IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

AMERICAN COUNCIL OF LIFE INSURERS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-FORT WORTH, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-DALLAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-PINEYWOODS OF EAST TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, NATIONAL ASSOCIATION FOR FIXED ANNUITIES, INSURED RETIREMENT INSTITUTE, and FINSECA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, and JULIE SU, in her official capacity as Acting Secretary, United States Department of Labor,

Defendants.

Civil Action No. 4:24-cv-00482

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND STAY OF EFFECTIVE DATE

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INTRODUCTION

In 2018, the Fifth Circuit set aside as contrary to law a Department of Labor ("DOL") regulation that sought to impose fiduciary obligations on virtually all insurance agents and broker-dealers, among others, who do business in the retirement savings marketplace with employer-sponsored retirement plans and individual retirement accounts ("IRAs"). Consistent with established principles of statutory interpretation, the Fifth Circuit held that the governing law—the Employee Retirement Income Security Act ("ERISA")—codified common-law fiduciary standards, and that DOL's efforts to expand the statutory definition of an ERISA "fiduciary" beyond the common law exceeded the agency's statutory authority. *Chamber of Commerce v. DOL*, 885 F.3d 360 (5th Cir. 2018) ("*Chamber*"). Undeterred by the Fifth Circuit's decision, DOL now attempts to once again impose fiduciary obligations across the retirement savings marketplace. This 2024 Rule is invalid for the very same reasons the 2016 rule failed.

Plaintiffs are Texas-based and national associations that represent life insurance companies, insurance agents, brokers, and distributors who issue, market, and sell insurance and securities products, including annuities, to retirement savers. Plaintiffs and their members have long supported, and continue to support, reasonable and balanced regulation of the retirement savings marketplace, including recently enhanced consumer protections enacted by Texas and other state governments across the country, and regulations promulgated by the Securities and Exchange Commission ("SEC") designed to further the best interests of retirement savers.

Ignoring the impact of those recent reforms, and without meaningfully engaging with the regulatory agencies responsible for implementing and enforcing those reforms, DOL has again attempted a radical intervention in the retirement savings marketplace. In the Rule challenged here, DOL would transform the retirement savings marketplace by imposing an ERISA

"fiduciary" obligation—the highest duty known to the law—on effectively every insurance agent or broker (among others) who sells retirement products to retirement savers.[1] Despite claiming to help consumers, the Rule, in fact, will be a catastrophe for retirement savers. By imposing on sales recommendations unnecessary, substantial burdens deemed counterproductive by other regulators, and by redefining essentially all commercial relationships in the retirement savings marketplace as fiduciary, the Rule will drastically and unreasonably raise the costs of assisting consumers; it will deprive many consumers of access to beneficial products (such as annuities); and it will impair consumer access to useful information about retirement products.

Like DOL's prior effort to transform virtually all insurance agents and brokers who sell retirement products into ERISA fiduciaries, the Rule is contrary to law. In vacating DOL's 2016 regulation, the Fifth Circuit explained, "[a]ll relevant sources indicate" that ERISA "codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence." *Chamber*, 885 F.3d at 369. The prior rule exceeded DOL's authority because it imposed fiduciary status on non-fiduciary sales recommendations and it eradicated, rather than respected, the common law's core distinction between sales activity (to which fiduciary status did not attach) and paid-for investment advice (to which fiduciary status did apply). As the Fifth Circuit concluded in terms directly relevant here, DOL lacks the statutory authority to impose fiduciary status on transactions for which "it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with

[1] By "Rule," Plaintiffs refer to substantively intertwined regulations that DOL proposed and adopted simultaneously. *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 2020-02, 89 Fed. Reg. 32,260 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 84-24, 89 Fed. Reg. 32,302 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 89 Fed. Reg. 32,346 (Apr. 25, 2024).

prospective purchasers." *Id.* at 380. Like the 2016 rule, the current Rule seeks to achieve DOL's policy preference of "fiduciary-only" regulation by jettisoning DOL's own nearly-half-century-old regulatory test for determining fiduciary status—a test that the Fifth Circuit explained "captured the essence of a fiduciary relationship known to the common law." *Id.* at 365.

Put simply, DOL's current Rule suffers from the same key legal defects as the 2016 rule. It exceeds the agency's statutory authority. It is the product of a rushed, outcome-oriented process. It is arbitrary and capricious in multiple respects, as detailed in Plaintiffs' Complaint. And it violates the U.S. Constitution by heaping significant fiduciary burdens on garden-variety sales conversations, violating the First Amendment rights of Plaintiffs' members to communicate truthful information to consumers about annuities and other retirement products and the rights of those consumers to receive such truthful information beneficial to their retirement futures.

Plaintiffs are entitled to a preliminary injunction and stay of the Rule's effective date. Absent preliminary relief, the Rule will take effect this September. At that time, virtually all insurance agents and brokers, among others, will be deemed ERISA fiduciaries when they sell retirement products to consumers. Plaintiffs' members face immediate, ongoing, and significant compliance costs to determine whether or how to restructure their operations to come into compliance. Indeed, DOL acknowledges that the Rule will lead to more than half a *billion* dollars in compliance costs during the first year. Declarations submitted with this motion show that DOL has underestimated these costs and confirm that the injuries inflicted by the Rule are imminent and substantial—readily establishing irreparable injury under Fifth Circuit law.

Plaintiffs respectfully request preliminary relief by July 26, 2024—approximately two months before the Rule's effective date—after which point many of Plaintiffs' members will need to make difficult-to-reverse choices to attempt to comply with an unlawful Rule.

