No. 17-10238

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; EDWARD C. HUGLER, ACTING 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; EDWARD C. HUGLER, ACTING 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.

EDWARD C. HUGLER, ACTING 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, Dallas Division, Nos. 3:16-cv-1476, 3:16-cv-1530, 3:16-cv-1537

BRIEF FOR ACLI AND NAIFA APPELLANTS

COUNSEL LISTED ON INSIDE COVER

ANDREA J. ROBINSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

MICHAEL A. YANOF
THOMPSON COE COUSINS & IRONS, LLP
700 North Pearl Street
25th Floor – Plaza of the Americas
Dallas, TX 75201

DAVID W. OGDEN
Counsel of Record
KELLY P. DUNBAR
ARI HOLTZBLATT
KEVIN M. LAMB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Counsel for 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 Advisor-Great Southwest, and National Association of Insurance and Financial Advisors-Wichita Falls

May 2, 2017

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,

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UNITED STATES DEPARTMENT OF LABOR; EDWARD C. HUGLER, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR,

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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.

EDWARD C. HUGLER, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

The undersigned counsel of record certifies the following listed persons and entities as described in the fourth sentence of Local 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.

Appellants the American Council of Life Insurers, the National Association of Insurance and Financial Advisors, the National Association of Insurance and Financial Advisors-Texas, the National Association of Insurance and Financial Advisors-Amarillo, the National Association of Insurance and Financial Advisors-Dallas, the National Association of Insurance and Financial Advisors-Fort Worth, the National Association of Insurance and Financial Advisors-Great Southwest, and the National Association of Insurance and Financial Advisors-Wichita Falls are all nonprofit associations or organizations that have no parent corporation, and no publicly held corporation owns 10 percent or more of their respective stock.

A. Plaintiffs-Appellants

1. American Council of Life Insurers
2. National Association of Insurance and Financial Advisors
3. National Association of Insurance and Financial Advisors-Texas
4. National Association of Insurance and Financial Advisors-Amarillo
5. National Association of Insurance and Financial Advisors-Dallas
6. National Association of Insurance and Financial Advisors-Fort Worth
7. National Association of Insurance and Financial Advisors-Great Southwest
8. National Association of Insurance and Financial Advisors-Wichita Falls
9. Others who are not participants in this matter but may be financially interested in its outcome include financial services providers, insurance companies, and retirement savers

B. Current and Former Attorneys for Plaintiffs-Appellants

David W. Ogden
Kelly P. Dunbar
Jessica P. Leinwand
Ari Holtzblatt
Kevin M. Lamb
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Andrea J. Robinson
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Michael A. Yanof
THOMPSON COE COUSINS &
IRONS, LLP
700 North Pearl Street
25th Floor – Plaza of the Americas
Dallas, TX 75201

C. Co-Plaintiffs-Appellants

10. Chamber of Commerce of the United States of America
11. Financial Services Institute, Inc.
12. Financial Services Roundtable
13. Greater Irving-Las Colinas Chamber of Commerce
14. Humble Area Chamber of Commerce d/b/a Lake Houston Area Chamber of Commerce
15. Insured Retirement Institute
16. Lubbock Chamber of Commerce
17. Securities Industry and Financial Markets Association
18. Texas Association of Business
19. American Equity Investment Life Insurance Company
20. Indexed Annuity Leadership Council
21. Life Insurance Company of the Southwest
22. Lubbock Chamber of Commerce
23. Midland National Life Insurance Company
24. North American Company for Life and Health Insurance

D. Attorneys for Co-Plaintiffs-Appellants

Eugene Scalia
Jason J. Mendro
Paul Blankenstein
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

David T. Bellaire
Robin Traxler
FINANCIAL SERVICES INSTITUTE, INC.
607 14th Street, N.W., Suite 750
Washington, DC 20005

Kevin Carroll
Ira D. Hammerman
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005

James C. Ho
Russell H. Falconer
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201

Kevin Richard Foster
Felicia Smith
FINANCIAL SERVICES ROUNDTABLE
600 13th Street, N.W., Suite 400
Washington, DC 20005

J. Lee Covington II
INSURED RETIREMENT INSTITUTE
1100 Vermont Avenue, N.W.
Washington, DC 20005

Joseph P. Guerra
Peter D. Keisler
Eric D. McArthur
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

Yvette Ostolaza
SIDLEY AUSTIN LLP
2001 Ross Avenue, Suite 3600
Dallas, TX 75201

E. Defendants-Appellees

25. United States Department of Labor
26. Edward C. Hugler, Acting Secretary, U.S. Department of Labor

F. Attorneys for Defendants-Appellees

Nicholas C. Geale
G. William Scott
Edward D. Sieger
Thomas Tso
Megan Hansen
M. Patricia Smith
Elizabeth Hopkins
U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
200 Constitution Avenue, N.W.,
Suite N-2119
Washington, DC 20210

Michael Shih
Michael S. Raab
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE
SECTION
950 Pennsylvania Avenue, N.W.,
Suite 7268
Washington, DC 20530

Galen N. Thorp
Emily Newton
Joyce R. Branda
Benjamin C. Mizer
John R. Parker
Judry L. Subar
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL
PROGRAMS BRANCH
20 Massachusetts Avenue, N.W.,
Room 6140
Washington, DC 20001

G. Amici in the District Court

27. AARP
28. AARP Foundation
29. American Association for Justice
30. Financial Planning Coalition
31. Public Citizen Inc.
32. Better Markets Inc.
33. Consumer Federation of America
34. Public Investors Arbitration Bar Association
35. National Black Chamber of Commerce

H. Attorneys for Amici in the District Court

Mary Ellen Signorille
AARP Foundation Litigation
601 E St., N.W.
Washington, DC 20049

Bernard A. Guerrini
6500 Greenville Avenue, Suite 320
Dallas, TX 75206

Martin Woodward
STANLEY LAW GROUP
6116 North Central Expressway,
Suite 1500
Dallas, TX 75206

Deepak Gupta
Matthew W. H. Wessler
GUPTA WESSLER PLLC
1735 20th Street, N.W.
Washington, D.C. 2009

Brandan S. Maher
STRIS & MAHER LLP
1920 Abrams Parkway, Suite 430
Dallas, TX 75124

Doug D. Geyser
STRIS & MAHER LLP
6688 North Central Expressway,
Suite 1650
Dallas, TX 75206

Brian W. Barnes
David H. Thompson
Peter A. Patterson
COOPER & KIRK PLLC
1523 New Hampshire Ave NW
Washington, DC 20036

Brent M. Rosenthal
ROSENTHAL WEINER LLP
12221 Merit Drive, Suite 1640
Dallas, TX 75251

Julie Alyssa Murray
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, N.W.
Washington, DC 20009

Braden W. Sparks.
BRADEN W. SPARKS PC
12222 Merit Drive, Suite 800
Dallas, TX 75251

Dennis M. Kelleher
BETTER MARKETS INC.
1825 K. Street, N.W., Suite 1080
Washington, DC 20006

Theodore Carl Anderson, III
Alexandra Treadgold
KILGORE & KILGORE PLLC
3109 Carlisle Street, Suite 200
Dallas, TX 75204

Richard Aaron Lewins
LEWINSLAW
7920 Belt Line Road, Suite 650
Dallas, TX 75254

Charles Flores
BECK REDDEN LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010

/s/ David W. Ogden
DAVID W. OGDEN
WILMER CUTLER PICKERING HALE
AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

May 2, 2017

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that their statutory and constitutional challenges to the Fiduciary Rule promulgated by the U.S. Department of Labor are sufficiently important to warrant oral argument.

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INTRODUCTION

Appellants are national and Texas-based associations that represent member life insurance companies, insurance agents, and brokers who issue, market, and sell insurance products, including annuities, to American retirement savers.[1] This suit challenges an attempt by the Department of Labor ("DOL") to upend and transform the way that annuities have been explained, marketed, and sold to consumers for decades. Through a complex of provisions, collectively called the "Fiduciary Rule" or "Rule," DOL has attempted a radical intervention in the retirement savings marketplace that imposes unprecedented burdens on traditional sales speech involving retirement products. Not only does the Rule constrict the flow of truthful information, but it also biases consumer choices by burdening speech about some products more than others—in both cases, harming the very retirement savers DOL purports to be protecting.

