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.*	§ §	**Case Number** 4:24-cv-00482-O

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* HISPANIC LEADERSHIP FUND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND STAY OF EFFECTIVE DATE

Pursuant to Local Rule 7.2(b), the Hispanic Leadership Fund ("HLF") submits this Unopposed Motion seeking leave to file the attached proposed brief as *amicus curiae* in support of Plaintiffs' Motion for Preliminary Injunction and Stay of Effective Date (Dkt. 11). Plaintiffs

and Defendants have consented to HLF's submission of an *amicus* brief. HLF has limited its brief to 15 pages.

As addressed more fully in HLF's Statement of Interest and Argument in its proposed *amicus* brief, HLF is a non-partisan advocacy organization dedicated to strengthening working families by advancing common sense public policy solutions that foster individual liberty, opportunity, and prosperity. This case involves a challenge to the United States Department of Labor's attempt to resurrect its harmful 2016 rule that provided a new definition of an investment advice fiduciary ("2016 Fiduciary Rule") in a manner that directly conflicts with the Fifth Circuit Court of Appeal's 2018 invalidation of that rule in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018). DOL's latest rule redefining who is an investment advice fiduciary ("2024 Fiduciary Rule") is effectively the same as the very harmful 2016 Fiduciary Rule.

In 2021, HLF sponsored a groundbreaking study ("HLF Fiduciary Study") of the effects of reinstating the 2016 Fiduciary Rule. The HLF Fiduciary Study, which has been widely circulated within Congress and the Biden Administration, found that resurrecting the 2016 Fiduciary Rule—which is what the 2024 Fiduciary Rule does—would: 1) reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years; and 2) contribute to a roughly 20 percent increase in the wealth gap for Black and Hispanic Americans, when looking at accumulated individual retirement arrangement savings alone. HLF's strong interest in the outcome of this case stems from these findings and its desire to help ensure that individuals working toward a brighter future get the financial assistance they need to achieve a dignified retirement.

For the foregoing reasons, HLF respectfully requests that the Court grant it leave to file the attached proposed *amicus* brief.

A proposed order is attached.

Date: June 12, 2024

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that, on June 6, 2024, counsel for *amicus curiae* conferred *via* email with counsel for Plaintiffs and counsel for Defendants, who represented that Plaintiffs and Defendants, respectively, consent to this motion.

/s/ Kent A. Mason

CERTIFICATE OF SERVICE

On this 12 day of June, 2024, I filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rules of Civil Procedure 5(b)(2).

/s/ Kent A. Mason

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.*	§ §	**Case Number** 4:24-cv-00482-O

BRIEF FOR *AMICUS CURIAE* HISPANIC LEADERSHIP FUND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND STAY OF EFFECTIVE DATE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 2008, the Hispanic Leadership Fund ("HLF") is a non-partisan advocacy organization dedicated to strengthening working families by advancing common sense public policy solutions that foster individual liberty, opportunity, and prosperity. HLF seeks to protect and enhance equal opportunity, encourage entrepreneurship and ownership, increase financial literacy, and expand access to markets and investment opportunities.

HLF sponsored a groundbreaking study ("HLF Fiduciary Study") of the effects of reinstating the 2016 United States Department of Labor ("DOL") fiduciary rule ("2016 Fiduciary Rule"). The HLF Fiduciary Study has been widely circulated within Congress and the Biden Administration. HLF sponsored this study to protect the ability of millions of low- and middle-income individuals, including Hispanic and Black Americans, to receive critical financial assistance with respect to their retirement planning and investments. HLF is filing this brief for the same reasons—to help ensure that individuals working toward a brighter future get the financial assistance they need to achieve a dignified retirement.

HLF has a strong interest in this case. DOL's latest rule redefining who is an investment advice fiduciary ("2024 Fiduciary Rule") is effectively the same as the very harmful 2016 Fiduciary Rule that was invalidated in a 2018 decision by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). The HLF Fiduciary Study found that resurrecting the 2016 Fiduciary Rule—which is what the 2024 Fiduciary Rule does—would: 1) reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years; and 2) contribute to a roughly 20 percent increase in the wealth gap for Black and Hispanic Americans, when looking at accumulated individual retirement arrangement ("IRA") savings alone. And based on data from the 2016 Fiduciary Rule, without a stay of the effective date, many of the adverse effects of the 2024 Fiduciary Rule will take place ***before*** the September

23, 2024 effective date of the 2024 Fiduciary Rule. Thus, HLF supports the plaintiffs' motion to preliminarily enjoin the 2024 Fiduciary Rule and stay its effective date.

