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
No. 3:16-cv-01476

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Plaintiffs-Appellants,

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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,

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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.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of any plaintiff-appellant or that own stock in the plaintiffs-appellants.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns significant changes in the financial-services and insurance industries, which are being imposed by the U.S. Department of Labor instead of Congress or the nation's primary regulator of investment products and services, the Securities and Exchange Commission. Appellants submit that oral argument would be useful to the Court's consideration of the case.

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INTRODUCTION

This case involves an attempt to impose profound changes in the financial-services and insurance industries by an agency that is charged with overseeing labor and employment matters and has virtually no authority beyond those arenas. The Department of Labor (the "Department" or "DOL") seeks to outlaw the compensation models that have long been a cornerstone of these industries, impose on them new standards of conduct, erase universally recognized distinctions between salespeople and fiduciary advisers, and reconfigure relationships among financial and insurance representatives and their customers—all at staggering costs that will stretch well into billions of dollars.

The goal of the Department's ambitious new regulatory scheme is to circumvent its lack of statutory authority over Individual Retirement Accounts ("IRAs"). Congress never vested DOL with authority to regulate IRAs, which have nothing to do with the labor and employment matters that Congress charged the Department with overseeing. DOL nonetheless has decided that certain changes should be required for financial and insurance professionals when they are handling retirement-related

accounts, regardless whether the accounts are employers' retirement plans or individual IRAs.

To that end, the Department deployed a two-step strategy to transcend the limits on its power. First, the Department exploited its limited authority to interpret certain terms in the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") to subject brokers, insurance agents, and other financial professionals to fiduciary restrictions that would transform or even destroy their businesses unless they obtain exemptive relief. Second, DOL made clear it would withhold that exemptive relief unless they agree to opt in to DOL's expansive new regulation of the IRA market. The Department thus leverages its *deregulatory* power into a regulatory power to coerce additional obligations on the IRA market—all in circumvention of Congress's decision to withhold from DOL the authority to regulate IRAs.

This so-called "Fiduciary Rule" (or "Rule") and its related exemptions are arbitrary, capricious, and contrary to law. Through them, the Department uproots the term "fiduciary" from its statutory and common law meaning, expanding it to encompass stock brokers, insurance agents, and other professionals engaged in ordinary sales or other traditionally

non-fiduciary activity. The Rule misuses DOL's narrow authority to relieve regulatory burdens as a tool to compel regulated entities to submit to onerous new requirements that DOL has no power to impose directly. It impermissibly creates a new private right of action that Congress never authorized. And it imposes unlawful restrictions on arbitration agreements in violation of the Federal Arbitration Act.

The Fiduciary Rule and its related exemptions should be vacated.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1331. That court entered final judgment on February 9, 2017, ROA.9954, and Plaintiffs–Appellants filed a notice of appeal on February 24, 2017, ROA.9955. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Did the Department interpret "fiduciary" and "renders investment advice for a fee" in a manner that is unreasonable, arbitrary, and capricious, and conflicts with the plain meaning of ERISA and the Code?

II. Was it unreasonable, arbitrary, and capricious for the Department to use its "exemptive" authority, which is meant to reduce regulatory burdens, to impose transformative new requirements related to IRAs that the Department had no authority to impose directly?

III. Was it contrary to *Alexander v. Sandoval*, 532 U.S. 275 (2001), and arbitrary, capricious, and otherwise unlawful, for the Department deliberately to create new enforceable rights with respect to IRAs and to dictate the forum, procedures, and remedies available for the vindication of those rights?

IV. Did the Department violate the Federal Arbitration Act ("FAA") by barring any firm that seeks exemptive relief from entering arbitration agreements unless the firm allows class-wide claims?

STATEMENT OF THE CASE

I. The Financial-Services Industry And Insurance Industry

Americans saving for retirement depend on the services and products offered by hundreds of thousands of financial and insurance professionals, small businesses, and other institutions in the financial-services

and insurance industries. Studies show that individuals who receive assistance from financial and insurance professionals save more than those who do not. ROA.3722-23.

Financial services and insurance are among the most comprehensively regulated industries in the United States. The laws regulating financial services include the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940 ("Advisers Act"), the Investment Company Act of 1940, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The States also regulate the financial-services industry, as do self-regulatory organizations such as the Financial Industry Regulatory Authority ("FINRA"). *See* 15 U.S.C. § 78o-3(b)(6); ROA.2700-01, 8085-86. The business of insurance is subject to extensive regulation at the state level. ROA.2295-96, 6130-31. Certain insurance products—such as variable annuities—are simultaneously regulated by state insurance departments and the SEC. *See* ROA.6130.

For nearly 80 years, federal and state law have recognized three basic categories of financial and insurance professionals:

Investment advisers offer ongoing investment advice to clients, for which they typically receive periodic fees. Their fees may be based on the value of the assets in customers' accounts, or may be a flat fee or hourly charge. *See, e.g.*, ROA.9095-97.

Brokers—also known as registered representatives—sell investment products, ordinarily receiving compensation for each transaction executed. This compensation typically takes the form of a commission, mark-up, or sales load.

State-regulated insurance agents sell fixed-indexed, fixed-rate, and variable annuities and other insurance products and ordinarily are compensated on a transaction basis. *See* ROA.8535.

Under federal and state law, investment advisers—who are compensated for their advice—have long been recognized to be fiduciaries. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 190-92 (1963). This generally is not the case for brokers and insurance agents, who nonetheless must adhere to strict standards of conduct, including that they recommend only transactions that are "suitable" for their customers. *See* FINRA, Rule 2111.

II. Regulation Of Fiduciaries Under ERISA

Individuals often save for retirement through employer-sponsored retirement plans, and through IRAs.

Employer-sponsored plans are governed by Title I of ERISA, which regulates the plans in three ways that are pertinent to this appeal.

First, ERISA designates certain service providers to plans as fiduciaries, and holds them to heightened duties of loyalty and prudence. 29 U.S.C. § 1104(a). ERISA contains a three-part definition of "fiduciary." As relevant here, a person is a fiduciary "to the extent" that "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii). This tracks language in the Advisers Act, which defines an adviser—a role that has been long recognized as fiduciary—as someone who "for compensation . . . advis[es] others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." 15 U.S.C. § 80b-2(a)(11).

Second, ERISA bars fiduciaries from engaging in several "prohibited transactions." 29 U.S.C. § 1106(b)(3). These include transactions in

which the fiduciary receives a commission paid by a third party or compensation that varies based on the advice that is provided. *Id.*; ROA.383, 453.

Third, ERISA creates several exemptions to allow transactions that would otherwise be prohibited, and authorizes the Department—the nation's principal employment regulator—to create additional exemptions if certain criteria are satisfied. 29 U.S.C. § 1108(a), (b). The Act gives DOL enforcement and regulatory authority over employer-sponsored retirement plans, in addition to authorizing plan participants to sue fiduciaries who breach their duties of loyalty or prudence. *Id.* § 1001(b); *id.* § 1132(a).

III. Regulation of Fiduciaries under the Internal Revenue Code

IRAs (and certain other tax-favored retirement accounts) are governed by the Internal Revenue Code, not ERISA. The two laws have similarities—and importance differences.

The Code contains an essentially identical definition of "fiduciary," 26 U.S.C. § 4975(e)(3), and also enumerates certain "prohibited transactions," *id.* § 4975(c). However, fiduciaries to IRAs are not subject to the

duties of loyalty and prudence that apply to ERISA fiduciaries. Moreover, DOL has no enforcement or regulatory authority over IRAs, and the Code provides no private right of action. The Code's prohibited-transaction provisions are enforced by the Treasury Department, through audits and excise taxes. *Id.* § 4975(a), (f)(8)(E).

