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, Dallas Division, Nos. 3:16-cv-1476, 3:16-cv-1530, 3:16-cv-1537

BRIEF FOR PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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July 6, 2017

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AMICUS CURIAE PUBLIC CITIZEN'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULE 29.2

No. 17-10238

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, doing business as Lake Houston Chamber of Commerce; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

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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.

Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen, Inc., submits this supplemental certificate of interested persons to fully disclose all those with an interest in the amicus brief.

Undersigned counsel certifies that amicus curiae Public Citizen, Inc. is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

Pursuant to Fifth Circuit Rule 29.2, undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the amicus brief.

Public Citizen, Inc.—amicus curiae in this Court

Public Citizen Litigation Group—non-profit, public interest law firm for Public Citizen, Inc.

Public Citizen Foundation, Inc.—nonprofit organization of which Public Citizen Litigation Group is a part

Scott L. Nelson—attorney at Public Citizen Litigation Group representing Public Citizen, Inc., and

Allison M. Zieve—attorney at Public Citizen Litigation Group representing amicus curiae Public Citizen, Inc.

As disclosed in the certificates submitted by the parties, Public Citizen, Inc., was represented in the district court by Julie Murray, attorney at Public Citizen Litigation Group, and Brent Rosenthal of the law firm Rosenthal Weiner LLP in Dallas, Texas.

Respectfully submitted,

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July 6, 2017

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INTEREST OF AMICUS CURIAE

Amicus curiae Public Citizen, Inc., is a non-profit consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial speech doctrine. Public Citizen has defended commercial speech regulations in cases where those regulations were important to protecting public health or served other important government and public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad restraints on commercial speech when those restraints harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Public Citizen has become increasingly concerned that corporate and commercial interests are promoting stringent applications of commercial speech doctrine to stifle legitimate economic regulatory measures and protections for consumers. This case implicates that concern. The appellants' position that the group of Department of Labor regulations known as the Fiduciary Rule is subject to strict First Amendment scrutiny, if accepted by this Court, would wrongly tilt the First Amendment balance against laws and regulations that serve important public interests.

Public Citizen therefore respectfully submits this brief, which is limited to addressing the First Amendment arguments in this case. Public Citizen believes the brief avoids duplication of argument and may assist the Court in considering whether First Amendment scrutiny is applicable to the Rule and, if it is, what level of scrutiny applies.[1]

[1] The appellees have consented to Public Citizen's filing of this brief. All appellants have also consented on the conditions that the brief complies with the applicable word limit, is filed by July 6, 2017, and is permissible in light of this Court's June 28, 2017, order. Counsel for amicus curiae understand that the reference to the filing of separate briefs in the June 28 order refers to the group of amici who moved for leave to file a combined brief in excess of the word limit and prohibits them from filing separate briefs in light of the grant of extra words for their joint brief. In a telephone call on June 29, the Clerk's Office informed undersigned counsel for amicus curiae that it also understands that the order applies to that group of movants, and permits other amici to file briefs in compliance with Federal Rule of Appellate Procedure 29 and Rule 29 of this Court.

This brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The Fiduciary Rule regulates professional relationships, not speech.

The Department of Labor's Fiduciary Rule imposes fiduciary duties on professionals who are paid to provide advice about investments of retirement savings. Those duties impose obligations of loyalty, prudence, and fidelity to the interests of investors. They also carry with them limits on the form of compensation a fiduciary may receive—specifically, a general prohibition on commission-based compensation, which presents a conflict of interest with the client, unless the fiduciary qualifies for an exemption. For many advisers who are fiduciaries under the Rule—including those who advise investors to purchase variable annuities and fixed indexed annuities—an exemption allowing commission-based compensation requires compliance with the terms of the "Best Interest Contract Exemption," or "BICE." That exemption is available when the adviser enters into a written contract with an investor that, among other things, acknowledges the adviser's fiduciary status, requires the adviser to act impartially and in the investor's best interest and to refrain from misleading statements in rendering advice, permits the adviser to receive no more than reasonable compensation, and requires disclosures of fees and other steps to avoid violations or incentives to act contrary to the investors' best interests. Such contracts may not limit the adviser's liability for breach of contract, may not limit the investor's right to participate in class actions, and may not provide for liquidated damages.

