No. 19-

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT N. HOCHMAN
JOEL S. FELDMAN
MARK B. BLOCKER
CAROLINE A. WONG
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

July 1, 2020

* Counsel of Record

QUESTION PRESENTED

A person is a "fiduciary" under ERISA to the extent that person "exercises any authority or control respecting management or disposition of [the] assets" of an ERISA-governed employee benefit plan. Petitioner offers a product that plan sponsors may choose to make available to plans' participants. Every six months, petitioner adjusts the rate of return offered to participants who choose to put money into this product, and pre-announces the rate before it goes into effect. Plan sponsors that make this product available to participants agree that if they want to stop offering the product, they must either pay petitioner 5% of the assets allocated to it, or wait 12 months to remove all participants' monies. Participants, however, can remove their money from the product without waiting or paying anything. As a result, though petitioner adjusts the rate every six months, it lacks the final say over whether any participant's assets remain invested at any particular rate. The question presented is:

Whether a service provider is a fiduciary under 29 U.S.C. § 1002(21)(A)(i) when it changes the rate of return on a product offered in an employee benefit plan, even though the plan's participants, by virtue of their freedom to withdraw from the product at any time, retain "authority [and] control respecting management [and] disposition" of their assets.

RULE 29.6 STATEMENT

Petitioner Principal Life Insurance Co. is wholly owned by a sole shareholder, Principal Financial Services, Inc., an Iowa corporation, which in turn is wholly owned by a sole shareholder, Principal Financial Group, Inc., a Delaware corporation. The common stock of Principal Financial Group, Inc. is publicly traded on the NASDAQ.

RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

Rozo v. *Principal Life Ins. Co.*, No. 18-3310 (Feb. 3, 2020)

United States District Court (S.D. Iowa):

Rozo v. *Principal Life Ins. Co.*, No. 4:14-cv-00463-JAJ (Sept. 25, 2018)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. ERISA and Defined Contribution Plans	4
B. The Principal Fixed Income Option	5
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW CREATES A CONFLICT REGARDING THE STANDARD FOR DETERMINING WHEN A SERVICE PROVIDER IS A FIDUCIARY UNDER ERISA	14
II. THE QUESTION PRESENTED HAS PROFOUND CONSEQUENCES FOR EMPLOYEES' ABILITY TO PUT THEIR RETIREMENT SAVINGS IN SAFE, VALUABLE INVESTMENTS	20
III. THE DECISION BELOW IS WRONG BECAUSE IT IS CONTRARY TO ERISA'S TEXT	23
CONCLUSION	30

TABLE OF CONTENTS—continued

Page

APPENDICES

APPENDIX A: Opinion, *Rozo* v. *Principal Life Ins. Co.*, No. 18-3310 (8th Cir. Feb. 3, 2020), reported at 949 F.3d 1071 .... 1a

APPENDIX B: Order, *Rozo* v. *Principal Life Ins. Co.*, No. 4:14-cv-00463-JAJ (S.D. Iowa Sept. 25, 2018), reported at 344 F. Supp. 3d 1025 .... 9a

APPENDIX C: Statutory Provisions Involved.... 38a

TABLE OF AUTHORITIES

CASES Page

Chi. Bd. Options Exch., Inc. v. *Conn. Gen. Life Ins. Co.*, 713 F.2d 254 (7th Cir. 1983) 3, 13, 14, 15
Chi. Dist. Council of Carpenters Welfare Fund v. *Caremark, Inc.*, 474 F.3d 463 (7th Cir. 2007) 18
Ed Miniat, Inc. v. *Globe Life Ins. Grp., Inc.*, 805 F.2d 732 (7th Cir. 1986) 18
F.H. Krear & Co. v. *Nineteen Named Trs.*, 810 F.2d 1250 (2d Cir. 1987) 2, 15, 16
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 28
Gordon v. *CIGNA Corp.*, 890 F.3d 463 (4th Cir. 2018) 24
Hecker v. *Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) 18
Hi-Lex Controls, Inc. v. *Blue Cross Blue Shield of Mich.*, 751 F.3d 740 (6th Cir. 2014) 17
John Hancock Mut. Life Ins. Co. v. *Harris Tr. & Sav. Bank*, 510 U.S. 86 (1993) 23
LaRue v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008) 21
Leimkuehler v. *Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013) 2, 17, 18
Loomis v. *Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011) 26
McCaffree Fin. Corp. v. *Principal Life Ins. Co.*, 811 F.3d 998 (8th Cir. 2016) 24
Pappas v. *Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991) 18

TABLE OF AUTHORITIES—continued

Page

Pegram v. *Herdrich*, 530 U.S. 211 (2000) 23, 24, 26
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 21
Pipefitters Local 636 Ins. Fund v. *Blue Cross & Blue Shield of Mich.*, 722 F.3d 861 (6th Cir. 2013) 17
Reich v. *Lancaster*, 55 F.3d 1034 (5th Cir. 1995) 17
Renfro v. *Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011) 16, 26
Rush Prudential HMO, Inc. v. *Moran*, 536 U.S. 355 (2002) 21
Santomenno ex rel. John Hancock Tr. v. *John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284 (3d Cir. 2014) 2, 16
Santomenno v. *Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018) 2, 19
Schloegel v. *Boswell*, 994 F.2d 266 (5th Cir. 1993) 2, 16, 17
Schulist v. *Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983) 18
Seaway Food Town, Inc. v. *Med. Mut. of Ohio*, 347 F.3d 610 (6th Cir. 2003) 2, 17
Teets v. *Great-W. Annuity & Ins. Co.*, 921 F.3d 1200 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019) 2, 3, 12, 14
Universal Health Servs., Inc. v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) 28
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 23, 28

TABLE OF AUTHORITIES—continued

Page

STATUTES AND REGULATIONS

29 U.S.C. § 1001(b) 4, 27
29 U.S.C. § 1002(2) 11
29 U.S.C. § 1002(21)(A)(i) 1, 2, 5, 12, 24
29 U.S.C. § 1002(34) 4
29 U.S.C. §§ 1021–30 27
29 U.S.C. § 1102(a)(1) 4, 11
29 U.S.C. § 1104(a) 4, 5, 27, 28
29 U.S.C. § 1104(c)(1)(A) 27
Iowa Code § 508.36 22
29 C.F.R. § 2550.404a-5(d)(1)(ii)(B) 6

