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

MOTION TO INTERVENE OF THE STATES OF CALIFORNIA, NEW YORK, AND OREGON

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April 26, 2018

CERTIFICATE OF INTERESTED PERSONS

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

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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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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INTRODUCTION

In 2016, the United States Department of Labor (DOL) adopted a suite of regulations known as the Fiduciary Rule to protect retirement investors from the conflicted recommendations of their investment advisors. That Rule was the product of six years of study, research, and recommendations about how to best address conflicts of interest in the market for retirement investment advice. Until recently, DOL vigorously defended that Rule in this and other courts. Now, however, DOL appears ready to abandon its effort to protect retirement investors by acquiescing to a split decision of this Court—even though every other court to issue a final judgment on the Rule's legality has upheld it. The States of California, New York, and Oregon thus move to intervene to ensure an effective defense against the claims made in this case and to protect their interests, as well as those of millions of their current and future retirees affected by this appeal.

The States have a vital interest in seeking rehearing en banc in this case. California and New York alone will lose more than $52 million in tax revenue from retirement investment income over the next ten years if the panel's decision remains in place. And their residents stand to lose billions of dollars in retirement investment gains. Intervention is necessary to prevent those results.

POSITION OF OTHER PARTIES

As required by Fifth Circuit Rule 27.4, before filing this motion, counsel for the State of California contacted counsel for Plaintiffs in this case and counsel for the Department of Labor. *See* Winn Declaration ¶¶ 1-3, 5. Counsel for plaintiffs indicated that they oppose this motion and the accompanying petition for rehearing en banc. *Id.* ¶ 6. Counsel for the government takes no position on this motion to intervene. *Id.* ¶ 4.

BACKGROUND

As explained in the States' concurrently filed petition for rehearing en banc, Congress adopted the Employee Retirement Income Security Act (ERISA) in 1974, and gave DOL broad authority to implement ERISA. *See* States' Petition for Rehearing En Banc 1-3. In response to enormous changes in the retirement investment market, in 2010 DOL began reconsidering its definition of "investment advice" fiduciaries. *Id.* at 3-4. After six years of exhaustive rulemaking, DOL adopted a suite of regulations known as the "Fiduciary Rule." *Id.* Among other things, the Fiduciary Rule requires financial advisors to act in their client's best interest and provides safeguards for millions of retirement investors. *Id.* at 4-5.

According to DOL, those retirement investors stand to gain billions of dollars in increased returns if the Fiduciary Rule goes into effect. *Id.* at 4.

Relevant to this motion is DOL's analysis of the gains that retirement investors would realize from the adoption of the Fiduciary Rule. *See* U.S. Dep't of Labor, Regulatory Impact Analysis (April 2016) (RIA).[1] As part of that study, DOL conducted a "careful review" of existing literature, which revealed a "wide body of economic evidence" demonstrating that the impact of conflicts of interest on retirement investment outcomes was "large and negative." *Id.* at 158; *see also id.* at 159-160 (listing ten studies showing that assets held as the result of conflicted advice underperformed relative to other assets). DOL found that "underperformance associated with conflicts of interest" could cost individual retirement account (IRA) investors between $95 and $189 billion over the next ten years. *Id.* at 158. It also uncovered the reasons why such returns were likely to be lower. For example, DOL discovered "[s]trong evidence" tying advisor conflicts to increased investments in "higher-load, more poorly performing mutual funds." *Id.* Other evidence "strongly suggest[ed]" that advisor conflicts inflicted additional losses by "prompting IRA investors to trade more frequently," which

[1] The RIA is available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

"increase[d] transaction costs and multiple opportunities for chasing returns and committing timing errors." *Id.*

DOL also evaluated what gains IRA investors could expect to realize if the Fiduciary Rule were adopted. RIA at 167, 170. Its analysis focused on one subset of the retirement investment market—front-end-load mutual funds—where conflicts are well measured. DOL compared the performance of this segment of the IRA market under the pre-Fiduciary Rule regulations with the performance of the same market segment in a world in which the Fiduciary Rule was in effect. *Id*. at 171-74. And the results of that analysis were dramatic: although only 13% of all IRA assets are held in front-end-load mutual funds, DOL concluded that IRA investors would realize between $33 and $36 billion more over the next ten years if the Fiduciary Rule were in effect than they would without the Rule. *Id*. at 170, 175.

After DOL promulgated the final Fiduciary Rule, plaintiffs in this case filed three separate lawsuits to enjoin its implementation. *See* States' Petition for Rehearing En Banc 1. The parties filed cross-motions for summary judgment, and the district court granted DOL's and denied plaintiffs'. *Id.* at 1. Plaintiffs appealed, and on March 15, 2018, a split panel of this Court reversed the district court and vacated the Fiduciary Rule "*in toto*." Slip Op. 46.

ARGUMENT

I. THE STATES ARE ENTITLED TO INTERVENE TO DEFEND THE FIDUCIARY RULE

The inquiry into whether a party is entitled to intervene as a matter of right is "'a flexible one'" that "'must be measured by a practical rather than technical yardstick.'" *Entergy Gulf States Louisiana, LLC v. U.S. EPA*, 817 F.3d 198, 203 (5th Cir. 2016). The rule is "liberally construed," and any doubts about whether intervention is proper are "'resolved in favor of the proposed intervenor.'" *Id*.

A party is entitled to intervene in an appeal as of right if: (1) its motion is timely; (2) it has a legally 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); *see also Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202-03 (5th Cir. 1992) (permitting intervention for appeal). Where, as here, a would-be intervenor seeks further appellate review not pursued by an existing party, it must also show that it has Article III standing—that it will suffer "'some injury from the judgment'" at issue. *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005).[2] The States meet each requirement here.

