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; R. ALEXANDER ACOSTA, 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; R. ALEXANDER ACOSTA, 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.

R. ALEXANDER ACOSTA, 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
No. 3:16-cv-01476

APPELLANTS' CONSOLIDATED OPPOSITION TO MOTION OF AARP TO INTERVENE AS A DEFENDANT-APPELLEE FOR THE PURPOSE OF SEEKING REHEARING EN BANC, PROPOSED INTERVENOR AARP'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING EN BANC, AND MOTION TO INTERVENE OF THE STATES OF CALIFORNIA, NEW YORK, AND OREGON

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No. 17-10238

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Defendants-Appellees.

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Plaintiffs-Appellants,

V.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of 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.

There are no corporations that are either parents of any plaintiff-appellant or that own stock in the plaintiffs-appellants.

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3. Financial Services Roundtable
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
11. National Association of Insurance and Financial Advisors
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6. Better Markets Inc.
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9. National Employment Law Project
10. Public Investors Arbitration Bar Association
11. National Black Chamber of Commerce
12. Washington Legal Foundation
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ARGUMENT

AARP and the states of California, New York, and Oregon ("Movants") have delayed until the last moment to file intervention motions to seek rehearing *en banc*. Their delay is unjustifiable and compels denial of their motions. The Movants have had ample opportunity to intervene in the multiple cases challenging the so-called "Fiduciary Rule" in district courts around the country, in appeals in two other circuits courts, and in this appeal, which was decided by this Court more than a month ago. And they have been on notice for more than a year that the government, under presidential direction, was reevaluating its approach to the Fiduciary Rule. Nevertheless, Movants waited until *two business days* before the deadline for filing a petition for rehearing *en banc* to seek leave to intervene—and AARP further seeks leave to extend the deadline to file a petition for rehearing to compensate for Movants' lack of diligence. Finally, Movants seek relief on a highly expedited schedule, but have disregarded this Court's rules for emergency motions.

This Court should deny the Motion of AARP to Intervene and Motion to Intervene of the States of California, New York, and Oregon

("Motions") for numerous reasons. First, the Movants do not satisfy the standard for emergency relief. Second, they lack standing. Third, the Motions are untimely and fail to satisfy the other standards for intervention on appeal. In short, Movants' improper, last-minute motions do not come close to justifying their unprecedented bid to intervene for purposes of filing a motion for rehearing *en banc*, itself an exceptional motion which this Court's rules firmly discourage—even when filed by a long-standing *party* to the proceedings.[1]

I. Movants Are Not Entitled To Emergency Relief.

The Motions should be denied because they seek relief on an emergency basis without attempting to satisfy the requirements of the Rules of this Court. Nor *can* they satisfy the Rules of this Court.

These Motions undoubtedly seek emergency relief. Under Fifth Circuit Rule 27.3, "motions seeking relief before the expiration of 14 days after filing" are considered emergency motions. These Motions seek intervention *four days* before the deadline to file a petition for rehearing *en banc*, and they do so for the purpose of moving for rehearing. (AARP

[1] Because the motions to intervene should be denied, AARP's Motion for Extension of Time to File Petition for Rehearing En Banc should be denied as moot.

also seeks extension of that deadline, which is only four days out.) After the rehearing deadline passes, their motions to intervene for purposes of filing such petitions would be moot. Accordingly, the motions necessarily seek relief within less than fourteen days.

The Motions do not satisfy the requirements of Rule 27.3, and the Court should deny them on that basis. The Motions are not "labeled 'Emergency Motion.'" 5th Cir. R. 27.3. They do not "[s]tate the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted." *Id.* They do not "[c]ertify that the facts supporting emergency consideration of the motion are true and complete." *Id.* And they do not "[p]rovide the date by which action is believed to be necessary." *Id.*

Even if Movants had satisfied the procedural requirements of Rule 27.3, they cannot possibly demonstrate any "irreparable harm" they "will suffer if the motion is not granted." *Id.* To "establish irreparable harm, 'speculative injury is not sufficient.'" *Walker v. Epps*, 287 F. App'x 371, 376 (5th Cir. 2008) (alterations adopted) (quoting *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001)); *accord Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Any harm

Movants might claim is purely speculative and not irreparable. Movants cannot claim that any harm—irreparable or otherwise—will flow from denying them leave to intervene to petition for rehearing *en banc* because their interests have already been fully and adequately represented through the conclusion of all non-discretionary proceedings in this case. *See infra* 18–21.

