No. 19-1462

IN THE

Supreme Court of the United States

PRINCIPAL LIFE INSURANCE COMPANY,
Petitioner,

v.

FREDERICK ROZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Founded in 1975, the American Council of Life Insurers ("ACLI") is the leading trade association driving public policy and advocacy on behalf of the life insurance industry.[1] 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's 280 member companies are dedicated to protecting consumers' financial well-being through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision, and other supplemental benefits. ACLI's member companies represent 94 percent of industry assets in the United States.

Most products sold by ACLI members in the group employee benefits market are purchased to fund benefits under plans subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* ACLI members' retirement-related business includes group-annuity-based, guaranteed-interest products issued to employer-sponsored retirement plans, such as the product offered by Principal Life Insurance Company ("Principal") at issue in this case. Such products—often grouped into the broader categories of "stable

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[1] No party's counsel authored this brief in whole or in part, and no party, its counsel, or other person made a monetary contribution intended to fund the brief's preparation or submission other than ACLI or its counsel. Counsel of record for all parties received timely notice of ACLI's intention to file this brief. All parties have consented to the filing of the brief.

value" or "fixed income" funds—are particularly attractive to more conservative retirement investors, as well as those simply seeking to balance their portfolios.

ACLI regularly participates as *amicus curiae* in litigation affecting its members and their customers. ACLI participated as *amicus curiae* both below (see Pet. App. 1a) and in *Teets v. Great-West Life & Annuity Insurance Co.*, 921 F.3d 1200 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019) ("*Teets*"). In *Teets*, the Tenth Circuit considered essentially identical fiduciary breach claims involving a similar guaranteed product offered by a different life insurer. Consistent with well-established criteria for determining service provider fiduciary status expressed in a time-tested line of decisions spanning six other Circuits, the Tenth Circuit held that the product provider was not a fiduciary because the provider did not exercise the requisite "authority or control" over plans or any plan assets as prescribed by ERISA. *Id.* at 1212-14, 1220-21. In sum, the Tenth Circuit, in harmony with its sister Circuits, got it right.

In its decision below, the Eighth Circuit, standing alone, got it wrong. The Eighth Circuit's misconstruction of fundamental precepts of ERISA fiduciary responsibility, if left uncorrected, will create significant risk and uncertainty for ACLI members and other plan service providers that operate within and beyond the Eighth Circuit. As a result, ACLI has a substantial interest in the favorable treatment of this petition. Broadly speaking, ACLI has a strong interest in ensuring the

proper, uniform interpretation and application of ERISA's fiduciary definition and attendant liability provisions as they may relate to providers of products and services to employee benefit plans. The absence of a consistent national standard—true to ERISA's text and Congress's intent—for distinguishing between fiduciary and non-fiduciary status could adversely affect the business operations of numerous ACLI member companies, altering their ability to offer a highly popular, guaranteed retirement savings vehicle on consumer-friendly, commercially viable terms. In all likelihood, such a result would reduce the availability of these desirable capital preservation options, to the detriment of millions of workers saving for retirement through their employer-sponsored plans.

ACLI respectfully submits this brief to offer its informed perspective and to urge the Court to grant Principal's petition.

SUMMARY OF ARGUMENT

As the petition explains, the Eighth Circuit's decision is wrong as a matter of law and runs counter to the sound judgment of seven other Circuits. However, as ACLI will address in this brief, the Eighth Circuit's ruling not only creates a Circuit conflict regarding a threshold legal issue under ERISA of fundamental importance to life insurers and other stable value product providers; the decision also has damaging economic and public policy implications for all constituencies of the multi-trillion-dollar, ERISA-governed group retirement plan market. Consequently, this Court's review is

important to the broader community of retirement plan service providers, plan sponsors, and the millions of plan participants who benefit from the ready availability and desirable features of the type of secure retirement savings product at issue.

