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.

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

Defendants-Appellees.

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

BRIEF FOR AMICUS CURIAE THRIVENT FINANCIAL FOR LUTHERANS IN SUPPORT OF CHAMBER OF COMMERCE PLAINTIFFS-APPELLANTS AND REVERSAL

ANDREW B. KAY
Attorney of Record
PHILIP RANDOLPH SEYBOLD
HARYLE A. KALDIS
COZEN O'CONNOR
1200 19th Street, NW
Washington, DC 20036
(202) 912-4800
akay@cozen.com
rseybold@cozen.com
hkaldis@cozen.com

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Attorneys for Amicus Curiae Thrivent Financial for Lutherans

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES PURSUANT TO CIRCUIT RULE 29.2

Case 17-10238, *Chamber of Commerce of the United States of America, et al. v. United States Department of Labor, et al.*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities, in addition to those disclosed in the parties' certificates of interested persons, 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.

Person or Entity	Connection to Case
Thrivent Financial for Lutherans	*Amicus curiae*
Cozen O'Connor	Law firm to *amicus*
Andrew B. Kay	Counsel to *amicus*
Philip Randolph Seybold	Counsel to *amicus*
Haryle A. Kaldis	Counsel to *amicus*

Thrivent is a not-for-profit, member-owned organization that provides life insurance and other benefits to its members.

/s/ Andrew B. Kay
Andrew B. Kay
COZEN O'CONNOR
1200 19th Street, NW
Washington, DC 20036
(202) 912-4800
akay@cozen.com
Attorney of Record for Amicus Curiae Thrivent Financial for Lutherans

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Thrivent Financial for Lutherans ("Thrivent") states that it is a fraternal benefit society with no parent corporation, and no publicly held corporation owns 10% or more of its stock. Thrivent is a not-for-profit, member-owned organization that provides life insurance and other benefits to its members.

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INTEREST AND INDEPENDENCE OF AMICUS CURIAE

Amicus Curiae Thrivent Financial for Lutherans ("Thrivent") is a fraternal benefit society founded in 1902 in Appleton, Wisconsin, as Aid Association for Lutherans ("AAL"). On January 1, 2002, Lutheran Brotherhood ("LB"), a Minnesota fraternal benefit society, merged into AAL, so that AAL, a fraternal benefit society organized under Wisconsin law, was the surviving entity of the merger between AAL and LB. Following the merger, AAL changed its name to Thrivent.

Thrivent is a not-for-profit, member-owned organization that provides life insurance and other benefits to its members. As required by both federal and state law, members of a fraternal benefit society must share a common bond; for Thrivent, the common bond shared by its members is Christianity. Thrivent's members directly elect the members of Thrivent's board of directors, which is its governing body. Each Thrivent member is entitled to one vote in the board of directors' election, regardless of the value of the member's insurance. Each member of Thrivent's board of directors is and must be a benefit member.

Thrivent's mission is to provide insurance and other fraternal benefits to members as permitted under the law, and to strengthen and assist Christian communities through fraternal and benevolent activities and financial assistance. Today, Thrivent has approximately 2.3 million members nationwide, and Thrivent is authorized to sell life insurance products in all fifty states and the District of Columbia. In addition to selling its members traditional life insurance products such as whole life and universal life, Thrivent also sells a full range of retirement products to its members with individual retirement accounts ("IRAs"), including insurance

products such as fixed rate annuities and fixed indexed annuities, and securities products such as variable annuities and mutual funds.

As a member-governed fraternal benefit society and as a matter of state law, Thrivent's Articles of Incorporation and Bylaws are incorporated into each insurance contract between Thrivent and a Thrivent member. Thrivent's Bylaws require that disputes with members related to insurance products must be resolved through an individual alternative dispute resolution process that includes mediation and culminates in arbitration, if necessary. Under the Bylaws, class actions or representative actions are not permitted as a means to resolve disputes. Thrivent's individual dispute resolution program is a core component of Thrivent's governance. It is conducive to preserving relations among members and has proven to be a successful process for resolving member disputes.