For reasons of administrative convenience, Congress gave DOL limited authority with respect to IRAs in two areas where ERISA and the Code overlap: DOL "may define accounting, technical and trade terms" as they appear in both laws, 29 U.S.C. § 1135, and may grant exemptions from the prohibited-transaction provisions of the Code, as for ERISA, *see* Reorganization Plan No. 4 of 1978, § 102 (Aug. 10, 1978), *reprinted* in 5 U.S.C. app. 1 (2016), *and in* 92 Stat. 3790 (1978) ("Reorganization Plan No. 4"). As noted, however, DOL has no enforcement authority over IRAs. *See id.* § 105.

IV. The Department's Original Interpretation Of "Fiduciary"

In 1975, DOL promulgated a regulation setting forth a five-part test for determining who is a fiduciary under the investment-advice provision

of the definition in ERISA and the Code.[1] DOL's 1975 regulation sought to capture the hallmark of a fiduciary relationship at common law: a special relationship of trust and confidence. *E.g.*, George G. Bogert, George T. Bogert & Caryl A. Yzenbaard, *Bogert's Trusts & Trustees* § 481 (2016 update). *See also* H.R. Rep. No. 93-533, at 2082 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (Congress adopted "fiduciary" definition that "in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts"). The regulation embodied the common law distinction recognized in the Advisers Act between an investment-advice fiduciary and a "broker or dealer" who provides advice that is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." 15 U.S.C. § 80b-2(a)(11)(C).

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[1] The regulation defined an investment-advice fiduciary as someone who (1) "render[ed] advice as to the value of securities or other property, or [made] 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, arrangement or understanding," with the plan or plan fiduciary; (4) where the advice "serve[d] as a primary basis for investment decisions with respect to plan assets"; and (5) the advice was individualized "based on the particular needs of the plan." 29 C.F.R. § 2510.3-21(j).

V. The Department's New Fiduciary Rule And Exemptions

In April 2015, DOL proposed a new definition of "fiduciary," two new prohibited-transaction exemptions, and amendments to six existing exemptions. ROA.1020-52 (new interpretation and new exemptions); ROA.1053-1139 (amendments to existing exemptions). After notice and comment, the new definition and exemptions were adopted and published in the Federal Register in April 2016 as a package of seven different rules, which are referred to collectively as the "Fiduciary Rule." ROA.322-538 (new interpretation and new exemptions); ROA.539-624 (amendments to existing exemptions).

DOL's new Rule rests on a sweeping critique of the securities laws, insurance products, broker-dealers, mutual funds, and other matters outside DOL's limited mandate of regulating employer-sponsored retirement plans. For example, disclosure requirements are a cornerstone of the securities laws and state insurance regulation, but DOL concluded that disclosure was "ineffective to mitigate conflicts in advice" and might actually "make consumers worse off." ROA.326-27, 780. Congress had determined that insurance products known as "fixed-indexed" annuities

should not be regulated by the SEC if certain state regulatory requirements are satisfied, Dodd-Frank Act, § 989J, 124 Stat. 1949-50 (2010), but DOL criticized those products and decided that heightened federal oversight was needed anyway, ROA.554-55. DOL also based the Rule on its preference for "passively managed mutual funds (i.e. index funds)" over "actively managed funds," and its "deep and continuing concern[s]" with "proprietary" financial products, for example, insurance policies that an insurance company both designs and markets. ROA.429, 782.

The Rule aims to address these perceived problems by instituting what DOL calls a "best interest" standard of conduct for all financial professionals, particularly those who service IRAs. (As noted, DOL has no regulatory authority over IRAs, and the Code does not subject IRA fiduciaries to duties of loyalty and prudence.) The Rule has two basic components: First, it adopts an interpretation of "fiduciary" that captures virtually all financial and insurance professionals who provide services to IRAs and ERISA plans—thereby subjecting them to those laws' prohibited-transaction requirements. These professionals are thus barred from receiving forms of compensation that have been a cornerstone of their business models for generations. Second, the Rule provides an exemption

from those prohibitions, but only if brokers and agents adhere to a range of new requirements designed by DOL to implement its best-interest standard. The Rule thus forces brokers and insurance agents to either "comply with [an] Exemption" or "curtail" services. ROA.7959.

A. The Labor Department's New Interpretation Of "Fiduciary"

The Rule's new definition of "fiduciary" applies to any person who provides "investment advice" to an ERISA plan participant or "IRA owner" and receives a "fee or other compensation" in connection with that advice.

"Investment advice" is defined broadly by DOL to include "recommendations" regarding, among other things, whether to buy or sell "securities or other investment property"; the "rollover" of retirement plan assets to an IRA; and how "securities or other investment property" should be invested in an IRA. ROA.373. "Recommendation," in turn, is also defined broadly as "a communication that, based on its content, context, and presentation, would reasonably be viewed as *a suggestion* that the advice recipient engage in or refrain from taking a particular course of action." ROA.373 (emphasis added).

Taken together, these definitions dramatically expand the scope of the statutory definition of "fiduciary." As the Rule operates in practice, a person can become a fiduciary if she simply "[d]irect[s] . . . advice to a specific advice recipient" regarding the "advisability of a particular investment . . . decision." ROA.373. That is, the Rule treats *any* suggestion in connection with a sale as conferring fiduciary status, with narrow exceptions. Under DOL's rule, for example, if an insurance sales agent tells a prospective customer, "You will be very pleased with my company's new annuity product," that agent is deemed—for having engaged in that act of *salesmanship*—to be a fiduciary. The Rule thus rejects the distinction between selling products and giving advice that has been fundamental to the securities laws for nearly 80 years.

B. The "Best Interest Contract" Exemption

DOL recognized that its new interpretation of "fiduciary" was overbroad and impractical. This "broad test," it said, "could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." ROA.324. The consequences of that are immense, because the prohibited-transactions provisions of the Code and

ERISA bar the third-party payments, commissions, and sales loads that are the norm for brokers and insurance agents. *See, e.g.*, ROA.368, 379-80. DOL recognized that outlawing those payments was unacceptable. Transaction-based compensation such as commissions are "commonplace in today's marketplace," DOL said, and "often support beneficial advice arrangements." ROA.439-40. "[B]anning all commissions, transaction-based payments, and other forms of conflicted payments . . . could have serious adverse unintended consequences." ROA.439. Indeed, DOL said, it is "abusive conduct" to use fee-based compensation rather than a transaction-based commission for smaller customer accounts that only engage in infrequent trading. ROA.388-89 n.18, 932 n.573.[2]

Rather than scale back its unacceptably broad interpretation of "fiduciary," DOL simultaneously promulgated numerous "exemptive rules" to permit certain otherwise prohibited transactions to continue—but only

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[2] *See also* ROA.6114-16 (for year 2010, approximately 50% of IRA accounts contained assets of $25,000 or less and had on average 3 to 5 trades per account for that year); ROA.8354 (Approximately 95% of accounts under $25,000 rely on transaction-based models).

if brokers and insurance agents accede to a range of new “conditions” designed by DOL.[3]

The most important of these is the Best Interest Contract (“BIC”) Exemption. Under the BIC Exemption, brokers and insurance agents may receive commissions (and other transaction-based payments) if the financial institution or insurance company that employs them, among other things:

- acknowledges in writing that it and its professionals are serving as fiduciaries;
- acknowledges that the company has adopted “impartial conduct standards” under which the professional’s recommendations must be in the “best interest” of the investors (requiring in part that the recommendations be made “without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party”), and the professional does not receive payment “in excess of reasonable compensation”;

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[3] In a surprise change from the proposal, DOL narrowed the scope of an important and long-standing exemption, Prohibited Transaction Exemption 84-24; although only individual variable annuities were excluded from the exemption as proposed (because they are regulated as securities), the final exemption also excludes group variable annuities and fixed-indexed annuities. ROA.548-49. It now includes only fixed-rate annuities.

