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; 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, Dallas Division, Nos. 3:16-cv-1476, 3:16-cv-1530, 3:16-cv-1537

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July 20, 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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Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

The undersigned counsel of record certifies 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.

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INTRODUCTION

The Department of Labor has abandoned the district court's holding that Appellants waived their First Amendment challenge, as advanced in an as-applied "declaratory-judgment claim." Br. 68. Instead, DOL raises for the first time on appeal a new "ripeness" argument that is obviously wrong. The Rule's expansive definition of "fiduciary" is already in effect and of its own force imposes direct costs, curtailing the constitutionally protected speech of Appellants' members. Conjecture that DOL may modify other, impending burdens changes none of that, and Appellants' First Amendment claim is thus properly before the Court.

DOL's defense of the Rule on the merits fares no better. The Rule intentionally, directly, and significantly burdens the commercial speech of those like Appellants' members who issue, market, and sell annuities. Like the restriction invalidated in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Rule aims directly at commercial expression—here, salespersons' "recommendations" to purchase annuities made outside existing fiduciary relationships. As in *Sorrell*, it imposes different burdens on truthful commercial speech depending on the content and message. And as in *Sorrell*, the Rule rests on the constitutionally impermissible premise that fully informed consumers cannot be trusted to make choices in their own best interest.

Despite all of that, DOL claims that the First Amendment does not even apply, implausibly maintaining that the Rule is a "quintessential regulation of commercial conduct," not "speech." Br. 18. *Sorrell* and other bedrock First Amendment decisions foreclose that argument. As those decisions make clear, the Rule is subject to heightened judicial scrutiny because, "on its face and in its practical operation," it targets truthful sales speech and favors and disfavors particular messages and speakers. 564 U.S. at 567.

DOL's contrary arguments depend on mischaracterizations of Appellants' constitutional claim. Appellants do *not* argue that the government cannot regulate the speech of fiduciaries acting in relationships of trust and confidence. To the contrary, the Rule's fundamental defects are its unprecedented imposition of fiduciary obligations on the commercial speech of *non*-fiduciaries—traditional sales speech at arm's length, outside any relationship of trust and confidence—and its imposition of substantially disparate regulatory burdens on messages DOL favors and disfavors. No case DOL cites has upheld a regulation with those glaring constitutional problems, nor are those problematic features characteristic of the statutes and regulations DOL contends would be implicated by Appellants' First Amendment claim.

The Rule's treatment of insurance products like variable and fixed-indexed annuities is also arbitrary and capricious, and DOL offers no persuasive defense.

As DOL now concedes, it knew that the Rule would drive the retirement market towards DOL-favored products (fixed-rate annuities) and away from disfavored ones (variable and fixed-indexed annuities). Yet DOL never assessed the trade-offs inherent in that choice or justified the harm the Rule will cause consumers by decreasing their access to variable and fixed-indexed annuities. Independently, DOL irrationally dismissed the effectiveness of all existing annuity regulation based on dated studies of mutual funds, which are not insurance products and are in key respects subject to less stringent regulation.

For these reasons and others, the Rule must be vacated or enjoined.

ARGUMENT

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

The First Amendment protects Appellants' members' right to engage in truthful commercial speech about annuities, and it prohibits regulations disfavoring speech because of its message. The Rule countermands each of those principles. ACLI Br. pt. I. Contrary to DOL's arguments, the First Amendment claim is properly before this Court; the Rule regulates protected speech, not conduct; and it fails even intermediate scrutiny.

A. The First Amendment Claim Is Properly Before This Court

1. DOL's threshold argument is that the First Amendment claim—whether arising under the APA or as a claim for as-applied declaratory relief—is

"not properly before this Court." Br. 66. Appellants have explained why that is incorrect, ACLI Br. 28-31, but DOL makes two important concessions on appeal that change and narrow the threshold issues this Court must address.

First, DOL acknowledges that APA issue-exhaustion principles are inapposite to Appellants' "separate declaratory-judgment claim." Br. 68. In doing so, DOL abandons—with good reason, ACLI Br. 28-39—any defense of the district court's erroneous application of waiver analysis to the declaratory-judgment claim. Instead, for the first time on appeal, DOL contends that Appellants' constitutional challenge is "premature" because Appellants have not alleged they intend to "violate" the Rule and because recent "developments" suggest DOL is considering modifying it. Br. 69.

This objection is meritless. As Appellants alleged and DOL never contested, Appellants' "members issue, market, and sell" annuities, ROA.10335; they "wish to engage in sales conversations with retirement investors that convey truthful commercial speech regarding annuity products," ROA.10342; and they "face an actual and imminent threat to their commercial speech rights from the Rule's implementation," ROA.10429. DOL appears to concede that these basic facts rendered the claim ripe in the district court.

