No. 17-10238

In the United States Court of Appeals for the Fifth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, doing business as LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas (The Honorable Barbara M. G. Lynn)
Case Nos. 3:16-cv-1467, 3:16-cv-1530, 3:16-cv-1537

MOTION OF AARP TO INTERVENE AS A DEFENDANT-APPELLEE FOR THE PURPOSE OF SEEKING REHEARING EN BANC

MARY ELLEN SIGNORILLE
WILLIAM ALVARADO RIVERA
DEAN GRAYBILL
DARA S. SMITH
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington DC 20049
(202) 434-2060
msignorille@aarp.org

DEEPAK GUPTA
MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Movant-Proposed Intervenor AARP

April 26, 2018

CERTIFICATE OF INTERESTED PERSONS

No. 17-10238

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, DOING BUSINESS AS LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS –AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVIORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of the movant-proposed intervenor or that own stock in the movant-proposed intervenor.

A. Plaintiffs-Appellants

1. Chamber of Commerce of the United States of America
2. Financial Services Institute, Inc.
3. Financial Services Roundtable

4. Greater Irving-Las Colinas Chamber of Commerce
5. Humble Area Chamber of Commerce d/b/a Lake Houston Chamber of Commerce
6. Insured Retirement Institute
7. Lubbock Chamber of Commerce
8. Securities Industry and Financial Markets Association
9. Texas Association of Business
10. American Council of Life Insurers
11. National Association of Insurance and Financial Advisors
12. National Association of Insurance and Financial Advisors – Texas
13. National Association of Insurance and Financial Advisors – Amarillo
14. National Association of Insurance and Financial Advisors – Dallas
15. National Association of Insurance and Financial Advisors – Fort Worth
16. National Association of Insurance and Financial Advisors – Great Southwest
17. National Association of Insurance and Financial Advisors – Wichita Falls
18. Indexed Annuity Leadership Council
19. Life Insurance Company of the Southwest
20. American Equity Investment Life Insurance Company
21. Midland National Life Insurance Company
22. North American Company for Life and Health Insurance
23. Others who are not participants in this matter but may be financially interested in its outcome include members of Plaintiffs-Appellants

B. Current and Former Attorneys for Plaintiffs-Appellants

Eugene Scalia
Jason J. Mendro
Paul Blankenstein
Rachel Mondl
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

James C. Ho
Russell H. Falconer
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201

David T. Bellaire
Robin Traxler
FINANCIAL SERVICES INSTITUTE, INC.
607 14th Street, NW, Suite 750
Washington, DC 20005

Kevin Richard Folster
Felicia Smith
FINANCIAL SERVICES ROUNDTABLE
600 13TH Street, NW, Suite 400
Washington, DC 20005

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Kevin Carroll
Ira D. Hammerman
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW, 8th Fl
Washington, DC 20005

David W. Ogden
Kelly Patrick Dunbar
Ari Holtzblatt
Kevin M. Lamb
Jessica Leinwand
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

Joseph R. Guerra
Peter D. Keisler
Eric Dean McArthur
Jennifer J. Clark
Benjamin Beaton
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

J. Lee Covington II
INSURED RETIREMENT INSTITUTE
1100 Vermont Avenue, NW
Washington, DC 20005
Andrea J. Robinson
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

Michael A. Yanof
THOMPSON COE COUSINS & IRONS, LLP
700 North Pearl Street, 25th Floor
Dallas, TX 75201

Yvette Ostolaza
David Sillers
SIDLEY AUSTIN LLP
2021 McKinney Avenue, Suite 2000
Dallas, TX 75201

C. Defendants-Appellees

1. United States Department of Labor
2. R. Alexander Acosta, Secretary, U.S. Department of Labor
3. Edward C. Hugler, Former Acting Secretary, U.S. Department of Labor

D. Current and Former Attorneys for Defendants-Appellees

Nicholas C. Geale
G. William Scott
Edward D. Sieger
Thomas Tso
Megan Hansen
M. Patricia Smith
Elizabeth Hopkins
US DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
200 Constitution Avenue, NW
Suite N-2119
Washington, DC 20210