- provides warranties regarding policies and procedures implemented by the company to ensure adherence to these impartial conduct standards; and
- makes various disclosures of conflicts of interests and third-party payments that may be received from the transaction.

ROA.453-57.[4]

A "critical" feature of the BIC Exemption, DOL said, was its requirement that IRA fiduciaries enter enforceable contracts with customers. ROA.397. These contracts bind them to fiduciary duties of loyalty and prudence (which do not apply under the Code) and may not contain provisions that are commonly used to limit liability, such as a liquidated damages clause or an arbitration agreement that waives participation in class actions. *See* ROA.379-80, 453, 455-56. This new contract's "enforceability," DOL said, "and the potential for liability" it created, were "central goals of this regulatory project." ROA.398, 410.

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[4] DOL created a second new exemption—the Principal Transactions Exemption—that allows financial institutions to engage in, and receive payments in connection with, otherwise-prohibited transactions. ROA.523, 525-28. The Principal Transactions exemption requires the same contractual obligations and liabilities as the BIC Exemption. *See* ROA.479-530. For simplicity, the remainder of this brief refers to both exemptions collectively as the BIC Exemption.

DOL thus concluded that the protections Congress had put in the Code were inadequate, and took it upon itself to fill in the holes it believed Congress had left. "Unlike participants and beneficiaries in plans covered by Title I of ERISA," the Department lamented, IRA owners "do not have an independent statutory right to sue fiduciaries for violation of the prohibited transaction rules." ROA.398; *see also* ROA.410. Therefore, DOL "creat[ed] a mechanism for investors" to sue. ROA.398. As a senior DOL official explained, DOL "had to be creative to try to find a way to" create enforceable rights under the Rule; "that's how we came up with the best interest contract exemption," "deputizing" consumers to bring "state contract actions." ROA.49-50.

The new Rule will have significant adverse effects for IRA owners, other retirement savers, and the products and professionals they rely upon. Advisory accounts (unlike brokerage accounts) usually require the account holder to maintain a minimum account balance to be eligible to receive services from an investment professional. ROA.6120. Because of account minimums, the Rule "could eliminate access to meaningful investment services for over 7 million IRAs." ROA.6106. DOL nonetheless brushed aside the record evidence indicating that the Rule would curtail

the availability of investment assistance and advice, harming the individuals it purported to help. ROA.2736-37, ROA.3719-23. DOL even ignored its own previous estimates that investment mistakes cost investors approximately $114 billion per year, that access to financial assistance reduced the cost of those mistakes by $15 billion per year, and that increased access to financial assistance would enable them to save billions more. *Investment Advice–Participants and Beneficiaries*, 76 Fed. Reg. 66,136, 66,152 (Oct. 25, 2011).

Individuals' access to certain products will be especially impaired, due to DOL's decision to favor certain products and distribution models while disfavoring others—including the fixed-indexed annuities products that Congress indicated in Dodd-Frank should be regulated by the States. *Supra* 11-12. Fixed-indexed annuities are often sold through independent insurance agents who may be part of an independent marketing organization ("IMO"). An IMO cannot qualify for the BIC Exemption: Only "Financial Institutions" are eligible, and IMOs are not Financial Institutions within the meaning of the Exemption. And although insurance companies that create annuities do qualify as Financial Institutions, ROA.454, ROA.460, those companies cannot obtain relief under the

BIC Exemption with respect to *independent* insurance agents, because the BIC Exemption imposes strict supervisory requirements that insurance companies cannot satisfy with respect to independent agents: those agents might sell the fixed-indexed annuities of several different insurance companies, and none of those companies can supervise the products the agent or IMO offers at a particular time, or the compensation offered by other companies. Because independent agents can neither receive commissions under the Rule nor qualify for the BIC Exemption, they may be forced to exit the market, thereby reducing consumer access and choice and shuttering the businesses of independent agents, many of whom are sole proprietorships or small businesses. DOL belatedly recognized its error and purported to address it in a proposed rule regarding "insurance intermediaries,"[5] but that proposal—which is not law—serves only to point up the error of the Rule DOL adopted, and which is before this Court.

The Rule's consequences reach well beyond retirement investments. Many broker-dealers and other investment firms serve both IRAs

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[5] *See Proposed Best Interest Contract Exemption for Insurance Intermediaries*, 82 Fed. Reg. 7,336 (Jan. 19, 2017).

and other types of accounts, and must now navigate a "panoply of regulatory regimes" regarding "different accounts" held by "a single customer." ROA.2703. DOL nonetheless concluded that it could not wait for other regulators to act, ROA.439, including the SEC, which Congress had instructed in the Dodd-Frank Act to consider whether a new standard of conduct for broker-dealers was needed, Dodd-Frank Act, § 913(b), 124 Stat. 1824 (2010). Instead, DOL elected to front-run the SEC and install itself as the paramount regulator of IRAs, a range of insurance products, and the financial professionals who offer them.

VI. District Court Proceedings

Plaintiffs–Appellants the U.S. Chamber of Commerce *et al.* ("Plaintiffs") challenged the Fiduciary Rule under the Administrative Procedure Act ("APA"). Two other actions filed in the same court were consolidated with this case.[6] On cross-motions for summary judgment, the district

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[6] Three other suits challenging the Rule are proceeding before other courts. *Nat'l Ass'n for Fixed Annuities v. Dep't of Labor*, No. 16-5345 (D.C. Cir.); *Market Synergy Grp. v. Dep't of Labor*, No. 17-3038 (10th Cir.); *Thrivent Fin. For Lutherans v. Hugler*, No. 0:16-cv-3289 (D. Minn.).

court adopted DOL's litigating position across the board and granted it summary judgment. ROA.9873-9953. This appeal followed. ROA.9955.[7]

SUMMARY OF ARGUMENT

The Fiduciary Rule is arbitrary, capricious, unreasonable, and contrary to law. The Court should vacate the Rule for each of the following four reasons.

I. The plain meaning of "fiduciary" precludes the Department from interpreting the term so broadly that it encompasses virtually all sales relationships. When Congress uses a common-law term of art in a statute, it incorporates the term's settled meaning, and at common law, a "fiduciary" relationship arises only where there is a special relationship of trust between the parties. The Fiduciary Rule's novel re-interpretation of "fiduciary" divorces that term from the relationships that define it, improperly equating sales interactions with disinterested fiduciary advice.

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[7] Shortly before the district court issued its opinion, the President issued a memorandum directing DOL to reconsider the Fiduciary Rule in light of its potentially adverse effects on investors. 82 Fed. Reg. 9,675 (Feb. 7, 2017). Specifically, the President directed the Department to assess whether the Rule might cause certain specified harms to investors. *Id.* If DOL determines that any of the specified harms will likely occur, it is to propose "rescinding or revising the Rule." *Id.*

Even if ERISA and the Code gave DOL some leeway in construing "fiduciary," the Rule has reinvented it in a way that is irreconcilable with its settled meaning and is unreasonable, arbitrary, and capricious.

II. The Fiduciary Rule exceeds the Department's power and abuses its exemptive authority. An agency cannot deploy a narrow grant of exemptive authority to promulgate industry-reshaping regulations. The Department, however, has attempted to radically redesign the market for IRAs—a market that it has no power to regulate directly—through its limited authority to reduce regulatory burdens. This back-door regulation is unlawful, arbitrary, and capricious.

III. In the absence of congressional authorization, an agency may not create a private right of action directly or indirectly. The BIC Exemption flouts this principle by creating private liability for the purpose of enforcing the requirements of the Fiduciary Rule. In crafting this new enforcement regime, DOL also engaged in an unreasonable, arbitrary exercise of regulatory power that is directly at odds with Congress's design.