Recent regulatory developments change none of that. Key parts of the Rule took effect on June 9, 2017, and today the Rule proclaims Appellants' members to

be fiduciaries by operation of law when they engage in commission-based, truthful sales conversations with consumers about annuities. Whether Appellants intend to violate or comply with the Rule is of no moment because compliance imposes direct costs on Appellants, including the surrender of First Amendment rights. DOL itself has recognized that, as of June 9, 2017, "firms will make efforts to adhere to those [new] standards, motivated both by their applicability and by the prospect of their likely continuation, as well as by the impending applicability of complementary consumer protections and/or enforcement mechanisms beginning on January 1, 2018." 82 Fed. Reg. 16,902, 16,907 (Apr. 7, 2017). This imposition of fiduciary obligations on commercial speech imposes costs that are presently violating Appellants' members' constitutional rights. *See infra* pp. 7-10, 16-21.

Moreover, the remainder of the Rule becomes applicable on January 1, 2018. As of that fast-approaching deadline, the Rule will empower plaintiffs' lawyers to bring actions to enforce the BICE. "[T]he prospect of future enforcement is" thus "far from 'imaginary or speculative.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014). Conjecture DOL might delay the January 1 deadline or modify the Rule, DOL Br. 69, does not render premature Appellants' challenge to a federal regulation that is effective, already imposes harms, and has a legally prescribed applicability date. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

Second, and independently, DOL does not dispute that, for this Court to interpret ERISA properly, it must assess the merits of the First Amendment objections under the avoidance canon. Br. 69 n.16; ACLI Br. 36 & n.9. DOL argues only—incorrectly—that the First Amendment claim is "insubstantial." Br. 69 n.16. That is an effective acknowledgment that the constitutional issues *are* before this Court at least for that purpose.

2. Given those concessions, DOL's extended discussion (at 66-69) of APA issue-exhaustion is beside the point. If this Court reaches the issue, however, it should hold, consistent with *Sims v. Apfel*, 530 U.S. 103 (2000), that Appellants did not waive their constitutional objections for APA purposes.

DOL principally relies (at 89-90) on *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003), but the *statute at issue* there required objections to be raised before the EPA. ACLI Br. 31 n.7. Here, neither Congress nor DOL has imposed a similar requirement. Under those circumstances, Supreme Court precedent dictates that issue exhaustion is prudential and turns on whether the proceeding was "adversarial," *Sims*, 530 U.S. at 107-108—which the rulemaking here was not.

Indeed, still-controlling precedent of this Court holds that issue exhaustion does not apply to agency rulemakings. *See* WLF Br. 7-10 (discussing *City of Seabrook v. EPA*, 659 F.2d 1349 (5th Cir. 1981)). The APA "divide[s] all the world of administrative action into two categories; an agency either issues an

'order' by 'adjudication' or a 'rule' by 'rulemaking.'" *Jean v. Nelson*, 711 F.2d 1455, 1475 (11th Cir. 1983). Adjudication is typically adversarial. If rulemaking is also "adversarial," *Sims*' holding that exhaustion does not apply when "an administrative proceeding is not adversarial" would have little practical meaning. 530 U.S. at 110.[1]

B. The Rule Is Subject To First Amendment Scrutiny

On the merits, the Rule imposes an array of content-based restrictions on commercial speech and thus is subject to First Amendment review. ACLI Br. pt. I.A. DOL's contrary arguments are deeply flawed.

1. The Rule directly burdens and regulates speech

At the outset, DOL insists the Rule "is a restriction on conduct that only incidentally burdens speech." Br. 70. The Supreme Court has consistently rejected similar defenses of commercial-speech regulation. *E.g.*, *Sorrell*, 564 U.S. at 567; *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017). This Court should do the same.

Contrary to DOL's position, the Rule's effect on speech is anything but incidental: It is intentional, direct, and substantial. ACLI Br. 15-19, 21. Just like

[1] That other courts (DOL Br. 67-68) have not faithfully applied *Sims* is no reason to repeat their mistake. Moreover, DOL does not dispute that, under *Sims*, issue exhaustion is prudential. Here, there are strong reasons for not finding waiver. ACLI Br. 31 & n.8; WLF Br. 14-19.

the restriction at issue in *Sorrell*, "on its face and in its practical operation," the Rule is triggered by "the content of speech and the identity of the speaker" and thus imposes "more than an incidental burden" on speech. 564 U.S. at 567. And just like the restriction at issue in *Expressions Hair Design*, the Rule "regulates … how sellers … communicate" with consumers about their products, here annuities. 137 S. Ct. at 1151. Directly regulating sales speech about annuities plainly constitutes a regulation of "commercial expression." *Edenfield v. Fane*, 507 U.S. 761, 765 (1993); *Sorrell*, 564 U.S. at 557-558.

