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 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
Case Nos. 3:16-cv-1476, 3:16-cv-1530, & 3:16-cv-1537
(Hon. Barbara M. G. Lynn)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, URGING REVERSAL

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May 9, 2017

CERTIFICATE OF INTERESTED PERSONS

No. 17-10238

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,

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

Defendants-Appellees.

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that all interested persons and entities who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the opening briefs of Plaintiffs-Appellants, except for the following listed persons and entities:

1. Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and issues no publicly held stock.

2. Cory L. Andrews and Mark S. Chenoweth are counsel for *amicus curiae* WLF in this matter.

/s/ Cory L. Andrews

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has appeared in numerous federal courts in cases raising First Amendment issues to support the free-speech rights of market participants. *See, e.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles on a variety of First Amendment issues affecting commercial speakers—including the Fiduciary Rule at issue in this case. *See, e.g.*, James M. Beck, *What Counts as "Commercial Speech" Today?*, WLF Legal Opinion Letter (April 7, 2017); Donald M. Falk & Eugene Volokh, *Labor Department's Fiduciary Rule Tests First Amendment Limits*, WLF Legal Opinion Letter (Oct. 14, 2016).

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

WLF believes that the decision below affords unacceptably broad deference to the Department of Labor's (DOL) decision to restrict truthful, non-misleading commercial speech. DOL seeks to justify its content-based and discriminatory burdens on the basis that those burdens are aimed solely at professional conduct, not speech. The district court agreed, explaining that Appellants and their members "may speak freely, so long as they recommend products that [in DOL's view] are in a consumer's best interest." ROA.9950. But "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

Such speech restrictions are subject to heightened First Amendment review, even when the speech in question is commercial in nature. By exempting DOL's rule from *any* level of judicial scrutiny, the decision below—if allowed to stand—would render Appellants' First Amendment rights a dead letter.

STATEMENT OF THE CASE

The facts of this case are set out in fuller detail in Appellants' briefs. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In April 2016, DOL promulgated the Fiduciary Rule, 81 Fed. Reg. 20,946 (Apr. 8, 2016), and related exemptions, which drastically expand the universe of

retirement investment advisors and employees who are deemed to be "fiduciaries" under federal law. Abandoning 40 years of settled statutory interpretation of the Employee Retirement Income Security Act of 1974 (ERISA) and parallel provisions of the Internal Revenue Code (IRC), DOL now maintains that a fiduciary is *anyone* who provides "recommendations" that are individualized or directed to a specific recipient for consideration in making investment or management decisions with respect to securities or other property of an ERISA plan or an IRA.[2]

The rule defines "recommendation" 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." *Id*. at 20,948. In its earlier proposed rulemaking, 80 Fed. Reg. 21,927, 21941 (April 20, 2015), DOL conceded that this expanded definition of fiduciary encompasses communications that "Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality." Nonetheless, the rule sweeps broker-dealers, their registered representatives, insurance companies,

[2] The rule applies only to persons paid by commission or other transaction-based compensation. The rule exempts recommendations about fixed-rate annuities and recommendations to investors in charge of $50 million or more in retirement funds.

brokers, and their commission-based sales agents into the broad definition of "fiduciary."

As a result, most brokers, agents, and other insurance salespeople may no longer receive customary forms of compensation, including commissions or sales loads, for recommending investments to retirement investors without first agreeing to become the investor's fiduciary under the government's onerous contract terms. In other words, the rule subjects everyday sales pitches about retirement products to "the highest legal standards of trust and loyalty," ROA.358, even if the transaction lacks any of the "hallmarks of a trust relationship," ROA.366.

