Nos. 24-10890 & 24-40637

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN COUNCIL OF LIFE INSURERS, *et al.*,
Plaintiffs-Appellees,
v.
UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

FEDERATION OF AMERICANS FOR CONSUMER CHOICE, INC., *et al.*,
Plaintiffs-Appellees,
v.
UNITED STATES DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas (No. 6:24-cv-00163; No. 4:24-CV-00482)

BRIEF OF AMICI CURIAE STATES OF IOWA AND 19 OTHER STATES SUPPORTING APPELLEES

BRENNA BIRD
Attorney General

ERIC H. WESSAN
Solicitor General

IOWA ATTORNEY GENERAL'S OFFICE
1305 E. Walnut St.
Des Moines, IA 50319
Phone: (515) 823-9117
eric.wessan@ag.iowa.gov

Counsel for Amicus Curiae *State of Iowa*

[additional counsel listed at end]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Federal law has specifically allocated the responsibility of regulating the business of insurance to the states for nearly eighty years. *See*, McCarran-Ferguson Act, approved March 9, 1945 (codified at 15 U.S.C. §§ 1011–15). That explicit delegation of authority reflects the States' responsibility in regulating insurance that goes back to the founding. For example, in Iowa the Iowa Insurance Division is the primary regulator supervising all insurance business transacted in the State. Like its sister Divisions across the country, Iowa's Insurance Division has a primary focus in protecting consumers through robust and well-regulated State markets offering security *and* choice to consumers.

The district court found that Plaintiffs "are virtually certain to succeed on the merits" because "the Rule conflicts with the statutory text by broadening 'fiduciary' just as the 2016 Rule attempted eight years ago." *ACLI v. Dep't of Lab.*, 2024 WL 3572297, at *4 (N.D. Tex. July 26, 2024). Given that virtual certainty, this Court should affirm.

And affirming is important because the Department of Labor's fiduciary Rule threatens to upend the Federalist delegation enacted by Congress. *See* Retirement Security Rule: Definition of an Investment

Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024) ("Fiduciary Rule"). Even worse: the challenged rule is substantially similar to one this Court vacated as contrary to the common-law concept of a fiduciary codified by Congress. *See Chamber of Commerce v. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018).

At common law, fiduciary status attaches only where there is "a special relationship of trust and confidence between the fiduciary and his client." *Id.* at 365. So extending fiduciary obligations to places where no such relationship would exist, including "one-time . . . annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers." *Id.* at 380. So too here.

The *amici* States of Iowa, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Idaho, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia take seriously our longstanding and primary role in regulating insurance and protecting consumers. We are also concerned with the Department of Labor overstepping to upset the careful balance Congress put in place reflecting the States' traditional role in regulating products now purportedly within the federal definition of fiduciary.

BACKGROUND

This appeal concerns the U.S. Department of Labor's so-called "Fiduciary Rule," which seeks to impose heightened ERISA fiduciary obligations on virtually all insurance agents and broker-dealers who recommend annuities to consumers in connection with tax-qualified retirement plans. *See* 89 Fed. Reg. 32,122 (Apr. 25, 2024).[1]

The current Rule sweeps in "virtually all financial and insurance professionals who do business with ERISA plans" and tax-qualified individual-retirement accounts, irrespective of the nature of the relationship with a consumer. *Chamber of Commerce*, 885 F.3d at 366. Also, the current Rule unreasonably discounts the effectiveness of

[1] The challenged Rules are: Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 2020-02, 89 Fed. Reg. 32,260 (Apr. 25, 2024); Amendment to Prohibited Transaction Exemption 84-24, 89 Fed. Reg. 32,302 (Apr. 25, 2024); and Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 89 Fed. Reg. 32,346 (Apr. 25, 2024). Collectively these challenged Rules are referred to throughout the brief as the "Fiduciary Rule."

measures taken since the last ill-fated attempt to pass a similar rule in 2016. Since then, the Securities and Exchange Commission and State regulators led by the National Association of Insurance Commissioners ("NAIC") have strengthened protections for consumers and address the conflicts of interest that the Department's Rule purports to remedy.

Indeed, many State insurance commissioners commented on the proposed rule raising concerns. In January 2024, Iowa's Commissioner of Insurance Doug Ommen submitted a comment to the proposed rule to the Department opposing the proposed version of the Rule. *See* Doug Ommen, Comment on Fiduciary Rule (Jan. 2, 2024). Commissioner Ommen explained "federal law has specifically allocated the responsibility of regulating the business of insurance to the states" for "nearly eighty years." *Id.* at 1.