The Rule's bias against disfavored messages also reinforces the necessity of First Amendment review. ACLI Br. 15-16. The Rule creates "regulatory incentive[s] to preferentially recommend" some products over others, imposing the more "stringent" BICE when agents and brokers "recommend" a variable or fixed-indexed annuity, but only the "streamlined" PTE 84-24 when they "recommend" a fixed-rate annuity. ROA.394-395. As Justice Kennedy recently explained, "singl[ing] out a subset of messages for disfavor based on the views expressed" is viewpoint discrimination, which "remains of serious concern in the commercial context." *Matal v. Tam*, 137 S. Ct. 1744, 1766-1767 (2017). DOL may not "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-579. The Rule does precisely that, deliberately burdening speech about disfavored annuities to prevent consumers from being persuaded to

choose those and to encourage "recommendations" of the fixed-rate annuities DOL prefers.

Sorrell thus forecloses DOL's labored distinction (at 71-72) between conduct and speech. Just as the use of prescriber information in aid of pharmaceutical marketing is protected speech, *Sorrell*, 564 U.S. at 557, so too is "communication" of "suggestion[s]" to purchase annuities, 29 C.F.R. § 2510.3-21(b)(1). Indeed, the Rule expressly *targets* speech "propos[ing] a commercial transaction," *Edenfield*, 507 U.S. at 767—the very definition of protected commercial speech—and therefore DOL's claim that the Rule merely regulates "conduct" cannot be taken seriously.

Nor does DOL's *ipse dixit* that all who "recommend" annuities are now "fiduciaries" somehow transform the commercial speech it is regulating into "conduct" it can burden at will. Even were DOL correct that it would not implicate the First Amendment "to regulate how *fiduciaries* may perform the act of giving investment advice," Br. 71 (emphasis changed), the Rule's novel application of fiduciary standards to truthful sales speech *outside* relationships of trust and confidence certainly does, ACLI Br. 22.

Appellants' members' in-person sales conversations with retirement savers do not meaningfully differ from the solicitations the Supreme Court has held to be "commercial expression to which the protections of the First Amendment apply."

Edenfield, 507 U.S. at 765. Such in-person sales speech has never been deemed fiduciary, and the Rule imposes burdensome regulation—including the "highest legal standards of trust and loyalty," ROA.358—without regard to whether it occurs within a relationship of trust and confidence. *E.g.*, DOL Br. 25-26 (definition of "fiduciary" is *not* a "trust-and-confidence standard"); *id.* at 33-34. If the government could strip sales speech of First Amendment protection simply by labeling commercial speakers "fiduciaries," then nothing would be left of the First Amendment's protection of commercial speech. That is not the law.

DOL's heavy reliance on *Ohralik* (at 70-72) is thus entirely misplaced. *Ohralik* involved pressures and privacy concerns unique to in-person solicitations by lawyers, paradigmatic fiduciaries who invite and accept clients' trust and confidence. *Ohralik* provides no support for the notion that the government may end-run the First Amendment by simply declaring *non*-fiduciary sales speech to be fiduciary. Moreover, later Supreme Court decisions have "made … clear" that "*Ohralik*'s holding was narrow" and that it "does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional." *Edenfield*, 507 U.S. at 774; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-642 (1985). As in *Edenfield*, "[w]ere [this Court] to read *Ohralik* in the

manner [DOL] proposes," "the protection afforded to commercial speech would be reduced to almost nothing." 507 U.S. at 777.[2]

Appellants do *not* argue that because "giving investment advice" has "a communicative component," "all regulation of [it]" is subject to heightened scrutiny. DOL Br. 72. To the contrary, in Appellants' view, investment advice rendered by a true fiduciary—like legal advice from a lawyer to her client—would present a very different question. DOL, however, may not treat *non*-fiduciary sales speech as fiduciary "advice" without accounting for the burdens its reclassification imposes on "'the exercise of constitutional rights.'" *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

The "parade of horribles" DOL claims would follow from applying these well-established constitutional principles is unconvincing. Unlike the Rule, "the[] statutes and regulations" DOL insists (at 73) would supposedly be vulnerable to "constitutional attack" under Appellants' First Amendment claim neither impose

[2] *Ohralik*'s dictum suggesting that the First Amendment does not apply to laws governing "corporate prox[ies]" and "securities," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), is no longer viable, if it ever was. *E.g.*, *National Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524, 530 (D.C. Cir. 2015) (SEC-mandated corporate disclosure relating to conflict minerals failed intermediate scrutiny). In any event, the dictum is irrelevant because the Rule is nothing like a traditional antifraud or disclosure regulation of securities markets; indeed, it goes well beyond regulating speech about securities, as many annuities are *not* securities.

burdensome fiduciary regulation on non-fiduciary sales speech nor discriminate between favored and disfavored speech.