LEGISLATIVE MATERIALS

H.R. Rep. No. 93-1280 (1974) 28
S. Rep. No. 93-1090 (1974) 28
H.R. Rep. No. 93-533 (1973) 28

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019)........ 24
10 George G. Bogert et al., *The Law of Trusts and Trustees* (3d ed. 2020 update) 29
3 Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2017 update) 29
Restatement (Second) of Trusts (Am. Law Inst. 1959) 29
1 George M. Turner, *Revocable Trusts* (5th ed. 2019 update) 29

PETITION FOR A WRIT OF CERTIORARI

Principal Life Insurance Company ("Principal") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a–8a) is reported at 949 F.3d 1071. The district court's opinion (Pet. App. 9a–37a) is reported at 344 F. Supp. 3d 1025.

JURISDICTION

The Eighth Circuit entered its judgment on February 3, 2020. On March 19, 2020, in light of the ongoing public health concerns relating to COVID-19, the Court entered an order that extended the time to file a petition for a writ of certiorari until July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(21)(A)(i) of the Employee Retirement Income and Security Act of 1974 ("ERISA") provides:

> [A] person is a fiduciary with respect to a plan to the extent … he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets[.]

29 U.S.C. § 1002(21)(A)(i). Other relevant provisions of ERISA are set forth in Appendix C (Pet. App. 38a–40a).

INTRODUCTION

In this case, the Eighth Circuit adopted a novel rule of law for determining when a service provider for ERISA-governed retirement plans may be deemed a fiduciary. The new rule, if allowed to stand, will substantially disrupt the availability of safe, highly valued options to people who are nearing retirement or who otherwise prefer to avoid market volatility and risk. This Court's review is urgently needed.

Under what was, until this opinion, settled law, a service provider who offers an investment product is not a fiduciary unless the service provider has the "final say" over whether the terms of the offer are imposed on participant assets. See, *e.g.*, *F.H. Krear & Co.* v. *Nineteen Named Trs.*, 810 F.2d 1250, 1259 (2d Cir. 1987); *Santomenno ex rel. John Hancock Tr.* v. *John Hancock life Ins. Co. (U.S.A.)* ("*John Hancock*"), 768 F.3d 284, 293–97 (3d Cir. 2014); *Schloegel* v. *Boswell*, 994 F.2d 266, 271–72 (5th Cir. 1993); *Seaway Food Town, Inc.* v. *Med. Mut. of Ohio*, 347 F.3d 610, 616–19 (6th Cir. 2003); *Leimkuehler* v. *Am. United Life Ins. Co.*, 713 F.3d 905, 911–12 (7th Cir. 2013); *Santomenno* v. *Transamerica Life Ins. Co.*, 883 F.3d 833, 838–39 (9th Cir. 2018); *Teets* v. *Great-W. Annuity & Ins. Co.*, 921 F.3d 1200, 1218–20 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019). That rule flows from the statutory definition of "fiduciary" in ERISA. As relevant here, "a person is a fiduciary" only "to the extent" that person "exercises any authority or control respecting management or disposition of [a plan's] assets." 29 U.S.C. § 1002(21)(A)(i). When a service provider offers terms to participants, it does not exercise any "authority or control" over participants' plan assets if participants are free to reject those terms.

The Eighth Circuit's new rule sweeps aside this settled law. According to the Eighth Circuit, even if

participants have the final say over whether their assets are subject to the terms offered by a service provider, the service provider becomes a fiduciary if the *plan sponsor* cannot *immediately* reject the service provider's product terms for all participants. This rule not only finds no basis in the statute, it contradicts the standards set forth by both the Tenth and the Seventh Circuits. Both of those courts have ruled that if *either* participants *or* plan sponsors can reject a service provider's product terms by directing plan assets away from that product, then the service provider is not a fiduciary. *Teets*, 921 F.3d at 1216–20; *Chi. Bd. Options Exch., Inc.* v. *Conn. Gen. Life Ins. Co.* ("*CBOE*"), 713 F.2d 254, 260 (7th Cir. 1983).

The Eighth Circuit's new rule dramatically expands the definition of an ERISA fiduciary beyond the terms of the statute. It cannot be squared with the "final say" rule, or with all the cases reflecting it, which have appropriately governed ERISA fiduciary status for decades. Moreover, it threatens to subject the retirement services industry to massive and wasteful litigation over valued products that participants remain free to accept or reject. The imminent and predictable result of this threat is that these valuable products—which include scores of low-risk products similar to petitioner's that are particularly popular among individuals nearing retirement—will disappear from the marketplace, to the detriment of plan participants nationwide. This Court should grant certiorari to clarify that no entity can be an ERISA fiduciary when it offers plan participants a product on terms that participants are always free to accept or reject as they see fit.

STATEMENT OF THE CASE

A. ERISA and Defined Contribution Plans

ERISA is a comprehensive federal statute designed to enable participants in employer-sponsored benefit plans to make safe and informed investment decisions. It "protect[s] … the interests of participants" in such plans by "requiring the disclosure and reporting to participants and beneficiaries of financial and other information" about their plans. 29 U.S.C. § 1001(b). It also establishes requirements for plan fiduciaries, who must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1).

One type of benefit plan that employers can sponsor for their employees is a defined contribution plan. In a defined contribution plan, the plan sponsor assembles a menu of investment options to make available to plan participants. Each participant holds an individual account, to which the participant and/or the plan sponsor contributes money. The participant chooses investment options from the menu, and chooses how much of the money in his or her individual account to allocate to each of those options. The amount in the participant's account is "based solely upon the amount contributed," "any income, expenses, gains and losses" resulting from the investment options the participant chooses, and "any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

Employee benefit plans are required to identify "one or more named fiduciaries" (often a committee of employees of the plan sponsor), 29 U.S.C. § 1102(a)(1), and those persons owe certain fiduciary duties to plan participants. A fiduciary must manage and administer the plan with the care and skill of a prudent person,

including by selecting prudent investment options to include within the plan's menu. *Id.* § 1104(a)(1)(B). And, except in certain circumstances described in the statute, a fiduciary must "diversify[] the investments" on a plan's menu "so as to minimize the risk of large losses" to participants. *Id.* § 1104(a)(1)(C), (a)(2).

