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To be argued by:
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Court of Appeals of the State of New York

In the Matter of the Application of

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., et al.,

Petitioners-Respondents,

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, et al.,

Respondents-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

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PRELIMINARY STATEMENT

As established in our opening brief, the Third Department erred in finding the Amendment unconstitutionally vague. Petitioners' arguments in defense of that ruling are meritless. While petitioners ask rhetorical questions about the meaning of the rule in an attempt to demonstrate its vagueness, many of those questions find answers in the text of the Amendment itself. One of their central arguments, for example, is that the Amendment sets forth a best-interest standard, but does not specify *whose* best interest is to be considered. (*E.g.*, Br. at 8, 19.) Not so. The Amendment requires a producer to act in the consumer's best interest in making a recommendation, and defines "consumer," in turn, as "the owner or prospective purchaser of a policy." 11 N.Y.C.R.R. § 224.3(a). Many of petitioners' other vagueness arguments are readily resolved by the Amendment's plain text.

The alternative grounds that petitioners assert for invalidating the Amendment fare no better. First, the Amendment does not cross the line into improper legislative policymaking. Instead, the Amendment is a valid act of administrative rulemaking under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), because the Legislature has set the key policy of ensuring high standards of producer conduct, and has delegated comprehensive authority to DFS to fill in the details of that policy. In relying on its technical expertise to select a standard for producer conduct that appropriately protects consumers of life insurance, DFS duly exercised authority delegated to it by the Legislature.

Second, the Amendment has a rational basis and is not contrary to law. Petitioners' argument mistakenly assumes that the Amendment imposes on producers a continuing duty to counsel clients—akin to a lawyer's professional duty—that conflicts with the common law. But the duty that the Amendment imposes is a discrete one that attaches only to a producer's act of recommending a transaction to a consumer; the duty ends once the recommendation has been made. While the Amendment does impose obligations on producers beyond the minimum prescribed by the common law, those additional obligations permissibly supplement the common-law baseline.

Finally, DFS complied with the State Administrative Procedure Act in promulgating the Amendment. It provided its best estimate of the Amendment's projected costs, explained why the rule exceeded minimum standards set by the federal government, and explained the rule's impact on small businesses. Petitioners' remaining arguments are unpreserved and meritless in any event. There are thus no grounds on which to invalidate the Amendment and the Third Department's judgment should be reversed.

ARGUMENT

POINT I

THE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

As explained in DFS's opening brief (at 35-55), the Amendment's key terms are sufficiently definite and provide clear standards for enforcement. Petitioners' arguments to the contrary are based on misinterpretations of the Amendment, and their concerns are baseless.

A. The Amendment expressly states whose "best interest" must be considered.

Petitioners' insistence that "[n]othing in the wording of the Regulation makes it clear whose best interest is at issue" (Br. at 19) is belied by the plain text of the Amendment. As DFS pointed out when petitioners made the same argument below,[1] the Amendment defines a

[1] *See* Pet. App. Div. Br. at 55; DFS App. Div. Br. at 58-59.

"consumer" to mean "the owner or prospective purchaser of a policy." 11 N.Y.C.R.R. § 224.3(a). Thus, when the Amendment requires producers to act "in the best interest of the consumer," *id.* §§ 224.4(a), 224.5(a), it clearly specifies that producers are to act in the best interest of the owner or prospective purchaser of the policy.

Further, as DFS guidance has confirmed, the best interest of the owner or prospective purchaser of the life-insurance or annuity policy controls over the best interest of the insured (if a different person), and also over the best interest of the beneficiary, to the extent those interests diverge from one another. *See* N.Y. Dept. of Fin. Servs., *Life Bureau Guidance Note*, (Feb. 12, 2020), available at https://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq (answer to question #9). While the needs of the beneficiary should be considered to the extent that they are "relevant to furthering the needs or goals of the owner," the beneficiary's needs do not supersede the owner's. *Id.*

Given the Amendment's clear definition in this respect, fact patterns such as that presented in *Vestal v. Pontillo*, 183 A.D.3d 1146 (3d Dep't 2020), *lv. denied*, 36 N.Y.3d 907 (2021), on which petitioners rely (Br. at 7-8, 19), do not establish any ambiguity in the Amendment. In

Vestal, the plaintiff's husband purchased a life-insurance policy but died of alcohol consumption before the policy's two-year contestability period had expired.[2] *Id.* at 1147. The insurer denied the claim for benefits filed by the plaintiff (the policy's beneficiary), finding that her husband had materially misrepresented his history of substance abuse on his application. *Id.* The plaintiff sued the producer, asserting that the producer had breached a common-law duty owed to her, because the producer allegedly knew of her husband's substance-abuse issues but failed to inform the plaintiff that they precluded her husband from satisfying the policy's underwriting guidelines. *Id.* at 1150.

The Third Department rejected the claim that the producer had any duty to a non-client, such as the plaintiff, who neither purchased the policy nor was in privity with the producer in any way. *Id.* The court thus affirmed summary judgment in favor of the producer.

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[2] Per Insurance Law § 3203(a)(3), life-insurance policies delivered in New York generally may not be contested by the insurer during the life of the insured, except during the first two years from the issuance of the policy. During that two-year period, the insurer may deny claims made under the policy if it determines that a material misrepresentation was made in the application.

Contrary to petitioners' suggestion (Br. at 8), *Vestal* would not have come out differently had the producer's conduct been analyzed under the Amendment instead of the common law, for several reasons.

First, because the Amendment specifies that the purchaser's best interest controls, nothing in the Amendment would have required the producer to prioritize the best interest of the wife (a non-purchaser) over that of the husband, to the extent their interests differed from one another.

Second, if the husband and wife did have divergent interests, the producer would not have been liable under the Amendment for recommending a product that served the husband's interest at the expense of the wife's, assuming that the producer properly gathered and analyzed all of the husband's relevant suitability information. *See* 11 N.Y.C.R.R. § 224.3(g). And in any case, the producer would remain free under the Amendment to sell the husband a product other than the one recommended if that is what the husband wanted. *See id*. § 224.4(f)(4).

Finally, nothing in the Amendment would make the producer liable for recommending a product to the husband that, according to the information provided, was suitable and served his best interest, even if it later turned out that the husband had lied. Petitioners' claim that, on these facts, the producer's liability would be "almost guaranteed" (Br. at 9), is therefore meritless.