Appellants—including (among others) the American Council of Life Insurers (ACLI), the Indexed Annuity Leadership Council (IALC), and the U.S. Chamber of Commerce—each filed separate suits challenging the Fiduciary Rule on behalf of their members. The U.S. District Court for the Northern District of Texas consolidated the suits into a single proceeding. Appellants claimed, among other things, that the rule violates their First Amendment right to free speech by drawing content-based regulatory distinctions between speakers (*i.e.*, commission-compensated or not), hearers (*i.e.*, investors of less than $50 million in managed funds or not), and investment vehicles (*i.e.*, fixed-rate annuities versus others). Given DOL's First Amendment violations, Appellants sought an injunction under

the Declaratory Judgment Act against future enforcement of the Fiduciary Rule against Appellants' members.

On cross motions for summary judgment, the district court granted judgment to DOL. ROA.9873-9954. The district court held that, because Appellants did not expressly raise their free-speech concerns with DOL in public comments during the informal rulemaking process, they "have waived their First Amendment arguments." ROA.9944. But even if Appellants' First Amendment challenge was not waived, the district court held that the challenged rule "regulate[s] professional conduct, not commercial speech," so that "any incidental effect on speech does not violate the First Amendment." ROA.9945. In justifying its holding, the district court relied on the "professional speech doctrine," which purportedly allows the government to "regulate a professional-client relationship" with "at most, an incidental burden on speech"—without running afoul of the First Amendment. ROA.9945, 9947.

SUMMARY OF ARGUMENT

The Fiduciary Rule is deeply flawed for many reasons, including that it improperly asserts regulatory authority over products and activities that are outside DOL's jurisdiction, in violation of the statutory limits Congress imposed on the agency. Significantly, the Fiduciary Rule also unlawfully abridges the protected speech of brokers, agents, and other insurance salespeople. Although Appellants'

complaint included a pre-enforcement First Amendment challenge under the Declaratory Judgment Act, the district court held that because Appellants "did not raise any First Amendment issues during the rulemaking process," their First Amendment claim "was waived." ROA.9940. That unduly harsh approach to waiver is not only contrary to settled Fifth Circuit precedent—which the district court conveniently obscured—but it has also been rejected by the U.S. Supreme Court. In any event, sound considerations of basic fairness and public policy strongly militate against a finding of waiver in this case.

On its face, the Fiduciary Rule discriminates against speech based solely on its content and the identity of the speaker, triggering heightened First Amendment scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015), holds that any effort to classify speech by reference to its content, or to burden speech that falls into a disfavored category, constitutes a content-based restriction subject to strict scrutiny. And *Sorrell v. IMS Health Inc*., 564 U.S. 552, 567 (2011), makes clear that any effort to restrict speech based on the speaker's "economic motive" is a speaker-based restriction subject at the very least to "heightened scrutiny." Nonetheless, the district court below held just the opposite, relying on the "professional speech doctrine" to effectively eliminate Appellants' First Amendment rights, based on nothing more than the regulated speakers' identities and the content of their speech.

Not only has the Supreme Court never recognized a separate First Amendment category for so-called professional speech, but it has consistently rejected any constitutional distinction between speech to the general public and speech to a particular person or group that somehow deprives the latter category of any meaningful First Amendment protection. Indeed, distinguishing between "professional" speech and ordinary speech is itself an impermissible content-based distinction. Even on the rare occasion that this Court has invoked the professional-speech doctrine, it has strictly limited its application to state regulatory regimes tied to a generally applicable licensing scheme—a threshold requirement not met here.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANTS WAIVED THEIR FIRST AMENDMENT CLAIM DURING THE RULEMAKING

The district court's holding that Appellants waived their First Amendment claim by "not rais[ing] any First Amendment issues during the rulemaking process," ROA.9940, is contrary to binding Fifth Circuit and Supreme Court precedents. As shown below, it is also contrary to fundamental notions of procedural fairness, sound public policy, and common sense.

A. The District Court Misapplied Fifth Circuit Precedent

The district court held that "Plaintiffs in this case have waived their First Amendment arguments" because they did not raise free-speech concerns with DOL

in public comments during the rulemaking process. ROA.9944. Contrary to the district court, the Fifth Circuit's governing precedent squarely rejects any issue-exhaustion requirement at the rulemaking stage.