For example, that "federal securities laws" (DOL Br. 97) regulate investment advisers (who are in common-law relationships of trust and confidence) differently from brokers (who are not) supports Appellants' First Amendment claim. The Rule's *erasure* of that distinction violates the First Amendment. Similarly, if "ERISA's prohibited-transaction provisions" (*id.* at 73) are limited to relationships of trust and confidence—as DOL interpreted the statute for four decades before adopting the Rule—those provisions are constitutionally sound. DOL's unmooring of the fiduciary definition from its accepted historical meaning implicates the First Amendment. Finally, it is irrelevant that "federal securities laws" (*id.*) regulate *products* differently; unlike those regulations, the Rule regulates *speech*.[3]

2. The professional speech doctrine is inapplicable

For many of the same reasons, DOL's reliance (at 74-76) on the "professional speech doctrine" to "bolster[]" its conduct argument is misplaced.

[3] That State suitability rules govern insurance products and not "appliances or cars" (DOL Br. 73) reflects that "a State may," consistent with the First Amendment, "regulate … in one industry but not in others, because the risk of fraud … is in its view greater there." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-389 (1992). That principle is irrelevant here because Appellants' challenge is to the myriad speaker-, product-, message-, and content-based distinctions drawn by the Rule within the insurance industry.

As with its untenable speech/conduct distinction, DOL's position would push that doctrine—even "[a]ssuming [it] is valid"—far beyond the "limit[s]" recognized by this Court. *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016).

DOL claims the Rule regulates professional speech because it applies to "personalized and paid-for investment advice." Br. 99. But the Supreme Court has made clear—in cases DOL hardly acknowledges—that economically-motivated, in-person sales conversations are protected commercial expression, regardless of personalization. *E.g.*, *Sorrell*, 564 U.S. at 558; *Edenfield*, 507 U.S. at 765. Indeed, *Edenfield* establishes that personalization is a First Amendment *virtue*, 507 U.S. at 766, not a basis, as DOL would have it, for stripping commercial expression of First Amendment protection.[4]

Moreover, DOL's refrain (at 74) that the Rule regulates only "paid-for investment advice" is another *ipse dixit*, true only if one accepts DOL's characterization of sales speech as "paid-for investment advice" whenever the salesperson is compensated by a commission, not for giving *advice*, but for selling *products*. Whether ERISA permits that false equivalence—it does not, *see* Chamber Br. 27-43; IALC Br. 19-35—the First Amendment limits the

[4] Thus, DOL's claim that annuity sellers are not traditional salespersons because they "educate" consumers (Br. 31) is mystifying. *Edenfield* recognizes that consumer "educat[ion]" lies at the core of valuable "commercial expression." 507 U.S. at 766; ACLI Br. 35.

government's authority to regulate speech by creating a fiduciary relationship by fiat. Otherwise, the government could declare all financially-motivated sales speech as "paid-for" professional speech, subject to no First Amendment review.[5]

Relying on Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 232 (1985), DOL contends (at 74-75) the professional speech doctrine is not limited to "fiduciary professions." But *Lowe* itself involved actual investment advisers—who have long been deemed fiduciaries because they sell impartial advice. And Justice White relied on investment advisers' "fiduciary responsibility" in *Lowe.* 472 U.S. at 229. Likewise, in *Serafine*—a decision DOL all but ignores—this

[5] DOL claims this "fear is illusory" because the doctrine applies only when there is a "personal nexus" and a speaker "exercis[es] judgment on behalf of a particular individual." Br. 75. But the first is no limit at all because, to the extent DOL deems an arm's-length sales relationship a "personal nexus," *all* personalized commercial speech involves a nexus. And the Rule itself goes well beyond DOL's own supposed second limit. Under the Rule, an insurance salesman becomes a fiduciary for making "recommendation[s]" "directed" at an individual rather than the general public. Br. 9. Thus, a statement to a consumer that "I have these three annuities, but the one I personally like the best is this" triggers fiduciary status, ROA.10169—even though the seller has not established a trust relationship by taking the buyer's "affairs … personally in hand" and "purport[ing] to exercise judgment" on the buyer's behalf, *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). That agents and brokers are subject to suitability standards does not change that analysis. Those standards have never been understood to transform sellers into fiduciaries.