INTRODUCTION

Very simply, this case is about DOL openly defying a 2018 Fifth Circuit decision invalidating a DOL regulation. DOL waited just six years following the Fifth Circuit's decision before effectively reissuing the same rule. If DOL is permitted to flout the court's mandate, the 2024 Fiduciary Rule[1] will have ***immediate*** disastrous effects on individuals saving for retirement—especially those with moderate and low incomes, including many Hispanic and Black Americans—as addressed by the HLF Fiduciary Study.

SUMMARY OF ARGUMENT

On March 15, 2018, the Fifth Circuit invalidated[2] DOL's 2016 Fiduciary Rule,[3] which re-defined the term "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and which severely harmed many low- and middle-income individuals by cutting them off from access to investment assistance. The 2016 Fiduciary Rule defined "fiduciary" so broadly that it intentionally included salespeople selling their company's financial products.[4] In other words, as absurd as it might sound, a salesperson for a financial institution who is selling that institution's products, such as annuity contracts, could not promote those products to, for example, an IRA owner without being considered a fiduciary under the 2016 Fiduciary Rule. Unlike any salesperson in any other business, a salesperson selling to an IRA owner would, as a fiduciary, be required to disregard the interests of the company for whom she is selling and not function as a

[1] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122 (Apr. 25, 2024).

[2] *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018).

[3] Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[4] *See Chamber of Com. of U.S.*, 885 F.3d at 366, 373, 380, 382.

salesperson.[5] For the reasons described below, the implications of this bewildering fiduciary status for salespeople and others proved to be devastating for constituents served by the *amicus curiae*.

The Fifth Circuit saw through this absurdity and invalidated the 2016 Fiduciary Rule. The grounds for invalidation were very clear. Under ERISA, a fiduciary relationship is a "special relationship of trust and confidence,"[6] and no such relationship exists in the case of a salesperson. In fact, in order for such a fiduciary relationship to exist, the Fifth Circuit reasoned that it "must exist prior to, and apart from" the subject transaction.[7]

On July 7, 2020, DOL carried out the mandate from the Fifth Circuit by reinstating[8] the prior regulation defining a fiduciary.[9] That regulation consists of the five-part test discussed below, a test that ensures fiduciary status is limited to relationships of trust and confidence. Stunningly, however, DOL has refused to give up on the position it took in its 2016 Fiduciary Rule—and even tried to do a brazen end-run around the Fifth Circuit decision in the 2020 preamble to Prohibited Transaction Exemption 2020-02, leading to a national invalidation of a critical part of that end-run.[10] Now, rather than trying another end-run, the 2024 Fiduciary Rule again directly

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[5] 29 U.S.C. § 1104(a)(1) (under ERISA, fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries").

[6] *Chamber of Com. of U.S.*, 885 F.3d at 365.

[7] *See id.* at 382 n.15 (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997)).

[8] Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (July 7, 2020).

[9] Definition of the Term "Fiduciary," 40 Fed. Reg. 50,842 (Oct. 31, 1975).

[10] In 2020, DOL attempted to rewrite the five-part test in the preamble to Prohibited Transaction Exemption 2020-02, to mostly reinstate the 2016 Fiduciary Rule invalidated by the Fifth Circuit decision (the "New Interpretation"). That 2020 overreach is currently being litigated separately, including in this Court, and has already been nationally invalidated in one case. *Am. Sec. Ass'n v. U.S. Dep't of Lab.*, No. 8:22-cv-00330-VMC-CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023) (invalidating DOL's interpretation of a fiduciary in the context of rollover advice); *Fed'n of Americans for Consumer Choice, Inc. v. U.S. Dep't of Lab.*, No. 3:22-cv-00243-K-BT (N.D. Tex. filed Feb. 2, 2022); *see also* Brief for Hispanic Leadership Fund as

treats salespeople as fiduciaries and makes a mockery of the requirement in the Fifth Circuit decision that fiduciary status requires a special relationship of trust and confidence. As discussed below, under the 2024 Fiduciary Rule, for example, when a broker-dealer solicits a previously unknown prospective customer to roll her 401(k) plan assets into an IRA serviced by the broker-dealer, that broker-dealer would be deemed to be a fiduciary under the law, despite this being a sales call with no relationship of trust and confidence.