Nor can Movants rely on any harm from vacatur of the Fiduciary Rule to support their motions. It is entirely speculative whether rehearing *en banc* would be granted and whether the *en banc* court subsequently would affirm the district court; if anything, the 1% rate at which the Fifth Circuit rehears *en banc* appeals decided on the merits strongly suggests that rehearing (much less success on rehearing) is unlikely. *See* 5th Cir. I.O.P. 35.

Furthermore, even the speculative harms Movants attribute to this Court's decision to vacate the Fiduciary Rule could soon be mooted by other regulatory action. Less than two weeks ago, the Securities and Exchange Commission ("SEC") announced a proposed rule that is intended to further the same goals as the Fiduciary Rule. *See* Regulation Best Interest, Release No. 34-83062, File No. S7-07-18 (Apr. 18, 2018)

(proposing a "standard of conduct . . . to act in the best interest of the retail customer at the time a recommendation is made" and requiring broker-dealers to manage conflicts of interest); *see also, e.g.*, Katherine Chiglinsky, *New York's Financial Watchdog Proposes 'Best Interest' Rules*, Bloomberg Mkts. (Dec. 27, 2017), https://www.bloomberg.com/news/articles/2017-12-27/new-york-proposes-best-interest-rules-amid-delay-in-washington. The SEC, not the Labor Department, is the appropriate regulatory authority in this area, as this Court's decision suggested. *See Chamber of Commerce of U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360, 385 (5th Cir. 2018) ("The SEC has the expertise and authority to regulate brokers and dealers uniformly. . . . Rather than infringing on SEC turf, [the Department of Labor] ought to have deferred to Congress's very specific Dodd-Frank delegations and conferred with and supported SEC practices to assist IRA and all other individual investors.").

The declarations submitted by AARP highlight the speculative relationship between vacatur of the Fiduciary Rule and any harm to Movants. The AARP members who filed declarations essentially want a best-interest standard—which is what the SEC has proposed in its new

rulemaking, which Movants failed to even mention. *See* Exs. C, D, E, & G to Mot. of AARP to Intervene as a Def.-Appellee for the Purpose of Seeking Reh'g En Banc ("AARP Mot.") (filed April 26, 2018). And with or without the Fiduciary Rule, individuals can always choose to retain fiduciary advisors, which makes the alleged harm from vacatur even more conjectural. *Infra* 10. A declarant's assertion that she "feel[s] well-advised by [her] present broker, [but] it certainly cannot hurt to have that broker and others subjected to a standard of acting in [one's] best interest," Ex. E to AARP Mot., is hardly the stuff of an emergency motion to avert irreparable harm.

II. Movants Lack Standing To Intervene.

The "'irreducible constitutional minimum' of standing" requires in part that the party seeking relief have "suffered an injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Courts are "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors," Mot. to Intervene of the States of California, New York, and Oregon ("States Mot.") 9 (filed April 26, 2018) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)), and "[f]or all relief sought, there must be a litigant with standing, whether

that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Federal Rule of Civil Procedure 24(a)(2) similarly requires "an interest relating to the property or transaction that is the subject of the action."

California, New York, and Oregon offer no facts that support an injury or interest. Their suggestion that they are harmed by lost general tax revenue from transactions that allegedly would have occurred under the Fiduciary Rule is inconsistent with *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). There, the Supreme Court stated that an allegation that a federal agency's actions "had injured a State's economy and thereby caused a decline in general tax revenues" is insufficient to confer standing on the state. *Id.* at 448. Standing was allowed in that case because there was "a loss of *specific* tax revenues" caused by abrogation of a severance tax for extracted coal. *Id.* (emphasis added). Here, the lost tax revenues are general, not specific. The alleged injury is also highly speculative; if the states had standing here, they would have standing to sue over virtually *any* general regulatory change because almost any economic policy could be argued to have some general impact

on tax revenues. Further, the States fail to account in any way for the taxes they gain if—as Movants allege—financial firms and their members realize higher revenue in the absence of the Fiduciary Rule.