In *City of Seabrook v. EPA*, 659 F.2d 1349, 1360 (5th Cir. 1981), this Court roundly rejected EPA's argument "that petitioners should be barred from raising any objection not raised during the 'notice and comment' period." Such an issue-exhaustion rule, the Court explained, "would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated." *Id.* at 1360-61. "This is a fate this court will impose on no one." *Id.* at 1361.

Nearly two decades later, in *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295 (5th Cir. 1998), the Court explicitly reaffirmed the rule it had announced in *Seabrook*, explaining that "we have never held that failure to raise an objection during the public notice and comment period estops a petitioner from raising it on appeal." Rejecting the government's "badly misplaced" waiver argument yet again, the Court found "no authority for the proposition that an argument not raised during the comment period may not be raised on review." *Id.* (citations omitted).

The district court, in concluding that Appellants had "waived" their First Amendment challenge, purportedly relied on *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828-29 (5th Cir. 2003), for the proposition that "challenges to [agency] action are waived by the failure to raise the objections during the notice and comment period" (internal quotations omitted). ROA.9942. In turn, *BCCA* itself relied on *Texas Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 933 n.7 (5th Cir. 1998), which—in a lone footnote and without even acknowledging the Circuit's prior precedents in *Seabrook* and *American Forest*—found that petitioners had "waived" any arguments not raised with the agency during notice-and-comment rulemaking.

Although *BCCA* acknowledged the intra-circuit conflict created by *Texas Oil & Gas*, 355 F.3d at 829 n.10, it did not purport to abrogate the rule established by *Seabrook—i.e.*, that "this Court will impose [an issue-exhaustion requirement] on *no one*." 659 F.2d at 1361 (emphasis added). Instead, after citing a handful of nonbinding cases from other circuits—none of which involved agency rulemaking—the panel simply stated in a footnote: "Because the present case is distinguishable from *Seabrook* on the law and the facts, the court need not resolve the conflict in the circuit at this time. Rather, the court finds *Texas Oil & Gas* controlling *here*." *BCCA*, 355 F.3d at 829 n.10 (emphasis added). Ultimately, *BCCA* makes no claim that *Seabrook* and *American Forest* are no longer binding

Circuit precedent. Those earlier decisions unequivocally reject any possibility of issue waiver during administrative rulemaking.

Regardless, neither *BCCA* nor *Texas Oil & Gas* could possibly override this Court's prior holding in *Seabrook*, which was decided first. It is a "firm rule" of this Circuit "that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot override a prior panel's decision." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). Nor is any Fifth Circuit panel "empowered to hold that a prior decision applies only on the limited facts set forth in that opinion," *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003), "and a prior panel's explication of the rules governing its holdings may not generally be disregarded as dictum." *Rios v. City of Del Rio*, 444 F.3d 417, 425 n.8 (5th Cir. 2006) (citing *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000)).

Controlling precedent in this Circuit could hardly be clearer that the rule announced in *Seabrook* still governs the issue of waiver in the rulemaking context. Because *Seabrook* categorically forecloses any finding that Appellants somehow "waived" their First Amendment claim during notice-and-comment rulemaking, the district court's waiver ruling is an obvious error that must be reversed.

B. The District Court's Finding of Waiver Contravenes Binding Supreme Court Precedent

The district court's imposition of an issue-exhaustion requirement without any statutory basis for one also contravenes *Sims v. Apfel*, 530 U.S. 103 (2000), which prohibits judicially created issue-exhaustion requirements in non-adversarial agency contexts. In *Sims*, the government argued that a Social Security claimant should be barred from raising an issue she had failed to raise at the Social Security Appeals Council (the agency board that reviews denials of benefits by the agency's administrative law judges). The Court rejected the government's contention "that an issue-exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies." 530 U.S. at 107.

