No. 24-40637

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERATION OF AMERICANS FOR CONSUMER CHOICE, INCORPORATED, et al.,
*Plaintiffs-Appellees*,

v.

UNITED STATES DEPARTMENT OF LABOR; LORI CHAVEZ-DEREMER, Secretary, U.S. Department of Labor, in her official capacity,
*Defendants-Appellants*,

Consolidated with No. 24-10890

AMERICAN COUNCIL OF LIFE INSURERS, et al.,
*Plaintiffs-Appellees*,

v.

UNITED STATES DEPARTMENT OF LABOR; LORI CHAVEZ-DEREMER, Secretary, U.S. Department of Labor, in her official capacity,
*Defendants-Appellants*,

On Appeal from the United States District Courts
for the Eastern and Northern District of Texas

# BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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## CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to those already listed in the parties' briefs, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

***Amicus*:** The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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*/s/ Jaime A. Santos*

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## INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Many of the Chamber's members maintain, administer, or provide products or services to employee-benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). Accordingly, the Chamber regularly participates as amicus curiae in ERISA cases and successfully challenged the previous iteration of the regulation at issue as a party litigant. *See Chamber of Commerce of United States of America v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018). The Chamber submits this brief to further explain how the latest regulation also conflicts with ERISA and this Court's *Chamber* decision.

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The fiduciary duties of prudence and loyalty are "the highest known to the law." *Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, 960 F.3d 190, 194 (5th Cir. 2020) (citation omitted). Congress took great care in assigning these duties under ERISA, codifying the common-law understanding of when they are owed. In Title I of ERISA, Congress enacted requirements governing employer-sponsored retirement and welfare-benefit plans. Congress imposed the duties of prudence and loyalty on those who serve as fiduciaries to these plans because they have authority over funds held in trust for other people. Further, Title I provides DOL with expansive authority to regulate these plans and their fiduciaries, and it provides a private right of action for Title I plan participants and beneficiaries to sue for breach of fiduciary duty.

In contrast with employer-sponsored retirement plans, individual savings vehicles (such as individual retirement accounts or individual retirement annuities, known collectively as IRAs) are not governed by Title I of ERISA. Investments in IRAs are subject to substantive requirements found in state law and other federal statutes governing investment products, such as federal securities law statutes that DOL does not administer. These investment products are also subject to Title II of ERISA, which amended the Internal Revenue Code, created IRAs, and created plan qualification requirements for federal income tax deferrals and deductions. But

when enacting Title II, Congress notably did not impose duties of prudence and loyalty with respect to individual savings vehicles despite creating them at the same time as it created Title I; it did not provide DOL with the kind of wide-ranging regulatory authority afforded by Title I; and it did not provide a private right of action.

This case is the consequence of DOL's dissatisfaction with Congress's design. When ERISA was enacted, IRAs were included in Title II to provide a tax-deferred savings vehicle for individuals not covered by employer-governed plans. In the years immediately following, consumer participation in IRAs was negligible. But now that IRAs are commonplace, DOL has searched for a way to do what Congress did *not* do when ERISA was enacted and has never done since: extend Title I duties to purely Title II plans. The result is this rulemaking package, which consists of several related rules that this brief collectively calls the "Rule."[2]

DOL adopted a two-step strategy in its rulemaking: First, it expanded the definition of a "fiduciary" in both Title I and Title II beyond its well-established common-law meaning, jettisoning a regulatory definition that has been in place for

[2] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 2020-02, 89 Fed. Reg. 32,260 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 84-24, 89 Fed. Reg. 32,302 (Apr. 25, 2024); and Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 89 Fed. Reg. 32,346 (Apr. 25, 2024).

almost 50 years. This redefinition would sweep many brokers and insurance agents of Title II plans into the status of ERISA fiduciaries. As a result, the receipt of compensation by these brokers or insurance agents would become presumptively unlawful as "prohibited transactions" under ERISA. This paved the way for the second step, in which DOL invoked regulatory "exemptions" to the newly created "prohibited transactions." But there is a catch: These exemptions are conditioned on (1) adhering to the fiduciary duties of prudence and loyalty found only in Title I of ERISA, and (2) acknowledging one's status as an ERISA Title I fiduciary in writing. By forcing many brokers and agents into fiduciary status and only allowing compensation if they affirmatively concede that Title I's requirements (including ERISA's fiduciary obligations) apply, DOL has engineered a workaround to impose duties that Congress declined to impose.

