No. 17-10238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

Plaintiffs-Appellants,

V.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-cv-01476

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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 interested persons and entities 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 any plaintiff-appellant or that own stock in the plaintiffs-appellants.

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5. Humble Area Chamber of Commerce d/b/a Lake Houston Area Chamber of Commerce
6. Insured Retirement Institute
7. Lubbock Chamber of Commerce
8. Securities Industry and Financial Markets Association
9. Texas Association of Business
10. American Council of Life Insurers
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INTRODUCTION

The briefs before the Court and the history of the rule at issue make two things clear: First, the Fiduciary Rule will have major economic and political consequences that, in the words of the Department of Labor ("DOL"), are "undeniably significant." DOL Br. 23. Second, the Rule is unprecedented. Never before has the mere act of being a salesperson—of recommending the purchase of your company's product—been deemed an act that marks you as a fiduciary. And never before has any agency been permitted to do what DOL has done here: wield the ability to *exempt* entities from regulation as a power to *erect* an entirely new regulatory architecture in an area (Individual Retirement Accounts, or "IRAs") where the agency lacks affirmative authority to regulate in the first place.

DOL's overreach is fatal to the Rule. As DOL is forced to concede, there is a "presumption that Congress incorporates the meaning of common-law terms into statutes." *Id.* at 16. Yet DOL has adopted an interpretation of "fiduciary" that is at odds with the common-law understanding of that term and the language Congress enacted in ERISA and the Code to capture fiduciaries' historical "function." When a law looks to

historical precedent, as ERISA and the Code do, it will not do to adopt a rule that defies centuries of precedent, as this Rule does.

As for DOL's foray into matters wholly outside its regulatory power and expertise—including insurance products and agents, broker-dealers, and the efficacy of the securities laws' disclosure requirements—a recent line of Supreme Court decisions denies agencies deference in similar circumstances, striking down their regulatory excursions. DOL attempts, unsuccessfully, to distinguish those cases on their facts, but it does not and cannot take issue with the principle for which they stand: When an agency "claims to [have] discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy," the courts "greet its announcement" not with deference, but with "skepticism." *Util. Air Regulatory Grp. ("UARG") v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (quotation omitted).

DOL has now admitted one error resulting from its detour into matters outside its ambit and expertise: its violation of the Federal Arbitration Act. But that was part of a larger transgression, in which DOL calculated what private "legal mechanism" (ROA.410) it thought was

needed to vindicate the rights it was creating, and then compelled regulated entities to enter a "Best Interest Contract" ("BIC") for the sole purpose of activating that enforcement mechanism. In adopting that requirement, DOL acted with an objective that is forbidden by *Alexander v. Sandoval,* 532 U.S. 275 (2001), is arbitrary and capricious, and exceeds DOL's authority. DOL may prefer now to ignore the "critical" role it attributed to the BIC enforcement mechanism when adopting it, but DOL cannot defend the Rule on that basis. ROA.398. The BIC—and the Rule as a whole—is arbitrary and capricious, and it must be vacated.

ARGUMENT

I. The Rule's Interpretation Of "Fiduciary" And "Render Investment Advice For A Fee" Is Contrary To The Plain Statutory Language, Unreasonable, And Arbitrary And Capricious.

DOL's brief does not dispute that if a salesperson tells the owner of an IRA, "You'll love my company's new annuity product, let me tell you about it," then under the Rule that person is a "fiduciary" who—if the annuity is purchased and a commission paid—has "render[ed] investment advice for a fee." 26 U.S.C. § 4975(e)(3)(B). Yet DOL expressly concedes (at 16) the "presumption that Congress incorporates the meaning of common-law terms into statutes"; effectively concedes (at 29) that

the term "fiduciary" has a settled common-law meaning referring to special relationships of trust and confidence; and admits (at *id.*) that the Rule's broad new interpretation "emphatically reject[s]" that common-law meaning. *See also* ROA.324, 1033. During the rulemaking, moreover, DOL admitted that its new "broad test" for fiduciary status is so expansive that, without a special carve-out and a series of "exemptive rules," it would "sweep in . . . relationships that are not appropriately regarded as fiduciary," thereby "banning" "beneficial . . . arrangements" and causing "serious adverse unintended consequences." ROA.324, 439-40. Indeed, the interpretation without the accompanying exemptive rules would give rise to "abusive conduct." Chamber Br. 14-15.