In rejecting waiver, the Court began by noting that whereas the "requirements of administrative issue exhaustion are largely creatures of statute," the judicially created concept of issue waiver arose from "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Id.* at 107-09. In reviewing its myriad precedents on administrative exhaustion, the Court reaffirmed its view that "'there are wide differences between administrative agencies and courts.'" *Id.* at 110 (quoting *Shepard v. NLRB*, 459 U.S. 344, 351 (1983)). The Court also repeated its warning against "reflexively 'assimilating the relation of … administrative bodies and the courts to the relationship between lower and upper courts.'" *Id.* (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134,

144 (1940)). Noting that the differences between courts and agencies are "more pronounced" in Social Security proceedings, the Court concluded that the petitioner need not "exhaust issues" with the agency to "preserve judicial review of those issues." *Id.* at 112.

At bottom, *Sims* holds that the "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id*. at 109. "Where the parties are expected to develop the issues in an adversarial administrative proceeding," the Court explained, "the rationale for requiring issue exhaustion is at its greatest." *Id.* at 110. But, the Court cautioned, "[w]here, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker." *Id.*

Applying *Sims* to the facts of this case is straightforward: if even the adjudicatory Social Security appeal in *Sims* was insufficiently adversarial to warrant issue exhaustion, then surely DOL's run-of-the-mill rulemaking proceeding below cannot be said to require it. Such agency rulemakings cannot plausibly be considered adversarial within the meaning of *Sims*. Rather, rulemakings are classic examples of non-adversarial administrative proceedings where participants are *not* expected to develop issues in an adversarial manner. *See* Edwin Rubin, *It's Time to Make the Administrative Procedure Act Administrative*,

89 Cornell L. Rev. 95, 108-09 (2003) ("The problem … is that rulemaking is not an adjudicatory process, and any effort to treat it as one is bound to produce an unusable monstrosity."). So while the need to exhaust every available procedural step makes a great deal of sense in appeals from agency *adjudications*, such a requirement simply does not apply to rulemakings, where there is typically a single proceeding that must be completed before a final rule is ripe for challenge.

When considering issue exhaustion in judicial reviews of administrative actions after *Sims*, other federal circuits have continued to focus on the adversarial nature of the agency proceeding below. *See, e.g., Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008) ("Because ERISA and its implementing regulations create an inquisitorial, rather than adversarial process, and because the [plan's explanation of benefits] does not notify a claimant that issue exhaustion is required, *Sims* leads us to conclude that Vaught was not required to exhaust his issues or theories in the context of this case."); *Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006) ("The strongest case for imposing an exhaustion requirement exists where the administrative proceedings closely resemble a trial.").

This Court, too, in categorically rejecting waiver in the rulemaking context, has drawn a strong distinction between imposing an issue-exhaustion requirement during agency rulemaking—which is neither adjudicatory nor adversarial—and

doing so in cases involving "a party who participated in a hearing at which evidence was taken and findings were made on the record, and who had an opportunity to appeal the hearing officer's decision to the [agency] itself." *Seabrook*, 659 F.2d at 1361 n.17. Likewise, in rejecting the government's issue-waiver argument in *American Forest*, the Court explained that the usual "concerns underlying the [administrative] exhaustion doctrine are not implicated here" because "[t]hat doctrine restrains courts from ruling on objections not considered by an agency by requiring a party to exhaust its administrative *remedies* before pursuing judicial review." *Am. Forest*, 137 F.3d at 295 (emphasis added).

Absent an administrative proceeding that is tantamount to "adversarial litigation," *Sims*, 530 U.S. at 109, federal courts simply do not have the authority to require stakeholders affected by administrative rulemakings to exhaust certain issues with the agency before seeking judicial review. Because the district court's ruling in this case is contrary to binding Supreme Court precedent, it must be reversed.

C. The District Court's Issue-Exhaustion Requirement Is Unfair to Affected Stakeholders and Contrary to Sound Public Policy

At a practical level, the very notion that a regulated stakeholder can somehow "waive" a challenge to an agency rule—*before* that rule is even reduced to final form—runs counter to basic notions of procedural fairness. After all, § 704 of the Administrative Procedure Act (APA), 5 U.S.C. § 704, precludes challenges

to *proposed* rules. And even in the closely related context of remedy-exhaustion, the Supreme Court has read § 704 to mean that federal courts *cannot* require litigants to exhaust available administrative remedies before seeking judicial review under the APA where, as here, neither the relevant statute nor the agency's rules explicitly mandate such exhaustion as a prerequisite to filing suit. *Darby v. Cisneros*, 509 U.S. 137, 145-47 (1993).