The Rule is deeply flawed and unlawful for many reasons. Appellants focus here on legal defects particularly relevant to annuities. First of all, the Rule violates the First Amendment rights of Appellants' members to communicate truthful commercial information to consumers about the annuities those members

[1] Appellants here—collectively, "Appellants" or "the ACLI and NAIFA Appellants"—comprise the American Council of Life Insurers ("ACLI"), the National Association of Insurance and Financial Advisors ("NAIFA"), NAIFA-Texas, NAIFA-Amarillo, NAIFA-Dallas, NAIFA-Fort Worth, NAIFA-Great Southwest, and NAIFA-Wichita Falls.

issue, market, and sell. The Rule imposes new and significant "fiduciary" burdens on garden-variety sales conversations and in doing so draws speaker-, listener-, and content-based distinctions—all of which are designed to manipulate the sales information and recommendations consumers receive to influence consumers to select products favored by DOL. The Rule is thus subject to, and fails, the heightened judicial scrutiny required by Supreme Court precedent as well as the intermediate scrutiny applied to commercial speech regulation.

The Rule's discriminatory treatment of annuities also fails the most basic requirements of reasoned decisionmaking under the Administrative Procedure Act ("APA"). Annuities play a critical role in today's retirement marketplace—a role that the Rule will substantially impede by placing heavier burdens on recommendations and sales of some types of annuities compared to others. Remarkably, despite the obvious impact that the Rule will have on retirement savers' choice of annuities, DOL wholly failed to consider the significant consumer benefits of the products the Rule threatens to drive from the marketplace, and therefore failed to assess the injury to consumers that the Rule will inflict. Furthermore, in imposing for the first time sweeping fiduciary obligations on insurance agents and brokers selling annuities, DOL failed to adequately consider the comprehensive and recently strengthened regulatory regimes that already protect consumers from the harms posited by the Rule. DOL's assessment of those

existing regimes was superficial and illogical and thus contrary to the requirements of reasoned decisionmaking.

For those reasons and others, this Court should grant Appellants equitable relief from enforcement of the Rule, vacate the Rule under the APA, or both.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court issued its Memorandum Opinion and Order on February 8, 2017, ROA.9873-9953, entering final judgment on February 9, 2017, ROA.9954. Appellants filed their Notice of Appeal on February 28, 2017. ROA.9959-9961. This appeal is timely under Federal Rule of Appellate Procedure 4(a)(1).

STATEMENT OF ISSUES ON APPEAL

In addition to the issues raised by the Chamber Appellants and IALC Appellants—which the ACLI and NAIFA Appellants join in and incorporate by reference here—the following issues are presented on appeal:

(1) Whether the Rule violates the First Amendment as applied to Appellants' members by imposing onerous fiduciary obligations on the commercial speech of insurance agents and others;

(2) Whether the Rule is arbitrary and capricious under the APA because DOL admittedly failed to consider the harm to consumers from decreased access to variable and fixed-indexed annuities under the Rule; and

(3) Whether the Rule is arbitrary and capricious under the APA because DOL unreasonably failed to consider whether existing, and recently strengthened, regulations already provide sufficient protection to retirement savers.

STATEMENT OF THE CASE

This appeal challenges a collection of related final rules promulgated by DOL, referred to collectively as the "Fiduciary Rule" or "Rule." ROA.322-1019. The statement of this brief focuses on the Rule's unlawful impact on those who buy, sell, and issue annuity products.

A. The Significant Role Of Annuities In The Retirement Savings Marketplace

Retirees today must balance numerous retirement objectives. They must save enough to provide for a potentially long life after retirement. They must protect their assets from the effects of inflation. And they must protect those assets against weak markets and declining asset values.

The annuity products that Appellants' members issue, market, and sell provide unique opportunities for retirement savers and retirees to balance those sometimes competing retirement risks and objectives. An annuity is a contract between an insurance company and an individual. Subject to the terms of the

contract, the individual invests a lump sum or series of payments, in exchange for periodic payments over either a set period of time or the individual's lifetime. An annuity can protect a retirement saver who lives a long life by providing a stream of guaranteed income payments for life. Retirement savers can further choose annuities with features that guard against inflation, investment-asset decline, or both.

Various annuity products allow retirement savers to prioritize these objectives differently. For example, a "fixed-rate annuity" prioritizes protection against investment risk by setting a declared interest rate that does not vary whether the market rises or falls. A "fixed-indexed annuity," by contrast, balances investment and inflation risk by tying rates, in part, to a market index, such as the S&P 500, while guaranteeing that rates will never fall below a specified minimum. And a "variable annuity" unlocks the full potential of investment market growth and thus maximizes protection against inflation risk by basing payments on a portfolio of assets selected by the retirement saver. Which type of annuity best meets the needs of a particular consumer depends upon, among other things, the consumer's financial situation, objectives, risk tolerance, and other investments.

Because they address the needs of retirees, annuities are enormously popular. Consumer satisfaction with annuities reflects the critical role they play in today's retirement marketplace in providing guaranteed lifetime income (in an era

with fewer and fewer pensions). For example, an earlier DOL-commissioned study "found that beneficiaries of lifelong guaranteed income"—through an annuity or pension—"were more satisfied in retirement and suffered from fewer depressions symptoms than those without such income." Brien & Panis, *Annuities in the Context of Defined Contribution Plans* 1 (Nov. 2011). The "boost in well-being became stronger" the longer a person was retired—a finding "consistent with the notion that … recipients of lifelong-guaranteed income … are less concerned with outliving their resources." *Id*.

Numerous other studies in the administrative record—largely ignored by DOL—also demonstrated the singular value of annuities to retirement savers. *E.g.*, ROA.7337, 7339, 7668-7669, 7811-7813.

B. Existing Practices Ensure Consumers Have Access To Annuities And Information About Annuities

Retirement investors often learn about annuities tailored to their particular objectives and circumstances the same way they learn about other products—through conversations with salespeople. For fixed annuities, that salesperson is most often an insurance agent; for variable annuities, it is a registered broker. Agents and brokers may be affiliated with an insurer and devote substantially all their sales 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—and especially those who sell fixed-indexed annuities—work

with third-party independent marketing organizations, from which they obtain sales support, product recommendations, and training.

Insurers pay agents and brokers sales commissions to compensate them for the time and effort needed to sell annuities. ROA.7337. Other compensation models, like annual fees based on a percentage of assets, are a poor fit for sales of annuities because most of agents' and brokers' efforts occur up front. ROA.7383-7384. An annuity, once purchased, is typically held for a long period without the need for added services from the salesperson. Fee-based accounts also typically require savers to maintain a minimum balance between $100,000 and $250,000—an amount that places such accounts out of reach for most Americans. ROA.8520-8521. And because savers often hold annuities for a long time without needing ongoing assistance, switching to annual fees would increase costs for many with no corresponding benefit. ROA.7358-7359, 7714-7715, 8561-8562.

C. Existing Federal And State Regulation Provides Robust Protection To Consumers

Comprehensive regulations govern annuities. ROA.7380-7381, 7388-7657. Designed to protect consumers, these regulations have the same stated goals DOL articulated in promulgating the Rule. As insurance products, all annuities are subject to state insurance laws administered by state insurance regulators. In addition, the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA") regulate the sale of variable annuities.

This regulatory oversight is designed to ensure that consumers receive truthful information about investment options and suitable retirement recommendations and to punish sellers who fall short. Regulators at both the state and national levels have strengthened these regulations in recent years, as described further below.

Anyone who sells variable annuities must register as a broker-dealer with FINRA and comply with, among other rules, both general suitability rules governing the sale of all securities (FINRA Rule 2111) and specific, more stringent requirements targeted at the sale of variable annuities (FINRA Rule 2330). Variable annuities must be registered with the SEC, 15 U.S.C. §§ 77f-h; customers must receive a prospectus filed with the SEC describing the annuity's features, *id.* § 77j; and variable annuity advertising must comply with FINRA Rule 2210-2.

Comprehensive state regulations also govern annuities. The National Association of Insurance Commissioners ("NAIC") has crafted a Model Suitability Rule for annuities that has been adopted in some form by 48 States and the District of Columbia. The recently strengthened 2010 Model Rule requires agent training in annuity products, supervision and oversight by the insurance company, and enforcement by state regulators. NAIC Model Suitability Rule § 6(A). It also prohibits an insurance agent from recommending an annuity until the agent has thoroughly informed the consumer of the annuity's features and benefits, and has determined that there are reasonable grounds to believe the annuity is suitable for

the consumer in light of, among other things, what the consumer has disclosed about his or her age, annual income, financial experience and objectives, investment time horizon, existing assets and investments, liquidity needs, liquid net worth, risk tolerance, and tax status. *Id*. §§ 5(I), 6(A).

D. The Rule

In April 2016, DOL promulgated the Rule, imposing new and burdensome rules on top of these existing regulatory programs. ROA.322-1019. As explained by the Chamber Appellants, Chamber Br. 11-21, the Rule classifies mere salespersons as "fiduciaries" under ERISA—a sweeping expansion of that category that prohibits traditional sales practices and modes of compensation—and creates a new exemption from the new prohibitions called the Best Interest Contract Exemption ("BICE"). The Rule's unprecedented definition of "fiduciary" encompasses brokers and insurance agents recommending the purchase of annuities for IRAs, thereby prohibiting receipt of commissions on those sales. The BICE, in turn, purports to permit brokers and agents to continue to receive commissions so long as the insurer executes a novel contract imposing a vast array of onerous conditions that are enforceable through class-action litigation.