These concessions make clear that DOL's Fiduciary Rule is inconsistent with the statutory language, unreasonable, and arbitrary and capricious. DOL's efforts to argue otherwise are unavailing.

***First*,** DOL strains to defend the Rule by ignoring the word "fiduciary," and focusing instead on the second of the three definitions ERISA and the Code give that term. DOL Br. 19-20. Under this "investment-advice" prong, a person is a fiduciary if she "renders investment advice for a fee or other compensation, direct or indirect, with respect to any

moneys or other property of such plan, or has any authority or responsibility to do so." 26 U.S.C. § 4975(e)(3)(B).

This language cannot support DOL's radical redefinition of "fiduciary," because the "for a fee" language imposes an important limitation—as does the word "renders": A person is a fiduciary only if the *purpose* of the fee is to compensate her for rendering investment advice. If she is paid a fee for some other reason—*e.g.*, for the service of selling an investment product or facilitating a transaction—then she is not a fiduciary under the investment-advice prong, whether or not she makes a recommendation in performing that service (as salespeople typically do). This limitation sensibly prevents deeming all salespersons "fiduciaries," by confining that classification to professionals who are retained to "render[ ]" advice.

This statutory language cannot be read so broadly as to cover the broker and insurance agent relationships that DOL seeks to classify as "fiduciary," because brokers and insurance agents typically do not render advice *for a fee*: Giving advice is neither necessary nor sufficient for them to generate a fee. Chamber Br. 37. If a transaction is consummated in the absence of any advice, then a fee is still paid; and, if no transaction is

executed, then no fee is paid even if extensive advice has been rendered.

Unable to respond to this fatal defect in its construction of the investment-advice prong, DOL rebuts an argument of its own invention—what it dubs the "primary purpose" argument. DOL Br. 30. The Chamber Appellants do not contend that fiduciaries must be "paid 'primarily' for the advice they give." *Contra id.* Brokers and insurance agents do not receive a fee primarily, secondarily, or *at all* for rendering advice; they receive a fee for facilitating transactions and selling financial products. DOL's rebuttal of its own "primary-purpose" argument is thus nonresponsive.

DOL's argument that the "direct or indirect" language in § 4975(e)(3)(B) encompasses fees paid "in part for recommending certain products" (DOL Br. 30) is off-point for the same reason: commissions generally are not paid to brokers and insurance agents in any part for advice. Moreover, DOL's construction of "direct or indirect" is wrong. That language refers to whether the "fee or other compensation" is paid directly (by the customer) or indirectly (through a third party such as the company offering the product), not to whether advice played a role "in whole or in part" (ROA.365) in generating the fee. In the Rule itself, DOL

correctly defined "direct or indirect" to refer to fees "received from any source." ROA.377.[1]

DOL's assumption that commissions are paid in part for advice also lacks a basis in the record. DOL misleadingly contends that commissions qualify as fees for advice because insurance agents and brokers sometimes provide "education" about financial products. DOL Br. 31 (quoting ROA.7337). But the Rule itself recognizes that "education" is different than "advice." ROA.374-75. The fact that—like most salespeople—insurance and financial professionals may provide information about their products does not mean they are paid in exchange for "render[ing] investment advice."

Second, turning to the term "fiduciary" itself, DOL suggests (at 20-21) that its common-law roots may be ignored because—as the Supreme Court explained in *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993)—ERISA "defines 'fiduciary' not in terms of formal trusteeship, but

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[1] The earlier regulations DOL cites (at 31) do not construe the terms "direct or indirect" to mean "in whole or in part" either. And DOL's suggestions in the 1970s that the receipt of commissions could lead to fiduciary status in some instances assumed that all five elements of the old rule were satisfied, thereby establishing an advice-based relationship of trust. *See* 40 Fed. Reg. 50,842, 50,843 (Oct. 31, 1975).

in *functional* terms of control and authority over the plan." Far from rebutting the presumption that the Code incorporated the common law's "trust-and-confidence standard," this argument *confirms* that it did. The effect of this functional approach was to do away with one limitation of "traditional trust law"—that only those expressly named as trustees (*i.e.*, "formal trusteeship") were subject to fiduciary duties. *Id.*[2] The effect was *not*, as DOL contends, to do away with common-law concepts entirely. The functions that are the hallmarks of fiduciary status under ERISA—"*control and authority* over the plan," *id.* (emphasis added)—are the same functions that are hallmarks of fiduciary status at common law. In short, the functional approach of ERISA and the Code does not depart from the common law's "trust-and-confidence standard" (DOL Br. 26), but embraces it over more formalistic requirements. Congress did not intend to apply the *law* of trusts in the absence of a *relationship* of trust.