B. The term "best interest" is sufficiently definite.

Contrary to petitioners' argument that the term "best interest" is unduly "nebulous" (Br. at 23), the Amendment fleshes out the well-known "best interest" standard—which appears in diverse areas of the law[3]—and tailors it to the particular context of life insurance. As discussed above, the Amendment specifies whose particular interests must be considered, 11 N.Y.C.R.R. § 224.3(a); it also provides guidance to producers as to the specific steps they must take in order to discharge the duty to act in the consumer's best interest, *id.* §§ 224.4(b), 224.5(b).

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[3] *See, e.g.*, Fam. Ct. Act § 631 (in adjudicating custody disputes, court is to determine custody of child "solely on the basis of the best interests of the child"; Rural Elec. Coop. Law § 25(a) (permitting indemnification of director or officer only if she acted in "the best interests of the cooperative"); 11 N.Y.C.R.R. § 152.4(b) (requiring insurance merit-rating plans to serve "the best interests of the people of this State"); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (citing "best interests" as example of "familiar" legal standard that properly constrains discretion despite its open-endedness); *Chamber of Commerce of the United States of America v. Hugler*, 231 F. Supp. 3d 152, 195 (N.D. Tex. 2017), *rev'd on other grounds*, 885 F.3d 360 (5th Cir. 2018) (rejecting vagueness challenge to "best interest" standard in federal Department of Labor rule and discussing standard's common-law roots).

In particular, to fulfill the duty, a producer must (i) collect and evaluate the consumer's suitability information, (ii) confirm that any recommended transaction is indeed suitable for the consumer, (iii) ensure that there is a reasonable basis to believe that the consumer will benefit from the recommended policy's features, (iv) document and disclose to the consumer the basis for the recommendation made, (v) refrain from considering the producer's own potential gain from a given transaction, and (vi) all the while employ "the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing." *Id.* § 224.4. This guidance gives producers ample notice of how to satisfy the "best interest" standard. *Cf. Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (rejecting vagueness challenge to Navy regulation that specified factors to consider in determining whether continued certification of training officer was in "best interests of the program"). Further, because compliance with the standard is based on the prevailing circumstances at the time of the recommendation, 11 N.Y.C.R.R. § 224.3(b)(1), petitioners are mistaken that the best-interest standard requires "clairvoyance" on the part of the producer.[4] (Br. at 54; *see also* Br. at 7 [arguing that Amendment "make[s] the producer a guarantor of every possible outcome for decades to come"].)

Petitioners further distort the Amendment's requirements when they argue that the term "best interest" is vague because it is "impossible" to locate "the single ideal policy" for a consumer, or to determine "how much life insurance is in a person's 'best interest.'" (Br. at 24, 29.) As explained in DFS's opening brief (at 23), the "best interest" standard does not assume that there is a single "best" product for any given consumer, or that there is a "correct" amount of coverage for that person. Instead, the Amendment gives producers a simple mandate: act in the consumer's best interest, not your own.

C. The definition of "recommendation" is sufficiently definite.

As explained in DFS's opening brief (at 38-39), a communication is a "recommendation" if one of two conditions is met: either the producer

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[4] *See also* 11 N.Y.C.R.R. § 224.3(g)(1) (defining "suitability information" as information that is "reasonably appropriate to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation *at the time of the recommendation* and the complexity of the transaction recommended") (emphasis added).

intends to induce the consumer to enter into in a transaction (the subjective prong) or the communication is reasonably viewed as being made with that intent (the objective prong).[5] Both are sufficiently definite.

1. The objective definition of "recommendation is sufficiently definite.

The modifier "reasonably" in the definition of "recommendation" under § 224.3(e)(1)—that which "reasonably may be interpreted by a consumer to be advice"—sets forth an objective standard that prevents arbitrary enforcement. This Court has so held in multiple cases. (*See* Opening Br. at 41-42.)

Without addressing any of those cases, petitioners first advance an argument that is directly at odds with the cases' holdings: that the word "reasonably" extends the definition of "recommendation" to a consumer's "subjective interpretation" of a producer's statement and allows for

[5] The complete definition is: "one or more statements or acts by a producer, or by an insurer where no producer is involved, to a consumer that (1) reasonably may be interpreted by a consumer to be advice and that results in a consumer entering into or refraining from entering into a transaction in accordance with that advice; or (2) is intended by the producer, or an insurer where no producer is involved, to result in a consumer entering into or refraining from entering into a transaction." 11 N.Y.C.R.R. § 224.3(e)(1).

standardless enforcement. (Br. at 21-22.) But that argument cannot be squared with this Court's holding in *People v. Stephens*, 28 N.Y.3d 307 (2016), as just one example. There, the Court held that an ordinance that prohibited playing music in a manner that would disturb "a reasonable person of normal sensibilities" provided an "objective standard [that] afford[ed] police sufficiently 'clear standards for enforcement.'" *Id.* at 315 (quoting *People v. Stuart*, 100 N.Y.2d 412, 420 [2003]). Petitioners provide no basis on which to distinguish *Stephens*.

Petitioners instead rely on *Suter v. Artist M.*, 503 U.S. 347, 359-60 (1992) (Br. at 21), a case that held only that there was no private right of action to enforce a federal statute requiring States to maintain a plan for using "reasonable efforts" to prevent the removal of children from their homes before placing them in foster care. No party argued that the term "reasonable efforts" was unconstitutionally vague, or that it set forth an improperly subjective standard.

Petitioners argue that an improperly subjective standard is at issue here because defining the term through the eyes of a reasonable consumer somehow amounts to an expansion of the producer's substantive duty to the consumer beyond what is required under either the common law or federal law. (Br. at 17, 21.) But even assuming that the Amendment does expand producers' duties (an argument addressed more fully in Point III below), it does not follow that a person of ordinary intelligence would not know, after reading the Amendment's definition of "recommendation," when those duties have been triggered.

Second, petitioners argue (Br. at 18) that no one of ordinary intelligence can understand which specific pieces of information constitute "recommendations" based on the definition of the term. That is demonstrably false, as is evident from the very next sentence of their brief, in which petitioners provide an example of a piece of information (a quote)[6] that would satisfy the definition. (Br. at 18.) Petitioners, then, plainly understand the definition; they just think that it is overbroad. But, as explained in DFS's opening brief (at 43-45), the concepts of vagueness and overbreadth are not interchangeable, and petitioners have never claimed that the Amendment chills a substantial amount of

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[6] As DFS clarified in its guidance, an individualized quote generally meets the definition of a "recommendation." N.Y. Dept. of Fin. Servs., *Life Bureau Guidance Note*, (Feb. 12, 2020), available at https://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq (answer to question #13). However, the definition may not be satisfied where a producer simply obtains a quote for a consumer in response to a consumer-initiated request for a specific policy. *Id.*

protected speech, as would be necessary to establish the Amendment's overbreadth.