This clearly invalid 2024 Fiduciary Rule has already been challenged in two lawsuits, including the case at hand.[11] The purpose of this brief is to share with this Court how important it is to issue a stay of the effective date of the 2024 Fiduciary Rule. The 2024 Fiduciary Rule not only violates the Fifth Circuit's mandate, but it will also have immediate devastating effects, as demonstrated by the data analyzed in the HLF Fiduciary Study.[12]

During the brief time that the 2016 Fiduciary Rule was in effect, low- and middle-income individuals suffered badly, thus exposing and exploding the myth that treating more financial professionals as fiduciaries helps individuals. For example, the well-known accounting and financial services firm Deloitte studied institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets.[13] Deloitte found that, ***as of the 2016***

Amicus Curiae Supporting Plaintiffs, *Fed'n of Americans for Consumer Choice, Inc. v. U. S. Dep't of Lab.*, No. 3:22-cv-00243-K-BT (N.D. Tex. filed Sept. 8, 2022).

[11] *See also Fed'n of Americans for Consumer Choice, Inc.v. U.S. Dep't of Lab.*, No. 6:24-cv-00163-JDK (E.D. Tex. filed May 2, 2024).

[12] QUANTRIA STRATEGIES & HISP. LEADERSHIP FUND, ANALYSIS OF THE EFFECTS OF THE 2016 DEPARTMENT OF LABOR FIDUCIARY REGULATION ON RETIREMENT SAVINGS AND ESTIMATE OF THE EFFECTS OF REINSTATEMENT (2021), *available at* https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf [hereinafter HLF Fiduciary Study].

[13] *See* DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS 4 (2017), *available at* https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf [hereinafter Deloitte Study].

Fiduciary Rule's first applicability date on June 9, 2017, 53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and $900 billion in savings.[14]

The loss of investment assistance was immediate in 2017, even though the 2016 Fiduciary Rule was not fully effective on June 9, 2017. The only part of the 2016 Fiduciary Rule that was fully effective on June 9, 2017 was the definition of a fiduciary, which is exactly the same situation as in 2024: the new definition of a fiduciary is fully effective September 23, 2024, while the amended exemptions[15] are not fully effective as of that date, exactly as in 2016. Moreover, financial institutions' decisions to eliminate access to brokerage and other commission-based assistance are being made now and will be communicated in advance of the September 23, 2024 effective date. Every day that a preliminary injunction is not in place, more savers will lose access to commission-based assistance. Every day that savers do not have access to investment assistance, more mistakes will be made, such as selling low due to market fluctuations or buying high due to news about past great performance by a company or sector.

The HLF Fiduciary Study examined the effects of resurrecting the 2016 Fiduciary Rule. The HLF Fiduciary Study shows that reinstating the 2016 Fiduciary Rule would: 1) reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years; and 2) contribute to a roughly 20 percent increase in the wealth gap for Black and Hispanic Americans, based on accumulated IRA savings alone.

ARGUMENT

I. The 2024 Fiduciary Rule Redefining Who is a "Fiduciary" Under ERISA

[14] *See id.* at 11.

[15] 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); Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128, 89 Fed. Reg. 32,346 (Apr. 25, 2024).

Conflicts with Both the Statute and the Fifth Circuit.

1. DOL's original five-part test regarding ERISA's definition of "fiduciary." ERISA defines an investment advice fiduciary in relevant part as a person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . ."[16] Under ERISA, a fiduciary providing investment advice to a retirement plan or plan participant must act "solely in the interest of the participants and beneficiaries" and is held to the highest duty of care under the law.[17]

In 1975, DOL issued its fiduciary rule,[18] which appropriately provided the following five-part test to determine who is considered to be a fiduciary under ERISA:

> Such person [1] renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and . . . Such person either directly or indirectly (e.g., through or together with any affiliate) — . . . Renders any [such] advice . . . [2] on a regular basis to the plan [3] pursuant to a mutual agreement, arrangement, or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as [4] a primary basis for investment decisions with respect to plan assets, and that such person will render [5] individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan assets.