This is not DOL's first attempt to bypass the relevant statutory limitations. When it promulgated a similar two-step regulation in 2016, the Chamber and others filed suit and this Court vacated the rule. *See Chamber of Commerce of United States of America v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018). Although there are some differences between this Rule and the prior iteration, many of the fatal defects identified by this Court are reprised in this Rule. Most saliently, the Rule dispenses with the definition of an ERISA fiduciary that has been operative since DOL and the Treasury Department first defined the term immediately after

ERISA's enactment—including the requirement that the adviser provide advice to the client on a "regular basis." But this Court specifically held that "[t]he 1975 regulation captured the essence of a fiduciary relationship" and that, as used in ERISA, fee-based "investment advice" requires "a substantial, *ongoing* relationship between adviser and client." *Id.* at 365, 375 (emphasis added). As the two courts below correctly held, DOL's latest attempt to redefine fiduciary status to include "one-time advice" outside the context of a substantial, ongoing relationship of trust and confidence is just as contrary to the statute as the previous effort. ROA.24-40637.407-08. Indeed, DOL's "arguments are nothing more than an attempt to relitigate the *Chamber* decision." ROA.24-10890.1514.

This Court also faulted the prior regulation for trespassing on "turf" that Congress had pointedly assigned to other regulators, namely the Securities and Exchange Commission (SEC) and the States. This Rule crosses that same line, and this incursion is, if anything, more egregious given regulatory developments since this Court's *Chamber* decision. In 2019, for instance, the SEC promulgated Regulation Best Interest (Reg BI), which overlaps to a large extent with the DOL's Rule. Industry largely supported Reg BI and did not challenge it in court. Reg BI requires brokers and dealers to put their clients' best interests first, including when making recommendations to retirement investors. But the SEC specifically declined

to impose fiduciary status on brokers and dealers because it recognized the serious adverse market consequences that would result.

If this Court allows the Rule to go into effect, harm to individual investors is not merely likely, but virtually certain. As the SEC found, DOL's previous fiduciary rule led to "a significant reduction in retail investor access to brokerage services" and "the available alternative services were higher priced in many circumstances." Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,322 (July 12, 2019). That is because financial-services providers that were not previously treated as fiduciaries will bear significant compliance costs and an increased risk of expensive class-action litigation.[3] Brokers and agents will inevitably pass on these costs to customers—or, daunted by this prospect, will simply transition to a model of offering full-service investment advice in exchange for asset-based compensation. That model is frequently too expensive for retail investors. In the end, many investors will pay more for financial services or be forced to forgo the benefit of expert guidance.

This Court should affirm both district courts' orders staying the Rule.

[3] Class-action ERISA litigation continues to surge, resulting in significant costs to ERISA plans and fiduciaries. *See, e.g.*, Daniel Aronowitz & Karolina Jozwiak, *401(k) Excessive Fee Litigation Spiked to 'Near Record Pace' in '24*, Plan Adviser (Jan. 13, 2025), https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/.

## ARGUMENT

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Courts must always interpret its provisions to honor "the balance between [the] competing goals that … Congress has struck." *Id.* at 263.

Under both Title I and Title II of ERISA, "a person is a fiduciary with respect to a plan to the extent ... he renders investment advice for a fee or other compensation, direct or indirect," regarding a plan's property. 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B). A Title I "plan" is limited to employer-sponsored benefit plans (*e.g.*, a pension plan or a 401(k) retirement plan), 29 U.S.C. § 1002(3), while a Title II "plan" includes individual savings vehicles like IRAs, 26 U.S.C. § 4975(e)(1). In 1975, shortly after ERISA was enacted, the Labor and Treasury Departments each promulgated a five-part test to define the term "investment advice for a fee" in the context of Title I and Title II plans. *See* 40 Fed. Reg. 50,842 (Oct. 31, 1975) (DOL regulation interpreting an investment-advice fiduciary as set forth in Title I); 40 Fed. Reg. 50,840 (Oct. 31, 1975) (Treasury regulation, interpreting an investment-advice fiduciary as set forth in Title II). "Under that test, an investment-advice fiduciary is a person who (1) 'renders advice … or makes recommendation[s] as to the advisability of investing in, purchasing, or

selling securities or other property;' (2) 'on a regular basis;' (3) 'pursuant to a mutual agreement ... between such person and the plan;' and the advice (4) 'serve[s] as a primary basis for investment decisions with respect to plan assets;' and (5) is 'individualized ... based on the particular needs of the plan.'" *Chamber*, 885 F.3d at 364-365 (alterations and omissions in original) (citation omitted).

