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

CHAMBER OF COMMERCE OF THE UNITED STATES, et al., Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M Consolidated with: No. 3:16-cv-1530-M No. 3:16-cv-1537-M

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF BETTER MARKETS, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 7.1(h) of the Local Civil Rules of Practice of the United States District Court for the Northern District of Texas, Better Markets, Inc. ("Better Markets") hereby submits this memorandum of law in support of the accompanying motion for leave to file the attached brief *amicus curiae* in support of the defendants, the United States Department of Labor ("DOL") and Thomas E. Perez, in his official capacity as the Secretary of the United States Department of Labor. Better Markets recognizes that Local Civil Rule Rule 7.1(d) requires a brief only if a motion is opposed. In this case, all parties have consented to the motion for leave to file the attached brief *amicus curiae*. But cognizant of the Court's order on August 8, 2016, which denied without prejudice a Joint Motion to Establish a Schedule Regarding Potential *Amicus Curiae*, *see* ECF No. 58, Better Markets submits this memorandum of law to demonstrate that it "has a special interest

that justifies having a say," *id*., and that its *amicus* brief is "timely and useful" to the Court, *id*. (quoting *Sierra Club v. FEMA*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007)).

This Court has "broad discretion" to permit an *amicus curiae* to participate in a case. *Id*. Although participation by *amici* is more common in appellate courts, the Northern District of Texas is no stranger to hearing from *amici*. *See, e.g.*, *Supreme Beef Processors v. U.S. Dep't of Agric.*, 2000 WL 127281, at *2 (N.D. Tex. Feb. 2, 2000) (recognizing the National Meat Association's important role as *amicus*). As acknowledged by the Fifth Circuit, "a third party can contribute usually most effectively and always most expeditiously by a brief *amicus curiae*." *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984).

In support of the motion for leave to file, counsel to Better Markets states as follows:

(1) Better Markets has a special interest in this case.

(2) Better Markets can assist this Court by providing timely and useful analysis on several important issues presented by the motion for summary judgment.

(3) This case presents considerations different from those faced by the district court in *Sierra Club v. FEMA*.

(4) No party will be prejudiced by the filing of this brief *amicus curiae*.

(5) The brief conforms to the pagination limit of Rule 7.2(c) of the Local Civil Rules of Practice of the United States District Court for the Northern District of Texas, as well as the requirements of Rule 29 of the Federal Rules of Appellate Procedure.

ARGUMENT

I. Better Markets Has a Special Interest in this Case

Better Markets is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public

advocacy. It fights for regulatory reforms that lead to a stronger, safer financial system; promote the economic prosperity of all Americans; and protect individual investors from fraud, abuse, and conflicts of interest. Better Markets has submitted more than 175 comment letters to the SEC, CFTC, DOL, and other financial regulators, advocating for strong implementation of reforms in the securities, commodities, and credit markets. *See* Comment Letters of Better Markets, *available at* http://www.bettermarkets.com/rulemaking. Better Markets has also filed numerous *amicus* briefs in federal district and circuit courts, often in deference of agency actions.[1]

Better Markets has extensive expertise on the subjects of financial-market regulation, investor protection, and administrative law, all topics central to this case. Better Markets is also intimately familiar with the provisions of the contested DOL fiduciary duty rule ("Rule") and the exhaustive rulemaking process that DOL followed to craft it, having filed comments with DOL in support of the Rule. *See* Comment Letter of Better Markets (Sept. 24, 2015), https://www.dol.gov/ebsa/pdf/1210-ZA25-00336.pdf. Furthermore, Better Markets testified during DOL's public hearings. *See* DOL, Conflict of Interest Proposed Rule Public Hearing, https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html (last visited July 28, 2016). In addition, Better Markets is a co-founding and steering member of Save Our Retirement, a coalition of almost 100 public-interest, retirement, and labor organizations that fought for years to support the Rule. *See* Save Our Retirement Membership List (Sept. 8, 2015),

[1] *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014) (reflecting Better Markets' arguments in upholding the SEC's economic analysis of its disclosure rule on conflict minerals), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377–80 (D.C. Cir. 2013) (reflecting Better Markets' arguments in upholding the CFTC's economic analysis of its registration rule for commodity-pool operators); *Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014) (citing Better Markets' description of the bailout funds channeled through AIG to its counterparties).

http://saveourretirement.com/2015/09/about-save-our-retirement/. This knowledge and expertise will enable Better Markets to assist this Court in resolving the issues raised in this critically important case.