Third, it is irrelevant that producers cannot solicit administrative guidance concerning each and every statement that they make to consumers on whether they constitute recommendations. (Br. at 28.) Due process does not require an enforcement official to supervise the work of a regulated party on a day-to-day basis. It is undisputed that regulated parties have the ability to solicit guidance in advance (*see* Opening Br. at 9-10, 54), which alleviates any vagueness concerns, *see Vil. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Finally, to the extent that statutes such as the Vehicle and Traffic Law ("VTL") have any relevance to this case (*see* Br. at 4), they support DFS, not petitioners. While the VTL does contain a number of bright-line rules, it also contains open-ended standards. For example, VTL § 1212 prohibits "reckless driving," which is statutorily defined as driving in a manner that "unreasonably interferes with the free and proper use of the public highway." In *People v. Grogan*, 260 N.Y. 138 (1932), this Court addressed a prior version of the statute, which defined the term by reference to "unnecessary"—rather than "unreasonable"— interference.

The Court held that, to save the statute's constitutionality, it would read the word "unnecessary" to instead mean "unreasonable." *Id.* at 149. Making that one-word substitution ensured that the statute was not "too vague and indefinite for enforcement." *Id.*

Thus, contrary to petitioners' argument (Br. at 21), the "mere use" of the term "reasonable" *can* make the difference between an unconstitutionally vague and sufficiently definite regulation. Here, the inclusion of the word "reasonably" in the definition of "recommendation" (that which "reasonably may be interpreted by a consumer to be advice") ensures that producers are not at the whim of irrational customers and appropriately limits producers' liability.

2. The subjective definition of "recommendation" is sufficiently definite.

As explained in DFS's opening brief (at 39-40), the subjective definition of "recommendation" set forth in 11 N.Y.C.R.R. § 224.3(e)(2) is also sufficiently definite, and petitioners do not argue otherwise. In fact, petitioners do not address that definition at all. While they correctly note that the intent of the producer is "irrelevant" in determining whether a statement is a "recommendation" under the objective definition (Br. at

26), they overlook the relevance of the producer's intent in determining whether the alternative subjective definition has been satisfied. That definition provides that a statement or act is a recommendation if it "is *intended by the producer*, or an insurer where no producer is involved, to result in a consumer entering into or refraining from entering into a transaction"—either a new purchase or an in-force transaction. *Id.* § 224.3(e)(2) (emphasis added).

Petitioners misunderstand DFS's argument on this point. As DFS explained in its opening brief (at 39-40), the subjective definition ensures that a producer who actually intends to induce a consumer to enter into a transaction is subject to the Amendment, however his actions are objectively viewed; such a producer cannot claim to be unaware that he is recommending a product. Accordingly, the intent requirement of the subjective definition ensures that producers will not be penalized for unknowing conduct under that definition. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 499 (scienter requirement ensures "adequacy of notice to the complainant that his conduct is proscribed"). The fact that what producers must intend to do is "noncriminal" (Br. at 26) is not germane one way or the other.

D. The term "suitability information" is sufficiently definite.

Petitioners are incorrect that the definition of "suitability information" is improperly "amorphous and subjective." (Br. at 20). *See* 11 N.Y.C.R.R. § 224.3(g).

To be sure, some elements of "suitability information" require producers to solicit subjective information from consumers, such as the consumer's peculiar risk tolerance and financial objectives. But the definition lacks the particular subjectivity problem that has doomed other regulations, which arises when the determination of whether a particular requirement has been satisfied lies in the eye of the beholder—and the regulation does not say whose eye controls. For example, in *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371 (1982), this Court struck down a noise ordinance that defined "unnecessary noise" according to a subjective standard that did not specify "whose point of view" would be dispositive. *Id.* at 375, 381. The question thus arose: unnecessary noise according to who? Here, by contrast, there is no such problem because the person who matters is undisputedly the particular consumer for whom a producer is recommending a product. And while the question, "What are your financial objectives?" certainly calls for a subjective answer, it does not follow that the term "financial objective" is itself impermissibly subjective, or that a producer who duly asked that question would not know whether he satisfied the Amendment.

Further, petitioners do not explain why it is "impossib[le]" for producers to provide consumers with summaries of relevant suitability considerations informing a particular recommendation, as required under 11 N.Y.C.R.R. § 224.4(f)(1). (Br. at 24.) In any case, petitioners' opinion that compliance with the requirement could prove time-consuming does not establish its vagueness.

Finally, petitioners again miss the point when they argue that the Amendment "runs afoul" of the NAIC model rule. (Br. at 22.) DFS does not cite the model rule as a yardstick by which to measure the validity of the Amendment, but rather to show that the Amendment's definition of "suitability information" has been adopted in nearly identical form by the NAIC and by at least 24 States (including four more since DFS's opening brief was filed).[7] The widespread inclusion of the definition in other States' enactments is evidence that the language has a "common

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[7] *See* Md. Code Regs. § 31.09.12.03(B)(10); N.M. Code R. § 13.9.20.7(D); S.D. Codified Laws § 58-33A-17; Wis. Stat. Ann. § 628.347(1)(e).

understanding" and is not vague. *Ulster Home Care, Inc. v. Vacco*, 96 N.Y.2d 505, 510 (2001).

In sum, nothing in the Amendment is unconstitutionally vague. This Court should reject that challenge and reverse.

POINT II

THE AMENDMENT IS A LAWFUL EXERCISE OF DFS'S RULEMAKING AUTHORITY

Although the issue was not reached by the Third Department, petitioners assert, as an alternative basis to affirm, that DFS exceeded its authority in promulgating the Amendment. (Br. at 29-37.) Contrary to petitioners' argument, however, the Amendment represents a valid exercise of DFS's comprehensive authority to regulate New York's insurance industry and comfortably passes the test set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987).

That test for whether an agency engaged in permissible interstitial rulemaking, or instead impermissible legislative policymaking, asks whether the agency (i) "used its expertise and understanding" to achieve a legislative objective, or whether it instead made a "value judgment" reflecting "complex policy decisions" beyond its mandate; (ii) filled in the details of a broad policy goal set by the Legislature, or whether it instead wrote on a "clean slate"; (iii) acted on an issue that has not been the topic of substantial public debate, or whether it instead took upon itself to regulate matters on which the Legislature already tried, and failed, to set policy; and (iv) relied on its special competence and expertise in the field, or whether it instead did not. *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 261, 264-67 (2018).