Nor can the states rely on *Texas v. United States* or *In re Oil Lease Antitrust Litigation* to support their novel theories of standing and intervention. In *Texas v. United States*, the injury for purposes of standing was that Texas would "incur significant costs" through the affirmative step of "issuing driver's licenses," not the failure of collection of hypothetical tax revenues. 809 F.3d 134, 155 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016). And in *In re Oil Lease Antitrust Litigation*, the state had "a financial interest in the investment income generated by [unclaimed] funds" that "Texas law assign[ed] . . . to the state," not mere tax revenues. 570 F.3d 244, 251 (5th Cir. 2009).

Parens patriae standing is also not available here because, as the states admit, "the law generally disfavors *parens patriae* suits against the federal government." States Mot. 13 n.4. Being on the side of the federal government does not change this calculus. In the only case cited by the states on this point, *Massachusetts v. EPA*, the Supreme Court held that Massachusetts "ha[d] alleged a particularized injury in its

capacity as a *landowner*" because it "owns a substantial portion of the state's coastal property." 549 U.S. 497, 521 (2007) (emphasis added). The states cannot possibly allege such an injury here.[2]

AARP similarly fails to demonstrate that it has standing. Although it submitted declarations from members explaining why they would like to get financial advice that is in their "best interest," they all fail to offer evidence showing that such advice is unobtainable in the absence of the Fiduciary Rule. The fact that *all* financial assistance is not *required* to be offered on certain terms does not mean it is *unavailable* on those terms to those—like the declarants—to whom it is important. Existing FINRA requirements obligate broker-dealers to take certain actions in their customers' best interests. *See, e.g.*, Epstein, Exchange Act Release No. 59328, 2009 WL 223611, at *12 n.24 (Jan. 30, 2009), *aff'd*, *Epstein v. S.E.C.*, 416 F. App'x 142 (3d Cir. 2010) (a broker-dealer's

[2] Although the States are correct that not all parties to a case must have standing, States' Mot. 5 n.2, they are incorrect to the extent they imply that the relevant portion of *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998), survived *Town of Chester*. "[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester*, 137 S. Ct. at 1651. The states' entire theory of intervention is that they seek relief that the government will not seek, namely rehearing *en banc*.

"recommendations must be consistent with his customer's best interests" (quotation marks omitted)). State insurance regulations impose robust protections designed to protect consumers. *See, e.g.*, Nat'l Ass'n of Ins. Commissioners, *Model Suitability Rule*, http://www.naic.org/store/free/MDL-275.pdf (2015). And, the declarants can simply *contract* for a fiduciary relationship if they believe that will serve them best, including by retaining one of the thousands of certified financial planners who—according to an *amicus* brief filed by their trade group—follow a self-imposed fiduciary standard, *see* Br. for *Amicus Curiae* Financial Planning Coalition in Support of Defendants-Appellees and Affirmance 3 (filed July 6, 2017), or registered investment advisors (who are already fiduciaries under federal securities laws). Moreover, the SEC has just proposed a "best interest" standard of its own. S*upra* 4.

In short, AARP's members have a freedom to contract that puts them in a fundamentally different position than, for example, the member of a neighborhood environmental group who will experience increased emissions from a nearby plant unless the EPA prevents it. AARP therefore has not put forth "specific allegations establishing that

at least one identified member ha[s] suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

III. Movants Fail To Satisfy The Standard For Intervention.

The Motions also fail on the merits. Although leave to intervene in the *district court* is liberally granted, "[a] *court of appeals* may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *United States v. 22,680 Acres of Land in Kleberg Cty.*, 438 F.2d 75, 76 (5th Cir. 1971) (citation omitted) (emphasis added); *accord, e.g.*, *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017).

To determine whether this "exceptional" step is necessary, courts often evaluate the factors for granting intervention of right in Federal Rule of Civil Procedure 24(a)(2): (1) whether the motion is "timely," (2) whether the movant "claims an interest relating to the property or transaction that is the subject of the action," (3) whether the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," and (4) whether "existing parties adequately represent that interest."