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[2] In claiming that *Mertens* does not "mention written trust documents at any point in the relevant discussion" (DOL Br. 27), DOL ignores the Court's association of "formal trusteeship" with "persons named as fiduciaries by a benefit plan" (*i.e.*, a written trust document). 508 U.S. at 251, 262.

In *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996), decided three years after *Mertens*, the Court demonstrated how this "functional" approach works: "Though dictionaries sometimes help" in interpreting ERISA, "it [is] more important here to look to the common law, which, over the years, has given to terms such as 'fiduciary' and trust 'administration' a legal meaning which, we normally presume, Congress meant to refer." This common law is the "starting point, after which" courts inquire whether the statute "*require[s]* departing from common-law trust requirements." *Id.* at 497 (emphasis added); *see also Pegram v. Herdrich*, 530 U.S. 211, 224, 231 (2000) (emphasizing that fiduciary duties have "their source in the common law of trusts" and analyzing the distinction between fiduciary and non-fiduciary acts based on that common law).

As DOL itself shows (at 20), the Code's first and third definitions of "fiduciary"—under which "fiduciary" includes anyone who "exercises any discretionary authority," "control," or "responsibility" for plan "management" or "administration," 26 U.S.C. §§ 4975(e)(3)(A), (C)—further support the conclusion that the act of salesmanship does not make one a fiduciary. Since these other two prongs contemplate a relationship of trust and confidence, the investment-advice prong must be read to do the same.

See Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 101 (2012) ("the words of a statute must be read in their context" (quotation omitted)).

Third, having admitted in the rulemaking that its new interpretation would "sweep in some relationships" that "the Department does not believe Congress intended to cover as fiduciary" (ROA.324), DOL argues that this admission only concerned the relationships that the Rule exempted in its seller's carve-out (DOL Br. 29). In fact, DOL's concerns with the overbreadth and unadministrability of its new interpretation were far broader. Chamber Br. 14-15. And as in *UARG*—where the Court rejected a definition in part because the agency had adopted a companion "tailoring" rule to correct the definition's overbreadth—the fact that the Rule's interpretation of "fiduciary" necessitated a significant carve-out to avoid running afoul of Congress's intent "should have alerted [DOL] that it had taken a wrong interpretive turn." 134 S. Ct. at 2446.

Equally important, DOL has no meaningful response to the point that including a "seller's carve-out" (ROA.356) in one part of the Rule cannot be reconciled with its refusal elsewhere in the Rule to acknowledge the distinction between giving advice and making sales. The seller's carve-out exempts certain persons from fiduciary status if

their fee is not received "for the provision of investment advice (as opposed to other services)." ROA.359. Those "other services" are sales—hence the name "seller's carve-out." ROA.356. (DOL now prefers to call it the "counterparty carve-out." DOL Br. 29.) DOL argues the carve-out was included because of the "independen[ce]" and "experience[ ]" of the parties who qualify for the carve-out. *Id.* That misses the point: DOL *used* the sales-advice distinction, even while insisting for most of the Rule that the distinction (which Congress made a cornerstone of the Investment Advisers Act) is illusory.[3] That inconsistency was unreasonable, arbitrary, and capricious, *see Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49, 1153-54 (D.C. Cir. 2011), as was DOL's refusal to allow a carve-out for professionals who clearly and accurately articulate to customers that they are serving as sales agents, not fiduciaries, ROA.357-58.[4]

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[3] DOL also claims (at 29) that its carve-out was not based on the absence of a relationship of trust. But in the rulemaking DOL emphasized that the transactions within the carve-out do not reflect an "expectation" of a "relationship of trust and loyalty." ROA.359.