Court held that the professional speech doctrine, if valid at all, is limited to speech within the professional-client "fiduciary relationship." 810 F.3d at 360.[6]

Even if the professional speech doctrine somehow could be expanded to non-fiduciary professions—notwithstanding its "limited" scope, *Serafine*, 810 F.3d at 359—no case supports DOL's extraordinary view that an agency may, by regulatory command, deem sales speech to be a fiduciary professional practice with *no* First Amendment scrutiny. Justice White in *Lowe* rejected that type of dangerous power grab. 472 U.S. at 230-231.

Finally, DOL makes no meaningful response to Appellants' position that the professional speech doctrine is inapplicable because it is limited to licensing regimes, and DOL does not license agents or broker-dealers. ACLI Br. 24-25. The Rule thus is not "incidental[] to a valid licensing scheme." *Serafine*, 810 F.3d at 360. Indeed, DOL identifies no case in which the doctrine has been applied

[6] The Fifth Circuit decisions cited by DOL (at 75) are not to the contrary. In *Kagan v. City of New Orleans*, applying intermediate scrutiny, this Court upheld a licensing requirement for tour guides. 753 F.3d 560, 562 (5th Cir. 2014). And in *Hines v. Alldredge*, the Court rejected a First Amendment challenge to a law regulating licensed veterinarians. 783 F.3d 197, 201 (5th Cir. 2015). Those are vocational requirements. Neither suggests the professional speech doctrine permits the government to regulate commercial speech outside the context of a fiduciary relationship with no First Amendment review.

absent a connection to an otherwise valid licensing regime. That is a rational limiting principle, and one this Court should not be the first to reject.[7]

3. The Rule regulates truthful speech

DOL does not squarely defend the district court's holding that the Rule regulates only "misleading" speech, ROA.9950. Instead, DOL defends (at 76-77) a single restriction on "misleading statements" Appellants have never challenged. Indeed, Appellants' members are *already* subject to such restrictions. ACLI Br. 26 & n.4. Contrary to DOL's claim, Appellants do challenge the Rule's "expan[sion] [of] the category of individuals" (DOL Br. 76) who are ERISA fiduciaries. That expansion is indefensible as a regulation of inherently misleading speech because the Rule applies to any "suggestion" to buy an annuity—even if the information is all true, and the seller's non-fiduciary status is clear. ACLI Br. 25-28.

C. The Rule Fails Intermediate Scrutiny

Like the speech restriction struck down in *Sorrell*, the Rule imposes substantial, discriminatory burdens on commercial speech that cannot survive intermediate, much less "stricter," scrutiny. 564 U.S. at 571; *see Central Hudson*

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[7] DOL cites *Hines* (at 100-101), but *Hines* involved a regulation of how veterinarians (licensed professionals) practice medicine, a prototypical "'standard[] for licensing practitioners and regulating the practice of professions.'" 783 F.3d at 201. DOL also incorrectly claims (at 101) that *Hines* settles that there is no First Amendment scrutiny under the professional speech doctrine. *Hines* did not address the review standard, even in dicta—much less did it reject the emerging consensus that intermediate scrutiny applies. ACLI Br. 25.

Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564-565 (1980). DOL bears the burden of proof on these issues, *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007), and is entitled to no deference on law or fact, *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). DOL has not carried its burden.

1. The Rule does not directly advance substantial interests

At the outset, as Appellants have shown, the Rule does not directly advance a substantial interest because, in critical respects, the Rule is based on assumptions that are at war with the First Amendment. ACLI Br. 32-33.

In response, DOL identifies two interests underlying the Rule: "protecting consumers from making suboptimal investment decisions" and "limiting conflicts of interest in the market altogether." Br. 79. Neither suffices.

As to the first, substantial authority—cited by Appellants, and not answered by DOL—forbids the government from regulating truthful, non-misleading commercial speech on the ground it will persuade listeners to engage in lawful transactions disfavored by the government. ACLI Br. 18 n.3, 32-34. That is precisely what the Rule accomplishes. DOL justified regulating sales speech and disfavoring those who propose variable or fixed-indexed annuity purchases on the grounds that consumers are uninformed, confused, and easily swayed, and that DOL should steer consumers' choices through differential speech regulation.

ROA.326-327, 356-357, 395. The First Amendment does not tolerate such paternalism. *Sorrell*, 564 U.S. at 576.