DOL's latest rulemaking marks a fundamental break from the 1975 test, most critically by eliminating the "on a regular basis" criterion for fiduciary status that this Court previously deemed critical, and by ignoring a crucial distinction the statute draws between Title I and Title II plans: codifying the common law, Congress imposed the duties of prudence and loyalty only on Title I plans and not Title II plans. This new Rule is in direct conflict with ERISA and this Court's *Chamber* decision. And the Rule will significantly harm retirement investors by making basic financial services more expensive, and less available, due to the cost of increased regulatory burdens and litigation risks passed on to customers.

## I. DOL's Rule cannot be reconciled with ERISA's text and structure, or with this Court's precedent.

As both courts below explained, DOL's new Rule replicates several of the flaws that this Court's *Chamber* decision identified in the prior iteration of the regulation. The Chamber focuses here on some of the most glaring and significant conflicts with the statute and binding precedent, any one of which warrants the stay the district courts ordered.

### A. The Rule's expansive definition of fiduciary defies the common law meaning that ERISA incorporated.

In invalidating the prior rulemaking, this Court explained that "[t]he 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client," and unambiguously held that ERISA "incorporate[s]" this "well-settled meaning." *Chamber*, 885 F.3d at 365, 370-372 (citation omitted). In particular, this Court held that, as used in ERISA, fiduciary "investment advice" requires "a substantial, *ongoing* relationship between adviser and client," which DOL's 1975 regulation had incorporated by limiting ERISA fiduciary status to those who rendered individualized investment advice "on a regular basis." *Id.* at 374-375 (emphasis added). When DOL attempted to remove that limitation and omit the "regular basis" criterion, this Court blocked that path—holding that such an approach "fatally conflicts with the statutory text and contemporary understandings." *Id.* at 376.

Despite this Court's clear holding that the "regular basis" prong is part of the "essence of the fiduciary relationship" incorporated into ERISA's investment-advice fiduciary provision, DOL has yet again done away with it—brazenly contending that the "regular basis" requirement "finds no support in the text of ERISA." 89 Fed. Reg. at 32,179-32,180. Indeed, the Rule contemplates one of the key examples used by this Court to describe a transaction that *could not* be deemed fiduciary investment

advice: "one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers." *Chamber*, 885 F.3d at 380. Ignoring this unambiguous language, the Rule touts one-time "advice on whether to roll over … retirement savings … to purchase an annuity" as a paradigmatic example of advice that may fall within the Rule's definition of fiduciary—because, DOL asserts, the "regular basis" requirement "is not a sensible way to draw distinctions in fiduciary status." 89 Fed. Reg. at 32,179-32,180; *see id.* at 32,142 (asserting that "treating one-time advice as fiduciary investment advice subject to ERISA is consistent with a relationship of trust and confidence" when "all of the requirements of the regulatory test are satisfied"). The Rule thus directly conflicts with the common-law meaning of "fiduciary" that ERISA incorporates, as already elucidated by this Court.

Moreover, DOL's reason for once again doing away with a criterion that this Court deemed so critical finds no support in ERISA's text or structure, much less in the 1975 common-law landscape that Congress incorporated. DOL contends "that the 1975 regulation's regular basis test has served to defeat objective understandings of the nature of the professional relationship" because "even a discrete instance of advice can be of critical importance to the plan." 89 Fed. Reg. at 32,136. It is unclear where, precisely, DOL has found these "objective understandings." They cannot be

found in the statute's text or any contemporaneous understanding of the term "fiduciary" when Congress enacted ERISA.

Instead, DOL appears to have found inspiration for this change in the passage of time—DOL explained that "developments in retirement savings vehicles and in the investment advice marketplace have altered the way retirement investors interact with investment advice providers," including the proliferation of IRAs, which "were not major market participants" at ERISA's enactment. Proposed Rule, Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75,890, 75,899 (Nov. 3, 2023). Accordingly, DOL came to the conclusion that "the 1975 test" "is underinclusive" based on "[t]he Department's experience in the current marketplace." *Id.*; 89 Fed. Reg. at 32,132 (citing this discussion from the proposed rule to explain DOL's decision to amputate the "regular basis" criterion from the agency's interpretation of an investment-advice fiduciary). This may be a sound reason for Congress to engage in legislative factfinding and to craft a legislative solution to the extent it has these same concerns. But it does not permit an agency to dramatically redefine a statutory term that had a "well-settled meaning" when ERISA was enacted. *Chamber*, 885 F.3d at 371.