2. 2016 Fiduciary Rule. On April 8, 2016, DOL published its 2016 Fiduciary Rule, which provided a new definition of an investment advice fiduciary that replaced the five-part test set forth above.[19] Very generally, the new definition repealed the requirements in the five-part test that the advice: 1) be furnished on a regular basis; 2) be furnished pursuant to a mutual agreement; and 3)

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[16] 29 U.S.C. § 1002(21)(A)(ii).

[17] *Id.* § 1104(a)(1); *see, e.g.*, *Kopp v. Klein*, 894 F.3d 214, 221 n.35 (5th Cir. 2018) (stating that "ERISA's duty of loyalty is the highest known to the law") (citations omitted).

[18] Definition of the Term "Fiduciary," 40 Fed. Reg. 50,842, 50,843 (Oct. 31, 1975).

[19] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

serve as a primary basis for investment decisions.[20] All that was left were two requirements: there had to be a recommendation, and the advice had to be directed to a specific recipient.[21] Thus, a single individualized recommendation was enough to trigger fiduciary status under the 2016 Fiduciary Rule.

3. Fifth Circuit holding. On March 15, 2018, the Fifth Circuit invalidated DOL's 2016 Fiduciary Rule. The core of the Fifth Circuit's holding was that a fiduciary relationship must be a relationship of trust and confidence:

> Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so.[22]

The Fifth Circuit, in explaining that the five-part test "captured the essence of a fiduciary relationship,"[23] cited approvingly DOL's original explanation of the five-part test:

> DOL went on to say that this ["fee or other compensation" for the rendering of investment advice under ERISA] "may include" brokerage commissions, but only if the broker-dealer who earned the commission otherwise satisfied the regulation's requirements that the broker-dealer provide individualized advice on a regular basis pursuant to a mutual agreement with his client.[24]

The court thus made clear that the five-part test was critical in determining fiduciary status. The Fifth Circuit did not hold that broker-dealers or other commission-based professionals could never be fiduciaries. On the contrary, the Fifth Circuit held that: 1) such professionals can only be fiduciaries in cases when they satisfy the five-part test, as interpreted by the Fifth Circuit; and 2) correspondingly, they are not fiduciaries when they are acting as salespeople.

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[20] *See id.* at 20,955-56.
[21] *See id.* at 20,997.
[22] *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 376 (5th Cir. 2018).
[23] *Id.* at 365.
[24] *Id.* at 373 (citation omitted).

As noted, the Fifth Circuit held that the regular basis and mutual agreement prongs of the five-part test are indispensable elements of a valid definition of a fiduciary. In fact, regarding the regular basis test, the Fifth Circuit went on to say that, in the case of one-time advice, "it is ordinarily inconceivable that financial salespeople or insurance agents will have [the required] intimate relationship of trust and confidence with prospective purchasers [to be fiduciaries]."[25]

Since under the five-part test a mutual agreement is an agreement that the advice will "serve as a primary basis for investment decisions," the Fifth Circuit was also clearly holding that the "primary basis" prong was also an essential part of the test for fiduciary status. Yet these are the three prongs that DOL did away with in its 2016 Fiduciary Rule. As noted, DOL reinstated the five-part test[26] two years following the Fifth Circuit's mandate.

4. 2024 Fiduciary Rule. Through the 2024 Fiduciary Rule, DOL simply thumbs its nose at the Fifth Circuit, as illustrated by the key points of disagreement highlighted below.

- **Fifth Circuit:** The Fifth Circuit said that the five-part test "captured the essence of a fiduciary relationship."[27]
    - **DOL:** The 2024 Fiduciary Rule eliminated the same three prongs of the five-part test as it did in 2016: the regular basis test, the mutual understanding test, and the primary basis test. DOL stated: "The Department's experience in the current marketplace is that the five-part test—in particular, the 'regular basis' requirement and the requirement of 'a mutual agreement, arrangement or understanding' that the investment advice will serve as 'a primary basis for investment decisions'—too often works to defeat legitimate retirement

[25] *Id.* at 380.

[26] Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (July 7, 2020).