No statute requires exhaustion in this case, and DOL's Federal Register Notice, 80 Fed. Reg. 21,927 (April 20, 2015), never advised interested parties that they must submit public comments during the rulemaking process as a prerequisite to challenging the agency's final rule—much less that stakeholders may litigate in the future only the narrow category of issues raised in their comments. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy." *Hormel v. Halvering*, 312 U.S. 552, 557 (1941).

Because the issue-exhaustion requirement was born in the appellate litigation context, it is a particularly bad fit for notice-and-comment rulemaking. Parties to litigation obviously have a much clearer obligation to speak up to protect

their interests than do all of the potentially millions of people affected by a rulemaking:

> Rulemakings do not involve the rights of a few parties; the rules ultimately promulgated affect the physical and economic health and well-being of the entire United States and may have international effects as well. Thus, when a meritorious argument is procedurally barred, it is society at large who suffers for it—not only the individual petitioner. Further, unlike in adjudicatory proceedings, where the parties are contesting their specific interests, there is no guarantee that the parties that participate in rulemakings will be representative of the general interests at stake.

Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 Tex. L. Rev. 1065, 1086 (2012).

Requiring issue exhaustion during rulemaking is also highly problematic, because it tends to benefit well-heeled stakeholders at the expense of those who cannot afford to monitor every rulemaking that might affect them. Indeed, "[b]ecause many poorly financed groups—particularly public interest organizations and small businesses—are unable to bear the expense of submitting meaningful comments on most proposed rules, issue exhaustion serves to bar these groups from later challenging those rules in court." Markoff, *supra*, at 1065. As a result, requiring issue exhaustion during rulemaking as a prerequisite to judicial review "not only precludes court challenges, but it also removes the leverage that the threat of judicial review provides in rulemaking." *Id.*

So harsh a rule may also invite unintended consequences by inducing stakeholders to take an over-inclusive, scattershot approach to regulatory comments. Indeed, many judges have cautioned that requiring issue exhaustion during rulemaking may have a "force-feeding effect" that incentivizes commenters to include every conceivable issue they might potentially want to raise in court. *See, e.g.*, *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) ("We should be especially reluctant to … encourage strategic vagueness on the part of agencies and overly defensive, excessive commentary on the part of interested parties seeking to preserve all possible options for appeal."); *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 n.13 (9th Cir. 2007) ("If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency."). So although originally conceived as a way to save agency resources, the issue-exhaustion requirement "actually increases the burden on agencies." Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1363-64 (2010). To avoid waiver, "rational parties will react by erring on the side of providing too much rather than too little information," *id.*, thereby making both the agency's rulemaking task and the court's judicial review much more demanding.

Lastly, requiring issue exhaustion at the rulemaking stage is especially ill-suited for a constitutional challenge such as this one, where a more fully developed administrative record is neither necessary nor helpful. Courts—not agencies—decide constitutional questions, so it makes little sense to require a petitioner first to present a constitutional issue to the agency. Not only is a constitutional challenge the kind of question that courts can decide without an agency's help, but federal agencies are already well on notice of their constitutional limitations.

For that reason, courts have refused to find constitutional challenges waived even when they are raised for the first time in appeals from adversarial, adjudicative proceedings. *See, e.g., Kuretski v. Commissioner*, 755 F.3d 929, 937 (D.C. Cir. 2014) ("Just as the Supreme Court in *Freytag* elected to consider a belated constitutional challenge to the validity of a Tax Court proceeding, … we do so here."); *Ninestar Tech. Co. v. Int'l Trade Comm'n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012) ("Although we agree that these issues are tardily raised, constitutional challenges should not be deemed waived."); *Action for Children's Television v. FCC*, 564 F.2d 458, 469 (D.C. Cir 1977) (explaining that the petitioner's constitutional challenge "raises neither a novel factual issue for which an initial Commission determination is quite clearly both necessary and appropriate, nor a legal issue on which the Commission, and even this court, has not already made known its general views") (internal citations omitted).

