IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

AMERICAN COUNCIL OF LIFE INSURERS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-FORT WORTH, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-DALLAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-PINEYWOODS OF EAST TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS-TEXAS, NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, NATIONAL ASSOCIATION FOR FIXED ANNUITIES, INSURED RETIREMENT INSTITUTE, and FINSECA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, and JULIE SU, in her official capacity as Acting Secretary, United States Department of Labor,

Defendants.

Civil Action No. 24-cv-00482

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND STAY OF EFFECTIVE DATE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. LIKE THE 2016 RULE, THE RULE EXCEEDS DOL'S STATUTORY AUTHORITY 2

A. The Common Law, Not DOL's Regulatory Preferences, Define An "Investment Advice Fiduciary" Under ERISA 2

B. DOL's Arguments That The Rule Is Consistent With The Common Law And *Chamber* Lack Merit 5

1. DOL Has No Persuasive Defense Of The Rule's Eradication Of The Distinction Between Sales Speech And Fiduciary Investment Advice 5

2. Purported "Changes" Since 2016 Do Not Save The Rule's Sweeping Redefinition Of Fiduciary Status 8

3. DOL's Arguments Regarding The 1975 Test Are Misguided 12

4. The Major Questions Doctrine And Constitutional Avoidance Canon Reinforce DOL's Lack Of Statutory Authority 14

C. DOL Offers No Persuasive Response To The Rule's Other Conflicts With The Fifth Circuit's Decision In Chamber 16

II. THE REMAINING PRELIMINARY-INJUNCTION FACTORS WARRANT RELIEF 18

III. INJUNCTIVE RELIEF SHOULD NOT BE PARTY-LIMITED AND, AT A MINIMUM, SHOULD PROTECT PLAINTIFFS' MEMBERS FROM UNDISPUTED IRREPARABLE HARM 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States,
841 F.2d 658 (5th Cir. 1988) 6

Americans for Beneficiary Choice v. U.S. Department of Health & Human Services,
2024 WL 3297527 (N.D. Tex. July 3, 2024) 20

Braidwood Management, Inc. v. Becerra,
104 F.4th 930 (5th Cir. 2024) 20

Career Colleges & School of Texas v. U.S. Department of Education,
98 F.4th 220 (5th Cir. 2024) 19, 20

Chamber of Commerce v. U.S. Department of Labor,
885 F.3d 360 (5th Cir. 2018) 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17

Clark v. Martinez,
543 U.S. 371 (2005)....................16

Clarke v. CFTC,
74 F.4th 627 (5th Cir. 2023) 12

Corner Post, Inc. v. Board of Governors of Federal Reserve System,
144 S. Ct. 2440 (2024)....................20

Crawford Painting & Drywall Co. v. J.W. Bateson Co., Inc.,
857 F.2d 981 (5th Cir. 1998) 11

Edenfield v. Fane,
507 U.S. 761 (1993)....................7, 15

West Virginia v. EPA,
597 U.S. 697 (2022)....................14

Erie Insurance Co. v. Hickman by Smith,
622 N.E.2d 515 (Ind. 1993) 6

Expressions Hair Design v. Schneiderman,
581 U.S. 37 (2017)....................15

Federation of Americans for Consumer Choice, Inc. v. U.S. Department of Labor,
2023 WL 5682411 (N.D. Tex. June 30, 2023) 15

Hughes v. Northwestern University,
595 U.S. 170 (2022)..10

Hult v. Home Life Insurance Co. of New York,
213 Iowa 890 (1932)..6

Loper Bright Enterprises. v. Raimondo,
144 S. Ct. 2244 (2024)..2, 12

Louisiana v. Biden,
55 F.4th 1017 (5th Cir. 2022) 18

Mertens v. Hewitt Associates,
508 U.S. 248 (1993)..3

National Institute of Family & Life Advocates v. Becerra,
585 U.S. 755 (2018)..15

Pegram v. Herdrich,
530 U.S. 211 (2000)..4

Perez v. Mortgage Bankers Association,
575 U.S. 92 (2015) 19

Pitts v. Jackson National Life Insurance Co.,
574 S.E.2d 502 (S.C. Ct. App. 2002)..5

Restaurant Law Center v. U.S. Department of Labor,
66 F.4th 593 (5th Cir. 2023) 18

Rishel v. Pacific Mutual Life Insurance Co. of California,
78 F.2d 881 (10th Cir. 1935) 6

Ryan LLC v. FTC,
2024 WL 3297524 (N.D. Tex. July 3, 2024) 20

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011)..15

Stockett v. Penn Mutual Life Insurance Co.,
106 A.2d 741 (R.I. 1954)..6

Varity Corp. v. Howe,
516 U.S. 489 (1996)..4

Walsh v. Campbell,
202 S.E.2d 657 (Ga. 1973)..6

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 15, 16

Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 ....15, 16

Employee Retirement Income Security Act,
Pub. L. No. 93-406, 88 Stat. 829 ....1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17

5 U.S.C. § 705 ....2, 19

REGULATIONS AND ADMINISTRATIVE MATERIALS

81 Fed. Reg. 20,946 (Apr. 8, 2016) 6

84 Fed. Reg. 33,318 (July 12, 2019) 9, 10

89 Fed. Reg. 32,122 (Apr. 25, 2024) 7, 8, 12, 15

In the Matter of Hughes,
Exchange Act Release No. 4048, 1948 WL 29537 (Feb. 18, 1948) 6

LITIGATION DOCUMENTS AND PUBLIC COMMENTS

Amicus Br. of AARP, et al., *Chamber of Commerce v. U.S. Department of Labor*,
No. 17-10238 (5th Cir. July 6, 2017) 11

Amicus Br. of Pub. Citizen, *Chamber of Commerce v. U.S. Department of Labor*,
No. 17-10238 (5th Cir. July 6, 2017) 11

