No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, DOING BUSINESS AS LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS;

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
Case Nos. 3:16-cv-1476, 3:16-cv-1530, & 3:16-cv-1537
(Hon. Barbara M. G. Lynn)

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, AMERICANS FOR FINANCIAL REFORM, BETTER MARKETS, CONSUMER FEDERATION OF AMERICA AND NATIONAL EMPLOYMENT LAW PROJECT URGING AFFIRMANCE OF THE DISTRICT COURT'S DECISION IN ITS ENTIRETY

CERTIFICATE OF INTERESTED PERSONS
No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, DOING BUSINESS AS LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

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Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

Pursuant to 5th Cir. R. 29.2, the undersigned counsel of record certifies that all persons and entities who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the Motion of AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America and National Employment Law Project as Amici Curiae to File a Joint Brief in Excess of the Maximum Word Limit in Support of Defendants-Appellees and the Supplemental Statement of Interested Parties listed in the Brief for Amicus Curiae Financial Planning Coalition in Support of

Defendants-Appellees and Affirmance. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: July 6, 2017

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INTERESTS OF AMICI CURIAE[1]

This brief is filed on behalf of six nonprofit organizations that are deeply committed to enhancing the quality of advice that millions of Americans receive concerning investments in their retirement accounts.[2] Amici believe that the Department of Labor's ("DOL") Fiduciary Rule ("Fiduciary Rule" or "Rule") protects individuals' retirement accounts and thus promotes retirement security. Amici are intimately familiar with the Rule's provisions and the exhaustive rulemaking process DOL followed to craft it.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The regulation of investment advice concerning tax-preferred retirement savings is a straightforward exercise of DOL's core delegated authority under ERISA and the Code. Congress authorized DOL to define certain statutory terms related to the statutes' coverage, including the definition of "investment advice." It also permitted DOL to create conditional exemptions from statutorily prohibited transactions. Over the years, DOL has repeatedly exercised its authority to define terms and create exemptions. The Fiduciary Rule is nothing more than a long-overdue update of these definitions and exemptions to account for changes in

[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5).

[2] A more detailed description of the Amici Curiae is attached as Addendum A.

retirement planning and to better advance the statutes' remedial purposes.

Having thus been provided broad discretion to define "investment advice," DOL did so reasonably. The imposition of fiduciary duties on investment-advisory relationships is central to Congress's goal in ERISA of increasing protections for plan participants and beneficiaries. Whatever value DOL's 1975 definition of "investment advice" may have had—with its convoluted five-part test, major changes in the structure of employee retirement plans and the market for investment advice rendered it obsolete. The widespread adoption of defined contribution plans, like 401ks, in place of traditional defined benefit plans, and the corresponding profusion of rollover IRAs has meant that participants and beneficiaries are responsible as never before for the management of their own retirement savings. By limiting "investment advice" to ongoing relationships, the 1975 definition left trillions of dollars of rollover and other one-time IRA transactions unprotected. The definition of "investment advice" contained in the Fiduciary Rule restores fiduciary protections to the vast bulk of plan assets, and thereby realigns the regulation with Congress's language and intent.

DOL's interpretation of the prohibited transaction exemption provisions of ERISA and Code is, if anything, an even more straightforward application of delegated authority. In shaping the contours of fiduciary standards of care and loyalty under ERISA and the Code, Congress identified certain "prohibited

transactions," each of which constitutes a per se breach of fiduciary duty. *See* 29 U.S.C. §1106; 26 U.S.C. § 4975. But, Congress also delegated to the Secretary of Labor the authority to grant conditional or unconditional exemptions to the prohibited transactions. *See* 29 U.S.C § 1108; 26 U.S.C § 4975. Here, DOL created a conditional exemption known as the Best Interest Contract Exemption (the "BICE"), precisely as authorized by Congress.

Appellants fail to provide any valid legal or policy basis for their contention that something in ERISA or the Code prevents DOL from conditioning the BICE on adherence to impartial conduct standards simply because Congress imposed these standards directly elsewhere on a subset of fiduciaries. The same is true with respect to the BICE's other conditions, all of which—like the impartial conduct standards—are entirely voluntary. If Appellants or their members do not wish to comply with the BICE conditions, they may simply refrain from utilizing the exemption.

Appellants suggest that these voluntary conditions include the creation of a new federal cause of action—which must exceed Congress's delegation—because access to the BICE entails use of a contract. But, the BICE creates no new cause of action, federal or otherwise. Financial service contracts with IRA-holders are creatures of state law and have existed since Congress established these accounts. To be sure, eligibility for the BICE is conditioned on reducing such contracts to

writing and the inclusion of certain terms. But enforcement of the contract against a financial institution does not compel its compliance with, or remedy a violation of, federal law—the essence of a federal cause of action.

Appellants also second-guess DOL's decision to condition prohibited transaction exemptions involving fixed-index annuities ("FIA") on the terms of the BICE, as opposed to those of a less-rigorously conditioned exemption available for fixed-rate annuities. DOL performed a thorough study of the FIA market and determined that conflicts of interest there posed a severe risk to plan participants and beneficiaries, which existing state regulation failed to mitigate.

Contrary to the government's new position, nothing in the Federal Arbitration Act prevents DOL from barring class action waivers in contracts in order for transactions to be eligible for the BICE.

Finally, Appellants resort to an unprincipled First Amendment argument that—if taken seriously—would jeopardize nearly all professional duties of care.