BACKGROUND

A. The Vital Role Of Insurance Products In The Retirement Savings Market

Plaintiffs represent members working at all levels of the insurance marketplace, which includes annuities—a guaranteed lifetime income product that plays an important role in retirement planning. An annuity is a contract between an insurer and a consumer in which the consumer invests a principal sum and, in exchange, the insurer makes periodic payments over either a set period of time or the lifetime of the individual. By guaranteeing consumers consistent wage-like compensation, annuities protect against "longevity risk"—that is, the risk that a retiree will outlive their retirement savings. *See* Compl. ¶23.

Annuities are advantageous for many retirement savers because they are customizable based on a consumer's risk tolerance, financial situation, and other preferences. A consumer may choose a "fixed annuity," which prioritizes security over potentially greater returns by guaranteeing that interest credited to the annuity is based on a specified rate. Or they may choose a "fixed indexed annuity," which provides the same guarantee while protecting against inflation by basing interest credited, in part, on a market index, like the S&P 500. A "variable annuity" provides even greater potential to benefit from market growth (but also market risk), by basing payments on not only a selection of guaranteed benefit options but on the performance of an underlying portfolio of assets (for example, stocks and bonds).

Like other investment products, annuities can be purchased through employer-sponsored retirement plans like 401(k)s or personal savings accounts called IRAs. In a time where Americans have become less reliant on pensions and have taken a more active role in managing retirement savings, annuities and the income they guarantee offer vital benefits to many. Recognizing the benefits that annuities can provide, Congress has repeatedly sought to promote their purchase through both employer-sponsored plans and IRAs. *See* Compl. ¶30.

B. The Marketing And Distribution Of Annuities

Consumers making choices about their retirement savings need access to truthful information about product options available, including annuities. Many retail consumers obtain information the same way they learn about other products: by speaking with a salesperson. For fixed annuities and fixed indexed annuities, that salesperson is typically an insurance agent; for variable annuities (which are securities under federal law), the salesperson is a broker-dealer registered with the SEC. Agents and brokers may be affiliated with an insurer and devote substantially all their efforts to that insurer's proprietary products. Or they may be independent and sell a range of products issued by different insurers. Many independent agents—especially those who sell fixed indexed annuities—work with third-party marketing organizations, from which they obtain sales support, product recommendations, and training.

Given the variety of features available in annuities and their different types, educating and informing consumers about them requires significant time and knowledge. To compensate salespersons for their time and effort, the insurance company—not the customer—typically pays an agent or broker a commission for completed sales. The alternative to commission-based compensation is a fee-for-advice model, in which typically wealthier consumers hire a financial adviser to manage their investments on an ongoing basis, and the adviser is paid a regular fee calculated as a percent of the total "assets under management." Under longstanding federal law, these investment advisers are fiduciaries who are paid for advice. But a fee-for-advice model often is not easily compatible with the annuities market. For one thing, the prerequisite in a fee-for-advice arrangement is ongoing advice, and annuities are often sold in one-time transactions. Moreover, fee-for-advice arrangements usually come with account balance minimums that less wealthy consumers often cannot satisfy. And even where a consumer can meet the minimum, a standard 1% annual fee is likely to cost consumers more over time than a one-time commission

paid by an insurer. Switching from a commission-based model to annual fees would therefore increase costs for many consumers.

C. State And SEC Regulation Of Annuities

Annuities are heavily regulated. As insurance products, all annuities are subject to state insurance laws. Often, these laws have been informed by model regulations adopted by the National Association of Insurance Commissioners ("NAIC"), a standard-setting organization made up of the chief insurance regulators from the 50 States and the District of Columbia. On top of state regulation, variable annuities are securities subject to additional regulation by the SEC, as well as FINRA. This shared responsibility between the States and the SEC has been endorsed by Congress. The Dodd-Frank Act provided that fixed indexed annuities sold in States that adopt the NAIC's regulations are to be "treat[ed] as exempt securities," not subject to SEC regulation. Pub. L. 111-203 § 989J, 124 Stat. 1376, 1949-1950. Dodd-Frank also authorized the SEC to issue heightened standards with respect to broker-dealers' recommendations of "non-exempt securities," including variable annuities. *Id.* § 913(g)(1), 124 Stat. at 1828.

In the wake of Dodd-Frank, the SEC and the NAIC have worked diligently to continue to assess and (where necessary) enhance consumer protections, including protections against perceived conflicts of interest. In late 2019, the SEC issued Regulation Best Interest (or "Reg BI") to strengthen the standards applicable to brokers "when making a recommendation of any securities transaction or investment strategy involving securities," including the purchase of a variable annuity. 17 C.F.R. § 240.15l-1(a)(1). Soon after, the NAIC substantially revised its model regulations—revisions that have been adopted in 45 jurisdictions.

Under both Reg BI and the current NAIC model regulation, salespeople recommending an annuity must "act in the best interest of the retail customer … , without placing" their own "financial or other interest … ahead of the interest of the retail customer." 17 C.F.R. § 240.15l-

1(a)(1); *accord* NAIC 2020 Model Regulation § 6(A). The SEC and NAIC regulations also impose similar care, disclosure, documentation, and conflict-of-interest requirements. *See* 17 C.F.R. § 240.15l-1(a)(2); NAIC 2020 Model Regulation § 6.