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[2] Where, as here, one party seeks to intervene to pursue an appeal, Article III does not require all potential intervenors to demonstrate they have standing, as long as at least one can. *See Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) ("Article III does not require each and every party in a case to have such standing.").

A. Timeliness

The States' motion is timely under the circumstances of this case. The timeliness inquiry is "contextual," and "absolute measures of timeliness should be ignored." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). The purpose of this requirement is not to "punish the tardy would-be intervenor," but instead to "guard against prejudicing the original parties by the failure to apply sooner." *Id.* In evaluating whether a motion to intervene is timely, this Court considers four factors: (1) the length of time between when a potential intervenor should have known that it had an interest in the case and when it moved to intervene; (2) whether the existing parties would suffer any prejudice as a result of the would-be intervenor's failure to move to intervene sooner; (3) the prejudice to the potential intervenor if the request to intervene is denied; and (4) any unusual circumstances. *Id*. (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-66 (5th Cir. 1977)).

Each factor weighs in the States' favor here. Until the panel issued its decision in this case, DOL vigorously defended the Fiduciary Rule's legality in this and other courts. Intervention before that juncture would have been unnecessary, as the States' interests were fully and adequately represented by DOL. *See Ross*, 426 F.3d at 755 (motion to intervene filed after district court entered judgment timely where earlier intervention would have been "pointless" because intervenor's interests were adequately represented by existing party). Once it became apparent

that DOL did not intend to seek further review of the panel's decision, the States moved swiftly to intervene. Because they sought intervention as soon as they were aware that their interests "would no longer be protected by the existing parties," their motion is timely. *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc); *see also Baker v. Wade*, 769 F.2d 289, 291-92 (5th Cir. 1985) (Texas district attorney entitled to intervene as matter of right after Texas Attorney General withdrew appeal); *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007) (State of Hawaii entitled to intervene as matter of right after panel decision issued, because no existing party was going to file petition for rehearing or certiorari).

Nor does the States' motion prejudice the existing parties. Both sides have had the opportunity to litigate the issues and present their case. And neither side can point to any adverse consequences from the States' failure to file their "motion to intervene *earlier*." *Ross*, 426 F.3d at 756. That Plaintiffs may have to defend the panel's decision before an en banc court or in the Supreme Court is a result that "would have arisen regardless of whether" the States had sought to intervene at some prior stage of this litigation. *Id.* At the same time, denying the States' motion would greatly prejudice their interests. Petitioning for rehearing en banc or for a writ of certiorari is the only means by which the States can ameliorate the harms that will flow from the panel's decision.

Further, intervention will not interfere with the "orderly processes" of this Court. *Ross*, 426 F.3d at 754. To the contrary, allowing the States to intervene is necessary to guarantee the adequate functioning of the adversary system. Absent their participation, there will be no party left committed to the "sharp adversarial presentation" of the important issues in this case. *United States v. Windsor*, 570 U.S. 744, 761 (2013).

B. Inadequate Representation

For the same reasons that their motion is timely, the States can no longer rely on DOL to adequately represent their interests. This requirement is "minimal," and is met upon a showing that that representation of the intervenor's interests "may be" inadequate. *Edwards*, 78 F.3d at 1005 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). That is the case here: it now appears that DOL will not seek further appellate review of the panel's decision.

C. Article III Standing and Legally Protected Interest

1. Article III Standing

The States have a strong interest in this litigation. As DOL's analysis concludes, allowing the Fiduciary Rule to take effect would increase investors' returns by at least $33 billion over the next ten years. RIA at 175. Those gains would translate directly into increased income tax revenues for California and New York. California expects that the Fiduciary Rule will increase its tax revenues from retirement investment income by at least $38 million over the next decade.

Chamberlain Declaration ¶ 8. New York similarly expects its income tax revenues to rise by approximately $14.9 million between 2018 and 2026, if the Fiduciary Rule takes effect. Malaspina Declaration ¶ 9.

These gains would be erased by the panel's opinion. By vacating the Fiduciary Rule, that decision precludes DOL from enforcing it. The States' residents will thus never realize the increase in their retirement investment returns had the Fiduciary Rule taken effect, and the States will never see the resulting growth in income tax revenues that would flow directly from these increased returns. These concrete and particularized injuries would be directly attributable to the panel's decision, and would be redressed by an order from an en banc court or the Supreme Court reversing it. The States thus have Article III standing to intervene. *See League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 428-431 (5th Cir. 2011) (*LULAC*) (listing elements of Article III standing). And although courts are often "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors," no such guesswork is required here. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). DOL's empirical study demonstrates that implementation of the Fiduciary Rule will cause investor returns to increase, which in turn will trigger a rise in the States' income tax receipts. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988) (for standing purposes, what matters is not the "length of the

causal chain," but the "plausibility of each of the links that comprise the chain") (citations and quotation marks omitted).[3]

The Supreme Court has held that States have Article III standing under similar circumstances. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), Wyoming sued to enjoin an Oklahoma law that required Oklahoma coal-fired electric plants that produced power for sale in Oklahoma to burn a mixture of coal that contained at least 10% Oklahoma-mined coal. *Id.* at 442. Although the State of Wyoming did not itself sell the commodity, it did impose a severance tax on any coal extracted from lands within the State. *Id.* Wyoming introduced evidence demonstrating that the Oklahoma law at issue had caused it to lose a little over $1 million in severance tax revenue over a two-plus year period. *Id.* at 445, 447. Because the law at issue caused a "direct injury in the form of a loss of specific tax revenue," the Court held that Wyoming satisfied Article III's standing requirement. *Id.* at 448.