ARGUMENT

I. THE FIDUCIARY RULE IS CONSISTENT WITH ERISA.

Appellants argue that the Rule is inconsistent with, and consequently unauthorized by, ERISA. They claim that DOL's interpretations of "fiduciary" and "investment advice" conflict with the meaning Congress ascribed to those terms in

the statute, and that DOL has exceeded its authority in crafting the BICE. As the court below held, these arguments are meritless.

A. DOL's Interpretation of "Fiduciary" and "Investment Advice" is Entitled to *Chevron* Deference.

In reviewing an agency's interpretation of a statute, the Court must apply the two-step analysis set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, 846 F.3d 99, 105 (5th Cir. 2017). As three district courts, including the district court here, have held in ruling in favor of Appellees,[3] DOL's interpretations of the terms "fiduciary" and "investment advice," as reflected in the Rule, are entitled to *Chevron* deference. DOL has broad statutory authority under ERISA to define "investment advice." As these courts have also held, the Rule is reasonable because it is consistent with ERISA's text, purpose, and legislative history.

1. ERISA expressly authorizes DOL to define the term "investment advice" and DOL stayed well within the boundaries of that authority.

DOL possesses statutory authority under ERISA to "prescribe such regulations as [it] finds necessary or appropriate to carry out the provisions" of the

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[3] In addition to the court below, *see* ROA 9873, the cases are *Market Synergy Grp. v. U.S. Dep't of Labor*, No. 16-CV-4083, 2016 U.S. Dist. LEXIS 163663, at *2 (D. Kan. Nov. 28, 2016), and *National Ass'n for Fixed Annuities v. Perez ("NAFA")*, 217 F.Supp. 3d 1, 23 (D.D.C. 2016).

statute. 29 U.S.C. § 1135. This statutory authority is notably broad, *see Johnson v. Buckley*, 356 F.3d 1067, 1074 (9th Cir. 2004); *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 708 (10th Cir. 1993), and unquestionably includes the power to define the term "investment advice." Appellants concede as much by touting DOL's previous regulation which established an outdated and thoroughly discredited five-part test for determining when a person's "investment advice" gave rise to fiduciary status under 29 U.S.C. § 1002(21)(A)(ii) of ERISA.

Appellants nevertheless maintain that it is outside the scope of the DOL's delegated authority to define "investment advice" in the manner it did. They claim that "fiduciary" as used in ERISA does not permit the definition because it tracks the narrower common-law meaning of the term. Br. for U.S. Chamber of Commerce Pls.-Appellants ("Ch. Br.") at 27-32.

Appellants' argument is baseless. As the court below concluded, *see* ROA 9889, Congress did not intend, nor does the plain language of ERISA limit itself to the common-law understanding of who is a "fiduciary."[4] To the contrary, Congress intended the term "fiduciary" as used in ERISA to include a broader class of persons than that included under the common law of trusts. In enacting ERISA, Congress took an "express statutory departure" from the common law of trusts when it defined the term "fiduciary" not "in terms of formal trusteeship, but in

[4] The argument was explicitly rejected by the other district court that considered it as well. *See NAFA*, 217 F.Supp. 3d at 25.

functional terms of control and authority over the plan . . . *thus expanding the universe of persons subject to fiduciary duties*." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-64 (1993) (emphasis added).

Thus, although ERISA's "fiduciary duties draw much of their content from the common law of trusts," which "governed most benefit plans before ERISA's enactment," the Supreme Court has stated that trust law "offers[s] only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departure from common-law trust requirements." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

One such departure from trust law is the "imposition of duties upon a broader class of fiduciaries." *Donovan v. Cunningham*, 716 F.2d 1455, 1464 n.15 (5th Cir. 1983); 120 Cong. Rec. 3977, 3983 (1974) (Rep. Perkins) ("The Committee has adopted the view that the definition of fiduciary is of necessity broad. . . . This is a departure from current judicial precedents but is necessary to the proper protection of these plans.").[5] Thus, Congress did not intend for the common law to limit fiduciary status under ERISA; rather, it intended the

[5] Another district court reached the same conclusion in rejecting this precise argument against the Rule by an industry trade group. *See NAFA*, 217 F.Supp. 3d at 24-25.

opposite.[6] Rolling back Congress's broad definition of "fiduciary" to the common law's more limited definition would contravene congressional intent and the statute's purpose of protecting retirement benefits. *See John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993) ("To help fulfill ERISA's broadly protective purposes, Congress commodiously imposed fiduciary standards on persons whose *actions* affect the amount of benefits retirement plan participants will receive." (emphasis added)).

2. DOL's definition of "fiduciary" is reasonable because it aligns with Congress's intent to provide broad protections for retirement investors in ERISA.

Under *Chevron* step two, the Rule is reasonable in light of ERISA's text, purpose, and legislative history. In enacting ERISA, Congress expressly stated that its purpose was to "protect . . . participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). Accordingly, ERISA is to be construed liberally, especially "in an era of increasing individual participation in [the] market." ROA 9896 n. 69. *See also Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 892 F.2d 1238, 1251 (5th Cir. 1990) (ERISA is to be given "a liberal construction…in keeping with its remedial purposes").

[6] Indeed, Congress's inclusion of a separate investment advice subpart in ERISA's fiduciary definition, *see* 29 U.S.C. § 1002(21)(A)(ii), shows as much, since that definition, by itself, takes the term beyond its common law meaning.