Thrivent is filing this brief in support of the argument made by Plaintiffs-Appellants the Chamber of Commerce ("Plaintiffs") that the availability of judicial class actions mandated by the Best Interest Contract ("BIC") Exemption violates the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. *See* Pls.' Br. at 59–63. Due to Thrivent's status as a fraternal benefit society that currently requires insurance-related disputes to be resolved individually in arbitration and that sells proprietary insurance products to its members, Thrivent would be particularly affected by the Fiduciary Rule adopted by the Department of Labor ("DOL"), because for Thrivent to continue to offer the full range of products to its members with IRAs and avoid engaging in prohibited transactions, Thrivent *must* implement the BIC. Accordingly, Thrivent has filed its own lawsuit against DOL, asserting a narrow challenge under the Administrative Procedure Act ("APA") to the BIC Exemption's judicial class

action requirement. *See Thrivent Financial For Lutherans v. Perez*, 16-cv-3289-SRN-HB (D. Minn.) (the "Thrivent Litigation"). In the Thrivent Litigation, DOL has conceded that the BIC Exemption is the only available means for Thrivent to avoid engaging in prohibited transactions and continue selling its full range of insurance products to its customers with IRAs.

Thrivent initiated the Thrivent Litigation on September 29, 2016; the parties' cross-motions for summary judgment were fully briefed as of January 17, 2017; and the court heard oral argument on the cross-motions on March 3, 2017. A decision by the court is pending. Because the BIC Exemption's condition requiring the availability of judicial class actions was the subject of extensive briefing in the Thrivent Litigation, and given the different context and points of emphasis in this matter, Thrivent is filing this brief as Amicus Curiae to ensure the Court is fully briefed with respect to how the BIC Exemption's judicial class action requirement violates the FAA and thus exceeds DOL's authority under the APA, which Thrivent's circumstances perfectly illustrate.

No one other than Thrivent and its counsel wrote this brief or parts of it. The cost of its preparation was paid for solely by Thrivent and its counsel.

All parties have consented to Thrivent's filing of this brief.

SUMMARY OF ARGUMENT

DOL carefully crafted the Fiduciary Rule and BIC Exemption to strongly disincentivize—and functionally prohibit—financial institutions from maintaining class-action waivers through the use of an oppressive excise tax. In so doing, DOL runs afoul of the FAA's pro-arbitration mandate, which broadly prohibits federal agencies from taking actions that have the effect of disfavoring arbitration, *D.R. Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344, 360 (5th Cir. 2013); interfere with the fundamental attributes of arbitration, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); or otherwise invalidate arbitration provisions, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533 (2012).

The "options" for a financial institution like Thrivent exemplify how the BIC Exemption's anti-arbitration condition violates the FAA. In fact, Thrivent cannot opt both to maintain its commitment to resolving disputes individually in arbitration and continue to sell the full range of its proprietary insurance products to its members with IRAs; rather, it must either: (a) utilize the BIC Exemption, and thereby revoke its existing arbitration agreements with its members and refrain from entering into similar agreements; or (b) pay a punitive 115% excise tax for the total amount of every prohibited transaction, *solely* because of Thrivent's commitment to individual arbitration. As DOL has *conceded* in the Thrivent Litigation, there is no way for Thrivent to continue to sell its full range of proprietary insurance products to its members with IRAs without engaging in prohibited transactions. Thus, either "choice" left to Thrivent—paying what amounts to an oppressive arbitration tax for maintaining individual arbitration provisions, or abandoning individual arbitration altogether—has the effect of disfavoring and imposing an actual impediment to

arbitration in violation of the FAA. Moreover, paying the exorbitant 115% excise tax on every prohibited transaction is not *actually* a plausible "option." Thus, the coercive anti-arbitration condition also invalidates Thrivent's arbitration agreements in violation of the FAA.