So too here. As the States' declarations submitted in support of this motion demonstrate, if the decision stands, the States will lose millions of dollars of "specific tax revenue." *Wyoming*, 502 U.S. at 448; *see also* Chamberlain

[3] That DOL has delayed implementation of portions of the Rule until July 1, 2019 does not alter this conclusion. *See* 82 Fed. Reg. 56,545 (Nov. 29, 2017). Once the Rule takes full effect, retirement investors—and the States—will begin reaping the Rule's full benefit.

Declaration ¶ 8; Malaspina Declaration ¶¶ 8-9. If it is reversed, retirement investment income and income taxes will increase. Chamberlain Declaration ¶¶ 3, 8; Malaspina Declaration ¶¶ 8-9. The harms to the States are "concrete and particularized," may be "'fairly trace[d]'" to the panel's decision, and would be "'redressed by a favorable decision.'" *LULAC*, 659 F.3d at 430-431.

This Court's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) lends further support to the States' position here. In that case, Texas sued to prevent the federal government from adopting the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Program. *Id.* at 146. Texas argued that it had standing to sue because, if DAPA took effect, the State would have been forced to issue hundreds of thousands of "state-subsidized driver's licenses" to immigrants who were otherwise ineligible to receive them. *Id.* at 149. The State estimated that it would lose $130.89 per license, meaning that DAPA would have cost Texas at least "'several million dollars.'" *Id.* at 155. This Court held that loss was sufficient to establish Article III standing. *Id.* at 155-161. Especially relevant here is the Court's conclusion that *Wyoming* supported Texas's position. *Id.* at 157-159. In rejecting the federal government's argument that Texas could have avoided injury by not subsidizing licenses, the Court relied on two features of the *Wyoming* decision that paralleled *Texas*. First, in both cases, the plaintiff State had "sued in response to major changes in" the defendant's

policies. *Id.* at 158. And second, in each case, the plaintiff State could not have redressed their claimed injury through other means, such as changing their own laws. *Id.* at 158-159.

The States are in the same position in this case. They seek to remedy a decision that will cost them millions of dollars each year for the foreseeable future. And they are seeking to intervene in response to a "major change[]" in the status quo—the panel's decision vacating the Fiduciary Rule. *Texas*, 809 F.3d at 158. Further, the States have no other avenues available to them to assure that the level of taxable investment income returns will be maintained except to seek en banc or Supreme Court review. *Id.* The similarities between *Wyoming*, *Texas*, and the States' position in this case further demonstrate that they have Article III standing to pursue further appeal.

The States also have *parens patriae* standing to intervene. The States have a "quasi-sovereign interest" in the "physical and economic" well-being of their residents "in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 607-608 (1982). To maintain a *parens patriae* action, a State must articulate an interest "apart from the interests of particular private parties"—that is, it must show that the challenged action injures "a sufficiently substantial segment of its population." *Id.* at 607. That is the case here: this appeal affects the welfare of their current and future retirees, who are among the States' most

vulnerable residents. *See also id.* at 600 (States' *parens patriae* derives from their power to prevent "'injury to those who cannot protect themselves'"). Implementation of the Fiduciary Rule would substantially further this interest: as DOL has concluded, it will result in billions of additional dollars in retirees' accounts. RIA at 175. And the panel's decision impairs that interest.[4]

2. Legally Protectable Interest and Impairment

This Court has at least "suggested"—if not held—that if a party shows it has Article III standing then it is "'deemed to have a sufficiently substantial interest to intervene.'" *Wal–Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 566 n.3 (5th Cir. 2016) (quoting *LULAC*, 659 F.3d at 434 n.17). It should now hold that Article III standing satisfies the legally protectable interest requirement to intervene—at least, where as here, a party seeks to intervene as a defendant. Other courts of appeals have reached that conclusion.[5] To meet one of the Article III requirements—the "injury in fact" requirement—a litigant must

[4] Although the law generally disfavors *parens patriae* suits against the federal government, *see Snapp*, 458 U.S. at 611 n.16, this is not such a case. The States are not suing the federal government but instead seek to *defend* a federal regulation and DOL's authority to regulate. *See also Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (suggesting that States may rely on quasi-sovereign interests to sue federal government).

[5] *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *Meek v. Metro. Dade Cty., Fla.*, 985 F.2d 1471, 1480 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007).

show that its "legally protected interest" has been invaded. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Similarly, the "touchstone of the [Rule 24(a)] inquiry" is whether the "interest alleged is 'legally protectable.'" *Wal-Mart*, 834 F.3d at 566. Thus, meeting the Article III standing requirement is also enough to meet the Rule 24 legally protectable interest requirement.

In important ways, however, Rule 24's interest requirement is less demanding than Article III's. An interest is sufficient for purposes of Rule 24 if it "is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015). For example, in *In re Lease Oil Antitrust Litigation*, 570 F.3d 244 (5th Cir. 2009), this Court held that the State of Texas had an interest of the kind protected by Rule 24 in the "interest accrued from unclaimed property to the state." *Id.* at 251. In that case, the district court directed that unclaimed funds from a settlement be distributed to a third party. *Id.* at 247. Texas then moved to intervene, arguing that it had an interest in the case because Texas law requires unclaimed property to be delivered to the state comptroller, and entitles the State to keep any interest earned from that property while it remains unclaimed. *Id*. at 247, 250 (citing Tex. Prop. Code § 74.301). This Court held that that interest satisfied Rule 24's demands—even

though Texas would not have been "able to [file] a claim," and its interest was not "directly related to the underlying dispute." *Id*. at 251.