The *Boreali* analysis is discussed in detail below, but it boils down to just a few key points. The Legislature has declared that it is the policy of the State to ensure that when consumers buy insurance, they do so from competent and trustworthy salespeople who engage in honest and fair business practices. To that end, the Legislature has expressly delegated to DFS general authority to supervise "persons providing[ ] financial products and services," Fin. Servs. Law § 201(a), as well as specific authority to establish "professional standards of conduct" for insurance producers, Ins. Law § 2104(a)(2). The Amendment's best-interest rule—which reflects the agency's special competence and expertise in the field of insurance—is just such a standard, one that has not been the subject of failed legislative efforts.

In keeping with this Court's observation that the *Boreali* factors are "overlapping" and "closely related," *Matter of LeadingAge New York*, 32 N.Y.3d at 261, the discussion below addresses the factors in the order most relevant to this case.

A. The Legislature has established a policy of ensuring high standards of conduct for insurance producers, and has delegated broad authority to DFS to fill in the details of that policy.

One important *Boreali* factor (commonly known as the second factor) looks to whether the agency has permissibly filled in the details of a legislative policy goal, or whether it has instead written on a clean slate. *See Boreali*, 71 N.Y.2d at 13. Here, the Legislature has made the key policy decision of ensuring the transparency, competence, and trustworthiness of insurance producers in their interactions with consumers. And the Legislature has delegated to DFS broad authority to address that policy. The Amendment thus constitutes a permissible exercise of DFS's authority to fill in the policy's details.

In a section of the Financial Services Law titled "Declaration of policy," the Legislature has made clear its goal of protecting consumers by ensuring producers' high standards of conduct. *See* Fin. Servs. Law

§ 201(b). In that section, the Legislature has stated its objectives of, among other things, (i) ensuring the "prudent conduct of the providers of financial products and services," (ii) "encourag[ing] high standards of honesty, transparency, fair business practices and public responsibility," and (iii) "eliminat[ing] financial fraud, other criminal abuse and unethical conduct in the industry." *Id.*

The legislative concern with producers' ethical standards is evident throughout the Insurance Law as well. For example, the Legislature has declared that it is against the law for producers to misrepresent the terms of a life-insurance policy or annuity contract. *See* Ins. Law § 2123(a)(1). The Legislature has barred producers from engaging in other unfair or deceptive acts or practices. *See id.* § 2403. And the Legislature has specified that a producer's professional license may be revoked if he engages in "dishonest practices" or demonstrates "incompetence" or "untrustworthiness." *Id.* § 2110(a). (*See also* Opening Br. at 5-8 [discussing statutory scheme].)

Not only has the Legislature clearly articulated its policy goal, but it has also delegated "broad power" to DFS to achieve it, *Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 863 (2003)—a factor that is "[o]f critical relevance" to the *Boreali* analysis. *Matter of LeadingAge New York*, 32 N.Y.3d at 262; *see also Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 613 (2018) (considering "delegat[ion] [of] significant power" to agency in the second prong of *Boreali* analysis). The Legislature has specifically directed DFS to "supervise the business of, and the persons providing, financial products and services," Fin. Servs. Law § 201(a), and has instructed the agency to take "such actions as the superintendent believes necessary" to achieve the policy goals mentioned above, *id.* § 201(b); *see also id.* § 202(a) (setting forth powers of superintendent); *id.* § 301 (same). The Legislature has also put DFS in charge of producer licensure, which entails "maintaining professional standards of conduct." Ins. Law § 2104; *see also id.* § 2103. And the Legislature has authorized DFS to interpret substantive provisions of the Financial Services and Insurance Laws, *see* Fin. Servs. Law § 302(a)(2); Ins. Law § 301(c), including to define new unfair or deceptive acts or practices, *see* Ins. Law § 2402(c).

In promulgating the Amendment, DFS has "merely fill[ed] in details" of the Legislature's policy of ensuring high standards of producer conduct. *Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks,* *Recreation & Historic Preserv.*, 27 N.Y.3d 174, 183 (2016) (rejecting *Boreali* challenge). Whereas the Insurance Law directs that producers are to be honest, competent, and trustworthy, the Amendment gives content to those requirements in the specific context of recommending a life-insurance or annuity transaction. And where a producer is considering multiple suitable products to recommend to a consumer, the Amendment directs that a competent and trustworthy selection will be one that furthers the consumer's best interest rather than the producer's. (*See* A. 303 [explaining that Amendment "clarif[ies] the conduct that is expected of producers"]). And the Amendment provides that a violation constitutes an unfair or deceptive act or practice under Insurance Law § 2402(c). *See* 11 N.Y.C.R.R. § 224.8.

Petitioners' argument on this point is not persuasive. As an initial matter, they attack the best-interest standard as lacking statutory authority (Br. at 32), despite having previously admitted that DFS had "ample authority" to promulgate the original version of the regulation (*e.g.*, Pet. App. Div. Br. at 19). That is effectively a concession that the regulation itself is valid interstitial rulemaking; petitioners disagree only with the precise standard of care that the Amendment adopts.

Nonetheless, petitioners claim—without citing any particular statute—that administrative promulgation of a best-interest standard is "preclude[d]" because no statutory provision "contemplates" such a standard. (Br. at 32-33.) But while neither the Financial Services Law nor the Insurance Law specifically prescribe a best-interest standard for producers, the separation-of-powers doctrine "does not require that the agency be given rigid marching orders." *Matter of LeadingAge*, 32 N.Y.3d at 260. Nor does the Legislature's decision to require a particular standard of care in discrete circumstances for life settlement brokers, Ins. Law § 7813(*l*), and directors and officers of life insurers, *id.* § 1405(c), undermine DFS's authority with respect to producers, as petitioners argue (Br. at 33-34). DFS's "general but comprehensive authority" to ensure high standards of producer conduct, described above, is more than sufficient to support the Amendment, even though the Legislature did not "specifically instruct" DFS to implement the best-interest standard "as the particular means to achieve that goal." *Matter of LeadingAge*, 32 N.Y.3d at 264. And contrary to petitioners' argument (Br. at 32-33), nothing in DFS's comprehensive authority makes its power in a given area contingent on the existence of a related federal rule.

B. The Amendment is a straightforward application of DFS's expertise to achieve the Legislature's policy goal—not a value judgment reflecting a new policy choice.

Two other *Boreali* factors (the first and fourth) ask whether the challenged regulation is the product of agency expertise: whether an agency "used its expertise and understanding" to achieve a legislative objective, or whether it instead made a "value judgment" reflecting "complex policy decisions" beyond its mandate. *Matter of LeadingAge New York*, 32 N.Y.3d at 263-64; *see Boreali*, 71 N.Y.2d at 11-14. Here, the Amendment satisfies both of those factors because it was the product of DFS's technical expertise, crafted to ensure high standards of producer conduct—an issue in the heartland of DFS's legislative mandate, as discussed above.