Intervention is improper if any one of these factors is not present,

Sommers v. Bank of Am., N.A., 835 F.3d 509, 513 (5th Cir. 2016), and the Motions fail this test on multiple grounds.

A. The Motions Are Untimely.

The Motions are untimely for numerous reasons. ***First***, Movants waited an exceptionally long "time during which [they] actually knew or reasonably should have known of [their] interest in the case before [they] petitioned for leave to intervene." *Sommers*, 835 F.3d at 512 (quoting *Ford v. City of Huntsville*, 242 F.3d 235, 239 (5th Cir. 2001)); *see also United States v. Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989) (same).

This case and others challenging the same regulation were filed nearly two years ago. *See, e.g.*, ROA.43 (Chamber complaint filed June 1, 2016); Complaint, *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 1:16-cv-1035 (D.D.C. June 2, 2016) (Dkt. 1). From the start, these cases received substantial attention from all quarters, including significant media coverage. Movant AARP filed an *amicus* brief more than nine months ago in this very appeal, Br. Amici Curiae AARP et al. (filed July 6, 2017), and participated in the original rulemaking, *see* AARP Mot. 2. Although California, New York, and Oregon did not bother to participate as *amici*, it was not for lack of notice. *See, e.g.*, Letter from Attorney Gen. Eric T.

Schneiderman to Acting Sec'y of Labor Edward Hugler (Apr. 17, 2017), https://ag.ny.gov/sites/default/files/2017_04_17_fiduciary_rule_comment_letter.pdf ("I urge DOL to implement the full rule without further delay.").

There are no "unusual circumstances militating for . . . a determination that the application is timely." *Sommers*, 835 F.3d at 513 (quoting *Ford*, 242 F.3d at 239) Intervention is inappropriate after a decision on appeal when "the reasons now urged for intervention would have been equally applicable at much earlier stages of this case." *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1554 (D.C. Cir. 1985). Although the Justice Department vigorously defended the Rule in the district court and before this Court, Movants were on notice long ago that the new Administration was not so deeply committed to the Fiduciary Rule that it would necessarily take the extraordinary step of seeking rehearing *en banc* if the Rule were vacated. More than fourteen months ago, and within weeks of taking office, President Trump directed the Department of Labor to re-evaluate the Fiduciary Rule. Fiduciary Duty Rule, 82 Fed. Reg. 9,675 (Feb. 3, 2017). Months later, a rulemaking was opened to consider potential changes to the Rule, and in November

2017, compliance obligations set to take effect in January 2018 were extended until July 2019.[3] And in its brief in this Court, the Justice Department affirmatively argued that the Rule's restrictions on arbitration were invalid and should be struck down. Appellees' Br. 45–48. Movants cannot justify their failure to seek intervention until two business days before the deadline for filing a petition for rehearing *en banc*.

The supposed reasons that Movants identify for their intervention are not recent developments. AARP (Mot. at 5) cites events that all occurred over a month ago—the decision of this Court (March 15); and the agency's announcement "[s]hortly after the decision" that it would not enforce the rule, "pending further review" (March 16).[4] This delay

[3] *See* 18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24), 82 Fed. Reg. 56,545 (Nov. 29, 2017).

[4] Carmen Castro-Pagan & Madison Alder, *Labor Dept. Won't Enforce the Obama-Era Fiduciary Rule*, Bloomberg BNA (Mar. 16, 2018), https://www.bna.com/labor-dept-wont-n57982089974/. Although

contrasts with the mere fifteen days between the relevant policy announcement in *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), and the motion to intervene. *Id.* at 1204 (June 24 to July 9). The dates of the declarations in support of AARP's Motion underscore how long AARP delayed in moving to intervene—all of the declarations were signed between April 10 and 13, that is, nearly two weeks before these motions. And the states identify *no* specific events that lead them to believe "it became *apparent* that DOL did not intend to seek further review of the panel's decision." States Mot. 6–7 (emphasis added).