Better Markets has a strong interest in the outcome of this case for three reasons. First, it seeks to defend the Rule and thereby ensure that Americans trying to save for a secure and dignified retirement are better protected from adviser conflicts of interest that pervade much of the industry, siphoning away tens of billions of dollars every year in hard-earned savings. The Rule, even with its generous exemptions, enshrines the commonsense principle that all financial advisers who serve retirement savers must put their clients' best interest first, as Congress always intended in the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"). A decision to invalidate the Rule would maintain a status quo that exacts a huge toll on retirement savers. Such a decision would also intensify an already serious retirement crisis in this country. Millions of Americans have far too little saved for retirement. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-419, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW RETIREMENT SAVINGS 9 (2015). Americans must at least be able to protect and preserve what savings they have managed to set aside.

Second, Better Markets has an interest in ensuring that the plaintiffs' profound misinterpretations of ERISA are firmly rejected. If, for example, ERISA is held to be bounded by the securities laws or common-law trust concepts—none of which actually limit the generous breadth of ERISA—then DOL's ability to implement and enforce ERISA's fiduciary duty would be impaired, not only as to the Rule but also as to future regulatory measures that DOL may take to protect retirement savers.

Finally, Better Markets has an interest in defending the DOL's rulemaking process against

the plaintiffs' attacks predicated on the Administrative Procedure Act ("APA") and general principles of administrative law. DOL conducted one of the most thorough, deliberative, and accommodating rulemakings in history, spanning nearly six years, including a six-month comment period and four days of public hearings. It culminated in a balanced Rule, a set of carefully crafted exemptions, a 395-page Regulatory Impact Analysis, and extensive commentary. *See* Regulatory Impact Analysis for Final Rule and Exemptions[2] ("RIA") (Apr. 2016), https://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf. The record shows that the DOL considered the appropriate factors, examined the relevant data, and offered rational explanations for the choices it made, all in accordance with applicable precedent. Moreover, contrary to the plaintiffs' contention, DOL had no statutory duty to conduct yet more cost-benefit analysis, nor was DOL required to protect the incumbent distribution model for fixed-indexed annuities ("FIAs") from disruptions under the Rule and the exemptions. If this Court were to find this extraordinary process inadequate, then future attempts by DOL and other agencies to adopt rules in the public interest will become much more vulnerable targets for litigation, based fundamentally on nothing more than the regulated industry's self-serving, unfounded, and ultimately irrelevant claims of harm to their bottom line.

II. The Brief *Amicus Curiae* Will Prove Timely and Useful to the Court

The attached brief contributes a number of arguments that will assist the Court by supplementing rather than repeating arguments made by the defendants. For example, Better Markets offers novel arguments that rebut the plaintiffs' contentions that the APA, ERISA, or *Michigan v. U.S. EPA*, 135 S. Ct. 2699 (2015), required the DOL to conduct yet more cost-benefit analysis, beyond the exhaustive evaluation set forth in the RIA. Better Markets further provides a

[2] *N.B.*, the RIA is produced in the administrative record at 308–698. For ease of reference, this brief cites to the RIA's original pagination.

wealth of industry commentary that belies the plaintiffs' claims of egregious harm from the Rule. This material is not found elsewhere in the briefing. Finally, Better Markets provides a robust analysis of the RIA, detailing more specifically why the DOL acted reasonably when it chose to condition exemptive relief for the sale of FIAs upon compliance with the heightened protections set forth in the "Best Interest Contract" exemption.

III. The Considerations Here Are Different from Those Present in *Sierra Club v. FEMA*

The considerations that led Judge Rosenthal to deny the Cypress Creek Flood Control Coalition's ("CCFCC") motion for leave to file in *Sierra Club v. FEMA* are not present in this case. Unlike CCFCC's brief in *Sierra Club v. FEMA*, both parties have consented to the submission of this brief. The court in *Sierra Club* noted that a court should "go slow in accepting" an *amicus* brief if "a district court lack[s] joint consent." 2007 WL 3472851, at *1 (quoting *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970)). Such consent is present here.

Furthermore, the brief in *Sierra Club* dealt with factual disputes, a context in which *amicus* participation should be "rarely . . . welcomed." *Id*. (quoting 432 F.2d at 569). This case does not require factual findings. Unlike *Sierra Club*, which dealt with factual issues concerning flood-elevation determinations, *see id*., this case concerns the legality of an administrative rule.

Amici appear less frequently in district courts because typically they are of little use in a determination of contested factual issues. Indeed, most district courts' local rules have no specific provision for the submission of *amicus* briefs. But the federal district court that hears a disproportionately large share of challenges to administrative rulemaking expressly provides rules for *amicus* briefs. *See* Local Civil Rules of the United States District Court for the District of Columbia Rule 7(*o*). This unique institutional commitment to hearing from *amici* suggests that there is much to be gained from *amicus* submissions to district courts hearing challenges to an

administrative rulemaking, particularly in a case of this magnitude.