Corrected Br. of Appellee, *Chamber of Commerce v. U.S. Department of Labor*,
No. 17-10238 (5th Cir. July 17, 2017) 3

Consumer Federation of America Comments on Conflict of Interest Rule (July 21,
2015), https://tinyurl.com/44vc3jyu 11

Letter from AARP, et al. to SEC Chair Mary L. Schapiro (Sept. 15, 2010),
https://tinyurl.com/s3bk9y9e 11

INTRODUCTION

DOL's opposition reinforces Plaintiffs' entitlement to preliminary relief. DOL devotes the bulk of its opposition attempting to defend the Rule on the merits, barely contesting the other preliminary-injuntion factors. But in doing so, DOL merely relitigates, rather than faithfully abides by, the Fifth Circuit's decision in *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018). DOL's lead argument—that ERISA's text is broad and authorizes DOL to go beyond the common law—all but ignores *Chamber*, relying on the same authorities the Fifth Circuit considered in holding precisely the opposite when invalidating the 2016 rule. *See* DOL Opp. to Prelim. Inj. Mot. ("Opp.") 12-15, ECF No. 44. Indeed, at times, the opposition constitutes outright defiance of the Fifth Circuit's decision by, among other things, claiming (incorrectly) that key parts of the opinion are dicta, *see id.* at 24, and even relying upon pre-*Chamber* decisions the Fifth Circuit necessarily rejected, *see id.* at 17 n.4.

Ultimately, two straightforward points are sufficient to decide the merits of this case. First, the Fifth Circuit established in *Chamber* that ERISA "codified the touchstone of common law fiduciary status—the parties' underlying relationship of trust and confidence." *Chamber*, 885 F.3d at 369. But, like the 2016 rule, the Rule seeks to transform virtually all insurance agents and brokers who recommend retirement products in compliance with existing state and federal laws into fiduciaries without regard to whether those relationships actually are or would be "fiduciary" at common law. Second, the Fifth Circuit held in *Chamber* that the statutory standard does not permit DOL to "dispense" with the well-established "distinction between investment advisers," who render *advice* for a fee and have long been deemed fiduciaries, "and stockbrokers and insurance agents, who generally assumed no such status in selling *products* to their clients." *Id.* at 372 (emphasis added). But, again like the 2016 rule, the Rule does precisely

what *Chamber* forbids: it ignores the core distinction between investment advice paid for by a client and sales speech engaged in by insurance agents, brokers, and others incidental to the sale of retirement products. In these ways and others, the Rule overrides the common law and exceeds DOL's statutory authority, just as the 2016 rule did.[1]

Once the merits are resolved, the case for preliminary relief and a stay under 5 U.S.C. § 705 are just as easy. DOL does not contest, and thus concedes, that Plaintiffs will suffer irreparable injury absent relief—a critical concession under the preliminary-injunction framework. And DOL barely contests that the public interest and balance of equities lie in favor of preserving the status quo regulatory regime, including DOL's five-part test as well as existing state and SEC protections. This Court should grant Plaintiffs' motion.

ARGUMENT

I. LIKE THE 2016 RULE, THE RULE EXCEEDS DOL'S STATUTORY AUTHORITY

The Rule exceeds the agency's statutory authority for the same reason as the 2016 rule: in key respects, it departs from the common law. DOL has no persuasive answer.

A. The Common Law, Not DOL's Regulatory Preferences, Define An "Investment Advice Fiduciary" Under ERISA

It is telling that DOL's lead defense of the Rule is the very same argument it advanced unsuccessfully in defense of the 2016 rule. Opp. 12-14. DOL argues that ERISA's standard is

[1] *Chamber* held that ERISA was "not ambiguous" in codifying a common-law standard, defeating *Chevron* deference. 885 F.3d at 369. The Supreme Court's recent decision in *Loper Bright* eliminates deference to administrative agencies even with respect to ambiguous statutes, making clear that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2024 WL 3208360, at *22 (U.S. June 28, 2024). As explained below, moreover, that decision teaches that executive branch interpretations of statutes may be due some measure of respect when made contemporaneously with statutory enactment, such as the 1975 test that the Rule seeks to supplant, as opposed to revolutionary reinterpretations like the Rule, posited by an agency nearly five decades later. *See infra* pp.12-13.

"expansive" and that the statute's assertedly "functional" test is not limited to "those already recognized as fiduciary under the common law," but instead supposedly grants DOL discretion to create a fiduciary relationship even where the common law would not recognize one. *Id.* at 13. At one point, DOL goes so far as to assert the common law is the "wrong reference point." *Id.* at 30. The Fifth Circuit rejected those claims, and DOL's efforts to revisit them are baseless.

In defense of the 2016 rule, DOL argued—as it does here—that ERISA defines fiduciary in "*functional* terms"; that ERISA does not "restrict its definition of an investment-advice fiduciary" to "a common-law understanding"; and that DOL therefore may regulate "beyond" that common-law standard. DOL Corrected Br. 3, 20, 25-26, *Chamber of Commerce v. DOL*, No. 17-10238 (5th Cir. July 17, 2017). The Fifth Circuit decisively rejected that entire line of argument. It held in *Chamber* that there was no statutory basis for concluding that Congress intended to depart from the "well-settled meaning" of "fiduciary" under the common law. 885 F.3d at 371. To the contrary, the Fifth Circuit held, "all relevant sources indicate that Congress codified the touchstone of common law fiduciary status." *Id.* at 369.

Notwithstanding the Fifth Circuit's controlling decision, DOL relies on the same language from the same cases here. DOL quotes (Opp. 13), for example, *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993), but *Chamber* found that "there is … no merit in DOL's reliance on *Mertens* for the broader proposition that ERISA departed from the common law definition of 'fiduciary.'" 885 F.3d at 377. Rather, *Mertens* held only that ERISA did not retain the common-law requirement of "formal trusteeship" for fiduciary status. *Id.* That ruling "is *consistent*, not *inconsistent*, with the common law trust and confidence standard," and ERISA's limited departure did not warrant discarding the common law as a whole when interpreting other aspects of ERISA, such as the definition of an "investment advice fiduciary." *Id.* at 377-378.

