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.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas (The Honorable Barbara M. G. Lynn)
Case Nos. 3:16-cv-1467, 3:16-cv-1530, 3:16-cv-1537

AARP'S REPLY TO APPELLANTS' CONSOLIDATED OPPOSITION

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May 1, 2018

CERTIFICATE OF INTERESTED PERSONS

No. 17-10238

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 ADVIORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

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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.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of the movant-proposed intervenor or that own stock in the movant-proposed intervenor.

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6. Insured Retirement Institute
7. Lubbock Chamber of Commerce
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9. Texas Association of Business
10. American Council of Life Insurers
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14. National Association of Insurance and Financial Advisors – Dallas
15. National Association of Insurance and Financial Advisors – Fort Worth
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6. Public Citizen Inc.
7. Public Citizen Foundation, Inc.
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9. Better Markets, Inc.
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AARP'S REPLY TO APPELLANTS' CONSOLIDATED OPPOSITION

AARP moved to intervene out of concern that the government would abandon its defense of the fiduciary rule. Although the government once "vigorously defended" the rule, as even the plaintiffs acknowledge, it no longer does so here now that the rehearing deadline has passed. Under standard intervention principles, that turn of events warrants granting AARP's motion to intervene.

None of the plaintiffs' efforts to avoid this conclusion is persuasive. Their view that the motion should be summarily denied for failing to comply with this Court's local rule covering "Emergency Motions" trips at the threshold: By its terms, that rule does not apply. And the plaintiffs' attack on AARP's standing fares no better. They posit a series of increasingly unlikely alternative ways that AARP members could avoid harm in the absence of the rule. But Article III's injury-in-fact requirement does not turn on the absence of harm-avoidance alternatives.

The plaintiffs' theory that AARP has failed to meet Rule 24's intervention requirements likewise contains multiple basic flaws. By focusing on the two years since this case was filed instead of the date when AARP became aware that its interests were likely no longer protected, the plaintiffs have misconstrued Rule 24's timeliness measure. And their claim that they will suffer prejudice because they will be forced to file "yet another brief" is unavailing. Filing a brief has yet to make it into the canon of legitimate reasons justifying denial. Finally, because AARP had

no strong incentive to seek intervention in this case at an earlier stage, granting its request to intervene now is necessary to "ensure that [this Court's] determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). The motion should be granted.

I. The motion does not seek emergency relief.

The plaintiffs lead with an odd procedural gambit: They argue (at 2–4) that the Court should convert AARP's motion into an "Emergency Motion," and then deny it because it does not "satisfy the requirements of Rule 27.3"—the rule governing motions seeking "emergency relief." In the plaintiffs' view, the motion "undoubtedly seek[s] emergency relief" because it was filed "four days" before the rehearing petition deadline.

That is not the standard for filing an emergency motion. To the contrary, Rule 27.3 covers motions "*seeking relief* before the expiration of 14 days after filing"—not those that are *filed* within 14 days of a deadline. 5th Cir. R. 27.3 (emphasis added). Were it otherwise, any motion that (to use the plaintiffs' words) is filed "within less than fourteen days" of a deadline—like an extension request under Rule 31.4.1—would "necessarily" become subject to Rule 27.3. Even more strangely, on the plaintiffs' understanding the same motion filed out of time would not. But that would thwart this Court's clear instruction that Rule 27.3 is reserved only for

situations where "there is an emergency sufficient to justify disruption of the normal appellate process." *Id.* (instructing that, absent such an emergency, "parties should not file motions seeking emergency relief").

That is not the case here. AARP seeks standard relief—an order granting AARP party status and extending the time to file a rehearing petition—requiring no "disruption of the normal appellate process." And the requested relief need not be granted within the 14-day period, as the Court may choose to consider the petition timely filed at any time before or after the expiration of the April 30 deadline. It therefore would have been improper to categorize the motions as "Emergency Motions" under Rule 27.3. As even the plaintiffs acknowledge (at 6), the motions here are "hardly the stuff of an emergency."

II. AARP and its members have standing.

The plaintiffs first challenge AARP's and its members' standing. They insist that, because it still might be possible to "get financial advice" that is unbiased, the "absence of the Fiduciary Rule" will produce no harm. Opp. 9–10 (pointing to existing "FINRA requirements" and claiming that anyone "can simply *contract* for a fiduciary relationship if they believe that will serve them best"). In other words, the plaintiffs argue that the existence of other possible means for avoiding harm places AARP's members "in a fundamentally different position" than a member of an

environmental group who would "experience increased emissions from a nearby plant unless EPA prevents it." Opp. 10. That is wrong.