DOL's second interest in "limiting conflicts of interest in the market altogether" (Br. 79) is a claim of breathtaking scope that would eliminate all protection for commercial speech. DOL never explains why eliminating conflicts in the abstract is a legitimate government interest, absent some showing of consumer harm. After all, myriad commercial transactions among those with economic interests occur daily absent fiduciary regulation. If DOL's point is that any financial interest in a commercial transaction is a "conflict" the government may address by imposing fiduciary obligations, that would jeopardize all commercial speech, as "a great deal of vital expression" "results from an economic motive." *Sorrell*, 564 U.S. at 567; ACLI Br. 27.[8]

2. The Rule is not narrowly drawn

The Rule also fails intermediate scrutiny because it is not properly tailored. ACLI Br. 34. "The regulatory technique" DOL adopted "extend[s]" far beyond "the interest[s] it serves." *Central Hudson*, 447 U.S. at 565. In DOL's words, the Rule "sweeps broadly," purposely encompassing sales speech that is concededly

[8] Nor is DOL's "analogy" to attorney conflict-of-interest rules illuminating. Br. 80. Again, Appellants do not contest reasonable conflict-of-interest regulation within the confines of fiduciary relationships characterized by trust and confidence. Appellants' objection is to the Rule's vast expansion of fiduciary standards to obliterate the distinction between impartial advice and sales speech.

non-fiduciary under the common law. ROA.324. Indeed, despite concerns the Rule would infringe "the right of businesses to market their products," ROA.358—voiced by Appellants and others, ROA.7339, 7343-7344—DOL rejected requests for a broader seller's carve-out narrowing the Rule's scope and honoring the distinction between advice-giving and sales speech. The Rule thus ignores that "regulating speech must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002).

Attempting to justify this vastly excessive sweep, DOL points to various harms: "complex and risky" products, "conflicted compensation," "abusive marketing techniques," and consumers' inability to assess "the quality of investments and of investment advice." Br. 81. But the government could have addressed those in numerous ways that would not unduly burden speech—for example, by directly regulating retirement products or compensation, requiring conspicuous disclosures, educating consumers, or all of the above. ACLI Br. 34.

Those reasonable alternatives demonstrate why the Rule fails intermediate scrutiny. *American Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 311 (5th Cir. 2017). DOL's argument (at 82) that it reasonably rejected disclosure is wrong. Instead of broadly expanding fiduciary regulation, DOL could have required agents and brokers to inform consumers whether they are fiduciary advisers or salespeople, allowing consumers to choose which they prefer. Such disclosures are

the preferred First Amendment course. *Zauderer*, 471 U.S. at 651; *Parker*, 860 F.3d at 311. Here, where DOL "can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, [it] must do so." *Western States*, 535 U.S. at 358.

DOL rejected disclosure because it claimed "disclosure … can backfire, leading … consumers to act contrary to [their own] interests," ROA.780. But this "highly paternalistic" assumption that an informed consumer will act against her self-interest is incompatible with the First Amendment. *Central Hudson*, 447 U.S. at 591. "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.[9]

As to the alternative that DOL itself engage in speech to educate consumers about its concerns with annuities or conflicts, DOL argues (at 82) only that the Rule will promote education. That is a dodge, not a response. Courts have recognized that government education, or "counter-speech," is a less-burdensome alternative. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-508 (1996) (plurality); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009) ("educational campaigns" are "less restrictive alternatives"). Yet,

[9] DOL claims (at 79, 82) Congress rejected disclosure as a means to regulate fiduciaries under ERISA. But that says nothing about using disclosure to inform consumers of a seller's *non*-fiduciary status.

despite bearing the burden of proof, DOL advances no reason this alternative would be unsuitable or unsuccessful here.

D. Constitutional Avoidance Resolves This Case

At the least, the First Amendment concerns raised by the Rule should guide this Court's interpretation of ERISA. ACLI Br. 36-37. DOL admits its construction of investment-advice "fiduciary" is not statutorily compelled and that another interpretation limiting that term to relationships of trust and confidence is "semantically possible." Br. 26.

The avoidance canon applies precisely in such circumstances. "It is a tool for choosing between competing plausible interpretations of a statutory text," and "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Here, as explained above and contrary to DOL's assertion (at 69 n.16), DOL's statutory interpretation raises "serious constitutional doubts." *Clark*, 543 U.S. at 381. That is sufficient to trigger the canon, and to reject DOL's interpretation.

II. THE RULE'S TREATMENT OF ANNUITIES VIOLATES THE APA

A. Consumer Access To Variable And Fixed-Indexed Annuities

As Appellants have explained and DOL does not dispute, under the Rule, fixed-rate annuities receive "streamlined" regulatory treatment, while variable and fixed-index annuities are subject to the "more stringent" burdens of the BICE,

ROA.554, 556—burdens DOL knew would adversely affect the availability of those disfavored annuities to consumers. ACLI Br. pt. II.A. Yet *nothing* in the record demonstrates DOL meaningfully grappled with the serious harm to retirement savers resulting from regulatory interference with access to variable and fixed-indexed annuities.