Stepping back, the underlying case is one of several cookie-cutter class action lawsuits filed in recent years ostensibly on behalf of retirement plan participants. These lawsuits have targeted major life insurance companies that offer principal-protected, guaranteed-rate investment options for inclusion in ERISA-governed, participant-directed retirement plans. None of these providers had ever been adjudged a fiduciary in connection with the offering of these products. As the district court below and both the district court and Tenth Circuit in *Teets* recognized, the suits are not well-founded under ERISA because, among other reasons, the defendant product providers do not have "final say" or control over any plan management or plan asset decisions such that fiduciary status could potentially be triggered. See Pet. App. 19a-20a; *Teets v. Great-West Life & Annuity Ins. Co.*, 286 F. Supp. 3d 1192, 1201-04 (D. Colo. 2017), *aff'd*, 921 F.3d 1200, 1218-20 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019). These decisions, based on settled ERISA jurisprudence, constituted a win for both plan service providers and retirement savers, given that their interests are aligned in relation to the important issues at stake.

In contrast, the Eighth Circuit's reversal below is a loss for all concerned. If left intact, it will be injurious to a vitally important segment of the

retirement services industry that has been offering these valuable guaranteed products for decades through a diverse array of market conditions. Relatedly, and more significantly, it will heighten the risk that plan sponsors seeking to construct diversified retirement plan investment menus for their employees—and, ultimately, older and more risk-averse retirement savers—will lose an important product option in the retirement plan marketplace. And, of course, it will spawn more unfounded lawsuits, likely adding indirectly to the cost of the products that remain.

Such adverse consequences could not come at a worse time. Risk-averse savers have increasingly turned to guaranteed, insurance company general account-backed products—like the Principal Fixed Income Option ("PFIO")—to protect the principal and accrued earnings of all or at least some portion of their retirement savings portfolios, while also securing a competitive return. Such retirement plan investment options have understandably become more popular since the 2008 world financial crisis, when their value was accentuated—in stark contrast to both riskier, non-guaranteed investments, like stocks or mutual funds, and lesser-performing, low-volatility investments, like money market funds. If issuers were forced to curtail offering these valuable guaranteed products in the group retirement market, savers would be left with fewer low-risk, low-volatility investment alternatives at a time when market volatility continues to be high, interest rates remain at historic lows, and millions of Baby Boomers are approaching retirement. Again, this

would not be a beneficial outcome for plan sponsors or participants.

Moreover, while the *Teets* courts and the district court below ruled for the defendant providers on other grounds (see Pet. App. 18a), ERISA contains a statutory exemption from "plan asset" status and related fiduciary responsibility—the so-called "guaranteed benefit policy" exception (29 U.S.C. § 1101(b)(2))—that reflects an important public policy determination regarding the value of guaranteed, general account-backed investment products and the need to encourage their availability to group retirement plan investors. The Eighth Circuit's decision directly undermines this longstanding public policy woven into ERISA's fabric, and upon which product issuers have relied for decades in structuring their retirement plan offerings. This is but another example of how the acceptance of the Eighth Circuit's erroneous decision would require the rejection of carefully considered policy judgments embodied in the ERISA statute and carried forward through years of interpretive decisions and authoritative guidance. The Court's intervention is necessary to correct this error and restore uniformity to the standard applied by the lower courts for determining service provider fiduciary status.

ARGUMENT

I. The Eighth Circuit's Decision Threatens The Ready Availability Of Highly Popular Guaranteed Savings Products Within ERISA-Governed Defined Contribution Plans.

A. Defined Contribution Plans are an Essential Element of Millions of Americans' Retirement Security.

As the traditional, employer-funded "defined benefit" pension plan continues to recede into the history books, the employer-sponsored "defined contribution" plan continues to assume greater and often primary importance as a retirement savings mechanism for American workers. *Cf. LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) ("Defined contribution plans dominate the retirement plan scene today."). This case involves 401(k) plans, by far the most prevalent type of defined contribution retirement savings plan offered by private employers in the United States.[2] At the end of 2019, employer-sponsored defined contribution plans held an estimated $8.9 trillion in assets, $6.2 trillion of which were held by 401(k) plans.[3] This reflects a dramatic increase since as

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[2] The universe of defined contribution plans also includes "403(b) plans" available to employees of educational institutions and certain non-profit organizations, "457 plans" sponsored by state and local governmental entities, and other types of private-employer plans, such as profit-sharing plans, without 401(k) features. See Investment Company Institute, *2020 Investment Company Fact Book*, at 169 (60th ed. 2020), available at https://www.ici.org/pdf/2020_factbook.pdf.