[27] *Chamber of Com. of U.S.*, 885 F.3d at 365.

investor expectations . . . ."[28]

- **Fifth Circuit:** It is "ordinarily inconceivable"[29] that one-time advice can be fiduciary advice and, in order for a fiduciary relationship to exist, the Fifth Circuit noted that it "must exist prior to, and apart from"[30] the subject transaction.
  - **DOL:** "[T]he Department believes that treating one-time advice as fiduciary investment advice subject to ERISA is consistent with a relationship of trust and confidence . . . ."[31]
- **Fifth Circuit:** "Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so."[32]
  - **DOL:** "[T]he Department rejects the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products. . . . [S]ales and advice typically go hand in hand in the retail market."[33]

II. A Sales Call from a Broker-Dealer to a Prospective Customer Illustrates the Conflict Between the 2024 Fiduciary Rule and the Fifth Circuit Decision.

Under the 2024 Fiduciary Rule, a person who makes an investment-related recommendation to a retirement investor for compensation is a fiduciary if:

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[28] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32,122, 32,132 (Apr. 25, 2024).

[29] *Chamber of Com. of U.S.*, 885 F.3d at 380.

[30] *Id.* at 382, n.15 (quoting Schlumberger Tech. v. Swanson, 959 S.W.2d 171, 177 (Tex. 1997)).

[31] 89 Fed. Reg. at 32,142, (Apr. 25, 2024).

[32] *Chamber of Com. of U.S.* at 376.

[33] Proposed Rule: Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75,890, 75,907 (Nov. 3, 2023). Although this was in the preamble to the proposed regulations, the final rule is substantively identical, as illustrated below.

> (i) The person either directly or indirectly (e.g., through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
>
> (ii) The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, or both, with respect to the recommendation.
>
> (iii) A person does not provide "investment advice" within the meaning of this paragraph (c)(1)(iii) if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) of this section is satisfied.[34]

Assume that a broker-dealer, acting as a salesperson, contacts a previously unknown prospective customer to solicit the individual to roll over her 401(k) account with a former employer to an IRA serviced by the broker-dealer. The Fifth Circuit decision makes it clear that this type of one-time sales recommendation is not fiduciary advice. But clause (i) of the above rule makes it fiduciary advice:

- The broker-dealer regularly solicits rollovers from *other prospective customers* as part of her business, so the 2024 Fiduciary Rule's completely different regular basis test is met.
- Like any good solicitation, the broker-dealer asks about the prospective customer's financial situation and describes how her IRA services would, in the broker-dealer's professional judgment, fit the customer's situation.
- As required by law,[35] the broker-dealer makes it clear that her recommendations are designed to be—and required to be—in the prospective customer's best interest.

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[34] 29 C.F.R. § 2510.3-21(c)(1)(i)-(iii) (effective Sept. 23, 2024).

[35] *See* 17 C.F.R. § 240.17a-14 and Securities and Exchange Commission ("SEC") Form CRS (requiring broker-dealers subject to the SEC's Regulation Best Interest ("Reg BI") to disclose to customers in Form CRS that they are required to act in the customer's best interest when providing a recommendation to the customer).

Thus, clause (i) is clearly satisfied by the solicitation, rendering the satisfaction of clause (ii) unnecessary. Then we come to clause (iii), which is touted by DOL as providing relief for salespeople,[36] but in reality accomplishes nothing of the sort. Clause (iii) effectively says that, if a person does not fall into the fiduciary definition in clause (i) or (ii), then the person does not fall into the fiduciary definition in clause (i) or (ii). So, it has exactly no effect. And the result is that the sales activity described above is fiduciary advice, in clear conflict with the Fifth Circuit decision. And the same analysis would apply to an insurance agent soliciting a rollover to an annuity product.

III. Treating Salespersons as Fiduciaries Under ERISA Harms Low- and Middle-Income Savers by Limiting Their Access to Much-Needed Financial Assistance.

There is a myth that treating more persons as fiduciaries automatically helps individual investors. Yet the facts are very different, as proven by data in the HLF Fiduciary Study. There are two main ways that individual investors, such as IRA owners,[37] receive investment assistance: through an advisory relationship and through a commission-based relationship.[38] Under an advisory relationship, an individual generally hires a registered investment adviser ("RIA") to manage the individual's assets, *e.g.*, IRA assets, for a fee, such as one percent of the value of the assets managed. In exchange for this fee, the RIA assumes ongoing fiduciary status and liabilities. This arrangement can work very well for investors with substantial assets.

