periods, in some cases several years.'" Br. 29 (quoting *Alamo*, 471 U.S. at 301). Plaintiffs misunderstand the role those facts played in the Supreme Court's analysis.

In *Alamo*, the workers in question viewed their labor for the religious organization at issue as "volunteering" and asserted that they did not "expect[] any kind of compensation" in exchange for their work. 471 U.S. at 300-01 (internal quotation marks omitted). The Supreme Court held that "these protestations, however sincere, cannot be dispositive." *Id.* at 301. The Court then noted that the

workers in *Alamo* were "entirely dependent upon the [religious organization] for long periods" and concluded that "[u]nder the circumstances," the workers "must have expected to receive in-kind benefits—and expected them in exchange for their services," rendering them employees. *Id.* (internal quotation marks omitted); *see also id.* at 301 n.22 (noting other evidence that the workers must have expected compensation in return for their work). This case is thus much easier than *Alamo* because, unlike in *Alamo*, there is no need to resort to circumstantial evidence to determine the dispositive legal question—whether consignor/volunteers must have expected to receive early-shopping benefits in exchange for staffing the company's consignment sales. The evidence discussed above directly establishes that conclusion, *see supra* pp. 16-18, and plaintiffs do not dispute it in their brief.

Plaintiffs similarly err in arguing that this Court's decision in *Morrison* established that "the final and determinative question" here "must be whether . . . the personnel are so dependent upon the business . . . that they come within the protection of the FLSA." Br. 30 (quoting *Morrison*, 253 F.3d at 11, which in turn was quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976)). The issue in *Morrison* was whether an individual who performed consulting work for a company was an independent contractor or an employee. 253 F.3d at 7-8, 10. Although economic dependence is relevant to the independent-contractor question presented in *Morrison*, it does not have any obvious relevance to the question presented here—whether workers are volunteers outside of the scope of the FLSA. *Cf. Velez v. Sanchez*,

693 F.3d 308, 327 (2d Cir. 2012) (economic dependence not pertinent to the question of whether an individual performing household tasks in his or her own home is an "employee").

In any event, plaintiffs misunderstand the scope of the dependence inquiry referenced in *Morrison*. As the Fifth Circuit explained in *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987), relied on in *Morrison*, 253 F.3d at 9, 11, "[e]conomic dependence is *not* conditioned on reliance on an alleged employer for one's primary source of income, for the necessities of life." *Mr. W Fireworks*, 814 F.2d at 1054. "Rather, the proper test of economic dependence . . . 'examines whether the workers are dependent on a particular business or organization *for their continued employment*' in that line of business." *Id.* (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985)). A contrary approach "would lead to senseless results," *Donovan*, 757 F.2d at 1385 n.11, including that "wealthy persons could never be employees under the FLSA, and employers could avoid liability to workers simply by paying them so low a wage that the workers are forced to live on other sources of income," *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 268 (5th Cir.), *reh'g granted on other grounds*, 826 F.2d 2 (5th Cir. 1987); *see also* JA 96.

At bottom, plaintiffs argue that the benefit the company provides to consignors to induce them to perform labor at their consignment sales—a graduated set of rights to shop early—is so paltry or intangible that the consignor/volunteers cannot be deemed "employees." *See, e.g.*, Br. 28-30. But the record evidence discussed above

amply supports the agency's conclusion that early-shopping benefits are valuable to consignor/volunteers, and plaintiffs' argument is also inconsistent with the company's practice during the period covered by the investigation of offering managers the right to shop before consignor/volunteers if they chose to forgo their hourly wage (of $8-9 per hour) for their first 12.5 hours of work. *See* JA 223; *supra* pp. 5, 7 (noting that the company agreed to cease this practice); *see also* JA 267 (email from company representative stating that volunteers "are already compensated much, much more than minimum wage from the savings to their tight budgets").

In any event, accepting plaintiffs' argument would stand the FLSA on its head, suggesting that businesses can avoid paying minimum wage and overtime pay as long as they can find workers willing to perform labor in exchange for minimal or intangible benefits. *See Halferty*, 821 F.2d at 268. One of the purposes of the statute "was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." *Walling*, 330 U.S. at 152; *see also Rosenwasser*, 323 U.S. at 362-63 (explaining that "the evils which the Act sought to eliminate permit of no distinction or discrimination based upon the method of employee compensation" and holding that the "mode of compensation . . . does not control" the "employee" question).