Hashim M. Mooppan
Deputy Assistant Attorney General
John R. Parker
United States Attorney
Michael S. Raab
Michael Shih
Thais-Lyn Trayer
US DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE SECTION
950 Pennsylvania Avenue, NW
Suite 7268
Washington, DC 20530

Galen N. Thorp
Emily Sue Newton
Joyce R. Branda
Benjamin C. Mizer
John R. Parker
Judry L. Subar
US DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 Massachusetts Avenue, NW
Room 6140
Washington, DC 20001

E. Amici

1. AARP
2. AARP Foundation
3. American Association for Justice
4. Americans for Financial Reform
5. Financial Planning Coalition
6. Public Citizen Inc.
7. Public Citizen Foundation, Inc.
8. Public Citizen Litigation Group
9. Better Markets, Inc.
10. Consumer Federation of America

11. Public Investors Arbitration Bar Association
12. National Black Chamber of Commerce
13. National Employment Law Project
14. Washington Legal Foundation
15. Thrivent Financial for Lutherans

F. Current and Former Attorneys for Amici

Mary Ellen Signorille
William Alvarado Rivera
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049

Bernard A. Guerrini
6500 Greenville Avenue, Suite 320
Dallas, TX 75206

Deepak Gupta
Matthew W.H. Wessler
Matthew Spurlock
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036

Brendan S. Maher
STRIS & MAHER LLP
6688 North Central Expressway
Suite 1650
Dallas, TX 75206

Brent M. Rosenthal
ROSENTHAL WEINER LLP
12221 Merit Drive, Suite 1640
Dallas, TX 75251

Martin Woodward
STANLEY LAW GROUP
6116 North Central Expressway
Suite 1500
Dallas, TX 75206

Braden W. Sparks
BRADEN W. SPARKS PC
12222 Merit Drive, Suite 800
Dallas, TX 75251

Dennis M. Kelleher
BETTER MARKETS INC.
1825 K Street, NW, Suite 1080
Washington, DC 20006

Doug D. Geyser
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017

Richard Aaron Lewins
LEWINSLAW
7920 Belt Line Road, Suite 650
Dallas, TX 75254

Cory L. Andrews
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
Theodore Carl Anderson, III

Brian W. Barnes
David H. Thompson
Peter A. Patterson
COOPER & KIRK PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036

Andrew B. Kay
Philip Randolph Seybold
Haryle A. Kaldis
COZEN O'CONNOR
1200 19TH Street, NW
Washington, DC 20036

Alexandra Treadgold
KILGORE & KILGORE PLLC
3109 Carlisle Street, Suite 200
Dallas, TX 75204

April 26, 2018

*_/s/ Deepak Gupta_*
Deepak Gupta
Counsel for Movant-Proposed Intervenor

MOTION OF AARP TO INTERVENE

AARP hereby moves to intervene as a defendant for the purpose of seeking en banc review of this Court's divided panel decision invalidating the Department of Labor's Fiduciary Rule.[1] Until now, AARP's interests were aligned with those of the government, which had fully defended this and other challenges to the rule. But the government recently decided to veer off that path. That change now requires AARP to intervene to protect its interests, and the interests of millions of its members.

AARP easily satisfies the standards for intervention. *First*, AARP's motion is timely because it acted promptly "when it became aware that its interests would no longer be protected by the original parties." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994). AARP had "no strong incentive to seek intervention in [this case] at an earlier stage," because, until the government's apparent about-face following the panel decision, it had vigorously defended its own regulation. *Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (granting intervention for purpose of en banc review following panel decision); *see also Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (same); *Safir v. Gibson*, 432 F.2d 137, 145 (2nd Cir. 1970) (same). And

[1] AARP has contacted counsel for all parties. The plaintiffs state that they oppose this motion and intend to file an opposition. The government takes no position on the motion.