This Court also held that the "statutory language" implicitly adopts an "important distinction" between investment advisers and brokers or insurance agents: "investment advisers" are "considered fiduciaries" while "stockbrokers and

insurance agents … generally assume[] no such status." *Id.* at 372-373. This is because "[s]tockbrokers and insurance agents are compensated only for completed sales …, not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they 'render advice.'" *Id.* at 373. DOL's new Rule obliterates this crucial distinction by lumping some ordinary practices of brokers and insurance agents together with investment advice under the same fiduciary rubric; indeed, DOL says that the Rule is meant to encompass conduct "commonly" performed by broker-dealers and insurance agents. 89 Fed. Reg. at 32,125. DOL may disagree with this Court's *Chamber* decision, but it cannot expect a rule disregarding the decision to survive judicial review.

### B. DOL impermissibly collapsed the distinction between the fiduciary duties imposed by Titles I and II of ERISA.

The Rule conflicts with ERISA and the *Chamber* decision in another key respect: DOL has again devised a scheme to copy-and-paste the fiduciary duties imposed by ERISA Title I into the Title II context, even though Congress deliberately refrained from imposing those duties on fiduciaries to Title II plans and denied DOL such regulatory authority. Therefore, the Rule once again "impermissibly conflates the basic division drawn by ERISA." *Chamber*, 885 F.3d at 381.

"Title I of ERISA confers on the DOL far-reaching regulatory authority over employer- or union-sponsored retirement and welfare benefit plans." *Id.* at 364

(citing 29 U.S.C. §§ 1108(a)-(b), 1135). "A 'fiduciary' to a Title I plan is subject to duties of loyalty and prudence," in addition to a bar on various enumerated "prohibited transactions." *Id.* (citing 29 U.S.C. §§ 1104(a)(1)(A)-(B), 1106(b)(3)). These duties are enforced through lawsuits by DOL and by private plan participants or beneficiaries. *See id.*

Title II of ERISA works differently. Title II is not a regulatory statute about employee benefits, nor is it administered by DOL; it is entitled "Amendments to the Internal Revenue Code Relating to Retirement Plans." Whereas a "plan" under Title I is limited to employer- or union-sponsored retirement and health plans, 29 U.S.C. § 1002(3), a "plan" under Title II includes tax-deferred *individual* savings vehicles like IRAs, 26 U.S.C. § 4975(e)(1). But while Congress included IRAs within Title II, Congress "did not authorize DOL to supervise financial service providers to IRAs in parallel with its power over ERISA plans." *Chamber*, 885 F.3d at 364. Importantly, "fiduciaries to IRAs are not, unlike ERISA plan fiduciaries, subject to statutory duties of loyalty and prudence." *Id.* Rather, Title II IRA fiduciaries are subject only to excise taxes for violations of the prohibited-transaction provisions that apply to both Title I and Title II plan fiduciaries. Imposition of those taxes is assigned to the Treasury Department; Congress did not provide DOL or private plaintiffs (*i.e.*, IRA investors) with a federal right of action against IRA providers.

*See id.* Instead, "state law and other remedies remain available to those investors." *Id.*

As with the rule invalidated in 2018, one of the chief catalysts of this Rule was DOL's assessment that "the use of participant-directed IRA plans has mushroomed as a vehicle for retirement savings." *Id.* at 365. DOL remained unsatisfied that financial professionals who render services regarding IRA investments "have no legal obligation to adhere to the fiduciary standards in Title I of ERISA"—*i.e.*, the fiduciary duties of loyalty and prudence. 89 Fed. Reg. at 32,124. But DOL still lacks authority to add fiduciary duties beyond those conferred by Congress.

DOL's solution was to grant itself authority to impose Title I fiduciary duties through legal gymnastics. First, it greatly expanded the definition of "fiduciary" for both Titles I and II so that ordinary brokers and insurance agents are swept in even though their sales do not occur in the context of a relationship of trust and confidence. Second, because that fiduciary status triggers a ban on compensation of advisers and brokers under ERISA's prohibited-transactions provisions (absent an applicable exemption), DOL conditioned the relevant exemptions (PTE 2020-02 and 84-24) on the advisers' and brokers' adherence to the Title I fiduciary "standards of prudence and loyalty," 89 Fed. Reg. at 32,267-32,268, and made the exemptions available *only* to those who will affirmatively "acknowledge their fiduciary status"

under Title I of ERISA "in writing." 89 Fed. Reg. at 32,261 & n.17. Thus, DOL has used perhaps the most powerful stick in the agency's arsenal—denial of compensation for services rendered—to impose ERISA's Title I fiduciary duties of prudence and loyalty on Title II plans despite Congress's contrary statutory design.[4]