[3] See Investment Company Institute, *2020 Investment*

recently as 2012, when defined contribution plans held approximately $5.1 trillion in retirement assets, of which approximately $3.6 trillion were held by 401(k) plans.[4] Even more dramatic, the number of 401(k) plans has increased from approximately 30,000 in 1985 to approximately 560,000 by year-end 2018.[5]

During this time of remarkable growth in the utilization of employer-sponsored defined contribution plans, increasing numbers of workers are preparing for and entering retirement. By 2015, nearly 48 million Baby Boomers were age 65 or older, and that number is expected to grow to nearly 66 million by 2025.[6] The largest wave of Boomers—

Company Fact Book, at 169 (60th ed. 2020), available at https://www.ici.org/pdf/2020_factbook.pdf.

[4] See Investment Company Institute, *2013 Investment Company Fact Book*, at 114, 116 (53d ed. 2013), available at https://www.ici.org/pdf/2013_factbook.pdf. In this context, the universe of defined contribution plan assets encompasses 403(b) plans, "457" government plans, and private employer-sponsored plans (including 401(k) plans). *Id.* at 116.

[5] See Investment Company Institute, *401(k) Plans: A 25-Year Retrospective*, at 3 (Nov. 2006), available at http://www.ici.org/pdf/per12-02.pdf (Figure 1, entitled "Changing U.S. Private-Sector Pension Landscape"); American Benefits Council, *401(k) Fast Facts January 2019,* available at https://www.americanbenefitscouncil.org/pub/e613e1b6-f57b-1368-c1fb-966598903769.

[6] See Insured Retirement Institute, *State of the Insured Retirement Industry, 2019 Review and 2020 Outlook*, at 2 (Feb. 2020), available at *https://www.myirionline.org/docs/default-source/press-release/soti_2019report_final.pdf?sfvrsn=2*.

comprised of approximately 33 million people born between 1952 and 1959—began to retire in 2017.[7] Approximately 10,000 Baby Boomers will turn 65 every day for the next 13 years.[8] This advancing cohort of soon-to-retire workers has created enormous financial product demand, while the group's risk tolerance, largely as a function of age, is generally perceived to be decreasing.[9] In light of these circumstances and other socioeconomic factors, the demand for low-risk retirement savings products has never been stronger.

B. As America Ages, General Account-Backed Guaranteed Products and Other Stable Value Funds are Increasingly Important and Popular Plan Investment Options.

Life insurers administer approximately 18 percent of the multi-trillion-dollar defined

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[7] See Insured Retirement Institute, *State of the Insured Retirement Industry, 2016 Review and 2017 Outlook* (Dec. 2016), available at https://www.myirionline.org/docs/default-source/research/iri-state-of-the-insured-retirement-industry---2016-review-and-2017-outlook.pdf?sfvrsn=2.

[8] See Insured Retirement Institute, *State of the Insured Retirement Industry, 2019 Review and 2020 Outlook*, at 22 (Feb. 2020), available at https://www.myirionline.org/docs/default-source/press-release/soti_2019report_final.pdf?sfvrsn=2.

[9] See, *e.g.,* Rui Yao *et al.*, *Decomposing the Age Effect on Risk Tolerance*, 40 J. Socio-Econ. 879, 883-84 (2011); John E. Gilliam *et al.*, *Determinants of Risk Tolerance in the Baby Boomer Cohort*, 8 J. Bus. & Econ. Res. 79, 83-84 (2010).

contribution plan asset base.[10] Typically (and as is the case here), employers choose to offer one or more "fixed interest," "stable value," or "low-risk, low-volatility" options on their plan investment menus to accommodate individual participants' differing risk tolerances and financial circumstances and objectives.[11] On this end of the risk/volatility spectrum, guaranteed products backed by an insurance company's general account are prevalent in defined contribution plans serviced by life insurance companies.[12]

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[10] See American Council of Life Insurers, *Life Insurers and Your State 2018: Iowa*, available at https://www.acli.com/Industry-Facts/State-Fact-Sheets/IA (With respect to the national market, "[l]ife insurers are leading providers of retirement solutions, including 401(k)s, 403(b)s, 457s, IRAs, and annuities, managing 18 percent of all defined contribution plan assets and 14 percent of all IRA assets.").