The district court erred in construing the FAA exceedingly narrowly—and in a manner that cannot be reconciled with Supreme Court and Fifth Circuit precedent—when it concluded that the BIC Exemption's judicial class action requirement does not contravene the FAA. In fact, the BIC Exemption contravenes the FAA in at least two ways. *First*, the BIC Exemption clearly disfavors arbitration; rules disfavoring arbitration are invalid under the FAA, as this Court and the Supreme Court have clearly held. *Second*, the district court concluded that the BIC Exemption's judicial class action requirement does not cause arbitration provisions to be invalidated because financial institutions have "several plausible options and alternatives." But this is incorrect, particularly for a financial institution (like Thrivent) that sells proprietary products to its members and thus has no option other than using the BIC Exemption. The BIC Exemption requires that such arbitration provisions be revoked and invalidated.

DOL thus acted without the requisite statutory authority to contravene the FAA. Indeed, this Court has *already* determined that ERISA does not contain a congressional command necessary to override the pro-arbitration mandate of the FAA. *See Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996). Because DOL cannot simply override Congress's judgment, as expressed by the FAA, DOL has exceeded its authority under the APA.

ARGUMENT

I. FINANCIAL INSTITUTIONS LIKE THRIVENT HAVE NO THIRD OPTION: THEY MUST USE THE BIC EXEMPTION OR PAY A PUNITIVE EXCISE TAX

In the proceedings below, the district court found that the BIC Exemption's conditions are not coercive. The court expressly premised this determination, in part, on the understanding that "Plaintiffs are not being coerced into relying on a particular exemption, as there are several plausible options and alternatives for the industry, including adjusting compensation models or innovating practices." ROA.9953. However, Thrivent's situation demonstrates the flaw in the district court's reasoning: Thrivent and other, similarly situated, financial institutions do not have "plausible options and alternatives."

A. Thrivent's Background

Thrivent's background and status as a fraternal benefit society is important to understanding why Thrivent and other financial institutions cannot simply "adjust[ ] compensation models or innovat[e] practices," ROA.9953, to avoid engaging in prohibited transactions.

First, as a fraternal benefit society, Thrivent members are required to have a common bond. 26 U.S.C. § 501(c)(8); *National Union v. Marlow*, 74 F. 775, 778–79 (8th Cir. 1896). For Thrivent, that common bond today is Christianity. In order to preserve the fraternal relationship and common bond with its members, Thrivent has long chosen to utilize alternative dispute resolution to resolve the rare disputes that arise with its members. Thus, Thrivent's Bylaws require that disputes with members related to insurance products be resolved through a one-on-one alternative dispute resolution process that culminates in arbitration, if necessary.

Second, state law *requires* fraternal benefit societies like Thrivent to sell proprietary insurance products to its members. *See* Wis. Stat. §§ 614.01(1)(a)5, 632.62(1)(b). Thus, in support of its mission, Thrivent offers its members a broad range of proprietary products, including whole life insurance, universal life insurance, term life insurance, annuities, and (through an affiliate) mutual funds. Thrivent's members may purchase proprietary annuities, such as fixed indexed annuities and fixed rate annuities, through an IRA.

Third, state law provides that the Bylaws of fraternal benefit societies like Thrivent, including all Bylaw amendments, are incorporated into all new and existing contracts with members. *See* Wis. Stat. § 632.93(1) ("The policy or certificate, any riders or endorsements attached thereto, the laws of the fraternal, and the application . . . constitute the agreement between the fraternal and the owner, and the policy or certificate shall so state."); *see also id.* § 632.93(2). Such "open contracts" further the fraternal interest by ensuring uniformity across the members of the Society, who are equally bound by the rights and obligations specified by the Bylaws. Thus, the Bylaws' requirement that disputes be resolved through an individual alternative dispute resolution process is incorporated into all of Thrivent's fraternal insurance contracts.

B. The Options Available Under The Fiduciary Rule

Financial institutions like Thrivent *must* rely on the BIC Exemption or pay a punitive excise tax—there are absolutely no other options available in order to maintain the commitment to resolve insurance disputes individually in arbitration and to offer fixed indexed annuities and other proprietary products to IRA customers.

