IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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 DBA LAKE HOUSTON AREA CHAMBER OF COMMERCE, INSURED RETIREMENT INSTITUTE, LUBBOCK CHAMBER OF COMMERCE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, and TEXAS ASSOCIATION OF BUSINESS, Plaintiffs, v. U.S. DEPARTMENT OF LABOR and THOMAS E. PEREZ, SECRETARY OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF DEFENDANTS

Pursuant to Local Rule 7.2(b), the Financial Planning Coalition (the Coalition) respectfully moves for leave to file the accompanying brief as *amicus curiae* supporting Defendants' opposition to summary judgment and cross-motion for summary judgment. The Coalition acknowledges that the Court has expressed "cautio[n]" in accepting *amicus* briefs, but, as explained below and in its brief, the Coalition submits that, as the lone *amicus* representative of financial professionals in the United States *already* operating under a fiduciary standard, it both can offer a unique perspective to assist the Court in its consideration of the pending motions for summary judgment and "has a

special interest that justifies" its participation. Order at 2 [Doc. No. 63] (Aug. 8, 2016). Defendants, the *ACLI* Plaintiffs, and the *IALC* Plaintiffs do not oppose this motion. The *Chamber* Plaintiffs do not oppose the Coalition's participation as an *amicus*, but they take no position on the Coalition's request to file its own brief.

1. The Coalition's counsel, Stris & Maher LLP, has extensive experience involving the subjects before the Court. Over the past decade, Stris & Maher has represented parties in more ERISA cases before the Supreme Court at the merits stage than any law firm in the nation.[1] The firm is similarly experienced handling ERISA matters in the lower courts.[2] Based on that experience, Counsel's considered opinion is that the Coalition's brief will uniquely benefit the Court. As explained below, the Coalition has direct, practical experience with the use and adoption of a fiduciary standard.

2. The Coalition is a collaboration of three leading national organizations of financial planners: Certified Financial Planner Board of Standards (CFP Board), the Financial Planning Association (FPA®), and the National Association of Personal Financial Advisors (NAPFA).

[1] *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (representing the petitioner); *Montanile v. Bd. of Trustees Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016) (argued by Peter K. Stris) (representing the petitioner); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013) (representing the petitioner); *US Airways Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) (representing the respondent); *Conkright v. Frommert*, 559 U.S. 506 (2010) (argued by Peter K. Stris) (representing the respondents); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) (argued by Peter K. Stris) (representing the petitioner); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (argued by Peter K. Stris) (representing the petitioners).

[2] *See, e.g.*, *Humana Health Plan, Inc. v. Nguyen*, 785 F.3d 1023 (5th Cir. 2015); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711 (8th Cir. 2014) (obtained reversal of dismissal of ERISA claims in case presenting important legal questions); *Frommert v. Conkright*, 738 F.3d 522 (2d Cir. 2013); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012); *Sanborn-Alder v. CIGNA Grp. Ins.*, 771 F. Supp. 2d 713 (S.D. Tex. 2011), appeal dism'd per stipulation sub nom., *Sanborn-Alder v. Life Ins. Co. of N. Am.*, No. 11-20184 (5th Cir. Jun. 15, 2011); *Allen v. Honeywell*, No. CV04-0424 (D. Ariz. Nov. 15, 2011).

Together, they represent nearly 80,000 financial-planning professionals across all business and compensation models. Of critical relevance to this litigation is that since 2008 CFP® professionals have been obligated to operate under a fiduciary standard similar to that required by the Department of Labor's (Department's) Rule.[3] During those eight years, these professionals have thrived. The number of CFP® professionals has grown by 30% while they have provided financial advice in the best interests of their clients, including service to middle-income Americans.

3. The Coalition thus submits that the experiences of its professionals and their clients will provide the Court with a perspective on the issues presented here that is unique among the parties and the other potential *amici*. Much of this case depends on the Rule's impact on the financial-advisor industry. Plaintiffs say that the Rule will be disastrous for the industry and the public, whereas Defendants say that it will significantly benefit both. The Coalition's brief offers the Court what the parties' speculation cannot: a concrete assessment of that dispute in the form of the real-world experience of tens of thousands of financial professionals who for nearly a decade have been effectively operating under standards similar to those imposed by the Rule. As detailed in the *amicus* brief, the Coalition offers anecdotal and empirical evidence that the imposition of the fiduciary standard has been a win-win for both the professionals and the public.