Chamber likewise disposes of DOL's reliance (Opp. 13 & n.3) on *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). "[T]hose cases stand for the unremarkable proposition that, although an individual may hold both fiduciary and non-fiduciary positions, the individual must be acting as a fiduciary to be subject to ERISA fiduciary duties." *Chamber*, 885 F.3d at 378 n.12. And when determining whether a party was acting as a fiduciary, *Varity* "specifically … reject[ed] reliance on dictionary definitions" and "reverted to common law." *Id.* at 372. Thus, the Fifth Circuit held, *Varity* and *Pegram* are, like *Mertens*, fully consistent with construing ERISA to codify the common law's requirement of an intimate relationship of trust and confidence. *Id.* at 372, 378 n.12.

DOL also fails to grapple with the Fifth Circuit's conclusion that ERISA's reference to "advice for a fee" draws a clear line between advisers paid for fiduciary investment advice and salespeople paid through commissions for the sale of products. *See Chamber*, 885 F.3d at 373; Pls.' Mem. 13, 19. Investment advisers are paid for advice, but brokers and insurance agents generally do not provide "advice for a fee" because they "are compensated only for completed sales." 885 F.3d at 373. DOL's 1975 test tracked that longstanding distinction. *Id.* at 373-374. In response, DOL observes that the Fifth Circuit "approvingly quoted" a statement from the preamble to the 1975 rule that "fees" could include commissions "where the 1975 five-part test is met." Opp. 25. That misses the point. The Fifth Circuit "approv[ed]" of that statement because the 1975 test appropriately ensured that commissions would qualify as "fees" *only* where the salesperson "who earned the commission otherwise satisfied the regulation's requirements that [he] provide individualized advice on a regular basis pursuant to a mutual agreement with his client." *Chamber*, 885 F.3d at 373. The Rule includes no such limitation. Rather, like the vacated 2016 rule, the Rule jettisons the "mutual agreement" and "regular basis"

prongs of the five-part test, with the impermissible result that virtually any commissioned sale of a retirement product triggers fiduciary status.

Contrary to DOL's position (Opp. 25), this understanding of the statute does not mean that "sales commissions are categorically exempt" from ERISA's fiduciary definition. As *Chamber* recognized, commissions can serve as fiduciary compensation in circumstances where an intimate relationship of trust and confidence exists, and a commission is paid for advice in such a relationship. 885 F.3d at 373-374; *see* Compl. ¶81. But the Rule—like the 2016 rule—improperly "dispenses with this distinction" between commissioned financial salespersons and investment advisers by treating all commissions as if they are compensation for fiduciary investment advice. *Chamber*, 885 F.3d at 372; *see* Pls.' Mem. 14-16.

B. DOL's Arguments That The Rule Is Consistent With The Common Law And *Chamber* Lack Merit

Once DOL's efforts to relitigate the Fifth Circuit's test are rejected, the case for vacatur of the Rule is straightforward. As Plaintiffs have shown, the Rule clashes with the common law and the Fifth Circuit's decision in multiple respects, *see* Pls.' Mem. 14-19, and DOL's half-hearted efforts to rehabilitate the Rule under those governing standards fall flat.

1. DOL Has No Persuasive Defense Of The Rule's Eradication Of The Distinction Between Sales Speech And Fiduciary Investment Advice

At the threshold, DOL cannot hide the fact that the Rule repeats the critical vice of the 2016 rule: the Rule eradicates, rather than respects, the common law's distinction between financial salespersons and investment adviser fiduciaries. Pls.' Mem. 13-15. DOL does not, and cannot, dispute that under the common law brokers and insurance agents were typically *not* fiduciaries.[2] Nor can DOL dispute *Chamber*'s holding that ERISA codified this "widely shared

[2] *See Pitts v. Jackson Nat'l Life Ins. Co.*, 574 S.E.2d 502, 508 (S.C. Ct. App. 2002)

understanding" that brokers and insurance agents were not fiduciaries, 885 F.3d at 373; indeed, *Chamber* observed that it was "ordinarily inconceivable" that fiduciary status attached to many agent and broker transactions, such as a one-time rollover, *id.* at 365.

DOL claims the Rule adequately addresses the salesperson distinction because it does not apply fiduciary obligations to the mere "execution of a securities transaction." That is irrelevant. DOL made this same claim in 2016, 81 Fed. Reg. 20,946, 20,987-20,988 (Apr. 8, 2016), and it failed then for the same reason it fails now: recommendations are and always have been a critical component of sales activity, and they *do* trigger fiduciary status under the Rule. But merely providing an individualized sales recommendation is wholly insufficient to establish the existence of an intimate relationship of trust and confidence under the common law. Personalized sales communications are common and, as the Supreme Court has held, they deliver "significant" benefits to consumers because they "enable[] a potential buyer to meet and evaluate the person offering the product or service" and "explore in detail the way in which a particular product or service compares to its alternatives in the market." *Edenfield v. Fane*, 507

(collecting precedent from South Carolina and "other jurisdictions"); *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993) (purchase of insurance policy is "a traditional arms-length dealing between two parties"); *Walsh v. Campbell*, 202 S.E.2d 657, 661 (Ga. 1973) ("general rule [is] that the mere insured-insurer relationship will not place fiduciary responsibilities upon the insurer"); *Stockett v. Penn Mut. Life Ins. Co.*, 106 A.2d 741, 744 (R.I. 1954) ("Ordinarily an insurance company stands in no fiduciary relationship to a legally competent applicant for an annuity[.]"); *Rishel v. Pacific Mut. Life Ins. Co. of Cal.*, 78 F.2d 881, 886 (10th Cir. 1935) (insurance agent's greater knowledge and "wide[r] experience" with annuities does not create a fiduciary relationship); *Hult v. Home Life Ins. Co. of New York*, 213 Iowa 890 (1932) (it does not "constitute a confidential relationship as the term is used in the law" when an insurance agent "merely provid[es] annuity contracts to the annuitant at the annuitant's request"); *see also 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) ("[s]imply urging the purchase" of insurance "products does not make an insurance company an ERISA fiduciary"); *In the Matter of Hughes*, Exchange Act Release No. 4048, 1948 WL 29537, at *7 (Feb. 18, 1948) (broker-dealers are not fiduciaries "unless they have by a course of conduct placed themselves in a position of trust and confidence as to their customers").