Critically, however, both the SEC and the NAIC made considered judgments not to impose fiduciary obligations on insurance agents or brokers. *See* 84 Fed. Reg. 33,318, 33,322 (Jul. 12, 2019) (declining "to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard"); NAIC 2020 Model Regulation § 6(d) (requirements "do not create a fiduciary obligation or relationship"). Historically, fiduciary obligations have been limited to unique and special circumstances, where there is an "intimate relationship[]" of "trust and confidence" between the parties. *Bogert's Trusts & Trustees* § 481 (June 2023 Update). Such a relationship necessarily involves more than mere "arms' length" dealings between "two contracting parties." *E.g.*, *Kap-Pel Fabrics, Inc. v. R.B. Jones & Sons, Inc.*, 402 S.W.2d 49, 58 (Mo. Ct. App. 1966). Where the requisite intimate relationship exists, the common law has held fiduciaries "to the highest amount of loyalty and good faith," required them to "exclude all selfish interest," and "prohibited" them "from putting themselves in positions where personal interest and representative interest will conflict." *Bogert's Trusts & Trustees* § 481.

This was a considered and careful choice by these primary regulators. The SEC explained when promulgating Reg BI that a fiduciary standard is not "appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation)" and that it "would significantly reduce retail investor access to differing types of investment services and products." 84 Fed. Reg. at 33,322. The NAIC made the same determination: a fiduciary standard "does not correspond with the transactional, sales relationship between the [insurance agent] and the consumer." NAIC

Comment on Reg BI, at 4 (Aug. 3, 2018). The SEC and the NAIC thus concluded that insurance agents and brokers are not typically common-law fiduciaries and that imposing such obligations on ordinary commercial interactions would be inappropriate and detrimental to consumers.

D. Fiduciary Obligations Under ERISA

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Title I of ERISA imposes strict duties of loyalty and prudence on "fiduciar[ies]" of 401(k)s and other employer-provided plans. *See* 29 U.S.C. § 1104. The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence … that a prudent man … would use." *Id.* § 1104(a)(1)(B). The duty of loyalty is "'the highest known to the law,'" *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000), and requires fiduciaries to act "solely in the interest of the participants and beneficiaries and … for the exclusive purpose of … providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A). In addition, Title I subjects fiduciaries to "prohibited transactions" provisions, which bar them from "receiv[ing] any consideration" (such as a sales commission) "from any party dealing with such plan in connection with a transaction involving the assets of the plan." *Id.* § 1106(b)(3). Title I makes fiduciaries personally liable for any losses to the plan resulting from violations of the statutory requirements—including violations of the fiduciary duties and prohibited transaction provisions—and it provides both DOL and private parties a right of action to enforce fiduciaries' obligations. *Id.* §§ 1109, 1132. Violations of the prohibited transaction provisions are also subject to an excise tax penalty enforced by the IRS. 26 U.S.C. § 4975.

By contrast, Title II of ERISA applies to non-employer-sponsored, personal IRAs. Congress structured Title II such that IRA fiduciaries are not subject to the same duties of loyalty and prudence, or to any private right of action. *See* 26 U.S.C. § 4975. Title II does, however,

subject IRA fiduciaries to the same "prohibited transaction" provision as Title I, enforceable by the IRS through an excise tax penalty. *Id.* §§ 4975(a)-(b).

Under both Title I and Title II, ERISA fiduciary status attaches to those who exercise certain types of authority or control over plans and IRAs, as well as to so-called "investment advice fiduciaries"—those who "render[] investment advice for a fee or other compensation … with respect to any moneys" of an IRA or employer-sponsored plan. 29 U.S.C. § 1002(21)(A); *accord* 26 U.S.C. § 4975(e)(3). In 1975, one year after Congress enacted ERISA, DOL promulgated a regulation establishing a five-part test—each part of which must be satisfied—to determine when a person "renders investment advice." Under that test, fiduciary obligations arise when a person (1) renders advice as to the value of securities or other property or makes investment recommendations, (2) "on a regular basis to the plan," (3) "pursuant to a mutual agreement, arrangement or understanding" that (4) that the advice will serve as a "primary basis for investment decisions with respect to plan assets," and (5) the advice is "individualized" "based on the particular needs of the plan." 40 Fed. Reg. 50,842, 50,843 (Oct. 31, 1975) (codified at 29 C.F.R. § 2510.3-21(c)). Consistent with the common law's foundational requirement that fiduciary relationships involve special, intimate relations of trust and confidence, DOL's test—particularly its requirements that advice be provided on a regular basis and pursuant to mutual arrangement—generally did not reach one-time sales recommendations, such as a recommendation to purchase an annuity for inclusion in an IRA.

E. The Department's Vacated 2016 Fiduciary Rule

In 2016, DOL sought to abandon its long-established five-part test and impose fiduciary status whenever a person makes a "recommendation" to a retirement saver "as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property." 81 Fed. Reg. 20,946, 20,948 (Apr. 8, 2016). DOL's principal legal defense was that ERISA's

definition of fiduciary was not tied to the common law and permitted the agency to define fiduciary "more broadly" than the common law. *Id.* at 20,990.

The Fifth Circuit disagreed. It vacated the 2016 rule in its entirety. *Chamber*, 885 F.3d 360. As the court explained, "[a]ll relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence." *Id.* at 369. That common-law understanding was fortified by ERISA's use of the phrase "advice for a fee"; "the preposition 'for' … indicates that the purpose of the fee is not 'sales' but advice.'" *Id.* at 373. The 1975 five-part test, the Fifth Circuit explained, "flowed directly from contemporary understanding of 'investment advice for a fee'" because it "contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions." *Id.* at 374. By contrast, the 2016 rule unlawfully disregarded the "dichotomy between mere sales conduct, which does not usually create a fiduciary relationship … , and investment advice for a fee, which does." *Id.*

F. The Department's Attempted Redo Of The 2016 Rule

DOL promulgated the Rule challenged here on April 25, 2024, with an effective date of September 23, 2024. Like the vacated 2016 rule, the Rule seeks to expand ERISA fiduciary status to essentially all insurance agents and brokers (among others) serving retirement savers. And like the 2016 rule, DOL accomplishes this end by abandoning its own 1975 regulatory standard, including requirements that fiduciary investment advice be provided on a "regular basis" and "pursuant to a mutual agreement." 89 Fed. Reg. 32,122, 32,124 (Apr. 25, 2024).

