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, INC.; 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.

U.S. Department of Labor; R. ALEXANDER ACOSTA, in his official capacity as Secretary 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.

U.S. Department of Labor; R. ALEXANDER ACOSTA, in his official capacity as Secretary 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.

U.S. Department of Labor; R. ALEXANDER ACOSTA, in his official capacity as Secretary of Labor,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, No. 3:16-cv-1476
Honorable Barbara M.G. Lynn

THE STATES OF CALIFORNIA, NEW YORK, AND OREGON'S MOTION FOR RECONSIDERATION

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May 16, 2018

CERTIFICATE OF INTERESTED PARTIES

No. 17-10238

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INC.; 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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Defendants-Appellees.

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

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4. Greater Irving-Las Colinas Chamber of Commerce
5. Humble Area Chamber of Commerce d/b/a Lake Houston Area Chamber of Commerce
6. Insured Retirement Institute
7. Lubbock Chamber of Commerce
8. Securities Industry and Financial Markets Association
9. Texas Association of Business
10. American Council of Life Insurers
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17. National Association of Insurance and Financial Advisors – Wichita Falls
18. Indexed Annuity Leadership Council
19. Life Insurance Company of the Southwest
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INTRODUCTION

The States of California, New York and Oregon respectfully request reconsideration of the Court's May 2, 2018 per curiam order denying the States' motion to intervene for the purpose of seeking en banc rehearing of the Court's March 15, 2018 decision vacating the Fiduciary Rule.[1] The federal government is no longer pursuing this appeal. Given that posture, the exceptional importance of the issues, and the grave harm the States will suffer as a result of the panel opinion—billions of dollars in lost retirement income to their residents and tens of millions of dollars in lost tax revenue—the States respectfully request that the Court reconsider its decision. If the panel declines to reconsider its order denying intervention, the States ask that the Court direct the Clerk to permit the filing of a petition seeking review of that order by the full Court.

ARGUMENT

The States meet the four prong test for intervention under Federal Rules of Civil Procedure 25. Requests for intervention are "liberally construed" and doubts are to be "resolved in favor of the proposed intervenor." *Entergy Gulf States Louisiana, LLC v. U.S. EPA*, 817 F.3d 198, 203 (5th Cir. 2005). A party is entitled to intervene in an appeal as of right if: (1) its motion is timely; (2) it has a legally

[1] Chief Judge Stewart dissented from the panel opinion and disagreed with the denial of the motion to intervene.

protected interest in the action; (3) the outcome of the case may impair that interest; and (4) the existing parties do not adequately represent that interest. *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005). As explained in the States' motion to intervene:

- The States' motion was timely as it was filed as soon as it became clear that the Department of Labor was unlikely to seek rehearing and that a motion to intervene was necessary; before that time, a motion to intervene would have been improvident.
- The States have demonstrated, through the declarations of economists, and based on the Department of Labor's own economic data, that they will lose more than $58 million in a specific category of state income tax (withdrawals from individual retirement accounts), which is directly attributable to the elimination of the Fiduciary Rule. This is a legally protectable interest and satisfies Article III standing.
- The panel's decision vacating the Fiduciary Rule clearly impairs the States' interest in protecting those tax revenues.
- The Department of Labor, which has taken no position on the motion to intervene, no longer adequately represents the States' interest—and the law requires only a showing that representation "may" be inadequate. *Trbovich v. United Mine Workers of Am*, 404 U.S. 528, 538 n.10 (1972).

If the panel is not prepared to reconsider its order denying intervention, the States respectfully seek to have that order reviewed by the full Court. The States sought to file a petition for en banc review of the order denying intervention but the filing was not permitted. The States believe that a petition seeking en banc review of such an order should be permissible, at least under the unusual circumstances of this case. *See Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc). In *Peruta*, the Ninth Circuit, sitting en banc, ultimately granted the State of California's motion to intervene after it had been denied by the original panel. *Id*. However, this Court's e-filing system will not accept such a petition, and the Court's Attorney Advisor stated to counsel that the Fifth Circuit considers a motion to intervene an administrative matter and does not permit en banc review of administrative matters. Winn Declaration ¶¶ 3-4. He stated that the only motion permissible for the States to file was one for reconsideration. *Id*.

Counsel is unaware of any Fifth Circuit authority clearly prohibiting a proposed-intervenor whose motion to intervene on appeal has been denied by a panel of the Court from seeking review of that denial by the full Court. At least one Fifth Circuit decision has granted a petition for en banc rehearing after a motion to intervene was denied by the panel. *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985). Entertaining a petition for such review would appear to be appropriate at least under the particular circumstances here, where the motion to

intervene follows a panel decision on the merits and appears to provide the only possible mechanism for potential en banc review of that merits decision.[2] In this situation, especially, an order denying intervention is a matter of great substance, not merely one of administration. If the Court disagrees, however, that important interpretation of applicable rules or court procedures should be made or expressly ratified by the Court itself. Accordingly, if the panel declines to reconsider its order denying intervention, the States respectfully request that the Court direct the Clerk to allow the States to file a petition for en banc rehearing of that order. Alternatively, if the Court concludes that a party denied intervention by a panel under the circumstances presented here may not seek review of that denial by the full Court, the States respectfully request an express ruling on that point.