U.S. 761, 766 (1993). The Rule, however, effectively outlaws such sales speech outside of a fiduciary relationship. *Infra* pp.15-16.

DOL also insists (Opp. 19) that the Rule appropriately regulates sales recommendations because it excludes "sales pitches" or "hire me" conversations, but that reasoning is circular. As DOL acknowledges, the Rule excludes only sales pitches or conversations that "do not involve a recommendation made under the contexts identified in the Rule." Opp. 19. As Plaintiffs explained (Pls.' Mem. 15-16), and DOL cannot deny, that supposed limitation simply states the tautology that communications not falling within the Rule's definition are not covered.

DOL's arguments about leaving room for sales speech ring hollow, moreover, because the Rule's elements are tailor-made to encompass virtually all sales recommendations that insurance agents and brokers make to retirement consumers. The Rule's first condition—that a person "makes professional investment recommendations to investors on a regular basis as part of their business," 89 Fed. Reg. at 32,256—serves no meaningful limiting function. Rather, as Plaintiffs have explained (Pls.' Mem. 15 n.3), this requirement serves only to exclude people like "divorce counselors" and "life coaches," 89 Fed. Reg. at 32,152—itself a clue that the Rule is overbroad—while sweeping in "virtually all financial and insurance professionals who do business with ERISA plans and IRA holders," irrespective of the nature of their relationship with the particular consumer at issue. *Chamber*, 885 F.3d at 366.

The Rule's second condition is no better. That so-called "objective facts-and-circumstances test" (Opp. 30) employs three sub-elements, each of which will be satisfied virtually any time an insurance agent or broker recommends a product to a retirement consumer. Indeed, brokers' and insurance agents' recommendations would not be useful to consumers if they did not satisfy the first two sub-elements—that is, if they were not "based on review of the

retirement investor's particular needs or individual circumstances," or did not "reflect[] the application of professional or expert judgment." 89 Fed. Reg. at 32,256. And the NAIC model rule and Reg BI require that all recommendations meet DOL's third sub-element—that recommendations be "intended to advance the retirement investor's best interests." *Id.*; Pls.' Mem. 6-7, 14.

Thus, despite DOL's protestations to the contrary (Opp. 15-17), the Rule's definition does not confine fiduciary status to those who "hold themselves out as advisors to induce a fiduciary-like trust and confidence." It instead repeats the 2016 rule's central defect: it permits "any financial services or insurance salesman who lacks a relationship of trust and confidence with his client [to] nonetheless be deemed a fiduciary." *Chamber*, 885 F.3d at 379 n.13.

2. Purported "Changes" Since 2016 Do Not Save The Rule's Sweeping Redefinition Of Fiduciary Status

Ultimately, DOL pivots to a much broader argument: insurance agents and brokers "are not mere salespeople" (Opp. 20) because they supposedly act and behave like fiduciaries. Given *Chamber*'s contrary holding, *see* 885 F.3d at 373, it would take extraordinary circumstances to justify the claim, just 6 years later, that despite not satisfying DOL's longstanding 1975 test, all insurance agents and brokers are now in fact investment advice fiduciaries under ERISA. DOL can point to nothing of the sort. Instead, the agency relies on two remarkably weak "strains of evidence" (Opp. 20) to support its assertion that circumstances have changed since the Fifth Circuit addressed the same issues in *Chamber*. Neither has merit.

a. DOL argues (Opp. 20) that post-*Chamber* "regulatory changes"—namely, Reg BI and enhancements to the NAIC model annuity regulation—make "clear that insurance agents and brokers are not mere salespeople." This contention is twice flawed. First, it is clear from *Chamber* that regulation of sales activity by other regulators does not justify the imposition of

fiduciary status. At the time of the *Chamber* decision, insurance agents were subject to heightened "suitability" requirements that went well beyond what applied to other traditional salespersons. *See Chamber*, 885 F.3d at 385. The Fifth Circuit easily concluded that annuity transactions regulated by these suitability rules typically involved non-fiduciary sales relationships, *id.* at 380, and that "[t]ransforming sales pitches into the recommendations of a trusted adviser mixes apples and oranges," *id.* at 382 & n.15. This remains true. The statutory question is whether insurance agents or brokers satisfy the test for common-law fiduciaries, not whether other state or federal laws impose enhanced consumer protections on their sales activity.

Second, as Plaintiffs have explained (Pls.' Mem. 15 n.3), DOL's attempt to bootstrap *non*-fiduciary standards into a one-size-fits-all *fiduciary* relationship makes no logical sense. For one thing, this argument defies the Fifth Circuit's common-law test, because DOL cites no support for the idea that insurance agents acting under the NAIC model rule or brokers acting under Reg BI are common-law fiduciaries.[3] DOL argues (Opp. 21) that the Rule appropriately reflects these new "market realities," but to the contrary, the NAIC regulation and Reg BI expressly *disclaim* fiduciary obligations—recognizing the "market reality" (in DOL's terms) that a fiduciary standard "does not correspond with the transactional, sales relationship" that brokers and insurance agents in fact maintain with consumers. *See* NAIC Comment on Reg BI, at 4 (Aug. 3, 2018); 84 Fed. Reg. at 33,322 (rejecting a fiduciary standard as not "appropriately tailored to the structure and characteristics of the broker-dealer business model"). The fact that