That reflects a broader point raised by Plaintiff American Council of Life Insurers ("ACLI"), in its own comment to the Department: that the McCarran Ferguson Act, passed by Congress in 1945, allocates to states the responsibility to regulate the insurance industry, and that the states have consistently exercised that authority for decades. *See* James Szostek & Howard Bard, ACLI Comment on Fiduciary Rule (Jan. 2, 2024). Indeed, Commissioner Ommen explained in his comment that Iowa, like other states, has regulated the insurance industry to protect consumers "dat[ing] back to the earliest days of our history as a state." Ommen, *supra*, at 1.

The Department's Rule risks displacing "the States' role in regulating most annuity sales" and other insurance products. *Id.* at 4. And the challenged rule goes against best practices embraced across the country by NAIC. While the NAIC working group considered imposing fiduciary obligations on annuity transactions, it opted instead for a best-interest standard, which requires "that all recommendations by agents and insurers must be in the best interest of the consumer." *Id.* at 7. That best-practices standard rejects the imposition of fiduciary status and obligations and instead offers consumers significant protection by requiring producers and insurers to make recommendations "without placing the producer's or the insurer's financial interest ahead of the consumer's interest." NAIC Suitability Model Regulation §6.A. The working group opted for this best-interest standard because it struck the right balance between "protect[ing] our citizens" and the importance of preserving "cost-effective access to the financial security products they need." Ommen, *supra*, at 6. That contrasts with the Department's decision to impose fiduciary obligations. That decision "inherently restrict[s] business models that many of our residents rely on." *Id.*

The NAIC itself has expressed disagreement with the Rule too. In December 2023, the NAIC submitted comments disagreeing with the Department's "characterization of state consumer protections around annuity sales as 'inadequate'" and noting that the proposal would "potentially limit[] access to well-regulated retirement guidance and products." Chlora Lindley-Myers, *et al.*, Comment on Fiduciary Rule (Dec. 21, 2023), at 2–3.

Despite many comments from many States and experts raising serious concerns with the proposed rule, the final rule issued with no changes.

So ACLI and the Federation of Americans for Consumer Choice, Inc., sued. ACLI moved to stay the Rule's September 2024 effective date because, like the earlier-vacated 2016 Rule, it expands the definition of a "fiduciary" under ERISA beyond the common-law requirement of an intimate relationship of trust and confidence.

On July 26, the district court granted preliminary relief and stayed the effective date of the Rule. The court held that we "are virtually certain to succeed on the merits" because "the Rule conflicts with the statutory text by broadening 'fiduciary' just as the 2016 Rule attempted eight years ago." *ACLI*, 2024 WL 3572297, at *4. Like the earlier vacated Rule, this Fiduciary Rule "overrides th[e] 'important distinction'" "between investment advice and mere sales conduct." Id. In doing so, "the Rule departs from the common law" and "expand[s] the meaning of 'fiduciary' far beyond what Congress intended" in enacting ERISA. *Id.*

SUMMARY OF THE ARGUMENT

I. States have long played a role in ensuring American retirees have access to many products to help them save for retirement. The Department's new Fiduciary Rule, reflecting a 2016 Rule that this Court vacated, goes too far in trying to regulate where the Department does not have a proper role. Congress's laws gave States, not the Department, authority to regulate this type of investment. And States have stepped up—working together to enact model rules that best protect consumers. The Department's decision to instead impose duties that Congress found to be inappropriate is itself, ironically inappropriate. This Court should affirm.

ARGUMENT

I. Text, History, and Tradition Support the States Role in Regulating the Products Captured by the new, sweeping, Fiduciary Rule.

The new Fiduciary Rule risks upsetting decades of practice and jurisprudence. By extending federal regulations to products long-regulated by the States—and in a way inconsistent with the practice currently existing in many States—the new Rule risks creating regulatory chaos. And the new Rule twists and abuses existing State rules in a manner that conflicts with what should be both the federal and State goals in this area of regulation: ensuring safe options for Americans to invest at a reasonable cost to best ensure that they are prepared for their retirements.

Ultimately, this dispute boils down to a fundamental deficiency in the new Fiduciary Rule that collapses the differences between duties imposed under ERISA's Title I and Title II. *Compare* 29 U.S.C. § 1002(21)(A)(ii); 26 U.S.C. § 4975(e)(3)(B) *with* 26 U.S.C. § 4975(e)(1). Congress imposed duties of prudence and loyalty on Title I plans but not on Title II. The new Fiduciary Rule, like the 2016 Rule this Court rejected, extends those duties to contexts Congress never authorized.