AARP's intervention "now, rather than earlier in the proceedings, does not cause prejudice" to any party, "since the practical result of its intervention—the filing of a petition for rehearing—would have occurred whenever [AARP] joined the proceedings." *Day*, 505 F.3d at 965. Rather than inject new issues into the case, AARP's intervention "will ensure that [this Court's] determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Id.*

Second, AARP has direct and vital interests in the rule's enforcement, interests that the disposition of this appeal—including its "precedential effect"—may "impair or impede." *Espy*, 18 F.3d at 1207. AARP has been at the forefront of the policies embedded in the rule for decades, was an ardent participant in the rulemaking, and played a leading role in defending the rule. The government's apparent refusal to defend its rule leaves *millions* of AARP members without adequate protection from conflicted retirement advice, leading to substantial and measurable financial harm.

Third, it is clear that "the existing parties do not adequately represent" AARP's interests in light of the government's new stance. *Ross v. Marshall*, 426 F.3d 745, 761 (5th Cir. 2005). AARP "would only be assuming the adversary role formerly discharged by the Government." *Legal Aid Soc. of Alameda Co. v. Dunlop*, 618 F.2d 48, 50–51 (9th Cir. 1980). If the Court does not permit AARP to intervene to

seek rehearing, "there is no party in th[e] case that can fully represent its interests." *Peruta*, 824 F.3d at 941.

BACKGROUND

Recognizing that fiduciary standards are "central to protecting the public interest in the integrity" of retirement benefits, and seeking to root out conflicts of interests that plague the retirement-products and investment-advice marketplace, DOL promulgated a package of several interlocking rules (collectively referred to as the "fiduciary rule" or "rule") designed to impose fiduciary standards and obligations on investment advisers. *See* ROA322–538.

Before the rule took effect, however, multiple groups of industry plaintiffs filed suit seeking to invalidate the rule. AARP submitted an amicus brief in support of the agency, explaining that the rule fell well within DOL's statutory authority, and reflected a considered and legitimate exercise of that authority. On February 9, 2017, the district court rejected the plaintiffs' various challenges to the rule. *See* ROA9887–9940. The plaintiffs appealed.

While the appeal was pending, the agency took several steps to delay the rule's implementation. The agency initially issued a temporary non-enforcement policy and then, in November 2017, issued a final rule postponing the applicability date of the rule's revised exemptions by eighteen months, until July 1, 2019, and

extending the non-enforcement policies that were previously set to expire on January 1, 2018. *See* 82 Fed. Reg. 56545 (Nov. 29, 2017).

On March 13, 2018, the Tenth Circuit issued its decision in an industry-group challenge to the agency's rule. *See Market Synergy Grp. v. U.S. Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018). Like this case, the *Market Synergy* appeal involved an APA challenge to the fiduciary rule's treatment of annuity products. Reviewing the same administrative record, the Tenth Circuit rejected the challengers' various arguments over (1) whether DOL had sufficiently supported its conclusion that fixed-indexed annuities should be treated differently from fixed-rate annuities, (2) whether DOL had adequately accounted for state regulatory regimes when concluding that existing laws have not eliminated the harms of conflicted advice, and (3) whether DOL's regulatory impact analysis had reasonably addressed the fiduciary rule's impact on the market for certain annuity products. *See id.* at 683–86.

Two days later, a divided panel of this Court invalidated the rule. *See Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). The panel majority held that the agency "lacked statutory authority to promulgate the Rule," reasoning that the rule's interpretation of "investment advice fiduciary" was "overreaching" and "fatally" in conflict "with the statutory text" of ERISA. *Id.* at 376, 379. Chief Judge Stewart dissented. In his view, the agency's rule involved a

valid and lawful exercise of its broad statutory authority under ERISA. *See id.* at 388.