[11] See U.S. Dep't of Labor, Employee Benefits Security Administration, *A Look at 401(k) Plan Fees*, at 2 (revised Aug. 2013), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf ("In recent years, there has been a dramatic increase in the number of investment options typically offered under 401(k) plans as well as the level and types of services provided to participants. These changes give today's employees who direct their 401(k) investments greater opportunity than ever before to affect their retirement savings."). Plan sponsors of participant-directed individual account plans are effectively required to include a fixed or low-risk investment option to qualify for safe-harbor protection under ERISA § 404(c), 29 U.S.C. § 1104(c). See 29 C.F.R. § 2550.404c-1(b)(3)(i)(B) (specifying requirement for plan to offer "broad range of investment alternatives" to qualify for safe-harbor protection).

[12] A life insurance company's "general account" refers to the

Within the overall menu of available investment options selected by the plan sponsor,[13] these general account products offer retirement savers an attractive, virtually no-risk option that guarantees their principal and accrued earnings while offering stable ongoing earnings opportunities that generally outpace (sometimes by wide margins) other fixed or low-volatility options such as bank certificates of deposit and money market funds.[14] The insurance

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insurer's own commingled asset account that supports the insurer's company-wide contractual obligations to policyholders and beneficiaries for guaranteed, fixed-dollar benefit payments. See American Council of Life Insurers, *Life Insurers Fact Book 2019*, at 7 (2019), available at https://www.acli.com/-/media/ACLI/Files/Fact-Books-Public/2019FLifeInsurersFactBook.ashx?la=en. Life insurers held $7 trillion in assets in 2018 ($4.5 trillion of which were general account assets), making insurers a significant source of investment capital in each state. *Id.* at 7, 87-89.

[13] According to a recent study, on average, plans offer between twenty-seven and thirty different investment options, depending on plan size. See BrightScope & Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015*, at 33 & Ex. 2.1 (Mar. 2018), available at https://www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf.

[14] See, *e.g.,* Adam Zoll, Morningstar, *For Safety-First Savers, Stable-Value Funds Are Tough to Beat* (Apr. 16, 2013), https://www.morningstar.com/articles/592164/for-safety-first-savers-stable-value-funds-are-tough-to-beat (noting that, in 2012, stable value funds (including insurance company general account products) paid 2.6% on average, while the average money market fund paid 0.03%); Antonio Luna *et al.*, T. Rowe Price, *Stable Value Holds Strong* (Apr. 29, 2019), https://troweprice.com/institutional/us/en/insights/articles/2019/q2/stable-value-holds-strong.html ("[D]espite increasing money market fund yields, stable value continues to outperform money market funds, as it has during most previous rate

companies' obligations are backed by the general account assets and financial strength of the historically stable life insurers that offer them, as well as the state guarantee funds that back the insurers' obligations in the rare event of insurer insolvency.

1. The Provider Bears The Investment Risk on the Principal and Declared Rate, as well as All Liquidity Risk on Participant Withdrawals.

General account products allow retirement savers to accrue and lock in credited interest gains on top of their protected principal at a guaranteed rate declared in advance of the period to which the rate will apply. Thus, retirement investors bear no risk of loss or any other investment risk, and they know ahead of time what the fixed rate will be and how much in total they will earn over the guarantee period if they elect to maintain their investment in the fund.

In contrast, the insurer bears all downside investment risk due to its obligation to fund the declared-in-advance, guaranteed rate with its general account assets. If the insurer's applicable general account assets do not earn a net return in excess of the guaranteed rate the insurer is obligated to credit to retirement investors' accounts for the

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hiking cycles. Accordingly, plans and participants have benefited from investing in stable value during both falling rate and rising rate environments.").

guarantee period, the insurer absorbs 100% of the loss. The insurer also bears all liquidity risk and associated costs because participants have the unqualified right to remove all funds from their accounts immediately, without penalty. Because plan participants can transfer funds from their fixed accounts at any time without penalty, participants have complete control over the decision to maintain their fixed account investments at the declared rate, or to move all or some of their funds elsewhere. As such, the insurer does not have investment discretion or any other relevant authority or control over participants' account assets.

2. The Marketplace Recognizes the Importance of General Account Products, and Retirement Savers Would Suffer if Providers Were Forced to Withdraw from the Market.

