No. 18-1019

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN TEETS,
Plaintiff-Appellant,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO (No. 1:14-cv-2330)
Hon. William J. Martinez

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF DEFENDANT-APPELLEE

Nancy G. Ross
Jed W. Glickstein
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae
(additional counsel listed in signature block)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the *amici* is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber's members include many employers that offer ERISA-governed benefit plans to their employees, as well as companies that fund or administer those plans.

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Its approximately 435 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici*, *amici*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief.

Each organization has a strong interest in ERISA litigation and regularly participates as *amicus curiae* in cases that affect employee-benefit design or administration. *E.g.*, *Sweda v. Univ. of Pa.*, No. 17-3244 (3d Cir.) (appealing pending); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011).

Plaintiff seeks to designate providers of general account stable value funds as functional fiduciaries merely because those providers set the terms on which their products are offered to plan participants. That designation would impose serious costs and operational constraints on service providers, imperiling the ability of employee benefit plans to offer these valuable funds to their participants and, at a minimum, ensuring that the funds would be offered on less desirable terms. Many of *amici*'s members are plan sponsors or fiduciaries who offer stable value funds and see firsthand how important these products are to participants and their beneficiaries. Plan sponsors and fiduciaries, including *amici*'s members, have a strong interest in ensuring that general account stable value funds continue to be offered to plan participants on appropriate terms.

SUMMARY OF ARGUMENT

In this appeal, Plaintiff seeks to hold Defendant Great-West Life & Annuity Insurance Company ("Great-West") liable under ERISA as a "functional fiduciary" due to Great-West's contractual right to set the crediting rate for its Key Guaran-

teed Portfolio Fund. The Court should affirm the judgment of the district court and reject Plaintiff's attempt to shoehorn Great-West into fiduciary status.

The Key Guaranteed Portfolio Fund is one type of "stable value fund," offering participants a compelling combination of principal protection, liquidity, and steady return. The marketplace for stable value funds and similar investment products in employer-sponsored retirement plans is robust, and plan fiduciaries monitor available offerings to ensure that their participants have access to suitable funds with an appropriate array of characteristics. Even after a particular fund has been selected, plan fiduciaries remain free to terminate the selected provider and to find a different stable value fund to offer to participants—or to offer a different capital preservation option entirely. These safeguards adequately protect plans' and participants' interests in obtaining prudent investment options at appropriate prices.

The growth of stable value offerings has been an enormous boon to sponsors and participants, helping to safeguard retirement benefits for millions of Americans. Unfortunately, Plaintiff would turn one type of these valuable products into a magnet for wasteful litigation. Treating general account stable value fund providers as functional fiduciaries would severely curtail stable value funds and potentially drive those providers out of the market entirely. Such an outcome is not just bad policy but also bad law, for ERISA does not treat a fund provider as a fiduciary merely because the provider announces in advance the rate of guaranteed interest

the fund will pay for the next 90-day period, especially when, as here, plans and participants can freely exit the fund if they do not like the terms. In these circumstances, plans and participants retain the final say over whether to accept a given crediting rate or move their investments elsewhere.

ARGUMENT

I. Fiduciaries And Plan Participants Desire Stable Value Funds

Stable value funds, like the Key Guaranteed Portfolio Fund offered by Great-West, "typically invest in a mix of short- and intermediate-term securities, such as Treasury securities, corporate bonds, and mortgage-backed securities." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806 (7th Cir. 2013). "Because they hold longer-duration instruments," stable value funds "generally outperform money market funds, which invest exclusively in short-term securities." *Id.* (citing A. Zoll, Morningstar, *For Safety-First Savers, Stable-Value Funds Are Tough to Beat* (Apr. 16, 2013)); *see also Tibble v. Edison Int'l*, 711 F.3d 1061, 1084 (9th Cir. 2013). The extra yield over traditional short-term bond funds allows stable value investors to preserve capital and enjoy easy access to their money while offsetting and frequently beating inflation, a major risk to the long-term value of a retirement portfolio.

Stable value funds can be loosely divided into two categories. In "guaranteed" stable value funds (like the Key Guaranteed Portfolio Fund), the fund's per-

formance is backed by the general account of the provider, which is typically an insurer. In such a fund, the provider guarantees a return to the investor for a set period of time and assumes the risk that its underlying assets will be insufficient to cover the guaranteed amount and the costs of providing it. Alternatively, in "synthetic" (or "wrapped") funds, the provider directly owns the underlying assets and separately contracts with a bank or insurance company to obtain insurance.[2] Under that arrangement, the "wrap" has the effect of "guarantee[ing] the fund's principal and shield[ing] it from interest-rate volatility," *Abbott*, 725 F.3d at 806, such that, if interest rates rise or an underlying bond defaults, the loss will be amortized over time and the book value of the fund will not take an immediate tumble.

Under either configuration, stable value funds offer a compelling value proposition: "principal protection and liquidity to individual investors, and steady *returns* that are roughly comparable to intermediate-term bond *yields*, but do not exhibit the volatility of intermediate-term bond *total rates of return*."[3]

Plan sponsors and fiduciaries have taken notice of these products. Department of Labor regulations encourage sponsors of 401(k) and other defined contri-

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[2] *See* D. F. Babbel & M. A. Herce, *Stable Value Funds Performance*, 6 RISKS, no. 1, at 2-3 (2018), https://bit.ly/2NlCt9U; G. Mitchell, Pension Plan Inv. Admin. Guide, *A Guide to Stable Value Funds for Pension Plan Sponsors and Advisors*, at 6-7 (Mar. 16, 2015), https://bit.ly/2J6gvFh.

For readability, all web links in this brief have been shortened using the Bitly URL shortener. Websites were last visited July 17, 2018.

[3] Babbel & Herce, *supra* n.2, at 3.

bution plans to offer "at least one relatively safe investment vehicle, described as an 'income producing, low risk, liquid' investment." *Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 3 (1st Cir. 2018).[4] Thus, virtually every plan chooses to offer at least one "safe" option: a low-risk investment option that protects principal. Traditionally, the role of the "safe" option has been served by money market funds that invest in high-grade, short-term debt. But increasingly, sponsors are turning to stable value funds to complement or replace money market funds as the "safe" option.

According to one recent study, 83% of defined contribution plans offered a stable value fund as an investment option, making stable value by far "the most prevalent capital preservation option"; almost half of plans offered *only* a stable value fund, with no money market options at all.[5] The Stable Value Investment Association estimates that over 167,000 defined contribution plans currently offer a stable value fund to their participants.[6] And industry experts agree that stable value funds are hard to beat. "More than eight in 10 consultants said they are likely or

[4] Safe-harbor protection under ERISA § 404(c), 29 U.S.C. § 1104(c), is contingent on a plan's offering participants at least three investment alternatives that, among other things, are (1) diversified, (2) have materially different risk and return characteristics, (3) enable a participant to achieve a portfolio with appropriate risk and return characteristics. 29 C.F.R. § 2550.404c-1(b)(3)(i)(B). In effect, this means that plans will offer a safe option as part of their set menu.

[5] MetLife, *2017 Stable Value Study*, at 2 (2017), https://bit.ly/2ucVlQj.

[6] Stable Value Inv. Ass'n, *Stable Value at a Glance*, https://bit.ly/2NA3cAj.

very likely to recommend stable value [funds] to plan sponsors seeking alternatives to prime money market funds."[7]

Stable value funds are not popular only with sponsors and advisors. They are also enormously popular with participants. As of year-end 2016, participants had invested $821 *billion* in stable value funds. Those funds held 13.5% of total assets in the top 200 private plans and 19% of total assets in the top 200 public plans, an amount roughly on par with the assets devoted to target date funds.[8]

Stable value funds have delivered as promised. Over the past decade, stable value funds outperformed both money market and short-term bond funds over 1-, 3-, 5-, and 10-year periods. During this time period, stable value funds consistently beat inflation, not just returning participants' capital but also affording them more purchasing power than when they first made their investment.[9] Indeed, by 2014 a dollar invested in a hypothetical stable value fund in 1988 would be worth a little over twice as much in nominal terms as a dollar invested in a money market fund.[10] Stable value products proved especially durable during and after the financial crisis. As equity markets plummeted and the returns for traditional money market

[7] B. Gorman, PIMCO, *DC Plan Capital Preservation: Stable Value Remains On Top* (Aug. 2017), https://bit.ly/2uf7Af8. In the wake of recent regulatory reforms affecting money market funds, most advisors continue to see stable value as the preferable "safe" option. MetLife, *supra* n.5, at 4.
[8] A. Luna et al., T. Rowe Price, *Stable Value: An Increasingly Attractive Preservation Alternative*, at 3 (June 2017), https://trowe.com/2u5CA20.
[9] *Id*. at 4-5.
[10] Mitchell, *supra* n.2, at 3.

funds fell to virtually nil, stable value funds continued to generate steady returns of 2.7% or more per year.[11]

Stable value funds' mix of low risk and higher return is particularly enticing for those participants nearing retirement age. These workers generally have a lower appetite for risk than their younger counterparts, and may be reluctant to expose themselves to choppy bond and equity markets. But older workers still face many years—and perhaps many decades—of future expenses and inflation, all of which could erode their nest egg substantially. For investors looking to safeguard their principal while enjoying a return that meets or even beats inflation—especially one that (like the Key Guaranteed Portfolio Fund) is guaranteed against market risks—a stable value fund's extra return can be compelling. The numbers bear this out. Research by the Investment Company Institute shows that "retirement investors in their 60s[] had a higher percentage of money invested in stable value funds than they had in bond funds — 11.7 percent versus 11.6 percent. The same investors had only 6.2 percent of their portfolios in money market funds."[12]

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[11] C. Marcks & J. Kalamarides, Prudential, *Assessing Stable Value After 2008: Performing As Designed*, at 2 (Apr. 2013), https://bit.ly/2JwhDm1.

[12] T. Grant, *'Stable value funds' deliver on promise for baby boomers*, Pittsburgh Post-Gazette (Jan. 20, 2015), https://bit.ly/2KXxmvK. Of course, stable value funds can play an important role in any worker's portfolio. *See* K. Bartell, Employee Benefit Adviser, *Three unique stable value fund benefits that help millennials* (Feb. 7, 2018), https://bit.ly/2MZ3JuC.

To be sure, there is no certainty that stable value funds will outperform money market funds in the future. Nor is it certain that stable value will deliver returns that match or beat inflation. And stable value funds carry risks and costs that traditional money market funds do not. That is why defined contribution plan sponsors and fiduciaries must continuously evaluate participants' needs and the products available to meet them. *Amici*'s members understand that fiduciaries are not expected to offer a particular fund or type of fund but rather to provide a suitable mix of investments and related services so that participants can construct a portfolio that matches their own goals and risk tolerances.

Nevertheless, experience, academic research, and sponsors' and fiduciaries' own expertise suggests that stable value funds very often will be part of the foundation of a successful benefits plan. As a recent study examining stable value funds' performance since 1973 put it, under reasonable assumptions, stable value funds can be a "major component of an optimal portfolio, to the exclusion of money market funds and intermediate-term bonds."[13] With hundreds of billions invested in stable value funds, millions of participants agree.

II. Litigation Over Stable Value Funds Has Harmed Plan Participants

Unfortunately, if not surprisingly, stable value funds' growth and solid record of performance after the 2008 financial crisis has coincided with a surge of

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[13] Babbel & Herce, *supra* n.2, at 36.

lawyer-driven lawsuits challenging virtually every aspect of the product. *Amici*'s members know all too well the costs and burdens such litigation can bring. Indeed, surveys show that many plan sponsors are "as concerned about litigation as they are about failing to meet their participants' retirement goals."[14]

This concern is justified. In the stable value fund context, as in other areas, ERISA defendants often face "diametrically opposed" theories of liability. *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008). Even a glance at recent suits shows the tightrope that fiduciaries and fund providers must try to walk to avoid finding themselves in the litigation crosshairs.

In just the past six years, plaintiffs have sued sponsors, fiduciaries, and providers for, among other things:

- offering a money market (or money-market-like) fund instead of a stable value fund;[15]
- offering a fixed annuity instead of a stable value fund;[16]
- offering *both* a stable value fund *and* a money market fund;[17]

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[14] R. Steyer, Pensions & Investments, *Litigation heavy on minds of defined contribution execs* (Mar. 23, 2015), https://bit.ly/2u3wPBZ.

[15] *E.g.*, *Schultz v. Edward D. Jones & Co., L.P.*, 2018 WL 1508906, at *2 (E.D. Mo. Mar. 27, 2018); *Pledger v. Reliance Trust Co.*, 240 F. Supp. 3d 1314, 1333 (N.D. Ga. 2017); *Wilman v. Am. Century Servs., LLC*, 237 F. Supp. 3d 902, 915 (W.D. Mo. 2017); *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2017 WL 1091248, at *5 (S.D. Ind. Mar. 23, 2017); *Ortiz v. American Airlines, Inc.*, 2016 WL 8678361, at *11 (N.D. Tex. Nov. 18, 2016); *White v. Chevron Corp.*, 2016 WL 4502808, at *8 (N.D. Cal. Aug. 29, 2016).

[16] *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1352 (N.D. Ga. 2017).

- offering a stable value fund that was supposedly "managed '*too much*' like a money market fund";[18]
- offering a stable value fund that was supposedly *too risky*;[19]
- offering a stable value fund that was supposedly *not risky enough*;[20] and
- offering a stable value fund that was supposedly too expensive relative to its performance.[21]

The instant case is one more facet of this litigation explosion—and it is hardly the only such case in the pipeline.

This flurry of litigation has real costs. As courts have recognized, the mere prospect of discovery in ERISA actions is "ominous," entailing "probing and costly inquiries" and the need to retain expensive fiduciary and financial experts. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). Facing the possibility that "a plaintiff with a largely groundless claim" will nonetheless "us[e] discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff," *id.*, some defendants have chosen to settle these lawsuits. Others have

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[17] *Barrett v. Pioneer Natural Resources USA, Inc.* No. 1:17-cv-01579 (D. Colo.).
[18] *Barchock v. CVS Health Corp.*, 886 F.3d 43, 49 (1st Cir. 2018) (emphasis added).
[19] *In re JPMorgan Stable Value Fund ERISA Litig.*, No. 1:12-cv-02548 (S.D.N.Y.).
[20] *Ellis*, 883 F.3d at 4; *Abbott*, 725 F.3d at 814 (alleging that the stable value fund "was *so* low-risk that its growth was insufficient for a retirement asset").
[21] *Austin v. Union Bond & Tr. Co.*, 2014 WL 7359058, at *14 (D. Or. Dec. 23, 2014).

chosen to litigate. In either case, defendants must expend massive amounts of time and resources to defend themselves against meritless charges.

This state of affairs is good for lawyers but bad for plans and providers. The direct costs of the litigation spree surrounding stable value funds fall on sponsors, fiduciaries, and providers, who must pay for legal services, indemnification, and insurance, and endure the burdens of litigation. For the twenty percent of plan sponsors that are small or mid-sized entities—a number that has already decreased in recent years[22]—there is a risk that costs inflated through the need to defend meritless lawsuits may discourage them from offering, or continuing to offer, benefits under ERISA—just as Congress feared when it "sought to create a system that is not so complex that the administrative costs, or litigation expenses, unduly discourage employees from offering ERISA plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). And the same can be said for fund providers, particularly those who, like Great-West, incur significant costs in offering stable value products and who must guarantee—or procure insurance to guarantee—a full return of principal and earnings on demand regardless of market conditions.

Ultimately, however, plan participants are the ones who suffer from these lawsuits, whether because sponsors have less money to devote to key aspects of

[22] Deloitte Development LLC, *Defined Contribution Benchmarking Survey*, at 6 (2017), http://bit.ly/2BW7z6d (reporting that more than one-third of plan sponsors surveyed in 2013 and 2014 employed 500 or fewer employees, while just one-fifth employed the same number of employees in 2017).

employee-benefit programs, such as retirement matching contributions or subsidization of healthcare premiums, or because products that participants want become more expensive, less valuable, or cease to be offered altogether. The effects of this litigation tax are significant: reduced choice, lower returns, and smaller account balances for participants in retirement.[23]

III. Sponsors, Fiduciaries, and the Marketplace Provide Important Checks On Fund Providers.

It would be one thing if the costs borne by sponsors and providers, and ultimately by plan participants, were necessary to ensure that stable value offerings were priced appropriately. But that is not the case. There is no reason to believe that providers in the fiercely competitive market for stable value funds are overcharging plans or plan participants, and thus no reason to believe that subjecting providers like Great-West to litigation over routine decisions about its crediting rate will benefit participants at the end of the day.

[23] The Department of Labor's fiduciary rule—recently vacated by the Fifth Circuit on *Chevron* and Administrative Procedure Act grounds (*Chamber of Commerce of the United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018))—illustrates the considerable costs that an expansion of fiduciary status can have on investor choice. Studies show that in the wake of the new rule, many companies enacted major changes or decided to leave certain parts of the brokerage business entirely. *See, e.g.*, U.S. Chamber of Commerce, *The Data Is In: The Fiduciary Rule Will Harm Small Retirement Savers* (2017), https://uscham.com/2qWFKnD; S. Batkins, American Action Forum, *Fiduciary Rule Has Already Taken Its Toll: $100 Million In Costs, Fewer Options* (Feb. 22, 2017), https://bit.ly/2ugCbcz.

Drawn by the hundred of billions of dollars of plan assets and the strong demand for stable value products from participants (a demand likely to grow as more workers approach retirement), dozens of banks and insurance companies have created stable value offerings. As one court has recognized, there are some "forty-three firms" that offer stable value funds. *Barchock*, 886 F.3d at 52 n.9. These firms offer stable value funds with an array of different features. Some are more aggressive in their underlying asset allocations; others are more conservative, allocating a higher proportion to cash or cash-like assets. *Id*. at 53. Some products are structured as individually managed accounts, others as pooled funds or in insurance company general accounts.[24] Firms compete on these and many other dimensions, such as administrative costs, management skill, diversification, reputation, and historical performance. And in all of these dimensions, stable value funds are subject to "basic and obvious market incentives." *Ellis*, 883 F.3d at 9.

These incentives pertain to the fund's crediting rate as well. The crediting rate essentially represents the amount of interest a stable value fund is guaranteed to pay for a given period. The rate is a function of many variables, including administrative costs, the performance of the assets backing the fund, the manager's views about interest rates or other market risks, and more. These factors shift as market conditions, participant contributions, and other factors change. Over time,

[24] Stable Value Inv. Ass'n, *Stable Value Market Segments*, https://bit.ly/2MWwrw8.

however, the crediting rate should approach the performance of the underlying portfolio minus expenses and costs.[25]

All else equal, funds that periodically adjust crediting rates are able to offer higher rates than those that fix rates for the duration of the contract. Adjustable credit rates mean not only that a fund can lower rates when market conditions warrant; they also mean that the fund can raise rates if the return of the underlying assets, or the costs of administering the fund, are better than expected. Requiring providers to set "predetermined" interest rates at the outset of the contract—as Plaintiff suggests ERISA requires (Pl. Br. 19)—would require providers to make a single judgment about what interest rates, administrative costs, and many other factors will look like years in the future. Given these uncertainties, forcing providers to decide what crediting rate to offer *ex ante* will mean lower guaranteed rates, harming participants.[26]

Even a stable value fund with an adjustable rate is subject to market forces, moreover. A fund that consistently lowballs its crediting rate relative to the risk, expenses, and returns of the underlying assets will, over time, underperform its

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[25] *See* Babbel & Herce, *supra* n.2, at 4-5.

[26] A pre-set crediting rate is particularly ill-suited for "guaranteed" stable value funds, like Great-West's, that are not backed by particular securities but instead by the insurer's entire general account. *See supra* pp. 4-5. Because there are no specific bonds or other assets underlying a guaranteed fund, providers cannot simply set the crediting rate to reflect the performance of the underlying portfolio minus expenses.

benchmark and lose market share as plans switch to more competitive options. By the same token, a fund that offers too generous a crediting rate will face difficulty maintaining capital reserves, satisfying expected redemptions, and so forth. And sponsors and fiduciaries deciding whether to select a given stable value fund on a plan's menu necessarily take a hard look at all aspects of the fund, including its crediting rate, when deciding whether to include the offering in their plans.

Thousands of plan sponsors and fiduciaries have agreed that stable value funds provided by Great-West are prudent and valuable investment options for their participants. Those same sponsors and fiduciaries have a legal obligation to monitor the suitability of their plan offerings on an ongoing basis. *See* A.152 ¶ 20 (noting that numerous plans that offered the Key Guaranteed Portfolio Fund "elected to exercise their contractual right to terminate their investment" since 2008). These pressures ensure that no fund can long offer a crediting rate that is out of step with the market. *Cf. Ellis*, 883 F.3d at 9 ("If Fidelity publishes a benchmark that implies no greater safety but lower returns than those implied by the benchmarks published by competing funds, it risks losing out as plan sponsors choose what options to offer plan participants.").

IV. Defendant Is Not An ERISA Fiduciary

Notwithstanding the enormous demand for stable value products and the robust market that demand has engendered, Plaintiff contends that Great-West has

"created a product that ERISA prohibits." Pl. Br. 16. Fortunately for the millions of participants who want to invest in the Key Guaranteed Portfolio Fund or similar guaranteed offerings, Plaintiff is incorrect.

ERISA provides that a person or entity "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 § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Plaintiff argues that because Great-West has the contractual right to set the crediting rate and is entitled to retain the spread between that rate and the market returns in its general account, Great-West can "determin[e] the amount of its own compensation." Pl. Br. 19. That is wrong for two reasons.

First, contrary to Plaintiff's contention, a provider like Great-West cannot use the crediting rate to "determin[e] the amount of its own compensation" any more than a steel manufacturer can "determine" its future profits by adjusting its wholesale prices. The only way Great-West could "determine" its compensation through the interest rate is if Great-West knew, in advance, what the return on its general account investments would be. But Great-West cannot know that, because the return on those investments—the product of countless unpredictable transactions and market forces—is not determinable in advance. Put another way, uncer-

tainty about how bonds and similar investments will perform over a 90-day period is the *very risk* that participants wish to offload to the stable value fund provider.

In fact, because Great-West guarantees the crediting rate regardless of the performance of its investments or of its own costs, Great-West faces the very real possibility that it will lose money in any given 90-day period. The only compensation that is "determined" by the crediting rate is that of *participant*s, who are given the guaranteed option to earn interest at that rate for up to 90 days, or to move their money elsewhere at any time.

Courts unsurprisingly agree that when, as here, an insurer or other provider "guarantee[s] the rate of return in advance," the party lacks the kind of "control over the disposition of [p]lan assets" required to "be a fiduciary under ERISA." *Chicago Bd. Options Exch. v. Conn. Gen. Life Ins.*, 713 F.2d 254, 260 (7th Cir. 1983); *see also Assocs. in Adolescent Psych. v. Home Life Ins. Co. of N.Y.*, 729 F. Supp. 1162, 1190 (N.D. Ill. 1989) ("an insurer's declaration of interest in advance, even coupled with the right to adjust the rates during the life of the contract, insulates the insurer from fiduciary status under § 3(21)(A)(i)"), *aff'd*, 941 F.2d 561 (7th Cir. 1991).

Plaintiff's efforts to analogize to case law in which a defendant *did* exercise unfettered discretion over specific terms of compensation are unavailing. *See, e.g.*, *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d

861, 868 (6th Cir. 2013) (insurer "*unilaterally* determined whether to collect" an added fee "and determined the rate" of such fee); *United States v. Glick*, 142 F.3d 520, 528 (2d Cir. 1998) (fiduciary "exercised *unhampered* discretion" in setting own commission); *FH Krear & Co. v Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) (discussing case in which insurer was deemed "a fiduciary with respect to its own compensation where its fees were based on a percentage of claims paid, and Blue Cross had *complete discretion and control* over what claims would be paid"); *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co.*, 931 F. Supp. 2d 296, 304 (D. Mass. 2013) (bank had contractual right to set lending fees directly) (emphases added throughout). The reasoning behind these cases does not apply to a provider like Great-West because Great-West has no ability to set its compensation or even guarantee that it will receive compensation at all.[27]

Second, Great-West does not exercise discretionary control over plan assets because plan sponsors and plan participants have the final say over whether to ac-

[27] Other cases cited by Plaintiff simply do not address the question presented. *See Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 840-41 (9th Cir. 2018) (stating that the case's "narrow" holding is limited to the collection of "definitively calculable and nondiscretionary compensation"). Even though the *Santomenno* court allowed that a service provider's collection of funds in other circumstances *might* present a "different case," the conduct the court hypothesized—a provider "withdr[awing] more than it was entitled to," or collecting a fee "based on self-reported hours worked" or that "involved expenses" (*id.* at 841)—is not remotely analogous to Great-West's setting a crediting rate in conformance with the terms of its contract.

cept the terms that Great-West offers. As Great-West correctly notes, there is no dispute that Great-West does not become a fiduciary by virtue of setting initial crediting rates for the plan. Def. Br. 1-2; *Santomenno*, 883 F.3d at 838 ("A service provider is plainly not involved in plan management when negotiating its prospective fees or compiling a list of proposed investment options."). Nor is there any dispute that Great-West announces its crediting rates in advance and does not impose fees or gates for participants who wish to withdraw their money.

In effect, then, Great-West provides participants with a new prospective investment option each 90-day period. It makes no sense to say that Great-West *is not* a fiduciary when it first sets the crediting rate but *is* a fiduciary every time thereafter. *Cf. Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132 (7th Cir. 1983) (insurer could negotiate future compensation with an ERISA plan without "incur[ring] the obligations of a fiduciary"). As a *functional* matter—for the inquiry under § 3(21)(A)(i) calls for a "functional analysis" (*DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007))—the effect of these various crediting rates on the plan and its participants is exactly the same.

Plaintiff cannot dismiss this authority as limited to the exercise of final authority by plan sponsors and fiduciaries rather than plan participants. As Great-West explains, "numerous courts" have held that service providers are not fiduciaries where "participant decision-making authority constrained the service providers'

ability to control a plan's assets or the service providers' own compensation." Def. Br. 24-25. Cases outside the service provider context support this conclusion. In *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 2005), for example, the Eleventh Circuit rejected the contention that an insurer was a functional fiduciary because it allegedly misrepresented features of its life insurance policies, including *after* extending the policies to the plaintiffs. As the court reasoned, the insurer "has never exercised discretionary authority or control over plan management or the administration of plan assets because the decisions to purchase, amend, and borrow against the policies were made by the plaintiffs themselves." *Id*. at 1279. Likewise here, Great-West did not exercise discretionary control of the administrative of plan assets because the decision to invest in the Key Guaranteed Portfolio Fund—both initially and later at a given crediting rate—was made by each participant individually.[28]

Plaintiff also would ignore the role of the plan sponsors and fiduciaries who are responsible for selecting and monitoring Great-West, and who undoubtedly pay close attention to crediting rates and the Key Guaranteed Portfolio Fund's performance. Sponsors and fiduciaries have the power to renegotiate terms or even to terminate service providers entirely. Plaintiff argues that because Great-West's

[28] Of course, unlike *Cotton* there is no allegation of any misrepresentation here. Investors in the Key Guaranteed Portfolio Fund received exactly the interest rate they were promised (as well as the benefits of guaranteed principal and liquidity).

contracts purport to limit a plan's access to funds for up to a year, the plan fiduciaries do not have sufficient control over the crediting rate to make Great-West a non-fiduciary. But Plaintiff has no evidence that Great-West has ever utilized, or even threatened to utilize, this contractual right. Because plan sponsors and fiduciaries provide important and independent safeguards, there is no need to add an additional layer of fiduciary responsibility for providers—particularly when designating providers as fiduciaries would make it more difficult for plans to offer participants stable value funds on attractive terms.

CONCLUSION

Defined contribution plans like 401(k) plans are "designed to offer participants meaningful choices about how to invest their retirement savings" within the parameters of the plan. *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). Yet Plaintiff would take that choice away and replace it with a wooden, inflexible fiduciary test that would increase costs, reduce returns, and jeopardize a product that has given millions of participants and retirees safe, steady retirement income. ERISA does not require such a perverse result. The district court's judgment should be affirmed.

Dated: July 17, 2018

Respectfully submitted,

/s/ Brian D. Netter

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
Jed W. Glickstein
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amici Curiae

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1616 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

Janet M. Jacobson
AMERICAN BENEFITS COUNCIL
1501 M Street, NW, Suite 600
Washington, DC 20005

Counsel for Amicus Curiae
American Benefits Council

CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for *amici curiae*, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 5,502 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate. The text of the electronic brief is identical to the text of the paper copies, and the electronic brief has been scanned by Microsoft System Center Endpoint Protection engine version 1.1.15000.2, with antivirus version 1.271.1124.0 (updated July 17, 2018), which did not detect a virus.

Dated: July 17, 2018

Respectfully submitted,
/s/ Brian D. Netter

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

Dated: July 17, 2018

Respectfully submitted,

/s/ Brian D. Netter

Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Counsel for Amici Curiae