Article III's "cost of admission" does not require the absence of harm-avoidance alternatives. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 318 (D.C. Cir. 2015). Where a party "benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit," a proposed intervenor has established "a sufficient injury in fact" for standing purposes. *Id* at 317.; *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (holding that movants who face the "prospect" of economic injury have standing to intervene in challenge to rule). And that is true regardless of whether the regulation affects the proposed intervenors "direct[ly]" or "indirectly." *Crossroads*, 788 F.3d at 318; *see also Military Toxics Project v. EPA,* 146 F.3d 948, 954 (D.C. Cir. 1998) (finding standing where members benefited indirectly from an EPA rule regarding munitions).

So it is here. The plaintiffs do not, and cannot, dispute that the rule was intended to benefit precisely those individuals who comprise the vast majority of AARP's membership. *See* Mot. 16. In justifying its rule, the agency explained that its new "definition of fiduciary investment advice" would "better protect[] plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty." ROA.322. A final "unfavorable decision" invalidating the rule

would indisputably "remove" the "benefit" of better protection from conflicts of interest and disloyalty. *Crossroads*, 788 F.3d at 317. And, beyond that, AARP's members face the serious prospect of economic injury in the absence of the fiduciary rule. *See* Mot. 13 (detailing the huge economic costs that would occur in the rule's absence). That is more than enough to satisfy injury-in-fact.

Were there any doubts about AARP's standing, the evidence in the record would cinch it. *See Fund For Animals v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003) (looking to member affidavits and declarations to support standing analysis). Consider an example. One AARP member explained that, although she does not "currently have a relationship with a financial planner," she hopes to find one who "will give me advice that is in my best interests." Ex. G ¶¶ 7, 9. And she is trying to make this crucial choice while confronting "marketing materials from many companies calling themselves financial advisers who have offered different products and advice." *Id.* ¶ 8. Others stand in a similar position. *See, e.g.*, Ex. C ¶ 9 (expressing the desire to "seek advice from someone who has my best interests in mind, but right now, I'm not sure who has to do that under the law"). The rule was designed to afford protection in just this situation by *requiring* that all such advisors adhere to

robust fiduciary standards and scrupulously act in the best interest of their clients. Its absence robs workers and retirees of this guarantee.[1]

In any case, the plaintiffs' theory proves too much. If it were true that standing could be defeated by simply positing the existence of harm-avoidance alternatives, then it would also apply to the hypothetical member of the neighborhood environmental group. After all, she could always purchase an air filter, avoid going outside, or, for that matter, move. For Article III purposes, however, it is enough that AARP's members have "a concrete stake in the favorable agency action" that was in place. *Crossroads*, 788 F.3d at 319.

III. AARP has satisfied the requirements for intervention.

The plaintiffs also contend that AARP's intervention motion does not meet several of Rule 24's requirements. These arguments are addressed in turn.

A. *The intervention request is timely*. The plaintiffs (at 11) accuse the movants of waiting an "exceptionally long" time before filing these motions because "[t]his case and others challenging the same regulation were filed nearly two

[1] It is no response to say, as the plaintiffs do, that other potential rulemakings from different agencies may alleviate some of the risk. *See* Opp. 4 (identifying a Securities and Exchange Commission proposed rule). That proposed rule, which is entirely speculative, is a half-measure. It covers only the sale of securities, not other investments that are typically found in a retirement account, including most insurance products or commodities. *See* Regulation Best Interest, SEC Release No. 34-83062 (Apr. 18, 2018), *available at* https://www.sec.gov/rules/proposed/2018/34-83062.pdf.

years ago." But this Court has explicitly held that the "absolute measure[]" of time that has elapsed in the case is not the relevant yardstick and "should be ignored." *Espy*, 18 F.3d at 1205. Instead, what matters is when the would-be intervenor "became aware that its interests would no longer be protected by the original parties." *Id.* at 1206.

The answer to that question easily disposes of the plaintiffs' objection. The plaintiffs concede (at 13), as they must, that the government "vigorously defended the Rule in the district court and before this Court." It was only when the government publicly announced that it would no longer enforce the rule that AARP feared that its interests would "no longer be protected." *Id.* And it is that "independent identifiable event" that triggered AARP's motion to intervene. *Save Our Springs Alliance Inc. v. Babbitt*, 115 F.3d 346, 347 (5th Cir. 1997). [2]

That explains why the plaintiffs are wrong to assert (at 16–17) that AARP "lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings." It "cannot be said" that AARP "ignored the litigation or held back from participation to gain tactical advantage," precisely because it "sought amicus

[2] The plaintiffs say (at 14 n.4) that the stipulated dismissal in the D.C. Circuit could "hardly signal a change in the government's position" because "the government *prevailed*" below. But following immediately on the heels of the government's announcement that it would not enforce the rule, the reasonable inference to draw from this dismissal is that the challenger no longer feared the government would compel its compliance with the rule.

status" and argued "potentially dispositive" issues in this case. *Day*, 505 F.3d at 966. So, contrary to the plaintiffs' assertion, AARP's intervention effort is reinforced—not undermined—by its conduct in this case. *See Espy*, 18 F.3d at 1205–06.

