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May 16, 2023

The Honorable Charles E. Schumer
Majority Leader
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
317 Russell Senate Office Building
Washington, D.C. 20510

Dear Majority Leader Schumer and Minority Leader McConnell:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I write in opposition to the nomination of Acting Secretary Julie Su for Secretary of Labor (DOL). NFIB is concerned that if confirmed, Ms. Su would enact rulemakings that cause significant harm to small business owners and disregard the department's statutory requirements to consider the impact of federal regulations on small businesses.

As the California Labor Secretary, Ms. Su was responsible for implementing AB 5. AB 5 was passed by the California legislature as an attempt to change the business model of large ride-share companies by requiring businesses that traditionally use independent contractors to reclassify these workers as employees or pay civil penalties between \$5,000 and \$25,000 per violation. However, these industries ended up being exempt from the requirements of AB 5, along with dozens of other industry-specific exemptions. Thus, this legislation ended up ensnaring millions of California small businesses while missing the primary targets. Since being confirmed as the Deputy Secretary at DOL, Ms. Su oversaw the publication of a proposed rule to redefine and restrict what constitutes an independent contractor under the Fair Labor Standards Act. Much like her work in California, this rule will again ensnare millions of small business owners making it difficult for businesses to determine whether an individual is properly classified as an independent contractor putting millions of small businesses at risk of liability from misclassification.

During her tenure as Deputy Secretary, DOL was noncompliant with the Regulatory Flexibility Act and disregarded the well-being of small business owners when conducting rulemakings. Between July 2021 and December 2022, DOL was cited five times by the Small Business Administration's (SBA) Office of Advocacy for being deficient small business reviews when issuing regulations.¹

Regarding the Independent Contractor proposed rule, the SBA's Office of Advocacy called DOL's analysis, "deficient" because it "severely underestimates the economic impacts of this rule on small businesses" and will be "detrimental and disruptive to millions of small businesses that rely upon independent contractors as part of their workforce."² Advocacy concluded that DOL's certification that a regulation requiring a \$15 minimum wage for federal contractors would have not a significant impact on a substantial number of small entities to be false, "the certification . . . lacks a factual basis and is invalid," and that "DOL's IRFA [initial

¹ Rob Smith, *The Regulatory Flexibility Act, Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, National Federation of Independent Business Small Business Legal Center, May 2, 2023, <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf>.

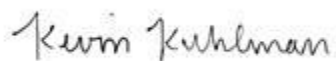
² *Id.*

regulatory flexibility analysis] underestimates the small business compliance costs including increased wages under this regulation.”³

NFIB is also concerned about Ms. Su’s management of California’s unemployment insurance program. During her tenure, Ms. Su’s department issued \$30 billion in fraudulent jobless benefits during the pandemic.⁴ This massive fraud contributed to the current \$18.9 billion unemployment insurance trust fund deficit, which is more than double the deficit of any other state.⁵ This deficit will result in a tax increase of \$434 per employee at California small employers, and will increase by \$21 over the next ten years if the substantial debt is not lowered.

NFIB urges opposition Julie Su’s nomination for Secretary of Labor and encourages the Department of Labor to better consider the costs and burdens that federal regulations impose on Main Street.

Sincerely,



Kevin Kuhlman
Vice President, Federal Government Relations
NFIB

cc: Members of the U.S. Senate

³ *Id.*

⁴ The Editorial Board, *A Big Labor Partisan Named Julie Su, Biden’s Labor nominee puts union interests above workers*, The Wall Street Journal, April 18, 2023, <https://www.wsj.com/articles/julie-su-department-of-labor-nominee-biden-california-ab5-unions-workers-8d3ed6da>.

⁵ Adam Bean, *California Companies Pay Higher Taxes for Unemployment Debt*, May 3, 2023, Associated Press, <https://apnews.com/article/california-deficit-newsom-unemployment-debt-taxes-f6588e0376703fca4398375e11639838>.