DOL reasonably applied these broad remedial purposes to current market realities when it revised its previous five-part test through the Fiduciary Rule. The five-part test has become wholly inadequate to fulfill ERISA's purposes. The retirement income landscape in America has changed drastically over the past four decades, shifting away from employer-sponsored defined benefit plans to employer-sponsored defined contribution plans (such as 401(k) plans) whereby retirement savers are increasingly responsible for their own retirement security. In addition, "the increased complexity and variety of financial products in the marketplace has sown 'confusion,' 'increase[d] the potential for very costly mistakes,' left retail investors more dependent on expert advice, and exposed plan participants and IRA owners to unknown conflicts of interest." *NAFA*, 217 F.Supp. 3d at 29 (quoting Final Fiduciary Definition, 81 Fed. Reg. 20,946, 20,949 (Apr. 8, 2016)). Moreover, "[i]n today's marketplace," commissions "give [] . . . advisers a strong reason, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the [plan] participants." Final Fiduciary Definition, 81 Fed. Reg. at 20,949-50.

One of the toughest and most complex financial decisions savers face is what to do with their retirement savings when they decide to retire or separate from their employers. The overwhelming majority of these plan participants are advised to roll over their retirement savings into Individual Retirement Accounts (IRAs),

often because it is in the financial interests of the adviser and not because it is in the best interest of the investor. Consequently, "limiting fiduciary status to those who render investment advice to a plan or IRA 'on a regular basis' risked leaving retirement investors inadequately protected—particularly when one-time transactions like rollovers will involve *trillions* of dollars over the next five years and can be among the most significant financial decisions investors will ever make." *NAFA*, 217 F.Supp. 3d at 28 (citing Final Fiduciary Definition, 81 Fed. Reg. at 20,949-55). This puts retirement investors at incredible risk. For example, "[a]n ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial advisor." *Id*. at 35 (citing Final Fiduciary Definition, 81 Fed. Reg. at 20,949). The vast changes in the retirement savings market and the devastating harms that can occur to savers demanded a broader application of the ERISA fiduciary standard. Not only is DOL's new test reasonable, but as the district court found, given today's market realities, "the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA." ROA 9895.

B. When it Adopted the BICE, DOL Stayed Within its Broad Statutory Authority to Establish Conditions for Exemptions.

1. DOL has broad authority over IRAs.

DOL has extensive authority over numerous aspects of IRAs, including authority to determine who is a fiduciary subject to the prohibited transactions set forth in the Code, and particularly relevant here, authority to create exemptions from those prohibitions relating to IRAs as well as employer-sponsored plans. DOL's broad statutory authority to create exemptions for IRAs disposes of the Appellants' core contention that DOL acted "without clear congressional authorization" when it promulgated the BICE. Ch. Br. at 44. And, it sets this case apart from the authorities the Appellants rely on, in which agency rules did or would *conflict* with the statutory language. As the district court explained, "Congress expressly created a regulatory scheme through which DOL has explicit and broad authority to regulate IRAs and employee benefit plans by granting conditional or unconditional exemptions from otherwise prohibited transactions." ROA 9904.

Title I of ERISA protects plans and their participants by requiring plan fiduciaries to act prudently and loyally. 29 U.S.C. § 1104(a). Congress supplemented these fiduciary duty provisions by categorically barring certain transactions that are likely to injure employee benefit plans. 29 U.S.C. § 1106; *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993); *Donovan v.*

Cunningham, 716 F.2d at 1464-65. The prohibited transaction provisions apply, with only minor variations, to both Title I employee benefit plans under 29 U.S.C. § 1106 and to Title II IRAs under 26 U.S.C. § 4975.

Congress gave the Secretary of Labor broad statutory authority to grant administrative exemptions to prohibited transactions under Title I. 29 U.S.C. § 1108. Because of the parallel provisions in Title I of ERISA and § 4975 of the Code, which governs IRAs, President Carter issued Reorganization Plan No. 4 in 1978. The Reorganization Plan expressly gave DOL authority over the fiduciary definition and prohibited transaction provisions in § 4975—authority to interpret, issue rules, and make exemptions to the prohibited transaction provision for IRAs. *See* Reorganization Plan No. 4 § 102. Congress ratified the plan in 1984. *See* Pub. L. No. 98-532, 98 Stat. 2705 (codified at 5 U.S.C. App. 1, 29 U.S.C. § 1001 note). Thus, the DOL has ample authority to create exemptions such as the BICE covering advisers to IRAs.

Appellants are also wrong to suggest that any other statutes, specifically the securities laws, stand in the way of DOL's authority over IRAs. Ch. Br. at 50. It is true that in § 913(g) of the Dodd-Frank Act, Congress explicitly gave the SEC authority to impose a fiduciary standard on broker-dealers giving investment advice about securities. But that provision has no bearing on the scope of DOL's authority under either ERISA or the Code. The SEC has no legal authority to issue

or update any rules implementing ERISA or the Code. Congress mandated that the DOL, not the SEC, discharge that responsibility. Furthermore, the SEC lacks any authority to regulate advice about investments that are not securities. Yet retirement accounts routinely include a variety of non-securities investments, including insurance products, real estate investments, and even commodities. Unlike the SEC, DOL has broad authority over all of these assets, as well as any other "moneys" or "property" of a retirement plan. *See* 29 U.S.C. § 1002.