Third parties who provide services to defined contribution plans can sometimes be fiduciaries. As relevant here, a third party is a fiduciary if it "exercises any discretionary authority or discretionary control respecting management of [a] plan," or "exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i).

B. The Principal Fixed Income Option

Principal is an insurance company that offers products and services to employee benefit plans, including defined contribution plans. One product it offers is the Principal Fixed Income Option, or "PFIO." If the plan sponsor chooses to make the PFIO available on its menu, participants decide whether and how much money to allocate to the PFIO from monies in their individual accounts.

The PFIO offers a guaranteed rate of return that is backed by the assets in Principal's general account and is higher than the rates of similarly safe products, such as money market funds and other short-term debt securities. The PFIO's rate of return has ranged from 1.10% to 3.50% during the class period. By contrast, for most of the class period, the rate of return on money market funds has averaged approximately 0.44%, and bank certificates of deposit have generally offered rates below 0.25%. Treasury bonds have also offered consistently lower rates than the PFIO, ranging from 0.03% to 0.32% during the same period.

The PFIO's rate is fixed for six-month periods. Principal notifies plan sponsors of the next six-month period's rate of return approximately 30 days before the new rate goes into effect. In turn, federal regulations promulgated under ERISA require plan sponsors to notify participants of each new rate on or before the date it goes into effect. See 29 C.F.R. § 2550.404a-5(d)(1)(ii)(B); see also Pet. App. 12a & n.9. Participants who allocate money to the PFIO can withdraw their money at any time, including after they learn what the next six months' rate will be and before that rate goes into effect. At all times, participants control their own assets. And of fundamental importance, there is never any cost to a participant who wants to withdraw from the PFIO.[1]

Principal invests the money participants allocate to the PFIO, along with other money in its general account, and earns a return on its investments. Principal must pay the PFIO's guaranteed rate to participants regardless of whether Principal's return on its general account investments are higher or lower than the guaranteed rate. The "spread," or the difference between the guaranteed rate for any particular six-month period and the net return Principal earns on its general account investments, is Principal's profit. If Principal's general account investments yield a lower return than the amount promised to participants in the PFIO, then Principal loses money on the product for that six-month period.

---

[1] Participant withdrawals are subject to an "equity wash" provision, under which participants who withdraw monies from the PFIO may not then invest those monies in certain competing options until 90 days after the withdrawal. Pet. App. 12a–13a. The equity wash provision neither requires participants to pay a charge to withdraw monies from the PFIO, nor imposes any delay on withdrawals. *Id.*; see also *id.* at 26a.

The PFIO is a particularly popular product among participants who are saving for or nearing retirement. In addition to a forward-looking guaranteed rate of return that facilitates financial planning, the PFIO is exceedingly reliable. The PFIO is guaranteed to preserve the capital invested by participants and yield returns at the promised rate, and these guarantees are backed by the assets of a major insurance company, whose financial stability is closely watched by insurance regulators to ensure that the company can meet its going-forward financial obligations to policyholders as well as participants in its guaranteed return products.

The guaranteed rate of return for the PFIO is designed to be stable and to change only modestly from period to period. It is structured as a series of underlying funds that accept deposits for six months each. Every six months, Principal opens a new fund that will receive deposits for the next six months, and Principal sets an interest rate for that new fund. That rate is fixed for the ten-year life of that fund. Participants in the PFIO do not receive that rate. Instead, they are promised the asset-weighted average of all 20 such funds (all the funds opened every six months for the past ten years) that make up the PFIO. Every six months, the oldest underlying fund expires and is replaced with a new fund, while the other 19 funds remain in place with their existing interest rates. So when Principal calculates the asset-weighted rate of return for a given six-month period, 19 of the 20 rates that are averaged are the same as those used to calculate the rate for the prior period. The PFIO's weighted-average rate of return has changed 24 times since the start of the class period; 22 of those times the rate either did not move or moved 0.2% or less, and the

other two times the rate moved by 0.35%, once up and once down.

Unlike participants, who are entirely free to enter or exit the PFIO at any time and are assessed no fees for doing so, plan sponsors agree, when choosing to make the PFIO available to their participants, to place some conditions on their ability to remove the PFIO from their plan menus. A plan sponsor who wants to withdraw all plan assets allocated by participants to the PFIO must either provide Principal with 12 months' notice before Principal is obliged to release the funds, or pay Principal a charge equal to 5% of the assets allocated to the PFIO if it wants Principal to release the funds sooner.[2] These terms minimize volatility in Principal's general account. Volatility in an insurance company's general account raises concerns regarding the insurance company's ability to meet its obligations to *all* its policyholders. The National Association of Insurance Commissioners, a standard-setting organization governed by the chief insurance regulators of the 50 states, the District of Columbia, and five U.S. territories, has issued risk-based capital rules to regulate that volatility. These rules determine how much capital an insurance company must set aside for each particular product it offers. The PFIO's 12-month notice requirement and 5% surrender charge are designed to ensure that the PFIO complies with these rules.

---

[2] The plan assets withdrawn from the PFIO when the plan sponsor chooses to remove the PFIO from the menu remain assets belonging to participants. Typically, the plan sponsor chooses to withdraw from the PFIO when the plan sponsor is changing recordkeepers; the PFIO is available only to plans that also use Principal's recordkeeping services. Regardless, when the assets are withdrawn from the PFIO, participants decide which alternative option from the menu in which to invest those assets.

C. Proceedings Below

1. Respondent Frederick Rozo allocated money to the PFIO through his participation in his employer's 401(k) plan. He received in full the guaranteed returns that Principal promised during the periods in which he kept money in the product. After his employer ceased offering the PFIO, he filed this case against Principal on behalf of himself and a class of more than 100,000 other plan participants who also allocated monies to the PFIO. He alleged that Principal acts as an ERISA fiduciary when it sets the rate of return for the PFIO. Respondent also alleged that Principal is liable as a fiduciary for breaching its duties to participants and engaging in prohibited transactions under 29 U.S.C. §§ 1104(a) and 1106(b), because Principal keeps the difference between the returns it guarantees to participants and the net returns it earns on the assets in its general account.[3]

2. The district court certified respondent's proposed class of participants and later entered summary judgment in Principal's favor. It held that Principal is not a fiduciary when it sets the rate of return for the PFIO because—as established by the "overwhelming weight" of precedent, Pet. App. 25a—offering a rate to participants is not an exercise of "authority" or "control" over a plan or plan assets, as required by ERISA's definition of "fiduciary."