2. The degree of control exerted by the company over consignor/volunteers exemplifies an employer-employee relationship.

a. The agency's determination that the company's consignor/volunteers are "employees" is also supported by the agency's well-documented findings regarding the degree of control the company exercises over consignor/volunteers. JA 101, 258, 304. Among other things, the record amply establishes that (1) the company sets work shift schedules and specifies the nature of the work to be performed on each shift, and consignor/volunteers are required to sign up for shifts ahead of time on the company's website, *see, e.g.*, JA 133, 152, 171, 194, 225; *see also, e.g.*, JA 241-50 (sample sign-up list); (2) consignor/volunteers working shifts sign in and out on a time sheet, *see, e.g.*, JA 133, 138, 149, 152, 156, 161, 167, 171-02, 194; and (3) consignor/volunteers report to managers, who "tell [them] what to do," JA 133; *see also, e.g.*, JA 135, 152, 156, 159, 162, 167, 171.

Such indicia of control plainly support the agency's conclusion that the consignor/volunteers are "employees" under the FLSA. *Cf., e.g.*, *Morrison*, 253 F.3d at 11 (explaining that similar indicia of control are relevant to the "employee" question in a case involving a purported independent contractor); *Henthorn*, 29 F.3d at 684, 686 (explaining that similar indicia of control are relevant to determining when certain prisoners are employees).

b. Plaintiffs argue (Br. 34, 36-37) that the company does not exercise control over consignor/volunteers in various ways, but, as explained below, each of plaintiffs'

arguments fails on its own terms. In addition, as the district court held, even assuming that plaintiffs have established that the company does not exercise control over consignor/volunteers in certain respects, "substantial evidence supports the [agency's] other factual conclusions and, under a totality of the circumstances test, the factors that [plaintiffs] highlight[] do not outweigh the other factors that the [agency] reasonably concluded support employee status." JA 96.

Perplexingly, plaintiffs first assert that the company "ha[s] no power to hire and fire the consignor/volunteers." Br. 36; *cf. Morrison*, 253 F.3d at 11 (considering the "power to hire and fire" in the independent-contractor context (internal quotation marks omitted)). But the document plaintiffs cite to support this proposition stated only that *consignors* and/or *consignor/volunteers* "do not think of themselves as having their own employees to hire and fire." JA 304.[2] Moreover, the remainder of the record shows that the company does have the power to hire and fire consignor/volunteers—indeed, the company hires its consignor/volunteers by soliciting consignors to sign up for work shifts posted on its website. *See, e.g.*, JA 272, 283; *supra* pp. 5, 22. The fact that the company conducts its hiring in this manner does not mean that it lacks the "power" to hire—or fire—a consignor/volunteer.

[2] The relevant sentence of the document uses the term "individuals in question" rather than "consignors" or "consignor/volunteers," but the surrounding text makes clear that the document was using the term "individuals in question" to reference consignors and/or consignor/volunteers. JA 304.

Plaintiffs also argue (Br. 37) that the company lacks control over consignor/volunteers because consignors may sign up for the work shifts they prefer or may choose not to work at a given sales event. As explained above, however, the company chooses the dates, times, and nature of the work to be performed for each shift, and thus the company exercises control over scheduling in the sense that is relevant here. *See supra* p. 22; *cf., e.g.*, *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (explaining, in case involving purported independent contractors, that even though the workers at issue in that case were "free, within limits, to determine their hours of work," the employer "essentially established plaintiffs' work schedules" because the workers "could wait tables only during the restaurant's business hours").

Finally, plaintiffs dispute (Br. 34, 37) the agency's finding that the company supervises consignor/volunteers. But copious record evidence supports the agency's finding. *See, e.g.*, JA 133 (statement of consignor/volunteer) ("There are some managers [when you volunteer], . . . who tell you what to do."); *see also, e.g.*, JA 135, 152, 156, 162, 167, 171 (similar); JA 159 (statement of manager) ("I supervise the volunteers."). Moreover, the document plaintiffs rely upon (Br. 34, 37)—an email from the company to the agency—conceded that managers "assist first time [consignor/volunteers] find their way" and explained that "[*because*] [*t*]*he work performed by* [*consignor/volunteers*] *is rather menial*," "once [consignor/volunteers] have worked a shift or two[,] they take very little supervision, if any." JA 223 (emphasis added); *see also* JA 224 (similar). The company thus plainly supervises consignor/volunteers in the

relevant sense. *See Morrison*, 253 F.3d at 11-12 (explaining, in a case involving a purported independent contractor, that "[s]upervision need not be frequent under the economic reality test"); *see also, e.g.*, *Superior Care*, 840 F.2d at 1060 (similar) (relied upon by *Morrison*, 253 F.3d at 11-12).[3]

3. The labor of each consignor/volunteer benefited the company, not the individual consignor/volunteer.

a. The agency also properly based its conclusion that consignor/volunteers are employees on its findings that the tasks a consignor/volunteer performed while working shifts for the company were "for the benefit of [the company's] general sales operations" rather than an effort to sell items that the workers themselves had consigned. JA 101-02; *see also* JA 257, 303, 306.