First, as discussed *supra*, a financial institution like Thrivent cannot stop selling proprietary products; Wisconsin law *requires* that fraternal benefit societies sell proprietary insurance products to members. *See* Wis. Stat. §§ 614.01(1)(a)5, 632.62(1)(b). Under the Fiduciary Rule, sales of such proprietary products to IRA customers *necessarily* constitute prohibited self-dealing because—in DOL's thinking—irrespective of the manner in which an agent is compensated, financial institutions "benefit" from the sale of proprietary products. *See* 29 U.S.C. § 1106(b). Thus, in contrast to the proceedings here, DOL *conceded* in the Thrivent Litigation that there is no way for Thrivent to fulfill its core mission as a fraternal benefit society by selling its full range of proprietary insurance products to its members with IRAs without engaging in a prohibited transaction—unless it relies on the BIC Exemption.[1] *See* Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, Thrivent Litigation, filed Dec. 23, 2016, ECF No. 37.

The costs for engaging in prohibited transactions are staggering. The Internal Revenue Code (the "Code") provides that the excise tax "shall be equal to 15 percent of the amount involved with respect to the prohibited transaction[s] for each year . . . in the taxable period," and every "disqualified person who participates in the prohibited transaction" is liable for this tax. 26 U.S.C. § 4975(a). Thus, for a violation, the financial institution is initially subject to a fifteen-percent tax on the proceeds from the prohibited transaction. But further, any prohibited transaction that is not corrected within the tax year is *then* subjected to a subsequent "tax equal to 100 percent of the amount involved." *Id.* § 4975(b). In total, therefore, financial

[1] The BIC Exemption is the only exemption available for prohibited transactions involving fixed indexed annuities because the other possible exemption, PTE 84-24, as amended, excludes them from its scope. ROA.1110.

institutions would be subject to a 115% tax on the total value of each prohibited transaction.

Thus, contrary to the reasoning of the district court, a financial institution like Thrivent has only two options: (1) revoke its existing arbitration agreements, refrain from entering into new individual arbitration agreements, and abandon its commitment to individual arbitration in order to utilize the BIC Exemption; or (2) adhere to the commitment to resolve disputes individually in arbitration and pay a 115% excise tax—effectively, an arbitration tax—on every prohibited transaction.

II. THE ANTI-ARBITRATION CONDITION OF THE BIC EXEMPTION VIOLATES THE FAA

The district court read the FAA narrowly. In essence, the district court's ruling would confine the FAA to preserving the enforceability of existing arbitration agreements in judicial actions alone. Thus, the district court held that the BIC Exemption's condition requiring judicial class actions does not violate the FAA because arbitration agreements—including those with class-action waivers—"remain enforceable, but do not meet the conditions for relief from the prohibited transaction provisions of ERISA and the Code." ROA.9951 (internal quotations and citation omitted).

DOL relied on a similar premise in the rulemaking. DOL reasoned that the BIC exemption is "fully consistent with the FAA" because the "exemption does not purport to render an arbitration provision in a contract between a Financial Institution and a Retirement Investor invalid, revocable, or unenforceable." ROA.421. This is because, in DOL's view:

> Both Institutions and Advisers remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action or any representative action in court.

> Instead, such a contract simply does not meet the conditions for relief from the prohibited transaction provisions of ERISA and the Code. As a result, the Financial Institution and Adviser would remain fully obligated under both ERISA and the Code to refrain from engaging in prohibited transactions.

Id. On the basis that financial institutions continue to have the ability to "invoke and enforce arbitration provisions . . . that waive or qualify the right to bring a class action," by "refrain[ing] from engaging in prohibited transactions," DOL in the rulemaking expressly purported to distinguish the BIC Exemption from the anti-arbitration rule adopted by the National Labor Relations Board and held by this Court to violate the FAA in *D.R. Horton*, 737 F.3d at 360. ROA.421, ROA.421 n.82.

Both the district court and DOL erred in taking so narrow a view of the FAA. The FAA embodies a primary federal policy to promote and protect arbitration from rules that would disfavor it or invalidate agreements requiring it. Indeed, as this Court recognized in *D.R. Horton*, rules that have the effect of "disfavor[ing] arbitration" or that pose "an actual impediment to arbitration . . . violate[ ] the FAA." 737 F.3d at 359–60; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. at 346 (the Supreme Court "ha[s] repeatedly described the [FAA] as 'embod[ying] [a] national policy favoring arbitration'") (citation omitted); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (same); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) (recognizing that the FAA evinces a "liberal federal policy favoring arbitration agreements").[2]

[2] Moreover, the FAA, by its plain language, is *not* confined simply to judicial "enforceability" of arbitration agreements. Section 2 specifies that contractual arbitration agreements shall not only be "enforceable," they shall also be "valid" and "irrevocable." 9 U.S.C. § 2. Each of these terms must be given meaning. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (citation and internal quotations omitted)).