Imposing duties on professionals who provide advice to clients and regulating the terms of their contracts are traditional exercises of the government's power to regulate the conduct of market participants. However, parties challenging the Fiduciary Rule on behalf of the insurance and annuity industry—specifically, the ACLI and NAIFA Appellants—contend that the imposition of fiduciary duties on those who advise Americans about how to invest their retirement savings is not a matter of legitimate economic regulation, but instead is a content- and viewpoint-based restriction of speech subject to the strictest form of scrutiny under the First Amendment. Characterizing the Fiduciary Rule as a prohibition of non-fiduciary speech, the ACLI and NAIFA Appellants argue that the Rule should be treated as if it prohibited editorial writers from expressing disfavored viewpoints. ACLI/NAIFA Br. 23. Alternatively, they assert that the Rule fails the intermediate scrutiny applicable to commercial speech.

A. The ACLI and NAIFA Appellants' First Amendment argument is fundamentally misguided. The imposition of fiduciary duties on those who provide investment advice is not in form or substance a prohibition of speech, let alone a content- or viewpoint-discriminatory one. It does not prevent advisers from recommending any type of investment, but requires only that, in doing so, they assume duties to their clients and abide by terms aimed at preventing advice that is in the interest of the advisers rather than the clients.

Tellingly, the appellants cite no precedent for the proposition that a law imposing an obligation to provide advice in the best interest of a client, limiting the forms of compensation an adviser may receive, or requiring particular contractual terms to protect clients is a speech restriction subject to First Amendment scrutiny. Indeed, this Court's precedent is to the contrary. As the Court has held, "regulation of the practice of a profession," including the imposition of duties on professionals to protect the interests of clients, "does not violate the Constitution"—"even though that regulation may have an incidental impact on speech." *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015).

In *Hines*, this Court considered—and upheld—a law providing that an individual could provide veterinary medical advice only if he entered into a "veterinarian-client-patient relationship" in which he "assume[d] responsibility for medical judgments regarding the health of an animal," and made those judgments on the basis of an in-person examination of the animal. *Id*. at 199. A veterinarian who sought to provide veterinary medical advice without complying with these requirements sued, contending that the law infringed his First Amendment rights. This Court held otherwise, relying in part on Justice White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J. concurring in the result), which expressed the view that impacts on the speech of professionals that are incidental to legitimate regulation of their profession are not subject to First Amendment scrutiny. *Id* at 232. As this Court put it, "content-neutral regulation of the professional-client relationship does not violate the First Amendment." *Hines*, 783 F.3d at 202. Accordingly, the Court held that the imposition of duties on a veterinarian who sought to provide advice to a client "denies the veterinarian no due First Amendment right," *id*. at 202, so long as those requirements are rationally aimed at improving the quality of the professional services rendered, protecting the interests of the client, or serving some other legitimate objective, *see id*. at 202–03.

Of course, professional regulation cannot be used to justify measures that do not regulate a relationship with a client, patient, or customer, but instead seek to muzzle speech outside of any such relationship. Thus, in *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016), this Court held that the First Amendment did not allow application of a law prohibiting unlicensed practice of psychology to the speech of a political candidate who described herself as a psychologist on her campaign website and in other campaign-related materials. The Court held that the doctrine recognized in *Hines* must be limited to the relationship of a professional and a client, while "speech by a professional to the general public … is subject to full First Amendment protection." *Id*. at 359. The Court again drew on Justice White's concurrence in *Lowe v. SEC* for this distinction, citing a passage in which Justice White explained that a "personal nexus between professional and client," in which the professional "purport[s] to be exercising judgment on behalf of [a] particular individual with whose circumstances he is directly acquainted," is the hallmark of "legitimate regulations of professional practice with only incidental impact on speech." *Id*. (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring in the result)).

The provisions of the Fiduciary Rule fall within the scope of this Court's holding in *Hines* without exceeding the boundaries set in in *Serafine*. The Rule does not limit the ability of those who sell insurance, annuity products, or other investments to speak about them to the general public through advertising or other forms of information. The Rule comes into play when an adviser recommends an investment to a particular investor, establishing the "personal nexus" in which the adviser is "purporting to exercise judgment on behalf of [a] particular individual with whose circumstances he is directly acquainted." *Id*. Even then, the Rule does not limit what advice may be given, but only imposes duties, similar to those at issue in *Hines*, to ensure that the advice reflects the adviser's exercise of judgment in the interest of the client.