As the district court explained, consignor/volunteers perform tasks that are the "bread and butter of a retail enterprise," such as "'hang[ing] up clothes; organiz[ing] items as they get disturbed during sale; [and] . . . carry[ing] things to cars for shoppers.'" JA 94 (some alterations in original) (quoting JA 223). *See, e.g.*, JA 141, 151-52, 156, 161, 171, 218, 223, 263; *see also, e.g.*, JA 241-50, 274-82 (sign-up sheets listing categories of work performed by consignor/volunteers, including, *e.g.*, "move-in,"

[3] To the extent that plaintiffs contend that the consignor/volunteers are not employees because they "work[] for very short periods of time," Br. 34, that argument fails. Courts have explained that "where," as here, "work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative." *Superior Care*, 840 F.2d at 1060-61.

"store set-up," JA 274, "consignor check-in/store organization," JA 276, "returns," JA 277-79, "sorting and packing," JA 281, and "consignor pick up & clean up," JA 282 (capitalization omitted)). Moreover, in light of the nature of these tasks and statements by consignor/volunteers that "[t]here is no way for a consignor to just sell their items because all the items are mixed in together," JA 153; *see also, e.g.*, JA 172, the agency reasonably concluded that "the tasks performed by the [consignor/volunteers] supported [the company's] sales generally" and largely "would not have helped to sell any items that the workers had consigned at the sales." JA 102; *see also supra* pp. 16-18 (explaining that the company induced consignor/volunteers to perform this work by offering them early-shopping benefits in exchange for their labor).

Underscoring the integral nature of these tasks to the company's business, the record shows that, at least on occasion, if the company needed additional help with tasks that are typically performed by consignor/volunteers, the company offered to pay consignors (and perhaps others) hourly cash wages in exchange for the work. *Compare* JA 287 (email to consignors offering to pay $8 per hour for "additional help" with "sorting" after a sale), *with, e.g.*, JA 248-49, 280-81 (volunteer sign-up sheets listing "sort[ing]" after a sale as a potential task for a consignor/volunteer (capitalization omitted)), JA 141 (consignor/volunteer explaining that he or she performed "sort[ing]"), *and* JA 152, 161, 163, 167-68, 171 (similar). Unsurprisingly, in

other emails soliciting volunteers, the company emphasized that "[v]olunteers are the lifeblood of our events and we can't do it without you." JA 272, 284.

The agency's findings that the labor performed by consignor/volunteers directly benefited the company's for-profit business, and largely did not advance the consignor/volunteer's own interest, further supports the agency's conclusion that the consignor/volunteers are "employees." *See, e.g.*, *Alamo*, 471 U.S. at 295 ("An individual who, 'without promise or expectation of compensation, *but solely for his personal purpose or pleasure*, worked in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the [FLSA]." (emphasis added) (quoting *Walling*, 330 U.S. at 152)); *Paragon Contractors*, 884 F.3d at 1231-32; *cf. Walling*, 330 U.S. at 153 (holding that trainees were not "employees" after relying heavily on "unchallenged findings . . . that the [purported employer] receive[d] no 'immediate advantage' from any work done by the trainees").

b. Plaintiffs seek to identify an inconsistency in the Department of Labor's analysis, noting that the agency did not deem consignors to be employees if they did not work any shifts at the company's sales and instead simply "entered items for sale into the computer system, packaged and prepared items for sale, tagged items, checked-in and priced items, and placed their items on display racks," activities that "arguably conferred an immediate advantage on [the company]." Br. 32.

But these individuals performed those limited tasks only in order to ready *their own items* for sale. *See* JA 142, 144 (documents upon which plaintiffs rely). Because the

company generally gave consignors 70% of the sales price of their items, JA 222, the performance of these tasks directly—and principally—benefited the individuals themselves. *See* JA 306. By contrast, a consignor/volunteer working shifts at the company's sales performed work that "w[as] for the benefit of [the company's] general sales operations" rather than for the benefit of the individual consignor/volunteer. JA 101-02; JA 306 (noting consignor/volunteers "assist[] in the sales of everyone's goods"); *supra* pp. 25-27. Because of this distinction, the agency reasonably determined that the consignor/volunteers are "employees," but the consignors who do not work shifts for the company are not. *Cf. Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163-64 (D.C. Cir. 1975) (holding that an employer did not need to pay an employee for activity that was neither "controlled by the employer" nor pursued "primarily for [the employer's] benefit").