2. DOL stayed within the ambit of its authority when it crafted the BICE.

All of the BICE provisions, including the conditional duties of prudence and loyalty, fall within the clear scope of DOL's statutory authority to establish exemptions. Indeed, the law *required* DOL to impose them to the extent they were necessary to ensure that the BICE met the requirements of both ERISA and the Code that exemptions protect plan participants. *See* 29 U.S.C. § 1108(a); 26 U.S.C. § 4975(c)(2). Accordingly, as the district court correctly found, DOL did not exceed its statutory authority when it conditioned the BICE on adherence to the duties of loyalty and prudence. ROA 9989-9908. The BICE "simply specifies conditions to qualify for exemptions when fiduciaries engage in transactions that are otherwise prohibited by ERISA and the Code." ROA 9900. DOL has for many years exercised its authority to develop exemptions and conditions not only for employer-sponsored plans, but for IRAs as well—and in situations where the

exemption would have a large-scale economic impact. ROA 9904 ("DOL has granted conditional exemptions under ERISA and the Code for almost half a century"); *id.* ("[S]ince at least 1977"). This exemption is at heart no different than the many other conditional exemptions that DOL has granted.[7]

DOL adopted the BICE after an extensive notice-and-comment period that led it to conclude that conflicts of interest in the market for retirement investment advice were widespread and could cost retirement investors tens to hundreds of billions of dollars over the next ten years. Based on these findings, DOL determined that it was necessary to require that fiduciaries adhere to impartial conduct standards if they wished to engage in otherwise prohibited transactions in order "to ensure that Advisers' recommendations reflect the best interest of their Retirement Investor customers, rather than the conflicting financial interests of the Advisers and their Financial Institutions." ROA 437. This fundamental rationale for the BICE is certainly reasonable, since, in the words of the district court, "advisers . . . paid on a commission basis may very well make investment recommendations that benefit themselves at the expense of plan participants and beneficiaries." ROA 9906. That basic conflict of interest applies with no less force

[7] See, for example, PTE 93-33, 58 Fed. Reg. 31,053 (May 28, 1993), as amended at 59 Fed. Reg. 22,686 (May 2, 1994) and 64 Fed. Reg. 11,044 (Mar. 18, 1999); PTE 97-11, 62 Fed. Reg. 5855 (Feb. 7, 1997), as amended at 64 Fed. Reg. 11,042 (Mar. 8, 1999); and PTE 91-55, 56 Fed Reg. 49,209 (Sept. 27, 1991), as corrected at 56 Fed. Reg. 50,729 (Oct. 8, 1991).

to advisers to IRAs, including those IRAs into which plan account balances are transferred, than it does to advisers to 401(k)s and other types of plans.

The substance of the BICE is also reasonable. *Id*. It provides that advisers electing to receive commission compensation—something the statutes otherwise prohibit—must make a legally enforceable commitment to give advice in the client's best interest; charge no more than reasonable compensation; avoid misleading statements; implement policies and procedures; and fairly disclose fees, compensation, and material conflicts of interest. ROA 9886. The BICE also provides for a written contract between adviser and client, which allows the adviser to impose mandatory arbitration on the client and limits the client's right to punitive damages and rescission, although it may not restrict the client's right to participate in class actions—a right that has also been preserved for years in other contexts, including FINRA arbitrations over securities law violations. ROA 9935. These protective conditions are all reasonable, and the district court correctly so held. ROA 9906-08; *NAFA*, 217 F.Supp. 3d at 49-50.

Contrary to the Chamber's argument, there is nothing in the statute that prohibits DOL from conditioning the BICE on compliance with rules that Congress directly imposed on plan fiduciaries but left open with respect to IRA advisers. It would be nonsensical to hold that the very safeguards Congress included in Title I as essential to protect the interests of participants and beneficiaries may not be

used by DOL as conditions for an exemption under Title II designed to protect those very same interests.

3. Compliance with the BICE is not mandatory, nor is the BICE unworkable.

Appellants wrongly assert that DOL is forcing firms and advisers to comply with the BICE. In reality, the BICE represents an accommodation to the industry's desire to preserve commission-based compensation, and it offers an alternative and entirely optional way to do so, subject to compliance with the conditions. As the district court stated, DOL does not mandate that Appellants' members adhere to the BICE—it merely lays out conditions that must be met to qualify for the exemption. To say that the industry has "no choice at all" but to accept the BICE, Ch. Br. at 51, is simply untrue.

Firms and advisers can still give conflict-free advice according to a variety of compensation models. The fact that many prominent firms have announced that they plan to continue to offer their customers a choice between fee and commission-based IRAs, *see* Bruce Kelly, *Despite new review of DOL fiduciary rule, firms are sticking with higher standard of care*, Investment News, Feb. 6, 2017, http://www.investmentnews.com/article/20170206/FREE/170209945/despite-new-review-of-dol-fiduciary-rule-firms-are-sticking-with, shows that firms are not being forced to comply with one compensation model over another. In addition, many companies that offer fixed-indexed annuities and

variable annuities are supplementing their existing menu of commission-based products with new fee-based alternatives. *See, e.g.,* Cyril Tuohy, *Here Come the Fee-Based Indexed Annuity*, InsuranceNewsNet.com, Feb. 20, 2017, https://insurancenewsnet.com/innarticle/here-come-the-fee-based-indexed-annuities.

Appellants' attack on the BICE misses a fundamental point. DOL was under no obligation to ensure that its approach would be based on the industry's preferred approach or that it would leave undisturbed the industry's preferred model, which was fraught with conflicts of interest. Neither ERISA nor the Code requires DOL to provide exemptive relief to a regulated industry. If some in that industry do not want to take advantage of the exemption, they are free not to do so. They can always structure their business practices in a way that complies with Congress's flat prohibitions, thus avoiding altogether the prohibited transaction exemptions and the BICE.