---

[3] DOL dismisses the overwhelming common-law authorities holding that insurance sales do not give rise to fiduciary relationships on the ground they "pre-date the [post-2016] regulatory developments." Opp. 21 n.7. But DOL does not cite a single decision in which an insurance agent or broker has now been deemed a fiduciary solely by making a sales recommendation under these new regulations—which is unsurprising given that Reg BI and the NAIC model rule affirmatively reject the imposition of fiduciary obligations.

these primary regulators deliberately rejected fiduciary status, after reaching a contrary conclusion about "market realities," surely matters when assessing "the expectations of both financial professionals and retirement investors about the relationships being formed." Opp. 22.[4]

b. Next, DOL claims that "there is plentiful evidence that insurance agents and brokers do not behave like, or even see themselves as, mere salespeople." Opp. 22. But DOL does not have the statutory power to declare that anyone acting beyond a "mere" salesperson is a fiduciary. The question, the Fifth Circuit held, is whether there is a "special relationship of trust and confidence." *Chamber*, 885 F.3d at 376. DOL's reliance on testimony by NAIFA's former president Bryon Holz is thus misplaced. That Holz does not view himself "as *just* a salesperson," DOL App. 292-293, ECF No. 45 (emphasis added), does not mean he "behaves" or "sees" himself as a *fiduciary*. And in relying on Holz's testimony that he has "*a sort of* relationship of trust and confidence," Opp. 23 (emphasis added), DOL is playing word games, confusing the trust buyers may place in some salespersons with the special, intimate relationship to which heightened fiduciary obligations attach. Some degree of trust and confidence inheres in many commercial transactions between consumers and salespersons. Yet the common law did not regard trust and confidence in such transactions as sufficient to create a fiduciary relationship with every salesperson. *See* Pls.' Mem. 12-13, 15. As the Fifth Circuit has elsewhere

[4] According to DOL, the SEC declined to impose a fiduciary standard in Reg BI solely because "the SEC reserves its 'fiduciary' label for those who must provide ongoing monitoring and advice, … but ERISA does not require such ongoing monitoring and advice." Opp. 21. ERISA's fiduciary duties often do, however, include "a continuing duty of some kind to monitor investments and remove imprudent ones." *Hughes v. Northwestern University*, 595 U.S. 170, 175 (2022). Thus, the Rule implicates the same concerns that the SEC was careful to avoid. DOL ignores, moreover, the reason the SEC gave for declining to subject broker-dealers to a fiduciary standard: "in contrast to the generally ongoing nature of the advisory relationship," "the provision of recommendations in a broker-dealer relationship is generally transactional and episodic"—that is, it is structured around the particular products the broker recommends and ultimately sells to the customer. *See* 84 Fed. Reg. at 33,331.

recognized, mere "expressions that the parties … trust and have confidence in each other" are insufficient to establish fiduciary relationships because "[t]he same could be said … about most of the people we deal with each day." *Crawford Painting & Drywall Co. v. J.W. Bateson Co., Inc.*, 857 F.2d 981, 985-986 (5th Cir. 1988).

The handful of comments DOL cites do not establish otherwise. Opp. 23-24 & nn.10-11.[5] For over a decade, many of the same commenters have raised the same or similar points to DOL and the SEC in prior rulemakings (including DOL's unlawful 2016 rule),[6] and in amicus briefs filed in the *Chamber* litigation.[7] Yet the SEC determined these concerns did not justify subjecting brokers to a fiduciary standard, and the Fifth Circuit concluded that they did not support a different construction of ERISA or authorize DOL to ignore the statute's common-law standard. As the Fifth Circuit explained, these are "arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority"; they are not reasons to "empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority." *Chamber*, 885 F.3d at 379.

---

[5] DOL also cites (Opp. 23-24 & n.10) comments asserting that certain participants in the retirement savings market engage in marketing practices designed to portray themselves as knowledgeable and trustworthy. Those marketing practices do not show that financial salespeople enter into "special relationships" with their customers, so they do not establish that a distinction between financial salespeople and fiduciary investment advisers no longer exists. And to the extent existing state and federal antifraud and consumer protection laws do not adequately address advertising practices, the solution would be for the appropriate regulators to take action, not for DOL to extend fiduciary obligations indiscriminately across the industry. *See Chamber*, 885 F.3d at 379.

[6] *See, e.g.*, Letter from AARP, et al. to SEC Chair Mary L. Schapiro (Sept. 15, 2010), https://tinyurl.com/s3bk9y9e; Consumer Federation of America Comments on Conflict of Interest Rule (July 21, 2015), https://tinyurl.com/44vc3jyu.

[7] *See, e.g.*, Amicus Br. of AARP, et al., *Chamber of Commerce v. DOL*, No. 17-10238, 2017 WL 2992767 (5th Cir. July 6, 2017); Amicus Br. of Public Citizen, *Chamber of Commerce v. DOL*, No. 17-10238, 2017 WL 2992768 (5th Cir. July 6, 2017).

Finally, DOL's reliance on Plaintiffs' declarations is badly misplaced. Opp. 23-24 & n.9. That many clients of Plaintiffs' members "need guidance" (Opp. 23 n.9) does not transform a sales relationship into a fiduciary one. Nor does the fact that some consumers may refer family and friends to an insurance agent or broker. *See id.* And the fact that some consumers "use the advice from financial professionals to make important financial decisions," Opp. 24 n.11, does not establish a fiduciary relationship: a consumer can be satisfied with—and even trust in and rely on—a salesperson when making important purchasing decisions without entering into a fiduciary relationship, *see* Pls.' Mem. 12-13.[8]

3. DOL's Arguments Regarding The 1975 Test Are Misguided

DOL also has no compelling response to the fact that the Rule unlawfully abandons the same three prongs of the 1975 test that led to the invalidation of the 2016 rule in *Chamber*. Pls.' Mem. 13. DOL argues that Plaintiffs wrongly "imply that the 1975 Rule is the only way to satisfy *Chamber*'s analysis," Opp. 16, but the 1975 test should certainly carry significant weight in discerning the statute's meaning because it was "issued roughly contemporaneously with [ERISA's] enactment" and reflected DOL's consistent position for more than four decades, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2024 WL 3208360, at *9 (June 28, 2024).