The Rule's disparate treatment of these annuities—an effort to steer consumers to "simple[r] and inexpensive" products DOL prefers, ROA.943—violates the APA. Under the APA, an agency must openly "*face* the trade-off[s]" it made and explain why they were "worth it." *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321, 323-324 (D.C. Cir. 1992). Thus, for example, an agency requiring cars to be more fuel efficient must confront and explain the safety trade-offs inherent in the smaller cars that result. *Id.* Here, it was incumbent upon DOL to acknowledge that the Rule's disparate regulatory burdens would drive the market from variable and fixed-indexed annuities toward fixed-rate annuities, and to explain why that cost was "worth it"—an inquiry demanding some quantification or assessment of the *unique* benefits to many consumers from variable and fixed-indexed annuities.

DOL's contrary arguments are unconvincing. Crediting DOL's arguments below, the district court was "unpersuaded" the Rule will "reduce consumer access to [fixed-indexed] or variable annuities." ROA.9936; *see* ROA.4779 (claiming

DOL had "no reason to expect that [fixed-indexed or] variable annuities … will lose market share"). DOL jettisons that position on appeal, now acknowledging it knew the Rule "would have a heightened impact on … fixed-indexed and variable annuities." Br. 63.

That is not a problem, DOL now insists, because the anticipated decrease in market share for variable and fixed-indexed annuities will result not from the Rule's disparate regulatory burdens but only from a "reduction in mismatched recommendations of products that may not be in the best interest of investors." Br. 63-64. That response is twice flawed, as Appellants have already explained and DOL hardly acknowledges.

First, the administrative record, basic economics, and common sense all drive the same conclusion: Subjecting one type of annuity to streamlined regulation, while subjecting others to a burdensome regime (characterized by class-action litigation), will affect the availability of annuities in the marketplace based on non-merits factors. DOL deliberately structured the Rule to expose those who sell under the BICE to significant litigation risk, including "class litigation, and liability and associated reputational risk," ROA.323, and the record demonstrated the BICE's burdens would reduce the availability, or at least raise the cost, of variable and fixed-indexed annuities, *e.g.*, ROA.7828, 7844. Post-promulgation

events confirm this, as the market for variable annuities declined by an astonishing $28 billion following the Rule's promulgation. ACLI Br. 41.[10]

Second, DOL itself recognized time and again that regulating a product under the BICE rather than PTE 84-24 would affect availability—*not* because of a customer's best interest but because of the differential costs of the regimes. DOL claimed that placing fixed-rate annuities in the lightly regulated "PTE 84-24 will promote access to the[m]," ROA.553, and that moving fixed-indexed annuities from PTE 84-24 to the BICE was necessary to "avoid[] creating a regulatory incentive to preferentially recommended indexed annuities" over products regulated under the BICE, ROA.395.[11]

For those reasons, DOL knew the Rule would drive the annuity market toward fixed-rate annuities, at the expense of variable and fixed-indexed annuities. But the Rule contains *no* discussion of the unique benefits of those products and

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[10] DOL objects that this evidence "is not properly before the Court," Br. 66 n.15, but this "subsequent event[]"confirms explanations that were made in the record as to why the Rule would harm variable annuities. *Wold Commc'ns, Inc. v. FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984). Moreover, that the Rule is not the "whole story" (DOL Br. 66 n.15) in the decline of variable annuities hardly undermines the industry view that the Rule played a significant role in a single-year $28 billion decline.

[11] DOL suggests (at 65) it would "breach" fiduciary duties to recommend "suboptimal investments to minimize" litigation risk, but that ignores two things: (1) DOL acknowledged differential regulation would create regulatory incentives to recommend one product over another, and (2) many annuity sellers may stop offering variable or fixed-indexed annuities as a result of the BICE, *e.g.*, ROA.7337, 7765-7766, 7826-7828, 7990-7991.

the resulting "trade-offs" DOL made. This is no small matter—particularly for a Rule justified as helping retirement savers. Variable and fixed-indexed annuities, for example, offer consumers the important ability to manage competing retirement risks of longevity and inflation, something fixed-rate annuities *cannot* do. ACLI Br. 4. Thus, DOL's acknowledgment that "'annuities'" can be helpful "'in retirement planning'" (Br. 64) says nothing about whether and how DOL justified depriving consumers of the unique benefits of variable and fixed-indexed annuities. Before impeding consumers' access to valuable products, DOL owed them "reasonable candor," *Competitive Enter. Inst.*, 956 F.2d at 327, and reasoned decisionmaking required DOL to confront this significant "disadvantage[]," *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

B. Existing Annuity Regulation

The administrative record made clear that annuities are subject to existing and comprehensive regulation—by state insurance departments and FINRA, among others—that are designed to protect consumers. ROA.7380-7381, 7384-7385; ACLI Br. 7-9. DOL deemed these "existing protections" deficient because, in its view, nine studies assessing mutual-fund performance from 1999 to 2009 show "advice conflicts are inflicting losses on IRA investors." ROA.747-748. In other words, DOL relied on the studies to attempt to prove that existing annuity regulations were insufficient to protect consumers from investor loss.