In the wake of this Court's divided panel decision, it appears that the agency's litigating position has changed. Shortly after the decision, the agency publicly stated that, in light of this Court's divided decision and "pending further review," it would "not be enforcing the 2016 Fiduciary Rule." *See, e.g.*, Sarah O'Brien, Labor Department Won't Enforce Investor Protection Rule after Court Decision, CNBC, Mar. 19, 2018, https://cnb.cx/2EQ6JoO. And, after the agency confirmed it would not enforce the rule, a different trade-association challenger stipulated with the government to dismiss its pending appeal in the D.C. Circuit of a district court's decision upholding the rule. *See* Joint Stipulation of Dismissal, *Nat'l Assoc. for Fixed Annuities v. U.S. Dep't of Labor*, No. 16-5345 (D.C. Cir. Mar. 23, 2018) ("*NAFA*").

ARGUMENT

AARP seeks to intervene now to seek en banc rehearing of the panel decision. In so doing, AARP seeks to forestall harm to millions of workers, retirees, investors, and their families who were protected from conflicts of interest and misleading advice by the rule that the government is no longer defending. Because AARP and its members' interests are likely "no longer [] protected by the original parties," *Espy*, 18 F.3d at 1206, and because they meet all the requirements of

Federal Rule of Civil Procedure 24(a)—and Article III—AARP respectfully requests that this Court permit it to intervene to file for rehearing en banc.

I. AARP is entitled to intervene as of right.

"Federal courts should allow intervention where no one would be hurt and greater justice could be attained." *Espy*, 18 F.3d at 1205 (citation omitted). Under this Circuit's precedent, movants are entitled to intervene when (1) the motion to intervene is "timely," (2) the movant claims "an interest relating to the property or transaction that is the subject of the action," (3) the movant is "so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest," and (4) the movant's interest is "inadequately represented by the existing parties to the suit." *Espy,* 18 F.3d at 1204–05 (citing Fed. R. Civ. P. 24(a)(2)). AARP satisfies all these requirements.

A. AARP's motion is timely.

Because this motion is being filed soon after the government announced that it would not enforce the rule and agreed to dismiss the pending appeal of these same issues in the D.C. Circuit, it is timely. The timeliness of a motion to intervene "is not limited to chronological considerations [and] 'is to be determined from all the circumstances." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (quoting *U.S. v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977)). The inquiry "is contextual; absolute measures of timeliness should be

ignored." *Id.* (quoting *Espy*, 18 F.3d at 1205). Relevant factors include (1) the time elapsed since intervenor knew its interest in the case required intervention, (2) the purpose and necessity of intervention, and (3) the risk of prejudice to the existing parties. *Espy*, 18 F.3d at 1205–06 (explaining that the "gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties")

1. Time elapsed. AARP "promptly move[ed] for intervention" as soon as the government appeared to abandon representation of its interests. *Id.* at 1205. The date of the agency's apparent position-switch determines the relevant time frame for intervention: "courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court." *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). A motion to intervene is timely, for example, when filed only after it became apparent that the "[g]overnment's representation of the appellants' interests became potentially inadequate . . . when it equivocated about whether it would appeal [an] adverse ruling of the district court" and movants sought to intervene "in order to ensure that the appeal . . . [took] place." *Smoke v. Norton*, 252 F.3d 468, 470–71 (D.C Cir. 2001).

Courts of appeals have applied this exact standard for motions to intervene for the purpose of seeking rehearing or rehearing en banc on appeal. In *Peruta*, for

example, the Ninth Circuit granted intervention for rehearing en banc where "the timing" of the motion to intervene "did not prejudice Plaintiffs," and the movant "had no strong incentive to seek intervention . . . at an earlier stage," because it "had little reason to anticipate either the breadth of the panel's holding or the decision of [the existing defendant] not to seek panel rehearing or rehearing en banc." 824 F.3d at 940; *see also Day*, 505 F.3d at 965 (granting intervention at the rehearing stage to a party that filed an amicus brief at the panel stage because it would "not create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties"); *Safir*, 432 F.2d at 145 (noting that a company "sought leave to intervene for the purpose of seeking a rehearing," following the panel's decision, and that the panel "granted such leave").