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[36] 89 Fed. Reg. at 32,149.

[37] Even though IRAs are not subject to ERISA, DOL has certain regulatory authority over IRAs for purposes of Internal Revenue Code section 4975, including the authority to define a fiduciary. Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978).

[38] *See, e.g.*, *Registered Financial Professionals*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/registered-financial-professionals (last visited May 22, 2024); *Investment Advisers*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/investment-advisers (last visited May 22, 2024).

For an investor with a small amount of savings, such as a $2,000 IRA, advisory relationships are generally unavailable. The investor is usually unwilling to pay more than a nominal direct fee, if any, for assistance, and it is not commercially feasible for RIAs to assume year-round fiduciary status for one percent of $2,000, or $20. Generally, the only personalized advice available to such an investor is through a commission-based model where there is no separate fee. To illustrate the prevalence of the commission-based model for smaller investors, a study by Oliver Wyman, a leading international management consulting firm, found that 98 percent of investor accounts with less than $25,000 were in brokerage relationships.[39]

The 2016 Fiduciary Rule imposed severe restrictions on the commission-based model. In DOL's view, a broker-dealer's receipt of commissions on transactions creates a conflict of interest.[40] But this same "conflict of interest" exists whenever a sale of any product or service occurs – even a doctor recommending more tests. Nevertheless, the 2016 Fiduciary Rule deemed the commission-based model's conflict of interest as so problematic that it treated all commission-based assistance as fiduciary assistance.

The effects of the 2016 Fiduciary Rule, which triggered far greater potential liability for broker-dealer relationships and, consequently, significantly higher costs, are difficult to overstate. DOL's decision led to many financial institutions ceasing to serve small accounts. Financial

[39] OLIVER WYMAN, ASSESSMENT OF THE IMPACT OF THE DEPARTMENT OF LABOR'S PROPOSED "FIDUCIARY" DEFINITION RULE ON IRA CONSUMERS 2 (2011).

[40] *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,949 (Apr. 8, 2016) ("Investment professionals play an important role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice that some render and erode plan and IRA investment results."). *See also id.* at 20,955 ("The narrowness of the 1975 regulation allows advisers, brokers, consultants, and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility.").

institutions do not make money on small accounts; for example, servicing a $2,000 IRA is not profitable.[41] So, if the cost and potential liability of serving that account is increased too much, as was caused by the 2016 Fiduciary Rule, then financial institutions have little choice but to cut back on serving small accounts. That is exactly what happened in 2017 when the 2016 Fiduciary Rule first became applicable, and this is ultimately why a rule that was intended to help investors with smaller accounts in fact caused them significant harm.

The harm was even greater for investors interested in purchasing guaranteed income for life in the form of an annuity. Annuities are most commonly sold through the commission-based model, rather than the advisory model. So, unlike in the case of stocks, bonds, and mutual funds, the advisory model was far less available for annuities, so that the adverse effects of the 2016 Fiduciary Rule were even worse for investors seeking the benefits provided by annuities.

In 2021, the *amicus curiae* sponsored the first and, to our knowledge, only study that used data on the actual effects of the 2016 Fiduciary Rule to provide a fact-based analysis of the rule's effects and what is likely to happen if the 2016 Fiduciary Rule is resurrected in large part, as the 2024 Fiduciary Rule would do. As an example of those effects, as noted, the accounting firm Deloitte found that, as of the DOL rule's first applicability date, 53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and $900 billion in savings.[42]

Based on a rigorous analysis of data, and actual experience collected through surveys and

[41] If the loss on a small account is manageable, as it was prior to the 2016 Fiduciary Rule, working with small accounts can be workable, especially for new broker-dealer representatives looking to grow with their clients.