DFS relied on its "special competence and expertise" in the supervision of producers and investigation of consumer complaints, *State Farm. Mut. Auto. Ins. Co. v. Malella*, 4 N.Y.3d 313, 321 (2005), which "was necessary to flesh out details of the broadly stated legislative policies" discussed above, *Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 184 (quoting *Boreali*, 71 N.Y.2d at 14). Relying on this experience, DFS began formulating the Amendment when it observed several specific trends in the insurance industry, including (i) a growing complexity in life-insurance and annuity products that were increasingly being marketed to consumers as investments, rather than as insurance (A. 211-213 ¶¶ 38-44; A. 303); (ii) a compensation structure for producers' sale of life-insurance products that was creating incentives for producers to act in their own interests, rather than those of consumers (A. 213-217 ¶¶ 45-54; A. 304-305); and (iii) a high lapse rate in certain life-insurance policies, as demonstrated by independent research, suggesting that many consumers could not afford the polices they had been sold (A. 217-218 ¶¶ 55-57). Additionally, DFS was concerned about the significant number of consumer complaints it had received about producer practices (A. 218 ¶ 58-59; A. 306), and about practices uncovered during investigations into specific instances of insurer and producer misconduct (A. 218-220 ¶¶ 60-64; A. 303).

This experience, combined with its broader understanding of insurance markets and practices, informed DFS's determination that the prior regulatory framework was inadequate and that more was needed to achieve the legislative goal of consumer protection through scrupulous producer conduct. (A. 221-225 ¶¶ 66-74.) DFS therefore promulgated the heightened best-interest standard, in order to "make[ ] it clear that a producer, when recommending from among suitable products, must base the recommendation on what is in the best interest of the consumer[,] not what is most financially beneficial to the producer." (A. 306.) As the agency explained, "this goes to the heart of what it means for a producer to be competent and trustworthy"—standards of conduct established by the Legislature. (A. 306.) *See* Ins. Law § 2110(a).

In light of the extensive expertise supporting the Amendment, petitioners' assertion that DFS simply made value judgments rings hollow. (Br. at 31.) The Amendment has none of the hallmarks of value-laden policymaking, such as "categorical exemptions reflecting accommodations to special interest groups," *Rent Stabilization Assn. of N.Y. City v. Higgins*, 83 N.Y.2d 156, 170 (1993), and petitioners do not argue otherwise. Instead, their primary argument is that DFS chose to implement the Amendment in spite of its costs, which DFS "downplayed." (Br. at 31-32.) But even assuming that petitioners are right about the Amendment's costs (a point discussed more fully in Point IV below), the existence of incidental compliance costs, without more, does not show that the agency made impermissible legislative “trade-offs.” *Boreali*, 71 N.Y.2d at 12.

Petitioners are simply mistaken in arguing that DFS did not in fact rely on any expertise in promulgating the Amendment. (Br. at 36-37.) Petitioners make the puzzling claim that, because DFS does not regulate ERISA plans, securities brokers, or investment advisors, it lacks the “depth of knowledge” that “other agencies” have (Br. at 36). But DFS has ample experience in regulating insurance agents and brokers. It makes no sense to say that because DFS does not regulate parties that are beyond the Amendment’s scope, it lacks expertise concerning those that are squarely covered by the Amendment.

C. The Amendment does not concern a topic that was the subject of failed legislative effort.

Although of “limited probative value,” the third *Boreali* factor—“whether the legislature has unsuccessfully tried to reach agreement on the issue”—is also satisfied here. *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d at 224-25 (internal quotation marks omitted); *see Boreali*, 71 N.Y.2d at 13. This factor tends to weigh against a regulation only in the event of “‘repeated failures by the legislature to reach an agreement' on the [regulation's] subject matter 'in the face of substantial public debate and vigorous lobbying by a variety of interested factions.'" *Garcia*, 31 N.Y.3d at 615 (quoting *Boreali*, 71 N.Y.2d at 13).

Here, the Legislature has not considered *any* bill on the same subject as the Amendment, let alone engaged in the sort of sustained debate that would be necessary for this factor to weigh in petitioners' favor. While petitioners point (Br. at 35) to a bill called the Investment Transparency Act—which was proposed unsuccessfully in the Assembly in the 2015 and 2017 sessions, and unsuccessfully in the Senate in the 2019 session—that bill dealt only with disclosures in the provision of "investment advice," and made no mention of the sale of life insurance or annuity products by insurance producers. *See, e.g.*, 2019 N.Y. Senate Bill S2872A. And it was a disclosure-only bill: it did not obligate the professionals under its purview to act in the best interests of their customers. *See id.* In fact, it affirmatively mandated that professionals disclose that they are *not* required to act in their customers' best interests. *See id.* Thus, it did not regulate the substance of producers' recommendations to consumers, and thus did not "relate specifically" to the Amendment's subject matter. *Matter of LeadingAge New York*, 32

N.Y.3d at 265-66. In any event, the "proposed bills never cleared their respective committees, a situation hardly indicative of the 'vigorous debate' referred to in the third *Boreali* factor." *Roman Catholic Diocese of Albany v. Vullo*, 185 A.D.3d 11, 20 (3d Dep't 2020), *vacated on other grounds*, 142 S. Ct. 421 (2021) (citing *Matter of Leading Age New York*, 32 N.Y.3d at 265-66).

Not only has the Legislature not taken action on the subject of the Amendment, but it has also not taken action to repeal or otherwise modify Regulation 187 as a whole, which has been in effect in one form or another since 2010. "Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, [the Court] can infer, to some degree, that the legislature approves of the agency's interpretation or action." *Greater New York Taxi Assn. v. New York City Taxi & Limousine Commn.*, 25 N.Y.3d 600, 612 (2015). Because the Legislature has taken no action against Regulation 187, and because "[t]he bills that petitioners identify deal[ ] with other matters," *id.*, the third *Boreali* factor, like the others, favors DFS.

POINT III

THE AMENDMENT HAS A RATIONAL BASIS AND IS NOT CONTRARY TO LAW

As another alternative basis to affirm, petitioner argue that the Amendment lacks a rational basis and is inconsistent with existing law. (Br. at 44-59). However, they have shown neither that the Amendment is "so lacking in reason for its promulgation that it is essentially arbitrary," nor that it conflicts with any statutory or case law. *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 96 (1999). Accordingly, they have not carried their "heavy burden" of establishing the Amendment's irrationality. *Matter of Acevedo*, 29 N.Y.3d at 227. Nor could they do so, because the Amendment has a rational basis and is entirely consistent with existing law.