The district court ignored whether the BIC Exemption's judicial class action requirement disfavored arbitration (as it clearly does) and thus violates the FAA. Instead, the district court adopted DOL's argument and simply held that the class action requirement does not violate the FAA because it does not "render arbitration agreements between a financial institution and investor invalid, revocable, or unenforceable." ROA.9951. In this way, the district court erred in two respects. *First*, the FAA prohibits rules or laws that require the availability of class actions and thus "disfavor" arbitration, or otherwise "interfere[] with fundamental attributes of arbitration" and thus the ability to resolve disputes through arbitration. *Concepcion*, 563 U.S. at 341, 344; *see also D.R. Horton*, 737 F.3d at 360 ("Requiring a class mechanism is an actual impediment to arbitration and violates the FAA."). Financial institutions that wish to require disputes to be resolved individually in arbitration—or that, like Thrivent, *already do require* disputes be resolved in that manner—would indisputably be treated differently under the Fiduciary Rule as compared to other financial institutions, in a manner that disfavors arbitration. For financial institutions to maintain their commitment to arbitration, they would need to either drastically modify or abandon their existing business practices to avoid needing to use the BIC Exemption (whereas other financial institutions would not need to do so), or they would be subjected to a punitive excise tax.

Second, the district court erred in concluding that the BIC Exemption's judicial class action requirement does not invalidate agreements to arbitrate, which the FAA also prohibits. *See, e.g.*, *Marmet Health Care*, 565 U.S. at 533 (holding that state public policy violated the FAA because it prohibited arbitration of certain claims); *Ferrer*, 552 U.S. at 359 (holding that a law that mandatorily diverted certain

litigants subject to an arbitration agreement to a non-arbitral forum violated the FAA). This is particularly true for a financial institution like Thrivent which—by virtue of the fact that it sells (and, under state law, must sell) proprietary products to its members—has no alternative other than using the BIC Exemption. Contrary to the district court's reasoning, in order to avoid engaging in prohibited transactions (and avoid the punitive excise tax), financial institutions like Thrivent cannot "adjust[ ] compensation models or innovate[e] practices." ROA.9953. Accordingly, the effect of the BIC Exemption is to invalidate *existing* and *enforceable* dispute resolution provisions that require disputes to be resolved individually in arbitration.

A. The Effect Of The BIC Exemption's Judicial Class Action Requirement Is To Disfavor Arbitration

This Court in *D.R. Horton* recognized that the FAA requires courts to examine whether a law or regulation will have "the effect of . . . disfavor[ing] arbitration." 737 F.3d at 359. This Court conducted a functional analysis, determining whether the law or regulation at issue imposed "an actual impediment to arbitration." *Id.* at 360. Where the law or regulation will "give companies less incentive to resolve claims [through arbitration] on an individual basis," the effect is to disfavor arbitration. *Id.* at 359. And this Court held that the FAA invalidates any law that has such an effect—even a law that is "facially neutral"—absent a congressional command to override the FAA. *Id.* at 359–60.