DOL's new regime breaks sharply with past DOL regulations and federal law in many ways. As relevant here, the Rule would abandon a longstanding distinction between fiduciary investment advisers and non-fiduciary salespersons.

For more than 75 years, advisers hired to provide impartial investment advice have been required to comply with fiduciary obligations Congress imposed in the Investment Advisers Act of 1940. If an agent or broker was selling *advice* and not products, the agent or broker was a fiduciary. But agents and brokers who sell *products*, and whose advice is "solely incidental" to sales activity, have been subject instead to salesperson-specific regulations, including prohibitions against false or misleading speech and, more recently, suitability requirements. For the four decades prior to the rulemaking, DOL's considered statutory interpretation honored this distinction by limiting fiduciary status to relationships with characteristics emblematic of a traditional fiduciary relationship, that is, one with special hallmarks of trust and confidence. The Rule departs radically from that approach and subjects every ordinary sales conversation about covered retirement products to "the highest legal standards of trust and loyalty," ROA.358, even when the sales relationship lacks any "hallmarks of a trust relationship," ROA.366.

Moreover, the Rule discriminates among salespeople and sales pitches depending on the type of annuity being marketed or sold. Until now, DOL has treated all annuities the same way, permitting them to be sold under an exemption referred to as "PTE 84-24." The Rule, however, discriminates based on the content of the sales pitch, retaining the "streamlined" PTE 84-24 for products like fixed-rate annuities that DOL wishes to "promote" for consumers, but requiring

that variable and fixed-indexed annuities be sold under the "more stringent" BICE. ROA.553-554, 556. The Rule thus sharply tilts the playing field to help annuity products favored by DOL and to hurt those annuity products DOL disfavored.

E. Procedural History

After DOL issued the Rule, Appellants filed suit in the Northern District of Texas, ROA.10333-10437, and their suit was consolidated with suits filed separately by the Chamber Appellants and IALC Appellants in the same court, ROA.10564-10565. The parties cross-moved for summary judgment. Crediting DOL's litigation positions across the board, the district court granted summary judgment to DOL. ROA.9873-9954. This appeal followed.

SUMMARY OF THE ARGUMENT

I. The Rule must be declared unconstitutional as applied to Appellants' members because it violates the First Amendment rights of insurers, insurance agents, and brokers to engage in truthful sales speech with consumers about annuities. The Rule is a textbook example of content-based regulation of commercial speech. It is triggered by and targeted at sales speech—conversations involving "recommendations" to buy a retirement product. It imposes discriminatory burdens depending on the speaker, listener, and subject matter involved. And it is justified based on content: DOL's desire to prevent consumers from being persuaded by sales speech with which it disagrees. The Rule is

therefore unconstitutional unless it survives "heightened judicial scrutiny." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-566 (2011).

DOL cannot justify the Rule under traditional intermediate—let alone "heightened"—judicial scrutiny. DOL's assumption that commercial information tainted by financial interest is harmful is at war with the First Amendment. Any legitimate concerns identified by DOL could be achieved in numerous, less burdensome ways, including through simple and prominent disclosures or by directly regulating certain products and unreasonable compensation. And—like other paternalistic measures struck down because they burden truthful commercial speech—the Rule will harm, not help, consumers by decreasing access to truthful information about retirement products.

At a minimum, the canon of constitutional avoidance requires this Court to construe ERISA to avoid these serious First Amendment concerns.

II. Apart from the Rule's constitutional defects, the Rule must be vacated under the APA because it is arbitrary and capricious. By its own admission, DOL failed to consider an important disadvantage of the Rule: the harm to consumers from decreased access to variable and fixed-indexed annuities. The administrative record—which the district court summarily ignored—overwhelmingly established that the Rule would seriously impede consumer access to such annuities by requiring them to be sold under the onerous BICE rather than the more streamlined

PTE 84-24. Reasoned decisionmaking required DOL to account for the consumer benefits of those products and to justify the loss of those benefits.

In addition, DOL unreasonably disregarded the extensive, and recently strengthened, regulatory framework that already protects consumers with respect to annuities. DOL purported to show regulatory failure based on stale and inapposite data—data that predated significant regulatory reforms in and after 2010 and that measured only mutual fund performance, not annuities. Such analytic incoherence was arbitrary and capricious and requires vacatur of the Rule.[2]

STANDARD OF REVIEW

An agency rule that is "arbitrary and capricious," "contrary to constitutional right," or "in excess of statutory … authority" must be vacated. 5 U.S.C. § 706(2)(A)-(C). Agency action is arbitrary and capricious if the agency failed to "examine[] the relevant data," to consider "'relevant factors,'" or to "articulate[] a 'satisfactory explanation for its action.'" *Texas v. EPA*, 690 F.3d 670, 677 (5th Cir. 2012). "[J]udicial review of a claim that the agency's action violated [a party's] constitutional rights is conducted *de novo*." *Darden v. Peters*, 488 F.3d 277, 284 (4th Cir. 2007); *see Porter v. Califano*, 592 F.2d 770, 780 & n.15 (5th Cir. 1979). This Court's review of the district court's First Amendment analysis is also "de novo." *Bailey v. Morales*, 190 F.3d 320, 322 (5th Cir. 1999).

[2] Appellants incorporate by reference all the arguments made in the briefs filed separately today by the Chamber Appellants and IALC Appellants.

ARGUMENT

I. THE RULE VIOLATES THE FIRST AMENDMENT AS APPLIED TO THE COMMERCIAL SPEECH OF APPELLANTS' MEMBERS

The Rule imposes significant content-based and discriminatory burdens on the commercial speech of Appellants' members—insurers, insurance agents, and brokers who market and sell annuities to American retirement savers—in an unconstitutional effort to influence the purchasing decisions of consumers. Under the Supreme Court's commercial speech jurisprudence—including the Court's seminal decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)—the Rule is subject to, but fails, the "heightened judicial scrutiny" that the First Amendment demands be applied to such regulations of commercial speech. Appellants are therefore entitled to declaratory and injunctive relief protecting the rights of their members to engage in truthful, non-misleading commercial speech in aid of the marketing and sale of annuities. 28 U.S.C. §§ 2201-2202.

A. The Rule Is Subject To Heightened First Amendment Review

In *Sorrell*, the Supreme Court held that "[s]peech in aid of pharmaceutical marketing … is a form of expression protected by the Free Speech Clause of the First amendment." 564 U.S. at 557. The Court also held that "heightened judicial scrutiny" applies to government regulations that "impose a specific, content-based burden on [such] protected expression" because, the Court explained, laws that impose "content-based burdens must satisfy the same rigorous scrutiny as …

content-based bans." *Id.* at 565-566 (internal quotation marks omitted). *Sorrell*—a decision DOL did not discuss in its briefing before the district court and a decision that the district court wrongly brushed aside—governs the analysis here and compels application of "heightened judicial scrutiny" to the Rule.

1. The Rule imposes heavy burdens on non-fiduciary sales speech in a content-discriminatory manner

Sorrell demands application of "heightened scrutiny" to the Rule. Like the speech restriction struck down in *Sorrell*, the Rule "[o]n its face" burdens truthful commercial speech "based in large part on the content of [that] speech." 564 U.S. at 563-564. Regulation "is content based if [it] applies … because of the topic discussed" or "defin[es] regulated speech by particular subject matter [or] … by its function or purpose." *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). The Rule is plainly content-based: It regulates a particular subject matter of speech—what it calls "recommendation[s]," broadly defined to encompass any "suggestion" to buy a retirement product. 29 C.F.R. § 2510.3-21(b)(1). Speech with that content triggers fiduciary status and is subjected to new regulatory burdens. *Id.* § 2510.3-21(a). Indeed, the Rule, in its own words, applies to "a communication … based on its content." *Id.* § 2510.3-21(b)(1).

Equally significant, as in *Sorrell*, the Rule adopts myriad exemptions and distinctions that are "designed … to target" "disfavored speech by disfavored speakers." 564 U.S. at 564-565. Within the category of sales "recommendations"

subject to DOL's expansive definition of "fiduciary," the Rule draws discriminatory lines based on the identity of the speaker, the listener, and the retirement products being discussed. For example, while subjecting human insurance agents and brokers to the BICE, DOL declined to apply the BICE fully to so-called "robo-advi[sers]"—those who make recommendations generated by "software-based models or applications." ROA.435. DOL intentionally drew that line to avoid "adversely affect[ing]" the market for robo-advice—making clear its preference for the speech of some speakers over others. ROA.435.