Appellants would have this court believe that the BICE is somehow "unworkable." But actual evidence of market developments since the Rule was finalized belies this claim. In reality, investors will have more and better options to receive high-quality, affordable advice and to be able to pay for that advice in a variety of ways, including through commissions; other fees such as asset-based fees, hourly fees, engagement fees, retainer fees, monthly subscriptions; or some

combination of fees and commissions. Indeed, evidence from firms' public announcements makes clear that retirement investment advice will continue to be available through all of these business models under the Rule. *See* Kelly, *supra* at 16. And, the fact that different firms are deciding to comply with the Rule in different ways proves that the Fiduciary Rule provides sufficient flexibility to enable firms to choose an approach that best fits their preferred business model.

C. The BICE's Written Contract Requirement Does Not Create a Private Right of Action and Is Reasonable.

1. DOL did not create a private right of action.

As the district court correctly held, the BICE does not create a private right of action to enforce federal law in violation of *Alexander v. Sandoval*, 532 U.S. 275 (2001). ROA 9908-12. The BICE does *not* give IRA owners the right to sue for violations of ERISA's or the Code's fiduciary provisions or to enforce the prohibited transaction rules. The BICE simply dictates terms that must be included in written contracts between financial institutions and IRA owners in order for financial institutions to qualify for an exemption from the prohibited transaction rules. Any action brought to enforce the terms of the written contract would have to be brought under state law, and the enforceability of the required contractual terms would ultimately be controlled by state law. If, for example, the financial institution acted imprudently or disloyally in violation of the contract, the IRA owner could not bring suit under ERISA or the Code to enforce the financial

institution's fiduciary duties, but could only seek enforcement of the contract under state contract law. Similarly, even if the financial institution did not comply with the BICE's terms, the IRA owner could not challenge the exemption, require the imposition of any excise tax, or seek any disgorgement, pursuant to the BICE. Accordingly, DOL has not created a private right of action to enforce federal law through creation of the BICE.

As the district court found, the BICE does not "change the enforcement regime that existed prior to the current rulemaking." ROA 9910. In fact, annuities held in IRAs have historically been subject to state breach of contract claims. *See, e.g., Jacobs v. Mazzei*, 977 N.Y.S.2d 123 (N.Y. App. Sic. 2013); *McGrogan v. First Commonwealth Bank*, 74 A.3d 1063 (Pa. Super. Ct. 2013); *Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W. 3d 480 (Mo. Ct. App. 2004). The BICE "merely add[s] certain new terms to contracts that already existed and were enforceable under state law." ROA 9910. If a court concludes that the contract terms are not enforceable, the IRA owner has no federal cause of action, nor can the federal government impose an excise tax or otherwise seek redress for a prohibited transaction.

Suits to enforce terms required by the BICE would not "turn on the construction of the meaning and scope of fiduciary duties created by federal law." Ch. Br. at 55. As shown above, the duties of loyalty and prudence have their roots

in common law duties that have been in existence for centuries. But even if a suit to enforce contractual terms relies on the construction of federal law, it does not follow that DOL has summarily created a private right of action to the Code. *See Lowe v. Gen. Motors Corp*., 624 F.2d 1373, 1379 (5th Cir. 1980) (stating that even though federal law might have significance or bearing on the case, the suit was not to enforce federal law and did not create a private right of action).

Finally, the Rule is not the first example of federal agency regulations requiring private contracts with mandatory provisions. As the district court below recognized, there are many examples where federal agencies, including DOL, require regulated entities to enter into contracts—often requiring specific provisions or promises. *See e.g.* PTE 84-14, 49 Fed. Reg. 9494, 9503 (Mar. 13, 1984), ROA 9910 (requiring "written management agreement" for "Qualified Professional Asset Managers" to state they are fiduciaries); PTE 06-16, 71 Fed. Reg. 63,786, 63,797 (Oct. 31, 2006); *see also NAFA*, 217 F. Supp. 3d at 37-38; ROA 9910-11 (citing examples of contractual terms mandated by other federal agencies). Like the contracts required by the BICE, these contracts are all enforceable by the private contracting parties. Appellants' argument, if credited, would invalidate all these contracts under *Sandoval.* However, a federal agency's use of private contracts to regulate is not new and does not result in a new cause of action.

II. DOL FULFILLED ITS DUTIES UNDER THE ADMINISTRATIVE PROCEDURE ACT, PARTICULARLY WITH REGARD TO ITS TREATMENT OF FIXED-INDEXED ANNUITIES.

The Administrative Procedure Act's ("APA") core requirement is that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). The extraordinarily thorough and well-supported Regulatory Impact Analysis ("RIA") and extensive accompanying analysis removes any doubt that DOL satisfied its obligations under the APA, including with regard to the Rule's treatment of fixed-indexed annuities ("FIA"). DOL thoughtfully analyzed current market practices, incentives, and regulations; considered and responded to comments in the record, addressing all legitimate concerns raised; arrived at reasonable conclusions; and explained its reasoning where it disagreed with commenters. Given the inadequacies in the state regulatory framework and the problematic features, sales practices, and compensation incentives associated with FIAs, described below, DOL acted appropriately in concluding that FIAs should be subject to the BICE. As the district court found, "DOL justified its decision [to move FIAs into the BICE] in three steps: (1) by explaining the complexity and risk of FIAs; (2) distinguishing between fixed-rate annuities and FIAs; and (3) demonstrating how FIAs and variable annuities are similar." ROA 9917.

