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Via CM/ECF

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 South Maestri Place
New Orleans, LA 70130

RE: *Utah v. Su*, No. 23-11097 (set for argument July 9, 2024)

Dear Mr. Cayce:

I write to respond to plaintiffs' letter regarding *Loper Bright Enterprises, Inc. v. Raimondo*, 2024 WL 3208360 (U.S. June 28, 2024). *Loper Bright* overrules *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on which the district court relied. But our brief did not invoke *Chevron*. *See* Br. 40-41. We agreed with plaintiffs—and agree now—that the Court should itself resolve the issue of statutory interpretation that this case presents: When two or more investments equally serve a plan's financial interests, and transactional or monitoring costs make it imprudent for a fiduciary to diversify among them, does ERISA compel the fiduciary to choose among the investments by flipping a coin? Or is ERISA silent as to how the fiduciary should make that choice, such that the fiduciary is free to consider an investment's collateral benefits?

Although that question is for the Court to resolve, *Loper Bright* reaffirms that "the interpretations of those responsible for implementing particular statutes … 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" 2024 WL 3208360, at *13. "[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Id.*

That is true here. Notwithstanding modest evolution in the language of the tiebreaker standard, the Department has for three decades consistently rejected the interpretation that plaintiffs advance. Across administrations, the Department has recognized that when fiduciaries cannot choose among investments on the basis of risk and return, and prudence requires that they make a choice, ERISA leaves them free to consider factors other than risk and return. Although the Department did not publish the tiebreaker standard in the Federal Register until two decades after ERISA's enactment, its analysis reflected "principles" that had been "established" by prior responses to "opinion requests." *Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974*, 59 Fed. Reg. 32,606, 32,606-32,607 (June 23, 1994). Plaintiffs offer the Court no reason to disagree with the long-settled view of the agency charged with interpreting ERISA.

Sincerely,

/s/ Daniel Winik
Daniel Winik

cc: All counsel (via CM/ECF)