The States are in a similar position here. They have an interest "of the type that the law deems worthy of protection"—an interest in the income tax revenue they will realize if the Fiduciary Rule takes effect. *See, e.g.*, Cal. Rev. & Tax. Code §§ 17041-17061, 17071, 17501. These interests are sufficient to support intervention.

In addition, there is no dispute that the panel's decision would impair these interests. Without the Fiduciary Rule, retirement investors will not realize the gains from financial advisors acting in their best interests and the States will not be able to claim the taxes owed. *See supra* 10-11 (describing how State's tax revenues will rise and fall depending on the outcome of this appeal). There is "no question" that the States' interests will be impaired or impeded if they are not allowed to intervene. *In re Lease Oil*, 570 F.3d at 251.

II. PERMISSIVE INTERVENTION

For the same reasons that they are entitled to intervene as a matter of right, the States should be granted permissive intervention. They have "claim[s] or defense[s] that share[] with the main action a common issue of law or fact," Fed. R. Civ. P. 24(b)(1)(B)—whether ERISA unambiguously defines a fiduciary, and whether, by adopting the Fiduciary Rule, DOL exceeded its authority under

ERISA. Nor would intervention "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). To the contrary—now that DOL has chosen to abandon this appeal, the States can provide the robust adversary presentation necessary to resolve the important issues raised in this case.

CONCLUSION

The motion to intervene should be granted.

Dated: April 26, 2018

Respectfully submitted,

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Attorney General of New York
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Solicitor General
STEVEN C. WU
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/s/ Amy J. Winn
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Attorneys for the State of California

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4, because it contains 3,688 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Times New Roman font.

April 26, 2018 */s/ Amy J. Winn*
Amy J. Winn

CERTIFICATE OF SERVICE

I certify that on April 26, 2018, the foregoing Motion to Intervene was served electronically via the Court's CM/ECF system upon all counsel of record.

April 26, 2018 */s/ Amy J. Winn*
Amy J. Winn

ADDENDUM

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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

DECLARATION OF JAY CHAMBERLAIN
IN SUPPORT OF THE STATES' MOTION TO INTERVENE

DECLARATION OF JAY CHAMBERLAIN

I, Jay Chamberlain, declare and say as follows:

1. I am the Chief of the Financial Research Unit for the California Department of Finance. I have worked for the California Department of Finance for 7 years. Before that, I worked at the California Franchise Tax Board performing various revenue estimating functions for 20 years. I received a Ph.D. in economics from the University of California at Davis in 1987. The facts stated herein are of my own personal knowledge, and I could and would competently testify to them.

2. As the California Department of Finance's Chief of the Financial Research Unit, I am responsible for overseeing all major revenue forecasts, including forecasting revenue California will receive from income taxes.

3. In April 2016, the United States Department of Labor ("DOL") issued a Regulatory Impact Analysis ("RIA") entitled *Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions*. In the RIA, the DOL estimates that the Fiduciary Rule will produce gains to IRA investors worth between $33 billion and $36 billion over 10 years. RIA at 10. These gains cover only one segment of the IRA market – front-end-load mutual funds – which represents only 13 percent of all IRA assets. RIA at 10, 170, 175.

4. Appendix B of the RIA provides detail on how the DOL calculated the expected gains to IRA investors. The DOL calculates the expected gains by "comparing alternative scenarios, under the rule, to the baseline scenario where no rule is finalized." RIA at 343. The DOL's comparison results in an "Asset Differential" which is the difference between the investment performance under a baseline scenario (no rule) and the investment performance under alternative scenarios (with the rule). RIA at 344. The Asset Differential is then computed over 10 years. RIA at 344. The DOL then calculates the amount of the Asset Differential that is withdrawn by IRA investors each year. RIA at 344. This amount is called the "Asset Differential Withdrawn." RIA at 344.

5. In order to account for non-taxable withdrawals from Roth IRAs, I estimated the percentage of the Asset Differential Withdrawn that will be

taxable for the next 10 years. This estimate begins at 88% and gradually decreases to 80% over the next 10 years because the percentage of assets withdrawn from non-taxable Roth IRAs will likely increase. These estimates are based on a July 2017 Investment Company Institute publication entitled *Ten Important Facts About Roth IRAs* (available at https://www.ici.org/pdf/ten_facts_roth_iras.pdf), which provides information about the percentage of IRA assets that are in Roth IRAs.

6. Based on IRS historical tax statistics, California's share of total U.S. pension income was 11.4% in 2015. This is a good approximation to calculate the amount of taxable Asset Differential Withdrawn in California because the IRS pension line item includes IRAs and, of all the income items from the IRS statistics, it best represents IRA income. Thus, I used 11.4% to calculate the California portion of the taxable Asset Differential Withdrawn for the next 10 years and then used the 5.4% discount rate[1] to compute the present value of the California portion of the taxable Asset Differential Withdrawn over the next 10 years.

7. I performed an analysis of California tax returns and found that California's average tax rate on IRA income is approximately 6%. Therefore, I multiplied 6% by the present value of the California portion of the taxable Asset Differential Withdrawn for the next 10 years. The resulting calculation yields the income tax revenue that California expects to receive under the DOL's alternative scenarios where the DOL's rule is in effect.

8. Using the methodology outlined above and with respect to only the front-end-load mutual fund segment of the IRA market, I estimate that California will lose between $38 million and $42 million in income tax revenue over the next 10 years if the DOL's Fiduciary Rule does not go into effect.

I declare under the penalty of perjury under the law of the United States that the foregoing is true and correct, and this declaration was executed on April 23, 2018, at Sacramento, California.

Jay Chamberlain

[1] This is the same rate used by the DOL in its analysis. *See* RIA at 345.

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.