B. The ACLI and NAIFA Appellants assert that the rationale of *Hines*, Justice White's *Lowe* concurrence, and other cases concerning professional regulation is limited to licensing requirements and, therefore, inapplicable here. But the challenge in *Hines* was not to a licensing requirement as such: The plaintiff satisfied the requirement that a veterinarian be licensed and challenged only the *duties* imposed on a person who rendered veterinary advice. That those duties were part of a licensing scheme as opposed to professional regulation accomplished through some other means—such as the imposition of fiduciary duties without a licensing requirement—was neither critical to the Court's analysis nor logically relevant to whether the imposition of the duties somehow violated the First Amendment. Moreover, the Court's opinion made clear that its holding reflected the broad governmental "power to establish standards for licensing practitioners *and* regulating the practice of professions." *Hines*, 783 F.3d at 201 (emphasis added) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992)). Nothing in that formulation suggests that the authority to regulate the practice of professions depends on exercise of the power to license them as well.

The argument that *Hines* turns on the existence of licensing requirements also makes no sense in First Amendment terms. Where substantial First Amendment concerns are genuinely implicated, licensing requirements are highly suspect because, "[g]enerally, speakers need not obtain a license to speak." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988). The appellants, however, posit that the First Amendment somehow gives preference to licensing regulations that altogether preclude some individuals from practicing a profession over other regulations that take the less restrictive approach of prescribing duties that are attendant to the provision of professional advice. That illogical position is, not surprisingly, unsupported by the case law.

C. ACLI and NAIFA further assert that the Fiduciary Rule cannot be treated as a legitimate exercise of professional regulatory authority because it is not content- or viewpoint-neutral. As in *Hines*, "recognizing the [law] at issue in this case for what it is," 783 F.3d at 201, is fatal to this argument. The Fiduciary Rule generally provides that an investment adviser is subject to fiduciary duties, and it governs the way the adviser is compensated and the contractual terms to which the fiduciary relationship is subject, to avoid conflicts of interest. But the Rule does not control the advice given: "It does not regulate the content of any speech, require [advisers] to deliver any particular message, or restrict what can be said once a [fiduciary] relationship is established." *Id.*; *see also Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014) (rejecting claim that regulation of tour guides is content based, because "what they say is not regulated").

The Fiduciary Rule is thus unlike laws that seek to suppress specific messages that professionals may seek to convey in the exercise of their professional judgment, and that have been held to violate the First Amendment. *See*, *e.g.*, *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (striking down Florida law prohibiting physicians from talking to patients about gun ownership); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (striking down prohibition on physicians recommending medical marijuana). Unlike such laws, the Fiduciary Rule does not "expressly limit the ability of certain speakers … to write and speak about a certain topic." *Wollschlaeger*, 848 F.3d at 1307. The Fiduciary Rule allows advisers to speak about any investments and to express any viewpoints about such investments. Requiring advisers to do so in compliance with fiduciary duties to their clients and regulations concerning their compensation and the terms of their contracts does not transform the Rule into a content-based or viewpoint-based restriction.

D. That the Rule applies only to the provision of investment advice does not make it a content- or speaker-based speech restriction. Regulations of particular professions are necessarily specific in their impact to the practitioners of those professions and the advice they render in the course of their professional relationships. If regulations specific to a profession were deemed content- and speaker-based in First Amendment terms, then virtually all limitations on the ability of anyone to practice law or medicine would be subject to strict scrutiny on the theory that the same restrictions would not apply to a plumber, or to a doctor or lawyer giving advice about plumbing. Courts, however, have recognized that restrictions applicable only to the subject of the practice of a particular profession are content-neutral. *See*, *e.g.*, *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 19–20 (D.C. Cir. 2017) (practice of law); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 220–21 (3d Cir. 2015); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569–70 (4th Cir. 2013) (practice of fortune-telling); *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1055 (9th Cir. 2000) (practice of psychology).

E. The ACLI and NAIFA Appellants also appear to assert that the Fiduciary Rule draws a content or viewpoint-based distinction between advice given in the best interest of the client and advice given in the self-interest of the adviser. That distinction is not, however, based on the content of the *advice*. Whether an adviser violates a fiduciary duty, or qualifies for exemption from the prohibition on commission-based compensation under BICE, depends not on the substance of the advice, but on whether the adviser has complied with duties of loyalty, prudence, and fidelity to the client's interests in giving it, and whether the criteria of the exemption governing the contract with the client are satisfied. Advice with exactly the same viewpoint (*e.g.*, "I recommend you invest in this variable annuity") may violate the rule in one instance and comply with it in another. Conversely, pieces of advice with completely different or even opposite viewpoints (e.g., "I recommend that you invest in this variable annuity instead of this mutual fund" and "I recommend that you invest in this mutual fund instead of this variable annuity") may violate the rule, or satisfy it, depending not on the message, but on the adviser's compliance with his duties to the client.