This Court should follow its thorough opinion issued in the 2016 challenge to a substantially similar rule and affirm.

A. Historically, states have regulated the insurance industry.

Regulating the insurance industry has long been the responsibility of states, not the federal government, and federal law has respected that this is the case since passage of the McCarran Ferguson Act in 1945. *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissions*, 26 Fla. State Univ. L. Rev. 625 (1999). The Rule displaces State regulation and substitutes the Department of Labor's judgment for the expert judgment of state insurance commissions. As this Court recognized with the 2016 Rule, the new Fiduciary Rule "occup[ies] the Dodd-Frank turf" by imposing "oversight of broker/dealers handling IRA investments and the sale of fixed-indexed annuities"—a sphere classically reserved for the States. *Chamber of Commerce*, 885 F.3d at 385–86.

Most States have a chief insurance regulator that is the primary regulator of ERISA-covered plans. *See*, *e.g.*, Ommen, *supra*, at 3. That means that ERISA does not expressly preempt State insurance regulations. *See* 29 U.S.C. § 1144(b)(2)(A). ERISA does provide specific fiduciary duty standards of care and legal causes of action for breach. *See* 29 U.S.C. §§ 1104, 1132. Those requirements exist against a backdrop of State regulation of fiduciaries' behavior. So, for example, if an insurance professional recommended an in-plan annuity to an ERISA plan, the ERISA fiduciary standard of care would apply as well as the State insurance standard. That overlap was well understood—until now.

Now, relying in part on designations under State laws and rules, the new Fiduciary Rule threatens to expand to include brokers and agents selling products that have never before had a fiduciary obligation imposed on them. This will dramatically curtail the availability of those products—products long regulated by the States under a different framework than fiduciary.

B. NAIC and All 50 State Insurance Commissioners Have Concluded that Imposing Fiduciary Status Would Harm Consumers, and Recently Deliberately Refrained from Doing So.

States actively regulate the insurance industry. Most recently, 50 states have adopted the NAIC's revised model regulation, which requires insurers and producers making annuity recommendations to act in the best interest of the consumer without placing their financial interest ahead of the consumer's interest. Consistent with state law's historical treatment of insurance agents as *not* fiduciaries, *see Pitts v. Jackson Nat'l Life Ins. Co.*, 574 S.E.2d 502, 508 (S.C. Ct. App. 2002); *Stockett v. Penn Mut. Life Ins. Co.*, 106 A.2d 741, 744 (R.I. 1954); *Moses v. Mfrs. Life Ins. Co.*, 298 F. Supp. 321, 323 (D.S.C. 1968) *aff'd,* 407 F.2d 1142 (4th Cir. 1969); *Rishel v. Pacific Mut. Life Ins. Co. of Cal.*, 78 F.2d 881, 886 (10th Cir. 1935), the NAIC and all 50 States expressly decided not to impose fiduciary status, determining doing so would limit consumer access to valuable products. *See* Brian Anderson, *All 50 States Now on Board with NAIC Best Interest Annuity Rule* (Apr. 21, 2025), https://perma.cc/F79T-X7JE; *see*, *e.g.*, Ala. Admin. Code r.482-1-137 *et seq.* (imposing "best interest" standard for annuity transactions).

American retirement savers need lifetime guaranteed income products today more than ever. Imposing fiduciary obligations on brokers and insurance salespeople will be so burdensome as inevitably to limit consumers' access to those products. *See Chamber of Commerce*, 885 F.3d at 366; Comp'l ¶¶90-92, 94-97, 104-108; ACLI Mot. for PI at 12-21.

And the States' role reflects Congress's determination not to give the federal government the authority "to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render 'personalized investment advice about securities to a retail customer'" *Chamber of Commerce*, 885 F.3d at 385 (cleaned up). Indeed, Congress prohibited the SEC—then trying to impose a rule in this sphere—from eliminating "commissions or other standard compensation" in regulating these types of products. *Id.* So this Court found the Department's proposed 2016 regulation—arrogating the same power, but to the Department with even less relevant expertise for such regulating—went too far. *Id.*

Indeed, there is strong evidence that Dodd-Frank "opted to defer" these regulations "to the states, which have traditionally and under federal law borne responsibility for thoroughgoing supervision of the insurance business." *Id.*

States have answered Congress's call. All 50 States have adopted NAIC's Model Regulation. And the Department itself recognizes that regulation requires "insurance agents must act in the consumer's best interest, as defined by the Model Regulation, when making a recommendation of the annuity." 89 Fed. Reg. at 32,125.