Appellants' First Amendment challenge is one of constitutional magnitude and great public concern, and it would be a miscarriage of justice to refuse to consider their claim on the merits. Because considerations of procedural fairness and sound public policy weigh heavily against a finding of waiver in this case, the district court's waiver ruling should be reversed.

II. THE DISTRICT COURT'S PERFUNCTORY FIRST AMENDMENT ANALYSIS IS DEEPLY FLAWED AND SHOULD BE REVERSED

Although it found that Appellants waived their First Amendment claim, the district court nonetheless went on to hold that because the Fiduciary Rule "regulate[s] professional conduct, not commercial speech," any "incidental effect on speech does not violate the First Amendment." ROA.9945. The district court then invoked the "professional speech doctrine" as an additional basis for denying *any* First Amendment scrutiny to the challenged rule. *Id.*

The district court did not analyze whether an important governmental interest exists, nor did it seriously examine the extent to which Appellants' speech is burdened by the Fiduciary Rule's onerous requirements. Instead, it merely assumed that any burden must be incidental because the rule is directed at conduct, and that any speech related to that conduct is of "professional" in nature. But as the Supreme Court has repeatedly made clear, the First Amendment demands—and Appellants here deserve—heightened judicial scrutiny of DOL's discriminatory,

content-based burdens on Appellants' commercial speech. The district court's deeply flawed holding should be reversed.

A. The Fiduciary Rule Regulates Speech, Not Conduct

In holding that the Fiduciary Rule does not run afoul of the First Amendment, the district court concluded that the rule does not regulate speech at all. Rather, the district court explained, the rule merely regulates "the conduct of receiving a commission" by those who are deemed to be engaged in professional speech as fiduciaries. ROA.9949. The district court's rationale leaves much to be desired.

The Supreme Court has routinely held that the First Amendment is presumptively violated when the government burdens a targeted class of speakers with financial obligations or restrictions that have the effect of chilling speech. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) ("While this state interest might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

Here, there can be no serious question that a regulation imposing new liabilities for the receipt of commission-based compensation tied solely to the

identity of the speaker (*i.e.*, those insurers, insurance agents, and brokers deemed "fiduciaries") and the content of their speech (*i.e.*, those "recommendations" that DOL broadly deems "investment advice") will severely chill such speech by those speakers in the future. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("In regulating the communication of prices rather than prices themselves, [the statute] regulates speech.").

In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), the Supreme Court explicitly rejected the same conduct-not-speech reasoning embraced here by the district court. That case involved a challenge to New York's "Son of Sam law," which restricted the right of publishers to pay convicted felons to write books about their crimes. New York argued that its law did not implicate First Amendment rights because it did not interfere with the publication of such true-crime stories, nor was that even the law's purpose, which was simply to ensure that income earned by convicted felons remained available to compensate victims of their crimes. The Supreme Court nonetheless held that the law unconstitutionally abridged the First Amendment rights of would-be publishers and authors, because "[i]t single[d] out income derived from expressive activity for a burden the State places on no other income," and thus "plainly impose[d] a financial disincentive only on speech of a particular content." 502 U.S. at 116.

Similarly, while the Fiduciary Rule does not explicitly bar a particular investment strategy, it plainly prohibits speakers who receive commission-based compensation from "recommending" *any* variable and fixed-indexed annuity to consumers—unless those speakers first agree (as "fiduciaries") to abide by DOL's onerous terms and conditions.[3] That restriction clearly implicates Appellants' First Amendment rights. As the Supreme Court noted in *Sorrell*, "the distinction between laws burdening and laws banning speech is but a matter of degree, and … the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans. … Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." 564 U.S. at 565-66 (internal quotations omitted). So too here.

