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

STATE OF UTAH ET AL.,

Plaintiffs,

v.

JULIE A. SU* and
UNITED STATES DEPARTMENT OF LABOR,

Defendants.

NO. 2:23-CV-00016-Z

PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* Plaintiffs have substituted the name of the Acting Secretary of Labor as a Defendant in accordance with Fed. R. Civ. P. 25(d).

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Plaintiffs demonstrated in their Motion for Preliminary Injunction and Reply, Dkts.39, 85, that the 2022 Rule[1] is contrary to law and arbitrary and capricious under 5 U.S.C. § 706(2)(A), (C). Their Motion for Summary Judgment, Dkt.92, showed that the administrative record does not change that result. DOL responds that the 2022 Rule is merely a clarification prompted by concerns about chilling ESG investments. This ignores that the 2020 rules[2] did not prohibit ESG considerations relevant to a financial analysis, while the 2022 Rule improperly permits nonpecuniary factors and eliminates protections for participants at every turn. It is an attempted end run around ERISA's strict fiduciary requirements and *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

I. THE 2022 RULE IS ARBITRARY AND CAPRICIOUS

A. DOL Did Not Rebut Its Prior Finding That Strict Regulations Are Necessary

DOL did not rebut its prior finding that strict regulations are necessary to protect participants from a lack of rigor related to ESG. Dkt.92 at 2-4. DOL responds that *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), does not always require an agency to provide a "more detailed justification." Dkt.95 at 3 n.2. But the next sentence in *Fox* says, "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy." 556 U.S. at 515. That is the situation here, and DOL was required to provide "a reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy," *id.* at 516, specifically its prior finding of "shortcomings in the rigor ... by some participating in the ESG investment marketplace." Dkt.85 at 9. The 2022 Rule focuses on aiding *fiduciaries* and ignores protecting participants, thereby arbitrarily and capriciously contradicting the 2020 rules' findings.

DOL contends that the 2020 rules required clarification because they "chilled" consideration of climate change and other ESG factors "even in cases where it is in the financial interest of plans to

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[1] "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," 87 F.R. 73822 (Dec. 1, 2022).

[2] Financial Factors in Selecting Plan Investments, 85 F.R. 72846 (Nov. 13, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 F.R. 81658 (Dec. 16, 2020).

take such considerations into account." Dkt.95 at 3. But DOL acknowledged that the 2020 rules allowed fiduciaries to account for ESG factors related to financial returns, thus directly undermining DOL's asserted justification. 87 F.R. at 73877. DOL also argues that Plaintiffs were not sufficiently specific in the alternatives DOL failed to consider. *See* Dkt.95 at 4. Plaintiffs' alternative is maintaining the reasonable protections of participants and issuing sub-regulatory guidance. *See, e.g.*, *infra* page 5.

B. The Alleged Justification for the 2022 Rule Is Inadequate

The record fails to demonstrate in a concrete manner how a generalized "chill" or "confusion" risked reducing financial returns for participants—the sole focus of ERISA. Dkt.92 at 4-6. DOL also never plausibly explained how the 2020 rules created a "chill" distinct from ERISA and *Dudenhoeffer*'s strict requirement to focus on financial returns. *Id.*; *see also* Dkt.39 at 29; Dkt.85 at 11. And even if the concern over "chill" or "confusion" could justify some additional rulemaking or guidance, nothing in the record supports the conclusion that these concerns empower DOL to facilitate consideration of collateral (*i.e.*, nonpecuniary) factors and eliminate reasonable protections for participants.