Appellants erroneously claim that DOL's decision to subject FIAs to the BICE was arbitrary and capricious because DOL did not adequately consider the sufficiency of existing regulation in its decision-making. Ch. Br. at 36. As the district court found:

> The DOL comprehensively assessed existing securities regulation for variable annuities, state insurance regulation of all annuities, academic research, and government and industry statistics on the IRA marketplace, and consulted with numerous government and industry officials, including the National Association of Insurance Commissioners ("NAIC"), the SEC, FINRA, the Department of the Treasury, the Consumer Financial Protection Bureau, the Council of Economic Advisors, and the National Economic Council. DOL found the protections prior to the current rulemaking insufficient to protect investors.

ROA 9921.

The RIA included a close examination of the fragmented regulatory landscape affecting the distribution of annuities. For example, it reviewed the lack of uniformity with regard to state insurance suitability regulations. *See* ROA 673-680, 748 (only thirty-five states have adopted the NAIC model regulation.). And despite Appellants' claim, IALC Br. at 17, DOL demonstrated the problematic absence of national standards: The RIA cited to the Federal Insurance Office's Annual Report on the Insurance Industry, published in September 2015, which stated, "[a]s unprecedented numbers of seniors reach retirement age with increased longevity, and as life insurers continue to introduce more complex products

tailored to consumer demand, the absence of national annuity suitability standards is increasingly problematic." ROA 679.

Even in states that have adopted the Model Suitability Regulation of the NAIC, the regulations do not adequately protect retirement investors against sales-driven conflicts of interest. State insurance suitability rules resemble FINRA's suitability rules, which apply to broker-dealers' securities sales. ROA 670-72, 767-80, 748. DOL provided compelling evidence that such standards, even after recent updates, provide retirement investors with inadequate protections from sales-driven conflicts of interest in both contexts. *See* ROA 673-80, 733, 746-48, 767-69, 775-77, 919-23. Suitability rules allow the sale of the least suitable among a wide range of "suitable" investments and function more like a "do not defraud" standard than a best-interest standard. Given that mutual funds and annuity contracts are similarly fraught with harmful conflicts of interest based on sales incentives[8] (and that both types of products have been subject to similar regulatory frameworks), DOL appropriately concluded that retirement savers needed the enhanced protections offered under the rule for both variable annuities and FIAs.

Appellants assert that DOL's treatment of annuities was based on an analysis of mutual fund data, which was purportedly and capricious. IALC Br. at 45-48.

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[8] In fact, DOL found "the conflicts of interest in the annuity market can be even more detrimental than the mutual fund market." ROA 768. The RIA detailed how annuities sold on commission, and specifically FIAs, are associated with product features that are detrimental to retirement savers. *Id*.

However, DOL did not rely exclusively on evidence of conflicts of interest in the mutual fund market to justify regulatory action in the annuity market. While it is true that the quantitative analysis in the RIA was based primarily on mutual funds, where more high-quality data was available, the RIA also provided an extensive analysis of the annuity market. *See* ROA 646, 738-41, 754-56, 759-63, 767-69, 771-72, 775-77. This included a review of the various products and their features, the distribution of various annuity products, the conflicts of interest that exist in the annuity market, and the harms to retirement savers that can result from those conflicts. While data limitations impeded quantification of the losses that affect retirement savers who invest in annuities, DOL found nonetheless that there is "ample qualitative and in some cases empirical evidence that they occur and are large both in instance and on aggregate." ROA 646. Thus, DOL provided independent evidence beyond the mutual fund context that conflicts in the annuity market result in material harm to retirement investors and therefore demand the enhanced protections that the rule provides.

DOL requested on several occasions detailed and reliable data from the industry, including the Appellants in this case, that would enhance DOL's economic analysis. However, they indicated that this data was not available and that it would be prohibitively expensive to collect or compile it. ROA 806 n.385. After ignoring or refusing such requests, Appellants cannot now argue that DOL

should have relied on more or better data. Presumably, if the industry opponents actually had high quality, credible data to disprove DOL's research and findings, they would have provided it, instead of attempting, as they now do, to pick apart each and every piece of data that DOL relied on. The Supreme Court has held "[i]t is one thing to set aside agency action under the [APA] because of failure to adduce empirical data that can be readily obtained. It is something else to insist upon obtaining the unobtainable." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (citation omitted). Thus, it was entirely appropriate for DOL to make do with the information that was available and regulate on the basis of that available information.

To the extent DOL did consider the harms from conflicted advice that occur in the mutual fund market relevant and applicable to the annuity market, it was reasonable and appropriate for DOL to do so. The RIA demonstrated that similar sales-based incentives drive behavior, encouraging and rewarding advisers for acting in ways that are detrimental to investors. *See* ROA 759, 768-69. Those incentives and conflicts exist to the same, or even a greater, extent in the annuities market than the mutual fund market. DOL found that:

> various annuity products… involve similar or larger adviser conflicts [as compared to mutual funds], and these conflicts are often equally or more opaque. Many of these same products exhibit similar or greater degrees of complexity, magnifying both investors' need for good advice and their vulnerability to biased advice. As with mutual funds,

> advisers may steer investors to products that are inferior to, or costlier than, similar available products, or to excessively complex or costly product types when simpler, more affordable product types would be appropriate.