In place of the five-part test, the Rule provides for fiduciary status to attach (in relevant part) whenever a person "either directly or indirectly … makes professional investment recommendations to investors on a regular basis as part of their business," and "the recommendation is made under circumstances that would indicate to a reasonable investor in like

circumstances that the recommendation" (i) "is based on review of the retirement investor's particular needs or individual circumstances"; (ii) "reflects the application of professional or expert judgment to the retirement investor's particular needs"; and (iii) "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." 89 Fed. Reg. at 32,122. Like the 2016 rule, this definition of "fiduciary" would sweep in essentially all recommendations to retirement savers to purchase retirement products.

The Rule pairs this expansive definition of fiduciary status with revised Prohibited Transaction Exemptions (PTE 84-24 and PTE 2020-02) that DOL claims will permit agents and brokers to receive sales commissions despite fiduciary status. But those PTEs impose costly obligations on insurance agents, brokers, distributors, and insurance companies, including a requirement that the newly deemed fiduciaries provide a "written acknowledgment" stating that they are "providing fiduciary investment advice and … are fiduciaries under Title I, [Title II], or both." 89 Fed. Reg. at 32,226. This "written acknowledgment" would have the obvious (and thus, presumably intended) effect of subjecting parties to state-law claims for breach of contract or fiduciary obligations. Those PTEs, moreover, subject covered entities to duties of loyalty and care that mirror the fiduciary standards Congress imposed on Title I, but not Title II, fiduciaries.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction against the Rule as well as a stay under 5 U.S.C. § 705 because (1) they are "likely to prevail on the merits"; (2) they face a "substantial threat of irreparable injury if the injunction is not granted"; (3) the "threatened injury outweighs any harm that will result to [DOL] if the injunction is granted"; and (4) the "injunction will" serve, not "disserve," the "public interest." *Restaurant Law Ctr. v. DOL*, 66 F.4th 593, 597 (5th Cir. 2023); *see also Career Colleges & Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220 (5th

Cir. 2024) (applying preliminary injunction standard to motion under 5 U.S.C. § 705); 5 U.S.C. § 705 (court may stay "effective date of an agency action").[2]

I. THE RULE IS CONTRARY TO LAW

Plaintiffs are likely—indeed, virtually certain—to succeed in showing that the Rule is contrary to law. 5 U.S.C. § 706(2)(A), (C). It is axiomatic that "[a] regulator's authority is constrained by the authority that Congress delegated it by statute." *Chamber*, 885 F.3d at 369. The last time DOL attempted drastically to expand ERISA's definition of "investment advice fiduciary," unmooring it from common-law fiduciary standards, the Fifth Circuit vacated the rule. The Rule here is indistinguishable in scope, and should be set aside for the same reasons.

A. The Rule Exceeds DOL's Statutory Authority

1. ERISA provides that "a person is a fiduciary with respect to a plan to the extent" that, as relevant, "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan." 29 U.S.C. § 1002(21)(A)(ii). In *Chamber*, the Fifth Circuit held that "all relevant sources indicate that Congress codified the touchstone of common law fiduciary status." *Id.* at 369; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

Fidelity to the common law fiduciary standard is especially important under ERISA, the court of appeals reasoned, because "fiduciary" has deep roots in the common law of trusts. *Chamber*, 885 F.3d at 370. Under the common law, fiduciary status requires a "special relationship of trust and confidence" between a professional and a client. *Id.* at 365 (citing *Bogert's Trusts & Trustees* § 481). Critically, not every commercial relationship that involves

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[2] The Rule is unlawful for many reasons, as set forth in the Complaint. Given the need for expedited relief and to avoid burdening the Court, Plaintiffs address only certain claims here, reserving their right, of course, to brief other issues more fully in later stages of this litigation.

some degree of trust or confidence fits the bill; rather fiduciary relationships are unique as they are reserved for those special relationships involving "an extraordinary reliance which causes [a consumer] to drop his guard, abandon formalities, and deal with another in intimacy." Bogert, *Confidential Relations and Unenforcible Express Trusts*, 13 Cornell L. Q. 237, 245 (1928); *see also Chamber*, 885 F.3d at 370-371 (collecting treatises and common-law authority).

ERISA's codification of a common-law fiduciary standard, moreover, is reinforced by the statute's use of the phrase "advice for a fee." 29 U.S.C. § 1002(21)(A)(ii). As the Fifth Circuit explained, "the preposition 'for' … indicates that the purpose of the fee is not 'sales' but 'advice.'" *Chamber*, 885 F.3d at 373. The statutory text in that way carefully tracks the "structure of the financial services industry," which has long distinguished between, on the one hand, "[s]tockbrockers and insurance agents [who] are compensated only for completed sales" and, on the other hand, "[i]nvestment advisers" who "are paid fees because they 'render advice.'" *Id.* at 372-373. DOL's 1975 regulation "flowed directly" from this understanding, reflecting a recognition that "advice for a fee" refers to "an intimate relationship between adviser and client"—a relationship that goes "beyond ordinary buyer-seller interactions." *Id.* at 374. The 2016 rule failed precisely because it disregarded the statute's common-law foundation.