A. The Amendment has a rational basis.

As explained above and in DFS's opening brief (at 14-21), the Amendment was carefully crafted in response to DFS's investigations, examinations, and observations since 2013, which demonstrated the need for a heightened standard of care beyond the existing "suitability" standard. DFS identified consumer-protection issues arising from both the increasing complexity and variety of financial products, and the compensation structure for producers' sale of insurance products. (A. 210

¶ 37.) In the agency's judgment, these changing market dynamics resulted in "a greater need for consumers to rely on professional advice and assistance in understanding available life insurance and annuity products, making purchasing decisions, and ensuring a financial outcome in their best interest." (A. 303.) DFS also considered additional factors, such as the industry-wide lapse rate of life insurance products, and consumer complaints regarding producers' provision of conflicted advice. (A. 217-220 ¶¶ 55-64.)

These factors provide a rational basis for DFS's assessment that imposing a best-interest requirement on producers would provide "a consistent standard of care across life insurance and annuity product lines and protect[ ] consumers from conflicted recommendations." (A. 305.) That judgment "warrant[s] substantial deference." *Matter of Acevedo*, 29 N.Y.3d at 227.

Petitioners mistakenly argue that the Amendment is irrational because its costs were "unexplored" and its benefits unsupported by "empirical documentation." (Br. at 46-47.) Petitioners' contentions regarding DFS's consideration of costs simply repackage their SAPA arguments and are addressed in Point IV below. And their argument regarding benefits misguidedly relies on *New York State Assn. of Counties v. Axelrod*, 78 N.Y.2d 158 (1991), which has no application here.

In that case, the Department of Health issued a regulation implementing a fixed reduction in Medicaid reimbursement rates for nursing homes that ostensibly reflected an attendant increase in the accuracy of data that the facilities reported. *Id.* at 163. But the Court found that the empirical predicate for the rule was missing: there was no evidence that the facilities had indeed experienced the claimed increase in data accuracy. *Id.* at 167-68.

Here, by contrast, the Amendment imposes a flexible standard of care, supported by extensive qualitative observations about consumer and producer behavior. It does not impose a numerical cap or rate that demands quantitative analysis. As this Court has explained, "[a]lthough documented studies often provide support for an agency's rule making, such studies are not the *sine qua non* of a rational determination." *Matter of Consolation Nursing Home v. Commissioner of N.Y. State Dept. of Health*, 85 N.Y.2d 326, 332 (1995). Rather, an agency "may apply broader judgmental considerations based upon [its] expertise and experience." *Id.* DFS did just that here.

Further, while petitioners argue that DFS "fail[ed] to demonstrate why prior suitability rules are deficient" (Br. at 47), DFS's revised regulatory impact statement did just that: it explained why "rules are needed to prevent insurers and producers from recommending transactions that, while arguably 'suitable' because they minimally further the needs and objectives of consumers, are not otherwise in the best interest of that consumer because they are designed to maximize compensation to the sellers." (A. 303.) (*See also* Opening Br. at 24 [illustrating difference between suitability and best-interest standards in practice].) And petitioners' suggestion that DFS may not impose a rule in New York that "differs from everywhere else" (Br. at 47) is wrong: the State need not hew to a national standard in promulgating rules for its own citizens. In any event, the Amendment does not in fact substantially differ from the rules in other States—at least 24 States nationwide have now adopted similar rules. (*See* Opening Br. at 31-33.)

Petitioners' remaining objections argue in one way or another that the Amendment is unnecessary, but DFS rationally came to a different conclusion. For example:

- Petitioners argue that the life-insurance lapse rates and market complexity on which DFS relied in part are "not novel"

(Br. at 47), but DFS is not limited to “novel” considerations in making a rational determination that intervention is warranted.

- Petitioners argue that consumers already understand that a producer will earn more money for selling more expensive policies (Br. at 52-53), but DFS rationally concluded that any such understanding does not provide an adequate check against the harms that may result from conflicted advice.
- Petitioners argue that no regulation can prevent a consumer from buying something he cannot afford (Br. at 53), but DFS rationally concluded that such behavior can be reduced, even if not eliminated, by prohibiting salespeople from steering consumers toward unaffordable products.
- Petitioners argue that the common law and other regulations already respond adequately to the Amendment’s underlying concerns (Br. at 54), but DFS rationally concluded that consumers would be even better protected by the Amendment, which complements existing rules.

B. The Amendment neither conflicts with established law nor imposes conflicting duties on producers.

Although petitioners claim that the Amendment is irrational because it is “irreconcilable with governing law” (Br. at 48), they do not cite any particular statutory provision with which the Amendment supposedly conflicts. Nor can they. As discussed above, the Amendment represents a valid exercise of DFS’s extensive authority to fill in statutory interstices and regulate producer conduct. (*See* Points II.A, II.B, *supra*.)

Petitioners are also wrong that the Amendment impermissibly conflicts with the common law. (*E.g.*, Br. at 10.) Under the common law, producers have a duty to "obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so." *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997). The Amendment supplements that baseline duty by prescribing a standard of care to be followed when making recommendations in response to consumer queries. Because "nothing in the case law forbid[s]" DFS from setting forth such a standard, "there is no inconsistency" between the Amendment and the "duties owed by a producer to an insured at common law." *Matter of Sullivan Fin. Group, Inc. v. Wrynn*, 94 A.D.3d 90, 96 (3d Dep't 2012) (rejecting challenge to DFS regulation).

Indeed, this Court has expressly approved of the practice of issuing regulations that supplement or even supplant the common law in this area. In *People v. Wells Fargo Ins. Servs., Inc.*, 16 N.Y.3d 166, 170 (2011), the Attorney General sued an insurance brokerage for a breach of an asserted common-law fiduciary duty, alleging that the brokerage improperly failed to disclose certain compensation to its clients. *Id.* at 169-70. While acknowledging that nondisclosure may be unscrupulous, this Court rejected the Attorney General's claims, reasoning that the brokerage was under no common-law duty to disclose. *Id.* at 171. The

Court, however, noted that the "better way" of ending the "questionable" practice of nondisclosure was to promulgate a regulation—such as the one promulgated by the Insurance Department (predecessor to DFS) after the conduct in question—setting forth disclosure requirements over and above those required by the common law. *Id.* at 171-72.