B. The Fiduciary Rule Is a Content-Based Regulation Subject to Heightened Scrutiny

By its own terms, the Fiduciary Rule regulates "a communication … based on its content." 29 C.F.R. § 2510.3-21(b)(1). The Supreme Court has explained that "[t]he First Amendment requires heightened scrutiny whenever the

[3] Of course, the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). DOL may no more condition Appellants' ability to receive commission-based compensation on their abandoning their First Amendment rights than it could ban Appellants' free speech outright. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that school districts may not require public school teachers, as a condition of employment, to relinquish their First Amendment rights).

government" imposes content-based limits on speech, and that "[c]ommercial speech is no exception." *Sorrell*, 564 U.S. at 566.

The district court held that the Fiduciary Rule does "not regulate the content of speech." ROA.9948. Rather, it "require[s] individuals who qualify as fiduciaries under ERISA to conduct themselves according to fiduciary standards." ROA.9948. But that reasoning begs the question. Under the Fiduciary Rule, commission-compensated brokers, agents, and other insurance salespeople are deemed "fiduciaries" based on nothing more than the government's *ipse dixit*. So designated, they may not recommend investments to retirement investors without first agreeing to become the investor's fiduciary—under government-imposed contract terms. Even ordinary sales pitches about retirement products are subject to "the highest legal standards of trust and loyalty," ROA.358, regardless of whether those transactions lack any of the "hallmarks of a trust relationship," ROA.366. If the federal government can avoid First Amendment scrutiny simply by labeling certain speakers "fiduciaries"—without any searching inquiry into the speech burdens imposed by that label—then little will remain of the First Amendment's commercial-speech protections.

The Supreme Court has insisted that a speech regulation is content-based if the regulation is triggered "because of the topic discussed" or "the communicative content" of the regulated speech. *Reed*, 135 S. Ct. at 2227, 2230. *Reed* rejects the

now-familiar contention of government regulators, repeated by DOL here, that a "regulation is content neutral—even if it expressly draws distinctions based on … communicative content—if those distinctions can be justified without reference to the content of the regulated speech." *Id.* at 2228 (internal quotation marks omitted). Instead, *Reed* holds that a content-based regulation of speech is subject to strict scrutiny "regardless of the government's benign motive, content neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* Here, the manner in which investment professionals "communicate" with customers is quintessentially expressive and, under *Reed*, always subject to strict First Amendment scrutiny.

C. The Fiduciary Rule Fails Heightened Scrutiny

A regulation generally cannot withstand strict scrutiny if a less restrictive alternative would accomplish the government's objectives. *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may … regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

Here, the government could have chosen many less restrictive alternatives: it could have regulated commissions and compensation directly, in connection with financial transactions rather than by targeting free speech; it could have regulated retirement products themselves; or it could have allowed consumers to receive

truthful commercial speech from a non-fiduciary with a simple disclosure agreement. Because any of these alternatives could achieve the government's alleged interest in the integrity of retirement investments without eroding free speech rights, the Fiduciary Rule fails strict scrutiny review.

D. The "Professional Speech Doctrine" Does Not Excuse DOL from Complying with the First Amendment

The district court also held that because the Fiduciary Rule is aimed at regulating "professional speech"—*i.e.*, speech "incidental to the conduct of the profession"—it "do[es] not run afoul of the First Amendment." ROA.9945, 9947. Not so. Contrary to the district court, professional speech cannot be excluded from First Amendment protection; the very distinction between ordinary speech and professional speech is *itself* a content-based distinction. Not only has the Supreme Court never embraced a "professional speech" doctrine, but it has cautioned lower courts that its free-speech jurisprudence "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010).[4]

[4] There are few exceptions to the rule that content-based speech regulations are subject to strict scrutiny. Such regulations are generally only permitted within the narrow "historic and traditional categories [of expression] long familiar to the bar." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (citations and quotations omitted). Those accepted categories are: obscenity, defamation, speech integral to criminal conduct, true threats, fighting words, fraud, child pornography, and speech presenting some grave and imminent threat preventable by the government. *Id.* (summarizing cases). None of those exceptions applies here.