---

[8] DOL's claim (Opp. 22-24) that it assembled a robust "factual record" on this point is also an impermissible "post hoc rationalization." *Clarke v. CFTC*, 74 F.4th 627, 642 (5th Cir. 2023). Although DOL referenced Holz's testimony in a background section of the Rule's preamble, the Rule does not rest on an aggregate factual determination that all, or nearly all, insurance agents and brokers across the United States are in relationships with customers that *in fact* satisfy the common-law standard. Rather, the Rule is built on a legal fiction that any time a "financial professional" makes an individualized recommendation in compliance with existing state and federal law, that person has "assumed a position of trust and confidence with respect to the investor." 89 Fed. Reg. at 32,154. That irrebuttable presumption is an unlawful end-run around the Fifth Circuit's decision, as Plaintiffs have explained. Pls.' Mem. 18.

That is particularly so given that the Fifth Circuit held that the 1975 test "captured the essence of the fiduciary relationship known to the common law" and appropriately tracked "the then-thirty-five year old distinction" between investment advisers and brokers. *Chamber*, 885 F.3d at 365.

Whatever flexibility DOL may have to modify the 1975 test, *Chamber* at least stands for the proposition that DOL cannot now abandon the *same* three prongs of the 1975 test ("regular basis," "mutual understanding," and "primary basis") that it unlawfully rejected in the 2016 rule. That is because those prongs work together to ensure that statutory fiduciary status conforms to the common law. *See Chamber*, 885 F.3d at 366 (explaining it was "critical[]" that the 2016 rule "dispense[d] with the 'regular basis' and 'primary basis' criteria" and thus "encompasse[d] virtually all financial and insurance professionals who do business with ERISA plans and IRA holders"); *see id*. at 369 (identifying "regular basis" and "primary basis" provisions as "hallmarks of an 'investment advice' fiduciary's business" "[f]or the past forty years").

Indeed, the Rule's elimination of the "regular basis" prong, and its express inclusion of one-time sales transactions, reinforces the dissonance between the Rule and the common law. *See* Pls.' Mem. 16. DOL acknowledges (Opp. 24-25 & n.12) that the Rule permits fiduciary status to arise out of one-time transactions (claiming that the "regular basis" prong is atextual), even though *Chamber* stressed that it was "ordinarily inconceivable" that "an intimate relationship of trust and confidence" would exist in that situation. 885 F.3d at 380. *Chamber*'s reasoning on this point was not dicta (Opp. 24); *Chamber* cited the application to one-time transactions as one of the chief ways that the 2016 rule "disregard[ed] the essential common law trust and confidence standard." 885 F.3d at 380. The same is true of the Rule here.

DOL's elimination of the "mutual agreement" prong also underscores the Rule's departure from the common law. As Plaintiffs have shown, the common law historically

provided parties the flexibility to structure their relationships through mutual agreements to enter or not enter into a fiduciary relationship. *See* Pls.' Mem. 16-17. DOL does not dispute this understanding of the common law. Instead, DOL argues (Opp. 30) that the common law "is the wrong reference point." That is a startling position in the face of the Fifth Circuit's holding that common law is the "touchstone" of ERISA fiduciary status. And DOL equally misses the point by debating the efficacy of "fine print disclaimers" (Opp. 31). The Rule deprives parties of the freedom to define the nature of their relationship regardless of the extent to which their mutual agreement is clear and conspicuous. *See* Pls.' Mem. 17.

4. The Major Questions Doctrine And Constitutional Avoidance Canon Reinforce DOL's Lack Of Statutory Authority

The same concerns the Fifth Circuit cited in applying the major questions doctrine in *Chamber* apply equally to the Rule. *See* 885 F.3d at 387-88; Pls.' Mem. 19-20. Ignoring *Chamber*, DOL argues the doctrine does not apply because DOL is not relying on "an 'ancillary provision' of ERISA." Opp. 31. But the doctrine is not limited to "ancillary-provision" cases; it applies whenever agencies claim the power to make "major policy decisions" normally reserved for Congress. *West Virginia v EPA*, 597 U.S. 697, 723 (2022); *see id.* at 721-724 (discussing "various circumstances" that trigger doctrine's application). Here, as in 2016, DOL claims to "reinterpret[] the forty-year old [now roughly fifty-year old] term 'investment advice fiduciary'" "to transform the trillion-dollar market for IRA investments, annuities and insurance products, and to regulate in a new way the thousands of people and organizations working in that market." *Chamber*, 885 F.3d at 387. DOL "must point to 'clear congressional authorization'" to exercise such "highly consequential power." *West Virginia*, 597 U.S. at 723. No such authorization exists; if anything, Congress has—through the Dodd-Frank Act—delegated such authority to

other regulators. Pls.' Mem. 21; *infra* p.16. DOL, meanwhile, points only to the same statutory provision *Chamber* deemed inadequate to support the 2016 rule.[9]

The canon of constitutional avoidance likewise requires this Court to construe ERISA to avoid the grave First Amendment concerns that the Rule raises by subjecting nearly all insurance agents and brokers to fiduciary regulation based on protected sales speech. *See* Pls.' Mem. 20-21. DOL argues (Opp. 32-34) the Rule regulates conduct, not speech. But the Rule's focus is the "communication" of a "recommendation" to purchase products, such as annuities. 89 Fed. Reg. at 32,143. The Rule thus targets speech "propos[ing] a commercial transaction," *Edenfield*, 507 U.S. at 767—the very definition of protected commercial speech—and it does so "based on its content," 89 Fed. Reg. at 32,143; *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Nor is the Rule's burden on speech "incidental" (Opp. 33). The Rule's "primary effect" is not to directly regulate products or sales commissions but "how sellers may communicate" with retirement savers. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017). Just as the communication of prices in *Expressions Hair Design* and the use of prescriber information in aid of pharmaceutical marketing in *Sorrell* were protected speech, so too is the "communication" of "suggestion[s]" to purchase annuities, 89 Fed. Reg. 32,143.