Petitioners argue that the Amendment is "anathema" to the common law because the Amendment imposes a continuing duty on producers—a duty that this Court has rejected. (Br. at 6.) *See Murphy*, 90 N.Y.2d at 273 (holding that producers "have no continuing duty to advise, guide, or direct a client to obtain additional coverage," absent specific request from client). Petitioners are wrong. The Amendment's best-interest standard—which regulates discrete transactions between producers and consumers—does *not* impose any continuing duty on producers and thus is fully consistent with the common law as described by *Murphy* in that respect. Specifically, in the event that a producer recommends a particular transaction to a consumer, he must act in the consumer's best interest, but he is under no continuing duty to provide additional unsolicited recommendations to safeguard the consumer's best interest in the future. In other words, contrary to petitioners' argument

(Br. at 10, 17), nothing in the Amendment creates a "professional relationship" between the producer and the consumer that imposes on the producer an ongoing, affirmative duty to "counsel and advise clients" as circumstances change. *Chase Scientific Research v. NIA Group*, 96 N.Y.2d 20, 29 (2001) (cited at Br. at 10). Instead, a producer's obligation to the consumer is a defined and limited one: it attaches solely to the making of a recommendation, and ends once made.

Petitioners make the additional claim—seemingly incompatible with the claim discussed above—that there is "no need" for the Amendment because it is "just a codification of *Murphy*." (Br. at 19.) Petitioners are wrong about that, too. DFS is authorized to go beyond the common law in implementing the Legislature's objectives, and it has done so here: in prescribing a heightened standard of care for producers that responds to inadequacies in the prior framework (*see* Point III.A, *supra*), it permissibly goes beyond the general duty imposed by the common law. *See Wells Fargo Ins. Servs.*, 16 N.Y.3d at 171-72.

The out-of-State cases on which petitioners rely do not support their argument. Petitioners cite *Robinhood Fin. LLC v. Galvin*, No. 2184CV00884, 2022 WL 1720131 (Mass. Super. Ct. Mar. 30, 2022) (Br.

at 10-11), in which a Massachusetts judge invalidated the State's "fiduciary rule," based on a purported conflict with the common law as set forth by the State's high court. But whatever the validity of that unreviewed Massachusetts trial-court decision (which was stayed to permit the State to appeal), it does not call into question a New York State agency's authority to supplement the common law, as discussed above.

Petitioners also rely on the decision of the United States Court of Appeals for the Fifth Circuit in *Chamber of Commerce of U.S. of Am. v. U.S. Dept. of Labor*, 885 F.3d 360 (5th Cir. 2018) (Br. at 49-50, 55), which invalidated the federal Department of Labor's fiduciary rule.[8] But that decision held only that the rule conflicted with the plain text of the federal Employee Retirement Income Security Act (ERISA), not that any attempt to impose a heightened standard of care on insurance agents would be per se improper, as petitioners suggest. (*See* Br. at 49-50.)

Finally, petitioners mistakenly argue that the Amendment is flawed because it imposes conflicting duties on insurance agents—

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[8] The federal Department of Labor regulates, under ERISA, insurance and annuity products that are offered as employment benefits. DFS regulates those that are not.

requiring them to act in the consumer's best interest, even though rules of agency require them to work only in the best interest of the principal (the insurer). (Br. at 49.) But petitioners overlook that the Amendment governs insurers as well as their agents, *see* 11 N.Y.C.R.R. §§ 224.4(a), 224.5(a), meaning that insurers and agents alike are prohibited from recommending products that are not in consumer's best interest. The Amendment cannot create a conflict between agents and their principals when both are being held to the same standard. Further, the Amendment honors the agent's duty to "promote the principal's product" (Br. at 49) by requiring producers making recommendations to consider only those products "available to the producer," 11 N.Y.C.R.R. § 224.3(h). Thus, an agent who, for example, represents only one insurer is not required to recommend products that are inconsistent with her contractual obligations to that insurer (*i.e.*, the products of another insurer). (*See* A. 323.)

POINT IV

DFS COMPLIED WITH THE STATE ADMINISTRATIVE PROCEDURE ACT IN PROMULGATING THE AMENDMENT

Contrary to petitioners' third alternative argument (Br. at 37-44), DFS complied with sections 202-a(3)(c)(iv), 202-a(3)(h), and 202-b(1) of SAPA in promulgating the Amendment.

A. DFS complied with SAPA § 202-a(3)(c)(iv) by providing its best estimate of the Amendment's projected costs.

SAPA § 202-a(3)(c)(iv) requires agencies to include in the regulatory impact statement ("RIS") its "best estimate" of a regulation's projected costs. The costs required to be estimated are the "additional expenditures required" by the rule, *Matter of Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 145 (1988)—not "speculative costs which might occur at unknown future dates." *Matter of Lake George Chamber of Commerce v. New York State Dept. of Health*, 205 A.D.2d 93, 95 (3d Dep't 1994).

DFS carefully considered the Amendment's projected compliance costs and concluded that they would be minimal and likely to "decrease over time as better-trained and supervised producers come into compliance with the regulation." (A. 309-310.) DFS's determination in this regard was based in large part on the Amendment's "principles-based approach to compliance" that allows insurers and producers to leverage existing systems and curtail potential costs. (A. 308-309; *see also* Respondent's Appendix ["R.A."] 187-190.) The RIS explained that:

> The amendment was specifically designed to allow producers to leverage existing practices and file management systems. . . . This amendment identifies certain suitability information that the producer should be asking their clients, if not already doing so. Although some producers and insurers have expressed an intention to create new forms or new file management systems, that is not required to comply with this amendment.

(A. 308-309.) DFS thus did not mandate specific forms or procedures, and determined that insurers and producers could comply largely by using their existing systems, with minimal modifications as applicable. (A. 308-311.) This flexible approach to compliance in turn precluded DFS from providing a specific dollar figure of the costs associated with the rule "because the approach to compliance [is] subject to the discretion of each producer and insurer." (R.A. 187 ¶ 6.)

DFS reached this conclusion after meeting with stakeholders and implementing numerous revisions to address their concerns. For example, as noted in the RIS, DFS was persuaded by public comments arguing that proposed provisions on in-force transactions were unduly costly, and "significantly scaled back" those provisions as a result. (A. 308.) DFS exhaustively assessed other public comments and responded to cost-related concerns, indicating its reasons for agreement or disagreement. (*See* A. 316-340, 347-376.)