Moreover, the Rule's "seller's carve out" draws listener-based distinctions based on DOL's judgment about which listeners are sophisticated enough to distinguish between sales speech and fiduciary advice. The Rule accordingly subjects sales speech directed at "retail investors and small plan providers," ROA.357, to fiduciary obligations, but includes a "seller's carve-out" for speech to specified representatives of large benefit plans, ROA.356. The Rule thus permits agents and brokers to engage in traditional commercial speech with a class of listeners DOL deemed "capable of evaluating investment risks independently," 29 C.F.R. § 2510.3-21(c)(1)(ii)—a judgment DOL made based on "proxies" for "financial sophistication" that have little to do with a listener's ability to distinguish a sales presentation from disinterested fiduciary advice, ROA.358.

Furthermore, the Rule discriminates against particular "message[s]"—those about variable and fixed-indexed annuities—reflecting DOL's hostility toward suggestions to customers to purchase those products. *See, e.g.*, *Sorrell*, 564 U.S. at 572 (striking down law intended to foster sale of generics and to disfavor sale of branded pharmaceuticals). For instance, agents and brokers "recommending" the purchase of a fixed-rate annuity need only comply with a "streamlined" regulatory regime (PTE 84-24), while they must satisfy a much more "stringent" regulatory regime (the BICE) when they "recommend[]" variable and fixed-indexed annuities to consumers. ROA.394. The BICE imposes even more stringent "conditions" when a seller discusses an insurer's "proprietary" annuities from a menu limited "in whole or in part" to such products, based on DOL's distrust of proprietary product sales. ROA.429. *Sorrell* makes clear that the First Amendment does not tolerate these sorts of content-discriminations.

Distinctions like those drawn by the Rule—that target communications by specific speakers to specific listeners about specific subject matters—are "paradigmatic" content discrimination subject to strong presumptions of invalidity. *Reed*, 135 S. Ct. at 2223. Such regulatory favoritism is anathema to the First Amendment. Just as "[t]here are divergent views regarding" the advantages of the generic pharmaceuticals whose sale the State favored over the brand-name ones it frowned upon in *Sorrell*, 564 U.S. at 578, reasonable differences of opinion surely

exist about the relative merits of variable, fixed-indexed, and fixed-rate annuities for consumers. "Under the Constitution," however, "resolution of that debate must result from free and uninhibited speech," not from government efforts "to tilt public debate in a preferred direction," *id.* at 578-579, and listeners must be trusted to make their own choices based on accurate commercial information, as the Supreme Court has long held.[3]

Finally, the Rule is a content-based restriction because it cannot be "'*justified* without reference to the content of the regulated speech.'" *Sorrell*, 564 U.S. at 566; *Reed*, 135 S. Ct. at 2227. As in *Sorrell*, the Rule seeks to prevent annuity sellers from persuading consumers to make purchasing decisions that "'conflict with [DOL's] goals.'" 564 U.S. at 580. DOL's stated concern about the "dangers" of "conflicted advice" is simply a concern that consumers will be persuaded by expression with which DOL disagrees. ROA.326. Dissatisfied with consumers' choices on a level playing field, DOL attempts to change those choices by differential regulation of commercial *speech*, heaping heavy burdens on speech about products it deems unsatisfactory for consumers. DOL knew that its decision

[3] *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 644-647 (1985); *Central Hudson Gas & Elec. Corp. v. Pubic Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-562 (1980); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 96-97 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-770 (1976).

to place variable and fixed-indexed annuities in the BICE as opposed to PTE 84-24 would create "regulatory incentives" for agents and brokers to stop discussing and recommending the disfavored products to consumers. ROA.395, 558-559.

That is textbook content discrimination. Indeed, it is not materially different from the example given in *Sorrell* of the government "seek[ing] to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles." 564 U.S. at 577-578; *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and in the judgment) (speech restrictions are *per se* illegitimate when "government's asserted interest is to keep legal users of a product … ignorant in order to manipulate their choices in the marketplace"). That the Rule heaps burdens on speech about some products (variable and fixed-indexed annuities) through the BICE—including massive liability under the BICE—while permitting speech about other products (fixed-rate annuities) under the more "streamlined" PTE 84-24, ROA.556, requires searching scrutiny under the First Amendment. *See Pitt News v. Pappert*, 379 F.3d 96, 111-112 (3d Cir. 2004) (Alito, J.) ("threat to the First Amendment arises from the imposition of financial burdens that may have the effect of influencing or suppressing speech").

2. The district court erred by effectively applying no First Amendment review to the Rule

For those reasons, the Rule must withstand "heightened judicial scrutiny." *Sorrell*, 564 U.S. at 565. As explained below in Part I.B, the Rule fails First Amendment review. The district court, however, did not subject the Rule to any First Amendment scrutiny. Its reasons for doing so are unconvincing and conflict with binding Supreme Court and Fifth Circuit precedent.

a. The professional speech doctrine does not shield the Rule from First Amendment review

On the merits, the district court declined to subject the Rule to *any* First Amendment scrutiny because, in its view, under the so-called "professional speech doctrine," the Rule "regulate[s] professional conduct, not commercial speech." ROA.9946. That is decidedly wrong for four reasons.

First, the Rule plainly regulates "speech," not "conduct." In fact, the Rule by its terms is targeted at and triggered by commercial speech—a protected category of expression under the First Amendment. Under the Rule, the threshold determination of fiduciary status is pegged to "communication[s]" in which a speaker has a financial interest and that "would reasonably be viewed as a suggestion" to buy a product. 29 C.F.R. § 2510.3-21(b)(1).

For example, a statement by an insurance agent that "I think you would like this annuity and you should consider buying it" triggers fiduciary regulation. But

that type of speech "propos[ing] a commercial transaction" is the very definition of commercial speech. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *see Gibson v. Texas Dep't of Ins.—Div. of Workers' Comp.*, 700 F.3d 227, 235 (5th Cir. 2012). By imposing regulatory burdens on the exercise of commercial speech rights, the Rule regulates *speech* purposefully and directly—not "incidental[ly]." ROA.9945; *see Sorrell*, 564 U.S. at 567 (restriction had "more than an incidental burden" where, "on its face and in practical operation," it was triggered by "the content of the speech and the identity of the speaker"); *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("regulating the communication of prices … regulates speech," not "conduct").

Second, the professional speech doctrine—which has never commanded a majority of the Supreme Court—is inapplicable because the Rule, in design and effect, sweeps far more broadly than regulating speech within existing fiduciary relationships. The professional speech doctrine traces to Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), a case involving the SEC's authority to regulate investment advisers under the Investment Advisers Act—advisers who by definition are offering fiduciary advice for a fee. In that context, Justice White opined that the government may regulate the conduct of true fiduciaries subject to less stringent First Amendment review. *Id.* at 228-229

As this Court recently cautioned, however, "application" of the professional speech doctrine—"[a]ssuming it is valid"—"should be limited." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). The limiting principle this Court identified in *Serafine* is that the doctrine applies, if at all, only within the narrow context of an existing fiduciary relationship, for example, between a doctor and patient or a lawyer and a client; "*[o]utside*" such "fiduciary relationship[s] … speech is granted ordinary First Amendment protection." *Id.* at 360 (emphasis added).

The narrow professional speech doctrine cannot rescue the Rule here because the Rule does not regulate existing fiduciary expression or speech within existing fiduciary relationships. Instead, it *imposes* fiduciary obligations in the context of sales relationships based solely on ordinary sales speech. Far from denying that fatal flaw, DOL trumpets, in its own words, that the Rule "sweeps broadly," ROA.324, rendering an ordinary seller of retirement products "subject to the highest legal standards of trust and loyalty," ROA.358, when the seller makes everyday sales recommendations. Indeed, DOL has disclaimed the need to show that the recommendations it now deems fiduciary occur within existing "relationships of trust and confidence"; in DOL's view, it may "artificially *create*[]" such relationships, and thereby restrict sales speech, subject to no First Amendment constraints at all. ROA.4986.

On that view, nothing limits government's power to deem speech "professional" and exempt itself from the Constitution, and nothing in the case law remotely countenances such a claim. To the contrary, the government "'cannot foreclose the exercise of constitutional rights by mere labels.'" *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). It follows that the Constitution does not permit the government to evade First Amendment protections by labeling non-fiduciary commercial speech "fiduciary." Were it otherwise, the government could regulate all manner of commercial speech with little or no First Amendment review simply by declaring that such speech is now "fiduciary" or "professional." Justice White rejected just that approach in *Lowe*:

> Surely it cannot be said … that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which 'unqualified' writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment.