[4] This Court recognized in *American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States*, 841 F.2d 658, 664 (5th Cir. 1988), that sales activity

Fourth, DOL argues that its Rule does not equate sales and fiduciary relationships because a salesperson is not a fiduciary unless he "renders investment advice" within the Rule's meaning. DOL Br. 32. But the Rule defines "render[ing] investment advice" so broadly that it encompasses ordinary sales activity. Chamber Br. 13-14. Almost every sales transaction will include a suggestion "to a specific advice recipient . . . regarding the advisability of a particular investment . . . decision." DOL Br. 9 (quoting ROA.373). And it was arbitrary and unreasonable for DOL to make routine acts of selling financial products a hallmark of fiduciary status when the Code generally *prohibits* fiduciaries from selling financial products to plans. *See* 26 U.S.C. § 4975(c)(1).

Fifth, DOL falls back (at 21) on "ERISA's history and purpose," but "vague notions of [ERISA's] 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220

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does not confer fiduciary status, but DOL argues (at 44) that the decision should be ignored because it was decided under the Department's original five-part test of fiduciary status. The Court did observe that "advice to self-insure" does not fit within the five-part test, but separately reasoned that "urging the purchase of [the company's] products" does not create fiduciary status. *Am. Fed'n*, 841 F.2d at 664. That statement is not accompanied by a citation to the five-part test.

(2002) (internal citation and quotation omitted). Moreover, Appellants' challenge centers on the Code and IRAs, not ERISA. Congress may not have anticipated that individually managed *employer* plans like 401(k)'s would eventually eclipse traditional pension plans under ERISA (DOL Br. 6, 21), but it knew from the start that the Code's *individual* retirement accounts would be *individually* managed. And what Congress would never have intended is that "fiduciary" be defined so broadly as to bar the sale of annuities and other investments to IRA holders by the very people who would be expected to do so—insurance agents and brokers.

Finally, DOL invokes *Chevron* to support its Rule. But as shown above, "traditional tools of statutory construction" reveal that DOL's unprecedented interpretation defies the plain meaning of ERISA and the Code under *Chevron* step 1, and that it is also unreasonable under step 2. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).[5]

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[5] Deference is also inappropriate because the Rule's "consequences . . . are undeniably significant" (DOL Br. 23) in areas outside DOL's

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For more than 40 years, DOL and the courts have used the five-part interpretation of "investment advice" fiduciary that DOL promulgated shortly after ERISA's enactment. DOL's new Rule eliminates every part of that test but one—the old rule's requirement of a "recommendation as to the advisability of investing in, purchasing, or selling securities or other property." 29 C.F.R. § 2510.3-21(j) (2015). DOL repeatedly criticizes that old rule, but the Department's dissatisfaction with the purported under-breadth of that rule cannot justify the *over*breadth of its new rule. And the issue before the Court is not the appropriateness of the old rule, but whether DOL may deem an individual a "fiduciary" based on nothing more than the fact that she sold you a product and said, "This is great, you'll like it." The answer is no. This is no one's definition

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regulatory power and expertise, and in light of principles of constitutional avoidance and the rule of lenity. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); ACLI Reply at 21; Chamber Br. 25-26.

Contrary to DOL's protestations, the meaning of "fiduciary" does have criminal implications, *see* 29 U.S.C. § 1111, and the applicability of the rule of lenity is before this Court both because "a standard of review cannot be waived," *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994), and because the Chamber preserved the "core . . . argument" that the Fiduciary Rule does not merit *Chevron* deference, *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000).

of a fiduciary, or of what it means to "render[ ] investment advice for a fee."

II. In Attempting To Use Its Limited Authority To Lift Regulatory Restrictions As A Means For Instituting Sweeping Changes In The IRA Market, DOL Has Violated The Tax Code And The Administrative Procedure Act.

In a telling passage in its brief (at 23), DOL suggests that it has "similarly sweeping" authority under the Code as under ERISA. That is false—yet it would effectively become true if DOL prevailed in this case. That outcome would be irreconcilable with the Code, the Administrative Procedure Act ("APA"), and our separation of powers.

Under ERISA, DOL may promulgate substantive and procedural rules, issue subpoenas, conduct investigations, and initiate enforcement actions. Under the Code, DOL may do just two things that it may also do under ERISA—interpret "accounting, technical and trade terms," and provide exemptions from the restrictions Congress places on fiduciaries. *See* 29 U.S.C. § 1135; Reorganization Plan No. 4 of 1978, at § 102; 26 U.S.C. § 4975(c)(2).