4. For the same reasons, the Coalition has a strong interest in the outcome of this litigation. The issues are vitally important to financial professionals and the public—especially those less sophisticated investors who are particularly vulnerable to conflicted advice—and the Coalition strongly believes in the virtues of a fiduciary standard that requires financial advisors to act in the best interests of their clients. Plaintiffs profess to support a "best interests" standard, yet have

[3] "Rule" refers to the administrative rule and related "prohibited transaction exemptions" recently promulgated by the U.S. Department of Labor and challenged by Plaintiffs in this case. *See* Compl. [Doc. No. 1] ¶ 2 & n.1 (defining "Rule").

moved at every step to undermine the Department's efforts to impose precisely that duty of care. The Court's pronouncements on the propriety of such a standard will have significant repercussions for the Coalition's stakeholders and the industry of which they are a part.

5. At the same time that the Coalition's brief will substantially assist the Court, it will not unduly burden either the Court or Plaintiffs. The brief is under 16 pages, well within the standard limits. *See* N.D. TEX. LOCAL R. 7.2(c) (generally limiting briefs to 25 pages); *id.* 56.5(b) (allowing 50 pages for a principal brief supporting or responding to a motion for summary judgment); FED R. APP. P. 29(d) (limiting *amicus* briefs in the courts of appeals to one-half the length of a party's principal brief). Moreover, under the current briefing schedule approved by the Court, Plaintiffs will have an opportunity to respond to the Coalition's contentions, as their reply brief is not due until September 16. *See* Order at 2 [Doc. No. 45] (July 7, 2016); *cf.* FED. R. APP. P. 29(e) (mandating that an *amicus* brief be filed "no later than 7 days after the principal brief of the party being supported is filed").

6. The Coalition acknowledges that, as reflected in the Certificate of Conference, the *Chamber* Plaintiffs have refused to take a position on the Coalition's request to file its own brief. There is no basis for withholding consent, however. Although the *Chamber* Plaintiffs express concern about duplicative briefing, as noted above, the Coalition alone among the parties and *amici* can offer the Court the perspective of actual financial planners operating under a fiduciary standard.

7. Needless to say, there can be no burdensome duplication where no other *amicus* or party can provide the viewpoint that the Coalition's financial professionals can. An empirical presentation that refutes the key factual predicates of the Plaintiffs' arguments is uniquely and straightforwardly useful to the Court. Moreover, the alternative—having the Coalition merge its

arguments into another *amicus*'s brief that presents wholly disparate themes and contentions—would be even more burdensome to the Court, because it will be far easier to follow and understand a short, separate brief. These issues affect thousands of individuals, and a serious stakeholder with relevant information should be permitted to contribute to the discussion in a clear, helpful manner.

CONCLUSION

For the foregoing reasons, the Coalition respectfully requests that the Court grants its motion for leave and accept the attached *amicus* brief for filing.

Dated: August 24, 2016

Respectfully submitted.

/s/ *Brendan S. Maher*
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CERTIFICATE OF CONFERENCE

I hereby certify that on August 23, 2016, I conferred with counsel for Plaintiffs and Defendants. Counsel for Defendants (Galen Thorp), the *ACLI* Plaintiffs (Kelly Dunbar), and the *IALC* Plaintiffs (Joseph Guerra) indicated that they do not oppose this Motion. Counsel for the *Chamber* Plaintiffs (Jason Mendro) indicated that they do not oppose the Coalition's participation as an *amicus* in this consolidated case, but they take no position on the Coalition's request to file its own brief.

/s/ *Brendan S. Maher*
Brendan S. Maher

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2016, I electronically filed the foregoing document with the clerk of the court for the Northern District of Texas using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ *Brendan S. Maher*
Brendan S. Maher