In a separate line of attack, plaintiffs point (Br. 32-34) to three district court decisions in which the "benefit" factor was evaluated in determining whether a worker was a volunteer outside the scope of the FLSA. But plaintiffs do not dispute that all three district courts held that examination of the "benefit" factor was relevant to determining whether the workers in question were "employees," nor do plaintiffs challenge the agency's well-supported conclusion that the labor performed by the consignor/volunteers here benefited the company, not the individual consignor/volunteers.

The Sixth Circuit recently reversed one of the three district court decisions plaintiffs cite, but the Sixth Circuit's decision has no bearing here. *See Acosta v. Cathedral Buffet, Inc.*, No. 17-3427, __ F.3d __, 2018 WL 1788050 (6th Cir. Apr. 16, 2018). In *Cathedral Buffet*, the Sixth Circuit concluded that certain church members who worked for a church-affiliated restaurant were not "employees" because, as neither side disputed, the church members "neither expected nor received any wages or in-kind benefits in exchange for their service." *Id.* at *4; *cf. id.* at *5 (leaving open the possibility that a showing of economic coercion "might be sufficient to overcome a volunteer's lack of expected compensation and bring her within the protections of the FLSA"). *Cathedral Buffet* is inapplicable here because the consignor/volunteers expected and received in-kind benefits that they valued in exchange for their labor—early-shopping benefits. *See supra* Section I(B)(1). Moreover, in light of its ruling, *Cathedral Buffet* had no occasion to decide which—if any—additional factors should be considered where, as here, a purported "volunteer" expects and receives compensation in exchange for his or her labor.[4]

[4] Plaintiffs' effort (Br. 32-33) to analogize this case to *Patel v. Patel*, No. 2:14-CV-0031 KJN, 2014 WL 6390893 (E.D. Cal. Nov. 17, 2014) (unpublished), is unavailing. Even assuming that case was correctly decided, the district court's ruling that the worker there was not an "employee" was principally based on a determination that the worker performed labor for a family business with the "personal purpose" of "maintaining her relationships with [her family]," not because she expected compensation in exchange for her work. *Id.* at *7, *8 & n.12. Consignor/volunteers have no personal purpose here and instead expect compensation (early-shopping benefits) in exchange for their labor that directly benefits the company.

C. The Department of Labor's determination is supported by the purposes of the statute and the agency's prior opinion letters.

1. Plaintiffs argue that the agency's conclusion that the company's consignor/volunteers are employees does not further the purposes of the FLSA because consignor/volunteers assertedly "are not unprotected workers lacking in bargaining power or workers toiling away for long hours in sub-standard conditions." Br. 38. But plaintiffs offer no support for their assertion that consignor/volunteers have sufficient bargaining power, and, in any event, plaintiffs frame the purposes of the FLSA too narrowly. As the Supreme Court has explained, "the FLSA was designed . . . to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (second alteration in original) (emphasis and internal quotation marks omitted); *see also, e.g.*, *Walling*, 330 U.S. at 152. The Department of Labor's determination undoubtedly advances that statutory purpose.

Relatedly, plaintiffs assert that "none of the consignor/volunteers . . . have sought [protection under the FLSA]," and they suggest that the consignor/volunteers do not require the protections of the FLSA because they "volunteered willingly" to perform labor in exchange for early-shopping benefits. Br. 38. But plaintiffs do not know whether any consignor/volunteers have sought protection because, *inter alia*, consistent with its policy, the agency has not disclosed whether its investigation here

was initiated by a complaint. *See* U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet # 44: Visits to Employers 1 (2015), https://www.dol.gov/whd/regs/compliance/whdfs44.pdf. In any case, "the purposes of the Act require that it be applied even to those who would decline its protections." *Alamo*, 471 U.S. at 302. Moreover, the FLSA was enacted to protect not only workers who are *coerced* into performing labor, but also workers who *willingly* agree to perform labor in exchange for substandard compensation or no compensation at all. *See, e.g.*, *id.* at 300-02; *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 & n.18 (1945).

Finally, plaintiffs appear to concede (Br. 39-40) that another purpose of the FLSA was to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987); *see also* 29 U.S.C. 202(a)(3); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 807-08 (D.C. Cir. 1983). Although plaintiffs argue (Br. 39-40) that they have no such competitive advantage because their competitors in the consignment-event industry follow a materially identical business model, plaintiffs' competitors also include other outlets for inexpensive children's clothing and products, such as used-clothing stores and national big-box retailers. *Cf., e.g.*, JA 133 (statement of consignor/volunteer) ("I . . . buy my clothes [at the company's events] at Walmart

prices."). By failing to pay its workers, the company gains an unfair competitive advantage over these businesses.[5]

2. Although this Court need not reach the issue, the agency's conclusion that the company's consignor/volunteers are employees is also supported by opinion letters issued by the Department of Labor, which are "entitled to respect." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *cf.* JA 96 n.4 (district court decision) (stating that it is "likely" that the agency's opinion letters support the agency's determination but not deciding the issue). Those letters (1) establish that the factors identified above in Section I(B) are critical to determining whether workers are "employees" or volunteers outside of the scope of the FLSA; and (2) set forth the agency's reasonable "longstanding position . . . that, with very limited exceptions, for-profit companies cannot treat workers as volunteers instead of employees under the FLSA," JA 102 (Darling Decl.).