The appellants' contrary view would, if accepted, have extraordinarily far-reaching consequences. Any requirement that professional advice reflect the interests of a client rather than the self-interest of the professional rendering it would, under the appellants' view, be a content- or viewpoint-based restriction. The requirement that an attorney must exercise professional judgment in the best interest of a client and refrain from giving legal advice reflecting her own personal interests, or that a physician's advice must reflect medical judgments about how best to advance the health of a patient, would be subject to strict First Amendment scrutiny as content- or viewpoint-based prohibitions of self-interested advice. ACLI and NAIFA cite no support for the view that imposing duties of fidelity to the interests of clients in professional relationships is equivalent to the content- or viewpoint-based suppression of speech. As another court of appeals has put it, there can be no "serious suggestion that the First Amendment protects [professionals'] right to give advice that is not consistent with the accepted standard of care." *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014).[2]

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[2] The ACLI and NAIFA Appellants also see a "viewpoint-based" distinction in the different requirements needed to obtain exemption from the prohibition on commission-based compensation for sales of fixed annuities as opposed to variable and fixed-index annuities. The Fiduciary Rule, however, imposes no viewpoint-based limits on speech advocating (or discouraging) investments in variable or fixed-index annuities. It merely provides for different conditions for exemption from the prohibition on commissions, reflecting a judgment that the differences between the risks and complexities presented by these different investment products justify different levels of protection of consumers against the possible impact of self-interested advice. Nothing in the First Amendment requires the government to ignore such differences in marketplace transactions in determining the nature of the duties that should be imposed on participants in those transactions to achieve the level of consumer protection required. "Just as the internal requirements

F. In the face of these considerations, the appellants' reliance on *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), to support their characterization of the Fiduciary Rule as a content- or viewpoint-based speech restriction is untenable. *Sorrell* did not touch on whether the imposition of fiduciary duties, limits on appropriate compensation, and contractual obligations on practitioners of a profession constitutes a content-based speech restriction. It addressed what the Court viewed as a direct prohibition on "creation and dissemination of information," which "are speech within the meaning of the First Amendment." *Id.* at 570. That prohibition, the Court concluded, was content-based because it turned on the nature of the information expressed, *see id.* (analogizing the prohibition to a "ban on the sale of cookbooks, laboratory results, or train schedules"), and also because it allowed the expression of the information in certain forms of speech (educational communications) but not others (pharmaceutical marketing). *See id.* at 564. Thus, the Court determined that the law's proscription of speech had the intended effect of burdening

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of a profession may differ, so may the government's regulatory response based on the nature of the activity and the need to protect the public." *Moore-King*, 708 F.3d at 570.

"disfavored speech by disfavored speakers," *id.*, and "create[d] 'a regulation of speech because of disagreement with the message it conveys,'" *id.* at 566 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The Fiduciary Rule shares none of these characteristics. Most importantly, it does not prohibit any category of speech, let alone one defined by its content. Nor does it operate to prohibit a disfavored message. Its protections, designed to protect investors against advisory relationships affected by material conflicts of interest are, in *Sorrell*'s terms, "justified without reference to the content of … speech" and hence are content-neutral. *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (emphasis omitted)).

II. If the Fiduciary Rule is subject to First Amendment scrutiny, the appropriate standard of review is *Central Hudson*'s intermediate scrutiny for commercial speech regulations.

A. Even if the Fiduciary Rule's provisions were subject to some form of First Amendment scrutiny, the assertion that strict scrutiny (or some level of scrutiny approaching strict scrutiny) applies would nonetheless be unfounded. The ACLI and NAIFA Appellants do not claim that the Fiduciary Rule regulates or burdens fully protected speech; by their own account, it affects only their commercial speech. Commercial speech has long received lesser protection than other forms of speech, and restrictions on such speech are subject to intermediate scrutiny under the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), which requires only that the restriction directly and reasonably advance a substantial government interest. *See id.* at 564; *see also Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citing *Central Hudson* as the standard for a "valid commercial speech regulation"); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (summarizing standard); *McKinley v. Abbott*, 643 F.3d 403, 408 (5th Cir. 2011) (same). The "common-sense distinction" between commercial and noncommercial speech stems from the former's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted).