The district court recognized that, under the rule articulated in "a number of cases," a service provider

---

[3] Respondent also claimed in the alternative that Principal was liable as a non-fiduciary party in interest under 29 U.S.C. § 1106(a). This claim is an alternative to the fiduciary duty breach claim and is not relevant to this petition. The district court rejected it at summary judgment, Pet. App. 35a–37a, and the Eighth Circuit did not address it, *id.* at 1a–8a.

is not an ERISA fiduciary when it proposes a rate of return on an investment product, as long as plan participants who "dislike the new rate" can "vote with their feet" by withdrawing their investments or otherwise rejecting the product. *Id.* at 19a (quotation marks omitted). That is because in those circumstances, participants—not the service provider—have "final say" over whether their assets will be subject to the proposed rate. *Id.* at 23a. The district court also recognized the long-standing rule that a service provider is not an ERISA fiduciary when it adheres to the terms of a contract resulting from an "arms-length negotiation" with a plan sponsor. *Id.* at 22a.

These well-established principles mean that, in the view of the district court, Principal is not an ERISA fiduciary even though it can change the PFIO's offered rate every six months. When Principal calculates a new rate of return for an upcoming six-month period, it announces the rate "in advance" and "communicates [the rate] to plan sponsors," who in turn are "required by law to communicate [the rate] to participants." Pet. App. 25a. If participants dislike the rate that Principal announces, they have a "meaningful opportunity to 'vote with their feet' by leaving the PFIO," and they never have to pay a penalty or fee to do so. *Id.*

3. The Eighth Circuit reversed. It held that Principal is a fiduciary when it identifies the offered rate of return for the PFIO because *plan sponsors* who dislike the proposed rate cannot immediately withdraw all participant assets from the PFIO without paying a charge.[4] The Eighth Circuit did not disagree

---

[4] The Eighth Circuit confusingly referred to the PFIO as a "plan" in various places in its opinion. The PFIO is not a plan; it is a product that may be offered to participants in 401(k) plans serviced by Principal. ERISA makes clear that the "plan" is the

with the district court's conclusion that *participants* always have a meaningful ability to reject a proposed rate by withdrawing their assets from the PFIO at no cost. To the contrary, the court acknowledged that participants "can immediately withdraw their funds" at any time, Pet. App. 2a, and that participants therefore always have the unimpeded "ability to reject the [rate]," *id.* at 7a. Rather, it determined that unless *both* plan sponsors *and* participants are free to direct plan assets out of the PFIO, then Principal is a fiduciary. *Id.* at 7a–8a. It did so even though this case was brought on behalf of participants, not plan sponsors. No plan sponsor has ever brought a claim challenging the rate of return or any other aspect of the PFIO.

The Eighth Circuit asserted that its rule is in accord with *Teets*, a recent Tenth Circuit decision that considered a similar guaranteed return product offered by a different insurance company. Pet. App. 4a. But, as the Eighth Circuit's decision makes clear, the Tenth Circuit considered whether *either* the plan sponsor *or* participants may freely direct plan assets out of the product. *Id.* at 3a–4a ("[A] service provider acts as a fiduciary[] if … it 'took a unilateral action respecting plan management or assets without the plan *or* its participants having an opportunity to reject its decisions.'" (emphasis added) (quoting *Teets*, 921 F.3d at 1212)). Because "plan sponsors here do not have the unimpeded ability to reject [Principal's new] rate," the Eighth Circuit concluded that Principal is a fiduciary. *Id.* at 5a (quotation marks omitted).

The Eighth Circuit not only quoted the passage in *Teets* stating that a service provider is not a fiduciary

---

employer's retirement program, see 29 U.S.C. § 1002(2), which is a written instrument, see *id.* § 1102(a)(1).

if either the plan sponsor *or* participants can direct assets away from a product whose terms the service provider has changed, it acknowledged the Seventh Circuit decision that held the same almost 40 years ago. Pet. App. 6a–7a (citing *CBOE*, 713 F.2d at 260). The Eighth Circuit offered no rationale for departing from these other Circuits' legal standards.

The Eighth Circuit also never confronted ERISA's language. The opinion does not explain how changing the offered rate can be said to be "authority" or "control" over "management of [a retirement] plan," which is one way a discretionary act makes a third party a fiduciary under ERISA. 29 U.S.C. § 1002(21)(A)(i). Neither did it explain how Principal can be said to be exercising "authority or control" over "[plan] assets" (the other relevant way a third party can be a fiduciary) when it re-computes the rate of return, even though participants remain in full control of whether the new rate is ever applied to their assets.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit is the only federal court of appeals to have ruled that a service provider is a fiduciary when it sets the terms of a product offered to participants unless *both* the plan sponsor *and* participants can freely reject those terms and direct plan assets away from that product. Both the Tenth and Seventh Circuits have held that if *either* the plan sponsor *or* participants can reject the service provider's terms and direct plan assets away from the product, then the service provider is not a fiduciary. See *Teets*, 921 F.3d at 1212 ("[T]o establish a service provider's fiduciary status, an ERISA plaintiff must show the service provider … took a unilateral action respecting plan management or assets without the plan *or* its participants having an opportunity to reject

its decision." (emphasis added)); *CBOE*, 713 F.2d at 260 (concluding that "[it] is not the case" that the service provider would "be a fiduciary under ERISA" merely by "guarantee[ing] the rate of return in advance" for a product from which participants could withdraw). The novel Eighth Circuit rule also cannot be reconciled with the decades-old line of cases acknowledged by the Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits that makes clear that a service provider is not a fiduciary when it sets the terms of a product but lacks "final say" over whether plan assets will be subject to the terms it proposes.