That same logic applies here. AARP participated as amicus curiae in this Court, and anticipated continuing in this role so long as it "legitimately believed" that the agency would continue to "defend" its own rule. *Espy,* 18 F.3d at 1206. But that is no longer the case. In the wake of this Court's divided panel opinion, the agency's decision to refuse enforcement of the rule, coupled with its approval of NAFA's immediate effort to end the appeal in the D.C. Circuit, indicates that the agency intends to prolong a position of non-enforcement and abandon its defense altogether. AARP moved as soon as its interests in relief from the panel's decision

invalidating the rule were undermined by the government's statement (made after the panel decision in this case) that it would not enforce the rule at all. If the Court does not permit AARP to intervene, "there is no party in th[e] case that can fully represent its interests." *Peruta*, 824 F.3d at 941.[2]

2. Purpose and necessity of intervention. As explained in more detail below—and in the movant's declarations—"it is obvious that the economic interests of the movants are at stake." *Espy*, 18 F.3d at 1207. The government's latest decision to refuse enforcement of the rule, illustrated by its public statements and other industry challengers' decisions to forego ongoing appeals, effectively acquiesces to the panel's decision to vacate the rule and paves the way for its wholesale abandonment. In the absence of intervention, any additional substantive "briefing of issues" as well as the ability to continue to appeal the panel's divided decision will be foreclosed. *Id.* As a consequence, AARP and its members will be deprived of the rule's protections from misleading advice and conflicts of interest in the sale of services and products in the retirement-investment market, promulgated after extensive deliberation pursuant to a record more than sufficient to survive arbitrary and capricious review.

[2] The government has not definitively stated whether it will file a petition for rehearing en banc. Regardless, the possibility that it might file will become a non-issue once midnight strikes on April 30, 2018, the deadline for the government's rehearing petition.

3. Lack of prejudice. The timing of this motion does not prejudice existing parties. This analysis is "measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate." *Id.* at 1206. (no prejudice from delay of intervention when motion was filed "less than three weeks after" inadequacy of representation became apparent). This requirement is designed to "prevent[] potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (internal citations omitted).

But it is not prejudicial, or unfair, for movants to ensure that the rule is adequately defended, particularly when the government's position is no longer adversarial to the industry challengers. If anything, the opposite it true: Denying this motion to intervene would only serve as "effective insulation" of the panel's decision. *Acree,* 370 F.3d at 50. Nor would intervention here delay this litigation: AARP has filed this motion to intervene within the time for seeking rehearing and has prepared a petition for rehearing en banc that accompanies this motion.

B. AARP has a vital interest in this litigation that may be impaired or impeded, and therefore satisfies Article III standing requirements.

1. Direct, substantial, and legally protectable interests. AARP has a vital interest in this litigation. The final resolution of this case will determine whether workers, retirees, and their families will be protected from misleading

information and conflicts of interest when they receive retirement advice concerning investments in their retirement accounts or purchase retirement products. The requirement that an intervenor establish a legally-protected interest is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Espy*, 18 F.3d at 1207 (citation omitted). The interest must be "direct, substantial, [and] legally protectable." *Id.* It is enough that, if the challenge to the regulation succeeds, the intervenor will be harmed economically. *Id.*; *see also Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992) (rejecting a "narrow[]" interpretation of "property or transaction" under Rule 24(a)(2)); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (holding that insurer had an interest in defending statute limiting damages, and therefore insurer liability).

AARP's interest meets this standard. It is an organization of nearly 38 million members dedicated to increasing the availability, security, equity, and adequacy of pension, health, and other employee benefits that countless members and other older individuals receive or may be eligible to receive. Add. Ex. A ¶ 2. One of its major priorities has been to assist Americans in accumulating and effectively managing the assets they will need to supplement Social Security, so that they can maintain an adequate standard of living in retirement. And it has been at the forefront of the policies embodied in the fiduciary rule: When President Obama

announced that he was directing DOL to propose the rule, he did it at AARP's national headquarters in Washington, DC. Add. Ex. B ¶ 20.

AARP has also been a direct and ardent participant in the rulemaking itself. AARP's Legislative Counsel and Policy Director for Government Affairs, David Certner, was "the first witness to testify" at the agency's hearing on the rule. Add. Ex. B ¶ 21. AARP submitted public comments "voicing vigorous support for the rule," and "arguing that the 1975 regulations on investment advice [were] outdated and [didn't] adequately protect the millions of Americans who are now in charge of their own retirement investment decisions through IRAs and 401(k) plans." Add. Ex. B. ¶ 22. In those comments, AARP drew on its decades of experience and expertise about retirement savings to explain "how the proposed rule is consistent with ERISA and the Department of Labor's authority," and why it "would protect consumers in the modern individual account based retirement system, where defined benefit plans are all but obsolete." *Id.*

AARP has likewise played a prominent role in defending the rule against litigation and regulatory opposition. It filed an *amicus* brief in support of the rule in this case as well as in *NAFA* and *Market Synergy*—the two other cases that went up on appeal to the DC and Tenth Circuits, respectively. Add. Ex. B ¶ 31. And "[t]hroughout the litigation concerning the Fiduciary Rule in the Courts of Appeals, AARP has led the coalition of amici supporting the rule's validity and

helping to inform courts nationwide about the rule's crucial impact on broad swaths of the country's population that would benefit from unconflicted advice to support their retirement security." *See* Add. Ex. B ¶ 31. AARP also filed public comments opposing DOL's "delay in enforcing the rule" because of the "urgency of implementing the rule's protections for investors." Add. Ex. B ¶ 27. As AARP told the agency, the "cost of the delay to investors is more significant than the cost to the financial services industry." *Id.*

The government's apparent decision to abandon its defense of the rule puts retirement investors, including millions of AARP members, at incredible risk. As AARP has explained, without the rule's protection, "millions" of its members will not be "adequately protect[ed]" from "conflicted retirement investment advice." Add. Ex. B ¶¶ 21, 22. Absent the rule, investors face "high fees and expenses" and are at continuous "risk of being steered into higher-risk or lower-performing investments or paying excessive transaction costs." Add. Ex. B ¶ 21.

And these costs are not abstract. The White House Council of Economic Advisors has calculated that conflicted retirement investment advice "costs investors an estimated $17 billion each year." Add. Ex. B ¶ 21. Without the rule, underperformance associated with conflicts of interest in the mutual funds segment alone could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years,

ROA646, and most at risk for the "adverse effects of conflicted advice" will be "low-to-middle-income individuals and small investors." Add. Ex. B. ¶ 28.

The bottom line: AARP's "interests" in "protect[ing] consumers in the modern individual account based retirement system" would be irreparably harmed if the rule is vacated or the government refuses to enforce it. Add. Ex. B ¶ 22.

2. Article III standing. For the same reasons, AARP has independent Article III standing to defend the rule. Last year, the Supreme Court made clear that "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017). That requirement holds true of relief on appeal, such as rehearing. *See Goldin v. Bartholow,* 166 F.3d 710, 720 n.12 (5th Cir. 1999). An organization has standing to intervene if (1) at least one of its members would have standing to sue in his or her own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim nor the relief requested requires the participation of an individual member. *Supreme Beef Processors, Inc. v. Dep't of Agriculture*, 275 F.3d 432, 437 n.14 (5th Cir. 2001).

There is little question that AARP satisfies the last two criteria. Protecting consumers, workers, investors, retirees, and their families from conflicted or misleading advice in retirement-investment decisions is not only germane to AARP's mission, it is one of its core objectives. *See* Add. Ex. B ¶ 3. AARP is the

leading authority on "retirement savings and the need for unconflicted advice;" and it is a leading advocate for protecting and enhancing the rights of those directly affected by the fiduciary rule: retirees and workers "who are now in charge of their own retirement investment decisions through IRAs and 401(k) plans." *See* Add. Ex. B ¶ 22. AARP's interest in protecting the legality of the rule is more than sufficient. *See Competitive Enter. Inst. v. Nat'l Highway Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990) (explaining that the standard "is satisfied by a 'mere pertinence' between litigation subject and an organization's purpose"). And, because defending the rule does not require the participation of members for individualized proof or monetary relief, "the only issue is whether [AARP's] members have standing in their own right," *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016), which they do.

To establish Article III standing at least one member must show: (1) injury-in-fact; (2) causation; and (3) redressability. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As detailed above—and in the attached member declarations—there is no question that AARP's members have a direct economic stake in the protections afforded by the fiduciary rule. As the agency explained in promulgating its rule, "[i]n today's marketplace," commissions "give [] . . . advisers a strong reason, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the

[plan] participants." ROA333. To combat these incentives, the rule delivered enhanced protections to investors, workers, retirees and their families for what is one of the toughest and most complex financial decisions they face. The outcome of the litigation will decide whether AARP members' individual retirement accounts and access to retirement advice, information, and products will be protected from damaging conflicts of interests and bias.

Multiple members have made clear their desire to obtain advice free from any conflict. *See, e.g.*, Add. Ex. G ¶¶ 7, 9 (active bedside nurse nearing retirement "looking for financial advice" about moving money out of a 401(k), who doesn't "currently have a relationship with a financial planner," is "not knowledgeable about financial transactions," and wants to "know who will give me advice that is in my best interests"); Add. Ex. C ¶¶ 5–7 (self-employed engineer who "plan[s] to retire in the next couple of years," "want[s] to consolidate" his retirement accounts and "roll the money in my 401(k)s into an individual retirement account," and is "looking for financial advice about this transaction"); Add. Ex. D ¶¶ 8, 13 (retired librarian "looking for financial advice about other investment options to make sure I'm doing as well as possible with my retirement money in terms of risks, fees, and growth" and worried that current advisor is not "complying with the fiduciary rule").

And the potential harm that these members face is not abstract. As Mary Jo Simon, an 82-year-old retired secretary and AARP member explained, had the protections afforded by the fiduciary rule been in place earlier, she would have avoided a loss of more than $400,000 stemming from an unscrupulous and conflicted broker-advisor. *See* Add. Ex. E ¶ 9. After Ms. Simon retired in 2001, she rolled her 401(k) plan, along with her recently deceased husband's 401(k) plan into an IRA and began investing those benefits "following the advice of the broker." Add. Ex. E ¶ 6. "On more than one occasion," she and her late husband "told the broker" that they were "ultra-conservative" investors "who wanted to avoid risk." Add. Ex. E ¶ 7. Their broker "assured" them that "he would invest [their] funds in safe, secure, low-risk investments." Add. Ex. E ¶ 7. That did not happen. As Ms. Simon found out, virtually "all of funds" had been invested in "private placement investments"—risky securities that conservative retirement investors would never consider. Add. Ex. E ¶ 8. As Ms. Simon learned, her investor "had financial interests" in those investments. Add. Ex. E ¶ 8. "Almost all of the investments ultimately failed' and she lost $434,197—nearly all the money she had planned to live on—because her broker was not acting "in [her] best interest." Add. Ex. E ¶ 10.

This presentation is enough for injury-in-fact. Article III standing for non-regulated parties is satisfied where the "injury is fairly traceable to the regulatory

action . . . that the [plaintiff] seeks in the underlying lawsuit." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003). And that is particularly true in a situation like this one: where "a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015). *See, e.g.*, *Supreme Beef,* 275 F.3d at 437 n.14 (holding that association had Article III standing where suit "deal[t] with the application of a performance standard that affects [association's] members"); *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (explaining that, where agency takes some action "with the purpose and substantially probable effect of economically helping regulated Party A and hindering Party B, Party B ordinarily will have standing to challenge the rule"); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir 1998) (concluding that associational standing to intervene is met where members benefited from existing rule challenged by petitioner).