ACLI and NAIFA assert that the Supreme Court's decision in *Sorrell* supplanted the intermediate scrutiny standard by requiring some additional level of "heightened scrutiny" for "content-based" commercial speech restrictions. The en banc Ninth Circuit, in a near-unanimous decision, recently explained why that view is incorrect. *See Retail Digital*

Network, LLC v. Prieto, __ F.3d __, 2017 WL 2562047 (9th Cir. June 14, 2017). As *Retail Digital Network* explains, *Sorrell* employed the term "heightened scrutiny" generically to describe levels of scrutiny more demanding than the rational basis scrutiny applicable to non-speech restrictions, not to identify a new form of scrutiny more demanding than *Central Hudson* intermediate scrutiny. *See id.* at *6–*9. Indeed, the standard applied in *Sorrell* was *Central Hudson*'s intermediate scrutiny. *See Sorrell*, 564 U.S. at 572.

In any event, the Fiduciary Rule, if it regulates speech at all, is not "content-based" in the sense that concerned the majority in *Sorrell*: It embodies no prohibition that suppresses a particular message based on its content. *See id.* at 564–65. *Sorrell* nowhere suggested that a commercial speech regulation would be subject to some higher level of scrutiny merely because it applied only to certain types of transactions or commercial actors, as the challengers here urge. Triggering more stringent review based on such a broad conception of what it means for a commercial speech restriction to be "content-based" would swallow the rule that regulations of commercial speech are subject to intermediate scrutiny, because application to particular commercial transactions and speakers is an inherent feature of commercial speech regulation.

Indeed, at the broadest level, commercial speech restrictions, by definition, apply to commercial messages and commercial speakers, and "the classification of speech between commercial and noncommercial is itself a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015), *aff'd*, 854 F.3d 1105 (9th Cir. 2017). As one scholar has observed, "th[e] argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content." Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. Bus. & Tech. L. 1, 20 (2016).

The challengers' position—in addition to making a "hash" of the case law—risks devastating consequences for the government's ability to adopt commonsense regulations to rein in marketplace abuses. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, and drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R. § 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). Acceptance of the appellants' argument here would require strict scrutiny of all such laws because they apply to "communications by specific speakers to specific listeners about specific subject matters." ACLI/NAIFA Br. 17.

Laws addressing particular types of commercial messages by particular marketplace actors, however, have repeatedly been considered by the Supreme Court under the intermediate scrutiny standard of *Central Hudson*—including in *Central Hudson* itself, which concerned regulation of "advertising intended to stimulate the purchase of utility services." *Central Hudson*, 447 U.S. at 449 (internal quotation marks omitted). *See also, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176, 183–84 (1999) (casino gambling advertising); *Rubin v. Coors Brewing*

Co., 514 U.S. 476, 478, 482, 488 (1995) (beer labeling); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (attorney solicitations); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61, 68–69 (1983) (contraceptive advertisements); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (attorney advertising). In each case, the restrictions turned on the subject matter of speech and the identity of the speaker and hence would have been subject to strict scrutiny under the view of the challengers here. And in each case, the Supreme Court held that the restrictions were subject to intermediate scrutiny. Nothing in *Sorrell* indicates that the Court intended to overturn its consistent and repeated use of the *Central Hudson* test for review of regulations of commercial messages.

Two very recent Supreme Court decisions confirm that *Sorrell* did not bring about such a revolution in commercial speech doctrine. The first, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1134, involved a challenge to a New York statute prohibiting merchants from imposing surcharges on credit-card purchasers. The threshold issue before the Court was whether the statute was a regulation of speech at all, and the Court ultimately concluded that it was because it "regulat[ed] the communication of prices." *Id*. at 1151. Viewed as a restriction on speech, the statute was "content-based" in the very broad sense in which ACLI and NAIFA use that term: It applied to speech about a particular topic (credit card pricing) by particular speakers (merchants who accept credit cards for sales of goods or services) to particular listeners (credit card purchasers). But the Court did not even hint that the statute might be subject to any level of scrutiny higher than *Central Hudson* intermediate scrutiny, much less strict scrutiny. Rather, the Court remanded for application of *Central Hudson* scrutiny (or, if the regulation was properly understood as addressing only the manner in which prices are disclosed, the even more permissive scrutiny applicable to commercial disclosure requirements under *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (2017)). *See Expressions Hair Design*, 137 S. Ct. at 1151. That *Central Hudson* intermediate scrutiny was the *highest* level of scrutiny contemplated by the Court in *Expressions Hair Design* refutes the suggestion that *Sorrell* now requires more stringent scrutiny for commercial speech regulation that addresses particular types of marketplace transactions.