472 U.S. at 231.

In holding otherwise, the district court assumed that an exemption in the Rule for "'general marketing materials'" adequately protects sales speech implicated by the Rule. ROA.9946. But to the extent the court viewed commercial speech protections applicable only to mass advertising or generalized marketing, it was certainly wrong. As the Supreme Court has held, "it is clear" that in-person sales conversations—like those Appellants' members engage in with

retirement savers day in and day out across the nation—are "commercial expression to which the protections of the First Amendment apply." *Edenfield*, 507 U.S. at 765. *Sorrell*—which involved individualized sales presentations promoting pharmaceutical products—stands for the same proposition. 564 U.S. at 557-558 (describing the in-person sales practice of "detailing").

Third, the district court improperly broadened the professional speech doctrine in another way, by applying it to a regulation unconnected to "a valid licensing scheme." *Serafine*, 810 F.3d at 360. As *Serafine* and other decisions make clear, the doctrine is anchored in, if anything, the government's "power to establish standards for licensing practitioners and regulating the practice of the professions." *Id.* at 359 (internal quotation marks omitted); 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 20:37.40 (2017) (professional speech "may be regulated as an incident to" authority "to license … professions").

DOL itself has acknowledged that limitation. ROA.5041 (doctrine is "most often" applied to "schemes" "involv[ing] the licensing of professionals"). DOL, however, neither licenses agents or brokers nor regulates those professions—other regulators (the SEC, FINRA, and state insurance departments) do. *See* ROA.668-676. The Rule thus fails the threshold requirement that a professional speech regulation be "incidental[] to a valid licensing scheme." *Serafine*, 810 F.3d at 360.

No other court of which Appellants are aware has applied the professional speech doctrine absent a close connection to an otherwise valid licensing scheme.

Fourth, even if the professional speech doctrine applied, it demands at least intermediate scrutiny, as multiple courts have recognized. *See Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1310 (11th Cir. 2017) (en banc); *National Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 840 (9th Cir. 2016), *petition filed*, No. 16-1140 (U.S. Mar. 20, 2017); *King v. Governor of N.J.*, 767 F.3d 216, 237 (3d Cir. 2014); *cf. Smolla & Nimmer on Freedom of Speech* § 20:37.40 (courts have developed "a form of intermediate scrutiny review" for professional speech regulation). The district court thus erred in subjecting the Rule to no First Amendment review.

b. The Rule is not targeted at misleading speech

The district court also wrongly credited DOL's alternative argument that any commercial speech "regulate[d]" by the Rule is "misleading." ROA.9949.

The Rule is not aimed at fraudulent or misleading speech, but rather burdens speech whether it is accurate or not if the speaker has "conflicts of interest" and therefore provides what DOL calls "conflicted advice." ROA.326, 963. Existing federal securities laws, SEC regulations, and state insurance laws already prohibit false and misleading statements in this setting, and as DOL effectively recognizes, another prohibition on false or misleading expression in this area would add

nothing.[4] The Rule applies to *all* "suggestions" to buy annuities or other products if the speaker is selling the products and thus has an interest in the transaction—whether the information provided is true or false. DOL has made clear that neither the imposition of fiduciary status under the Rule nor liability for violations of ERISA "require[s] proof of fraud or misrepresentation, and full disclosure is no defense." ROA.405. It is simply wrong, then, to say that the Rule burdens only false or misleading expression; it is specifically designed to burden all information, including entirely truthful non-misleading information, in the belief that truthful commercial information provided by interested salespeople (even those who fully disclose their interest) may persuade consumers to make investment choices that DOL deems are not in their "best interest." ROA.326-327, 772-773, 780.

The Supreme Court has long made clear that such paternalism cannot support regulation of speech. In *Sorrell*, for example, Vermont argued that marketing to doctors would "lead to prescription decisions not in the best interest of patients." 564 U.S. at 557. The Court rejected that position: "Those who seek to censor or burden free expression often assert that disfavored speech has adverse

[4] *E.g.*, 15 U.S.C. § 78j (prohibiting manipulative and deceptive practices that violate SEC rules); 17 C.F.R. § 240.10b-5 (prohibiting fraudulent and deceptive practices and untrue statements or omission of material facts in connection with sale of securities); NAIC Model Unfair Trade Practices Act § 4 (defining prohibited "unfair trade practice" applicable to insurer to include false or misleading statement in "sales presentation[s]").

effects"—that is why "'[t]he First Amendment directs [courts] to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.'" *Id*. at 577.

Were the district court correct that sales speech may be regulated as "misleading" whenever a seller has a financial stake in a recommended purchase, that would vitiate First Amendment protection for vast swaths of commercial speech. That is obviously not the law. All sellers (and buyers) have financial interests in commercial transactions, but that does not take commercial speech outside the protections of the First Amendment. To the contrary, "a great deal of vital expression" "results from an economic motive." *Sorrell*, 564 U.S. at 567; *see Edenfield*, 507 U.S. at 766; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 167 & n.63 (5th Cir. 2007).

The district court's alternative holding is misplaced for another reason: While the government may ban commercial speech that is "misleading," ROA.9950, "potential" to mislead is not enough, *In re R. M. J.*, 455 U.S. 191, 203 (1982); *Gibson*, 700 F.3d at 235-236. To justify banning a "form or method" of speech, DOL must demonstrate that the speech is "inherently likely to deceive" or "has in fact been deceptive," and that it cannot be presented in a non-deceptive

way, *R.M.J.*, 455 U.S. at 202-203; *Gibson*, 700 F.3d at 236—none of which DOL established here.[5]

c. The First Amendment claim was not waived

Although the district court reached the merits of Appellants' First Amendment claim (as discussed), it separately held that the claim was waived. ROA.9940-9944. That conclusion is twice flawed.

First, the court ignored the nature of the First Amendment claim. Although Appellants brought APA claims seeking vacatur of the Rule (a retrospective, across-the-board remedy), the First Amendment claim was brought as a pre-enforcement challenge to *prospective* application of the Rule to Appellants' members. ROA.10334, 10429, 10436. That distinction is fundamental, because typical APA doctrines such as exhaustion and waiver do not limit the broad

[5] The district court wrongly characterized this claim as "facial." ROA.9944-9945. "[T]he distinction between facial and as-applied challenges" goes to the scope of relief. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Here, the complaint—which the district court did not discuss—requests "declaratory and related injunctive relief from enforcement of the regulation as applied to the commercial speech regarding annuity products by [Appellants'] members." ROA.10436. That is a classic as-applied challenge. *See Citizen Action Fund v. City of Morgan City*, 154 F.3d 211, 217 (5th Cir. 1998), *opinion withdrawn on denial of reh'g*, 172 F.3d 923 (5th Cir. 1999). That Appellants also seek vacatur as an alternative remedy, 5 U.S.C. § 706(2), does not transform their "as applied" claim into a "facial" one. *See* ROA.10334-10335, 10341-10342, 10429, 10436.

availability of "simple pre-enforcement attack[s] on … regulation[s] … restricting speech." *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996).[6]

Waiver sensibly has no place in this context. For example, if an agency today announced imminent enforcement against a company for violating a rule promulgated decades ago, no one would suppose that the company could be barred from raising a First Amendment defense—whether it had participated in the rulemaking at all. Similarly, as long as its claim is ripe and other threshold criteria for suit are met, the company could seek declaratory and injunctive relief against *prospective* enforcement of the regulation. *See, e.g.*, *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997) (pre-enforcement challenge under First Amendment to prospective application of regulation against plaintiff). A contrary approach would give executive agencies carte blanche to enforce unconstitutional speech restrictions whenever such First Amendment concerns were not raised during a rulemaking. That cannot be the law.

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[6] Appellants' First Amendment claim does not depend upon the APA's cause of action because federal courts, without a statutory cause of action, may restrain federal officials from "unconstitutional actions." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). To be sure, Appellants also sued and sought vacatur under the APA in the alternative, 5 U.S.C. § 706(2)(B), but "resort to the APA as a basis for judicial review, and as a component of the … remedy, [is] unnecessary" because the Constitution provides sufficient basis to enjoin application of the Rule to Appellants' members. *United States v. District of Columbia*, 897 F.2d 1152, 1158 (D.C. Cir. 1990) (Ginsburg, R.B., J.).

Second, even if Appellants' First Amendment claim were wrongly conceived of as arising only under the APA, waiver would still be inappropriate. The Supreme Court in a plurality opinion in *Sims v. Apfel*, 530 U.S. 103, 107-108 (2000), held that "requirements of administrative issue exhaustion are largely creatures of statute" or agency "regulation." Where issue exhaustion is *not* required by statute or regulation, the doctrine is prudential—with its application turning on "the degree to which" the "administrative proceeding" resembles "normal adversarial litigation." *Id.* at 109. This Court has embraced *Sims*, holding that trial-like features of an HHS appeals board hearing—two adverse parties with counsel and rights to cross-examines witnesses, present argument, submit post-hearing briefing, and develop a record for appeal—supported issue exhaustion. *Delta Found., Inc. v. United States*, 303 F.3d 551, 561-562 (5th Cir. 2002).