In *D.R. Horton*, this Court concluded that the FAA invalidates laws that have the effect of disfavoring arbitration, after conducting a "detailed analysis" of the Supreme Court's decision in *Concepcion*. *Id.* at 359. In *Concepcion*, the Supreme Court considered "[a] California statute [that] prohibited class action waivers in arbitration agreements." *Id.* (citing *Concepcion*, 563 U.S. at 340, 351–52). Although

the California law "applied in both judicial and arbitral proceedings"—and thus was facially neutral—*D.R. Horton* explains that the Court in *Concepcion* nevertheless recognized that "requiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'" *Id.* (citing *Concepcion*, 563 U.S. at 340 and quoting *Concepcion*, 563 U.S. at 344). That was because, after analyzing the "numerous differences between class arbitration and traditional arbitration," the *Concepcion* Court determined that "the effect of requiring the availability of class procedures was to give companies less incentive to resolve claims on an individual basis"—and thus the law necessarily implicated and was invalidated by the FAA. *Id.* (citing *Concepcion*, 563 U.S. at 347–351). Thus, both *D.R. Horton* and *Concepcion* hold that the FAA does more than simply ensure the judicial enforcement of existing agreements to arbitrate; it also invalidates rules that disincentivize agreements to arbitrate. As *D.R. Horton* held, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." 737 F.3d at 360.

The district court ignored the analysis mandated by *D.R. Horton* entirely. Instead, it narrowly limited its inquiry to whether arbitration agreements technically "remain enforceable" under the BIC Exemption, ROA.9951—but failed to consider whether the BIC Exemption's judicial class action requirement "give[s] companies less incentive to resolve claims" through arbitration and thereby has the effect of "disfavor[ing] arbitration." 737 F.3d at 359.

It is difficult to imagine a clearer-cut case of a rule that has the effect of disfavoring arbitration. DOL would tax *only* those entities that engage in prohibited transactions *and* refuse to adopt its BIC condition requiring judicial class actions.

Financial institutions such as Thrivent would be *strongly* discouraged from requiring individual arbitration—the penalty for doing so is a punitive 115% excise tax—and thus the condition has the "effect" of "disfavor[ing] arbitration." *See D.R. Horton*, 737 F.3d at 359. Moreover, any financial institution that adopts the BIC Exemption must abandon individual arbitration requirements altogether—which certainly operates as an "actual impediment" to arbitration. *See id.* at 360. Thus, under either scenario, the BIC Exemption's judicial class action requirement plainly violates the FAA.

B. DOL Effectively Invalidates Existing Individual Arbitration Provisions Because Companies Have No Choice But to Adopt The BIC Exemption

While the fact that the BIC Exemption disfavors arbitration is a sufficient basis to hold that the Fiduciary Rule violates the FAA, on its own terms the district court also erred in concluding that the BIC Exemption's judicial class action requirement is not coercive, and thereby does not invalidate agreements to resolve disputes individually in arbitration. The district court reasoned that "Plaintiffs are not being coerced into relying on a particular exemption" because "there are several plausible options and alternatives for the industry, including adjusting compensation models or innovating practices." ROA.9953. But as discussed in Section I., *supra*, that is just not correct for financial institutions like Thrivent. The only *plausible* option is to adopt the BIC Exemption, including the anti-arbitration condition that effectively invalidates Thrivent's existing arbitration agreements—all of which require individual arbitration.[3]

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[3] During the rulemaking, DOL similarly contended that the BIC Exemption's judicial class action requirement does not prohibit class-action waivers because "[b]oth Institutions and Advisers

Beyond the FAA's prohibition against laws that have the effect of disfavoring arbitration, the FAA also prohibits laws or regulations that ban or invalidate arbitration provisions. Thus, in *Marmet Health Care Center, Inc.*, 565 U.S. at 533, the Supreme Court concluded that a state law prohibiting arbitration of certain claims violated the FAA. *See also, e.g.*, *Ferrer*, 552 U.S. at 359 (holding that a law that mandatorily diverted certain litigants subject to an arbitration agreement to a non-arbitral forum violated the FAA).

For financial institutions like Thrivent, the BIC Exemption's judicial class action requirement effectively invalidates existing agreements requiring individual arbitration. Contrary to the holding of the district court, such financial institutions *are* "being coerced into relying on a particular exemption," ROA.9953—the BIC Exemption. Financial institutions that sell proprietary products have no other option but to adopt the BIC Exemption. The penalty for failing to do so—a 115% punitive excise tax—is *plainly* coercive. *See South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (Where "the financial inducement" is "so coercive as to pass the point at which 'pressure turns into compulsion,'" the inducement offers no real choice at all. (citation omitted)). No conceivable financial institution could withstand such a punitive tax and remain viable. Thus, DOL's Fiduciary Rule forces financial