This is substantively no different from what DOL attempted to do in the previous regulation—and what this Court rejected. This Court noted that, while "ERISA plan fiduciaries must adhere to the traditional common law duties of loyalty and prudence in fulfilling their functions, … IRA plan 'fiduciaries' … are not saddled with these duties." *Chamber*, 885 F.3d at 381. Yet, "[d]espite the differences between ERISA Title I and II, DOL is treating IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries," which "impermissibly conflates the basic division drawn by ERISA." *Id.* "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Babb v. Wilkie*,

[4] DOL downplayed the impact of applying this fiduciary standard by reference to the prior version of 2020-02, which it said already imposed a similar "impartial conduct standard" on fiduciaries of IRAs. 89 Fed. Reg. at 32,267 (citing Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers and Retirees, 85 Fed. Reg. 82,798 (Dec. 18, 2020)). But the 2020 PTE itself had downplayed concerns about its scope by pointing to the fact that it applied only to those "already deemed to be fiduciaries within the meaning of the [1975] five-part test." 85 Fed. Reg. at 82,822. That is a bait and switch: Because the 2020 PTE relied on the existence of the 1975 test, it cannot support jettisoning that same test.

589 U.S. 399, 412 (2020) (alteration and citation omitted). DOL's new Rule disregards these principles.

### C. The Rule intrudes on turf that Congress assigned to other regulators.

*Chamber* also held that the 2016 regulation "conflict[ed]" with Congress's efforts in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and faulted DOL for "occupying the Dodd-Frank turf" by seeking "to secure further oversight of broker/dealers handling IRA investments and the sale of fixed-indexed annuities." *Chamber*, 885 F.3d at 385-386. These problems are likewise present in the current Rule. In fact, subsequent developments have aggravated the conflict with Dodd-Frank.

#### 1. The SEC's authority and Regulation Best Interest.

With respect to broker-dealers, this Court noted that Dodd-Frank specifically authorized "the SEC to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render 'personalized investment advice about securities to a retail customer'" while flatly "prohibit[ing] SEC from eliminating broker-dealers' 'commissions or other standard compensation.'" *Id.* at 385 (alteration and citations omitted). Yet, "[b]y presumptively outlawing transaction-based compensation as 'conflicted,'" DOL's regulation "undercut[] the Dodd-Frank provision that instructed SEC not to prohibit such standard forms of broker-dealers' compensation." *Id.* at 386. Moreover, this Court explained that

"[t]he SEC has the expertise and authority to regulate brokers and dealers uniformly," whereas "DOL has no such statutory warrant" but is limited to the retirement context. *Id.* at 385.

DOL's new Rule "infring[es] on SEC turf" no less than the prior one. *Chamber*, 885 F.3d at 385-386. Consider Dodd-Frank's authorization to the SEC to "commence a rulemaking … to address the legal or regulatory standards of care for brokers, dealers, [and] investment advisers … for providing personalized investment advice about securities to … retail customers." Pub. L. No. 111-203, § 913(f), 124 Stat. 1376, 1827-1828 (2010) (15 U.S.C. § 78o note). In a subsection entitled "Authority to Establish a Fiduciary Duty for Brokers and Dealers," Congress expressly empowered the SEC, should the agency deem it appropriate, to impose fiduciary status "with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer." *Id.* § 913(g)(1), 124 Stat. at 1828 (codified in part at 15 U.S.C. § 78o(k)(1)). ERISA, of course, does not give DOL similar authorization.

In 2019, after the *Chamber* decision, the SEC acted on this statutory authority and promulgated Reg BI. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019). The SEC adopted a "best interest" standard of conduct for broker-dealers, which is "similar to key elements of the fiduciary standard for investment advisers." *Id.* at 33,321. Yet the SEC "declined

to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under [the Investment Advisers Act of 1940] because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model." *Id.* at 33,322. The SEC emphasized that it "believe[d,] (and [its] experience indicate[d]), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors obtaining investment recommendations." *Id.* Indeed, the SEC specifically pointed to "the now vacated [2016 DOL] Fiduciary Rule" as a cautionary tale, explaining that its adoption led to "a significant reduction in retail investor access to brokerage services, and [the SEC] believe[d] that the available alternative services were higher priced in many circumstances." *Id.* (footnotes omitted).