The second decision, *Matal v. Tam*, 137 S. Ct. 1744 (2017), illustrates the circumstances—not remotely present here—in which a commercial speech limit might be subject to a level of scrutiny higher than *Central Hudson*. *Tam* concerned the constitutionality of a federal statute "prohibiting the registration of trademarks that may 'disparage ... or bring ... into contemp[t] or disrepute' any 'persons, living or dead.'" *Id*. at 1751. The Supreme Court unanimously held the statute unconstitutional because, as the lead opinion put it, "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id*.

All members of the Court agreed that the statute discriminated on the basis of viewpoint in seeking to suppress socially offensive speech. *See id*. at 1763 (opinion of Alito, J., joined by three Justices); *id*. at 1766 (Kennedy, J., concurring in part and in the judgment, joined by three Justices). The lead opinion explained that it was unnecessary to determine whether the restriction concerned commercial speech because it failed the *Central Hudson* test by failing to advance a legitimate governmental interest: The interest in "preventing speech that expresses ideas that offend," the opinion stated, is not permissible under the First Amendment. *Id*. at 1764 (opinion of Alito, J.).

The four concurring Justices, by contrast, expressed the position that *viewpoint* discrimination—"disapproval of a subset of messages [the government] finds offensive," *id.* at 1766 (Kennedy, J., concurring)—subjects even a commercial speech regulation to stricter scrutiny than *Central Hudson*. Notably, however, the concurring Justices—led by the author of *Sorrell*—distinguished viewpoint-based restrictions from content-based ones, and specifically noted that the latter are *not* a matter of serious concern with respect to commercial speech: "*Unlike content based discrimination*, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context." *Id.* at 1767 (Kennedy, J., concurring).

Even if it could properly be viewed as regulating commercial speech, the Fiduciary Rule, unlike the trademark law struck down in *Tam*, is not based on condemnation of messages because those messages express offensive ideas. Rather, the Rule reflects a judgment that consumers require protection against self-dealing by those they trust to provide them with advice about investing their retirement funds. *Tam*, together with *Expressions Hair Design*, lays to rest any suggestion that the Supreme Court has required strict scrutiny of commercial speech regulations that are directed at the subject-matter of particular types of market transactions and those who participate in them.[3] If the Fiduciary Rule were subject to First Amendment scrutiny, the framework would be the intermediate scrutiny standard of *Central Hudson*.

B. As the Department of Labor's brief explains, the Fiduciary Rule readily satisfies the *Central Hudson* standard because it directly advances, and is reasonably tailored to achieve, the substantial government interest in protecting investors against relationships with advisers acting under conflicts of interest. ACLI's and NAIFA's contrary arguments do not reflect true First Amendment concerns, but assert an economic policy preference for allowing commission-based compensation—without the Fiduciary Rule's protections to ameliorate the resulting conflicts of interests—for those who provide advice on which investors rely. Those arguments illustrate how even *Central Hudson*'s less rigorous standard of scrutiny can be exploited by business interests to "achieve de- or -re-regulatory goals not obtainable through the political process." John C.

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[3] The decisions likewise demonstrate that the ACLI and NAIFA Appellants' reliance on the Supreme Court's discussion of the scrutiny applicable to content-based restrictions on *non-commercial* speech in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), is wholly misplaced.

Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 Const. Commentary 223, 262 (2015).

In arguing that strict scrutiny is inapplicable to commercial speech restrictions, we by no means advocate even intermediate scrutiny of the Rule at issue. As discussed in part I, *supra*, this case is fundamentally about the way investment advisers should be paid and what duties they should owe to retirement investors. Accordingly, even intermediate First Amendment scrutiny is inapplicable. The use of First Amendment scrutiny to put a deregulatory thumb on the scales of such economic policy debates threatens to revive Lochnerism in a new form. *See generally*, *e.g.*, Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133 (2016); Robert Post & Amanda Shanor, Commentary: *Adam Smith's First Amendment*, 128 Harv. L. Rev. Forum 165 (2015). An economic regulation should not be treated as if it were a speech regulation. The difficulties posed by treating the Fiduciary Rule as a regulation of speech, however, would be magnified even more by accepting the erroneous view that strict scrutiny applies to commercial speech restrictions.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word 2016), complies with the word limits imposed by this Court's Rule 29.3, Federal Rule of Appellate Procedure 29(a)(5), and Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 5,340 words (excluding parts of the brief not required by the applicable rules to be included in the calculation), less than half the number of words permitted by the rules for the brief of a party.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on July 6, 2017.

/s/ Scott L. Nelson
Scott L. Nelson