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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

DECLARATION OF AMY J. WINN
IN SUPPORT OF THE STATES' MOTION TO INTERVENE

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 proposed intervenor-appellee the State of California 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. On Monday, April 23, 2018, at around 4.30 p.m. (Eastern Standard Time), I telephoned the number appearing on pleadings in this case for the staff attorneys at the United States Department of Justice representing defendants-appellees. I reached the voicemail of Mr. Michael Shih and left a message stating who I was and indicating that the states of California, New York and Oregon were planning to file a motion to intervene and a petition for rehearing en banc in the present case. I left my contact information and requested a return call.

3. Shortly thereafter, I called the main number for the Department of Justice and requested to speak to Mr. Michael Raab. I eventually reached his assistant who indicated he was unavailable. I left a message with Mr. Raab's assistant to the same effect as the message I left on Mr. Shih's voicemail.

4. Shortly after that, I sent an email to Mr. Raab and Mr. Shih confirming the substance of the two messages. I received a response on Wednesday, April 25, 2018, at around 7:00 p.m. (EST), stating that the "government takes no position as to intervention." A true and correct copy of that email is attached hereto as Exhibit 1.

5. On Wednesday April 25, 2018, a little after 10.30 a.m. (EST), I telephoned Joseph R. Guerra of the law firm of Sidley Austin LLP, counsel for some of the plaintiffs-appellants in this case. I identified myself and provided the same information I had previously provided to Mr. Raab and Mr. Shih. Mr. Guerra indicated he would forward this information to counsel for the other plaintiffs and get back to me with plaintiffs' position regarding the proposed motions. Shortly thereafter, I sent a confirming email.

6. A little after 5:00 p.m. (EST) on April 25, 2018, Mr. Guerra responded by email. The email states that all plaintiffs would oppose the States' motion to intervene and petition for en banc review. A true and correct copy of his email is attached hereto as Exhibit 2.

I declare under the penalty of perjury under the law of the United States that the foregoing is true and correct, and this declaration was executed on April 25, 2018, at Sacramento, California.

Amy J. Winn

EXHIBIT 1

Amy J. Winn

From: Shih, Michael (CIV) <Michael.Shih@usdoj.gov>
Sent: Wednesday, April 25, 2018 4:02 PM
To: Amy J. Winn; Raab, Michael (CIV)
Subject: Re: Chamber of Commerce v. DOL (Case No. 17-10238) (Motions to Intervene and to Seek Rehearing En Banc)

Dear Ms. Winn:

Good evening! The government takes no position as to intervention.

Best,

Mike

Sent from my Verizon, Samsung Galaxy smartphone
-------- Original message --------
From: "Amy J. Winn" <Amy.Winn@doj.ca.gov>
Date: 4/23/18 4:53 PM (GMT-05:00)
To: "Raab, Michael (CIV)" <MRaab@CIV.USDOJ.GOV>
Cc: "Shih, Michael (CIV)" <mshih@CIV.USDOJ.GOV>
Subject: Chamber of Commerce v. DOL (Case No. 17-10238) (Motions to Intervene and to Seek Rehearing En Banc)

Counsel,

A few minutes ago, I left a message with the receptionist at Mr. Raab's office and on the voicemail of Mr. Shih. I am calling in accordance with local rules to inform you that the states of California, New York and Oregon are planning on filing motions to intervene and to seek *en banc* rehearing in the above case. I would appreciate your calling me at your earliest convenience to discuss and to let me know your client's position with respect to these motions. Thank you.

Amy J. Winn
Office of the California Attorney General
Acting Senior Assistant Attorney General
Corporate Fraud Section
(916) 210-7786

Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

EXHIBIT 2

Amy J. Winn

From: Amy J. Winn
Sent: Wednesday, April 25, 2018 3:05 PM
To: 'Guerra, Joseph R.'
Subject: RE: Chamber of Commerce v. DOL (5th Circuit Appeal) Case No. 17-10238

Thank you for getting back to me.

Amy J. Winn
Office of the California Attorney General
Supervising Deputy Attorney General
Corporate Fraud Section
(916) 210-7786

From: Guerra, Joseph R. [mailto:jguerra@sidley.com]
Sent: Wednesday, April 25, 2018 2:15 PM
To: Amy J. Winn <Amy.Winn@doj.ca.gov>
Subject: RE: Chamber of Commerce v. DOL (5th Circuit Appeal) Case No. 17-10238

Ms. Winn,
I have consulted with counsel for all of the plaintiffs and am authorized to tell you that we oppose your motion to intervene and petition for en banc review. We have received a request from counsel for the AARP, who stated that his client will also move for an extension of time to file a petition for rehearing en banc. It's not clear whether the States also plan to seek such an extension, but if so, we oppose that request as well.

If you have any questions, I can be reached at the number below for the next hour or so. I will be out of town the rest of the week.

Regards,

Joe

JOSEPH R. GUERRA

SIDLEY AUSTIN LLP
+1 202 736 8228
jguerra@sidley.com

> **From:** Amy J. Winn <Amy.Winn@doj.ca.gov>
> **Sent:** Wednesday, April 25, 2018 11:01 AM
> **To:** Guerra, Joseph R. <jguerra@sidley.com>
> **Subject:** RE: Chamber of Commerce v. DOL (5th Circuit Appeal) Case No. 17-10238
>
> Thank you.
>
> **From:** Guerra, Joseph R. [mailto:jguerra@sidley.com]
> **Sent:** Wednesday, April 25, 2018 7:55 AM

To: Amy J. Winn <Amy.Winn@doj.ca.gov>
Subject: RE: Chamber of Commerce v. DOL (5th Circuit Appeal) Case No. 17-10238

Thanks for the notice. I will pass it along and we will get back to you.