If, however, DOL may interpret "fiduciary" as it has—sweeping in not merely common-law fiduciaries, but also brokers and insurance agents—and may then make conducting their business as they have for

generations dependent on whatever "conditions" DOL elects to impose, it will have bootstrapped its way into an authority under the Code that rivals its role under ERISA—and in some ways exceeds it. After all, ERISA does not allow punitive damages. But if today DOL may license private rights of action with restrictions on liquidated-damages clauses, there is nothing to prevent it tomorrow from requiring firms to enter contracts that subject them to punitive-damage awards.

DOL's bid to be a leading regulator over brokers and insurance agents is all the more remarkable given its statutorily assigned focus on labor and employment, rather than financial-services policy. In the Dodd-Frank Act, Congress created the "Financial Stability Oversight Council" (or "FSOC"), a body that includes the heads of numerous financial regulatory agencies and is intended, among other things, to "facilitate information sharing . . . regarding domestic financial services policy development[ ] [and] rulemaking." Dodd-Frank Act, Pub. L. No. 111-203, § 112(a)(2), 124 Stat. 1395. The heads of fourteen different federal and state regulatory agencies sit on the FSOC. DOL is not among them. Similarly, Congress placed *three* different insurance experts on FSOC to ensure the Council was properly informed, because insurance generally is

regulated by the States rather than the federal government. *Id.* § 111(b), 124 Stat. 1392-93. Yet DOL, an employment agency, has by itself refashioned a broad swath of the American insurance industry.

DOL claims that in implementing this sweeping regulatory restructuring, it is entitled to deference. But a string of Supreme Court decisions makes clear that *Chevron* deference is inapplicable to regulations that have great economic and political consequences and are not clearly authorized. Congress does not "hide elephants in mouseholes"—that is, it does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). DOL's claim "to [have] discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the" insurance and securities markets thus must be met with "skepticism," not deference. *UARG*, 134 S. Ct. at 2444 (quotation omitted).

DOL fails in its attempt to distinguish the salient elements of this "major question doctrine." *See* Chamber Br. 25, 44-47, 50-51.

As an initial matter, DOL's contention (at 41-42) that these Supreme Court cases concerned violations of statutory text is unavailing because DOL's "fiduciary" interpretation contradicts the statutory text

for reasons shown above, as does the use of the exemptive authority for reasons shown below.

More importantly, when an agency has adopted an immensely consequential regulation based on a slim statutory reed, the regulation cannot be sustained merely on the ground that it could arguably be reconciled with the text of a statute. Rather, such significant actions must be supported by clear congressional authority: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 134 S. Ct. at 2444 (quotation omitted). By ignoring its lack of clear authority, DOL neglects half the analysis when it observes that "*Chevron* deference . . . may be applied to 'big, important' questions." DOL Br. 22-23 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)).[6] And DOL invokes the wrong standard (at 38) when it argues that the differences between ERISA and the Code do

[6] DOL's quotation is misleading. The Court in *City of Arlington* rejected the argument that certain "big, important" questions should be classified as "jurisdictional" and should be denied *Chevron* deference on that basis; that was unacceptable, the Court explained, because "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." 133 S. Ct. at 1868. The Court did not reject the principles it had articulated before and since regarding the major question doctrine.

not "unambiguously prevent[ ]" it from requiring IRA fiduciaries to comply with fiduciary duties that DOL borrowed from ERISA. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("While the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules.").[7]

DOL's superficial discussion of the Supreme Court's major-question jurisprudence backfires in other respects. In *UARG*, DOL says, EPA "seiz[ed] expansive power that it admit[ted] the [Clean Air Act] [wa]s not designed to grant." DOL Br. 41-42 (quoting *UARG*, 134 S. Ct. at 2444). So too here, DOL has refashioned large swaths of the insurance industry and broker-dealer practices through an exemptive authority that was not "designed to grant" affirmative regulatory power. And DOL argues that in *MCI Telecommunications Corp. v. AT&T Corp.*, 512 U.S. 218 (1994),

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[7] The differences between ERISA and the Code themselves create a powerful presumption that in providing for IRAs, which it did simultaneously with enacting ERISA, Congress did not intend IRA service providers to be subject to the same duties and enforcement suits as ERISA fiduciaries. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

the FCC seized on the word "modify" to work a "'fundamental revision' of the statutory scheme." DOL Br. 42. But DOL has devised an even more "fundamental revision" of the framework established by Congress for IRAs, and bases it on an equally dubious foundation.