Not surprisingly, these positive product attributes have made retirement plan investment options backed by an insurance company's general account (and fixed annuity products generally) popular capital preservation vehicles.[15] In 2019,

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[15] See, *e.g.,* Insured Retirement Institute, *State of the Insured Retirement Industry, 2016 Review and 2017 Outlook*, at 6 (Dec. 2016), available at https://www.myirionline.org/docs/default-source/research/iri-state-of-the-insured-retirement-industry---2016-review-and-2017-outlook.pdf?sfvrsn=2 ("Through the midway point of 2016, year-to-date sales of fixed annuities exceeded sales of variable annuities for the first time . . . ."); see also Insured Retirement Institute, *State of the Insured Retirement Industry, 2017 Review and 2018 Outlook*, at 4 (Dec. 2017), available at https://www.myirionline.org/docs/default-

approximately 75% of defined contribution plans offered some type of insurance company-backed or other stable value option, with an average of 13% of total plan assets allocated to stable value options within each plan and total stable value assets across all plans in excess of $839 billion.[16] The broad availability of guaranteed products in the defined contribution plan marketplace has been a boon to retirement savers, particularly those risk-averse investors who had funds in these products (and saw guaranteed *gains*) during the 2008 financial crisis and subsequent global recession, while countless Americans' retirement nest eggs were decimated.

Unfortunately, if the Eighth Circuit's erroneous ruling were embraced, the marketplace would be severely disrupted. Plan sponsor and consumer choice in this critical area of retirement security would suffer. Insurers cannot be expected to bear all downside investment risk and all liquidity risk and

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source/research/soti-report_2017_final-(2).pdf?sfvrsn=2 ("Over the past 5 years, fixed annuities have flourished, relatively speaking, against a backdrop of persistent low interest rates, market volatility, and increased regulatory burdens. From representing just over a quarter of the annuity market five years ago to fully half the market today."); Insured Retirement Institute, *State of the Insured Retirement Industry, 2019 Review and 2020 Outlook*, at 4 (Feb. 2020), available at https://www.myirionline.org/docs/default-source/press-release/soti_2019report_final.pdf?sfvrsn=2 ("As of the third quarter of 2019, fixed products account for about 57% of total annuity sales . . . .").

[16] Newport Retirement Services, *Stable Value Primer* (Nov. 29, 2019), https://newportgroup.com/knowledge-center/november-2019/stable-value-primer/.

costs associated with these guaranteed products, while at the same time ostensibly being precluded from retaining any financial benefit associated with prudent, successful management of their own general account investment portfolios. But, seemingly, that is the untenable position in which insurers would find themselves because—*at least (and only) according to the Eighth Circuit*—the insurers owe fiduciary duties of prudence and loyalty exclusively to plan participants in connection with product rate-setting (even though participants can freely reject any proposed rate by exiting the fund at any time without penalty). Pet. App. 7a-8a.

Insurers' predicament under the Eighth Circuit's unprecedented holding would be economically unsustainable. But beyond that, it would also be incompatible with insurers' state-based regulatory obligations. Insurers must comply with state laws and regulations intended to minimize insolvency risk and ensure equity among policyholders and beneficiaries across all lines of each insurer's general account-backed business. See *infra* § II.B. ERISA plan fiduciary status would conflict with these fundamental insurance company obligations and would almost assuredly force insurers to discontinue offering and underwriting these products in the ERISA-governed retirement plan market. Such a result would not serve the ultimate interests of retirement savers, who would be left with a depleted market of historically lower-performing capital preservation options.

II. The Eighth Circuit's Decision Subverts ERISA's "Guaranteed Benefit Policy" Exception, Which Embodies An Important Public Policy Determination Regarding The Need To Make These Products Available In Retirement Plans.

From ACLI's perspective, almost as deleterious as the Eighth Circuit's flawed legal analysis (as detailed in Principal's petition) is the decision's incompatibility with an important public policy determination regarding general account-backed guaranteed products that Congress expressly incorporated into ERISA. In sum, recognizing the potential benefits and value of the products to retirement investors, Congress sought to facilitate their availability in ERISA-governed plans through a specific statutory provision intended to accommodate their use. This enactment—which provides dispensation from potential "plan asset"-based fiduciary responsibility to issuers of qualifying products—is generally referred to as the guaranteed benefit policy ("GBP") exception (or, alternatively, the GBP "exemption" or "exclusion"). See 29 U.S.C. § 1101(b)(2).