Joe

JOSEPH R. GUERRA

SIDLEY AUSTIN LLP
+1 202 736 8228
jguerra@sidley.com

From: Amy J. Winn <Amy.Winn@doj.ca.gov>
Sent: Wednesday, April 25, 2018 10:49 AM
To: Guerra, Joseph R. <jguerra@sidley.com>
Subject: Chamber of Commerce v. DOL (5th Circuit Appeal) Case No. 17-10238

Dear Mr. Guerra,

Thank you for talking with me just now. I informed you that, on Thursday, April 26, the states of California, New York and Oregon plan to file a motion to intervene and petition for en banc review of the March 15, 2018 decision in the above matter. You indicated you would pass this information on to the other plaintiffs' counsel and get back to me shortly with plaintiffs' position on these matters. Thank you.

Amy J. Winn
Office of the California Attorney General
Supervising Deputy Attorney General
Corporate Fraud Section
(916) 210-7786

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.

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

DECLARATION OF DR. PETER A. MALASPINA
IN SUPPORT OF THE STATES' MOTION TO INTERVENE

DECLARATION OF PETER A. MALASPINA

I, Peter Malaspina, declare as follows:

1. I am the Chief Economist for the New York State Office of the Attorney General ("NYOAG"). As the NYOAG Chief Economist, I serve as the office's lead economic policy advisor. My responsibilities include the oversight of economic analysis done for the NYAOG Investor Protection Bureau. Prior to appointment with the NYOAG, I was Vice President at an economic consulting firm called Quantitative Economic Solutions L.L.C., where my work included analyses of economic harm in a variety of contexts for the purposes of litigation and settlement. I received a Ph.D. in economics from the University of North Carolina at Chapel Hill in 2011. My CV is attached as Exhibit 1.

2. In my current assignment, I have been asked by counsel to analyze the impact on New York ("NY") State tax revenue in the event that the DOL's Fiduciary Rule does not go into effect. The facts stated herein are of my own personal knowledge, and I could and would competently testify to them.

3. In April 2016, the United States Department of Labor ("DOL") issued a Regulatory Impact Analysis entitled *Regulating Advice Markets, Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions* (the "RIA"). The DOL estimates that the Fiduciary Rule will produce gains to IRA investors (for the entire U.S.) worth between $33 billion and $36 billion over 10 years.[1]

4. The DOL calculates the expected asset gains by "comparing alternative scenarios, under the rule, to the baseline scenario where no rule is finalized."[2] The DOL's comparison results in an "Asset Differential" which is the difference between the investment performance under a baseline scenario (no rule) and the investment performance under

[1] RIA, p.10; These gains cover only one segment of the IRA market – front-end-load mutual funds – which represents only 13 percent of all IRA assets (see, RIA, pp. 10, 170, 175).

[2] RIA, p. 343.

alternative scenarios (with the rule).[3] The Asset Differential is then computed for each year from 2017 through 2026.[4] The DOL then calculates the amount of the Asset Differential that is withdrawn by IRA investors each year (the "US Asset Differential Withdrawn").[5]

5. Using the DOL's estimate of US Asset Differential Withdrawn as a starting point, I can estimate the net present value ("NPV") of the impact on NY State tax revenue for the years 2018 through 2026.[6] This estimate proceeds with the following steps:
   - Accounting for the non-taxable portion of the US Asset Differential Withdrawn;
   - Estimating NY's percent share of the taxable portion of the US Asset Differential Withdrawn;
   - Estimating the average effective NY income tax rate on NY's percent share of the taxable portion of the US Asset Differential Withdrawn (resulting in an estimate of lost NY income tax over time); and
   - Estimating the NPV in 2018 of the estimate of lost NY income tax over time.

6. In order to account for non-taxable withdrawals from IRAs, I estimated the percentage of the Asset Differential Withdrawn that will be taxable. Publically available data indicates that at least 81% of IRA assets are in Traditional IRAs and therefore taxable.[7] Therefore, 81% is a reasonable estimate of the percentage of assets withdrawn from IRAs that are taxable.

7. Next, I estimated NY's percent share of the taxable portion of the US Asset Differential Withdrawn based on IRS historical tax statistics.[8] The IRS data indicates that NY's share of total U.S. pension income was 6.5%

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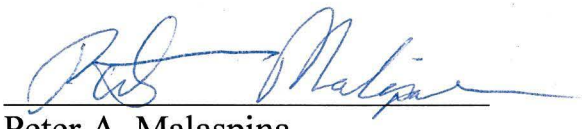
[3] RIA, p. 344.
[4] RIA, p. 344.
[5] RIA, p. 344.
[6] My analysis excludes DOL's estimates for 2017.
[7] These estimates are based on a July 2017 Investment Company Institute publication entitled *Ten Important Facts About Roth IRAs* (available at https://www.ici.org/pdf/ten_facts_roth_iras.pdf).
[8] See Exhibits 2 and 2-A.

in 2015.[9] I used this 6.5% as the estimate for NY's portion of the taxable US Asset Differential Withdrawn for the years 2018-2026.[10]

8. Next, I performed an analysis of NY tax return data and estimated that NY's average tax rate on IRA income is approximately 4.2%.[11] Therefore, multiplying 4.2% by NY's portion of the taxable Asset Differential Withdrawn for the years 2018-2026, yields the additional income tax revenue that NY would expect to receive if the DOL's rule is in effect (relative to the scenario where the rule is not in effect) for the years 2018 to 2026.