DOL does not deny that content-based speech regulations are "presumptively unconstitutional." *NIFLA v. Becerra*, 585 U.S. 755, 766 (2018). It argues only that the Rule does not implicate the First Amendment because "what matters is not what triggers a regulation

---

[9] *Federation of Americans for Consumer Choice, Inc. v. DOL*, 2023 WL 5682411 (N.D. Tex. June 30, 2023), does not help DOL. There, a magistrate judge did not apply the major questions doctrine to a far more limited DOL interpretation regarding rollovers on the view that it did "not rise to the level of the expansive power the DOL sought to exert through the 2016 Fiduciary Rule." *Id.* at *14. The Rule asserts the same "expansive power" DOL claimed in 2016, *id.*, and is subject to the same "skepticism" under *Chamber*, 885 F.3d at 381.

but what the regulation does once it is triggered." Opp. 33. But the Rule both is triggered by non-fiduciary sales speech—a point DOL seems to concede—and substantially burdens such speech by requiring speakers to either forgo recommending retirement products to consumers altogether or to conform their speech to onerous fiduciary standards. Because DOL's broad construction of ERISA "would raise a multitude of constitutional problems," the Court should interpret the statute to avoid those problems. *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).

C. DOL Offers No Persuasive Response To The Rule's Other Conflicts With The Fifth Circuit's Decision In *Chamber*

1. As it did when issuing the 2016 rule, DOL again claims authority that, as *Chamber* recognized, Congress delegated to the SEC or reserved to the States. *See* 885 F.3d at 385-386 & n.16; Pls.' Mem. 21. DOL contends there is no conflict because Dodd-Frank addresses the SEC's authority under the federal securities laws, not DOL's authority under ERISA. Opp. 29 n.15 (citing 89 Fed. Reg. at 32,138). DOL made that same contention in *Chamber*, but the Fifth Circuit was "unconvinced," because "Congress does not ordinarily specifically delegate power to one agency while knowing that another federal agency stands poised to assert the very same power." 885 F.3d at 386. DOL claims the Rule "harmonizes" (Opp. 29) with post-*Chamber* changes like Reg BI and the NAIC model regulation. Even setting aside that imposing fiduciary status where the SEC and States rejected it is the definition of inconsistency, not harmony, DOL's claim of authority conflicts with Congress's considered choices in Dodd-Frank about who should regulate recommendations by brokers and insurance agents in connection with retail securities and annuities transactions.

2. The Rule also "ignores that ERISA Titles I and II distinguish between DOL's authority over ERISA employer-sponsored plans and individual IRA accounts." *Chamber*, 885 F.3d at 381; Pls.' Mem. 21-22. DOL does not dispute that through PTE 84-24 and PTE 2020-02,

the Rule imposes on IRA fiduciaries duties of prudence and loyalty that ERISA omits from Title II. DOL relies on parallel "exemptive authority" under Title II to justify this regulatory overreach. Opp. 28. But *Chamber* rejected this same argument, reasoning that DOL may not "comparably regulate fiduciaries to ERISA plans and IRAs" where ERISA treats them differently. 885 F.3d at 381. Nor can DOL sidestep *Chamber* by claiming to have cured the 2016 rule's "defects" (Opp. 29). As in 2016, DOL relies on PTEs because its expansive "fiduciary" definition sweeps in insurance agents and brokers who are not common-law fiduciaries. *Supra* pp.5-8. That "concepts of care and loyalty are not unique to Title I" (Opp. 29) is thus beside the point. Congress chose not to incorporate those statutory duties into DOL's enforcement of Title II, and that choice "is taken to be intentional." *Chamber*, 885 F.3d at 381. By "impermissibly conflat[ing] the basic division drawn by ERISA," *id.*, the Rule contravenes Congress's choice in the same way as the 2016 rule.

3. The written acknowledgment of fiduciary status is independently unlawful because it authorizes private enforcement that Congress did not. *See id.* at 384; Pls.' Mem. 22. DOL says this does not conflict with *Chamber* because the Rule allows parties to "disclaim … enforcement rights other than those specifically provided" by ERISA. Opp. 27. But as DOL admits, IRA fiduciaries may be "subject to suit in State courts on State-law theories of liability." *Id*. DOL does not explain how an enforcement disclaimer would prevent an acknowledgment of fiduciary status from triggering suit or disabling potential defenses. That the Rule does "not alter the existing framework for bringing suits under State law" (*id.*) is irrelevant. The 2016 rule did not alter state contract law by requiring certain contracts. But *Chamber* nevertheless struck down that requirement as an unlawful "end run around Congress's refusal to authorize private rights of action enforcing Title II fiduciary duties." 885 F.3d at 384. DOL insists the

acknowledgment here "simply ensures up-front clarity." Opp. 27. But "clarity" could be achieved by having salespersons disclose their *non*-fiduciary status. That the Rule requires them to pledge fiduciary status in writing shows that the purpose of the acknowledgment is to prevent brokers and insurance agents from disputing fiduciary status, subjecting them to liability under state law. *See* Pls.' Mem. 22. That is the same unlawful "end run" by different means.