Despite recognizing the States' salutary role in regulating—a role expressly delegated by Congress—the Department has decided that 50 States adopting a unified regulatory approach does not work. That is because, the Department contends, the model rules do "not protect retirement investors to the same degree as the fiduciary protections in Title I and Title II of ERISA." *Id.* at 32,139. That mischaracterization mistakenly conflates Title I and Title II and then asserts that the fiduciary protections under Title I must be extended to Title II. Not so. And there was no response to State-led and other comments that the "best interest" standard is worse for consumers than the fiduciary standard the Department prefers.

Ultimately, the Department rejects Congress's choice—but it lacks the power to do so. This Court explained in 2016 that "Congress exhibited confidence in the states' insurance regulation." *Chamber of Commerce*, 885 F.3d at 386. While the Department may criticize "Dodd-Frank provisions as 'insufficient' to protect the 'subset' of retirement-related fixed indexed annuities transactions" under the Department's purview, that critique is with the law itself. *Id.* There is no reasonable basis to issue a rule that tries to usurp Congress's laws.

C. The Rule Irrationally Premises Imposition of Fiduciary Status on NAIC and State Rules That Do Not Do So.

The Department's Rule uses the factual predicate underlying the model NAIC regulation adopted by many States—individualized review by an insurance professional to recommend an annuity transaction in the consumer's best interest—as grounds to impose fiduciary status on every insurance agent and broker selling qualified annuities nationwide. But that turns the State regulations upside-down. By using State regulations that do not themselves impose fiduciary status on insurance agents and brokers the federal Rule irrationally twists what the States have done for its own misguided regulatory purpose. The Department thus imposes fiduciary status on insurance agents based largely on compliance with State regulations that do not impose fiduciary status.

Ultimately, a fiduciary under federal law is designated as such based on advice and compliance with State laws and regulations that do not, under State law, make the underlying agent or broker a fiduciary.

And the effects of this will be very real for consumers. Studies and the SEC agree that the substantially similar 2016 Rule that this Court vacated caused "a significant reduction in retail investor access to brokerage services. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,322 (July 12, 2019). That is why the SEC declined to impose full fiduciary standards in its own rules. *Id.* The SEC recognized that the concerns and ultimate decline in consumer choice married to increased costs "are not theoretical." *Id.*

Reducing access—either by discouraging market entrants or increasing costs—hurts peoples' pocketbooks. Studies show that professional financial assistance can help investors avoid costly investment mistakes. *Id.* They can help allocate portfolios in a more diversified manner protecting against unexpected market movements. *Id.* They can help ensure that investors are not overpaying taxes. *Id.* They can increase savings—something that is so vital for America's retirees. *Id.* The new Fiduciary Rule pushes this type of advice and access to products outside the reach of many people saving for their retirement. That is wrong.

CONCLUSION

This Court should affirm the district court decisions.

Respectfully submitted,

Brenna Bird
Attorney General
Eric H. Wessan
Solicitor General
Iowa Attorney General's
Office
1305 E. Walnut St.
Des Moines, IA 50319
Phone: (515) 823-9117
eric.wessan@ag.iowa.gov

ADDITIONAL COUNSEL

Steve Marshall
Attorney General of Alabama

Stephen J. Cox
Attorney General of Alaska

Tim Griffin
Attorney General of Arkansas

James Uthmeier
Attorney General of Florida

Chris Carr
Attorney General of Georgia

Raúl R. Labrador
Attorney General of Idaho

Liz Murrill
Attorney General of Louisiana

Lynn Fitch
Attorney General of Mississippi

Catherine Hanaway
Attorney General of Missouri

Austin Knudsen
Attorney General of Montana

Michael T. Hilgers
Attorney General of Nebraska

Drew Wrigley
Attorney General of
North Dakota

Dave Yost
Attorney General of Ohio

Gentner Drummond
Attorney General of Oklahoma

Alan Wilson
Attorney General of
South Carolina

Marty Jackley
Attorney General of
South Dakota

Jonathan Skrmetti
Attorney General of Tennessee

Ken Paxton
Attorney General of Texas

John B. McCuskey
Attorney General of
West Virginia

CERTIFICATE OF COMPLIANCE

Consistent with Rule 27(d)(2) of the Federal Rules of Appellate Procedure, this brief contains 3,470 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), as required by Rule 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Eric H. Wessan
Eric H. Wessan