Consider Texas's failed intervention bid in *Save Our Springs*. There, the state "never" filed "a brief as *amicus curiae*," gave no indication that it would participate in the proceedings at all, failed to identify any "independent event" from which timeliness could be measured, and waited three months before seeking intervention. 115 F.3d at 34. Those factors led this Court to conclude that intervention was inappropriate in *Save Our Springs*; but here, they illustrate why intervention is warranted.

Falling back, the plaintiffs dispute that the agency's announcement on March 16 that it would not enforce the rule is a "recent development[]." Opp. 14. But this Court itself has specifically held that an intervention request filed "just under one month" after a party became clear that its interests would no longer be protected sufficiently "discharge[s] the[] duty to act quickly." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 262 (5th Cir. 1977) (rejecting the district court's view that this amount of time qualifies as a "'long' delay" warranting denial); *but see Save Our Springs*, 115 F.3d at 347 (concluding that *three months* "is too long a delay"). Yet again, the plaintiffs have found no case to support their contrary view.

B. ***There is no prejudice.*** The plaintiffs also claim prejudice. They will suffer, they say, because the intervention request has forced them "to file yet another brief," and may potentially require still more if movants "have their way." Opp. 16. That is weak. The standard for evaluating prejudice does not turn on "the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Espy*, 18 F.3d at 1206. Prejudice to a party exists when "relief from longstanding inequities is delayed." *Day*, 505 F.3d at 965 (internal quotations omitted).

But here, allowing AARP to intervene "will not create delay by inject[ing] new issues into the litigation" or "threaten to broaden the scope of the case going forward." *Id.* at 965–66. All it will do is "ensure that [the] determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Id.* at 965. And, unlike the state in *Save Our Springs*, AARP appended its rehearing petition to its motion to intervene. *See* 115 F.3d at 347 (criticizing Texas for failing to "file briefs as a party pending the court's decision on its motion to intervene"). Suffice to say: If filing "yet another brief" were the test, no intervention request could ever overcome this requirement.

C. ***Because the government has declined to file a rehearing petition, AARP's interests are not adequately represented.*** The plaintiffs' final argument also fails. They insist (at 18) that there is "no reason to believe" that the

government "does not adequately represent" AARP's interests. But, the plaintiffs do not dispute that the government has dropped its "vigorous[]" defense in this Court. And, true enough, the deadline for the government's rehearing petition has come and gone. That is all that's required. This "last requirement for intervention" is "not onerous"—a movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *Crossroads*, 788 F.3d at 321. And that is especially true in cases where the government's lawyers are expected to serve "as adequate advocates for private parties." *Id.* In those circumstances, as here, AARP has met its "'minimal' burden of showing that representation of its interest by existing parties may be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986).

Ultimately, the plaintiffs' claim here boils down to a complaint about posture. The government's "elect[ion] not to file a petition for rehearing," the plaintiffs say, does "not rise to the level of inadequate representation." Opp. 19. But the premise is flawed, and (once again) no case supports the plaintiffs' view. Instead, as AARP explained in its motion (at 7–8), those courts that have confronted this question have come out the other way. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (granting intervention for purpose of en banc review following panel decision); *Day*, 505 F.3d at 965 (same); *Safir v. Gibson*, 432 F.2d 137, 145 (2nd Cir. 1970)

(same). The plaintiffs have not even *tried* to distinguish these cases or explain why they should not control. That alone is enough to reject their view.

AARP had "no strong incentive to seek intervention in [this case] at an earlier stage," because, until the government's about-face following the panel decision, it had vigorously defended its own regulation. *Peruta*, 824 F.3d at 940. That is no longer the case.

CONCLUSION

The Court should grant AARP's motion to intervene.

Respectfully submitted,

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I hereby certify that this reply complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because it contains 2,535 words, exclusive of the portions excluded by Rule 32(f). I further certify that this reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this reply has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2016 in 14-point Baskerville font.

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I hereby certify that on May 1, 2018, I electronically filed the foregoing reply with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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