Any remaining doubt about DOL's authority evaporates under the light of the Dodd-Frank Act, in which Congress granted the SEC—not DOL—the authority to design and impose a uniform fiduciary standard for advisers and broker-dealers. § 913(g), 124 Stat. 1828. Countenancing DOL's action under ERISA would "ignore the plain implication of Congress' subsequent [fiduciary]-specific legislation," which is particularly improper when "a decision of such economic and political significance" is at issue. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

DOL's remaining defenses of its use of its exemptive authority are also unavailing.

First, DOL argues that "nothing in the statute indicates that Congress" did not intend for DOL to create "collateral consequences beyond those set forth" in the Code (DOL Br. 41), but this overlooks the statutory language. In allowing DOL to grant "conditional" exemptions, Congress

meant that the exemptions would be available so long as the conditions were satisfied and, if they were not, the statutory requirements and penalties would snap back in place. A condition is "[s]omething established or agreed upon as a requisite to the doing or taking effect of something else; a stipulation or provision." *Webster's Second New Int'l Dictionary* 556 (1959). Authority to impose conditions is not authority to inflict penalties or consequences more severe than Congress provided, as the Rule does. Chamber Br. 49-50.

DOL has no answer to the Chamber Appellants' point (at *id.*) that it is arbitrary and capricious for DOL to impose both excise taxes and private liability on fiduciaries who fall short of the BIC Exemption's requirements, when Congress itself imposed excise taxes alone for violating the very statutory prohibitions that the exemption is supposed to ease. *See generally Sandoz v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly" (quotation omitted)). It is not for lack of trying that DOL and its *amici* fail to cite a single "deregulatory" exemptive rule by DOL or any other agency that imposes more severe penalties

than the statute itself, or that constructs towering new regulatory requirements to revolutionize an industry, as this Rule does.

Second, DOL claims that nothing in the Code prevents it from "adopting conditions" that impose "some regulatory burdens" (DOL Br. 39), but it is inaccurate to suggest that DOL has merely imposed "some regulatory burdens." The BIC Exemption erects a whole new regulatory architecture. Chamber Br. 15-18.

Nor can the expansive new burdens of the BIC Exemption be justified by claiming that they reduce the burden of the statutory bar imposed by the prohibited-transaction provisions. DOL Br. 39. Taken to its limit, that contention would allow DOL to condition exemptive relief on adherence to *any* obligation or requirement, no matter how onerous or irrelevant to its affirmative authority.

Third, DOL argues that brokers and insurance agents can "restructur[e]" their compensation systems. *Id.* at 40. In doing so, DOL disregards its own statement in the rulemaking that it would be "abusive conduct" for an IRA service provider to opt out of the BIC Exemption by switching smaller accounts from commission-based compensation to fee-based compensation. ROA.388-89 n.18. DOL now contends that service

providers can switch to compensation systems that rely neither on fees nor commissions (DOL Br. 40), but that is a pure litigating position. In the rulemaking, DOL doubted that it would be possible for many service providers to move away from commission-based compensation (ROA.440), and instead predicted that the Rule would present new "fiduciaries" with a binary choice: "comply with [the BIC] Exemption" or "curtail" services (ROA.7959).

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Because DOL has exceeded its exemptive authority, the Court should vacate the BIC Exemption. And vacatur of the exemption requires vacatur of the entire Fiduciary Rule and all related exemptions. Throughout the rulemaking, DOL made clear that the BIC Exemption was integral to the Rule and its assessment of the Rule's purported benefits. *See, e.g.*, ROA.368 (DOL "inten[ds] that advice fiduciaries in the retail investment market rely" on the BIC Exemption to avoid the overbreadth of the "fiduciary" interpretation); ROA.322 (with the exemptions, DOL "[seeks] to preserve beneficial business models for delivery of investment advice"); ROA.439 ("[B]anning all commissions, transaction-

based payments, and other forms of conflicted payments could have serious adverse unintended consequences."). These provisions were promulgated as a package and must be vacated as a package. 5 U.S.C. § 706(2); *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 734-36 (D.C. Cir. 2001).