DOL's asserted chilling effect is nothing more than a conclusory statement that rests on similarly generic and unsupported assertions offered by a handful of commenters, several of whom are not fiduciaries or are unaffiliated with plan sponsors and fiduciaries. *See Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1137-38 (5th Cir. 2021) (unsupported conclusory statements are indicative of arbitrary and capricious action). In fact, the limited data DOL does cite indicates that ESG investing in ERISA plans *increased* in recent years, and that "[b]ased on current trends, [DOL] believes that the use of ESG factors by ERISA plan fiduciaries will likely increase in the future." 87 F.R. at 73878. This undercuts the chilling-effect claim. DOL thus lacked the substantial evidence required to demonstrate agency rulemaking is not arbitrary and capricious, particularly when replacing a prior rule that even DOL admits did not prohibit ESG investing. *See Lincoln v. Vigil*, 508 U.S. 182, 198 (1993) (substantial evidence applies to rulemaking); *NFIB v. Perez*, No. 5:16-cv-00066-C, 2016 WL

3766121, at *29 ¶¶73-74 (N.D. Tex. June 27, 2016) (agency must examine relevant data).[3]

Equally telling is the admission of a DOL official that the rulemaking's aim was "to craft rules that better recognize the important role that [ESG] integration can play in the evaluation and management of investments." Dkt.92 at 10 (quoting AR0010151). In other words, the purpose was to open the door to ESG "integration," which conflicts with ERISA and *Dudenhoeffer*'s strict focus on financial returns, and to obfuscate these activities from participants. DOL adds that it "careful[ly] consider[ed]" *Dudenhoeffer*, Dkt.95 at 5 n.3 (citing 87 F.R. at 73834), but the conclusions it drew are implausible. DOL argued that including a "pecuniary/nonpecuniary distinction … undermin[ed] the fundamental principle [that] fiduciaries must protect the financial benefits of plan participants." 87 F.R. at 73834, which seems painfully unaware that "nonpecuniary" comes directly from *Dudenhoeffer*.

C. The 2022 Rule Is Unreasonable, Internally Inconsistent, and Relies on Impermissible Considerations

Plaintiffs have also demonstrated that many of the 2022 Rule's provisions are unreasonable, internally inconsistent, fail to consider relevant factors, and rely on impermissible considerations. Dkt.92 at 7; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). The 2022 Rule expressly allows consideration of collateral (i.e., nonpecuniary) factors by fiduciaries in both investing and proxy voting, which is contrary to ERISA and *Dudenhoeffer*. *See* Dkt.39 at 31-33. The administrative record does not change this because there are no permissible factors DOL can consider to adopt provisions that contravene ERISA. On the "tiebreaker," DOL contends that it simply reverted to the "traditional tiebreaker," Dkt.95 at 6, but that is wrong, *see* Dkt.39 at 24; Dkt.85 at 6. Moreover, the only time DOL considered *Dudenhoeffer* was when it adopted the narrow tiebreaker in the 2020 rules. Dkt.85 at 6. Any prior tiebreaker lacked that guidance from the Supreme Court. And on proxy voting, 29 C.F.R. § 2550.404a-1(c)(2)(ii)(C) (2021) prohibited "promot[ing] non-pecuniary

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[3] DOL even cites a comment, Dkt.95 at 5 (citing AR0009676), recognizing that the 2020 rulemaking "heard the criticisms of the rule as originally proposed and responded accordingly in the final rule. The [2020] final rule is neutral as between investment strategies and drops any mention of ESG."

benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries." *See* Dkt.92 at 8. The 2022 Rule removed that correct statement of law, loosening fiduciary restrictions and relying on generic articulations of duty that DOL has acknowledged as inadequate. *See* Dkt.95 at 6-7.

Importantly, Plaintiffs also demonstrated that removing documentation requirements for fiduciaries follows DOL's pattern of transferring the "burdens" on ERISA fiduciaries to participants. Dkt.92 at 8. DOL's citations to the record do not provide any explanation of how simply writing down the reason a fiduciary is acting is "burdensome." And logically, it is not.

Finally, removing requirements for QDIAs in the 2022 rules was arbitrary and capricious because, unlike other investments, participants do not opt into QDIAs and may well be concerned about plans that pursue collateral objectives. *Id.* Even if self-interested commenters supported this (due to the possibility of higher fees), DOL failed to adequately consider participants.