IV. The Fiduciary Rule violates the Federal Arbitration Act ("FAA") by prohibiting financial and insurance professionals who rely on the BIC Exemption from entering arbitration agreements that contain

class waivers. The FAA prohibits States and federal agencies from conditioning the enforceability of arbitration agreements on the presence or absence of particular terms. Accordingly, the Department's impermissible attempt to use the BIC Exemption to dictate the terms of arbitration agreements is contrary to federal law.[8]

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's grant of summary judgment, applying the same standard as the district court." *Assoc. Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016) (quotation omitted).

Under the APA, this Court "shall . . . hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations," or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C); *see also Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on

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[8] Plaintiffs incorporate by reference the briefs (and all arguments therein) filed today by the Indexed Annuity Leadership Council ("IALC") Plaintiffs-Appellants and the American Council of Life Insurers ("ACLI") Plaintiffs-Appellants.

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The deference that often is given an agency's interpretation of a statute under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), does not apply to "question[s] of deep economic and political significance" that Congress did not "expressly" assign to the agency. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). Thus, an agency is prohibited from adopting a regulation that "would bring about an enormous and transformative expansion in [its] regulatory authority without *clear* congressional authorization." *Util. Air Regulatory Grp. ("UARG") v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (emphasis added); *see also* Josh Blackman, *Gridlock*, 130 Harv. L. Rev. 241, 261 (2016) (describing the "major question doctrine" as an "exception to *Chevron*" under which "the agency is owed no deference" when its "regulation implicates a 'major question'").

Chevron deference also should not apply to a term—like ERISA's definition of fiduciary—that has both civil and criminal applications. The rule of lenity "requires interpreters to resolve ambiguity in criminal laws in favor of defendants," *Whitman v. United States*, 135 S. Ct. 352, 352-53 (2014) (statement of Scalia, J., respecting the denial of certiorari), yet "[a] single law should have one meaning," *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730, 733 (6th Cir. 2013) (Sutton, J., concurring). Therefore, a term with both criminal and civil consequences should be interpreted using the rule of lenity, not *Chevron*. *Id.*; *accord Gutierrez-Brisiel v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring). *Cf. United States v. Flores*, 404 F.3d 320, 326-27 (5th Cir. 2005) (declining to "decid[e] whether full *Chevron* deference is appropriate" where a statute "involv[es] a mixture of both immigration and criminal law" (footnote omitted)).[9]

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[9] Since the definition of "fiduciary" in the Code is effectively identical to the definition in ERISA and was passed at the same time, *see* Pub. L. No. 93-406, 152-53, 88 Stat. 829, 877 (1974); 26 U.S.C. § 4975(e)(3)(B), the Court also should not defer to the Department's interpretation of "fiduciary" in the Code.

In circumstances where *Chevron* does apply, courts follow a familiar two-step process: At step one, if "the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, "the intent of Congress is clear, [and] that is the end of the matter." 467 U.S. at 842-43 & n.9. At step two, an agency's interpretation of an ambiguous statute will be rejected if it is "unreasonable," including if it "violate[s] [Congress's] intent." *Texas v. United States*, 497 F.3d 491, 501, 506 (5th Cir. 2007).

ARGUMENT

I. The Rule's Redefinition Of "Fiduciary" Is Unlawful.

In promulgating its new interpretation of "fiduciary," DOL contravened the plain text of the Code and ERISA, adopting an unreasonable construction that strayed far beyond what Congress intended. The interpretation, and the Fiduciary Rule as a whole, must be vacated.

A. Under ERISA And The Code, The Hallmark Of A "Fiduciary" Is A Relationship Of Trust And Confidence.

The plain meaning of the term "fiduciary" precludes the Department from adopting an interpretation so broad that it includes virtually

all persons who engage in sales interactions, regardless of the presence of a relationship of trust and confidence.

It is a "cardinal rule of statutory construction that, when Congress employs a term of art" from the common law, "it presumably knows and adopts the cluster of ideas that" the common law attached to that term. *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (quotation marks omitted). Even where a statute "abrogates the common law in certain respects," courts must nevertheless "presume that Congress retained all other elements of [the common law] that are consistent with the statutory text." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 n.2 (2016); *see also, e.g.*, *Neder v. United States*, 527 U.S. 1, 23-25 (1999); *Molzof v. United States*, 502 U.S. 301, 310-11 (1992).

At common law, a "fiduciary" relationship arises only where "special intimacy or . . . trust and confidence" exists between the parties. Bogert, *supra* § 481; *see also, e.g.*, *Granik v. Perry*, 418 F.2d 832, 836 (5th Cir. 1969) (a "fiduciary" relationship exists where "a relation of trust and confidence exists between the parties" (citation omitted)); *Oak Cliff Bank & Trust Co. v. Steenbergen*, 497 S.W.2d 489, 493 (Tex. Civ. App.—Waco

1973, writ ref'd n.r.e.) ("a fiduciary relationship" is "one of trust and confidence"); *Black's Law Dictionary* 753 (rev. 4th ed. 1951) (defining "fiduciary" based on the "trust and confidence involved" in the relationship).

Thus, in ERISA and the Code, Congress used the term "fiduciary"—a well-defined, common law term of art—to refer to individuals having special relationships of trust and confidence with their clients. *See, e.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (ERISA and the Code incorporate principles of the common law of trusts). The word "fiduciary" has, "over the years," obtained "a legal meaning, to which, we normally presume, Congress meant to refer." *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996). The House Report on ERISA specifically confirms that ERISA imports the common-law principle that a "fiduciary is one who occupies a position of confidence or trust." H.R. Rep. No. 93-533, at 2082 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649. And for more than forty years DOL itself recognized this settled definition of "fiduciary" in its regulations, which expressly confirm that fiduciary status applies only to persons who rendered advice "on a regular basis" and "pursuant to a mutual agreement" that was "individualized" and "serve[d] as a primary basis for investment decisions." *See supra* note 1.

To be sure, ERISA contains definitional provisions that further guide how "fiduciary" should be interpreted, but none of those provisions suggest that Congress discarded the settled meaning of "fiduciary"—as if any other word would have equally sufficed. Nor do they suggest that Congress abandoned the essential characteristic of a "fiduciary": a special relationship of trust and confidence. Rather, the definitional provisions confirm that Congress was referring to advisers who occupy a privileged and influential role. The definition of "fiduciary" in ERISA and the Code has three elements. *See* 26 U.S.C. § 4975(c)(3); 29 U.S.C. § 1002(21)(A). The first makes a person a fiduciary if she exercises "discretionary authority or discretionary control respecting management" of a plan, and the third provides that a person is a fiduciary if he has "discretionary authority or discretionary responsibility" over plan administration. 26 U.S.C. § 4975(c)(3)(A), (C); 29 U.S.C. § 1002(21)(A)(i), (iii). Both contemplate a substantial, ongoing, and confidential relationship with a plan.

DOL's new interpretation concerns the second requirement (regarding the provision of "investment advice"), under which a person is a

fiduciary if she "*renders* investment advice *for a fee* or other compensation, direct or indirect, with respect to" an IRA, or if she "has any authority or responsibility to do so." 26 U.S.C. § 4975(e)(3)(B) (emphases added). The essence is that a fee is being paid to procure the "advice" of someone with expertise and independent judgment about the best course to pursue, as opposed to a commission being paid for consummating a transaction with a broker or insurance sales agent. The second half of this definition, with its reference to "authority" and "responsibility," confirms the focus of the definition as a whole on substantial, ongoing relationships of trust and confidence.

Further, this requirement must be read in conjunction with the first and third that bookend it, both of which plainly contemplate a substantial relationship of trust and confidence. "[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quotation omitted); *see also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001).

Yet as shown below, DOL's Rule sweeps well beyond the relationships captured by the term "fiduciary" and the statute's "investment advice" definition.

B. The Plain Language Of ERISA And The Code Forecloses The Rule's Redefinition Of "Fiduciary."

Under DOL's rule, the very act of selling—recommending the purchase of a financial product—makes a broker or an insurance agent a fiduciary.[10] That clashes with the plain meaning of "fiduciary."

