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WLF Combats Free Speech Burdens Produced by Drastic Dept. of Labor Rule Change

(Chamber of Commerce, et al. v. Department of Labor)

“Rather than increasing access to investment education and expanding consumer choice, the Fiduciary Rule will make it more difficult for America’s workers and retirees to receive quality advice about their investment options. This chilling effect comes at the expense of the First Amendment.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—In an effort to combat unprecedented burdens on commercial speech, Washington Legal Foundation filed an *amicus* brief today in a Fifth Circuit case that challenges the Fiduciary Rule. The brief was submitted in support of the Appellants in *Chamber of Commerce, et al. v. Department of Labor* urging reversal of the District Court’s decision.

This case arises from the Department of Labor’s attempt to impose new burdens on speech around the sale of retirement products. DOL created these burdens in April 2016 through a collection of related final rules referred to collectively as the “Fiduciary Rule.” The Appellants seek declaratory and injunctive relief from these burdens for life insurance companies, agents, and brokers so that they may continue to serve retirement savers in full capacity.

As WLF’s brief explains, the Rule distorts the meaning of “investment advice” and abandons 40 years of statutory interpretation and common law understanding. DOL has unduly expanded the definition of a “recommendation” so that a “fiduciary” is anyone who participates in communication that “would reasonably be viewed as a suggestion” to “engage in or refrain from taking a particular course of action.”

WLF’s brief focuses on DOL’s violation of the First Amendment by creating a rule that discriminates against speech based on its content and the identity of the speaker. A content-based restriction on speech must meet strict scrutiny, and WLF argues that the Rule fails this test.

The District Court circumvented proper application of strict scrutiny by holding that the Appellants waived any First Amendment claims because they did not raise these issues during the rulemaking process. WLF’s brief argues that this harsh approach has been rejected in the past by both the Fifth Circuit and the U.S. Supreme Court.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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