2. The Rule here well exceeds DOL's statutory authority and countermands the Fifth Circuit's binding decision. Like the vacated 2016 rule, the Rule reflects DOL's policy-driven effort to transform all retirement-related recommendations by insurance agents and brokers to retirement savers into fiduciary relationships. DOL undertakes this effort by once again abandoning DOL's nearly half-century-old test for fiduciary status—a test that the Fifth Circuit emphasized "flow[s] directly" from the common-law definition of "fiduciary," particularly its requirement "of an intimate relationship" of "trust and confidence between the adviser and

client," "beyond ordinary buyer-seller interactions." *Chamber*, 885 F.3d at 373. The Rule clashes with the common law and defies the Fifth Circuit's decision in multiple respects:

First, and most fundamentally, the Rule redefines all sales speech as fiduciary speech. Under the common law, an insurance sale "is an arm's length commercial transaction" that "does not give rise to a fiduciary relationship." *Pitts v. Jackson Nat'l Life Ins. Co.*, 574 S.E.2d 502, 508 (S.C. Ct. App. 2002) (collecting South Carolina precedent as well as decisions of "other jurisdictions"); *see also Stockett v. Penn Mut. Life Ins. Co.*, 106 A.2d 741, 744 (R.I. 1954) ("Ordinarily an insurance company stands in no fiduciary relationship to a legally competent applicant for an annuity"); *Chamber*, 885 F.3d at 373-376 (discussing "widely shared understanding that financial salespeople are not fiduciaries absent [a] special relationship"). Under the Rule, however, the *sine qua non* of selling an insurance product—a recommendation by an agent or others to a consumer to purchase the product—triggers compulsory fiduciary status. That is so, moreover, whether or not the parties to the transaction, the insurance agent and the consumer, intend or desire that outcome. Like the 2016 rule, that Rule's broad standard obliterates the distinction "between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does." *Chamber*, 885 F.3d at 374. Put simply, under the Rule, each and every recommendation to a retirement saver made by a financial professional to purchase a retirement product that is in compliance with existing state or federal regulation will be deemed fiduciary. That sweeping transformation of "ordinary buyer-seller interactions," *id.*, repeats the core overreach of the 2016 rule.

DOL can have no persuasive defense of this extreme regulatory intervention. DOL claims that its "objective[]" test captures circumstances in which salespeople have "held themselves out as a trusted advice provider." 89 Fed. Reg. at 32,152. But DOL commits a

category error in assuming that providing consumers trustworthy, valuable, and accurate information is sufficient to establish a fiduciary relationship. Those are also hallmarks of *many* sales relationships. Indeed, most commercial relationships carry with them duties of honesty, good faith, and fair dealing. Thus, at common law, "not every kind of confidence" established fiduciary relations, *Bogert*, 13 Cornell L. Q. at 245; rather, a special, intimate relationship of trust and confidence was critical. For example, although "[a] customer of a food dealer relies on his grocer to furnish wholesome food, and to give honest measure for fair prices … this is not the trust and confidence necessary to create" a fiduciary relationship under the common law. *Id.* at 245. Likewise, insurance sales did not typically create fiduciary relationships at common law, *see supra* p.14, which is why the NAIC and SEC imposed a best interest standard but deliberately did not impose fiduciary status and why the Fifth Circuit previously held that "[s]imply urging the purchase" of insurance "products does not make an insurance company an ERISA fiduciary[.]" *Am. Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 664 (5th Cir. 1988).[3]

DOL's late-breaking addition of a new provision to the Rule purportedly establishing that

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[3] The Rule's requirement that a recommendation be "intended to advance the retirement's investor's best interest," 89 Fed. Reg. at 32,256, does not cure the Rule's overbreadth. Under the NAIC model rule and the SEC's Reg BI, every covered recommendation must satisfy best-interest standards. But both NAIC and the SEC made considered judgments not to impose fiduciary obligations. *Supra* pp.7-8. DOL's bootstrap of *non*-fiduciary standards into *fiduciary* regulations only underscores the arbitrariness of DOL's position. DOL also states its test differs from the 2016 rule, including based on new language about being "in the business" of providing "professional investment recommendations," 89 Fed. Reg. at 32,150-32,151, but these and related formulations serve no meaningful limiting function. DOL claims that these elements exclude "human resources employees" as well as "real estate agents selling homes to prospective residents, life coaches, probation officers and divorce counselors." *Id.* at 32,151, 32,152. But the 2016 rule's central vice was not that it regulated "life coaches" as ERISA fiduciaries. Rather, it was that the prior rule deemed fiduciary all insurance sales to retirement savers, despite the fact that it was generally "inconceivable" that a relationship of trust and confidence existed in those circumstances. *Chamber*, 885 F.3d at 380. The Rule suffers from the same defect.

"sales pitches … can occur without ERISA fiduciary status attaching," 89 Fed. Reg. at 32,154, does not change this analysis. DOL makes clear that any "sales pitch" that satisfies the Rule's broad fiduciary standard remains covered. *Id.* The added language thus does not narrow the Rule; it simply states a tautology that if a recommendation is not covered by the Rule, then it is not covered. Lest there be any doubt about DOL's commitment to a sales exclusion, DOL elsewhere explicitly refused an exemption "for salespersons." *Id.* at 32,149.

Second, the Rule deliberately transforms one-time commercial transactions into fiduciary relationships. At common law, a fiduciary *relationship* generally presupposed a "preexisting confidential [or fiduciary] relation." Bogert, 13 Cornell L. Q. at 246. In vacating the 2016 rule, the Fifth Circuit accordingly identified as a key defect that "[t]he Rule expressly includes one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers." *Chamber*, 855 F.3d at 380. In defiance of the Fifth Circuit's holding, DOL once again includes "one-time" transactions within its scope, 89 Fed. Reg. at 32,150, and insists that a "regular basis" requirement—a key component in aligning the 1975 test with the common law—has "no basis in the statutory text," *id.* at 32,180; *see also id.* 32,164 (confirming fiduciary status may attach even in initial "hire me" communications).