At the time ERISA was enacted, it was well recognized that an arms-length sales transaction did not give rise to a fiduciary relationship of trust and confidence. *See, e.g.*, *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 113-14 (N.D. Ala. 1971) (broker not

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[10] Moreover, "providing a selective list of securities" and indicating they are "appropriate for [that] investor" without making a "recommendation . . . with respect to any one security" can create a fiduciary relationship and fiduciary obligations. ROA.348. An introductory conversation with a broker during which an IRA was suggested as an investment option would be fiduciary "advice," even if the broker's statement was entirely incidental to the ultimate sale. *See* ROA.343-44.

a fiduciary), *aff'd*, 453 F.2d 417 (5th Cir. 1972).[11] As the SEC explained, "render[ing] investment advice merely as an incident to . . . broker-dealer activities" does not by itself place broker-dealers "in a position of trust and confidence as to their customers." Hughes, Exchange Act Release No. 4048, 1948 WL 29537, at *7 (Feb. 18, 1948), *aff'd*, *Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949). This Court's precedent is in accord: "Simply urging the purchase of [the company's] products does not make an insurance company an ERISA fiduciary with respect to those products." *Am. Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S.*, 841 F.2d 658, 664 (5th Cir. 1988). Indeed, at common law and under the securities laws at the time of ERISA's enactment, a fiduciary was defined in contra-distinction to salespeople and other third parties who, because they "act[ed] at arm's length," did not have to abide by a fiduciary's "punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

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[11] The fact that brokers are not fiduciaries does not leave investors without any recourse for alleged misconduct. Investors can exercise contractual rights and enjoy the protection of FINRA's suitability standard.

To conclude that someone is a salesperson is to conclude that she *is not* a fiduciary; DOL's interpretation turns this on its head.

Perhaps not surprisingly, then, DOL conceded in the rulemaking that its new "broad test" for determining who is a fiduciary "could sweep in some relationships" that "the Department does not believe Congress intended to cover as fiduciary relationships." ROA.324; *see also* ROA.1033 ("Congress did not intend to cover as fiduciary 'investment advice'" communications "that parties would not ordinarily view" as "characterized by a relationship of trust or impartiality")*;* ROA.325 (acknowledging the need to "avoid[] burdening activities that do not implicate relationships of trust").

That concession ends this case. The Department has no authority to adopt an interpretation at odds with a law's "intended" meaning. An agency "must always give effect to the unambiguously expressed intent of Congress." *UARG*, 134 S. Ct. at 2445 (citation and quotation marks omitted).

DOL defends this flaw by arguing that the Rule's overbreadth is repaired by the BIC Exemption, which enables the Rule's newly dubbed fiduciaries to engage in transactions otherwise prohibited by ERISA and

the Code. *See* ROA.380. That is non-responsive; DOL's interpretation of the statute must stand on its own. The EPA made a similar error in the *UARG* case, where it adopted an overbroad statutory interpretation, which it purported to cure with a companion "tailoring rule." But as the Court explained, "Agencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness." 134 S. Ct. at 2446 (internal quotations and alterations omitted). In the absence of exemptive relief, DOL's broad definition of fiduciary would bar the widely accepted practice of commission-based compensation, which DOL admitted in the rulemaking "could have serious adverse unintended consequences." ROA.439. Here, as in *UARG*, the need to provide exemptive relief "should have alerted [the agency] that it had taken a wrong interpretive turn." *Id.*

DOL's other arguments fare no better. DOL insists that decisions about IRA rollovers "are often the most important financial decisions that consumers make in their lifetime," ROA.641, but the importance of a transaction does not establish that the professionals who facilitate it fall within the definition of "fiduciary" under the Code. "[A]n agency may not

rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

DOL also contends 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 refutes DOL's position. *Mertens* clarified that ERISA defines "fiduciary" "in *functional* terms," eschewing only the formal requirement that a fiduciary be a named trustee in a written trust document. *Id.* The upshot is that a fiduciary's *function* at common law plays a central role in determining who holds that status under ERISA. This was demonstrated in *Varity*, where the Court looked to the common law to determine whether fiduciary functions were being performed. *Varity*, 516 U.S. at 502-03. These common law antecedents should be given great weight, the Court said, unless "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.* at 497.

DOL again goes astray when it contends that a person can be deemed a fiduciary if making recommendations—and hence, giving "investment advice"—is *one part* of what the person does while obtaining compensation. But giving investment advice makes a person a fiduciary

only if he "*renders* investment advice *for a fee* or other compensation, direct or indirect." 26 U.S.C. § 4975(e)(3)(B) (emphases added); 29 U.S.C. § 1002(21)(A)(ii) (same). This language limits the category to persons who are paid *for the purpose of* rendering advice.[12] It does not inquire whether a person who is paid *for something else* might incidentally make a "suggestion" that is neither essential to receiving the fee nor sufficient to earn it, as in the case with brokers and insurance agents, who are paid a commission *if and only if* a sale is made. If no sale is made, then no fee is paid, regardless of whether (and how much) advice was conveyed. On the other hand, if a sale is made, the commission is paid even if no advice was provided.

Under DOL's approach an appliance salesperson "renders appliance advice for a fee" by making a "recommendation" to buy an appliance. That is absurd, and any permissible interpretation of "render[] investment advice for a fee" must distinguish circumstances where the fee is

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[12] The preposition "for" indicates that the *purpose* of the compensation is to pay for the advice. *See The American Heritage Dictionary of the English Language* (1969) (defining "for" as, among other things, "[a]s a result of" or "out of").

for advice from circumstances where it is for something else. To the extent, as DOL will argue, that some brokers and agents hold themselves out as advisors to induce a fiduciary-like trust and confidence, the solution is for an appropriately authorized agency to craft a rule addressing *that* circumstance, not to adopt an interpretation that deems the speech of a salesperson to be that of a fiduciary, and that concededly is so overbroad that (like the rule vacated in *UARG*) it must be accompanied by a raft of corrections.[13]

C. The Labor Department's Construction Of "Fiduciary" Is Unreasonable And Arbitrary.

Even if there were ambiguity to the term "fiduciary" (and there is not), the Fiduciary Rule would still fail because the Department's interpretation is patently unreasonable: *Chevron* deference, even when applicable, does not license an agency to take a statutory term with a settled meaning and distort it to mean the opposite. But that is what the Fidu-

[13] Even if DOL's construction fell within the outer limits of ERISA's definition of "fiduciary" (it does not), the serious First Amendment concerns raised by DOL's interpretation require rejecting it. *See* ACLI Br. Part I; *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

ciary Rule does, by equating two things—a sales relationship and a fiduciary relationship—that ordinarily are defined in contra-distinction to one another.

DOL contends that it is reasonable for the Rule to "reject[] the purported dichotomy between a mere 'sales' recommendation, on the one hand, and advice, on the other," ROA.357, because "the dichotomy between advice and sales" is "no[t] existent in reality," ROA.5579. That assertion is emblematic of DOL's breezy disregard for concepts written into the law by Congress (*supra* 10), and is erroneous in numerous other respects.

First, DOL's rejection of the advice-sales dichotomy rings hollow because DOL *embraced* that dichotomy in another portion of the Rule that excludes certain transactions involving large employer-sponsored plans (plans with at least $50 million in assets). For this aptly named "seller's carve-out" to apply, "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, ROA.359 (emphasis added). In this manner, DOL recognized a sales exclusion for ERISA retirement plans that fall within DOL's core regulatory authority, while insisting on

making fiduciaries out of the insurance agents and broker-dealers in the IRA market for which Congress gave DOL no regulatory authority. Resting part of a rule on the rejection of a supposedly illusory distinction, while making that distinction the basis for another section of the rule, is textbook arbitrary and unreasonable agency action. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49, 1153-54 (D.C. Cir. 2011).