That was doubly irrational. The studies could not possibly address the effectiveness of existing annuity regulation in protecting consumers from economic loss because they relate only to mutual funds (which are regulated differently from insurance products like annuities) and because they predate significant reforms of mutual-fund *and* annuity regulation. *See* ACLI Br. 44-48.

DOL's litigation arguments are unpersuasive. At the threshold, DOL mistakenly argues it was "not required to assess the efficacy" of existing regulations. Br. 54. As Appellants have explained and DOL does not dispute, the sufficiency of existing regulations was an "important aspect of the problem" that DOL was required to consider, *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); it had a duty to respond reasonably to "significant" comments arguing that existing regulations obviated the need for the Rule, *Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015); and because it "staked its rationale in part" on that basis, its failure to identify evidence of a "problem is not reasoned decision-making," *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006).

Moreover, DOL at various points insists that existing annuity regulation is insufficient because it permits "conflicted advice," Br. 58—namely, commission-based sales. But that misses the point. The Rule's premise is that conflicts of interest lead consumers to purchase ill-suited, economically-underperforming

products. As proof, DOL cited the nine studies, ROA.796-797, and it deployed those studies to indict existing regulations wholesale. But these studies did not and could not demonstrate the ineffectiveness of annuity regulations to prevent investor loss because they relied on data concerning mutual funds—not annuities—that predated significant enhancements to FINRA and State rules.

DOL further suggests (at 55) it reasonably analogized the nine studies to "the market for annuities" because annuity commissions are often higher and annuities are more complex. This confuses the issue. Appellants' objection is not that DOL improperly analogized the *products*. The point is that DOL relied on nine studies to assail the efficacy of existing *regulations*. That reliance was deeply irrational for reasons Appellants have explained. ACLI Br. 45-46.

DOL also asserts that mutual-fund and annuity regulation are similar because both involve "suitability standards." Br. 55; *see id.* at 58, 60. But that is misguided in two respects. First, although mutual funds and variable annuities must comply with generally applicable suitability standards in FINRA Rule 2111, variable annuities are *also* governed by a customized regulatory framework that was enhanced in 2010 to account for annuities' unique features: FINRA Rule 2330. Second, variable and fixed-indexed annuities, *unlike* mutual funds, are subject to a second layer of state insurance regulation and enforcement. NAIC Model Suitability Rule § 6(A)(2)-(3).

Recognizing that the nine mutual-fund studies offer no basis to criticize existing annuity regulation, DOL cites (at 55) "a supplemental study of mutual-fund data from before and after [regulatory] changes." Appellants have explained, however, why that supplemental study proves nothing—it is only about mutual funds, and even as to those, it mixes data from before and after the new regulations took effect. ACLI Br. 48-49.[12] DOL does not respond to those key points.[13]

CONCLUSION

The Court should reverse the district court's judgment, and direct vacatur of the Rule, the award of appropriate equitable relief, or both.

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[12] Independently, DOL committed "serious procedural error" by failing to make the study—DOL's only analysis of data from after 2010—available for comment. *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999); ACLI Br. 49. Had DOL done so, Appellants would have, among other things, identified the improper mixing of data from before and after regulatory reforms and explained why the study is not relevant to annuities. That demonstrates prejudice. *See Chamber of Commerce v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006).

[13] DOL cites (at 55) other evidence "postdating these regulatory changes," apparently referring to a single comment letter and testimony. ROA.798 & nn.365-366. Neither is relevant. The letter responds to criticism that post-2009 developments in the mutual-fund market relating to the percentage of no-load versus load funds render the studies inapt; it has nothing to do with the *regulatory* changes at issue. *See* Christofferson & Evans Cmt. 2 (Sept. 10, 2015). And the testimony discusses research conducted *in 2008*—years before new regulations were fully implemented. *See* Schoar et al., *The Market for Financial Advice* 8-9 (2012).

Respectfully submitted,

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July 20, 2017

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Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, which will send a notice of filing to all counsel of record.

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