This Court's review is urgently needed to resolve the conflict and restore a nationally uniform test for determining fiduciary status under ERISA. The decision muddies a foundational legal principle governing retirement plans—the rule for when a third party is subject to fiduciary duties—by ignoring the statutory terms in ERISA that provide the much-needed clarity regarding that issue. Moreover, service providers like Principal offer their products widely to plans with participants across many jurisdictions. If the Eighth Circuit's ruling stands, they and numerous other service providers offering popular guaranteed return and other stable value products will face costly litigation over products they have offered for years, on terms which no other Circuit has ever before suggested could create fiduciary status. The uncertainty and costs imposed by such litigation will inevitably cause many service providers to stop offering products like the PFIO. This Court should grant this petition.

I. THE DECISION BELOW CREATES A CONFLICT REGARDING THE STANDARD FOR DETERMINING WHEN A SERVICE PROVIDER IS A FIDUCIARY UNDER ERISA.

1. The Tenth and Seventh Circuits have held that if *either* a plan sponsor *or* participants can direct plan assets away from a product, then the service provider offering those terms is not a fiduciary. The Eighth Circuit's ruling rejects those decisions without offering any reason to do so.

In *Teets*, the Tenth Circuit considered a product very similar to the PFIO. There, as here, the service provider offered a guaranteed return product to plan participants and changed the rate of return on the fund periodically (every 90 days). There, as here, a certified class of participants asserted that the service provider was a fiduciary when it modified the going-forward rate each period. The Tenth Circuit determined that the service provider is not a fiduciary. It explained that the service provider's fiduciary status "depend[ed] on whether the Plan *or* its participants [could] reject a change" in the rate of return. 921 F.3d at 1216–20 (emphasis added). Unlike the Eighth Circuit, it did not require both the plan *and* the participants to have authority to reject the rate. See *id.*

The ruling in *Teets* has roots in *CBOE*, in which the Seventh Circuit announced, decades ago, that participants' ability to reject a service provider's guaranteed rate of return forecloses fiduciary status. In *CBOE*, the court considered a service provider that offered participants an investment product with a pre-announced, guaranteed rate of return that the provider could change "from time to time." 713 F.2d at 256. The contract governing the product allowed participants to withdraw their investments at any time, except under certain conditions. Several years after

the product became available to participants, the service provider unilaterally amended the contract in a way that ensured that participants would be restricted from making withdrawals for the next ten years. The Seventh Circuit held that the service provider's actions made it a fiduciary under 29 U.S.C. § 1002(21)(A)(i). Because the service provider's unilateral amendment of the contract effectively "lock[ed]" the plan's assets into the investment product for a ten-year period, the amendment amounted to an exercise of "control" over those assets, as that term is used in the statute. *Id.* at 260.

Critically, the Seventh Circuit explained that simply changing the product's guaranteed rate of return did not render the service provider a fiduciary—so long as the service provider announces the rate in advance and participants remain free to withdraw. See *id.* (explaining that if the service provider had merely "guaranteed the rate of return in advance for the [product], [it] is not the case" that the service provider would "be a fiduciary under ERISA"). That explanation made clear that if participants *or* plan sponsors can reject a rate change, then the entity proposing that rate is not a fiduciary. See *id.*

2. The rulings in *Teets* and *CBOE* are specific instances of a broad, generally accepted rule for determining when a service provider can be a fiduciary under ERISA. Case after case for decades has agreed that a service provider is not a fiduciary when it has discretion over the terms of a product, unless the service provider has the "final say" over whether plan assets are made subject to those terms.

The Second Circuit in *F.H. Krear & Co.*, 810 F.2d 1250, considered whether a service provider for three employee benefit plans had become a fiduciary when it proposed the terms on which it would be compensated.

The court concluded that the service provider was not a fiduciary because the plans' trustees could reject the proposed terms of the service provider's compensation. The service provider thus had "no authority or responsibility for [those] terms," and lacked the "authority or control" necessary to trigger fiduciary status under the statute. *Id.* at 1259.

The Third Circuit has taken the same approach. In *John Hancock*, 768 F.3d 284, the service provider had authority to select the investment options available on a "big menu" from which the plan's trustee could select a subset of options to put on a "small menu" offered to plan participants. The service provider also could change the options on the big menu, as long as it gave adequate notice of the changes to plan sponsors. Despite the service provider's authority to change the options, the court held that the service provider was not a fiduciary because the plan's trustees "exercised final authority" over which funds would be included on the small menu. *Id.* at 295. In other words, because the service provider lacked the "ultimate authority" to decide "whether to accept or reject" its changes to the list of available options, it was not an ERISA fiduciary. *Id.* at 297; see also *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) (service provider was not an ERISA fiduciary with regard to terms of its compensation because it lacked authority over final "approval of those terms").

In *Schloegel*, 994 F.2d 266, the Fifth Circuit considered whether a benefit plan's consultant was an ERISA fiduciary when he proposed that the plan invest in insurance policies for which he received commissions. The court held that the consultant lacked sufficient "authority or control" to be a fiduciary because he merely "made an investment *proposal*, not an investment decision," with regard to the plan's

assets, and thus lacked power over the "ultimate decision" whether to invest in the insurance policies at issue. *Id.* at 272. Conversely, in a different case in which a consultant acted as the final "decision maker" for a plan, the Fifth Circuit held that the consultant was a fiduciary. See *Reich* v. *Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995).

The Sixth Circuit similarly considered in *Seaway Food Town, Inc.*, 347 F.3d 610, whether a service provider was an ERISA fiduciary when it renegotiated contractual terms with a benefit plan. The court held that the service provider had no ability to exercise "discretion or authority" over the plan in connection with those terms, because the plan sponsor was "free to seek … a different administrator with a better plan and lower costs" if it did not like the terms the service provider proposed. *Id.* at 617–19. By contrast, when a service provider has the power to make unilateral decisions affecting plan assets without first disclosing those decisions to plan sponsors or participants, the Sixth Circuit has held that the service provider is a fiduciary. See *Hi-Lex Controls, Inc.* v. *Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 744–45 (6th Cir. 2014) (service provider that decided to retain undisclosed additional fees was a fiduciary); *Pipefitters Local 636 Ins. Fund* v. *Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 865–67 (6th Cir. 2013) (same).