Petitioners' "[p]aramount" complaint is the RIS's "lack of any dollar figures," which they claim is impermissible under SAPA. (Br. at 41.) But the legislative history on which they rely says just the opposite: SAPA does not require agencies to "project an actual dollar figure." (R.A. 346.) Rather, a "best estimate" of costs can take the form of a "description of the formula employed by the agency in projecting costs." (R.A. 346.) As demonstrated above, DFS satisfied that requirement by explaining that the minimal projected costs were a function of its principles-based approach to compliance. At a minimum, DFS's cost estimate was in "substantial compliance" with SAPA. *See* SAPA § 202(8) (rules must be promulgated in "substantial compliance" with SAPA § 202-a); *Matter of Medical Socy.*, 100 N.Y. 2d at 869 (same); *cf.* XXII N.Y. Reg. 21 (Aug. 2, 2000) (RIS upheld in *Matter of Medical Socy.* that estimated that "costs will be minimal compared to the overall savings to be enjoyed by New

York's auto insurance consumers as a result of the lower fraud and abuse").[9] Petitioners' disagreement with DFS's estimate of costs does not mean that DFS "failed to meet its obligations under SAPA." (Br. at 42.)

Petitioners also take issue with the RIS's statement that the Amendment would impose minimal additional costs because insurers were already preparing to comply with the federal DOL rule. (Br. at 39-40.) Petitioners, however, do not dispute this proposition, complaining only that DFS erroneously claimed that the Amendment's costs had "magically evaporated" once the federal rule was invalidated. (Br. at 40.) Petitioners miss the point: it is not that the costs disappeared, but that—as petitioners acknowledge (Br. at 39)—those costs had already been substantially incurred by the time that DFS proposed the Amendment, such that the marginal costs of complying with the Amendment were minimal. *Cf. Seneca Nation of Indians v. State of New York*, 89 A.D.3d 1536, 1538 (4th Dep't 2011), *lv. denied*, 18 N.Y.3d 808 (2012) (expenses

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[9] While this edition of the New York State Register contains only a summary of the relevant RIS, the complete RIS published on the Insurance Department's website reflects a substantially similar discussion of the costs associated with the rule. *See* N.Y. Ins. Dep't, *Consolidated Regulatory Impact Statement for 11 NYCRR 65 (Regulation 68) and the First Amendment to 11 NYCRR 64-2 (Regulation 35-C)*, https://web.archive.org/web/20000902225225/http:/www.ins.state.ny.us/r6835cps.htm (last visited June 3, 2022).

were not cognizable under SAPA where they were attributable to cost of complying with preexisting statute).

Finally, while petitioners attack the RIS's purported imprecision in estimating costs (Br. at 39), their own vagueness about costs is telling. Indeed, petitioners do not articulate *any* of the Amendment's supposed "tangible costs" (Br. at 40), beyond providing an unexplained citation to 135 pages of the record (Br. at 41). Included in those pages are the affidavits of two petitioners, Gary Slavin and Stephen Testa, who make dire predictions about the Amendment's effect on the New York insurance industry, ranging from increased litigation to entire businesses shutting down or leaving the State. (*See, e.g.*, R.A. 8-9, 15-16.) But those are precisely the sort of speculative costs that need not be accounted for in a RIS, and, indeed, are impossible to quantify. *See Matter of Lake George Chamber of Commerce*, 205 A.D.2d at 95. Moreover, to the extent that Slavin and Testa posit that the need to search the market to locate the singular best product for a consumer will result in increased costs (*e.g.*, R.A. 7 ¶ 7; R.A. 14 ¶ 6), they conflate the notion of an ideal "best" product with one that furthers the consumer's—not the producer's—best interest. Only the latter is required, as discussed above. (*See* Point I.B, *supra*.)

B. DFS complied with SAPA § 202-a(3)(h) by explaining why the Amendment exceeded federal standards.

SAPA § 202-a(3)(h) requires that an RIS identify "whether the rule exceeds any minimum standards of the federal government for the same or similar subject areas and, if so," provide "an explanation of why the rule exceeds such standards." Petitioners do not seriously dispute that the RIS here did so. They assert instead that DFS failed to explain the rationale for promulgating the Amendment "once there was no federal counterpart." (Br. at 42.) The premise of this argument is that the existence of the federal DOL rule authorized DFS to take similar action, and that DFS's authority vanished once that rule was vacated. As detailed above, that is not the case. (*See* Point II.A*, supra* [discussing DFS's authority under state law].) Indeed, even as it struck down the federal rule, the Fifth Circuit recognized the continued need for state regulators to act within their authority. *Chamber of Commerce*, 885 F.3d at 379. In any event, contrary to petitioners' argument (Br. at 42), the

RIS appropriately addressed the heightened need for state action in the absence of federal regulation. (*See* A. 304-305.)

C. DFS complied with SAPA § 202-b(1) by considering the Amendment's impact on small businesses.

SAPA § 202-b(1) requires agencies to "consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses." DFS analyzed the Amendment's impact on small businesses, including by assessing the Amendment's administrative costs, meeting with interested parties, altering the Amendment in response to commenters' concerns, and issuing a regulatory flexibility analysis ("RFA") and several revisions to it. (A. 342-344.) DFS also expanded its RFA analysis in response to public comments, adding to the section on costs so as to clarify the Amendment's impact on small businesses. (A. 375-376.) Thus, the record shows that DFS complied with the procedural requirements of SAPA and took considerable action to ensure that stakeholders' views were reflected in the final product.

POINT V

PETITIONERS' ANTITRUST AND FIRST AMENDMENT ARGUMENTS ARE NOT PRESERVED AND MERITLESS IN ANY EVENT.

Finally, petitioners make two additional arguments without any substantive analysis: (i) that the Amendment somehow forces insurers to commit "antitrust violations," and (ii) that it also compels producers to speak, in violation of the First Amendment. (Br. at 24, 28.) Neither is preserved for this Court's review.

In Supreme Court, petitioners raised five grounds for invalidating the Amendment, but neither the antitrust nor First Amendment claim was one of them. (*See* A. 27-65.) Petitioners' argument on the First Amendment claim was limited to a four-sentence footnote in both the petition and their memorandum of law. (A. 58, 119.) Petitioners made no argument regarding any purported antitrust violations. These issues are therefore unpreserved for this Court's review. *See, e.g.*, *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019).

The contentions are meritless in any event. First, there is no antitrust problem because, if and to the extent that the Amendment entails any restraint of trade (far from clear in any event), that restraint would be "compelled by direction of the State acting as a sovereign" and thus exempt from antitrust rules. *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (internal quotation marks omitted). Second, there is no compelled-speech problem because the Amendment does not, as petitioners assert, require producers to make recommendations to consumers; it simply prescribes the applicable standard of care if they decide to do so. Accordingly, there is no basis for invalidating the Amendment.

CONCLUSION

The Court should reverse the order of the Third Department and reinstate the judgment of Supreme Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Reply Brief for Appellants contains 9,627 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1), enlarged as set forth in the letter dated May 13, 2022.

SARAH L. ROSENBLUTH