Sierra Club cautioned—and this Court repeated in its order—that a district court should consider whether an *amicus* brief acts as "an advocate for one of the parties." ECF No. 58 (quoting 2007 WL 3472851, at *2). Unlike CCFCC in *Sierra Club*, which had "the same interests and policy objectives" as the plaintiff and did not present a new perspective nor new information, 2007 WL 3472851, at *3 ("[i]t is unclear what new perspective or information CCFCC could provide"), Better Markets here presents a unique perspective on how to handle cost-benefit analysis in administrative disputes. This brief advances arguments not made by the DOL that will prove useful to the Court in understanding the Rule's relationship to the Administrative Procedure Act and ERISA. It also provides the Court with a more in-depth analysis of the Supreme Court's recent decision in *Michigan v. U.S. EPA*.

Of course, Better Markets does believe that the DOL should prevail in this case, and that such an outcome is in best the interest of consumers and the financial markets themselves. But as *Sierra Club* recognized, "courts routinely permit organizations to file *amicus* briefs when their interests are closely aligned with those of one party," *id*., and that "by the nature of things an *amicus* is not normally impartial," *id*. (quoting *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970)). Indeed, the Federal Rules of Appellate Procedure expressly contemplate that an *amicus* may be "partisan" in supporting the position of one party over another, just as it may support neither party. *See* Fed. R. App. P. 29(e) ("An amicus curiae must file its brief . . . no later than 7 days after the principal brief *of the party being supported* is filed. An amicus curiae *that does not support either party* must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed." (emphases added)). Moreover, an "interest in the case" is a required showing for leave to file. Fed. R. App. P. 29(c)(4). The plain language of the modern Rules belies

the antiquated notion of an idealized *amicus* as a "nonpartisan" with no interest in the outcome. Such a "description of the role of an amicus was once accurate and still appears in certain sources, but this description became outdated long ago." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.).

"The suggestion that "a strong advocate cannot truly be the court's friend . . . is contrary to the fundamental assumption . . . [that hearing] opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id.* Accordingly, Better Markets, which has appropriately disclosed its interests in this case, contends that it can be a true friend of the Court by demonstrating to the Court why, in accordance with the law and the public interest, the defendants *should* prevail.

Recently, faced with similar motions for leave to file—which were vigorously opposed by the plaintiff in that case, relying in part on this Court's denial of the joint scheduling order for *amici*—a court in the District of Kansas granted the motions in an unusually thorough 7-page order. *See* Order, *Market Synergy Group, Inc. v. U.S. Dep't of Labor*, No. 16-cv-4083, ECF No. 42 (D. Kan. Aug. 23, 2016). In its order, the court wrote approvingly of the interests of the *amici*—including Better Markets—as well as their contributions to the case: "The would-be amici do not have a direct interest in another case by which this case would materially affect their interest; however, because of the nature of this case, a ruling on Market Synergy's preliminary injunction motion has the potential of materially affecting their interest." *Id.* at 3. "While the court agrees with Market Synergy that the proposed briefs overlap with the brief filed by defendants, each of the proposed briefs also provides additional information or perspective not included in defendants' brief." *Id.* at 4. The Kansas court also rebuffed familiar arguments about "partisanship" of the would-be *amici* and that any *amicus* brief submission should wait for a later stage of the litigation.

See id. at 5–6. Although not binding on this Court, the Kansas court's decision (in a case that challenges the same Rule as here) is persuasive.

IV. No Party Will Face Prejudice from the Filing of Better Markets' Brief

The defendants and plaintiffs have consented to this motion. The filing of a brief *amicus curiae* seven days after the principal brief of the party supported by the *amicus* is the timing prescribed by Rule 29 of the Federal Rules of Appellate Procedure. This schedule permits an *amicus* one week to evaluate the party's brief with an eye toward reducing redundancies and lightening the burden on the Court without unduly delaying. This established timeline inflicts no prejudice.

V. Better Markets' Brief Is Timely and Conforms with Applicable Requirements

The brief is timely, filed only seven days after the defendants' brief. The brief also conforms with the applicable requirements of this Court: Its body runs fewer than 25 pages of typewritten, legible font. *See* N.D. Tex. Rule 7.2(a)–(c).

For all these reasons, this Court is respectfully urged to grant the motion for leave to file.

DATED: August 26, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I filed and served the foregoing Memorandum of Law in Support of Motion for Leave to File a Brief *Amicus Curiae* with the Clerk of the Court by causing a copy to be electronically filed via the CM/ECF system. In accordance with Rule 5.1(d) of the Local Civil Rules of Practice of the United States District Court for the Northern District of Texas, electronically filing a document operates to effect service of the document on all counsel who have consented to electronic service, as all counsel have in this case.

DATED: August 26, 2016

/s/ Braden W. Sparks
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