Third, the Rule precludes parties from structuring their relationships as non-fiduciary through clear contractual language, underscoring its departure from the common law. Because the common law required that a fiduciary relationship involve "extraordinary reliance which causes [the beneficiary] to drop his guard, abandon formalities, and deal with another in intimacy," Bogert, 13 Cornell L. Q. at 245, clear and conspicuous acknowledgements that a fiduciary relationship did not exist were often credited, even if not always dispositive. *E.g.*,

Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP, 420 P.3d 223, 235 (Colo. 2018) (collecting cases). The "mutual agreement" prong of the 1975 rule similarly reflected that parties should be free to structure their relationships, including by effectuating a mutual intent not to enter into a fiduciary relationship and the costs and burdens it entails.

The Rule replaces that flexibility with a regulatory straitjacket. DOL explains, for example, that a "written disclaimer is insufficient to defeat fiduciary status" anytime the elements of DOL's fiduciary test are satisfied. 89 Fed. Reg. at 32,155. What DOL means is that a disclaimer is effective only when the conduct at issue is not fiduciary (under DOL's expansive test) to begin with. For example, under the Rule, an insurance agent could not say: "I am going to make a recommendation that takes account of your needs, that reflects my professional judgment, and that will comply with state-law best interest suitability requirements. But to be clear upfront, we both understand and acknowledge that this will not be a fiduciary relationship."

DOL's overreach is further evident in its refusal to exclude arm's length recommendations involving sophisticated counterparties. DOL rejected calls to create an express exemption for "'communications with sophisticated and independent parties," reasoning that its objective fiduciary test should govern in those circumstances. 89 Fed. Reg. at 32,160. But it is entirely implausible that arm's length sales discussions between sophisticated parties would create an intimate relationship of trust and confidence at the common law. And DOL's insistence that such dealings may be fiduciary shows just how far afield the Rule is from the common law. *See Chamber*, 885 F.3d at 382 (criticizing 2016 rule for failing to enact broader seller's carveout reflecting that even "smaller-scale sales pitches" were not fiduciary).

Fourth, DOL's new "objective[]" standard, 89 Fed. Reg. at 32,152, is an unlawful end-run around the Fifth Circuit's decision in other ways. The *Chamber* decision teaches that ERISA

codifies the "cornerstone" of the common-law standard, such that fiduciary status can attach only to "special relationship[s]" of "trust and confidence." 885 F.3d at 376. The Fifth Circuit also deemed it "ordinarily inconceivable" that the standard is met in consumer interactions with insurance agents and brokers involving retirement products. *Id.* at 380. Given those holdings, one would have thought that, before again attempting a redefinition of the retirement marketplace, DOL would have at least tried to build a factual record establishing that many, if not most, insurance agent-consumer or broker-consumer relations do involve "intimate relationship[s]" of "trust and confidence," characteristic of common-law fiduciary relations. *Id.*

Remarkably, DOL did none of that. Instead, the agency engaged in legal calisthenics by establishing what amounts to a new irrebuttable presumption. Under the Rule, when a salesperson (i) offers "an individualized, reliable recommendation" (ii) that is "based on the application of professional or expert judgment" and (iii) that "is intended to advance the retirement investor's interest," then fiduciary status automatically and irrevocably attaches because, DOL asserts, "parties should reasonably understand" that a relationship of trust and confidence exists. 89 Fed. Reg. at 32,152. But that is pure *ipse dixit*. Agency-created presumptions must, at the least, reflect a "rational nexus between the proven facts and the presumed facts"; an agency may not use a presumption based on "policy to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists, Loc. 829, Bhd. of Painters & Allied Trades, AFL-CIO v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985); *see also NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979). The Rule transgresses those limits because it purports to presume conclusively, based only on DOL's policy preferences, what parties "*should* reasonably understand" without any real-world showing that is how parties *actually* "understand" their relationship. This legal maneuvering to avoid making factual

determinations required by the Fifth Circuit is especially glaring given that the court deemed it ordinarily "inconceivable" that relationships of trust and confidence exist in these circumstances.

Fifth, the Rule conflicts with ERISA's "advice for a fee" requirement. In tying fiduciary status to "advice for a fee," Congress intended to capture circumstances in which the "purpose" of a paid fee is for "advice," not "sales." *Chamber*, 885 F.3d at 373. The Fifth Circuit explained that this "statutory language" "preserves" the "important distinction" between insurance agents and brokers—who are "compensated only for completed sales"—and investment advisers—who are "paid fees because they 'render advice.'" *Id.* Like the 2016 rule, the Rule overrides this "important distinction." Under the Rule, the "advice for a fee" requirement is satisfied so long as there is a "link" between a commission and a "recommendation." 89 Fed. Reg. at 32,157. And that "link" exists, DOL posits, every time there is a sales recommendation, a consumer purchase, and a paid commission—basically all of the time. DOL "read[s]" the Fifth Circuit's opinion as "not foreclosing" its sweeping position, 89 Fed. Reg at 32,159 n.221, but the court could not have been clearer that agents and brokers are compensated "for" sales, not "for" advice.