Reg BI covers much of the same ground as the DOL Rule. It encompasses recommendations to plan participants about their retirement accounts, including "IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans," and specifically encompasses "recommendations to roll over or transfer assets into an IRA." *Id.* at 33,339, 33,343. In other words, Reg BI already protects the kind of "inexpert customers" seeking assistance with their retirement investments who are the primary focus of DOL's Rule. *See* 89 Fed. Reg. at 32,180-32,181; *see id.* at 32,179 (discussing the need to

protect "a plan participant [who] seeks advice on whether to roll over all their retirement savings, representing a lifetime of work," when "the plan participant has no investment expertise whatsoever"). Industry did not challenge Reg BI in court, and the SEC and the Financial Industry Regulatory Authority (FINRA) have made clear that the regulation will be vigorously enforced—particularly with respect to retirement investors. *See, e.g.*, James Van Bramer, *SEC to Focus on Protections for Retirement Investors, Products*, Plan Adviser (Nov. 19, 2025), https://www.planadviser.com/sec-to-focus-on-protections-for-retirement-investors-products/. In these circumstances, DOL's Rule impermissibly encroaches on the SEC's turf, which is underscored by the fact that the SEC expressly considered DOL's approach of treating broker-dealers as fiduciaries and rejected it as harmful to investors.[5]

**2. State authority to regulate insurance agents.**

The other aspect of Dodd-Frank's "turf" this Court identified was the regulation of fixed annuities sold by insurance agents. "In Dodd-Frank," the court noted, "Congress opted to defer such regulation to the states, which have

[5] Moreover, applying Reg BI's "best interest" standard in the ERISA fiduciary context is conceptually problematic. Reg BI requires that the broker-dealer act in "the best interest *of the retail customer*," 84 Fed. Reg. at 33,319 (emphasis added), but an ERISA fiduciary's duty of loyalty extends to *all* of the plan's participants and beneficiaries, 29 U.S.C. § 1104(a)(1). Since an ERISA fiduciary's duties run toward the plan as a whole, not any individual account, treating a broker-dealer as an ERISA fiduciary makes little sense.

traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business." *Chamber*, 885 F.3d at 385; *see also* 89 Fed. Reg. at 32,213 ("While variable annuities and some indexed annuities are considered securities, such that their sale is subject to SEC and FINRA regulation, the standard of care owed to a customer for other types of annuities [*e.g.*, fixed annuities] depends on the State regulation." (footnote omitted)).

In recent years, the States have answered Congress's call. Forty-nine States have adopted a version of the 2020 Model Regulation issued by the National Association of Insurance Commissioners (NAIC).[6] As DOL recognized, this regulation provides "that insurance agents must act in the consumer's best interest, as defined by the Model Regulation, when making a recommendation of an annuity." 89 Fed. Reg. at 32,125.

Yet DOL asserts that States have not gone far enough—that "the NAIC Model Regulation … does not protect retirement investors to the same degree as the fiduciary protections in Title I and Title II of ERISA." *Id.* at 32,139. For example, the NAIC Model Regulation takes care to point out that it does *not* impose a fiduciary obligation. *See* NAIC Model Regulation §§ 1.B, 6.A(1)(d). But, as this Court noted in the prior litigation, DOL's complaints really lie with Congress: "While Congress

[6] *See* NAIC, NAIC Annuity Suitability "Best Interest" Model Regulation (Aug. 2025), https://content.naic.org/sites/default/files/government-affairs-brief-annuity-suitability-best-interest-model.pdf.

exhibited confidence in the states' insurance regulation, DOL criticizes the Dodd-Frank provisions as 'insufficient' to protect the 'subset' of retirement-related fixed-indexed annuities transactions within DOL's purview." *Chamber*, 885 F.3d at 386. Once again, "DOL is occupying the Dodd-Frank turf" that specifically directs state regulation of other types of annuities—without statutory permission. *Id.*

## II. DOL's effort to distinguish *Chamber* falls flat.

DOL contends that the new Rule's definition is not "the 'same' or 'similar' to the definition that *Chamber* rejected"; indeed, DOL ambitiously declares that the new "Rule's definition of a fiduciary … bears no resemblance to the definition at issue in *Chamber*." Opening Br. 30, 34. That assessment is incorrect. Like the last rule, the new one does away with the "regular basis" and "primary basis" prongs—which is precisely what this Court said was a "critical" flaw last time around. *See Chamber*, 885 F.3d at 366. And DOL's brief does not argue otherwise; instead, it *criticizes* the "regular basis" requirement based on policy considerations (Opening Br. 15, 40), and suggests that *Chamber* simply emphasized that fiduciary relationships must involve "trust and confidence" (Opening Br. 12, 13). DOL claims that its "definition translates *Chamber*'s trust-and-confidence standard into an objective, administrable test." Opening Br. 23. However, DOL in no way explains how this "translation" excludes regular and primary basis, which *Chamber* deemed critical to fiduciary status.