III. The Department Unlawfully And Unreasonably Created New Private Enforcement Actions.

DOL's brief makes three critical concessions that together establish that the BIC Exemption unlawfully creates a private right of action. First, DOL does not dispute that only Congress has the power to authorize private enforcement of duties created by federal laws or regulations. *Sandoval*, 532 U.S. at 291. Second, DOL concedes that Congress did not authorize civil actions under the Code as it did under ERISA. DOL Br. 5. And third, DOL concedes that the BIC Exemption requires the contract between IRA fiduciaries and their customers to contain privately enforceable promises to adhere to the "Impartial Conduct Standards" and other duties created by the Exemption, thereby "requir[ing] private enforcement for IRA fiduciaries." *Id.* at 42, 44. These admissions erase any doubt that DOL has authorized private enforcement in violation of *Sandoval*. The Exemption's creation of this private action is arbitrary and

capricious under the APA and unreasonable under *Chevron* step two. *See, e.g.*, *Loving v. I.R.S.*, 742 F.3d 1013, 1022 (D.C. Cir. 2014).

DOL characterizes its Rule (at 16-17) as dictating "certain provisions fiduciaries to IRAs must include in contracts," and asserts (at 43) that financial representatives "often enter into contracts" that their customers can enforce through breach-of-contract claims. This overlooks that the Rule *forces* IRA service providers to enter into the contracts, *and then* requires the contracts to include specific duties and terms that DOL devised to ensure the availability of private claims. DOL's purpose in requiring the contract, and specific terms, was to author a *new* liability; indeed, DOL admits that the BIC requirement enables IRA owners to "vindicate their rights under" the provisions of the BIC Exemption that delineate the Impartial Conduct Standards. *Id.* at 43. Thus, "suits to enforce" the BIC and "suits to enforce" the BIC Exemption's requirements "are in substance one and the same." *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 114 (2011).

DOL gets the law backwards when it argues it has the power to create a private right of action unless Congress "unambiguously foreclose[s]" it. DOL Br. 44. In our system of divided government, DOL may

not authorize private enforcement unless Congress has empowered it to do so, which Congress has not done.

DOL theorizes that suits to enforce the BIC would arise under state law. DOL Br. 43. That is a recent discovery for DOL—it was not set forth in the Rule's adopting release, and was not the argument DOL first presented in defending the Rule.[8] In any event, whether BIC-created claims arise under state or federal law is of no moment. Agencies have no more power to create private liabilities under state law than under federal law. *See* Chamber Br. 55-56.

At points, DOL's brief might be read to suggest that the private right of action firms will face under the Rule results not from the BIC Exemption, but *only* from state law and the absence of a preemption provision in the Code. DOL Br. 5, 41, 43. That is flatly inconsistent with

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[8] The first time DOL argued a case challenging the Rule, it initially acknowledged that suit would arise under *federal* law, insisting that federal law would preempt any state law that limited claims to enforce the BIC. The government reversed itself at the hearing after questioning by the court implied that the state-law theory might be a better defense. Hr'g Tr. at 75:25-80:19, 109:2-111:25, *Nat'l Ass'n for Fixed Annuities v. U.S. Dep't of Labor*, No. 1:16-cv-1035 (D.D.C. Aug. 25, 2016). DOL's new position is questionable. *See, e.g.*, *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 172 (5th Cir. 2009) ("federal law applies to a dispute under" a contract issued pursuant to a federal statute).

the sole rationale in the rulemaking for requiring firms to enter the Best Interest Contract. DOL explained in the rulemaking that it imposed "the contract requirement with respect to IRAs" to "provide[ ] an administrable means of . . . enforcing the exemption's conditions." ROA.399; *see also* ROA.385 (BIC allows IRA owners to "police" compliance); ROA.410 (a "central goal[ ]" of the BIC is to give IRA owners "an effective legal mechanism to enforce" the Impartial Conduct Standards). The requirement to enter into the BIC applies only to IRA service-providers—not ERISA fiduciaries—because the text of ERISA "provides a preexisting enforcement mechanism." ROA.398. That is, DOL created a private action against IRA service-providers for the very reason that Congress chose not to. ROA.410.