D. The 2022 Rule Is Arbitrary and Capricious on Additional Grounds

The 2022 Rule eliminated a provision from the NPRM that would have required fiduciaries to disclose information related to pursuing collateral benefits. *Id.* at 8-9. Eliminating this commonsense requirement follows the pattern of removing oversight mechanisms and failing to protect participants that pervades the rulemaking. DOL responds with arguments that it did not specify in the rulemaking, *cf.* Dkt.39 at 35-36, then claims counterarguments rest on "supposition that fiduciaries will violate their duties," *see* Dkt.95 at 7-8. But the NPRM conceded that at least some fiduciaries are engaging in impermissible collateral factor ESG investing, thus breaching their fiduciary duty. 86 F.R. 57272, 57285 (Oct. 14, 2021). Such a concession demonstrates the need for disclosure to protect participants and contradicts DOL's implausible conclusion that this results in too much disclosure. Nor does DOL even attempt to explain why collateral considerations are appropriate for fiduciaries but not participants. *See* Dkt.85 at 15. Ironically, DOL further justifies its decision with the emphatic assertion that "fiduciaries are *required to* focus solely on financial returns under ERISA and the Rule," Dkt.95 at

8, which directly conflicts with allowing collateral considerations, not to mention hiding them.

DOL also failed to adequately consider the alternative of issuing sub-regulatory guidance. Dkt.92 at 9-10. As to the overall chilling effect, sub-regulatory guidance could have cleared up any confusion because, as all parties admit, the 2020 rules did not prohibit consideration of ESG factors that related to financial returns. Assuming DOL's other reasons (eliminating the QDIA provision and documentation requirements) were proper, Dkt.95 at 8, it could have issued a much narrower rule.

II. The Court Should Vacate the 2022 Rule and Declare It Unlawful in Its Entirety

The 2022 Rule violates 5 U.S.C. § 706(2)(A), (C), and the proper remedy is the "default rule" of vacatur under § 706(2). *See* Dkt.92 at 10 (quoting *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc)); *Chamber of Com. of U.S. v. Dep't of Lab.*, 885 F.3d 360, 368, 388 (5th Cir. 2018). A citation to the government's own briefing in another case, *see* Dkt.95 at 9, cannot defeat binding precedent.[4]

Plaintiffs also meet the requirements for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a); 5 U.S.C. § 703. DOL says relief should be limited to Plaintiffs with standing. *See* Dkt.95 at 10. Private and State Plaintiffs have provided unrebutted evidence of their standing. Dkt.85 at 1-3. While the Court need not reach this standing issue to declare the 2022 Rule unlawful, it can nonetheless resolve it under Rule 65(a)(2) based on the evidence in the preliminary injunction briefing.

Finally, DOL argues that only the portions of the 2022 Rule found invalid should be set aside. *See* Dkt.95 at 9. But the unlawful portions of the 2022 Rule pervade it, the underlying justification is arbitrary and capricious, and its entire purpose was to free fiduciaries from protections for ERISA participants contained in the 2020 rules. *See supra* Part I; *see also Chamber of Com.*, 885 F.3d at 388 (vacating rule "in toto"). Severance is therefore inappropriate. DOL's cited case involved a challenge only to "two discrete parts of [a] rule." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1004 (5th Cir. 2019).

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[4] DOL's citation to *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021), is also unpersuasive. *See* Dkt.95 at 10. That case involved an injunction, not vacatur under § 706(2). Nationwide relief is also the only way to provide adequate relief here. *See* Dkt.39 at 12, 16, 39; Dkt.85 at 20.

Dated June 9, 2023.

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I certify that on June 9, 2023, the undersigned counsel used the CM/ECF system to file this motion with the Clerk of the Court for the United States District Court for the Northern District of Texas. The attorneys in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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