*Chamber* makes clear that "[t]he 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client," which it said necessarily entails that "the adviser's services were furnished 'regularly' and were the 'primary basis' for the client's investment decisions." 885 F.3d at 365. Yet rather than adhere to that principle in its new Rule, DOL criticizes the 1975 test for imposing those requirements (89 Fed. Reg. at 32,179)—ignoring this Court's determination that *ERISA* did so as well through its incorporation of the common-law definition.

Or consider a more specific example. *Chamber* teaches that "it is ordinarily inconceivable" that "one-time IRA rollover" recommendations will involve "an intimate relationship of trust and confidence." 885 F.3d at 380. Not only does the new Rule expressly disagree, DOL even casts that disagreement as "central" to its rulemaking project. "The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department's regulation of fiduciary investment advice." 89 Fed. Reg. at 32,184 In this Court, DOL argues that *Chamber*'s "ordinarily inconceivable" language does not foreclose the possibility that a one-time IRA rollover recommendation will *sometimes* be fiduciary advice. Opening Br. 31-32. But there is no colorable argument that a one-time IRA rollover recommendation from a salesperson or insurance agent forms an "intimate

relationship of trust and confidence" except in the most unusual circumstances. That was exactly *Chamber*'s point, and DOL misses it entirely.

Finally, DOL cannot rely on ERISA's limited grant of authority under 29 U.S.C. § 1135 to "define accounting, technical and trade terms" for its aggressive retooling project. *See* Opening Br. 45. Fiduciary status is not an arcane technical term that Congress left for the agency to define. It is the fundamental basis of ERISA. In granting DOL definitional authority over technical terms, Congress did not empower the agency to rewrite the statute to cover individual savings vehicles that both fall outside employee benefit plans and are regulated by other entities. In any event, this Court has already held that ERISA incorporates the common law definition of "fiduciary," and "the common law meaning was self-explanatory." *Chamber*, 885 F.3d at 371.

Thus, whatever the scope of § 1135's limited delegation, the Rule greatly exceeds "the boundaries of [that] delegated authority." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024) (citation omitted).

## III. This Rule will significantly harm investors by making important financial services more costly and less available.

The economic effects of this Rule are no mystery. Studies have demonstrated, and the SEC has confirmed, that "[w]ith the adoption of the now vacated [DOL] Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and [the SEC] believe[s] that the available alternative services

were higher priced in many circumstances." 84 Fed. Reg. at 33,322 (footnote omitted). Indeed, these "concerns about the ramifications for investor access, choice, and cost" are the principal reason why the SEC declined to impose a full fiduciary standard on broker-dealers in Reg BI. *Id.* Considering the adverse consequences of the vacated DOL rule, the SEC stressed, its concerns "are not theoretical." *Id.*

Specifically, the SEC observed that, under the fiduciary standard long applied to investment advisers, "broker-dealers would face increased compliance costs resulting from having to conform their advice models to a regulatory regime that was not formed for a transaction-based model." *Id.* at 33,464. That "would result in fewer broker-dealers offering transaction-based services to retail customers," *id.* at 33,330, as broker-dealers sought to avoid those compliance costs by shifting to a fee-based advisory model, *id.* at 33,464. Imposing the investment adviser fiduciary duty on broker-dealers, the SEC found, would "significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations." *Id.* at 33,322 & n.31; *see id.* at 33,464-33,465. Given these concerns about "consumer choice and affordability," the Second Circuit upheld Reg BI's decision not to impose a fiduciary standard on

broker-dealers. *See XY Planning Network, LLC v. SEC*, 963 F.3d 244, 256-57 (2d Cir. 2020).

