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

Defendants–Appellees

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

Plaintiffs–Appellants

v.

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

Defendants–Appellees

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

Plaintiffs–Appellants

v.

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

Defendants–Appellees

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

***CHAMBER OF COMMERCE* PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**

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Although it opposes Plaintiffs' motion for a preliminary injunction, the government concedes—explicitly and implicitly—all this Court needs to conclude that an injunction should be entered.

The rule before the Court indisputably would transform the financial-services industry and insurance business. And it would do so through three legally unprecedented steps: A boundless interpretation of "fiduciary"; use of an authority to grant regulatory exemptions as a means to impose a new code of conduct; and the creation of (in the words of the Department of Labor, or "DOL") a private "mechanism to enforce" those standards, to compensate for Congress's failure to do so.

The President has concluded that this deeply flawed and controversial Rule may be a mistake—it must be reviewed and perhaps rescinded. And relief is needed while the Rule is under review, the government has concluded. It has proposed a postponement that it may ultimately adopt and—when industry made clear that was insufficient and it was going to court—DOL first issued one "nonenforcement" bulletin, then the IRS issued another, as further gestures of relief.

But this motion remains pending, and for one reason: The businesses who must actually contend with this Rule know the government's patchwork relief plan is uncertain and insufficient.

When a dubious rule is under review and—as the government's actions concede—interim relief is needed, the Executive Branch is not the only one with a say. Those precise circumstances justify an injunction pending review by the courts. This Court does not tread on the Executive's prerogatives by exercising its time-honored equitable authority. Rather, by doing so, it provides the repose the government knows is needed but has failed to provide. And it does so more swiftly, with more clarity and certainty, and for a period of more definite, appropriate duration.

ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits.

DOL (like the court below) fails to address some of Plaintiffs' principal points on the merits.[1]

1. DOL does not dispute that "fiduciary" has a settled common-

[1] The district court's decision rests on erroneous conclusions of law, constituting an abuse of discretion to which no deference is due from this Court. *Janvey v. Alguire*, 647 F.3d 585, 591–92 (5th Cir. 2011).

law meaning under which—DOL "assum[es] *arguendo*"—"insurance salespersons can never be common-law fiduciaries." Resp. 12. Nonetheless, DOL argues that *Chevron* permits it to discard that settled meaning and deem "fiduciary" to include any broker or insurance sales agent who "suggest[s]" purchasing a financial product for an IRA. Resp. 5. In this manner, DOL tacitly concedes, the very act of selling a product—which historically a fiduciary cannot do—becomes a basis for finding fiduciary status. *See also* Mot. 1 (DOL conceding in rulemaking that its interpretation of "fiduciary" sweeps in relationships Congress never intended).

It is true that the Code (and ERISA) define fiduciary to include one who "renders investment advice for a fee or other compensation." 26 U.S.C. § 4975(e)(3)(B). But DOL misses the point (at 12) in arguing that someone might be a fiduciary under this definition if she is paid for advice only in part. Under long-established industry norms that the Rule threatens to wipe out, fees are paid for brokerage transactions regardless of whether advice is conveyed, and no fees are paid to brokers who convey extensive advice but do not execute transactions. In this context, it cannot be said that brokers render advice for a fee.

DOL reached that conclusion in the rulemaking by rejecting the distinction between sales and advice (Mot. 14-15), yet it relied on that distinction in its "seller's carve-out" for ERISA plans, which provides that "the person must not receive a fee or other compensation directly from the plan . . . for the provision of investment advice (as opposed to other services)," *i.e.*, sales.[2] DOL's contention (at 13) that the seller's carve-out "comports with ERISA's remedial purposes" is irrelevant; the point is that DOL cannot rest a rule on rejection of a supposedly illusory distinction when that same distinction is the basis for another part of the rule. *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49, 1153-54 (D.C. Cir. 2011).

DOL argues that ERISA departed from the common law by "expanding the universe of persons subject to fiduciary duties," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993), but that limited departure actually refutes DOL's position. ERISA (and the Code) rejected an approach under which only "named" trustees can be fiduciaries, and instead base fiduciary status on the function one performs. *Id.* at 251, 262. That makes a fiduciary's common-law function more important, not

[2] App. 451 (emphasis added).

less so, because "over the years" the common law has given fiduciary "a legal meaning to which, we normally presume, Congress meant to refer." *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (cited in Resp. at 12). Thus, the common law is the "starting point" when interpreting "fiduciary" under ERISA, and it should be the end point unless "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.* at 497. For this reason, in *Varity* the Court looked to the common law of trusts to identify the functions that make one a fiduciary—the precise thing DOL refuses to do here.