Simply, DOL adopted the BIC requirement because it believed a contract was necessary to private enforcement of the exemption's new standards of conduct. That purpose is prohibited by *Sandoval*. There is no *legitimate* reason for the BIC requirement, and a regulatory requirement without a legitimate basis is by definition arbitrary and capricious. Further, to the extent DOL now defends the BIC on the ground that enforceability of its new standards of conduct does not depend on the BIC,

that rationale must be rejected because it was not proffered in the rule-making. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

DOL's observation (at 43) that the Code does not preempt state-law claims, whereas ERISA does precisely that, only further demonstrates that DOL has veered far beyond Congress's intent. The central purpose of ERISA's preemption provision was to foster a uniform, federal standard of liability. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945, 947 (2016). The notion that Congress adopted this policy and at the same time authorized DOL to create private claims to enforce parallel provisions in the Code under the splintered laws of fifty States is absurd. The Code lacks a preemption provision because Congress designed it to *lack* the very private claims that DOL manufactured.

Finally, DOL unconvincingly distinguishes *Astra* by arguing that it involved suits by third-party beneficiaries, while the BIC would authorize suits by the contracting parties. DOL Br. 43. That is a meaningless distinction. Where, as here, Congress has declined to authorize *any* private suits, a suit by a party to the contract is just as "incompatible with

the statutory regime" as a suit by a third-party beneficiary. *Astra*, 563 U.S. at 113.[9]

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For all its arguments, DOL has no answer to this: If an agency can do what DOL did here, then at every agency with the authority to grant licenses or exemptions, there is also a power to create enforceable rights with tailor-made remedies—and at every one of those agencies, *Sandoval* is dead letter. That outcome is plainly impermissible.

The BIC private right of action must be vacated. And because the private right of action is "critical" to the Exemption, ROA.398, and the Exemption is integral to the Fiduciary Rule, the entire package of rules must be vacated. *Supra* 23-24.

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[9] *Astra*'s reservation of the question whether "a contracting agency may authorize third party suits to enforce a Government contract" (DOL Br. 43, quoting 563 U.S. at 119 n.4) does not help DOL. In response to a concern expressed in the government's *amicus* brief, the Court left open the possibility that a *statute* might authorize an agency to agree in a contract to allow a third-party beneficiary to enforce the contract. *See* 563 U.S. at 119 n.4 (citing Brief of the United States as *Amicus Curiae* at 22). *See also* Brief of the United States at 22 (arguing that "Congress may . . . confer on [an] agency the authority to agree that third parties may enforce the contract"). In this case, DOL does not and cannot contend that the Code authorized it to let private parties bring suit to enforce the Code.

IV. The Rule's Class Waiver Ban, Which The Department Concedes Is Unlawful, Is Not Severable And Compels Vacatur Of The Rule.

DOL now concedes that the class waiver ban in the BIC Exemption violates the Federal Arbitration Act ("FAA"). The required remedy for this violation of the FAA is vacatur of the entire Rule. *See* 5 U.S.C. § 706 (a court "shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law"); *see also NRDC v. E.P.A.*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring). *But see Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

Even if the Court considers whether "the remainder of the regulation could function sensibly without the stricken provision," *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) (quotation omitted), it should still vacate the entire Rule. Courts give weight only to reasoned judgments of agencies. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). DOL quotes purported findings in the Rule that the scheme would work as intended without the ban on class waivers (DOL Br. 49), but those findings gave no reason or explanation. And elsewhere, DOL reasoned that the Rule would not work as intended without the ban. Without class-actions, it

explained, some rights might go unenforced because "the monetary effect on a particular investor is too small to justify pursuit of an individual claim," which would "undermine" the Rule's operation. ROA.420. This explanation overrides DOL's unreasoned *ipse dixit* about severability. *See* DOL Br. 49 (quoting ROA.422). The Court should vacate the Rule and its exemptions in their entirety.

CONCLUSION

The Court should reverse the judgment below; hold that the Fiduciary Rule and its related exemptions are arbitrary, capricious, unreasonable, and contrary to law; and direct entry of judgment in favor of Appellants vacating the Rule and enjoining DOL from enforcing, implementing, or giving effect to the Rule in any manner.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2017, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 20th day of July, 2017, the foregoing brief was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) this reply complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding any part of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,389 words; (2) this reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with New Century Schoolbook Linotype 14-point for text and 14-point for footnotes; (3) any required privacy redactions have been made pursuant to this Court's Rule 25.2.13; (4) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1; and (5) the document has been scanned with the most recent version of Microsoft Forefront Endpoint Protection and is free of viruses.

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