Second, the Code and ERISA recognize the sales-advice dichotomy by generally prohibiting fiduciaries from selling financial products to plans. *See* 26 U.S.C. § 4975(c)(1); 29 U.S.C. § 1106(b). Yet the Rule makes the sale of a financial product to a plan a marker of fiduciary status. That is, the Fiduciary Rule treats the fact that a person has done something that a fiduciary generally may *not*, as dispositive evidence that the person is a fiduciary. That is patently unreasonable.

Third, touting *one's own product*—in common parlance, "selling"—has always been a tell-tale indicator that one is *not* a fiduciary. *See, e.g.*, *THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 532 F. App'x 813, 819 (10th Cir. 2013) ("Ordinarily, a buyer-seller relationship is not fiduciary in nature . . . .") (citation omitted); *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 912-13 (10th Cir. 2005) (noting "the weight of core authority

holding that the relationship between a product buyer and seller is not fiduciary in nature"). A broker, insurance agent, or other financial-sales professional may make "individualized solicitations much the same way a car dealer solicits particularized interest in its inventory." *Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 294 (7th Cir. 1989). That does not make them fiduciaries, *see id.*, as DOL itself recognized in 1975 when promulgating its five-part test for fiduciary status, *see supra* note 1.

Fourth, if there were any remaining doubt that DOL's interpretation of "fiduciary" is unreasonable, Congress's treatment of commission-based compensation in the Dodd-Frank Act would dispel it. Dodd-Frank gives the SEC authority to promulgate a single fiduciary standard for advisers and broker-dealers providing personalized investment advice about securities to retail customers, but forbids it from adopting a standard under which receipt of "commission[s] or other standard compensation" by broker-dealers is prohibited. Dodd-Frank Act § 913(g), 124 Stat. at 1828. Yet that is exactly what DOL has done: Under the Fiduciary Rule, a transaction in which a broker-dealer receives a commission is a prohibited transaction. It is implausible that Congress prohibited the

SEC—an agency with broad authority over the financial-services industry—from creating a standard for broker-dealers that banned commissions, while leaving DOL free to adopt an interpretation with that exact consequence under ERISA and the Code.

Finally, DOL's defiance of Congress is particularly acute in the case of fixed-indexed annuities. Dodd-Frank barred the SEC from regulating these products if certain state insurance law requirements were satisfied, Dodd-Frank Act, § 989J, 124 Stat. at 1949-50. But DOL cited its concerns with the products—and with state insurance laws—as justification for its Rule. ROA.554-55.[14]

For all of these reasons, the Fiduciary Rule is contrary to law, arbitrary, capricious, and unreasonable, and the Court should vacate it in its entirety. A "reviewing court *shall* . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, . . . not in accordance with law" or "in excess of statutory . . . authority[] or limitations." 5 U.S.C. § 706(2)(A)(emphasis added). *But see Cent. & S. W. Servs., Inc. v. EPA*,

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[14] Plaintiffs join in full the arguments concerning the Rule's impact on fixed-indexed annuities advanced by the IALC Plaintiffs and the ACLI Plaintiffs.

220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur). Moreover, the criteria thought to justify remanding a rule without vacatur in some cases plainly are not satisfied here. *Id.*

II. The Department Unlawfully Misused Its Narrow Exemptive Authority To Regulate Services And Products It Lacks The Power To Regulate.

The Department has arrogated to itself the authority to regulate the IRA market—and as a practical consequence, virtually all investment services and products—by using a narrow authority Congress gave it to *reduce* regulatory restrictions. That contravenes the Code (and ERISA) and is the very essence of arbitrary and capricious decisionmaking.

The BIC Exemption is the centerpiece of the Fiduciary Rule. Through this exemption—which allows brokers and insurance agents to make commission-based sales that would otherwise be "prohibited transactions" under the Code—DOL seeks to institute the most sweeping changes for broker-dealers since the Securities Exchange Act of 1934. The Exemption imposes a detailed code of conduct, extensive disclosure requirements, compelled contracts, limitations on arbitration rights, and potential class action liability. *See supra* 16-18. The scale of what DOL has done is reflected in the scope of its criticisms of existing laws and

practices—of the securities laws' disclosure requirements, state insurance law, proprietary financial products, and actively managed mutual finds. *Supra* 11-12. And yet, DOL is instituting revolutionary changes to a segment of the market—IRAs—over which Congress gave DOL neither regulatory nor enforcement authority.

DOL cannot base a regulatory transformation of this magnitude on the limited interpretive and exemptive authority it has with respect to IRAs. An agency may not enact a regulation that "would bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *UARG*, 134 S. Ct. at 2444. "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance," *id.* (citation omitted), because Congress does not "hide elephants in mouseholes"—that is, it does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), nor "delegate a decision of . . . economic and political significance to an agency in so cryptic a fashion," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). For that reason, when "an agency claims to discover in a long-extant statute an unheralded power

to regulate a significant portion of the American economy, [the courts] typically greet its announcement with a measure of skepticism." *UARG*, 134 S. Ct. at 2444 (internal citation and quotation marks omitted).

Thus, in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994), the Court rejected an agency's claim that its authority to "modify" the requirements in a statute allowed it to adopt a rule entirely removing one requirement for a segment of the industry. "It is highly unlikely that Congress would leave" such a momentous decision to the agency's discretion "through such a subtle device as permission to 'modify'" the statute's requirements. *Id.* at 231. The agency could not use this modest authority to "effectively . . . introduc[e] . . . a whole new regime of regulation." *Id.* at 234.

Similarly, in *UARG* the Court rejected as unreasonable EPA's interpretation of a provision in the Clean Air Act that would have caused "millions of small sources" not previously regulated under the Act to "be swept into" regulations applying only to "major sources." 134 S. Ct. at 2436, 2446. An agency may not "lay[] claim to extravagant statutory power over the national economy," the Court explained, if "the statute does not compel [the agency's] interpretation." *Id.* at 2444.

These principles are fatal to the Fiduciary Rule. The sweeping nature of the regulatory transformation DOL has effectuated is undisputed. *See* 82 Fed. Reg. 16,902, 16,908 (Apr. 7, 2017) (DOL citing "major and costly market disruptions" as a reason to delay implementation of parts of the Rule). The Rule fundamentally restructures the markets for IRAs, fixed-indexed and other annuities, and other retirement products, as well as the practices of brokers, insurance agents, and the independent marketing organizations that support independent agents. Indeed, the Rule may require many IMOs to exit the market entirely because they are neither eligible for the BIC exemption themselves nor able to rely on insurance companies to supervise their independent agents in a manner that would comply with the Exemption. *See supra* 19-20. But DOL has nothing approaching the "clear congressional authorization," *UARG*, 134 S. Ct. at 2444, necessary to institute such changes.

Although Congress gave DOL substantial authority over the employer-sponsored benefit plans governed by ERISA, it gave the agency only two slivers of authority relevant to IRAs: Authority to interpret "accounting, technical and trade terms" in the Code and to grant exemptions from the Code's prohibited-transaction provisions. *See* 29 U.S.C. § 1135;

Reorganization Plan No. 4, at § 102; 26 U.S.C. § 4975(c)(2). The Department may not regulate, inspect, investigate, or bring enforcement actions against IRA fiduciaries.

DOL rests its new, detailed requirements for IRAs on its authority to grant exemptions—that is, regulatory *relief*—when to do so is "administratively feasible, in the interest of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan." 26 U.S.C. § 4975(c)(2). But it is "fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction," *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quotation marks omitted), nor may an agency manipulate "safe harbor criterion" to conduct "backdoor regulation," *Hearth, Patio & Barbecue Ass'n v. U.S. Dep't of Energy*, 706 F.3d 499, 507-08 (D.C. Cir. 2013). Never before has DOL suggested that the "mousehole" of its exemptive authority, *Whitman*, 531 U.S. at 468, could be used to implement changes of the elephantine proportions involved here—let alone for IRAs, over which it lacks regulatory power.