For example, in a 2002 opinion letter, the Department of Labor considered a fundraising scheme under which students bagged and transported groceries at a for-

[5] In accordance with the purposes of the FLSA, the district court correctly held that "industry standards are not one of the economic reality factors that courts have traditionally turned to in their analysis." JA 96. Although plaintiffs appear (Br. 39-40) not to take issue with this conclusion, any challenge (Br. 40) based on *William J. Lang Land Clearing, Inc. v. Administrator, Wage & Hour Div.*, 520 F. Supp. 2d 870 (E.D. Mich. 2007), *aff'd*, 285 F. App'x 277 (6th Cir. 2008), is unavailing. The cited portion of that decision addressed a distinct question arising under, *inter alia*, the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*, and a related regulatory provision that made the prevailing practice within the industry potentially relevant to the question presented there. *See* 520 F. Supp. 2d at 877-78, 881-82.

profit supermarket in exchange for customer tips, which the students sought to donate to community organizations. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 2002 WL 32406599, at *1, *3 (Oct. 7, 2002). The agency concluded the students were "employees" of the supermarket and covered by the FLSA, emphasizing considerations like those present here, including that "[t]he students expected to receive compensation for their services in the form of customer tips"; "bagging activities were an integral part of the employer's provision of customer service because the employer paid regular employees to do the activities when the students were not present"; and the supermarket "derived an economic benefit from their services." *Id.* at *3.

By contrast, in a 1995 opinion letter, the Department of Labor acknowledged an exception to the agency's "longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations." U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1995 WL 1032503, at *1 (Sept. 11, 1995). The agency explained that "individuals who perform activities of a charitable nature" for a for-profit hospital or hospice are generally not "employees" where, unlike here, the hospital or hospice "does not derive any immediate economic advantage from the activities of the volunteers and there is no expectation of compensation" (such as when volunteers "sit[] with patients so that a family may have a break"). *Id.*; *see also, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter,

1996 WL 1031791, at *1 (July 18, 1996); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1996 WL 1005210, at *1 (June 28, 1996).

D. Plaintiffs' contention that the agency did not apply the correct legal test is meritless.

Plaintiffs do not dispute that the factors discussed above govern the question of whether consignor/volunteers who work shifts for the company are "employees." *See, e.g.*, Br. 18-19, 27-34, 36-37 (contesting only the application of these factors). Plaintiffs mistakenly argue, however, that the agency did not in fact evaluate those factors, rendering its decision arbitrary and capricious. *See* Br. 18-27.

1. Plaintiffs principally argue (Br. 19-27) that the Department of Labor looked to the factors applicable when determining whether a worker is an independent contractor (and thus not an "employee"), some of which differ from the factors described above. In support of this argument, plaintiffs rely (Br. 21-22) on two interim documents from May and June 2013 authored by Tamara Haynes, the Department of Labor investigator assigned to the case, JA 182. *See* JA 257-62 (May 2013 document); JA 299-310 (June 2013 document containing Haynes's "[r]ecommendations," JA 310).[6] A portion of each document evaluated how each

[6] The May 2013 document was prepared in connection with a "[f]inal [c]onference" between agency officials and company representatives and is erroneously dated May 2011. JA 257; JA 290 (noting that the final conference, referred to as "FC," took place in May 2013 and indicating that the May 2013 document was authored by Haynes); *see also* JA 308.

independent-contractor factor applied to the company's consignors and consignor/volunteers. *See* JA 257-59, 303-06.

The final agency action under review in this case, however, is the August 2013 decision issued by Haynes's superior—Robert Darling, who was then a District Director in the agency's Wage and Hour Division. *See* JA 311; *Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023, 1026-27 (D.C. Cir. 2016); *see also* JA 182. Under the APA, 5 U.S.C. 704, this Court's review must focus on the rationale underlying the final decision, which is articulated in a declaration by Darling that the district court properly admitted into the record, *see infra* Section II. *See, e.g.*, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007); *Williams v. Bell*, 587 F.2d 1240, 1246-47 (D.C. Cir. 1978); *cf. Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 923-25 (D.C. Cir. 2017) (looking to interim document only to clarify ambiguity in final decision). Plaintiffs do not dispute that the Darling Declaration focused on the appropriate set of factors, *see* JA 100-02. *See* Br. 18-19, 27-34, 36-37.