The denial of the States' motion to intervene is especially troubling because it effectively insulates the decision to vacate the Fiduciary Rule from further "appellate scrutiny." *Edwards v. City of Houston*, 37 F.3d 1097, 1107 (5th Cir. 1994), *rev'd en banc*, 78 F.3d 983 (5th Cir. 1996). Review of the underlying

[2] To the extent that the procedural issue in dispute here is governed by the text of Federal Rules of Appellate Procedure 35, Rule 35(a) provides for potential en banc hearing or rehearing of "an appeal or other proceeding," and Rule 35(b) states that a "party" may petition for hearing or rehearing en banc. The States agree that for these purposes a would-be intervenor does not become a "party" to an appeal, entitled to seek en banc rehearing of a panel decision on the merits, unless and until its motion to intervene is granted. That motion itself, however, is at least arguably a type of "proceeding" before the Court; and on that view, the movant would be a "party" to that "proceeding."

merits opinion is necessary because, as stated in Chief Judge Stewart's dissent, "nothing in the statutory text forecloses DOL's current interpretation" (Slip. Op. 51, Stewart, C.J., dissenting) and the panel opinion conflicts with decisions of three district courts that have upheld the Fiduciary Rule *in toto* as well as with the Tenth Circuit Court of Appeals decision upholding one part of the Fiduciary Rule. *See Chamber of Commerce of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. 2017) (decision below, upholding entire Fiduciary Rule); *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1 (D.D.C. 2016), *appeal dismissed per stipulation*, Case No. 16-5345, ECF No. 1724479 (D.C. Cir. Mar. 30, 2018) (upholding entire Fiduciary Rule); *Market Synergy Group v. U.S. Dep't of Labor*, 2017 WL 661592 (D. Kan. Feb. 17, 2017), *aff'd* 885 F.3d 676 (10th Cir. 2018) (upholding changes to prohibited transaction exemption 84-24).

Nor does the panel opinion's holding that the only permissible interpretation of the term "fiduciary" under the Employee Retirement Income Security Act (ERISA) is that provided by the common law of trusts square with Supreme Court precedent. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (trust law "offers a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes requires departing from common-law trust requirements"); *Mertens v. Hewitt Associates*, 508 U.S. 248,

262 (1993) (ERISA "expand[ed] the universe of persons subject to fiduciary duties").[3]

Prior to filing this motion, counsel contacted both plaintiffs' counsel and the Department of Justice. Plaintiffs' counsel indicated they would oppose the motion. The Department of Justice indicated that the government takes no position on the motion. Winn Declaration ¶ 2.

CONCLUSION

For all the foregoing reasons, the States respectfully request that the motion for reconsideration be granted.

[3] The States' arguments concerning the propriety and importance of the Fiduciary Rule are set out at greater length in their April 26, 2018 Motion to Intervene and Petition for Rehearing En Banc.

Dated: May 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 35(b)(2)(A), because it contains 1,377 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 because it has been prepared in 14-point Times New Roman font.

May 16, 2018

/s/ Amy J. Winn
Amy J. Winn

CERTIFICATE OF SERVICE

I certify that on May 16, 2018, the foregoing Motion for Reconsideration was served electronically via the Court's CM/ECF system upon all counsel of record.

May 16, 2018 *<u>/s/ Amy J. Winn</u>*
Amy J. Winn

EXHIBIT A

DECLARATION OF AMY J. WINN

I, Amy J. Winn, declare and say as follows:

1. I am a Supervising Deputy Attorney General with the California Department of Justice and am one of the attorneys of record for the States of California, New York and Oregon in this matter. I am admitted to practice before this court and make this declaration pursuant to Local Rule 27.4. The facts stated herein are of my own personal knowledge, and I could and would competently testify to them.

2. I sent emails to counsel for plaintiffs and the Department of Justice yesterday evening informing them of the States' intention to file this motion. Plaintiffs counsel stated that they oppose the motion. Counsel at the Department of Justice stated that "the government takes no position on this motion."

3. On Monday, May 14, 2018, in anticipation of filing the next day, I tested the Court's e-filing system to see if it would accept a petition for rehearing. The e-filing system would not allow me to file such a document. I subsequently talked to the e-filing staff who confirmed this and told me that the only motion the States could file was one for reconsideration directed to the Panel.

4. This morning, I spoke with the Court's Attorney Advisor, Mr. Timothy Phares. He confirmed that what the e-filing staff said was correct. He explained that the Fifth Circuit does not permit en banc review of

administrative matters and it considers a motion to intervene an administrative matter.

I declare under penalty of perjury under the law of the United States that the foregoing is true and correct, and this declaration was executed on May 16, 2018, at Sacramento, California.

Amy J. Winn

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