Under *Sims* and *Delta Foundation*, however, there is absolutely no basis for holding that Appellants' First Amendment claim is waived. Neither ERISA nor DOL regulations impose *any* issue exhaustion requirement, a point DOL has never contested. And because the relevant administrative process—an informal notice-and-comment rulemaking—bears slight, if any, resemblance to "normal adversarial litigation," application of a judicially created waiver bar to Appellants' claim is

wholly unjustified.[7]

Prudential, judicially created waiver rules are especially inapt here. Waiver must be applied sparingly, if at all, when constitutional rights are at stake. As the Supreme Court has explained, "failure to have raised [a] constitutional claim" before an agency is ordinarily "not" a bar to asserting such a claim in court. *Mathews v. Eldridge*, 424 U.S. 319, 329 n.10 (1976). Courts have recognized a similar exception for constitutional claims in the related context of administrative exhaustion. *E.g.*, *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 176 (5th Cir. 2012); *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007). If the failure to participate at all in an administrative process may be excused where constitutional rights are at issue, it follows *a fortiori* that not having raised a specific constitutional objection where a party did exhaust its remedies should be subject to at least the same exception.[8]

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[7] The single Fifth Circuit case cited by the district court—*BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003)—is not to the contrary. The Court there applied waiver in the context of an EPA rulemaking, where, unlike here, exhaustion is statutorily required. *See* 42 U.S.C. § 7607(d)(7)(B) ("Only an objection to a rule … which was raised … during the period for public comment … may be raised during judicial review.").

[8] Strict application of waiver does not make sense here, moreover, because Appellants did raise the substance of their claim during the rulemaking. ACLI explained, for example, that the Rule inappropriately "interfer[es]" with "practices that are clearly recognized as the sales and marketing of products and services." ROA.7343. ACLI also argued—echoing its First Amendment claim—that by erasing "the line between traditional marketing and fiduciary investment advice,"

B. The Rule Fails First Amendment Scrutiny

Because the Rule imposes content-discriminatory burdens on truthful, non-misleading sales speech, it is subject to "heightened judicial scrutiny." *Sorrell*, 564 U.S. at 557. As in *Sorrell*, however, because the "outcome is the same" whether intermediate scrutiny or a heightened inquiry is applied, this Court need not resolve the precise standard of review. *Id.* at 571. Under traditional commercial-speech analysis, "it is [DOL's] burden to justify its content-based law as consistent with the First Amendment," *id.* at 571-572—which would require showing that the Rule "directly advances" a "substantial" government interest and "is not more extensive than is necessary to serve that interest," *Central Hudson*, 447 U.S. at 566. It is clear, however, that DOL cannot carry its burden.

First, although DOL has a legitimate interest in protecting retirement savers, its assumptions that commercial information tainted by financial interest is harmful and that consumers would be better off not hearing sales speech about certain

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"the [R]ule will have a chilling effect on all types of marketing activity," ROA.7339, depriving individuals of critical "information," ROA.7344. APA-waiver principles are based on an "analogy" to appellate rules, 530 U.S. at 108, and those rules do "not demand the incantation of particular words" to preserve a claim—only that "the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA Inc.*, 529 U.S. 460, 469 (2000). That standard was satisfied here because ACLI alerted DOL to the substance of its objections; in fact, DOL expressly identified and rejected the position of "commenters" that insurers and others have a "right … to market their products" free from onerous fiduciary regulation. ROA.358; *see Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998).

products are at war with the First Amendment. The core of commercial speech protections is that "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue,'" *Sorrell*, 564 U.S. at 566—an apt proposition where retirement options are at issue. For that reason, "the First Amendment presumes that some accurate information is better than no information at all." *Central Hudson*, 447 U.S. at 562.

The Rule rests on unconstitutional contrary assumptions. DOL's disparagement of consumers' capacity to process truthful information pervades the rulemaking. For example, in rejecting clear and simple disclosures as an alternative, DOL explained "that even if disclosure about conflicts could be made simple and clear, it could be ineffective—or even harmful." ROA.327. The Rule treats sales speech as inherently "danger[ous]" because it deems consumers as lacking any "financial expertise," being "bewildered" by retirement options, and "hav[ing] no idea how advisers are compensated for selling them products" and "little understanding of … conflicts of interest." ROA.325-326. Reliance on such propositions to keep consumers in ignorance of accurate commercial information invalidates the Rule at the outset. *See supra* note 2 (collecting authorities).

Even if DOL's assumptions regarding consumers' ability to process information, to understand disclosures, and to make retirement decisions had been reasonable and supported by record evidence—they were not—they are foreclosed

by the First Amendment, which "assume[s] that [truthful] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). "The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'" *Sorrell*, 564 U.S. at 578. DOL was not free to choose differently.

Second, the Rule is not narrowly tailored. Any legitimate concerns identified by DOL could have been addressed in ways that do not unduly burden speech. For example, to dispel confusion about when someone is acting as a salesperson rather than a fiduciary adviser, DOL could have mandated clear disclosures. *E.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Likewise, with respect to purportedly harmful products or unreasonable compensation, Congress could have regulated these directly, or DOL could have undertaken to educate consumers itself. *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). DOL rejected these more tailored approaches, opting broadly to regulate commercial speech, based on a view the Supreme Court has long foreclosed—that consumers cannot be trusted to make sense of truthful commercial speech.

Third, the Rule will harm, not help, retirement savers by decreasing access to timely, cost-effective retirement information. To survive intermediate scrutiny, DOL must prove not only that "the harms it recites are real" but that the Rule will "alleviate" them "in a direct and material way." *Edenfield*, 507 U.S. at 767, 770-771. The administrative record showed the opposite.

The record confirmed that the non-fiduciary sales conversations are low-cost means by which many consumers obtain useful information about retirement products. *See, e.g.*, ROA.9505, 9519. In particular, evidence showed that consumers need truthful information and expert assistance to help them understand annuities and to make decisions about those products. ROA.7337, 7669-7670, 8635. As the Supreme Court recognized in *Edenfield*, "direct and spontaneous communication between buyer and seller" has "considerable value" for both: The seller's "strong financial incentive to educate the market and stimulate demand for his product" results in "more personal interchange," which "enables a potential buyer" "to explore in detail the way in which a particular product … compares to its alternatives in the market." 507 U.S. at 766. The "benefits" of such speech are especially "significant" in the case of products like annuities whose features can be tailored to a buyer's individual needs. *Id.*; *see* ROA.7337, 7379.

The record was equally clear that, as basic economics would predict, the Rule's imposition of fiduciary obligations—with the resulting regulatory burdens

and litigation risks—will impede consumers' access to commercial information by raising the cost of providing such information. For example, increased compliance costs associated with fiduciary obligations, as well as the threat of class-action litigation under the BICE, will drive some agents and brokers out of the market, lowering supply and increasing the price of investment information for retirement savers. *E.g.*, ROA.7376, 8519. The Rule thus not only fails to advance DOL's stated interests but it vitiates consumers' First Amendment "right to receive information" that will help them make important life decisions. *In re Express-News Corp.*, 695 F.2d 807, 809 & n.2 (5th Cir. 1982).

C. ERISA Should Be Construed To Avoid These Serious Constitutional Problems

At a minimum, the serious constitutional concerns raised by the Rule should bear heavily on this Court's statutory analysis. Under the canon of constitutional avoidance, courts are "obligated to construe the statute to avoid" constitutional concerns where an alternative interpretation that would avoid those concerns is "'fairly possible.'" *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 753-754 (5th Cir. 2008).[9]

[9] Even if Appellants had waived the constitutional claim—they have not—this Court should nonetheless address First Amendment issues with the Rule under the avoidance canon to resolve the statutory question that *is* plainly before this Court. *See Lebrun v. National Railroad Trans. Corp.*, 513 U.S. 374, 379 (1995) (parties may raise "new arguments" in support of "consistent" position).

This is a cut-and-dry constitutional avoidance case. The statutory text defines a "fiduciary" to include those who "renders investment advice for a fee or other compensation, direct or indirect." 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). Even if the Rule permissibly interpreted that text (it does not), at the least, the Rule pushes the outer limits of the definition, construing it "broadly" to impose "fiduciary" status based on even traditional sales speech, ROA.324, and thereby directly implicating commercial speech rights.