2. DOL offers no meaningful response to Plaintiffs' explanation that the Rule unlawfully shoehorns a sweeping new regulatory regime through DOL's narrow authority to reduce regulatory burdens. Mot. 16-18. DOL tacitly concedes that these new requirements will bring about the most profound changes to the retirement-savings system since ERISA's enactment in 1974. DOL claims (at 11-12) that Congress empowered it to make these changes by granting it the authority to interpret "fiduciary" and create exemptions from restrictions that apply to fiduciaries, but that authority is too slender a reed to bear the weight of the industry-reshaping changes the Rule would impose. Congress "does not hide . . . elephants in mouseholes;" it "does not alter the fundamental details of a regulatory scheme" in "ancillary provisions," such as DOL's exemptive authority. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Tellingly, DOL does not address *Whitman* or the other cases Plaintiffs cited to illustrate that an agency may not use a limited grant of authority to "effectively . . . introduc[e] . . . a whole new regime of regulation." *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994); *see also Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442-44 (2014).

DOL argues (at 11) that a broad rule is not "unreasonable if [it] was promulgated under an equally broad delegation of regulatory authority," but this just proves Plaintiffs' point. DOL has no regulatory or enforcement authority over IRAs, which would be revolutionized by its Rule. Mot. 5–6, 8. Although DOL insists that "Congress delegated to the Labor Department authority to decide against whom and to what degree ERISA may be enforced" (Resp. 20; emphasis added), DOL has no such authority with respect to IRAs.[3] DOL is thus attempting to seize power that Congress denied it.

3. DOL attempts to defend its creation of a private right of action by ignoring what it did; it is permissible, it argues (at 14), to "require fiduciaries to IRAs . . . to conclude written contracts with investors." The presence of the contract is not the problem, however—the problem is that the Best Interest Contract ("BIC") was required for the purpose of enabling IRA owners to bring lawsuits that Congress did not authorize. *See* Mot. 19.

DOL officials have admitted as much, explaining that they "came up with the best interest contract exemption" to "deputiz[e]" consumers to bring "state contract actions."[4] That DOL imposed the BIC requirement to foster private lawsuits was made crystal clear, as well, by DOL's decision not to require the BIC for ERISA plans, because—it explained—"the statutory framework . . . already provides enforcement rights to such plans."[5] Fostering private claims that Congress did not

[3] *See also* Resp. 2 (citing DOL's ERISA authority rather than a comparable authority over IRAs).

[4] App. 55–56.

[5] App. 492.

authorize was the BIC's essential purpose.

DOL argues that suits to enforce the BIC would arise under state law, but if those suits aren't dependent on the Rule, why is DOL's "enforceable" contract necessary at all? In fact it is DOL's regulations, not state law, that dictate the terms of the BIC, designate the forum in which suit can proceed, and prescribe the remedies and procedures that must be available—including mandatory class actions (which, under ERISA, may be waived).

DOL distinguishes *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110 (2011), by arguing that it involved suits by third-party beneficiaries, not parties to the contract, but that is a meaningless distinction. *Astra* holds that a federally required contract may not be the basis for a private right of action that the statute omitted, because doing so is "incompatible with the statutory regime," *id.* at 113, and *Alexander v. Sandoval*, 532 U.S. 275 (2001). Like the district court, DOL overlooks Plaintiffs' argument (Mot. 19-20) that nothing would be left of *Sandoval* if agencies could require regulated entities to enter into contracts providing a right of action where Congress determined not to do so.

It only makes matters worse that the rights being enforced under the BIC are not "statutory obligations." Resp. 14. An administrative agency without authority over IRAs has promulgated standards of conduct to govern them, and created a private right of action to "enforce" those standards through class actions. DOL has trespassed the boundaries on its authority and, indeed, the separation of powers.

B. Plaintiffs Have Demonstrated Imminent Irreparable Harm.

DOL does not dispute that Plaintiffs will suffer irreparable harm absent relief. Revealingly, DOL questions the "force" of Plaintiffs' arguments (at 2) only "in light of the recently issued nonenforcement policies," which it claims "substantially reduce the risk to plaintiffs." Resp. 2. Thus, DOL leaves no doubt that it, too, understands Plaintiffs to have identified substantial risks from which they must be "protect[ed]" immediately (Resp. 7), even while DOL considers a further (but also temporary) extension of the Rule's applicability date.

DOL claims that Plaintiffs "elide the distinction between costs already incurred and costs to be incurred." Resp. 17 (emphasis in original). Plaintiffs elide nothing. In the context of ongoing compliance costs, harms already incurred are compelling evidence of a "presently existing actual threat" of future injury. *United States v. Emerson*, 270

F.3d 203, 262 (5th Cir. 2001) (quotation omitted). Plaintiffs will continue to incur compliance costs until the Rule is enjoined for a substantial period or rescinded altogether. Common sense teaches that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part).