9. Last, I used a 5.4% discount rate to compute the present value of the additional income tax revenue that NY would expect to receive if the DOL's rule is in effect (relative to the scenario where the rule is not in effect) for the years 2018-2026.[12, 13] I estimate that NY will lose approximately $14.9 million in income tax revenue (in 2018 dollars) from 2018 through 2026 if the DOL's Fiduciary Rule does not go into effect.[14]

I declare under the penalty of perjury under the law of the United States that the foregoing is true and correct, and this declaration was executed on April 25, 2018 in New York, New York.



Peter A. Malaspina

---

[9] See Exhibits 2 and 2-A.

[10] This is a reasonable method to estimate the NY's share of the US Asset Differential Withdrawn because the IRS pension line item includes IRAs and therefore, of all the income items from the IRS statistics, it best represents IRA income.

[11] Estimated as the average effective tax rate on NY Adjusted Gross Income from Pensions and Annuities. (See, Exhibit 2-B)

[12] This is the discount rate used by the DOL in its analysis (*See* RIA, p. 345).

[13] See Exhibit 2.

[14] See Exhibit 2. Note, this estimate is only for the front-end-load mutual fund segment of the IRA market.

Exhibit 1
C.V. Of Peter A. Malaspina

Peter Adam Malaspina

30 Washington St., Unit 2Q
Brooklyn, NY 11201

peter.malaspina@ag.ny.gov
cell: 919-357-2285

EDUCATION

University of North Carolina at Chapel Hill
Ph.D Economics, 2011
Fields: Microeconomics, Law and Economics, Industrial Organization, Econometrics (minor)

Vassar College
B.A. Double Major in Math and Economics, 2003

RELEVANT EXPERIENCE

New York State Office of the Attorney General
Chief Economist, Fall 2017 – Present

- The Office of the Attorney General's ("OAG") lead economic policy advisor.
- Briefing the OAG's top decision makers in evaluating economic evidence during the course of an investigation, litigation or settlement.
- Responsibilities include assisting counsel across a number of bureaus including Antitrust, Investor Protection, Consumer Frauds, and Environmental Protection

Quantitative Economic Solutions LLC, Boston
Vice President, Winter 2017– Fall 2017
Senior Economist, Fall 2012 – Fall 2016

- General Responsibilities as a Case Manager (the senior staff member working for the Economic Expert on a case)
  - Drafted expert reports, constructed and programmed econometric models, oversaw teams of analysts and consultants, managed day-to-day communications with counsel, wrote deposition questions for opposing experts and attended their depositions, drafted direct testimony and supported experts during trial, responsible for signing monthly case invoices, conducted interviews, trained analysts and consultants.
- Antitrust
  - Vertical Restraints
    - Evaluated antitrust impact from most favored nations clauses in a statewide health insurance market.
    - Responsible for the analysis of a large statewide healthcare insurance claims dataset (12TB).
  - Collusion
    - Evaluated overcharge due to collusion of input suppliers for a major automotive manufacturer.
    - Developed a novel econometric model of overcharge.
- Patent Litigation
  - Medical Devices
    - Managed cases involving medical devices with more than $1 billion worth of damages at issue.
    - Conducted patent valuations issue using patent citation analysis.
  - Pharmaceuticals
    - Evaluated lost profits in a multibillion-dollar market for multiple sclerosis therapies.
    - Evaluated reasonable royalty claims against the manufacturer of a multibillion-dollar ED therapy.
    - Developed an econometric analysis to estimate the impact of an additional approved indication on sales.
  - Processors
    - Valued patents with a hedonic regression utilizing the specifications of server microprocessors.
- Pharmaceutical Commercial Success (Paragraph IV)
  - Evaluated commercial success for major pharmaceutical products.
    - Developed an econometric analysis to predict the impact of new product formulations on sales.

Energy Group at Freeman, Sullivan & Co., San Francisco
Consultant, Fall 2010 – Fall 2012

- Developed econometric analysis plans
  - Authored the econometric evaluation plan for the 2012 evaluation of the San Diego Gas and Electric's electric vehicle time-of-use pricing pilot program. Devised and implemented a nonlinear SUR estimation of price elasticities from hourly electricity load data.
  - Authored the evaluation plan for Southern California Edison's Summer Saver AC load control program, including sampling methods and regression techniques.
- Evaluated various utility programs
  - Evaluated Ontario Power Authorities DR-2 program (permanent load shifting) using an ordinal probit model
  - Evaluated Pacific Gas & Electric's non-residential time of use rates, using matched control groups
- Conducted interviews, managed analysts, and assisted senior consultants.

University of North Carolina, Chapel Hill
Instructor, Fall 2006-Spring 2010

- Taught four different undergraduate courses
  - Introductory Economics, Intermediate Micro Theory, Applied Micro Theory, and Public Policy.

Research Assistant, Fall 2004-Spring 2005 .

- Data entry and compiled summary statistics for Dr. Paul Rhode using data from historical archives.

SELECT PUBLICATIONS

- *Patent Citation Analysis in Patent Damages* (Working Paper). *2018*
- *2011 Ex Ante Load Impacts for PG&E's Non-residential TOU Rates.* June 1, 2012. (with Stephen George, Josh Bode, Peter Malaspina and Sam Holmberg).
- *2011 Ex Post and Ex Ante Load Impact Evaluation of San Diego Gas & Electric Company's Summer Saver Program.* May 21, 2012. (with Michael Perry).
- *Load Impact Estimates for SCE's Demand Response Programs.* April 1, 2011. (with Stephen George, Josh Bode, Michael Perry, Josh Schellenberg, Peter Malaspina, Sam Holmberg). Prepared for Southern California Edison.
- *Predatory Delays*. (Job Market Paper). The University of North Carolina at Chapel Hill, 2010.