The district court below determined that it was unnecessary to analyze the parties' arguments regarding the GBP exception in order to reach its conclusion in favor of Principal on the threshold fiduciary status issue. See Pet. App. 18a. As a result, the Eighth Circuit was not called upon to address the legal significance of the statutory exception to the claims at hand. Nevertheless, because of the critical legal and public policy

significance of the GBP exception to general account product providers servicing the ERISA-governed plan market, ACLI submits that a brief discussion of the statute and the key interpretive guidance surrounding it will not only prove useful but is necessary for the Court to fully appreciate the urgent need to grant review in this case.

A. Under the GBP Exception, an Insurer's Commingled General Account Assets are *Not* Deemed "Plan Assets" and thus Do *Not* Give Rise to Fiduciary Obligations on the Part of the Insurer.

ERISA provides, in pertinent part, that "a person is a fiduciary with respect to a plan to the extent (i) he . . . exercises any authority or control respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(i). Under this provision of ERISA's statutory definition of "fiduciary," plan participant allocations to an insurer's guaranteed product offering that are deposited in the insurer's general account could trigger fiduciary responsibility to the extent that the participant allocations are deemed plan assets.

However, to avoid this result, the GBP exception expressly provides that an insurer's general account assets with which plan or participant contributions are commingled are *not* deemed plan assets—thus *not* triggering fiduciary responsibilities under 29 U.S.C. § 1002(21)(A)(i) with respect to the management or disposition of those assets—to the extent that the applicable policy or contract issued by the insurer "provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. §

1101(b)(2). In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 106 (1993) ("*Harris Trust*"), this Court elaborated on the conditions for qualifying as a GBP under the statute: "A [contract] component fits within the guaranteed benefit policy exclusion only if it allocates investment risk to the insurer. Such an allocation is present when the insurer provides a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants and their beneficiaries."[17]

In other words, ERISA not only expressly contemplates the offering of guaranteed insurance products like the PFIO in retirement plans, it also specifically exempts an insurer's general account assets backing these products from ERISA plan asset status and attendant fiduciary responsibility. As will be discussed further below, this statutory dispensation is essential to product providers from a legal perspective because an insurance company's obligations under state insurance law with respect to the insurer's entire collectivity of contractholders and the management of its commingled general account assets are not fully compatible with the

[17] Although the courts below did not find the need to reach the issue, the PFIO plainly satisfies the *Harris Trust* test for GBP status. In addition to guaranteeing principal and accrued earnings, Principal declares guaranteed rates in advance for each period and therefore provides "a genuine guarantee of an aggregate amount of benefits payable to retirement plan participants" under the contract. See *Harris Trust*, 510 U.S. at 106. As *Harris Trust* expressly prescribes, this prospective guarantee results in an "allocat[ion of] investment risk to the insurer," thus establishing GBP status. *Id.*

exclusive and undivided loyalty to plan participants and beneficiaries required of an ERISA fiduciary.[18]

B. Public Policy Considerations and Longstanding Judicial Precedent and Agency Guidance Support the GBP Exception and the Inapplicability of Fiduciary Status to Guaranteed Product Providers.

Thus, ERISA's GBP exception reflects an explicit public policy determination that allows highly popular guaranteed insurance products to be offered in the ERISA-governed retirement plan marketplace. Plans and retirement savers have benefited from this legislative determination because it has enabled insurers to make the products available to consumers on competitive, economically favorable terms for several decades across a wide array of market conditions and interest rate environments. See *supra* note 14 & accompanying text.

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[18] It is also important to note that the common law has historically characterized the relationship between an insurer and a general account contractholder as a contractual rather than a fiduciary relationship. *Equitable Life Assurance Soc'y of U.S. v. Brown*, 213 U.S. 25, 46 (1909); *Ohio State Life Ins. Co. v. Clark*, 274 F.2d 771, 778 (6th Cir.), *cert. denied*, 363 U.S. 828 (1960); *Andrews v. Equitable Life Assurance Soc'y of U.S.*, 124 F.2d 788, 789 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942). Thus, prior to ERISA's enactment, insurers were not constrained by trust law requirements from issuing contracts with obligations that were supported by commingled assets, the management of which could not be undertaken on behalf of any particular contractholder or class of contractholders with the undivided loyalty expected of a fiduciary.