The Seventh Circuit has reaffirmed the "final say" rule in numerous cases since its decision in *CBOE*. For example, in *Leimkuehler*, 713 F.3d 905, a plan trustee claimed that a service provider was a fiduciary because it selected the set of funds from which the trustee could in turn choose a subset to offer to participants. The court held that the service provider was not a fiduciary—even though its selection of funds "shape[d] the disposition of Plan assets"—because the

trustee had the "final say" about which options to offer to participants and always remained "free to seek a better deal with a different 401(k) service provider." *Id.* at 911–12.

In *Hecker* v. *Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the court considered the fiduciary status of a service provider that managed two investment options available to a plan's participants and whose sister company was the investment advisor for 23 of the remaining 24 options on the plan's menu. The court concluded that the service provider was not an ERISA fiduciary because the plan sponsor, not the service provider, had the "final say on which investment options [would] be included" on the menu. *Id.* at 583. Compare also *Ed Miniat, Inc.* v. *Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 734, 737–38 (7th Cir. 1986) (service provider with power unilaterally to change rates applicable to plan assets may be a fiduciary), with *Chi. Dist. Council of Carpenters Welfare Fund* v. *Caremark, Inc.*, 474 F.3d 463, 473 (7th Cir. 2007) (service provider that proposed new prices during contract's term was not a fiduciary because plan sponsor could reject changes), and *Schulist* v. *Blue Cross of Iowa*, 717 F.2d 1127, 1131–32 (7th Cir. 1983) (service provider was not a fiduciary when it annually proposed rates because it "did not have any control over what organization would be chosen to fulfill [its] functions in the following year or on what terms"); see also *Pappas* v. *Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991) ("'[D]iscretionary authority,' 'discretionary control,' and 'discretionary responsibility' in § 1001(21)(A) … speak[] to actual decision-making power rather than to … influence.").

The Ninth Circuit has also applied the "final say" rule in a case where, as in *John Hancock* and *Leimkuehler*, a service provider selected a set of

investment options for a big menu from which a plan sponsor could choose a subset to put on the plan's menu. The court held that the service provider's selection of options was not an exercise of "discretionary control" or "authority" under ERISA's definition of "fiduciary," because the options and their associated fees were fully disclosed to the plan sponsor, which made the final decision about which subset of options to offer to participants. See *Santomenno*, 883 F.3d at 838–39.

3. The Eighth Circuit's ruling here breaks sharply from all of the other Circuits' "final say" decisions. It directly contradicts the holdings of *Teets* and *CBOE*, under which fiduciary status attaches only when *both* the plan sponsor *and* participants lack the freedom to reject changes to a product and direct plan assets away from the service provider's proposal. And it cannot be squared with the widely accepted "final say" rule.

With respect to rejecting the *Teets* and *CBOE* standard, the Eighth Circuit was explicit. It quoted the relevant passage in *Teets* and then, in the very next paragraph, it changed the *Teets* standard even as it purported to agree with it. The quotation from *Teets* clearly states that a service provider is not a fiduciary if either "the plan *or* its participants hav[e] an opportunity to reject" the service provider's change to the product. Pet. App. 3a–4a (emphasis added) (quoting *Teets*, 921 F.3d at 1212). The Eighth Circuit changed the word "or" to "and" in stating its own rule: the service provider is not a fiduciary if "a plan *and* participant[s] can freely reject" the service provider's actions. *Id.* at 4a (emphasis added).

The departure from the "final say" rule is just as clear, though not express. The Eighth Circuit never tried to explain how its view of the law can be squared with the "final say" rule. It cannot. The rationale

behind the widely accepted "final say" rule is that so long as *someone* has the authority to reject the service provider's actions, the service provider cannot be said to have "authority or control" over plan assets, as ERISA requires to establish fiduciary status. It does not matter whether the plan sponsor or participants or both stand in the way of the service provider's control over plan assets. The point of the "final say" rule is the absence of control by the service provider, not *why* the service provider lacks control, or *who* has control instead of the service provider, or *how many* parties stand in the way of service provider control. The Eighth Circuit never said that Principal has the "final say" regarding whether any participant's plan assets are made subject to Principal's rate changes. To the contrary, it admitted that participants have that "final say." Pet. App. 7a. That admission makes the departure from the "final say" rule as clear as if the Eighth Circuit had declared that it was abandoning it.[5]

II. THE QUESTION PRESENTED HAS PROFOUND CONSEQUENCES FOR EMPLOYEES' ABILITY TO PUT THEIR RETIREMENT SAVINGS IN SAFE, VALUABLE INVESTMENTS.

This Court's review is urgently needed not only to resolve the conflict in authority, but also because of the disruptive impact the Eighth Circuit's ruling will have on a nearly trillion-dollar industry.

---

[5] Though he did not develop the argument in the lower courts, respondent suggested in passing in his appellate briefing that discretion to change the rate for the PFIO might be deemed "management of [the retirement] plan," which, under ERISA, also makes a third party a fiduciary. As discussed below, the Eighth Circuit did not and could not have concluded that a change in the rate is "management" of the plan. *Infra* at 25–26.

Service providers operate nationwide. They now face the prospect of costly and disruptive litigation over a wide range of valued products like the PFIO, even though the Eighth Circuit is the only court to hold that such service providers are ERISA fiduciaries with regard to the terms on which they offer these products. The legal uncertainty created by the Eighth Circuit's decision, by itself, will predictably discourage service providers from offering such products. The legal conflict the Eighth Circuit created subverts "ERISA's policy of … assuring a predictable set of liabilities, under uniform standards of primary conduct." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) ("The uniformity of decision which [ERISA] is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." (quoting H.R. Rep. No. 93-533, at 12 (1973))).

Defined contribution plans "dominate the retirement plan scene today," *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008), and millions of Americans rely upon such plans as their primary means of saving for retirement. As of 2016, there were more than 530,000 defined contribution plans throughout the United States. And as of 2017, employer-sponsored defined contribution plans held an estimated $7.7 trillion in assets.