In any case, even if the analysis in Haynes's interim documents is pertinent, it is consistent with the analysis Darling conducted in making the final decision. As an initial matter, it was not wrong for Haynes to evaluate how the independent-contractor factors applied to the consignor/volunteers, both (1) to confirm that they could not alternatively be classified as independent contractors (rather than employees), a result that would have been favorable to plaintiffs; and (2) because

many of the factors in the independent-contractor analysis are relevant to the volunteer analysis discussed above. *See, e.g.*, JA 257-59, 303-06.

In addition, Haynes based her conclusions regarding consignor/volunteers on the appropriate "volunteer" analysis. Indeed, in a distinct part of the June 2013 document that followed Haynes's analysis of the independent-contractor factors, she announced her conclusion that consignor/volunteers are "employees." JA 306. The paragraphs that followed recognized that "[t]he majority of the workers refer to themselves as volunteers." JA 306. Haynes then engaged in analysis relevant to the "volunteer" question, emphasizing that the "incentive for consignors to work additional hours at an event is early purchasing access" and noting that consignor/volunteers perform duties such as "running the cash register, security, and assisting in the sales of everyone's goods." JA 306; *see also* JA 307; *cf.* JA 259-61 (May 2013 document describing the company's graduated system for "[r]emunerat[ing]" consignor/volunteers).

In addition, as the district court explained, the "record as a whole shows that the [agency] considered the relevant 'volunteer' factors." JA 91; *see also* JA 92; *Epsilon Elecs.*, 857 F.3d at 924-25. Not only does the Darling Declaration establish that the agency conducted the pertinent "volunteer" analysis, but so, too, does a letter from the Principal Deputy Administrator of the agency's Wage and Hour Division to a Congressman that was dated just four days after the final agency decision. That letter (1) summarized the legal principles governing the "volunteer" question; (2) identified

the genesis of many of those principles, including *Alamo*; and (3) outlined why, based on those principles, the agency concluded that the consignor/volunteers are employees. *See* JA 317-19.

Plaintiffs emphasize (Br. 25, 44 n.13) that the Principal Deputy Administrator's letter, JA 317-19—and a different May 2013 letter from Darling to the same Congressman, JA 293-94—enclosed the agency's "Fact Sheet #13," JA 322-23. According to plaintiffs, "[t]he attachment of this fact sheet, with its use of independent contractor factors . . . reveals that this was the operative analysis employed by [the agency]." Br. 25; *see also* Br. 44 n.13. But this fact sheet, which the agency provides generally in response to employment-relationship inquiries, both identifies the factors used to "determin[e] whether an individual is an independent contractor or an employee," JA 322, and separately addresses when "a person volunteering his or her services for another" is an employee, JA 323. Plaintiffs' argument is therefore unpersuasive. *See also* JA 91.

2. Plaintiffs also argue that the agency "did not investigate and analyze this matter using the *Alamo* totality of the circumstances framework because it started with the conclusory premise that individuals cannot volunteer with for-profit companies." Br. 20. Putting aside plaintiffs' inaccurate description of the agency's policy regarding volunteering at for-profit companies, *see supra* pp. 32-33; JA 102 (Darling Decl.) (noting that the policy has "very limited exceptions"), plaintiffs misunderstand the weight the agency placed on its policy in deciding this case. As the Darling

Declaration explained, the final agency decision was based on the agency's evaluation of the factors discussed above in Section I(B), *see* JA 100-02, and the agency's policy merely provided "further support for [the agency's] conclusion," JA 102. Moreover, to the extent they are relevant, the May and June 2013 interim documents created by Haynes (which plaintiffs rely on heavily for other parts of their argument, Br. 21-22) did not mention, much less rely on, the agency's policy. JA 257-62, 299-310.

Plaintiffs contend that the letter discussed above from the Principal Deputy Administrator to a Congressman, JA 317-19, "suggests that the [agency's] decision was based on a reflexive application of its . . . policy." Br. 25. But that letter—which did not purport to offer an exhaustive analysis of the issue—did not justify the agency's determination that the consignor/volunteers are employees by relying solely on the fact that the company is a for-profit corporation. *See* JA 319 (noting that consignor/volunteers "engaged in *activities that are an integral part* of [the company's] FLSA-covered, for-profit business" (emphasis added)). In any case, as discussed on page 35, the proper focus of this Court's review is the Darling Declaration, and that declaration—and the record as a whole—make clear that the agency's final decision was based on its evaluation of the factors described above in Section I(B).