ROA 646 (citing *Handbook in the Law and Economics of Insurance Research*, "Insurance Agents in the 21st Century: The Problem of Biased Advice" (2014)). These experts also consider it appropriate to analogize conflicts in the mutual fund space to conflicts in the insurance space, stating, "[w]hile not exactly on point, this literature is comparatively well developed and involves many of the same basic considerations as are at play in insurance markets." *Id.*[9]

Appellants also criticize DOL's research relating to conflicts of interest in the property-casualty insurance market as not being directly applicable to FIAs, yet DOL found that:

> [T]he conflicts of interest between insurance agents and consumers are relevant and applicable in the annuity market as well; if anything the potential harm from conflicts of interest would be larger in the annuity market because purchasers of annuities are often older

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[9] At a basic level, the performance of an investment product is reduced by the amount of commission, fees, and administrative expenses that are charged for that investment product. All else being equal, the higher these costs, the lower the investment's value will be, regardless of how the costs are charged (whether directly or indirectly, or through a front-end commission, ongoing fee, or back-end surrender charge). Thus, the higher an annuity's commission, the worse the annuity product is likely to be for the investor and, at the same time, the stronger the incentive will be for the adviser to recommend the higher cost, lower value annuity product.

> individuals who are less sophisticated in financial matters than purchasers of commercial property-casualty insurance.

ROA 759.

The RIA collected specific examples of conflicts in the FIA context, including a financial professional who was rewarded for steering customers toward insurers approaching their production goals. *See* ROA 769. Moreover, when annuities are considered within the context of the broader range of investment products, a financial professional may have an incentive to recommend an annuity over other alternatives, such as mutual funds, because annuity commissions are often substantially higher than broker-dealers' mutual-fund or securities commissions. *See* ROA 768-69. Conflicts of interest are thus likely more pronounced in the annuity market than in the mutual-fund market. Furthermore, commissions are typically higher for selling more complex and opaque FIAs and variable annuities than simpler, more consumer-friendly fixed-rate annuities, thus increasing the incentives to recommend FIAs and variable annuities. *See* Stan Garrison Haithcock, *What Level of Commission Do Agents Earn on Annuities*, The Balance, June 25, 2017, https://www.thebalance.com/what-levels-of-commission-do-agents-earn-on-annuities-146003.

Also contrary to Appellants' claims, Ch. Br. at 18-20, DOL considered in depth the Rule's effects on consumer access and appropriately rejected the

contention that the Rule would restrict such access. *See* ROA 816, 944-61. As the district court found, "[a]fter analyzing the relevant evidence, DOL found fewer conflicts of interest, more transparency and a more efficient market would increase the availability of quality, affordable advisory services for small plans and IRA investors' and that it would not have "unintended negative effects on the availability or affordability of advice." ROA 9936. DOL analyzed both the Rule's effects on various market participants, the products they sell, and how these effects, in turn, would affect consumers. On balance, DOL determined that the industry's claims were overblown and that, while the Rule "may pose a particular challenge" to those businesses, including some insurers and mutual fund companies, "whose commission and other compensation structures have been highly variable and laden with more acute conflicts of interest," any temporary frictions in these markets "would be justified by the rule's intended long-term effects of greater market efficiency and a distributional outcome that favors retirement investors over the financial industry." ROA 945-46. DOL reasoned that:

> Investors whose advisers and product providers are so affected also may experience some amount of disruption as markets adjust, and may incur some costs to find, acquire, and adjust to new services and products from the same or different vendors. These same investors, however, absent this final regulation and exemptions, would likely have been the most adversely affected by adviser conflicts, and therefore may stand to gain the most from reform, notwithstanding near-term disruptions.

ROA 946. DOL further explained that "the same frictions that present challenges for some businesses may enhance opportunities for others," as new market competition would promote innovation in both product lines and business models. *Id.*

Finally, DOL also specifically considered the Rule's effects on small-balance savers, concluding, for example, that "the market already shows the potential to serve small accounts with quality, impartial, affordable advice or other effective support for sound saving and investing decisions." ROA 816.

III. THE FEDERAL ARBITRATION ACT IS NOT IMPLICATED WHERE AN EXEMPTION IS CONDITIONED ON THE DISUSE OF CLASS ACTION WAIVERS.

Nothing in the Federal Arbitration Act prevents DOL from barring class action waivers in contracts in order for industry participants to be exempt from otherwise prohibited transactions pursuant to the BICE. In the proceedings below, the Government argued as much, and the district court agreed. ROA 9951-53. Here, it reverses its position without justification.

First, although the Government claims its switch is compelled by the Acting Solicitor General's new position in *NLRB v. Murphy Oil USA,* Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017), the issues in those cases are entirely distinct. The core question presented in *Murphy Oil* is whether private arbitration agreements that ban collective actions can be enforced given, the right, established

in the National Labor Relations Act, 29 U.S.C. § 151-169, to engage in collective concerted activity. The Acting Solicitor General now argues that they must be, on the theory that existing arbitration agreements may only be invalidated through specific Congressional authorization. *See* Br. for United States as Amicus Curiae, *Murphy's Oil*. Regardless of the merits of this argument, it is entirely irrelevant to the case at bar, which concerns the scope of DOL's exemptive authority under ERISA and the Code to allow something which would otherwise be prohibited by law. The BICE does not prohibit the enforcement of existing arbitration agreements, the core focus of the FAA. It admittedly does disincentivize the use of such agreements for financial advisers who want to choose the option of the BICE,[10] but the FAA is not concerned with promoting such agreements.

Moreover, the government provides no other rationale than *Murphy Oil* to support its reversal. It barely addresses the dispositive issue in this case. In conclusory fashion, and without a single citation, the government declares that "losing the exemption and the associated relief from the prohibited transaction provision [] for having entered into an arbitration agreement" would be "a significant obstacle" to the FAA. To the extent the Government equates

[10] As discussed above, at I-B-3, nothing requires the industry to take advantage of the BICE. Businesses can structure their practices to comply with Congress's prohibitions, and include mandatory arbitration clauses with class action waivers.