Nor is there anything to suggest that professional speech has traditionally been unworthy of meaningful First Amendment protection. To the contrary, "[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). In fact, "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

Even "[a]ssuming that the professional speech doctrine is valid," this Court has steadfastly insisted that any "application" of that doctrine "should be limited." *Serafine v. Branaman*, 810 F.3d 354, 359 (5th Cir. 2016) (overturning a portion of Texas's Psychologists' Licensing Act for unconstitutionally chilling protected speech under the First Amendment). In keeping with that admonition, the Court has carefully limited application of the professional-speech doctrine to state regulatory regimes that include "a valid licensing scheme." *Id.* at 360. Even *Hines v. Alldredge*, which the district court invoked below, concerned a challenge to a generally applicable state licensing scheme for veterinarians. 783 F.3d 197, 201 (5th Cir. 2015) (upholding a Texas law that "prohibits the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its surrounding premises"). In stark contrast, DOL does not license insurance agents, brokers, or their commission-compensated salespeople: state

insurance commissions and securities regulators do. So even if valid in a narrow set of cases, the professional speech doctrine simply does not apply here.

Notwithstanding the district court's invocation of Justice White's non-binding concurrence in *Lowe v. SEC*, 472 U.S. 181, 231-32 (1985) (White, J., concurring), the Supreme Court has consistently rejected any constitutional distinction between speech to the general public and speech to a particular person or group that somehow deprives the latter of meaningful First Amendment protection. The controlling precedent is *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010), which holds that specialized, technical advice from an expert to a specific person or group of recipients is fully protected speech entitled to strict scrutiny review.[5]

In *Humanitarian Law Project*, a retired administrative law judge, doctors, and humanitarian organizations sought to provide individualized legal and technical advice to designated terrorist groups in Turkey and Sri Lanka. *Id.* at 10. Fearing prosecution, they brought a First Amendment challenge to a federal law that criminalized providing "material support" to designated terrorists. *Id.* at 10-11. As DOL does here, the Department of Justice argued that such individualized

[5] Although *Humanitarian Law Project* did not use the phrase "strict scrutiny," referring instead to "a more demanding standard" than intermediate scrutiny, 561 U.S. at 4, the Supreme Court has since clarified that the review applied in *Humanitarian Law Project* was, in fact, "strict scrutiny." *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

communication was not speech at all, but was instead "conduct" undeserving of First Amendment protection. *Id.* at 27. All nine justices rejected that argument.[6]

Although upholding the challenged "material support" law even under strict-scrutiny review, *Humanitarian Law Project* clarifies that the First Amendment fully encompasses individualized professional and technical speech, and that drawing a distinction between general speech and individualized speech is itself a content-based distinction:

> [The statute] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist groups], and whether they may do so under [the statute] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecified knowledge.

561 U.S. at 27 (internal citations omitted). As a result, the government was "wrong to argue that [intermediate scrutiny] provides the correct standard of review." *Id.* That selfsame reasoning applies with full force here.

Under the Fiduciary Rule, as the district court readily conceded, communications intended for specific individuals are highly regulated, but "general communications to the public" are not. ROA.9946. In such cases, the

[6] Although Justice Breyer and two other justices dissented from the majority's holding on the merits, the dissenting justices all agreed with the majority that the challenged law was a restriction on speech, not conduct. *Humanitarian Law Project*, 561 U.S. at 42 (Breyer, J., dissenting).

challenged regulation must be analyzed as a content-based restriction on speech, which—at the very least—is subject to "heightened scrutiny."

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court reverse the judgment below.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,470** words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

3. Pursuant to Local Rule 25.2.1, the text of the electronically filed brief is identical to the text in the paper copies.

Dated: May 9, 2017

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on May 9, 2017, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. All parties to this case are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

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