II. The district court did not abuse its discretion in determining that the Darling Declaration belongs in the record.

A. The APA, 5 U.S.C. 706(2)(A), "imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an

explanation that will enable [a] court to evaluate the agency's rationale at the time of decision." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). When, however, a final agency decision does not itself provide sufficient explanation to facilitate judicial review, the Supreme Court has held that it is appropriate to "obtain from the agency . . . through affidavits . . . such additional explanation of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("*Overton Park*"). Where, as was the case in *Camp* but not in *Overton Park*, a final agency decision "curt[ly]" indicates the "determinative reason for the final action taken," such affidavits remain appropriate, but the validity of the agency's action must "stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 143; *see also id.* at 139 & n.2; *cf. Overton Park*, 401 U.S. at 408, 420 (noting final agency decisionmaker made no relevant findings supporting his final decision).

In accordance with this precedent, this Court has repeatedly relied upon affidavits or declarations by agency officials that "furnish[] an explanation of the administrative action that is necessary to facilitate effective judicial review." *Olivares v. TSA*, 819 F.3d 454, 464 (D.C. Cir. 2016); *see also, e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1181 (D.C. Cir. 2004); *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 385 n.5 (D.C. Cir. 1989). This Court has explained that such affidavits and declarations must not contain any "new rationalizations" and must be "merely explanatory of the original record." *Olivares*, 819 F.3d at 464 (quoting *Environmental Def. Fund, Inc. v. Costle*,

657 F.2d 275, 285 (D.C. Cir. 1981)). When, however, such affidavits and declarations explain an agency decisionmaker's "reasoning at the time of the decision" and are "consistent with the administrative record," a court may rely upon them in evaluating whether the challenged agency action should be upheld. *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 673 n.6 (D.C. Cir. 1986).[7]

The final agency decision in this case made clear that the Department of Labor concluded that the company's consignor/volunteers are "employees" within the meaning of the FLSA, but the decision did not describe the agency's rationale for reaching that conclusion. *See* JA 311. As a result, the agency submitted to the district court a declaration by the agency official who was responsible for the final decision, Robert Darling. *See* JA 99-102. That declaration "describe[d] how the record contemporaneously supported the challenged agency determination," noting, for

[7] In *AT & T Information Systems, Inc. v. GSA*, 810 F.2d 1233 (D.C. Cir. 1987) (per curiam), this Court held that an affidavit by an agency official could not be considered under *Camp* because the relevant agency decision "provided no rationalization." *Id.* at 1236. Unlike the agency decision in *AT & T*, which merely described the action the agency would take (providing certain parts of the plaintiff's bid proposal to a competitor) without describing the agency's relevant legal conclusions, *id.* at 1235, the final agency decision here clearly communicated the agency's legal conclusion that the company's consignor/volunteers are employees, JA 311. Underscoring the narrowness of *AT & T*'s holding (and its inapplicability here), the final agency decision in *Overton Park* contained no more reasoning on the relevant legal questions than the final agency decision at issue here, 401 U.S. at 408, and yet the Supreme Court held that the submission of explanatory affidavits on remand would have been appropriate in that case. *See id.* at 420; *Camp*, 411 U.S. at 143; *see also, e.g.*, *Olivares*, 819 F.3d at 460, 464 (permitting reliance on an agency declaration even though the underlying final agency decision provided no more reasoning than the final agency decision here).

example, why the agency "determined" that the consignor/volunteers are employees and describing the evidence in the administrative record upon which the agency "relied." JA 99-101. The Darling Declaration thus "furnishes an explanation of the administrative action that is necessary to facilitate effective judicial review," *Olivares*, 819 F.3d at 464, and it is "consistent" with the administrative record, *Manhattan Tankers*, 787 F.2d at 673 n.6. *See also supra* Section I(B), (D). Accordingly, the district court did not abuse its discretion in determining that it belongs in the record. *See* JA 35, 89 n.1.

Indeed, "[n]othing whatever would be gained" by ignoring the Darling Declaration and instead "remanding the case to the agency for an explanation that is already before [this Court]." *Manhattan Tankers*, 787 F.2d at 673 n.6; *see also, e.g.*, *Olivares*, 819 F.3d at 458 (characterizing similar remand as "pointless"); *Aguayo v. Harvey*, 476 F.3d 971, 976 (D.C. Cir. 2007) ("[W]e are not inclined to disregard [a supplemental memorandum explaining the basis for an agency decision] simply because it was not produced in response to a remand."); *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 79 (D.C. Cir. 1999). Put differently, any error the agency committed by not explaining itself fully in the final agency decision is harmless and thus may not serve as the basis for a remand. *See* 5 U.S.C. 706 (courts must take "due account . . . of the rule of prejudicial error"); *Envirocare*, 194 F.3d at 79.