Among those assets, approximately $821 billion are invested in stable value products like the PFIO. The vast majority of defined contribution plans offer at least one stable value product to their participants. As of 2016, 13.5% of the total assets in the 200 largest private benefit plans were invested in stable value funds, as were 19% of the total assets in the 200

largest public benefit plans. Over the last decade, stable value funds have consistently outperformed similarly low-risk products, such as money market funds, short-term bond funds, and bank certificates of deposit. They served as an especially valuable and rare safe haven to participants in the aftermath of the 2008 financial crisis, throughout which they continued to yield consistent and positive returns, despite the widespread turmoil affecting the financial markets.

The Eighth Circuit's decision jeopardizes the continued availability of these widely preferred and attractive products. The structure of the product at issue here—requiring a 12-month delay before a plan sponsor can withdraw all funds while participants can withdraw immediately—is standard in the industry. The decision thus impacts virtually all of the products in this nearly trillion-dollar market.

Service providers are certain to respond to the increased risk of litigation by reducing the products' availability. For the PFIO, for example, the 12-month notice requirement applicable to plan sponsors' withdrawals allows Principal to meet the risk-based capital standards promulgated by the NAIC and adopted by its state insurance regulators. See, *e.g.*, Iowa Code § 508.36. And it is no answer to suggest that Principal could offer a stable value product with an indefinitely fixed rate of return or a formulaic rate-setting mechanism. Such products would, of necessity, reduce the rate of return and thus harm investors with no discernible benefit. Part of what makes the PFIO and similar products valuable is that they outperform money market funds and other low-risk, low-value products invested in short-term debt securities. Changes to the product to ward off litigation would deprive investors of that value.

Recognizing the importance of having uniform standards for applying ERISA's provisions across the Circuits, this Court has granted certiorari on multiple occasions to clarify ERISA's definition of "fiduciary"—including in cases, unlike this one, that did not even present a split of authority among the lower courts. See *John Hancock Mut. Life Ins. Co.* v. *Harris Tr. & Sav. Bank*, 510 U.S. 86, 94–106 (1993) (deciding the meaning of "plan assets" in ERISA's definition of "fiduciary"); *Varity Corp.* v. *Howe*, 516 U.S. 489, 502–03 (1996) (deciding the meaning of "administration" in ERISA's definition of "fiduciary"); *Pegram* v. *Herdrich*, 530 U.S. 211, 231–37 (2000) (deciding whether a managed care organization acted as an ERISA fiduciary).

The Court should grant certiorari now to decide the meaning of the terms "authority" and "control" in that definition. No service provider exercises "authority" or "control" over a plan or plan assets by merely proposing a rate of return on a product that plan participants are always free to reject. The Eighth Circuit's conclusion otherwise sets a dangerous precedent that threatens to upend the national market for stable value products, with potentially disastrous effects for participants and their retirement savings. This Court should intervene to resolve the conflict among the Circuits and to adopt a rule that limits fiduciary status to entities that actually exercise control over ERISA plans or their assets.

III. THE DECISION BELOW IS WRONG BECAUSE IT IS CONTRARY TO ERISA'S TEXT.

The Eighth Circuit's ruling merits review also because it is wrong. The "final say" rule rejected by the Eighth Circuit reflects faithful adherence to the text of ERISA. The Eighth Circuit all but ignored the dictates

of that text, parroting the words while ignoring their import.

As relevant here, ERISA provides that a service provider is a fiduciary "to the extent" the service provider "exercises any discretionary authority or discretionary control respecting management of [a retirement] plan or … authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). Because ERISA defines a third party as a fiduciary only "to the extent" it exercises the requisite authority or control, third-party fiduciary status is not an "all-or-nothing" concept. See, *e.g.*, *Gordon* v. *CIGNA Corp.*, 890 F.3d 463, 474 (4th Cir. 2018); *McCaffree Fin. Corp.* v. *Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016). Rather, as this Court has held, fiduciary status is act-specific: the "threshold question" is whether the person was "acting as a fiduciary … when taking the action subject to complaint." *Pegram*, 530 U.S. at 226.

Here, the "action subject to the complaint" is announcing that the rate applicable to the PFIO will change. So under the text of ERISA and this Court's decision in *Pegram*, Principal is a fiduciary if, when announcing the rate, it exercises authority or control over "management" of either the plan itself or plan assets. The Eighth Circuit never explained how Principal could do either. It cannot.

1. Discretionary control over what rate to offer is not authority or control over plan assets. Setting a pre-announced rate is no exercise of "authority" or "control" over plan assets unless the service provider has the absolute power to decide that the rate will govern and become officially binding on those assets. See, *e.g.*, *Black's Law Dictionary* (11th ed. 2019) (cited in Pet. App. 4a) (defining "authority" as the "official right or permission to act," and defining "control" as

"direct or indirect power to govern the management and policies of a person or entity"). Without that power, all that the service provider is doing when it announces a new rate is proposing a contractual term that participants can reject. Authority and control over the assets remain, at all times, with the participants.

Indeed, respondent has never claimed that Principal acts as a fiduciary when it *initially* offers the PFIO to any plan. His theory instead is that Principal becomes a fiduciary six months *after* the initial offer, when it first changes the rate of return that it will offer for the next six months. But changing a rate that participants may reject gives Principal no more authority over plan assets than offering the initially proposed rate that participants were equally free to reject.

Nowhere in its opinion did the Eighth Circuit explain how a service provider can be thought to exercise "authority" or "control" over a plan or plan assets by proposing a rate of return that participants can always reject without cost. Instead, it held that a service provider in those circumstances is a fiduciary if the participants' *plan sponsor* lacks the ability to reject the proposed rate by forcing all of the participants to withdraw immediately. The statute, however, does not turn on whether *plan sponsors* have "authority" or "control" over the plan or plan assets. It turns on whether the *service provider* has such "authority" or "control," as the "final say" rule prevailing in other jurisdictions correctly recognizes. Here, Principal lacks such authority or control, so it is not a fiduciary within the meaning of the statute.