But the GBP exception also has important legal implications that the life insurance industry has relied upon for decades. The exception necessarily allows insurance companies to comply with applicable state insurance laws and regulations, which are generally designed to ensure that each insurer is able to satisfy its contractual obligations to *all* contractholders, and that all contractholders are treated equitably and on a non-discriminatory basis. See, *e.g.,* N.Y. Ins. Law § 4239 (authorizing New York superintendent of insurance to issue regulations providing for "the equitable allocation of income and expenses as among lines of business and as between investment expenses and insurance expenses"); N.Y. Comp. Codes R. & Regs. tit. 11, § 91.1(a) (equitable allocation of income and expenses of life insurer must, among other things, "comply with Insurance Law requirements that holders of insurance policies and annuity contracts be treated equitably").[19] As such, the GBP exception alleviates any conflict that would otherwise exist for general account guaranteed product issuers between ERISA's "exclusive benefit" fiduciary obligation (requiring fealty solely to ERISA plan participants and beneficiaries), on one hand, and issuers' broader

[19] State laws do not subject an insurance company's commingled general account investments to the "exclusive benefit" standard imposed by ERISA. See 29 U.S.C. § 1104(a)(1)(A) (prescribing ERISA's "exclusive benefit" or "exclusive purpose" fiduciary duty of loyalty). Rather, state insurance laws customarily specify the types of assets in which insurance companies may invest for their general accounts and impose a general prudence requirement on the corporate officials responsible for overseeing the companies' investment of general account assets. See, *e.g.*, N.Y. Ins. Law § 1405.

obligations under state insurance law—and to all classes of contractholders—on the other.

Even prior to this Court's decision in *Harris Trust*, courts consistently held that group annuity contracts providing for guarantees of principal and rates of return guaranteed for fixed periods declared in advance constitute "guaranteed benefit policies" that do not implicate fiduciary status on the part of the insurance company issuer. See, *e.g.*, *Chicago Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983) ("*CBOE*"); *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co. of N.Y.*, 729 F. Supp. 1162 (N.D. Ill. 1989), *aff'd*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, 502 U.S. 1099 (1992); *Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86-cv-9595-HDL, 1991 WL 285746, at *3-5 (N.D. Ill. Dec. 23, 1991). The United States Department of Labor—the federal agency responsible for enforcing ERISA's fiduciary conduct rules—has also confirmed the same guidance since *Harris Trust*. U.S. Dep't of Labor, Information Letter to Jon W. Breyfogle, 2004 WL 3419101 (Jan. 6, 2004). ACLI is not aware of any enforcement action or written pronouncement in which the Department of Labor has asserted that an insurer was acting as a plan fiduciary either in connection with the management of its general account assets or by virtue of the issuance of a general account-backed annuity contract to an employee benefit plan.

The PFIO's status as a GBP, Principal's related obligations pursuant to each plan contract, and the actual operation of the fund go hand in hand with the correct conclusion reached by the district court

below. Consistent with the "final say" standard embraced by seven Circuits (including the Tenth Circuit, in its 2019 summary judgment affirmance in the parallel *Teets* case), the district court held that Principal was not a fiduciary with respect to the guaranteed crediting rates announced in advance to plan participants, who can freely reject the rates by costlessly exiting the fund at any time. See generally Pet. App. 19a-29a.

In contrast, the Eighth Circuit's decision places two ERISA provisions in conflict and effectively nullifies the GBP exception (albeit *sub silentio*). While the GBP exception insulates product providers from potential fiduciary responsibility for exercising authority or control over plan assets in connection with offering and administering GBPs, the Eighth Circuit held that Principal is a fiduciary under ERISA's statutory definition in connection with offering and administering the PFIO, a GBP. Rules of statutory construction dictate that the provisions of a statute should be read in a manner that yields internal consistency. The Eighth Circuit has done the opposite here. Its ruling exposes a GBP provider, for the first time, to ERISA fiduciary obligations that inherently conflict with the provider's obligations under state insurance law. As a result, the ruling contravenes Congress's intent as embodied in the GBP exception and introduces significant risk and uncertainty for life insurers offering general account products in the ERISA-governed space. For upwards of 40 years, this essential segment of the retirement plan services industry has reasonably relied on both the GBP exception itself and consistent interpretive law and

agency guidance regarding the non-fiduciary treatment of these consumer-friendly financial products. The Eighth Circuit's decision upends that consistency and predictability.

III. Even If The Eighth Circuit's Decision Had Not Created A Circuit Conflict And Contravened Congressional Intent, Review Still Would Be Warranted.