"[A]n alternative interpretation of the statute," however, "is 'fairly possible,'" *St. Cyr*, 533 U.S. at 300—as explained by the Chamber Appellants and IALC Appellants, *see* Chamber Br. Part I; IALC Br. Part I. Indeed, DOL's prior construction of the statute governed the retirement market for more than four decades. Under that construction, speech does not give rise to fiduciary status unless, among other things, advice was rendered on a regular basis and was based on a mutual understanding that the advice would be individualized and serve as the primary basis for investment decisions. *See* Definition of the Term "Fiduciary," 40 Fed. Reg. 50,842, 50,843 (Oct. 31, 1975). Unlike the Rule, which invites "serious constitutional doubts," *Clark v. Martinez*, 543 U.S. 371, 381-382 (2005), DOL's prior interpretation avoids these First Amendment concerns.

II. THE RULE'S TREATMENT OF VARIABLE AND FIXED-INDEXED ANNUITIES VIOLATES THE APA

The Rule is also unlawful because DOL failed adequately to justify, consistent with requirements of reasoned decisionmaking, its regulatory treatment of annuities issued, marketed, and sold by Appellants' members.

A. DOL Unreasonably Failed To Account For The Rule's Effects On Consumer Access To Variable And Fixed-Indexed Annuities

The Rule should be vacated under the APA because DOL wholly failed to consider a significant disadvantage of the Rule—namely, the harm to consumers from decreased access to variable and fixed-indexed annuities. "[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). An agency thus must "*face* the trade-off[s]" caused by its decisions and explain why "the trade-off" it selected "was worth it." *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321, 323-324 (D.C. Cir. 1992). Otherwise, an agency has not fulfilled its duty to consider "important aspect[s] of the problem"—among the most fundamental obligations of non-arbitrary decisionmaking. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, DOL conceded that it did not assess as a "separate consideration" the disadvantages of decreased access to variable and

fixed-indexed annuities created by the Rule. ROA.5012. That omission renders the Rule arbitrary and capricious.

The administrative record demonstrated the enormous benefits that variable and fixed-indexed annuities provide retirement consumers. ROA.7350, 7379, 7756-7757, 8187, 8562-8563; *see supra*, pp. 4-6. Commenters stressed, for example, that annuities are the *sole* source of guaranteed lifetime income during retirement, ROA.7337, 7668, an important benefit in a marketplace in which consumers are living longer but without pensions. As noted earlier, a DOL-commissioned study confirmed the importance of ensuring access to annuities—finding that that "beneficiaries of lifelong guaranteed income … were more satisfied in retirement and suffered from fewer depression symptoms than those without." Brien & Panis 1. Other commenters explained why a range of annuity choices was important to consumers to help balance longevity, inflation, and investment risks. *See* ROA.7813. And others explained how variable annuities, in particular, provide insurance protections, while allowing consumer to benefit from capital market growth. ROA.7350, 7756-7757, 8187, 8562-8563.

The record also demonstrated that the Rule would seriously interfere with consumer access to annuities, skewing the marketplace. In particular, insurers have long paid sales commissions to compensate agents and brokers for the significant effort involved in learning about, marketing, and selling annuities.

ROA.768. But under the Rule, to continue to qualify for commissions, variable and fixed-indexed annuities would need to be sold under the "more stringent" BICE, while fixed-rate annuities can be sold under the "streamlined" PTE 84-24. ROA.553-554, 556; *see supra*, pp. 10-11. By exposing those who sell variable and fixed-indexed annuities to the burdens and risks of the BICE, the Rule, as DOL acknowledged, creates substantial "incentives" for those sellers to recommend fixed-rate annuities over variable and fixed-indexed annuities, ROA.395, 558-559, and thereby decreases consumer access to those products.

The resulting shift in the annuity market will reflect not consumers' best interests, but the differing regulatory burdens DOL imposed on speech about those annuities. The substantive standards imposed by the BICE and PTE 84-24 are identical, but only the BICE embeds "reasonable compensation" and "best interest" standards in contracts that will be enforced through breach-of-contract litigation in state and federal courts, exposing issuers and sellers to "class litigation, and liability and associated reputational risk." ROA.323. Making matters worse, DOL has thus far taken the position that each State (indeed, each jury) will be free to render different interpretations of those open-ended contract terms.

A national insurer operating under the BICE thus faces the near-impossible task not only of predicting the hindsight judgment of courts and juries, but also of having to do so without being able to assume that a practice upheld in one

jurisdiction will pass muster in another. Insurers, agents, and brokers can avoid those substantial risks by decreasing or stopping the issuance, marketing, and promotion of variable and fixed-indexed annuities, in favor fixed-rate annuities.

These harmful effects are not merely theoretical. "Subsequent events have borne out" commenters' prediction that the Rule would depress the market for variable annuities. *Wold Commc'ns, Inc. v. FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984) (Ginsburg, R.B., J.). Remarkably, variable annuity sales dropped by more than $28 billion in 2016 compared to the prior year, and according to industry observers, the Rule "played a huge role" in that "significant drop." Iacurci, *Department of Labor's fiduciary rule blamed for insurers' massive hit on variable annuity sales*, InvestmentNews (Mar. 28, 2017).

Although DOL promulgated a Rule that it knew or should have known would decrease consumer access to variable and fixed-indexed annuities, it failed entirely to consider the harms to consumers that would result. The district court summarily brushed aside DOL's failure, stating in a footnote that it was "unpersuaded that the new rules reduce consumer access to FIAs or variable annuities." ROA.9936. But the court offered no justification whatsoever for this conclusion, which flatly contradicts the administrative record, as explained above.

Equally important, the court's statement cannot be squared with the structure of the Rule or DOL's own position. In the rulemaking, DOL was clear that it

"intended and expected" the Rule "to move markets toward" what DOL believed would be "a more optimal mix of … financial products." ROA.945. And DOL laid bare its intention to influence consumer decisions in the "annuity market" in particular—predicting that the Rule would create "better matches between consumers and the annuity product." ROA.805; *see also* ROA.948 (anticipating market gains in "consumer-friendly insurance products"). Public statements made contemporaneously with the rulemaking made clear, moreover, which annuity products DOL disfavored: in a speech, DOL opined that "[v]ariable annuities are not the answer for so many people," and predicted that the Rule would steer consumers towards "simple investments" that it believed would better "serve[]" "[t]heir needs." Schoeff, *Perez calls out variable annuities in argument for DOL fiduciary rule*, Investment News (June 24, 2015).

Indeed, DOL acknowledged throughout the rulemaking that subjecting a product to the BICE, rather than PTE 84-24, would depress the market for that product—not because of anything intrinsic to the product but because of the disparate burdens the Rule created. DOL explained that placing fixed-rate annuities in "PTE 84-24 will ***promote access*** to the[m]," ROA.553 (emphasis added). It also predicted that moving fixed-indexed annuities from PTE 84-24 (as DOL had proposed) to the BICE was necessary to "avoid[] creating a ***regulatory incentive to preferentially recommend indexed annuities***" over variable annuities

and mutual funds (which DOL had always proposed to regulate under the BICE). ROA.395, 558-559 (emphasis added). And DOL declined to subject robo-advisers fully to the BICE to avoid "***adversely affect[ing]*** the incentives currently shaping the market for robo-advice." ROA.435 (emphasis added).

All of that unambiguously demonstrates that DOL knew that regulating variable and fixed-indexed annuities under the BICE while placing fixed-rate annuities in PTE 84-24 would decrease access to variable and fixed-indexed annuities. "When the government regulates in a way that" interferes with consumer "access" to beneficial products, "it owes them reasonable candor," so that "affected citizens at least know that the government has faced up to the meaning of its choice." *Competitive Enter. Inst.*, 956 F.2d at 327. That is particularly so here, where the Rule promotes some products (fixed-rate annuities) that serve one retirement objective (protection against investment risk) at the expense of others (variable and fixed-indexed annuities) that better serve a different objective (protection against inflation risk). *Cf. id.* at 323-324 (invalidating rule because agency failed to "*face* the trade-off" between promoting more fuel-efficient small cars at the expense of safer large cars). "Reasonable candor" would have meant accounting openly for the consumer benefits of the products that the Rule will drive from the market, and explaining why DOL nonetheless thought that the Rule's tradeoffs were worthwhile. DOL's failure to

consider this "important aspect of the problem" renders the Rule unlawful. *State Farm*, 463 U.S. at 43; *see Michigan*, 135 S. Ct. at 2707.

B. DOL Unreasonably Disregarded Existing Annuity Regulation

Independently, DOL breached the requirements of reasoned decisionmaking by failing to provide a reasonable explanation why it deemed insufficient the extensive, and recently strengthened, regulatory framework that governs annuity sales and protects consumers. DOL dismissed existing regulations based principally on nine quantitative studies, but, remarkably, those studies examined the wrong time period (before recent enhancements to state and federal regulations) and the wrong products (mutual funds, not annuities). Such arbitrary decisionmaking fell well short of DOL's obligations to consider all "'relevant factors,'" to articulate a "rational connection between the facts found and the choice made," *Texas*, 690 F.3d at 677, and "to determine whether, under the existing regime, sufficient protections … exist[]," *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010).