Plaintiffs have gone further and proffered actual, uncontroverted evidence of the harms the Rule both has inflicted and is poised to inflict. DOL does not dispute that many independent marketing organizations ("IMOs") in the insurance industry will be required to reconstruct their operational models, change their product offerings, and "invest heavily in infrastructure."[6] DOL does not deny that a number of IMOs are likely "to go out of business,"[7] and that as many as 20,000 insurance agents will

[6] App. 226 ¶ 11; App. 227–28 ¶ 16; 239–40 ¶ 23. DOL mischaracterizes the declaration that supports Plaintiffs' motion. The declaration does not concede that "whatever implementation remains to be done can be accomplished in a short period of time." Resp. 18. In the very sentence cited by DOL, the declarant explains that the applicability date kicks off the race to be ready for the "full BIC compliance [date, which] is January 1, 2018." App. 212 ¶ 7.

[7] App. 229 ¶ 23; *see also* App. 253–54 ¶ 25.

be forced out of selling fixed-indexed annuities.[8] Nor does DOL dispute that brokerage firms will undergo transformative and costly changes to comply with the BIC exemption.[9]

The risk to Plaintiffs and their members is certain and undisputed—it is DOL's statements that it might ameliorate those harms that are merely speculative. There is no guarantee that DOL will extend the Rule's applicability date through rulemaking. Thus, DOL retreats to the empty assurance that "a meaningful delay of some of the fiduciary rule's requirements beyond the proposed sixty-day period is a realistic possibility." Resp. 18 (emphases added). DOL's speculation that it might approve a longer extension of part of the Rule does not diminish the harms Plaintiff will suffer without immediate relief. Nor does DOL's vague indication that it "will consider" "other temporary relief" "as necessary" provide a respite from uncertainty or ongoing compliance costs from the Rule.[10]

[8] App. 230 ¶ 28.

[9] App. 216–18 ¶¶ 16–20.

[10] App. 632.

DOL's extension proposal and temporary nonenforcement policy are welcome but incomplete measures. Indeed, the measures appear to arise directly from the concerns Plaintiffs identified in seeking an injunction pending appeal.[11] But any relief that is uncertain and wholly within the discretion of one litigant cannot suffice to protect the interests of its party-opponents. That the government felt compelled to respond to Plaintiffs' motion with these discretionary policies—which it can withdraw at will—confirms that judicial relief is necessary.

C. The Balance of the Hardships and the Public Interest Heavily Favor an Injunction.

DOL's argument that an injunction would interfere with the public's interest in the notice-and-comment process is an exercise in misdirection. DOL's rulemaking is different from what Plaintiffs seek: DOL proposes an administrative deferral of the Rule for at least part of the time while DOL reconsiders it; Plaintiffs seek a judicial injunction while this appeal is pending. If DOL decides to extend the Rule, then an injunction would complement, not interfere with, DOL's objectives. And

[11] DOL issued its bulletin mere hours before Plaintiffs filed their motion in district court, and approximately a week after its consent to the motion was first requested. The IRS policy came after Plaintiffs filed their motion in this Court, as a direct result of points made in Plaintiffs' court filings.

if DOL declines to extend the Rule, it will have completed its process without interference while only punctuating the necessity of this separate, judicial process to protect Plaintiffs' interests. Furthermore, it clearly is mistaken that an injunction "would prevent the Department from determining the fiduciary rule's future in the first instance." Resp. 20 (quotation omitted). To the contrary, an injunction would aid DOL's reconsideration by ensuring that DOL has the benefit of appellate review of the Rule's legality.

In reality, it is DOL that seeks to preempt a vital process for addressing the immediate effects of the Rule: the judicial process. DOL's argument that Plaintiffs are exalting their interests over commenters' implies that the government may divest plaintiffs who are in jeopardy of serious harms from exercising their right to protect their own interests any time the government proposes partially overlapping administrative relief. There is no genuine public interest in permitting agencies to deprive courts of their equitable jurisdiction and to preempt complete judicial relief with half an administrative loaf.

CONCLUSION

The Court should grant an injunction staying the Rule pending appeal. In the alternative, expedited briefing and argument are warranted.

March 31, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 31st day of March, 2017, the foregoing reply 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. 27(d)(2)(C) because, excluding any part of the document exempted by Fed. R. App. P. 27(a)(2)(B), this reply contains 2,550 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 12-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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CERTIFICATE OF FACTS

Pursuant to this Court's Rule 27.3, I hereby certify on this 31st day of March, 2017, that the facts supporting consideration of this motion are true and complete.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2017, an electronic copy of the foregoing Reply in Support of Plaintiffs' Emergency Motion for an Injunction Pending Appeal 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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