"obstacles" to the formation of agreements with prohibitions on enforcement of existing agreements in violation of the FAA, its formulation is incorrect.

IV. THE RULE DOES NOT VIOLATE THE FIRST AMENDMENT.

The district court held that, even if Appellants' First Amendment challenge were not waived, the Rule does not violate the First Amendment because it merely regulates a professional-client relationship with only an incidental effect on speech. ROA 9944-51. This conclusion is correct and should be affirmed.

Appellants try to portray common-sense investor protection as an assault on one of the Nation's most cherished political values, freedom of speech. Because financial advisers must now, in certain circumstances, dispense advice with the same level of care they would use in managing their own affairs, we are told, their free expression is trampled. This is nonsense.

The government may regulate a professional's client relationship, including incidental speech. ERISA, the Code, and DOL's regulations do just that. Indeed, the Rule does no more than set the standard of care and loyalty for a professional service: investment advice for retirement. The distinctions that Appellants claim constitute "content" or "speaker"-based speech discrimination, *see* Brief for ACL and NAIFA Plaintiffs-Appellants at 16-17, are simply the contours of advisers' fiduciary obligations, which DOL was appropriately delegated discretion to draw.

Appellants seize on the unremarkable fact that governmentally imposed standards of professional conduct typically affect speech. This is because professional services are usually provided through speech. Doctors present diagnoses, lawyers counsel, financial advisers *advise*. Nothing in the First Amendment prevents the government from requiring that professionals exercise care and loyalty when giving their clients the diagnosis, counsel, and advice. The Rule no more limits Appellants' expression than the doctrine of professional negligence "restrains" the speech of engineers and architects who might otherwise recommend carelessly rendered blueprints.

It is telling that Appellants do not purport to challenge the DOL's previous line drawing. Nor do they imply that, had DOL declined to create any exemptions, the prohibited transaction provisions of ERISA would burden their free speech. Nor do they contend that had Congress simply left it solely to the courts to determine the scope of advisers' fiduciary duties—as courts do for common-law fiduciary relationships—there would have been a constitutional problem. There is no principled basis to distinguish the regulatory arrangement at issue in this case from those just described. They reflect merely different takes on the same exercise—the Congressional establishment of duties of care and loyalty for the provision of retirement investment advice.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision in all respects.

Dated: July 6, 2017

Sincerely,

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ADDENDUM A

AARP—with approximately 38 million members—is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement. Through, among other things, participation as amicus curiae in state and federal courts,[11] AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of pension, health, and other employee benefits that countless members and older individuals receive or may be eligible to receive. A major priority has been to assist Americans in accumulating and effectively managing the assets they will need to supplement Social Security, so that they can maintain an adequate standard of living in retirement.

Americans for Financial Reform ("AFR") is a nonpartisan, nonprofit coalition of more than 200 consumers, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, available at http://ourfinancialsecurity.org/about/our-coalition/. AFR works to lay the

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[11] *See, e.g.*, *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Cigna Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008). AARP and AARP Foundation generally file joint amicus briefs

foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to its members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation and investor protections.

Better Markets, Inc. (“Better Markets”) is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that create a stronger, safer financial system; promote the economic prosperity of all Americans; and protect individual investors from fraud, abuse, and conflicts of interest. Better Markets has submitted more than 225 comment letters to financial regulators, including DOL, advocating for strong implementation of reforms in the securities, commodities, and credit markets. It has also filed numerous amicus briefs in federal district and circuit courts defending agency rules on legal and policy grounds. *See generally* Better Markets, http://www.bettermarkets.com (including archive of comment letters and briefs).

Consumer Federation of America (“CFA”) is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA’s membership is available at http://consumerfed.org.

membership/. For three decades, CFA has been a leading voice in advocating for stronger protections for individual investors. CFA policy in this area is focused on ensuring that investors have a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they are the victims of wrongdoing. CFA's advocacy for a heightened standard of care when financial professionals offer investment advice dates back to at least 2000. Key letters and documents advancing that policy goal are available at http://consumerfed.org/issues/investor-protection/investment-professionals/.

The National Employment Law Project (NELP) is a national non-profit organization that for more than 45 years has advocated for policies and practices that promote economic opportunity and security for low-wage and unemployed workers. NELP's advocacy includes research, policy development and litigation, including filing amici curiae briefs in federal and state courts. To the extent low wageworkers have retirement savings that supplement social security at all, they have small-defined contribution plans or IRAs. These retirement vehicles require low wageworkers to make complex investment decisions that directly affect their quality of life in retirement. For that reason, many seek expert financial advice. Loopholes in prior regulations allowed important categories of financial advisers to operate with damaging conflicts of interest. These conflicts of interest are

estimated to have cost retirement savers billions of dollars a year, and no group of investors have been hurt more than low-wage workers, who — with their small savings — can least afford to absorb the losses. DOL's Rule closes these loopholes and provides low-wage workers with increased access to the impartial, quality investment advice that they badly need in order to accumulate as much money as possible towards retirement. NELP has a deep understanding of the rule, having followed closely its development and having participated in the rulemaking proceedings.

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the Court's Order dated June 28, 2017 in which the Court allows the Brief to exceed the word count but not to exceed 7,500 words because it contains 7,487 words.

2. This Brief complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(E) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: July 6, 2017

Respectfully submitted,

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, the foregoing Brief of Amici Curiae AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America and National Employment Law Project in Support of Defendants-Appellees was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Fifth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 6, 2017

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