Exhibit 2: Estimate of Net Present Value of Lost NY Tax Revenue 2017-2026

(All Numbers in Millions)

	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
US Asset Differential Withdrawn[1]	40.0	130.0	260.0	430.0	650.0	900.0	1190.0	1510.0	1850.0	2190.0
NY Asset Differential Withdrawn[2]	2.6	8.5	17.0	28.2	42.6	59.0	77.9	98.9	121.2	143.4
Taxable Amount of NY Asset Differential Withdrawn[3]	2.1	6.9	13.8	22.8	34.5	47.7	63.1	80.1	98.2	116.2
Lost NY Tax Revenue[4]	0.1	0.3	0.6	1.0	1.5	2.0	2.7	3.4	4.1	4.9
Annual Net Present Value of Lost NY Tax Revenue (2018 Dollars)[5]		0.29	0.55	0.86	1.23	1.61	2.02	2.42	2.81	3.14
Total Net Present Value of Lost NY Tax Revenue (2018 Dollars)[6]										**14.9**

Notes:

[1] 2016 RAM RIA, Figure B-3.

[2] (US Asset differential withdrawn) * 6.55%. 6.55% is equal to NY's estimated portion of Total US IRA Assets (See, Exhibit 2-A)

[3] (Taxable Amount of NY Asset Differential Withdrawn) = (NY Asset Differential Withdrawn) * 81%. 81% is the lower bound of reported values for (Traditional IRA Assets/Total IRA Assets), the percentage of Traditional IRA assets relative to total IRA assets available in "Ten Important Facts about Roth IRAs", Figure 1. (Available online at https://www.ici.org/pdf/ten_facts_roth_iras.pdf)

[4] "Lost NY Tax Revenue" is equal to the "Taxable Amount of NY Asset Differential Withdrawn" multiplied by the Average Effective NY Tax Rate on Traditional IRA Income (4.22%). (See, Exhibit 2-B)

[5] "Annual Net Present Value of Lost NY Tax Revenue" is calculated by applying the 5.4% discount rate assumed in the 2016 RAM RIA (p. 345) to the Lost NY Tax Revenue.

[6] Total Net Present Value of Lost NY Tax Revenue is equal to Annual Net Present Value of Lost NY Tax Revenue summed over all years 2018-2026.

Exhibit 2-A: Estimated NY % Portion of Total US IRA Assets

[A]	NY Amount of Pensions and annuities in AGI (thousands)	44,794,638
[B]	US Amount of Pensions and annuities in AGI (thousands)	683,514,468
[A]/[B]	Estimated NY Portion of Total US IRA Assets	**6.55%**

Sources

Data contained in tabs "US" and "NY" of the US and NY datasets obtained from IRS.gov at https://www.irs.gov/statistics/soi-tax-stats-historic-table-2

Exhibit 2-B Estimated Average Effective Tax Rate on Traditional IRA Income (2014)

NYAGI Class			Total Amount of NYAGI from Pension and Annuities including IRA distrabutions[1]	[A] Tax Liability as a % of NYAGI[2]	[B] Weights[3]	[A]*[B]
Less than		$5,000	$1,827	0.930325172	5.22116E-05	0.00005
$5,000	-	9,999	403,895	1.623535616	0.011541068	0.01874
10,000	-	14,999	771,403	1.313946838	0.022042377	0.02896
15,000	-	19,999	1,470,795	1.739875544	0.042027092	0.07312
20,000	-	24,999	1,419,738	2.243161583	0.040568174	0.09100
25,000	-	29,999	1,399,588	2.677771064	0.039992403	0.10709
30,000	-	34,999	1,653,105	2.880483492	0.047236496	0.13606
35,000	-	39,999	1,348,797	3.101998346	0.038541087	0.11955
40,000	-	44,999	1,247,194	3.307882018	0.035637837	0.11789
45,000	-	49,999	1,295,027	3.517344418	0.037004617	0.13016
50,000	-	54,999	1,207,416	3.663921707	0.034501181	0.12641
55,000	-	59,999	1,038,745	3.82724007	0.029681524	0.11360
60,000	-	64,999	1,179,125	3.938723004	0.033692783	0.13271
65,000	-	74,999	2,108,205	4.104531395	0.060240708	0.24726
75,000	-	99,999	4,151,400	4.373421228	0.118623794	0.51879
100,000	-	149,999	5,084,846	4.870103907	0.145296455	0.70761
150,000	-	199,999	2,982,643	5.383995655	0.085227242	0.45886
200,000	-	499,999	4,047,917	5.807961984	0.115666836	0.67179
500,000	-	999,999	1,155,661	6.133139259	0.033022326	0.20253
1,000,000	-	4,999,999	813,739	7.298102479	0.023252104	0.16970
5,000,000	-	9,999,999	119,728	8.096592329	0.003421168	0.02770
10,000,000		and over	95,558	8.240021983	0.002730516	0.02250
		Total	**$34,996,352**	**Estimated Average % NY Tax Liability on income from IRA Distributions**		**4.22%**

Sources:
2014 NY Tax Analysis Data available at
https://www.tax.ny.gov/research/stats/stat_pit/analysis_of_personal_income_tax_returns.htm.

Notes:
[1] Source: tab "Table 20": Major Items by New York Adjusted Gross Income Class - Full-Year Resident Taxable Returns in 2014 NY Tax Analysis Data

[2] Source: tab, "Table 23": Federal Components of Income by New York Adjusted Gross Income Class - Full-Year Resident Taxable in 2014 Tax Analysis Data

[3] Weights calculated calculating each's NYAGI Class's % share of the Total Amount of NYAGI from Pension and Annuities including IRA distributions.