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remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action or any representative action in court." ROA.421. Instead, DOL posited that the financial institution could "refrain from engaging in prohibited transactions," and on that basis purported to distinguish this Court's decision in *D.R. Horton* as an attempt by the NLRB "to prohibit class-action waivers as an 'unfair labor practice.'" ROA.421, 421 n.82. But for financial institutions like Thrivent, it is *impossible* to continue to sell insurance products to IRA customers without engaging in prohibited transactions—state law *requires* them to sell proprietary insurance products in a manner that constitutes engaging in prohibited transactions under DOL's Fiduciary Rule. *See* Section I., *supra*. Thus, DOL ignored that in order to continue to sell such products to IRA customers, some financial institutions *must* adopt the BIC Exemption and its anti-arbitration condition, effectively invalidating existing arbitration agreements.

institutions to use the BIC Exemption. And because the BIC Exemption imposes a condition that requires judicial class actions, DOL has effectively invalidated existing arbitration agreements, in violation of the FAA.

III. ERISA DOES NOT CONTAIN A CONTRARY CONGRESSIONAL COMMAND NECESSARY FOR DOL TO CONTRAVENE THE FAA

Because Congress has already spoken through its enactment of the FAA—adopting a pro-arbitration mandate that prohibits disfavoring arbitration—DOL is without power to contravene the FAA *unless* the FAA's mandate "has been 'overridden by a contrary Congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304, 2309 (2013) (same). But numerous courts—including the Fifth Circuit—have already held that ERISA lacks the requisite congressional command to override FAA's dictates. E.g., *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) ("We agree that Congress did not intend to exempt statutory ERISA claims from the dictates of the Arbitration Act."); *accord Franke v. Poly-America Med. & Dental Benefits Plan*, 555 F.3d 656, 658 (8th Cir. 2009); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118–19 (3d Cir. 1993); *Bird v. Shearson Lehman/Am. Express, Inc.*, 926 F.2d 116, 120 (2d Cir. 1991). Accordingly, DOL exceeded its authority by purporting, in the BIC Exemption, to bar arbitration agreements requiring resolution of disputes on an individual basis and precluding class actions.

Notwithstanding clear case law on this point, the district court erred in several respects. *First*, the district court found that "the standard of review articulated in *CompuCredit*"—the congressional command test—"is inapplicable." ROA.9953.

As discussed in Section II., *supra*, the FAA does more than simply ensure judicial enforcement of arbitration agreements; it also prohibits rules or laws that have the effect of disfavoring arbitration, and thus the contrary congressional command test *is* applicable.[4]

Second, the district court found that, notwithstanding the purported inapplicability of the congressional command test, "ERISA and the Code expressly authorize the DOL to grant conditional or unconditional exemptions from otherwise prohibited transactions." ROA.9953. But the relevant question was *not* simply whether ERISA authorized DOL to grant conditional or unconditional exemptions; it was whether ERISA authorized DOL to grant conditional exemptions in a manner that disfavored arbitration and *contravened the FAA*. And, as this Court has already held, that answer is no—nothing in ERISA permits DOL to contravene the FAA. *See Kramer*, 80 F.3d at 1084.

Relatedly, the district court relied on *Equal Employment Opportunity Commission v. Waffle House*, *Inc.*, 534 U.S. 279 (2002) for the proposition that "[t]he 'FAA's pro-arbitration policy goals do not require [the DOL] to relinquish its statutory authority.'" ROA.9953 (quoting *Waffle House*, 534 U.S. at 294). However,