B. Plaintiffs seek to impugn (*e.g.*, Br. 17-18, 22, 41, 44) the Darling Declaration as a "post-hoc" rationalization, emphasizing that it was dated three years after the

final agency decision, *see* JA 102, 311, and was executed after the initiation of litigation. But *Camp* and *Overton Park* expressly sanctioned reliance on such declarations even though they are "to some extent . . . a 'post hoc rationalization.'" *Overton Park*, 401 U.S. at 420 (explaining, in a 1971 decision, that it would be appropriate on remand for the agency to submit an explanation of a 1969 decision, *id.* at 408); *Camp*, 411 U.S. at 143. Similarly, in *Olivares*, this Court affirmed the propriety of relying on a declaration prepared during litigation, notwithstanding the fact that it was "a *post-hoc* account." 819 F.3d at 464.

Plaintiffs also argue (*e.g.*, Br. 22-23, 42-44) that the Darling Declaration offers impermissible "new rationalizations" because the analysis and evidence described in the declaration assertedly diverge from the analysis and evidence relied upon in the May and June 2013 interim documents drafted by Darling's subordinate. *See supra* pp. 34-36 (describing these two documents). Plaintiffs misunderstand the prohibition on "new rationalizations" in *Camp*, *Olivares*, and related cases.

Camp held that when a final agency decision indicates the "determinative reason for the final action taken," the agency's action must "stand or fall on the propriety of that finding." 411 U.S. at 143. New rationalizations that diverge from the rationalizations set forth in the final agency decision are therefore prohibited. *See, e.g.*, *Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1506-07 (D.C. Cir. 1996) (holding that it was inappropriate to rely on a declaration offering an "entirely new theory" for a testing rate that had been justified

on different grounds in the final agency decision). But we are aware of no precedent holding that a declaration by an agency official explaining his or her rationale for issuing a final agency decision may be considered only if that rationale—and the evidence he or she relies upon—are the same as the rationale and evidence that was relied upon in an interim agency document authored by a subordinate official.[8] Nor is there any good reason to adopt that counterintuitive conclusion, which is fundamentally inconsistent with the principle that final agency decisionmakers are not bound by the conclusions of their subordinates.

In any event, for all of the reasons already identified above in Section I(D), the analysis of the "employee" question described in the Darling Declaration is consistent with the analysis conducted by all other agency officials. And the Darling Declaration's citation to materials in the administrative record, JA 99-102—and its lack of citation to any evidence that was not before the agency at the time it rendered its final decision—quite plainly comports with this Court's decisions mandating that declarations be "merely explanatory of," *Olivares*, 819 F.3d at 464 (internal quotation

[8] In some decisions upholding the propriety of relying on a declaration by a final agency decisionmaker, this Court has observed that the declaration in question "'illuminate[s]' the reasons that are implicit in the internal materials [in an administrative record]." *Olivares*, 819 F.3d at 464 (first alteration in original) (quoting *Clifford v. Peña*, 77 F.3d 1414, 1418 (D.C. Cir. 1996)). This Court has never suggested, however, that the rationale described in a declaration must be the same as the rationale articulated in prior interim documents.

marks omitted), and "consistent with," *Manhattan Tankers*, 787 F.2d at 673 n.6, the administrative record.

Relatedly, plaintiffs argue that the Darling Declaration should not be part of the record because, during the investigation, the agency assertedly did not ask the company about certain pieces of evidence cited in the declaration. Br. 36, 42-43. Plaintiffs offer no support for this argument, however, and it is contradicted by Supreme Court precedent holding that the APA does not grant parties in informal adjudications the procedural right to be "apprised . . . of the material on which [an agency plans] to base its decision." *Pension Benefit Guar. Corp.*, 496 U.S. at 653, 655 (internal quotation marks omitted).

* * *

For all of the reasons identified above, this Court should affirm the district court's judgment. Even if this Court reverses, however, plaintiffs are wrong in contending that this Court should "declare that the consignor/volunteers are not [the company's] employees under the FLSA." Br. 45. To the contrary, under black-letter administrative law, "the proper course, except in rare circumstances," which plaintiffs do not argue are present here, "is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also, e.g.*, *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Of Counsel:

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

DEAN A. ROMHILT
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue NW
Room N-2716
Washington, DC 20210

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

MARK B. STERN

/s/ Sydney Foster
SYDNEY FOSTER
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5374
sydney.foster@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 11,219 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). 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 2013 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

On April 23, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. The participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Sydney Foster
Sydney Foster

ADDENDUM

ADDENDUM: TABLE OF CONTENTS

29 U.S.C. 203 (excerpts) ..... Add. 1

29 U.S.C. 203. Definitions (excerpts)

As used in this chapter--

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who--

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *