No. 18-1019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN TEETS,

Plaintiff-Appellant,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from a Decision of the United States District Court
for the District of Colorado
Hon. William J. Martinez, No. 1:14-CV-02330

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

Mary Ellen Signorille*
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
202-434-2060

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: April 18, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille

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INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation, through participation as amici curiae in state and federal courts,[2] seek to protect older Americans' pension, health, and other benefit rights guaranteed under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001. The determination of who is a fiduciary is a fundamental question for participants, employee benefit plans, investment managers, and the courts, with benefits and liabilities flowing from this

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[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

[2] *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008); *Callery v. United States Life Ins. Co*., 392 F.3d 401 (10th Cir. 2004).

determination. Because the purpose of ERISA was to provide more protection for participants than state and federal law did at the time of ERISA's enactment, 29 U.S.C. § 1001, Congress provided that parties who controlled plan assets were automatically fiduciaries by virtue of their control. 29 U.S.C. § 1002(21)(A).

Here, the complaint alleged that Great-West had the discretionary unilateral authority to determine the fixed rate of return for the retirement plan assets invested through its guaranteed investment annuity contract and to keep, as compensation, the spread between that fixed rate and its own investment returns in the market, however high. This case presents the issue of whether an insurance company which controls plan assets in this fashion can escape fiduciary obligations merely because the participants have the ability to choose another investment vehicle in the plan. AARP and AARP Foundation submit this brief because the decision below failed to ensure that fiduciaries prudently and loyally manage participants' plan assets, including the fees that are charged to participants for their investments. Resolution of the issues in this case will have a significant impact on the investment return that workers earn in their retirement accounts, and hence their retirement security.

SUMMARY OF ARGUMENT

"ERISA [] defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, *see* 29 U.S.C.

§ 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). It also provides that a person is a fiduciary if that person has, or exercises, any authority or control to dispose of, or manage, a plan's assets. 29 U.S.C. § 1002(21)(A)(i). Management of plan assets is so intrinsically tied to the fiduciary duty of loyalty, which requires fiduciaries to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), that Congress required persons with plan asset management authority to be subject to ERISA's fiduciary obligations. This is so whether or not they exercise any discretionary authority or control respecting management of the plan itself. *See, e.g., David P. Coldesina, D.D.S., P.C., Emp. Profit Sharing Plan & Tr. v. Estate of Simper*, 407 F.3d 1126, 1132-33 (10th Cir. 2005) ("parties controlling plan assets are *automatically* in a position of confidence by virtue of that control, and as such they are obligated to act accordingly") (emphasis in original). Thus, an agreement may give a service provider "such control over factors that determine the actual amount of its compensation that the [service provider] thereby becomes an ERISA fiduciary with respect to that compensation." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987).

Here, the complaint alleged that Great-West had the unilateral discretionary authority to determine the crediting rate (i.e., rate of return) for the retirement plan

assets invested through its guaranteed investment annuity contract. It also alleged that Great-West steadily reduced the crediting rate by more than 2%. The complaint further alleged that after establishing the crediting rate, Great-West invested the retirement assets it held and kept the difference between the investment returns and the crediting rate, resulting in earnings of between $350 and over $414 million annually.

The district court in this case determined that Great-West, despite its control over plan assets, is not a fiduciary because participants have the option to choose other investments in the plan. This argument, analogous to the defense to fiduciary liability set forth in ERISA § 404(c), 29 U.S.C. § 1104(c), ignores the clear distinction between fiduciary *status* and fiduciary *liability* honored in that provision. Section 404(c) absolves fiduciaries of liability only where injury can be traced to participants' affirmative investment choices of investment options. However, it does not absolve the investment provider of fiduciary status. The plain language of the statute states that "no person who is otherwise a *fiduciary shall be liable* under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). By holding that Great-West is not a fiduciary, the district court incorrectly conflates fiduciary status with fiduciary liability. In this case, the ability of participants to avoid allocating their retirement funds to a particular investment

contract that is already in the Plan has no bearing on whether the insurer's exercise of discretion over the terms of that contract is a fiduciary act under ERISA. Consequently, the district court's decision should be reversed.

ARGUMENT

Participants alleged that if an insurance company enters into an investment contract with an ERISA plan where the contract gives the insurer discretion to set a future term that determines the participants' benefits — here, the crediting rate — such insurer acts as a fiduciary whenever it exercises its discretion over that term. Participants alleged that Great-West, by exercising this discretion, assumed fiduciary status and breached its fiduciary duties under Section 404 of ERISA and also engaged in self-dealing in violation of Section 406 of ERISA. The district court held that because participants could choose to change their investments after the crediting rate was announced, Great-West could not be a fiduciary.

I. CONGRESS INTENDED PERSONS TO BE LIABLE AS FIDUCIARIES BASED ON THEIR ACTIONS.

Congress specifically stated that ERISA's purpose was to "protect . . . participants in employee benefit plans and their beneficiaries, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b); *see Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) ("ERISA's fiduciary standards 'will prevent abuses of the special responsibilities borne by those dealing with plans.'"); *Eaves v. Penn*, 587 F.2d 453,

457 (10th Cir. 1978) (quoting the statutory language and noting the dual requirements of prudence and undivided loyalty to the beneficiaries). To achieve this goal, Congress imposed a federal fiduciary regime applicable to the management of employer-sponsored benefit plans in order to eliminate abuses.[3] 29 U.S.C. § 1104; *Coldesina,* 407 F.3d at 1133-1134 (quoting *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 142-43 (1985) ("A fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets . . . ."). Not only did Congress establish a fiduciary's general duty of loyalty to the plan's beneficiaries, 29 U.S.C. § 1104, but it also established per se liability by categorically barring certain transactions deemed "likely to injure the pension plan." 29 U.S.C. § 1106; *Commissioner* v. *Keystone Consol. Industries, Inc*., 508 U.S 152, 160 (1993); *Eaves*, 587 F.2d at 457 ("Certain Sections of ERISA supplement these fundamental standards by expressly prohibiting numerous specific transactions between the plans and their affiliated 'parties in interest'").

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[3] The statutory language in pertinent parts is as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) 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, ...

ERISA imposes stringent standards on fiduciaries that have the authority to manage or control plan assets. In order to reach these entities and ensure further protections for plan participants, "ERISA [] defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, *see* 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties." *Mertens*, 508 U.S. at 262. Relatedly, "[f]iduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives." *Arizona Carpenters Pension Tr. Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997) (citing *John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993)).

II. AN INSURANCE COMPANY IS A FIDUCIARY IF IT HAS CONTROL TO ESTABLISH ITS OWN COMPENSATION.

ERISA provides that a person is a fiduciary if that person has, or exercises, any authority or control to dispose of, or manage, a plan's assets. 29 U.S.C. § 1002(21)(A)(i); *Coldesina*, 407 F.3d at 1132 ("In Congress's judgment, and consistent with general trust law, parties controlling plan assets are *automatically* in a position of confidence by virtue of that control, and as such they are obligated to act accordingly.") (emphasis in original); *accord Briscoe v. Fine*, 444 F.3d 478, 490-491 (6th Cir. 2006) ("[ERISA] imposes fiduciary duties . . . on entities or companies that exercise *any* authority or control over the covered assets.") (emphasis in original) (quotations omitted); *IT Corp. v. Gen. Am. Life Ins. Co*., 107

F.3d 1415, 1421 (9th Cir. 1997). As the Tenth Circuit has held, "[w]hereas Plan management or administration confers fiduciary status only to the extent the party exercises *discretionary* authority or control . . . [d]iscretion is conspicuously omitted from the fiduciary function of controlling plan assets." *Coldesina,* 407 F.3d at 1132 (emphasis in original). "Indeed, the statute provides that '*any authority or control*' over the management or disposition of plan assets is sufficient to render fiduciary status." *Id.* (emphasis in original). "[T]his distinction evidences Congress's intent to treat control over assets differently than control over management or administration." *Id*. This strict coverage of persons who have any control over the disposition of plan assets is a direct result of Congress's intent to prohibit self-dealing by fiduciaries. *National Sec. Sys. v. Iola,* 700 F.3d 65, 96 (3d Cir. 2012) ("One facet of plan misuse particularly troubling to Congress was self-dealing by fiduciaries."). Management of plan assets is so intrinsically tied to the fiduciary duty of loyalty, which requires fiduciaries to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), that Congress required persons with this authority to be subject to ERISA's fiduciary obligations, independent of whether they exercise any discretionary authority or control respecting management of the plan. *See, e.g., Coldesina,* 407 F.3d at 1132-35; *accord Briscoe v. Preferred Health Plan, Inc.*, 578 F.3d 481, 485 (6th Cir. 2009).

Accordingly, an agreement may give the service provider "such control over factors that determine the actual amount of its compensation that the [service provider] thereby becomes an ERISA fiduciary with respect to that compensation." *F.H. Krear & Co.*, 810 F.2d at 1259*; accord*, *Hannan v. Hartford Financial Servs, Inc.*, 688 Fed. Appx. 85, 89 (2d Cir. 2017); *Abraha v. Colonial Parking, Inc.*, 243 F. Supp. 3d 179, 186-87 (D.D.C. 2017) ("[B]ecause the Court finds that Plaintiffs have plausibly alleged that FCE exercised discretion over its fees, the Court need not address FCE's contention that it was not a fiduciary because it only performed ministerial, non-discretionary services."); *see also Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995) (insurance agent was a fiduciary because he was "decision maker when it came to insurance purchases and the payment of compensation to those who procured it on behalf of the Fund," including himself).

Conferring fiduciary status on an insurance company that determines its own compensation is not a novel proposition. For example, in *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich*., 722 F.3d 861, 866 (6th Cir. 2013), the court found that Blue Cross was a fiduciary in that it unilaterally imposed hidden administrative fees paid by the plan. In a similar case against Blue Cross, a court found that the insurer decided which plans would be charged for disputed fees. *See Hi-Lex Controls, Inc. v. Blue Cross Blue Shield*, 751 F.3d 740, 744 (6th Cir. 2014) (noting that the disputed fees were not part of the standard pricing arrangement for

the company, and "individual underwriters for [Blue Cross] had the 'flexibility to determine' how and when [these] fees were charged"). Additionally, Blue Cross held funds "wired by Hi-Lex 'in trust' for the purpose of paying plan beneficiaries' health claims and administrative costs." *Id.* at 747. Since these funds constituted plan assets, Blue Cross functioned as a fiduciary by holding them in trust. For both of these reasons, the court affirmed the lower court in finding that Blue Cross functioned as a fiduciary. *Id.* A different circuit found that a plan administrator breached its fiduciary duties by recommending and investing plan assets in an insurance product from which it would receive commissions. *See National Sec. Sys.*, 700 F.3d at 96-98.

Insurance companies issuing life insurance policies and group annuity contracts have also been found to be fiduciaries. Courts have found that insurers which retain the power to amend the policy and thereby alter a policy's value have the requisite authority over a plan's assets to be treated as ERISA fiduciaries. *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986); *Chicago Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 258-260 (7th Cir. 1983). In *Chicago Bd. Options Exch.*, the court concluded that the insurer was a fiduciary because the group annuity contract at issue was an asset of the plan and the insurer's ability to alter its value constituted "control respecting . . . disposition of [plan] assets." *Id.* The court recognized that the "ability to amend

[the policy], and thereby alter its value, is not qualitatively different from the ability to choose investments." *Id.* at 260; *see also Midwest Cmty. Health Serv. v. Am. United Life Ins. Co.*, 255 F.3d 374, 376 (7th Cir. 2001) (holding that insurer, which issued a group annuity contract to members of a hospital association, was a fiduciary because it had discretionary authority over the contract by its ability to amend the value of the contract).

Here, it is clear that Great-West acts as a fiduciary whenever it sets the discretionary interest rate that determines the participants' benefits and thus changes its compensation. *See* ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1) ("A fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account"); ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3)*;* *Coldesina*, 407 F.3d at 1132 ("parties controlling plan assets are *automatically* in a position of confidence by virtue of that control").

III. MERELY BECAUSE A PARTICIPANT CAN CHOOSE OTHER PLAN INVESTMENT OPTIONS THAT DOES NOT PROVIDE A DEFENSE TO FIDUCIARY STATUS WHERE AN ENTITY HAS THE DISCRETION TO SET ITS OWN COMPENSATION.

A. The Plain Language Of Section 404(c) Limits Liability, Not Fiduciary Status.

The district court held that, despite Great-West's control over its compensation, Great-West escapes fiduciary status and its concomitant obligations by virtue of participants' discretion to choose other investment options in their

plan. This argument is analogous to the defense for fiduciary ***liability*** – not fiduciary ***status*** – set forth in Section 404(c). Although the district court did not cite Section 404(c), it essentially applied a Section 404(c) analysis, but did so incorrectly. Congress provided one—and only one—exception to strict fiduciary liability: where plan assets are controlled by the participant or beneficiary in individual account plans, ERISA § 404(c), 29 U.S.C. § 1104(c), and it is a limited exception. Section 404(c) applies to individual account plans that are designed and operated so that participants exercise independent control over the assets in their accounts, as determined under regulations of the Secretary. 29 U.S.C. § 1104(c)(1). If the plan meets the requirements for Section 404(c) treatment under the regulations, a "person who is otherwise a fiduciary" is not liable for losses to the plan resulting from the participant's selection of investment in her own account over which she exercises the requisite control. 29 U.S.C. § 1104(c)(1)(B).

By its plain language, Section 404(c) provides a shield for plan fiduciaries from liability only for losses or breaches "which resulted from the participant's exercise of control."[4] 29 U.S.C. § 1104(c)(1)(B). That is not the case here. Moreover, the exception by its terms only limits liability; it does not determine

[4] "[N]o person who is otherwise a *fiduciary shall be liable* under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." ERISA § 404(c)(1)(A)(ii), 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added).

fiduciary status.[5] Consequently, by holding that merely because plan participants can, prior to each quarter's interest rate taking effect, choose to move their funds (without penalty) from the Great-West contract into any other plan option that Great-West cannot be a fiduciary, the district court incorrectly conflates fiduciary status with fiduciary liability.[6]

B. Section 404(c) Also Does Not Provide A Defense To Allegations That An Investment Option Is Imprudent And Permits Self-Dealing.

Even if Section 404(c) was applicable to this case, it clearly would not provide a shield for fiduciary breaches that do not result from participants' exercise of control over assets in their accounts. It is not a defense to imprudent investment options under the plan since the selection, monitoring and management of such options necessarily precede, and cannot result from, a participant's decision to invest in such options.

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[5] Moreover, exemptions to remedial statutes are to be narrowly construed. *See CIR v. Clark*, 489 U.S. 726, 739 (1989) ('In construing provisions . . . in which a general statement . . . is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.').

[6] The district court's assumption that a person will move their investments every time the interest rate changes is unrealistic. It is well-known that investor's inertia prevents people from making critical financial decisions. *See* Richard H. Thaler & Shlomo Benartzi, AARP PUBLIC POLICY INSTITUTE, No. 2007-02, *The Behavioral Economics of Retirement Savings Behavior* at i, v, 18, 21, 22 (2007), https://bit.ly/2H0H8i6.

The Department of Labor's interpretive regulation, 29 C.F.R. § 2550.404c-1, describes the circumstances under which the limited protections of Section 404(c) will be available to plan fiduciaries.[7] The regulation states that Section 404(c) "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." *See Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans)*, 57 Fed. Reg. 46906 (Oct. 13, 1992) (General preamble, n.27) ("[T]he Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, *is not a direct or necessary result of any participant direction of such plan*.") (emphasis added). This interpretation makes sense because participants should not be considered to have control over their assets if the investment options are imprudent in the first instance.

> The language used throughout Section 404(c) thus creates a safe harbor only with respect to decisions that the participant can make. The choice

[7] Defendant is not asserting a Section 404(c) exemption here and with good reason. It cannot affirmatively prove the precise requirements of the exemption. *See In re Wash. Mut., Inc.*, Nos. 2:08-md-1919 MJP, C07-1874 MJP, 2009 U.S. Dist. LEXIS 109961, *33 (W.D. Wash. Oct. 5, 2009); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1234 (D. Kan. 2004); *In re Reliant Energy ERISA Litig*., 336 F. Supp. 2d 646, 669 (S.D. Tex. 2004); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 764 n.12 (S.D.N.Y. 2003).

> of which investments will be presented in the menu that the plan sponsor adopts is not within the participant's power. It is instead a core decision relating to the administration of the plan and the benefits that will be offered to participants.

Howell v Motorola, Inc., 633 F.3d 552, 567 (7th Cir. 2010); *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) ("…although Section 404(c) does limit the fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance."); *Bell v. Pension Comm. of ATH Holding Co.*, No. 15-cv-02062-TWP, MPB, 2017 U.S. Dist. LEXIS 42107, at *17 (S.D. Ind. Mar. 23, 2017); *In re YRC Worldwide, Inc. ERISA Litig*., No. 09-2593-JWL, 2011 U.S Dist. LEXIS 41019, *6-15 (D. Kan. April 15, 2011).

Thus, the premise of Section 404(c) is that the investment options provided in the plan meet the fiduciary requirements of prudence and loyalty. If the investments do not meet these requirements, then participants cannot make a choice for which they are legally responsible. Under the district court's rationale, a plan could offer investment options, all which do not meet the requirements of prudence and loyalty; the only exercise of control a participant would have is whether to participate in the plan at all or chose among allegedly imprudent investment options. This makes no sense. The burden of avoiding the consequence of the fiduciaries' imprudent investment decision should not fall wholly on plan

participants. Similarly, in this case, the ability of participants to avoid allocating their retirement funds to a particular investment contract that is already in the Plan has no bearing on whether the insurer's exercise of discretion over the terms of that contract is a fiduciary act under ERISA.

Not only is the district court decision contrary to the plain language of the statute, but it is antithetical to the intent of Congress to protect participants and the spirit of ERISA. It severely undercuts ERISA's core fiduciary standards, directly disregarding Congress' reasons for enacting these provisions.

Congress acted wisely in expanding the entities that can be designated a fiduciary based on their actions. Americans generally lack the knowledge and training needed to understand complex investment offerings. *See* Fin. Indus. Regulatory Auth. Inv'r Educ. Found., *Financial Capability in the United States 2016* 28 (July 2016), https://bit.ly/2EGiCh0; U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, Inst. of Educ. Sci., *Literacy in Everyday Life: Results From the 2003 National Assessment of Adult Literacy* 13 (Apr. 2007), https://bit.ly/2qrqOx5. They rely on the plan's fiduciaries and investment managers to choose and manage investment options, prudently, loyally and in their best interests. *See, e.g.*, AARP, *Investor Perceptions and Preferences Toward Selected Stock Market Conditions and Practices: An AARP Survey of Stock Owners Ages 50 and Older* 4 (2004), goo.gl/rWhwUh.

Finally, defendant would face liability for prohibited transaction claims under Section 406(b) even if the logic of Section 404(c) was applied to absolve Great-West of fiduciary status. The only exemption from liability under Section 406 is through the process that Congress established in Section 408. *See* 29 U.S.C. § 1106(a), for exemptions from prohibited transactions. Moreover, Congress placed additional barriers to obtain an exemption from the Section 406(b) self-dealing prohibitions; the Secretary of Labor "may not grant an exemption" from Section 406(b) "unless he affords an opportunity for a hearing' and makes the required findings. 29 U.S.C. § 1108(a); *see Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979) ("That such extensive publication and hearing procedures were established by Congress before exemption may be authorized indicates an intent to create, in § 406(b), a blanket prohibition of certain transactions, no matter how fair, unless the statutory exemption procedures are followed.").

The purpose of Section 404(c) and its interpretive regulation is to relieve a fiduciary of liability for a participant's independent investment choices, but not from the fiduciary's imprudent decisions. That purpose is well served when, as in this case, the fiduciary has complete and discretionary control over a material term of the investment contract which will determine the amount of participants' benefits. Participants are entitled to, and reasonably expect, fiduciary oversight over the investment options in their plan. Congress only limited fiduciary liability

where participants control their accounts through the parameters of Section 404(c). If Congress meant to have Section 404(c) provide an exemption from fiduciary status rather than only from liability for certain fiduciaries, it could have done so. It did not. *United States v. Pauler*, 857 F.3d 1073, 1076 (10th Cir. 2017) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

CONCLUSION

For the foregoing reasons, the court should reverse the district court's decision.

Dated: April 18, 2018

Respectfully submitted,

/s/ Mary Ellen Signorille
Mary Ellen Signorille*
msignorille@aarp.org
William Alvarado Rivera
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202) 434-2060
*Counsel of Record
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7) because the brief contains 4,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: April 18, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille
Counsel for Amici Curiae

CERTIFICATE ECF SUBMISSION COMPLIANCE

Pursuant to this Court's CM/ECF User's Manual, I hereby certify that: (i) all required privacy redactions have been made; (ii) the seven hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and (iii) the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection and, according to that commercial virus scanning program, is free of viruses.

Dated: April 18, 2018

Respectfully submitted,

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I filed the foregoing Brief of Amici Curiae AARP and AARP Foundation in Support of Plaintiffs-Appellees with the Clerk of the United States Court of Appeals for the Sixth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: April 18, 2018

/s/ Mary Ellen Signorille
Mary Ellen Signorille