Yet only now, two business days before the deadline for a petition for rehearing *en banc*, have petitioners sought to intervene for the first time in this case. Movants do not cite a single case from this Court allowing intervention for the extraordinary purpose of seeking rehearing *en banc*, let alone one filed at the last minute. Rather, the Fifth Circuit

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AARP also confusingly cites the stipulated dismissal on March 23 of another case challenging the rule (Mot. at 5, 8), that is a case in which the government *prevailed*; all that was dismissed was the challenger's appeal. *See* Joint Stipulation of Dismissal, *Nat'l Ass'n for Fixed Annuities v. U.S. Dep't of Labor*, No. 16-5345 (D.C. Cir. Mar. 23, 2018). That event hardly signaled a change in the government's position, though it also preceded the untimely intervention motions by a significant period.

has affirmed denials of leave to intervene after dismissal with prejudice in the district court, *see Sommers*, 835 F.3d at 513 (quoting *Ford*, 242 F.3d at 239); it is all the more untimely to move after the district court entered judgment *and* the Court of Appeals issued its opinion *and* nearly the entire period for seeking rehearing has elapsed.

Second, there is considerable "prejudice [to] the existing parties to the litigation . . . as a result of the would-be intervenor[s'] failure to apply for intervention as soon as [they] knew or reasonably should have known of [their] interest in the case." *Sommers*, 835 F.3d at 512–13 (quoting *Ford*, 242 F.3d at 239). Movants waited to seek to intervene until after the district court had issued its judgment, after the parties litigated motions for a preliminary injunction in both the district court and this Court, after the merits had been briefed, after the case had been argued, after supplemental briefing was filed, and after the case had been *decided*. These intervention motions themselves are forcing the parties to file yet another brief—and, if Movants have their way, Appellants would have to expend significant resources to brief and argue the case anew. "It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the

parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings." *Amalgamated Transit Union Int'l*, 771 F.2d at 1553. By moving to intervene to seek rehearing, Movants have also prolonged the uncertainty for Appellants and their members regarding the legality of the Fiduciary Rule and, hence, their need to adhere to the many onerous requirements of the Rule that have been in effect since June 2017. *See* ACLI & Chamber Appellants' Response to Appellees' Rule 28(j) Letter (Dec. 8, 2017).

Appellants have litigated with urgency from the outset of this case because of the enormous costs the Rule is imposing and would continue to impose on the financial services industry, the insurance industry, and consumers, and because lack of a clear and final determination of the Rule's illegality is generating widespread confusion in the market. The government, the district court, and this Court all agreed that expedition was warranted. *See* ROA.312–14 (district court order adopting parties' proposed schedule); Order, *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, No. 17-10238 (May 25, 2017). Appellants' members need certainty to order their affairs and structure their businesses so that they

can serve their clients with confidence in the requirements of the law. Movants' belated attempt to parachute into this case, if condoned, would impose substantial prejudice by further delaying the outcome of litigation that the District Court and this Court prudently expedited in view of the need for a prompt resolution.

Third, there is minimal "prejudice [to] the would-be intervenor[s] . . . if intervention is denied." *Id.* at 513 (quoting *Ford*, 242 F.3d at 239). As explained above, Movants have not demonstrated that they suffer even the constitutionally minimal injury sufficient to confer standing. *See supra* 6–11. Moreover, rehearing *en banc* is seldom granted in any event, to the point that this Court's rules strongly discourage such motions. *Infra* 19–20. Movants thus would not be prejudiced by the denial of their intervention motions.

B. Movants Provide No Reason To Believe The Government Does Not Adequately Represent Their Purported Interests.

Even if the Court finds the motions to be timely, the Court should deny them because the government adequately represents Movants' claimed interests. The new Administration vigorously defended the Fiduciary Rule in courts throughout the country and defended in this

Court all the way through the conclusion of the ordinary litigation process. *See* States Mot. 6 (conceding that the government has "vigorously defended the Fiduciary Rule's legality"). If the government elects not to petition for rehearing—a decision that the appellate rules forcefully suggest is appropriate in most cases—that will not rise to the level of inadequate representation, and Movants cite *no* case from this Court holding that it does. Adequate representation does not require a party to engage in the exceptional step of rehearing *en banc*. *See, e.g.*, *United States v. Coney*, 120 F.3d 26, 27 (3d Cir. 1997) ("counsel, having appropriately briefed and argued an appeal, is not under an obligation to file a petition for rehearing or rehearing en banc").