The Eighth Circuit concluded below that the service provider *was* an ERISA fiduciary even though the provider's arm's-length conduct *did not*, by any recognized standard or rule of interpretation, implicate *any* prong of ERISA's definition of "fiduciary." This plain error is a momentous issue for ACLI members and other ERISA plan service providers across the country, irrespective of the existence of a Circuit split or any contravention of statutorily expressed Congressional intent. In light of the importance of ensuring that the lower courts maintain uniform standards when applying ERISA's fiduciary responsibility provisions, the Court's review is warranted. See, *e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (noting important ERISA objective of "assuring a predictable set of liabilities, under uniform standards of primary conduct"); see also Pet. 23 (citing examples where Court has granted certiorari to clarify issues relating to ERISA's "fiduciary" definition in absence of lower court split of authority).

To be clear, nothing associated with Principal's operation of the PFIO—or its exercise of any rights

under the terms of the annuity contracts to which plan sponsors/named fiduciaries agreed on behalf of each plan—triggers ERISA's functional fiduciary definitional prong regarding the exercise of "authority or control respecting management or disposition of [plan] assets." See 29 U.S.C. § 1002(21)(A)(i). A product provider such as Principal is not exercising "authority or control" over the annuity contract or any participant interests in the guaranteed fund when, on a scheduled basis in accordance with the contract, the provider prospectively announces resets to the guaranteed crediting rate—with such rate changes at all times subject to participant rejection via costless withdrawal from the fund. *Teets*, 921 F.3d at 1212-14; *CBOE*, 713 F.2d at 260. The provider exercises no authority or control over any plan assets in that the decision to either accept or reject the newly offered rate rests solely with plan participants who are invested in the fund. In holding otherwise, the Eighth Circuit committed clear error with broad consequences.

While acknowledging that participants can freely reject rate changes (thus giving participants "final say" over whether a new rate will apply to their assets), the Eighth Circuit nevertheless reached the conclusion that "Principal is a fiduciary when it sets the [crediting rate]." Pet. App. 8. The lower court based its finding of fiduciary status on the agreed-upon terms of the contract's plan-level termination provision relating to a *plan sponsor's* exercise of its right to terminate, reasoning that these terms "impeded" the plan sponsor from rejecting Principal's

proposed rate changes. *Id.* at 5a-7a.[20] The Eighth Circuit's rationale is untenable for numerous reasons that are catalogued in Principal's petition and need not be repeated here. See Pet. 10-12, 14-15, 19-20, 23-30. However, to the extent one assumes *arguendo* that the plan sponsor's ability to "reject" the rates even matters given participants' unimpeded ability to do so, ACLI would like to emphasize one additional point to further illustrate why the Eighth Circuit's reliance on the termination provision as a basis for fiduciary status is misplaced.

As the Eighth Circuit appears to recognize in its decision (see Pet. App. 4a), it is black-letter law that a service provider does not assume ERISA fiduciary status by requiring adherence to specific, agreed-upon contractual terms. See, *e.g., McCaffree Fin. Corp. v. Principal Life Ins. Co.,* 811 F.3d 998, 1003 (8th Cir. 2016) ("[A] service provider's adherence to its agreement with a plan administrator does not implicate any fiduciary duty where the parties negotiated and agreed to the terms of that agreement in an arm's-length bargaining process."); *Hecker v. Deere & Co.,* 556 F.3d 575, 583 (7th Cir. 2009) ("[A] service provider does not act as a

[20] Under this provision, the plan sponsor has the unilateral right to terminate the contract. The plan sponsor is entitled to the release of all funds within 12 months after providing notice of termination. If the plan sponsor wants the funds released sooner, it must pay a charge equal to 5% of the assets allocated to the PFIO. Pet. App. 5a-6a; see also Pet. 8, 22 (explaining that these standard industry terms are required to minimize volatility in Principal's general account and are designed to ensure that the PFIO complies with risk-based capital rules under state insurance regulations).

fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms."), *cert. denied*, 558 U.S. 1148 (2010). Yet that is precisely the import of the Eighth Circuit's ruling: namely, that Principal is a fiduciary to the extent it requires adherence to the specific, agreed-upon provisions of the parties' termination clause. That proposition is wrong as a matter of law. And it is yet another reason why the Court's review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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