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[4] The district court also pointed to rules adopted by FINRA as support, noting that the FINRA Customer Code "since 1992 has allowed individual arbitration but disallowed class action prohibitions." ROA.9951. But rules adopted by FINRA—a self-regulating organization, not a federal agency—are irrelevant to determining whether rules adopted by DOL—a federal agency—violate the FAA. *See Desiderio v. NASD*, 191 F.3d 198, 207 (2d Cir. 1999) (holding that rules adopted by self-regulating organization do not constitute state action). Moreover, to the extent that the district court relied on a decision by the FINRA Board for support, ROA.9951 n.240, such reliance was misplaced. *See Singh v. Interactive Brokers LLC*, ___ F. Supp. 3d ___, 2016 WL 7007791, at *7 (E.D. Va. Nov. 30, 2016) (decision in *In re Dep't of Enforcement v. Charles Schwab & Co.*, 2014 WL 1665738 (FINRA Bd. Apr. 24, 2014) has "little persuasive value" because it "was not handed down by a court of law but by FINRA's Board of Governors, an administrative body with an obvious interest in the outcome of the decision").

the district court's reliance on *Waffle House* was misplaced for at least two reasons.[5] First, *Waffle House* is plainly inapposite—it addressed whether an arbitration agreement between an employer and an employee could limit the EEOC's express statutory power to bring *its own* enforcement action against the employer under the ADA. 534 U.S. at 283–84, 290–92 (2002). Because the EEOC was not a party to the arbitration agreement—and therefore had not "agreed to arbitrate *its* claims"—the FAA did not require the EEOC "to relinquish" the express statutory authority conferred upon it by Congress to pursue *its own* enforcement action where "it has not agreed to do so." *Id.* at 294 (emphasis added). Here, DOL has no "statutory authority" to bring an enforcement action on its own under Title II of ERISA. Thus, DOL's role as a prosecutor and authority to bring an enforcement action in its own name is not at issue, and *Waffle House* is irrelevant. *See Ferrer*, 552 U.S. at 359 ("[I]n *Waffle House* . . . the Court addressed the role of an agency, not as adjudicator but as *prosecutor*, pursuing an enforcement action *in its own name* or reviewing a discrimination charge to determine whether to initiate judicial proceedings." (emphasis added)).

Moreover, the district court's reading of *Waffle House* would effectively nullify the congressional command test. The district court relied on DOL's authority to "grant conditional or unconditional exemptions" as a sufficient source of authority to disfavor arbitration. ROA.9953. If the court's reading were correct, *any* statutory authority for an agency to act would necessarily be sufficient to contravene the FAA. But the congressional command test requires not just authority to act, but authority

[5] Because *Waffle House* was raised by DOL in the district court for the first time at oral argument, after the cross-motions for summary judgment were fully briefed, the court was without the benefit of briefing regarding the case's inapplicability.

to specifically "override the provisions of the Arbitration Act." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 239 (1987). Whatever general authority DOL has to grant conditional or unconditional exemptions from otherwise prohibited transactions, it does *not* have the specific authority to contravene the FAA. Therefore, DOL may not grant conditional exemptions in a manner that violates the FAA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed in part. The BIC Exemption's impermissible anti-arbitration condition should be declared unlawful and enjoined from enforcement.

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Respectfully submitted,

/s/ Andrew B. Kay

Andrew B. Kay
Attorney of Record
Philip Randolph Seybold
Haryle A. Kaldis
COZEN O'CONNOR
1200 19th Street, NW
Washington, DC 20036
(202) 912-4800
akay@cozen.com
rseybold@cozen.com
hkaldis@cozen.com
Attorneys for Amicus Curiae
Thrivent Financial for Lutherans

CERTIFICATE OF COMPLIANCE
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(g)(1) AND CIRCUIT RULE 32.3

Pursuant to Fed. R. App. P. 32(g)(1) and Fifth Circuit Rule 32.3, I hereby certify the following:

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,266 words, exclusive of exempted portions.

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/s/ Andrew B. Kay
Andrew B. Kay
COZEN O'CONNOR
1200 19th Street, NW
Washington, DC 20036
(202) 912-4800
akay@cozen.com
Attorney of Record for Amicus Curiae Thrivent Financial for Lutherans

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are represented by counsel who are registered CM/ECF users, and will be served electronically by the appellate CM/ECF system.

/s/ Andrew B. Kay
Andrew B. Kay
COZEN O'CONNOR
1200 19th Street, NW
Washington, DC 20036
(202) 912-4800
akay@cozen.com
Attorney of Record for Amicus Curiae Thrivent Financial for Lutheran