The problem goes well beyond compliance costs. Even financial professionals and firms who are already adhering to heightened standards of care because of Reg BI or for other reasons face significant *new* and *greatly expanded* liability risks under this Rule. Fiduciaries under Title I of ERISA can be (and frequently are) sued for alleged breaches of fiduciary duties by private plan participants or beneficiaries, including in class actions seeking hundreds of millions of dollars. The claims may lack merit, but there is a very real "possibility that 'a plaintiff with a largely groundless claim'" may pursue discovery as "an *in terrorem* increment of the settlement value." *PBGC ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Thus, entities potentially falling within DOL's new definition of "fiduciary" must add the risk of class-action litigation to the compliance costs and harm to investors that will naturally flow from the Rule.

Moreover, brokers and insurance agents whom the Rule designates as fiduciaries would likely be exposed to new litigation risk even when they make recommendations related to Title II investment vehicles, even though Congress declined to include a private right of action in Title II. That is because their

newfound status as ERISA fiduciaries—and the requirement that they acknowledge their Title I fiduciary status *in writing*—will almost certainly be used by the plaintiffs' bar as a springboard for state-law claims, including breach of contract and breach of fiduciary duty. Importantly, Reg BI and the NAIC Model Regulation take pains not to impose such a broad fiduciary status, thereby heading off potential state-law claims for fiduciary breach. But DOL's Rule opens a new vista of litigation risks, even with respect to Title II plans.

The upshot is that the Rule will impose large burdens on financial professionals, who will likely in turn modify their services and pass on costs to the customers. The empirical evidence bears out these worries. One study showed that, in response to the 2016 DOL fiduciary rule, 53% of firms had reduced or eliminated access to transaction-based brokerage advice services, and 95% of firms reduced the type of products offered to retail investors. Deloitte, *The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors*, at 5 (Aug. 9, 2017), https://bit.ly/3UWAKw8. Many brokerage firms announced changes to their product and service offerings. *See* Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, Wall St. J. (Feb. 6, 2017), https://on.wsj.com/3KqAssI. These changes included "reduced product choice, a move to asset-based arrangements that may be more costly for buy-and-hold investors, and an increase in account

minimums for commission-based accounts." Letter from Dorothy M. Donohue, Gen. Counsel, Inv. Co. Inst., to Jay Clayton, Chairman, SEC, at 4 (Aug. 7, 2017), https://bit.ly/4bXFAjA. More than half of firms reported that they would likely pass on increased compliance costs to their clients through higher fees. *See* Letter from Richard Foster, Senior Vice President & Senior Counsel, Fin. Servs. Roundtable, to Jay Clayton, Chairman, SEC, App. B, at 77 & tbl. 1 (Oct. 17, 2017) ("FSR Study"), https://bit.ly/3X0N5BZ ("Key Poll Findings—National Survey of Financial Professionals" (July 17, 2017)) (attachment beginning at page 92 of PDF document).

Investors with small account balances are almost ten times more likely to be adversely affected than those with larger account balances. 84 Fed. Reg. at 33,423. This is because many investors would be unable to pay for a fiduciary advisory-fee model rather than a transaction-fee model, and investors with limited investment assets often do not qualify for advisory accounts because they do not meet account minimums. For example, if an investment adviser has a $25,000 minimum account balance (which is conservative), more than 40% of investors owning retail commission-based accounts would not qualify. *See* NERA Economic Consulting, Comment on the Department of Labor Proposal and Regulatory Impact Analysis, at 9-12 (July 17, 2015), https://bit.ly/4bw55IZ. Indeed, 68% of firms reported that they were less likely to provide transaction-based advisory services to smaller accounts.

*See* FSR Study at 77. And at least 29% of firms planned to move clients with account balances below $25,000 to robo-advisers. *Id.*

Reducing access to financial planning assistance for retirement investors would cause significant harm. The SEC highlighted several "academic studies of benefits that investors may obtain from hiring financial professionals," including overcoming "investment mistakes." 84 Fed. Reg. at 33,425 & nn.1046-1048 (collecting studies). These studies demonstrate that professional financial assistance helps investors minimize costly investment mistakes; allocate portfolios in a more diversified manner; minimize taxes; increase savings; and take advantage of economies of scale with respect to the cost of information. *See id.* Those benefits would be lost to investors without affordable access to financial assistance.

## CONCLUSION

This Court should affirm the well-reasoned decisions of the courts below.

Dated: November 20, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,494 words, not including the items excluded by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word. I further certify that this brief complies with typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: November 20, 2025

*/s/ Jaime A. Santos*
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**CERTIFICATE OF SERVICE**

I certify that 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. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 20, 2025

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