No. 19-1462

IN THE

Supreme Court of the United States

PRINCIPAL LIFE INSURANCE COMPANY,

Petitioner,

v.

FREDERICK ROZO,

Respondent.

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

BRIEF FOR STABLE VALUE INVESTMENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GINA MITCHELL
STABLE VALUE INVESTMENT ASSOCIATION
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 580-7620

MARK A. PERRY
Counsel of Record
MICHAEL J. SHOWALTER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

ADAM H. OFFENHARTZ
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae Stable Value Investment Association

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INTEREST OF *AMICUS CURIAE*[1]

The Stable Value Investment Association ("SVIA") is a non-profit organization dedicated to educating employers, employees, government officials, and the general public about the importance of saving for retirement and the contribution stable value investment products can make toward financial security. A leading authority on retirement investing, SVIA serves as a forum for the exchange of ideas important to the stable value industry. SVIA's membership represents all segments of the stable value investment community, including public and private plan sponsors, insurance companies, banks, investment managers, and consultants. SVIA members collectively manage more than $850 billion in stable value investments offered in more than 150,000 defined contribution plans. SVIA's research and data give it the perspective to advocate for a sound legal framework for the benefit of stable value funds and their investors.

Many of the institutions affected by the Eighth Circuit's erroneous decision, including the petitioner in this case, are SVIA members. If that decision stands, SVIA members could face costly and disruptive litigation over their stable value products. SVIA

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[1] The parties in this case received notice under Rule 37.2(a) and consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

members have an interest in ensuring plan sponsors' and named fiduciaries' continued ability to include stable value funds among the array of investment options available to participants in defined contribution plans.

SVIA's expertise allows it to offer a real-world perspective on how the decision below contradicts ERISA's principles and threatens to harm Americans by limiting choice and access to an investment option that can help them meet their savings goals. SVIA has never before submitted a brief as *amicus curiae* in this Court, but never before has this Court confronted a case that so directly involves the interests of SVIA and its members. SVIA respectfully submits that the Court should review and reverse the judgment of the court of appeals.

SUMMARY OF THE ARGUMENT

Breaking with other circuits, the Eighth Circuit has ruled that a service provider is an ERISA fiduciary based on two characteristics common to many stable value products—a rate of return that varies by period, and divestment restrictions applicable to plan sponsors (but not individual plan participants). That ruling opens a new front in ERISA litigation, and could pose an existential threat to the stable value industry. Since more than 10% of all assets held in defined contribution plans are invested in stable value products, the ramifications of the decision below extend to millions of Americans who rely on these products to save for retirement.

Stable value offers plan participants a combination of safety, liquidity, and yield that no other retirement savings product has been able to match. In recent decades, stable value investors have seen bond-like returns—but without bond-like volatility. Particularly for individuals seeking a fixed income option—because they are nearing retirement, fear a market downturn, or are generally risk-averse—stable value often has been an invaluable component of retirement savings portfolios. Recent volatility in the financial markets has seen an increase in stable value investing.

The decision below will make American workers less retirement-ready because it jeopardizes the availability and pricing of this important asset class. By exposing stable value providers to a new form of fiduciary liability, the Eighth Circuit decision could increase the cost of providing stable value funds. That would inevitably reduce participant choice (or decrease yields to participants), forcing some to turn to alternative investment products that may be riskier, lower-yielding, or otherwise less suited to their savings objectives. These real-world implications warrant the Court's immediate attention.

ARGUMENT

As relevant here, ERISA defines a "fiduciary" as one who "exercises any authority or control respecting management or disposition of [a retirement plan's] assets." 29 U.S.C. § 1002(21)(A)(i). The court of appeals held that Principal Life Insurance Company acted as a fiduciary when managing a stable value product offered as an investment option to retirement plan participants, focusing on two characteristics of Principal's product: (1) the contractual rate of return varies across periods; and (2) Principal imposes restrictions on the ability of the plan (but not individual plan participants) to withdraw from the investment without advance notice. Pet. App. 4a–6a. But those characteristics are common for stable value products, and do not as a matter of law make the provider of such products a plan fiduciary.

As explained in the petition, Principal did not exercise any authority or control over assets allocated to individual accounts, which remained at participants' command at all times. And the characteristic features of stable value highlighted by the court of appeals, including the hold period, were fully disclosed. In nevertheless imposing a new fiduciary duty on service providers, the Eighth Circuit created a circuit conflict that requires resolution, since most retirement plans operate nationwide and ERISA demands uniformity.

The Eighth Circuit also demonstrated a fundamental misunderstanding of the legal and economic realities surrounding stable value products. More than $857 billion is invested in this asset class nationwide, helping to bring financial security to hundreds of thousands of Americans each year. The decision below, if allowed to stand, will deprive some of those people, or their families, of an important tool in their effort to prepare for retirement. *Amicus* explains below why these problems warrant review.[2]

I. STABLE VALUE OFFERS PLAN PARTICIPANTS A VALUABLE CHOICE

"Stable value" refers to a relatively low-risk asset class that seeks to achieve consistently positive returns while providing investors with capital preservation and liquidity. In some ways, stable value funds are similar to certificates of deposit offered by banks and other financial institutions—both asset classes ensure protection of principal and a specified rate of return. But because of how deposited monies are reinvested, stable value funds typically have returned substantially higher yields than certificates of deposit. For these reasons, Americans who save for retirement through employer-sponsored plans have flocked to stable value in recent decades—particularly in times of economic distress.

A. How Stable Value Works

Stable value products generally are available to individual investors through defined contribution savings plans, including (as relevant here) 401(k) retirement plans subject to ERISA. In a defined contribution plan, "the retirees' benefits are typically tied to

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[2] The analyses and data set forth in this brief are based on SVIA's independent research and educational materials. Many of these materials are publicly available on SVIA's website (www.stablevalue.org) in the "knowledge" section. Accordingly, this brief will not provide additional citations for generally applicable (and, we believe, generally accepted) propositions as distinguished from specific facts or principles.

the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). In such a plan, a participant (and sometimes the plan sponsor as well) makes contributions to invest toward the participant's retirement; these contributions are allocated to the participant's individual account. The plan sponsor or named fiduciary makes available a menu of investment options (sometimes with a brokerage window allowing access to additional options), and each participant selects the options to which his or her individual account assets will be allocated.

Any time a defined contribution plan participant is invested in a particular asset offered on a plan's menu of investment options, therefore, it means both that the plan sponsor or named fiduciary has determined that the asset makes sense for the plan as a whole and that the participant has determined that the asset is well-suited to his or her individualized goals and needs. Participants are generally limited to the investment options the plan offers, and either the plan or the provider of an investment product may impose conditions on investing in particular options, but participants otherwise have full control over how to invest their individual accounts.

If a stable value fund appears on a plan menu of investment options and a participant selects it, the service provider contractually agrees that the participant will receive preservation of principal and a specified rate of return. The service provider then invests the money pooled from many investors in a diversified array of other assets (particularly bonds) designed to earn returns over time in excess of the contractual rate. But regardless of conditions in the financial markets, individual participants' access to the principal and contracted rate of return remains protected.

For most stable value products, the rate of return changes periodically and is stated for each period before it starts. (Again, a certificate of deposit is similar; the interest rate is stated for the next period, and may differ from preceding periods.) Subject to the terms of their particular plan, participants are generally free—at any time—to reallocate monies from a stable value fund to other investment options offered by the plan. *See Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 9 (1st Cir. 2018) (if participants "do not want [stable value] funds, they will not select them over the innumerable options available"). No rate, term, or condition is imposed on a participant without the participant's informed acceptance.[3]

To achieve the principal preservation and stated rate of return that are the hallmarks of stable value, service providers impose certain restrictions at the plan level. Once a plan chooses to offer a stable value fund as an option, the plan as a whole must remain invested in that fund for a specified period; if early divestment is allowed at all, a penalty is generally imposed. (Once again, certificates of deposit offer an analogy: The depositor generally must remain invested for the entire period to earn the stated return.) Like all investment products, stable value comes with

[3] *See* SVIA, Frequently Asked Questions: The Basics of Stable Value (2015), stablevalue.org/media/misc/SV_Basics_FAQ.pdf.

tradeoffs, and the plan's advance-notice requirement is a burden necessitated by the service provider's commitment to absorb the volatility to which individual participants would be exposed were they to invest directly in the bond markets.

Unlike changes in asset allocation in individual accounts, a plan-level withdrawal could affect hundreds or thousands of individual accounts simultaneously, and involve a significant amount of money. If plans could discontinue stable value investments without advance notice, service providers would be forced to account for the possibility of unannounced plan exits by holding enormous amounts of cash (or would be forced to liquidate positions to generate cash). That would preclude the service provider from putting that cash to work in the bond or other financial markets, which in turn could harm participants in other plans and preclude the service provider from offering the rate of return participants expect from stable value. Without advance notice of plan exit, in short, the stable value business model does not work.[4]

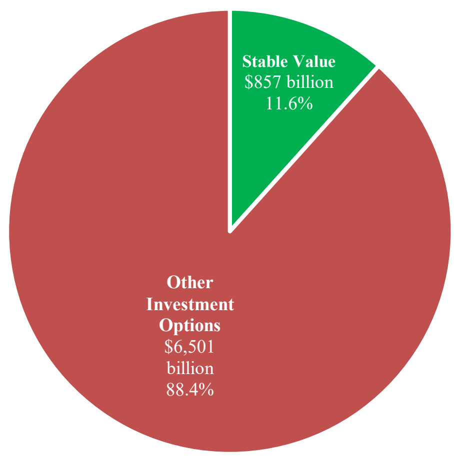
B. Many Americans Choose Stable Value

Since its inception in the 1970s, stable value has become one of the most common capital preservation options available for retirement saving. According to a 2019 survey, 78% of all American defined contribution plans offer stable value products, and stable

[4] *See* SVIA, Stable Value Exit Provisions (June 10, 2019), www.stablevalue.org/media/misc/SVIA_Exit_Provisions.pdf.

value composes 11.6% of all defined contribution assets.[5] In total, American savers hold more than $857 billion in stable value funds.

Defined Contribution Assets, 2020



Because stable value ensures principal preservation and a specified rate of return, it appeals particularly to individuals who wish to play it safe with all or a portion of their retirement savings. *See Ellis*, 883 F.3d at 3 (stable value is a "relatively safe investment vehicle"); *id.* at 9 (stable value funds "are generally presented as one of the more conservative options for investors who prefer asset preservation to the risk of pursuing greater returns"). Accordingly, stable value often attracts investors who are at or near retirement,

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[5] *See* SVIA, Stable Times (Second Half 2016), www.stablevalue.org/media/misc/Stable_Times_Volume_20_Issue_2.pdf; Deloitte, 2019 Defined Contribution Benchmarking Survey Report 16 (2019), www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-2019-defined-contribution-benchmarking.pdf.

are risk-averse, fear financial market volatility or economic uncertainty, or wish to balance more aggressive investments with a lower-risk asset.

Recent events demonstrate this dynamic. A saver fully invested in an index tracking the S&P 500, for example, would have lost more than 34% of his or her savings from the index's February 2020 high to its March 2020 low.[6] On the other hand, a saver fully invested in a typical stable value fund lost no retirement savings at all during that time, while continuing to earn a positive return. Indeed, participants added $49.7 billion to stable value accounts during the first quarter of 2020, seeking refuge from the market volatility induced by COVID-19.[7]

II. THE DECISION BELOW RISKS DISTORTING THE MARKET FOR STABLE VALUE

If allowed to stand, the decision below could limit the availability of the stable value products that provide financial security for millions of Americans planning for retirement. By exposing stable value providers to a new form of fiduciary liability, the decision below will drive up the cost of providing the product, which may force service providers to increase the product's price (or, equivalently, decrease its yield) or stop offering it altogether. Some plan participants

[6] Source: SVIA tabulations of Yahoo Finance data for the SPDR S&P 500 ETF Trust (SPY). *See* finance.yahoo.com/quote/SPY.

[7] *See* SVIA, Press Release: Stable Value Nets $50 Billion in Inflows Amid 1Q2020 Market Turbulence (2020), www.stablevalue.org/news/article/press-release-stable-value-nets-50-billion-in-inflows.

wishing to invest in stable value, in turn, will be unable to do so because it has become unavailable or too expensive. Those individuals will be forced to turn to alternative investment options that may be less effective in serving their investment objectives. By "narrowing … the options available to employees," the Eighth Circuit rule "runs counter to a central purpose of ERISA," *Schwartz v. Newsweek, Inc.*, 827 F.2d 879, 883 (2d Cir. 1987), and harms the very group ERISA is designed to benefit.

A. The Decision Below Could Prevent Some Plan Participants From Choosing Stable Value

By imposing a new form of fiduciary liability on providers of stable value products, the decision below is likely to force some service providers to raise the price (or reduce the stated yield) of stable value funds or discontinue them altogether. ERISA lawsuits "ha[ve] surged" in recent years. George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. for Ret. Research at Bos. Coll., *401(k) Lawsuits: What are the Causes and Consequences?* 1–2 (May 2018). And ERISA fiduciaries frequently are the target. *See* Practicing Law Institute, Securities Litigation: A Practitioner's Guide §§ 15:4.2–5 (2d ed. 2017). The decision below thrusts stable value providers onto this battlefield.

When service providers face a "fear of incurring fiduciary liability," there is a congruent "need to charge a higher price to compensate" for the "risk" of incurring such liability. *CSA 401(k) Plan v. Pension Prof'ls, Inc.*, 195 F.3d 1135, 1139 (9th Cir. 1999). "[F]ar from safeguarding the assets of ERISA-plan participants," therefore, the "litigation spawned" by the decision below "will simply drive up … costs." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 383 (4th Cir. 2014) (Wilkinson, J., dissenting). That squarely contravenes ERISA's aim, which is for a "system that is not so complex" that "litigation expenses" diminish participants' ability to structure their retirement accounts as they wish. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quotation marks and alteration omitted).

Importantly, these changes in the price or availability of stable value products would not reflect the intrinsic cost of providing the products but rather a court-imposed penalty that is not levied on similarly situated competing products. Moreover, neither of the common features of stable value products on which the Eighth Circuit relied—a periodically variable rate of return, or plan-level withdrawal restrictions—justifies imposing such a litigation tax.

When a service provider offers at arm's length a product with a particular rate of return, it makes no meaningful difference whether the service provider previously offered the product at a different rate of return. Either way, the participant is free to invest in stable value, or not, by allocating the assets in his or her individual account. The fact that stable value products offer a stated rate of return for one period at a time, therefore, does not make them meaningfully different than competing products offered by providers who undisputedly are not ERISA fiduciaries. (Indeed, many investment options, including most stock and bond funds, have no stated future return.)

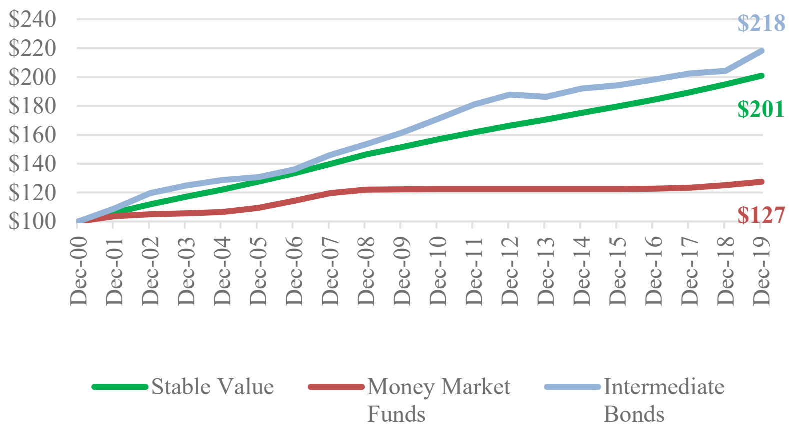
Nor do restrictions on plan-level exit mean that stable value service providers are exercising control over plan assets. Individual participants remain free to reallocate investments in their own accounts at any time. Plan-level exit restrictions are a (disclosed) quid pro quo for the service provider's obligation to protect participants from market volatility. Without such restrictions, service providers could not remain fully invested; if they did away with the notice requirement, participants would lose yield or stability. (It should be noted that many mutual funds and other investment options also impose redemption or trading restrictions on plans and/or participants.)

The Eighth Circuit's rule thus places stable value at a competitive disadvantage because of characteristics that have no bearing on the economic relationship between service providers and participants. And that market distortion hurts all sides of the transaction. Service providers should determine which products to produce through normal principles of supply and demand—*i.e.*, by identifying what participants want—rather than in response to the litigation risk erroneously imposed by the decision below.

B. Alternative Investments Do Not Serve The Same Retirement Objectives

Stable value's ability to serve the needs of risk-conservative investors is unique. As the charts below illustrate, stable value has outperformed competing investment options in recent decades, particularly for retirees interested in fixed income. Money market funds—the closest competitor in the market for principal preservation investment—have been slightly *more* volatile than stable value yet have produced substantially *lower* returns. If an individual invested $100 from the end of December 2000 through the end of December 2019, the investment now would be worth $201 if held in a typical stable value account but only $127 if held in a money market index.[8]

Growth of $100, 12/31/00 to 12/31/19



Courts have thus recognized that stable value funds "generally outperform money market funds."

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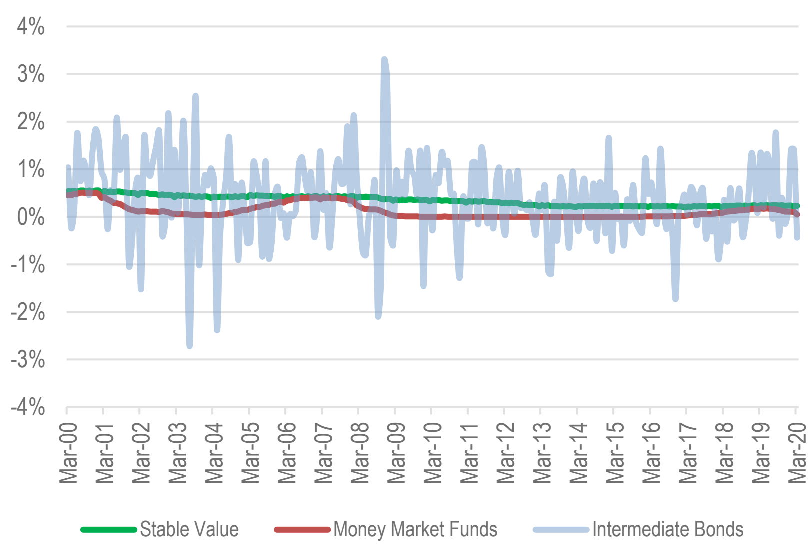
[8] In this chart, "Stable Value" is the 12-month average return of all market segments as reported on SVIA's Annual Investment & Policy Survey. Returns illustrated are gross of stable value management and distribution fees and net of contract (including wrap) fees. "Money Market Funds" is a simulation of money market returns from the iMoneyNet MFR Money Funds Index. Returns illustrated are gross before any fees. "Intermediate Bonds" is a simulation of market value bond fund returns from the Barclays Intermediate Government/Credit Bond Index. Returns illustrated are gross before any fees.

Abbott v. Lockheed Martin Corp., 725 F.3d 803, 806 (7th Cir. 2013); *see also Ortiz v. Am. Airlines, Inc.*, No. 4:16-CV-151-A, 2016 WL 8678361, at *11 (N.D. Tex. Nov. 18, 2016) ("Stable Value funds simply outperform money market funds." (quotation marks omitted)). Money market funds are no substitute for stable value.

A plan participant unable to invest in a stable value product may turn to bonds, a more volatile asset class. Bonds with short or intermediate terms (the safest kind) have grown slightly faster than stable value funds (the $100 invested in 2000 now would be $218 had it been invested in an intermediate-term bond index versus the $201 from the stable value fund). But bonds have carried dramatically higher

Monthly Returns, 3/31/00 to 3/31/20



volatility, making them less suitable for a risk-conservative investor.[9]

For an employee, retiree, or other plan participant seeking bond-like returns without bond-like volatility over the past twenty years, stable value was the only option. But if the decision below stands, some people who wish to invest in stable value will be forced to purchase assets that are riskier or lower-yielding instead.

There is no basis in law or economics for imposing on stable value service providers an additional layer of fiduciary liability under ERISA. Yet that is what the Eighth Circuit decided to do in this case. That decision will harm the very people ERISA is ostensibly designed to protect—defined contribution plan participants, especially older Americans planning for retirement, seeking income stability and avoidance of volatility.

* * *

Disuniformity in the law of retirement planning often "work[s] to the detriment of plan beneficiaries," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990), by creating "inefficiencies" that frequently are

[9] In this chart, "Stable Value" is a simulation of book value returns in a hypothetical fund holding intermediate bonds and stable value wrap contracts, with crediting interest rates reset monthly using the industry accepted crediting rate formula. "Money Market Funds" is a simulation of money market returns from the iMoneyNet MFR Money Funds Index. "Intermediate Bonds" is a simulation of market value bond fund returns from the Barclays Intermediate Government/Credit Bond Index.

"offset with decreased benefits," *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). That is doubly true here, where both disuniformity itself and the substance of the wayward rule independently generate inefficiencies. One way to restore uniformity—and ensure that Americans have the full array of tools they need to prepare for retirement—is for this Court to grant Principal's petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GINA MITCHELL
STABLE VALUE INVESTMENT
ASSOCIATION
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 580-7620

MARK A. PERRY
Counsel of Record
MICHAEL J. SHOWALTER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

ADAM H. OFFENHARTZ
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae
Stable Value Investment Association

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