The fact that DOL lacks authority to embark on a wholesale restructuring of the IRA market is reason enough to vacate the Fiduciary

Rule and its exemptions in their entirety, but DOL's use of its exemptive authority is plainly flawed in at least two other respects.

First, the new regulatory regime DOL has erected stands in direct conflict with what Congress enacted in the Code and ERISA. In simultaneously enacting ERISA and the IRA provisions of the Code, Congress prescribed a detailed code of conduct and private rights of action with respect to ERISA fiduciaries—and wholly omitted similar provisions for IRAs. But DOL, through the use of the BIC Exemption, is imposing on insurance agents and broker-dealers who service IRAs the very ERISA-style obligations that Congress omitted. DOL acknowledged as much in the rulemaking, explaining that the BIC Exemption "is intended to effectively incorporate" into the Code's treatment of IRAs "the objective standards of care and undivided loyalty that have been applied under ERISA." ROA.405. But the fact that Congress "include[d] particular language in" ERISA—for example, fiduciary duties and a private right of action—"but omit[ted] it in" parallel provisions of the Code, indicates "that Congress intended a difference in meaning." *Loughrin v. United States*, 134 S. Ct.

2384, 2390 (2014). It is not DOL's role to construct a regulatory framework that Congress purposely omitted.[15]

Second, DOL's exemptive rule here—unlike any prior DOL exemptive rule—attaches not merely new *conditions* to the availability of exemptive relief, but new *consequences* if those conditions are not met. Ordinarily, failure to satisfy a condition attached to an exemption means the exemption is lost and the statutory duties and penalties snap back into place. But under the BIC Exemption, if a firm seeks exemptive relief but falls short of the requirements of its "Best Interest Contract," it not only loses the exemption and becomes subject to the statutory penalty (an excise tax imposed by the IRS), it also incurs the new, non-statutory consequences that are written into the "Best Interest Contract," including potential class action liability without the protection of a liquidated damages clause or the possibility of arbitration. A firm that declined to use the "Best Interest Contract," and simply violated Congress's prohibited transaction requirements, would face *fewer* consequences than a firm

[15] In some respects, the restrictions DOL places on IRAs *exceed* what Congress imposed on employer plans in ERISA. This includes the restriction on arbitration agreements. *Infra* 59-63.

that "violated" DOL's supposedly exemptive rule. That is arbitrary, capricious, and a gross distortion of agency authority.

Each of the district court's reasons for allowing DOL to remake the market for IRAs was demonstrably erroneous. For starters, the district court relied on what it saw as the agency's "explicit and broad authority to regulate IRAs." ROA.9904. But DOL *has no regulatory authority over IRAs*; its regulatory authority extends only to employer-sponsored ERISA plans. In fact, in the Dodd-Frank Act, Congress gave the SEC—the nation's principal securities regulator—the authority to develop a uniform fiduciary standard for broker-dealers. Dodd-Frank § 913(g), 124 Stat. at 1828.

The district court also gave DOL *Chevron* deference, but that is precisely the error the Supreme Court sought to correct in *UARG* and *MCI Telecommunications*, where it explained that an agency may not "bring about an enormous and transformative expansion in [its] regulatory authority without *clear congressional authorization*." *UARG*, 134 S. Ct. at 2444 (emphasis added); *see also supra* 25; *King*, 135 S. Ct. at 2489; *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). Here, the burden was on

DOL to show that the statute "compel[s]" the approach it took." *UARG*, 134 S.Ct. at 2444.

Finally, the district court reasoned that DOL had remained within its statutory "authority to grant conditional exemptive relief" because "the industry has been given viable choices." ROA.9902. In reality, the industry was given no choice at all—acceptance of the BIC Exemption is a *fait accompli*. *See* ROA.7959 (result of Rule is that new "fiduciaries" "will be required to . . . comply with [the BIC] Exemption" or otherwise "curtail" services). The district court's conclusion is contradicted by the Department's own repeated statements that it would be "abusive conduct" to recommend fee-based accounts for certain segments of the market. *See supra* 14-15.

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In short, DOL has erred both by using its exemptive authority in a sweeping way that Congress never intended, and by introducing obligations that are plainly inconsistent with lines carefully drawn by Congress. For these reasons, the BIC Exemption must be vacated, and vacatur of that exemption, in turn, requires vacatur of the Fiduciary Rule and all related exemptions. DOL repeatedly said that the BIC Exemption is

integral to the Rule because its interpretation of fiduciary, and the Rule's cost-benefit analysis, are premised on the availability of that exemption. *See, e.g.*, ROA.322-23, 339, 368. These provisions were adopted together, and together they now must fall. 5 U.S.C. § 706(2); *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 734-36 (D.C. Cir. 2001).

III. The Department Impermissibly Created A Private Right Of Action In The BIC Exemption.

The BIC Exemption is meant to enable IRA holders to bring lawsuits against IRA fiduciaries, even though the Code itself gives IRA holders no private right of action. This violates *Alexander v. Sandoval*, 532 U.S. 275 (2001). It is also arbitrary and capricious, because DOL may not erect an enforcement regime inconsistent with the one established by Congress.

A. DOL Unlawfully Created A Private Right of Action.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. An agency "may not create a right that Congress has not." *Id.* at 291. And of course, "the government may not do indirectly what it cannot do directly." *United States v. Whitten*, 610 F.3d 168, 194 (2d Cir. 2010) (quotation omitted). Accordingly, just six years ago the Supreme Court

unanimously rejected an attempt to use contract law to create a private right of action under a statute that provided none. *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 113-14, 117-19 (2011). The contracts in *Astra* incorporated federal statutory duties: "Though labeled differently, suits to enforce [the statute] and suits to enforce [the contracts] are in substance one and the same." *Id.* at 114. Because the statute contained no private right of action, the Court held that a private citizen could not sue as a third-party beneficiary to enforce the contract, explaining: "The absence of a private right to enforce the [statute] would be rendered meaningless" if private citizens "could overcome that obstacle by suing to enforce the [contractual] obligations instead." *Id.* at 113, 118.

Unlike ERISA, which creates a right of action for beneficiaries of employer-sponsored retirement plans, the Code establishes no private right of action. Thus, the Department conceded in the rulemaking that IRA owners lack "an independent statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules." ROA.398. Nor can the Department "bring suit to enforce the prohibited transaction rules on their behalf"; the only liability Congress provided under the Code

was the imposition of excise taxes by the Treasury Department. ROA.398.

The enforceable contract required for the BIC Exemption is meant to circumvent Congress's decision not to provide a private right of action. DOL's "central goal[]" in adopting the BIC Exemption, it said, was to "create[] a mechanism for [IRA owners] to enforce their rights," including through "class litigation." ROA.398, 410; *see also* ROA.480. This contrivance, explained a senior Department official, was the result of the Department being "creative to try to find a way to make the . . . fiduciary responsibility [in ERISA] . . . enforceable in the IRA context." ROA.4621; *see also* ROA.397-98, 403-06.

Tellingly, the enforceable contract requirement for the BIC Exemption does not apply to fiduciaries to ERISA plans. *See* ROA.397. That is because, DOL explained, "the statutory framework . . . already provides enforcement rights to [ERISA] plans, their participants and beneficiaries, and the Secretary of Labor." ROA.399. Thus, the BIC Exemption was crafted to foster private claims against IRA fiduciaries *precisely because* such claims were not authorized by Congress. ROA.397, 398, 410, 418.

In upholding the private right of action created by the BIC Exemption, the district court reasoned that the right of action is a creature of state law. ROA.9909. That is both incorrect and irrelevant.