2. Changing the rate that applies for any six-month period is also not "management" of the "plan." It is, instead, discretion over the terms of a product offered through a plan. The terms of any particular product offered to participants through a retirement

plan are not terms of the plan itself. When Principal offered respondent's plan sponsor the option to place the PFIO on its retirement plan menu, the term allowing Principal to adjust the rate was part of the contract and thus fully disclosed. The plan sponsor, in its capacity as manager of the plan, made the decision to place the PFIO on its plan menu. To be sure, changes to the rate that occurred thereafter affected plan assets (for those participants who chose to keep money in the PFIO after the announced change), but it did not change, manage, or do anything to the "plan" itself. And it is no answer to suggest that delaying the plan sponsor's ability to remove the PFIO from the menu is "management" of the plan. The delay requirement was also a contractual term to which the sponsor agreed when it exercised its plan management discretion to include the PFIO within its menu. More importantly, that is not the "discretionary" act that is "subject to complaint." *Pegram*, 530 U.S. at 226. The only discretionary act at issue in this case is the periodic rate adjustment.

3. The Eighth Circuit's decision is also inconsistent with the overall design of ERISA with respect to defined contribution plans. One of ERISA's central aims for such plans is to encourage and enable informed decision-making by participants. See, *e.g.*, *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011) (noting that ERISA's provisions "encourage[] sponsors to allow more choice to participants"); *Renfro*, 671 F.3d at 327 ("An ERISA defined contribution plan is designed to offer participants meaningful choices about how to invest their retirement savings."). Yet the Eighth Circuit's decision treats participants' role in choosing how to invest their assets as legally irrelevant. That disconnect makes no sense, especially

in cases, like this one, that bring claims on behalf of a class exclusively comprised of participants.

Congress has made clear that the purpose of ERISA is to "protect … the interests of participants" in covered benefit plans by, among other things, "requiring the disclosure and reporting to participants" of information about their plans so that participants can make informed decisions about the management and disposition of their plan assets. 29 U.S.C. § 1001(b); see also *id.* §§ 1021–30 (setting forth ERISA's disclosure and reporting requirements). ERISA contemplates that participants will use this information to exercise control over their own plan monies. In particular, Congress recognized that "[i]n the case of a pension plan which provides for individual accounts"—that is, defined contribution plans—each "participant or beneficiary" may "exercise control over the assets in his [or her] account," including by "direct[ing] the investment of th[ose] assets." *Id.* § 1104(c)(1)(A).

Without question, the statute is also designed to "establish[] standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. § 1001(b). But that statutory objective, too, operates to enhance the power of plan participants. Fiduciaries' duties do not run to plan sponsors, or to plans in the abstract. They run "solely" to "participants and beneficiaries." *Id.* § 1104(a)(1); see also *id.* § 1104(a)(1)(A)(i) (requiring fiduciaries to discharge their duties for the "exclusive purpose of … providing benefits to participants and their beneficiaries").

Given the statute's focus on the decisions participants make about how to invest their plan assets and the crucial role of participant choice, it makes little sense for a court to ignore the role of participant decisions when it determines whether a service

provider has sufficient authority or control over plan assets to be an ERISA fiduciary. Yet that is what the Eighth Circuit's decision does.[6]

4. The Eighth Circuit's expanded definition of "fiduciary" is also contrary to the meaning that term has under the common law of trusts, which, as this Court and others have widely recognized, informs the meaning of ERISA's terms.

ERISA "abounds with the language and terminology of trust law," and the principles of trust law therefore "guide[]" the interpretation of its provisions. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110–11 (1989) (citing *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)). That is particularly true for the provisions that describe ERISA fiduciary status and fiduciary obligations, as those provisions were intended to "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Id.* (alterations in original) (citing H.R. Rep. No. 93-533, at 11). Courts have therefore traditionally drawn upon the common law of trusts in interpreting the words that appear in ERISA's definition of "fiduciary." See, *e.g.*, *Varity Corp.*, 516 U.S. at 496–97, 502–03 (collecting cases); see also *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016) ("[I]t is a settled principle of

---

[6] Nothing in the legislative history relating to Section 3(21)(A)(i) of ERISA supports the Eighth Circuit's decision either. Several Senate and House Committee Reports discuss the definition of "fiduciary," but none even hints that the definition includes a service provider that sets rates of return on a product that participants are free to reject, or that participants' ability to control their own assets was intended to be irrelevant to that definition. See, *e.g.*, H.R. Rep. No. 93-533, at 21; S. Rep. No. 93-1090, at 323 (1974); H.R. Rep. No. 93-1280, at 323 (1974).

interpretation that … Congress intends to incorporate the well-settled meaning of the common-law terms it uses." (quoting *Sekhar* v. *United States*, 570 U.S. 729, 732 (2013))).

At common law, fiduciary status turned on the existence of a relationship of trust and confidence between the fiduciary and its client. The concept of fiduciary duties "dates back to … Roman law" and is "founded on concepts of sanctity, trust, confidence, honesty, fidelity, and integrity." 1 George M. Turner, *Revocable Trusts* § 3:2 (5th ed. 2019 update); see also, *e.g.*, 3 Dan B. Dobbs et al., *The Law of Torts* § 697 (2d ed. 2017 update) (fiduciaries "act in a position of trust or confidence for the benefit of another"). The word "fiduciary" itself comes from the Latin *fiducia*, which refers to "ideas of trust or confidence." Turner, *supra*, § 3.3.

The common law traditionally distinguished between relationships of trust and confidence on the one hand, which give rise to fiduciary duties, and "arm's length" relationships on the other, in which each party acts according to his or her own judgment. See Restatement (Second) of Trusts § 2 (Am. Law Inst. 1959) (collecting cases holding that "arm's length" relationships do not create fiduciary obligations); 10 George G. Bogert et al., *The Law of Trusts and Trustees* § 481 (3d ed. 2020 update) (same).

The "final say" rule that has long governed fiduciary status under ERISA—with which the Eighth Circuit's decision below conflicts—is in perfect accord with this common-law understanding of "fiduciary." When a service provider proposes a rate of return on an investment product that participants are free to reject, it does not assume some special relationship of trust or confidence vis-à-vis the participants to whom it offers the product. It is simply offering a product for

sale. Participants exercise their own judgment about whether to accept the terms of the offer. The service provider is not a fiduciary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT N. HOCHMAN
JOEL S. FELDMAN
MARK B. BLOCKER
CAROLINE A. WONG
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

July 1, 2020

* Counsel of Record