3. If there were doubt about whether the Rule exceeded DOL's statutory authority (there should be none), the major questions doctrine resolves it. DOL's effort to subject large segments of the insurance and financial services industry to fiduciary regulation is unquestionably a major question. Prior to the Supreme Court's express embrace of the doctrine, the Fifth Circuit court reasoned that similar concerns applied because DOL had claimed "unheralded power to regulate a significant portion of the American economy" by "reinterpret[ing]" a "long-extant statute." *Chamber*, 885 F.3d at 387. The Supreme Court has since made crystal clear that courts must "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *West Virginia v. EPA*, 597 U.S. 697,

723 (2022). To overcome the presumption, "something more than a merely plausible textual basis for the agency action is necessary"; "[t]he agency instead must point to 'clear congressional authorization.'" *Id.* DOL has nothing resembling clear congressional authorization to assert powers of such "vast economic and political significance,'" *Louisiana v. Biden*, 55 F.4th 1017, 1033 (5th Cir. 2022), as those implicated by the Rule.[4]

4. The canon of constitutional avoidance also weighs against construing ERISA to countenance DOL's sweeping redefinition of fiduciary. Statutes should "be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). But reading ERISA to impose fiduciary status on nearly all insurance agents and brokers (among others) in the retirement marketplace based on *speech*—recommendations made to consumers—would raise serious constitutional concerns. DOL would be imposing regulatory burdens only on speech of particular content, namely, "recommendation[s]" to purchase a retirement product, including those related to "rolling over, transferring, or distributing assets from a plan or IRA." 89 Fed. Reg. at 32,256-32,258. Such content-based speech restrictions are "presumptively unconstitutional" under the First Amendment. *NIFLA v. Becerra*, 585 U.S. 755, 766 (2018).

DOL cannot justify its content-based restriction under strict scrutiny because it has not identified "an 'actual problem' in need of solving," and "the curtailment of free speech [is not] actually necessary to the solution." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). DOL's pervasive assumption that consumers must be protected from truthful speech cannot support such restrictions because "information is not in itself harmful" and "people will perceive

[4] Because the major-questions doctrine applies, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is not applicable, assuming DOL embraces it. Plaintiffs also preserve the position *Chevron* may not lawfully be applied. *See Loper Bright Enterprises v. Raimondo*, No. 22-451. And because ERISA is unambiguous, *see Chamber*, 885 F.3d at 368-379, an Article III court owes no type of deference to DOL.

their own best interests if only they are well enough informed." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). Moreover, several less restrictive alternatives (available to Congress, if not DOL) would advance any of DOL's legitimate aims, including clearer disclosure requirements or direct legislative regulation of commissions or of the retirement products themselves. Rather than accept "the broad reading" of ERISA "advanced by the Government," the Court has an "obligation to construe texts to avoid 'serious constitutional problems.'" *Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce*, 60 F.4th 956, 971 (5th Cir. 2023).

B. The Rule Conflicts With Fifth Circuit Precedent In Additional Ways

If more were needed (which it is not), the Rule conflicts with the Fifth Circuit's decision or is otherwise unlawful for other reasons. ***First***, like the 2016 rule, the Rule arrogates to DOL authority Congress delegated to the SEC or reserved to the States. As the Fifth Circuit explained in invalidating the 2016 rule, the Dodd-Frank Act (1) delegated to the SEC the power to promulgate enhanced regulations of securities recommendations to retail customers; and (2) expressly reserved for States the authority to regulate fixed indexed annuities (when a State has adopted the NAIC's model regulation). *Chamber*, 885 F.3d at 385. Like the 2016 rule, the Rule "conflicts with both of these efforts." *Id.* at 385. It expressly applies to variable annuities that (as securities) are subject to the SEC's Regulation BI, and to fixed annuities that are subject to the NAIC's enhanced standards. 89 Fed. Reg. at 32,185. Just as before, however, "there is no evidence that Congress expected DOL to more restrictively regulate a trillion dollar portion of the market when it delegated the general question to the SEC … and conditionally deferred to state insurance practices." *Chamber*, 885 F.3d at 386.

Second, like the 2016 rule, the Rule "ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts." *Chamber*, 885 F.3d at 381. For one thing, through PTE 84-24 and PTE 2020-02, the Rule

subjects Title II fiduciaries to the same standards as Title I fiduciaries—standards DOL acknowledges are reflections of the fiduciary duties of prudence and loyalty that Title II omits. *See* 89 Fed. Reg. at 32,137. On top of that, the Rule attempts to channel as many fiduciaries as possible into Title I, where ERISA's obligations are privately enforceable. As DOL explains, all "recommendations on distributions" from Title I plans, "including rollovers or transfers into another plan or IRA," are "covered by Title I of ERISA, including the enforcement provisions," "[e]ven if the assets would not continue to be covered by Title I … after they were moved outside the plan." 89 Fed. Reg. at 32,145. That, too, is inconsistent with statutory design. *See Chamber*, 885 F.3d at 381-382.

Third, like the 2016 rule, the Rule attempts to impermissibly "create vehicles for private lawsuits indirectly through … contract provisions" that are not provided directly by Title I or Title II of ERISA. *Chamber*, 885 F.3d at 384. The prior rule did so through a "Best Interest Contract Exemption," which required fiduciaries to enter into enforceable contracts with consumers to receive sales commission. *Id.* at 367. The current Rule accomplishes the same end, through a different means: Rather than label its requirement a "contract," the Rule relies on PTEs 84-24 and 2020-02 to require newly established fiduciaries to provide a "written acknowledgement" pledging fiduciary status. 89 Fed. Reg. at 32,270, 32,331. The obvious effect, if not purpose, of this "acknowledgement" is to expose salespeople to state-law liability under breach-of-fiduciary or breach-of-contract theories. The requirement serves no plausible purpose other than to create a judicial mechanism for private enforcement. But ERISA does not authorize DOL to create new enforceable rights in this way. *See Chamber*, 885 F.3d at 384.