The premise is incorrect because the BIC is a federally mandated contract, and the fiduciary duties it memorializes are creatures of federal regulation: It is DOL's rules, not state law, that create the compulsion to enter into the BIC, specify the terms the contract must contain, determine 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). At the very least, any suit to vindicate a right created by the BIC would turn on the construction of the meaning and scope of fiduciary duties created by federal law. *See generally Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9 (1983).

It is irrelevant in any event whether the cause of action that DOL created is denominated a state- or federal-law claim. *Astra* establishes that a federally required contract incorporating statutory duties may not be the basis for a private right of action that the statute omitted, because

private suits to enforce the contract would be "incompatible with the statutory regime." 563 U.S. at 113. It did not matter that the claim sounded in breach of contract under state law; what mattered was that Congress did not contemplate that a private claim would be available to enforce federal law. *See, e.g.*, *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 66-67 (3d Cir. 2008) (allowing a private suit under state common law would "circumvent the absence of a private right of action under" the Federal Insurance Contributions Act); *MM&S Fin., Inc. v. NASD, Inc.*, 364 F.3d 908, 910-11 (8th Cir. 2004). DOL cannot use the BIC to do an "impermissible end run around" the lack of a private right of action under ERISA and the Code. *See Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003). Indeed, nothing would remain of *Sandoval* if an agency could so easily circumvent its rule by compelling regulated entities to enter contracts that give rise to private suits.[16] *See Astra*, 563 U.S. at 118.

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[16] The district court tried to distinguish *Astra* by observing that investors suing under the BIC "would not bring suit under any statutory provision." ROA.9911. But that makes the problem worse, not better; DOL imposed duties that Congress purposely omitted and created a private enforcement mechanism that Congress never intended.

B. The BIC Exemption's Enforcement Provisions Are Unreasonable, Arbitrary, and Capricious.

Even if the Department's tactic of creating private claims through contract liability distinguished this case from *Sandoval* (and it does not), the BIC Exemption would nonetheless be arbitrary and capricious under the APA and unreasonable under step two of *Chevron*. Congress created a framework of requirements and penalties for IRAs; the Rule creates new enforcement mechanisms that deviate dramatically and improperly from the Code.

Congress authorized the IRS to enforce the prohibited-transaction provisions of the Code by imposing excise taxes and conducting audits. 26 U.S.C. § 4975(a), (f)(8)(E). The BIC Exemption creates an entirely new mechanism for enforcing those provisions by authorizing private lawsuits. DOL's creation of additional remedies under the Code ignores the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sand-*

oval, 532 U.S. at 290. In particular, "where Congress has otherwise enacted a comprehensive legislative scheme[,] including an integrated system of procedures for enforcement, there is a strong presumption that Congress deliberately did not create a private cause of action." *Tax Analysts v. IRS*, 214 F.3d 179, 186 (D.C. Cir. 2000) (quotation marks omitted).

The district court concluded that the BIC Exemption is reasonable because Congress authorized DOL to create conditional exemptions and certain other federal rules require written contracts. ROA.9910. These contract requirements were never tested in litigation, and therefore are not meaningful precedent. More significantly, those requirements are not remotely similar to the BIC: None was designed for the specific purpose of facilitating private suits to enforce federal standards. None prescribed the forum in which claims could be brought or mandated class action exposure. And none of those other rules creates liability for obligations that are outside the agency's authority to impose. But all of these features are the very purpose and effect of the BIC Exemption.

* * *

This Court should vacate the provisions of the BIC Exemption that authorize private lawsuits to enforce the BIC's requirements. Given the

"critical," "central" role that private enforcement played in DOL's decision to adopt the BIC Exemption, ROA.397, 398, 410, 418, vacatur of the private right of action requires vacatur of the entire rulemaking. 5 U.S.C. § 706; *MD/DC/DE Broadcasters Ass'n*, 253 F.3d at 734-36.

IV. The Rule's Ban Of Class Waivers In Arbitration Agreements Violates The Federal Arbitration Act And Is Arbitrary And Capricious.

The Federal Arbitration Act ("FAA") establishes a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and provides that any arbitration agreement in a commercial contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The Supreme Court has held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). This Court, in turn, has held that the FAA prohibits a State from conditioning the enforceability of an arbitration agreement on the absence of a forum selection provision. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (per curiam). And,

this Court's precedent confirms that the FAA will not permit a federal agency to do what a State may not. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-60 (5th Cir. 2013) (NLRB may not prohibit employer from entering employment arbitration agreements that waive class-wide arbitration).[17]

DOL has violated these principles by attempting to dictate the terms of arbitration agreements through the BIC Exemption. For transactions involving transaction-based (rather than fee-based) compensation, DOL conditions the exemption's availability not just on account holders' being able to pursue class claims, but on their being able to pursue class claims "in court." ROA.456. Thus, the BIC Exemption does not merely ban class waivers, it also dictates the forum in which class actions must be filed. This limitation prohibits financial and insurance professionals and institutions from accessing the arbitral forum for the very types of claims that expose them to the greatest risk and costs.

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[17] The Supreme Court has granted certiorari on this question. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307).

The Department may impose this restriction on the availability of arbitration only if the FAA was "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citation omitted). But neither ERISA nor the Code contains such a command. *See Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) ("Congress did not intend to exempt statutory ERISA claims from the dictates of the [FAA]."). DOL's prohibition on class waivers plainly runs afoul of the FAA.

In nonetheless upholding this prohibition, the district court accepted DOL's contention that restricting BIC arbitrations was permissible because use of the BIC Exemption is voluntary. ROA.9951-53; *see also* ROA.421. But in fact, financial and insurance professionals and institutions have no genuine choice regarding whether to use the exemptions. To have a "voluntary" choice, affected persons must have a genuine opportunity of "not yielding." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2603 (2012). A choice is not genuine if the pressure to accept one option over the other is "so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citation

omitted). Here, DOL has concluded that the transaction-based compensation model that necessitates an exemption is the only permissible model for many accounts. *See supra* 14-15, 51. Thus, for large segments of the industry, the so-called choice is to either "comply with [the BIC] Exemption" or "curtail" their services. ROA.7959. That is no choice at all.

Even if the BIC Exemption could charitably be characterized as powerfully deterring—rather than outright banning—class waivers, it would still offend the FAA. "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344. By interfering with this discretion, the rules impermissibly "interfere[] with fundamental attributes of arbitration," *id.* at 344, obstruct the FAA's "design[] to promote arbitration," *id.* at 345, and impair parties' ability to "structure their arbitration agreements as they see fit," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

Put differently, DOL may no more condition the BIC Exemption on surrendering the right to arbitration than a State may require forgoing arbitration to participate in a state licensing program or receive another

regulatory benefit. Its improper prohibition on class-action waivers requires vacatur of the Rule as a whole. 5 U.S.C. § 706; *MD/DC/DE Broadcasters Ass'n*, 253 F.3d at 734-36.

CONCLUSION

For all of these reasons, the Court should reverse the judgment of the district court; hold that the Fiduciary Rule and its related prohibited-transaction exemptions are arbitrary, capricious, unreasonable, and contrary to law; and direct the entry of a judgment in favor of Plaintiffs that vacates the Rule in its entirety and enjoins DOL from enforcing, implementing, or giving effect to the Rule in any manner.

May 2, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2017, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 2nd day of May, 2017, the foregoing brief was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) this reply complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(C) because, excluding any part of the document exempted by Fed. R. App. P. 27(a)(2)(B), this brief contains 11,969 words; (2) this reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with New Century Schoolbook Linotype 14-point for text and 14-point for footnotes; (3) any required privacy redactions have been made pursuant to this Court's Rule 25.2.13; (4) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1; and (5) the document has been scanned with the most recent version of Microsoft Forefront Endpoint Protection and is free of viruses.

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