The administrative record established that the buying and selling of annuities is subject to comprehensive state, federal, and FINRA regulations and rules that ensure that brokers and agents provide consumers with suitable recommendations. ROA.6412-6414, 7380-7381, 7388-7657, 8529; *see supra*, pp. 7-9. To make the case that this existing regulatory framework was inadequate and that a new and

burdensome layer of regulation was needed, DOL relied principally on nine quantitative studies. ROA.795-796 (studies were "most relevant" evidence DOL examined). According to DOL, these studies demonstrated that, "notwithstanding existing [regulatory] protections, there is convincing evidence that advice conflicts are inflicting losses on IRA investors." ROA.747-748, 795-796. Two fundamental flaws, however, rendered DOL's heavy reliance on these studies irrational.

First, the studies could not possibly demonstrate the inadequacy of *current* regulations because they examine data gathered *before* recent enhancements to the regulations took effect. Seven of the studies use data from 2005 or earlier; two use data ending in 2007 and 2009, respectively. ROA.796-797. Between 2010 and 2012, however, both FINRA and state insurance regulators implemented more stringent regulation of the sale of annuities—a body of regulations and rules the studies could not possibly have analyzed. In 2012, FINRA adopted FINRA Rule 2111, which enhanced requirements govern the sale of securities generally, including both mutual funds and variable annuities. Rule 2111 "strengthen[ed], streamline[d], and clarif[ied]" existing consumer protections by codifying and defining the three core suitability obligations: customer-specific, reasonable-basis, and quantitative suitability. FINRA Regulatory Notice 11-02, at 1 (2011). It "expanded [the] list of explicit types of information that firms … must attempt to gather and analyze as part of a suitability analysis." *Id.* at 3. And for the first time

the Rule extended suitability regulation to investment strategies involving securities, such as recommendations to hold securities. *Id*.

A new, comprehensive layer of annuity-specific regulations similarly took effect only *after* the period examined by DOL's nine studies. Not until 2010 did FINRA finish implementing FINRA Rule 2330, which "provide[s] more comprehensive and targeted protection to investors regarding deferred variable annuities." FINRA Regulatory Notice 07-53, at 1 (2007). In 2010, the NAIC also promulgated a strengthened model suitability rule, which has since been adopted by 37 states and the District of Columbia. *See* Heinrich, *State Roundup: State of the States—2015 Year in Review*, NAFA Annuity Outlook Magazine (Feb. 10, 2016). Record evidence demonstrated that this new rule has produced significant marketplace effects. *E.g.*, ROA.9242. The outdated studies DOL used could not possibly have measured the efficacy of these newly strengthened regulations.

Second, DOL's studies focused almost exclusively on *mutual funds*, not insurance products such as variable and fixed-indexed annuities. ROA.796-797. Annuities and mutual funds, however, are subject to different regulatory regimes—a fact that the district court ignored in blessing DOL's reliance on mutual fund studies. *See* ROA.9924. While both mutual funds and variable annuities must comply with generally applicable suitability standards set by FINRA Rule 2111, variable annuities are *also* governed by a customized and comprehensive

regulatory framework that was enhanced in 2010 specifically to account for annuities' unique features—FINRA Rule 2330. That rule requires brokers to have a reasonable basis to conclude that a customer would benefit from the annuity's distinct characteristics, such as tax-deferred growth, annuitization, or a death or living benefit. Member firms must develop written supervisory policies and procedures and create compliance training programs to ensure that those who effect and review covered deferred variable annuity sales understand their material features. And a registered principal must approve *each* deferred variable annuity sale—a heightened supervisory requirement that does not apply to mutual funds.

The recently strengthened 2010 version of the NAIC Model Suitability Rule creates similar protections for variable and fixed-index annuities. An agent must have reasonable grounds to believe the "consumer would benefit from certain [annuity] features," and from "[t]he particular annuity as a whole." NAIC Model Suitability Rule § 6(A)(2)-(3). And issuers must not only develop and implement product-specific compliance training but establish processes for reviewing each recommendation to ensure there is a reasonable basis to believe it is suitable—a requirement akin to FINRA's principal review obligation. *Id.* §§ 6(F), 7.

DOL's outsized reliance on its nine studies to demonstrate regulatory failure was thus doubly irrational, as those studies could have spoken only to a defunct regulatory framework that once governed different retirement products. DOL's

failure to "ma[ke] a reasonable effort to ensure that appropriate data was relied upon" renders the Rule "arbitrary and capricious." *Resolute Forest Prods., Inc. v. USDA*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016); *see also Desoto Gen. Hosp. v. Heckler*, 766 F.2d 182, 185-186 (5th Cir. 1985) (reliance on study that does not support agency's conclusions is arbitrary and capricious); *Business Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011) (similar).

None of the district court's reasons for excusing these defects withstands scrutiny. The court affirmed DOL's reliance on stale data on the grounds that DOL conducted a new analysis after the comment period closed using mutual fund data from 1980 to 2015 (ROA.803, 967-968), and that it "reviewed data from 2008 through 2014 submitted by commenters." ROA.9925. But the commenter-supplied data actually cast doubt on DOL's studies, ROA.800-801, 7375, 8500-8507; DOL "reviewed" those data in an attempt to justify disregarding them, *not* to explain why the data confirmed the studies, ROA.801-803. And DOL's own analysis does not plug the hole left by the nine studies: Rather than isolate and study the period following adoption of the new annuity regulations, DOL diluted data from those years by mixing them with two decades of data from earlier years—making it impossible to tell whether mutual fund underperformance was attributable to products recommended before the new rules took effect. ROA.967-

968. And DOL repeated one of the errors that plague its other studies, focusing once again on *mutual-fund* performance, rather than *annuities*. ROA.967-968.

Even setting aside these substantive analytic flaws, DOL "commit[ted] serious procedural error" in supplementing the record with such a significant study—the *only* quantitative analysis relied on by DOL in the entire rulemaking that examined data after 2009—without providing the public an opportunity to comment on that analysis. *Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007). "[C]ritical factual material that is used to support [an] agency's position," like DOL's last-minute analysis, "must … be[] made public in the proceeding and exposed to refutation." *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

Finally, the district court asserted DOL had no obligation even to "consider whether existing regulation was sufficient" and that DOL would have "satisfied the APA even without the [nine] studies." ROA.9921, 9923. It is doubtful whether it would ever be non-arbitrary for an agency to impose massive regulatory burdens without first determining that extant regulations had failed to achieve the agency's objectives. But that is beside the point here, because DOL "must defend its analysis before the court upon the basis it employed in adopting that analysis." *American Equity*, 613 F.3d at 177. And here DOL *did* justify the Rule based on claims that existing regulations were inadequate and it *did* rely principally on the

nine studies in trying to substantiate that claim. ROA.764, 795-796, 807. It therefore had an obligation to conduct that analysis in a reasonable manner: "Professing that an order ameliorates a real industry problem but" citing no reliable "evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006). The Rule is therefore unlawful and must be vacated.[10]

CONCLUSION

For these reasons, the district court's judgment should be reversed and remanded with instructions to direct vacatur of the Rule, to award appropriate declaratory and injunctive relief to Appellants, or both.

[10] The hodgepodge of additional evidence the district court cited does nothing to backstop DOL's nine studies. According to the court, DOL "considered" two bulletins in which the SEC and FINRA "express[ed] concern" that existing regulations "did not provide adequate protections." ROA.9925. But that is not what the bulletins say—or even what DOL claimed they say. *See* ROA.756, 777, 921. Rather, the bulletins simply educate consumers about the various features of fixed-indexed annuities—an example of the existing regulatory regime working, not evidence of its inadequacy. The district court also credited DOL for "consider[ing] studies" of (i) the property/casualty insurance market and (ii) life insurance sales in India. ROA.9924; *see also* ROA.759, 785-786. But "no property/casualty insurance products are subject to suitability rules." ROA.4200. And a central finding of the India study is that agents often recommended "*unsuitable* products." ROA.785-786 (emphasis added). Neither study therefore sheds any light on the efficacy of the robust suitability regime that governs annuities in the United States.

Respectfully submitted,

/s/ David W. Ogden

DAVID W. OGDEN
Counsel of Record
KELLY P. DUNBAR
ARI HOLTZBLATT
KEVIN M. LAMB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

ANDREA J. ROBINSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

MICHAEL A. YANOF
THOMPSON COE COUSINS & IRONS, LLP
700 North Pearl Street
25th Floor – Plaza of the Americas
Dallas, TX 75201

Counsel for 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 Advisor-Great Southwest, and National Association of Insurance and Financial Advisors-Wichita Falls

May 2, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 11,439 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ David W. Ogden
DAVID W. OGDEN

May 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ David W. Ogden
DAVID W. OGDEN