II. THE REMAINING FACTORS SUPPORT A PRELIMINARY INJUNCTION

A. Irreparable Injury

Absent preliminary relief, Plaintiffs will suffer certain and concrete irreparable injury. Under the law of the Fifth Circuit, the cost of complying with an invalid regulation "almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). Such costs are nonrecoverable "because federal agencies generally enjoy sovereign immunity for any monetary damages." *Wages & White Lion Invs. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). And because the proper inquiry is "not so much" a question of "magnitude," but "irreparability," *Texas v. EPA*, 829 F.3d at 433, most types of non-*de minimis* compliance costs are sufficient, *Restaurant Law Ctr.*, 66 F.4th at 600.

The compliance costs here are well beyond *de minimis*. *E.g.*, *Chamber*, 885 F.3d at 368 (finding that 2016 rule "spawned significant market consequences" and compliance costs). DOL estimates that the Rule will cause more than half a billion dollars (approximately $537 million) in compliance costs during the first year alone, with $2.5 billion in costs over the next decade. 89 Fed. Reg. at 32,222-32,223. In Plaintiffs' view, DOL has vastly understated those costs. But even taking DOL's calculation at face value, it easily establishes irreparable harm. For example, the estimate is three times more than DOL's cost estimate (of $177 million per year) in another case in which the Fifth Circuit found irreparable injury, relying in part on DOL's "concession that some businesses will incur ongoing costs." *Restaurant Law Ctr.*, 66 F.4th at 598-600.

Additional evidence confirms the certainty of those costs. As detailed in declarations submitted with this motion, 87% of independent insurance agents estimate that the Rule will increase their costs of doing business. App.4 (Mayeux Decl. ¶8); *see also* App.11 (Massey Decl. ¶10) (estimating $30,000 to $40,000 annual costs in staffing and operational costs alone). On top of those costs, 93% of agents expect their professional liability insurance premiums to

increase, and 59% expect them to increase significantly. App.16 (Cadin Decl. ¶4); *see also* App.12 (Massey Decl. ¶13) (premiums increased by 30% following the 2016 rule). Moreover, because each sale will take more time and be more burdensome, low-account (low-commission) sales will no longer be economically viable for many agents. Those agents expect to have to impose minimum account balances, resulting in unrecoverable lost business. *See* App.11-12 (Massey Decl. ¶11); App.28 (Hudspeth Decl. ¶25); *cf. Wages & White Lion*, 16 F.4th at 1142 (lost profits are irreparable harm). Some agents doubt that they will be able to comply with the Rule at all; they face a serious risk of going out of business, App.28-29 (Hudspeth Decl. ¶27), being forced to restructure their businesses, or retiring earlier. App.36 (Pinckard Decl. ¶13); App.42 (Fisher Decl. ¶12). With respect to these agents, the Rule "threatens the very existence of [their] business[es]." *Texas v. EPA*, 829 F.3d at 434 & n.41.

Insurance carriers face significant unrecoverable costs as well. Among other things, insurers will need to overhaul supervision systems to comply with PTE 84-24's requirement that insurers review every recommendation of one of their annuities made by an independent agent before an annuity is issued. 89 Fed. Reg. at 32,341. They will also need to develop new training programs, alter recordkeeping and disclosure practices, and upgrade technologies. And even though these requirements are subject to a "one-year transition period," *id.* at 32,171, most report that their efforts will need to begin within the next 60 days (some report they need to begin immediately) to ensure that the systems are fully operational when the requirements take effect. App.48 (Neely Decl. ¶11). Those costs—which, in the immediate-term, certain insurers expect to total an average of roughly $2.5 million per company—establish the need for preliminary relief and also show that the Department's cost estimate is substantially underinclusive. App.47-48 (Neely Decl. ¶10); *see also* App.51 (DiVencenzo Decl. ¶7-8). In addition, for those entities

required to pledge fiduciary status to comply with PTE 2020-02 or PTE 84-24, undoing fiduciary status when the Rule is vacated will also prove challenging.

B. The Balance Of Harms And The Public Interest Favor Injunctive Relief

The final preliminary injunction factors—"the balance of the equities and the public interest"—"'merge when the government is the opposing party.'" *Clarke v. CFTC*, 74 F.4th 627, 643 (5th Cir. 2023). Plaintiffs' strong showing of a likelihood of success is dispositive of these factors. "'[T]here is generally no public interest in the perpetuation of unlawful agency action.'" *Biden*, 55 F.4th at 1035; *accord Clarke*, 74 F.4th at 643-644. "To the contrary, there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Texas v. United States*, 40 F.4th 205, 229 (5th Cir. 2022). In addition, there is a strong public interest in limiting the substantial harm to consumers of the type that was inflicted by DOL's last failed attempt at fiduciary regulation, as studies show. *See* App.56 (ACLI Comments 4); App.100-01 (NAIFA Comments 8-9); App.127-28 (IRI Comments 20-21); App.227-29 (Finseca Comments 2-4); App.251-55 (NAFA Comments 4-8).

Relatedly, DOL has no plausible claim of hardship from a preliminary injunction or stay because such relief would preserve the status quo and consumers will continue to be protected by existing State and SEC regulations. It has also been more than 6 years since the last rule was vacated—foreclosing any claim there is a pressing need for the Rule to take effect immediately.

CONCLUSION

This Court should preliminarily enjoin the Rule and stay its effective date. Plaintiffs respectfully request relief by July 26, 2024, to avert further irreparable injury.

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Respectfully submitted,

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