Rather, as discussed above, rehearing *en banc* is extraordinary and "[p]etitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit." 5th Cir. I.O.P. 35. "Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties." 5th Cir. I.O.P. 35. The Fifth Circuit's Rules are careful to "remind[ ]" lawyers "that in every case the duty of counsel is *fully*

discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a)." 5th Cir. R. 35.1 (emphasis added). Moreover, "[c]ounsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1)." 5th Cir. R. 35.1. If the Court finds "manifest abuse of the procedure," it will even impose sanctions against counsel that seeks unnecessary rehearing *en banc*. *Id.*

The Court should discourage late intervention by non-parties who are dissatisfied when the government concludes that the high standards for *en banc* review are not satisfied. That conclusion is entirely reasonable here. Movants' assertions that there is a conflict with Supreme Court or Fifth Circuit precedent are wrong, Fed. R. App. P. 35(b)(1)(A), and the government could very reasonably conclude that the panel's decision presents no issues that rise to the level of "exceptional importance," Fed. R. App. P. 35(b)(1)(B).[5] Movants' interests—which are

[5] AARP notes that the Tenth Circuit rejected a separate challenge to the Fiduciary Rule. AARP Mot. 4. That case was different in kind: Appellants there did not argue that the Department of Labor lacked authority to promulgate the Fiduciary Rule or that the Fiduciary Rule

essentially indistinguishable from the interests of the public at large—are thus adequately represented even if the government decides not to petition for rehearing *en banc*.[6]

C. Movants Have Not Shown Protectable Interests That Justify Intervention.

For the same reasons that Movants have not demonstrated that they will suffer irreparable injury and, in fact, do not have standing to intervene, Movants have not shown that they have a legally protectable interest in this appeal. *See supra* 3–11. The interests Movants cite are neither "direct" nor "legally protectable." *Espy*, 18 F.3d at 1207 (quoting *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980)). Rather, the injuries Movants complain of are entirely speculative and are not caused

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impermissibly defined "fiduciary," issues at the heart of this appeal and the panel's decision. *See Mkt. Synergy Grp. v. U.S. Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018).

[6] The inappropriateness of *en banc* review in this case is illustrated by the large number of issues Movants believe must be heard by the *en banc* Court for them to prevail. Instead of focusing on one question of exceptional importance as envisioned by the Rules, Movants intend to relitigate the entire appeal. *See* Proposed Intervenor AARP's Pet. for Reh'g En Banc 2 & n.2; Pet. for Reh'g En Banc of Proposed Intervenors-Appellees the States of California, New York, and Oregon 1.

by vacatur of the Fiduciary Rule. Movants' submissions provide no basis to justify intervention, especially at this extremely late stage of litigation.

IV. Permissive Intervention Is Inappropriate.

Finally, Movants are not entitled to permissive intervention. Although both AARP and the states argue for permissive intervention, neither of their Motions identify a single case from this Court allowing permissive intervention for the first time on appeal, much less permissive intervention to petition for discretionary rehearing *en banc*. For the same reasons that Movants cannot intervene under the test in Federal Rule of Civil Procedure 24(a)(2), *see supra* 11–21, they are not entitled to permissive intervention for the first time after a decision on appeal.

CONCLUSION

The Court should deny the Motion of AARP to Intervene as a Defendant-Appellee for the Purpose of Seeking Rehearing En Banc and Motion to Intervene of the States of California, New York, and Oregon. The Court also should deny as moot AARP's Motion for Extension of Time to File Petition for Rehearing En Banc.

April 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2018, an electronic copy of the foregoing Opposition was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 30th day of April, 2018, the foregoing Opposition was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) this Opposition complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding any part of the document exempted from the word count, this Opposition contains 4,583 words; (2) this Opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with New Century Schoolbook Linotype 14-point for text and 14-point for footnotes; (3) any required privacy redactions have been made pursuant to this Court's Rule 25.2.13; (4) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1; and (5) the document has been scanned with the Symantec Endpoint Protection Version 14 and no virus was detected.

April 30, 2018

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