II. THE REMAINING PRELIMINARY-INJUNCTION FACTORS WARRANT RELIEF

DOL does not dispute that Plaintiffs have demonstrated irreparable injury, Opp. 34-35; Pls.' Mem. 23-25—a significant concession given the importance of this factor to the preliminary-injunction analysis. Instead, relying on the transition period for PTE requirements, DOL claims the harm to Plaintiffs' members will be "very limited" during the period that would be addressed by a preliminary injunction. Opp. 34. But DOL's *own* estimate of more than half a billion dollars in unrecoverable compliance costs in the first year alone is scarcely "very limited." And it easily satisfies the Fifth Circuit's "more than de minimis" standard. *Restaurant Law Ctr. v. DOL*, 66 F.4th 593, 600 (5th Cir. 2023). Moreover, the transition period is cold comfort for Plaintiffs, whose members must prepare for novel fiduciary requirements that will take effect in just over two months. Uncontested evidence, in fact, shows that large percentages of Plaintiffs' members will soon incur substantial, unrecoverable costs to meet that fast-approaching deadline, and that DOL's projection of costs is likely an underestimate. *See, e.g.*, Pls.' App. 48 (Neely Decl. ¶11); *id.* at 6 (Mayeux Decl. ¶13); *id.* at 16 (Cadin Decl. ¶9). The irreparable-injury requirement is certainly satisfied.

The remaining factors—the balance of equities and public interest, which merge, *see* Pls.' Mem. 25; Opp. 34—likewise cut decisively in Plaintiffs' favor because there is "no public interest in the perpetuation of unlawful agency action." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022). DOL argues an injunction will interfere with its ability "to advise the public of

[its] construction of the statutes and rules which it administers.'" Opp. 34 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015)). But any such interest cannot prevail when the agency's construction is unlawful. *Perez*, moreover, did not involve an injunction and does not speak to the relevant factors. Nor will preserving the status quo undermine the "public interest in protecting retirement investors." Opp. 34 (citing 89 Fed. Reg. at 32,133). In the interim, the public will be protected by the SEC and state regulations, as well as the 1975 test. And DOL's reliance on a single supportive comment ignores the numerous studies documenting the Rule's significant harm to low- and middle-income consumers. *See* Pls.' Mem. 25; *see also* Hispanic Leadership Fund Amicus Br. 11-15, ECF No. 38; Chamber Amicus Br. 16-21, ECF No. 31.[10]

III. INJUNCTIVE RELIEF SHOULD NOT BE PARTY-LIMITED AND, AT A MINIMUM, SHOULD PROTECT PLAINTIFFS' MEMBERS FROM UNDISPUTED IRREPARABLE HARM

Lastly, under binding Fifth Circuit precedent, this Court should "postpon[e] the effective date of the [challenged] portions of the Rule … for which [Plaintiffs have] shown a likelihood of success on the merits." *Career Colleges & Sch. of Texas v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024). DOL argues (Opp. 35) that any relief should be "limited in scope to the parties to the … motion." But *Career Colleges* held the opposite: under the APA, "the scope of preliminary relief … is not party-restricted." 98 F.4th at 255. As the Fifth Circuit explained, "[n]othing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to an [associational plaintiff] or its members." *Id.* As this Court recently held, moreover, "universal relief makes sense" where, as here, the challenged rule purports to "prescribe uniform standards," and "limiting relief to only the parties

[10] The comment DOL cites (Opp. 34) does not raise or address how imposing a fiduciary standard on brokers and insurance agents would affect low- and middle-income retirement savers' access to important financial information and products.

before the court would likely distort the market[,] 'prove unwieldy and … only cause more confusion.'" *Americans for Beneficiary Choice v. U.S. Dep't of Health and Human Servs.*, 2024 WL 3297527, at *7 (N.D. Tex. July 3, 2024); *accord Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2024 WL 3237691, at *15 (2024) (Kavanaugh, J., concurring) (explaining why government's "newly minted position" against universal vacatur is wrong). DOL cites (Opp. 35) *Braidwood Management, Inc. v. Becerra*, 104 F.4th 930 (5th Cir. 2024), but that case acknowledged the APA's "default" relief is "not party-restricted"; it declined to order such relief only because no APA claim remained. *Id.* at 952-953. DOL cannot sidestep *Career Colleges*' holding in this APA case.

At a minimum, any injunction should extend to Plaintiffs' members. The complaint and unrebutted declarations easily satisfy the requirements of associational standing: Each Plaintiff has members directly regulated by the Rule who would have standing to sue in their own right; the core interests that Plaintiffs seek to protect are obviously germane to their organizational purposes; and participation by individual members is not necessary. *See* Compl. ¶20; Pls.' App. 1-52; *Career Colleges*, 98 F.4th at 233-234 (affirming associational standing in similar circumstances). Nor has DOL ever raised or questioned standing, associational or otherwise. Any injunction must accordingly protect the members on whose behalf Plaintiffs sued.[11]

CONCLUSION

This Court should preliminarily enjoin the Rule and stay its effective date. If the Court would find it useful, Plaintiffs stand ready to participate in oral argument over the motion.

---

[11] Another judge in this district recently limited preliminary relief under the APA to named plaintiffs, primarily due to concerns about whether the associational plaintiffs had satisfied the requirements for associational standing. *See Ryan LLC v. FTC*, 2024 WL 3297524, at *15 (N.D. Tex. July 3, 2024). No such concerns are present in this case.

Dated: July 12, 2024

Respectfully submitted,

/s/ Kelly P. Dunbar
David W. Ogden (*pro hac vice*)
Kelly P. Dunbar (*pro hac vice*)
Kevin M. Lamb (*pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
(202) 663-6363 (fax)
david.ogden@wilmerhale.com
kelly.dunbar@wilmerhale.com
kevin.lamb@wilmerhale.com

Andres C. Salinas (*pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8800
(212) 230-8888 (fax)
andres.salinas@wilmerhale.com

/s/ Michael A. Yanof
Michael A. Yanof, Texas Bar No. 24003215
NICOLAIDES FINK THORPE
MICHAELIDES SULLIVAN LLP
2501 North Harwood Street
Suite 1210
Dallas, TX 75201
(469) 290-9047
(469) 290 9041 (fax)
myanof@nicolaidesllp.com

Counsel for Plaintiffs