[42] *See* Deloitte Study, *supra* note 13, at 11.

interviews conducted by research firms and industry organizations,[43] the HLF Fiduciary Study's conservative estimate is that reinstatement of the 2016 Fiduciary Rule would: 1) reduce the projected accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years; and 2) have the most adverse effects on Black and Hispanic Americans, reducing their projected accumulated IRA savings by approximately 20 percent over 10 years, and contributing to an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals.[44]

The HLF Fiduciary Study found that, if DOL applies a fiduciary duty standard to virtually all investment assistance, as the 2024 Fiduciary Rule would do, low- and middle-income investors will lose significant access to financial assistance,[45] adversely affecting their retirement security. For example, another study found that individuals with access to a broker-dealer or other financial professional have a minimum of 25 percent more assets than individuals lacking such access.[46]

The harm to low- and middle-income individuals will happen ***before*** the September 23, 2024 effective date of the 2024 Fiduciary Rule, hence the need to immediately stop the 2024 Fiduciary Rule from going into effect. The adverse effects of the 2016 Fiduciary Rule identified

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[43] The HLF Fiduciary Study examined data or analysis from, for example, Morningstar, the Federal Reserve Board, the U.S. Census Bureau, and the Internal Revenue Service.

[44] *See* HLF Fiduciary Study, *supra* note 12, at 1. As described in Appendix B of the HLF Fiduciary Study, the estimated $140 billion loss of projected retirement savings of certain lower-income individuals was developed by, for example: 1) identifying the IRA investors most likely to face adverse consequences by the reinstatement of the 2016 Fiduciary Rule; 2) simulating account activity under current conditions to determine the projected aggregate IRA account balance of a subset of IRA investors over a 10-year period; 3) simulating potential changes to account activity assuming reinstatement of the 2016 Fiduciary Rule to determine the projected aggregate balance of the subset of IRA investors; and 4) adjusting for any potential benefits of reinstatement.

[45] *See id.* at 37.

[46] *See* OLIVER WYMAN, THE ROLE OF FINANCIAL ADVISERS IN THE US RETIREMENT MARKET 16 (2015), *available at* https://www.napa-net.org/sites/napa-net.org/files/uploads/2015.07.13-Oliver-Wyman-Report.pdf. *See also* HLF Fiduciary Study, *supra* note 12, at 2.

by Deloitte occurred as of the first day that the 2016 fiduciary definition was effective, June 9, 2017, even though most of the rest of the 2016 Fiduciary Rule was not effective. The exact same situation is occurring in 2024, with the new definition going into effect on September 23, 2024.

Financial institutions almost always give advance notice to customers losing access to investment assistance. Decisions are being made now by financial institutions regarding who will lose access to investment assistance. And advance notice will be given later this summer. Loss of access to investment assistance for even a short time can be very harmful, especially with the frequent market fluctuations that can scare investors into making unwise decisions. Hence, there is a great need for an immediate stay stopping the 2024 Fiduciary Rule from going into effect.

CONCLUSION

At its core, this case is straightforward. The Fifth Circuit invalidated a 2016 DOL rule that would have converted salespeople into ERISA fiduciaries. DOL did not like that. So, DOL waited six years and then adopted its 2024 Fiduciary Rule, which is identical by any substantive measure. If DOL is permitted to do this, the dramatically adverse policy effects of the 2016 Fiduciary Rule will immediately occur again under the 2024 Fiduciary Rule, as evidenced by the HLF Fiduciary Study.

For these reasons, the *amicus curiae* asks this Court to find for the Plaintiffs and enter an order staying the effective date of the 2024 Fiduciary Rule and enjoining its enforcement pending a final judgment in this case.

Date: June 12, 2024

Respectfully submitted,

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Counsel for Hispanic Leadership Fund

CERTIFICATE OF SERVICE

On this 12 day of June, 2024, I filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rules of Civil Procedure 5(b)(2).

/s/ Kent A. Mason

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.*	§ §	**Case Number** 4:24-cv-00482-O

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* HISPANIC LEADERSHIP FUND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND STAY OF EFFECTIVE DATE

Before the Court is the Unopposed Motion of the Hispanic Leadership Fund ("HLF") for Leave to File a brief of *Amicus Curiae* in Support of Plaintiffs' Motion for Preliminary Injunction and Stay of Effective Date, filed on June 12, 2024.

The Motion is GRANTED, and the Court hereby grants HLF leave to file the proposed *amicus* brief attached to the Motion.

SO ORDERED.

Signed _____, 2024.

_____
Reed C. O'Connor
UNITED STATES DISTRICT JUDGE