Delaying the rule will also cause both "immediate" and "threatened" harm to AARP members. *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 342–43 (1977). Because (as the agency concluded) the "variety and complexity of financial products," has "widen[ed] the information gap between advisers and their clients," investors "are often unable to assess the quality of the expert's advice" or to "guard against the adviser's conflicts of interest." ROA330–31. As a result, delaying (or

declining) enforcement of the rule will harm AARP's members who are likely to confront retirement-investment decisions in the near future. *See, e.g.*, Add. Ex. G ¶ 6 (discussing desire to retire in "two to three years" and actively looking for financial advice about "what to do with my 401(k)"); Add. Ex. C ¶ 9 (noting the concern that "many people calling themselves advisors do not have to act in my best interests" and "not sure who has to do that under the law").

Causation and redressability are satisfied for similar reasons. AARP's injuries (along with those of its members) are "fairly traceable" to the panel's decision vacating the rule and handing the industry challengers all the relief they sought "in the underlying lawsuit." *Fund for Animals,* 322 F.3d at 733. And "a decision favorable" to AARP—reversing the panel decision vacating the rule—will redress these harms. *Id.* As a result, AARP and its members have both a legally protected interest under Rule 24(a)(2) and Article III standing to intervene independently. *LULAC v. Boerne,* 659 F.3d 421, 434 n.17 (5th Cir. 2011) ("[A] movant who shows standing is deemed to have a sufficiently substantial interest to intervene.").

3. Impairment of interests. For the same reasons, "an adverse resolution of [this appeal] would impair [the movant's] ability to protect their interest." *Espy*, 18 F.3d at 1207. The plaintiffs' case "is premised on the argument that" the fiduciary rule is unlawful, and AARP's members are "the beneficiaries of this regulatory system." *Wal-Mart,* 834 F.3d at 566.

AARP and its members are harmed every day the enforcement of the rule is enjoined—as workers, retirees, investors, and their families are forced to face the ongoing risk from damaging conflicts of interests and bias when it comes to advice about their individual retirement accounts and access to retirement information and products. And the harm to AARP members from that ongoing misleading or conflicted advice or sale "during any interim period would be substantial." *Fund for Animals*, 332 F.3d at 735.

C. AARP's interests are not adequately represented.

Finally, intervention is warranted because the federal government appears to no longer represent AARP's or its members' interests. For this, the "burden is 'minimal'" and "the applicant need only show that the representation 'may be' inadequate." *Espy*, 18 F.3d at 1207 (internal citations omitted). "[I]ntervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 (3d ed.).

Here, AARP intervenes only to "assum[e] the adversary role formerly discharged by the Government." *Dunlop*, 618 F.2d at 50–51; *see also Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (granting intervention to defend a rule based only on legitimate "concerns about the Government's enthusiasm for defending" it). That AARP "has participated previously in this action as amicus

curiae does not mean that its interest is protected now, as its ability to seek further review is conditioned on attaining party status." *Day*, 505 F.3d at 965. As a result, unless this Court grants intervention in this proceeding, "no petition for rehearing can be filed in this Court, and there will be no opportunity for the Supreme Court to consider whether to grant certiorari." *Id.* at 966. Because it appears "no party" in this litigation "can fully represent its interests" if intervention is denied, AARP has "appropriately sought to intervene to fill the void." *Peruta*, 824 F.3d at 941.

II. In the alternative, this Court should grant movant permissive intervention.

In the alternative, the Court should allow for permissive intervention of AARP under Federal Rule of Civil Procedure 24(b)(1). That rule grants courts broad discretion to allow intervention under appropriate circumstances, providing that "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). This is a substantially lower burden than the test for intervention as of right under Rule 24(a)(2).

For most of the same reasons already discussed above, permissive intervention is warranted. First, the motion is timely. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (explaining that timeliness inquiry is the same). Second, there are obviously common questions of law and fact. Third, the Court should exercise its equitable discretion to permit intervention

under Rule 24(b) because this case presents issues of exceptional importance to AARP that the government either cannot or will not adequately protect.

CONCLUSION

The Court should grant AARP's motion to intervene as a defendant-appellee in this case for the purpose of seeking rehearing en banc.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

MARY ELLEN E. SIGNORILLE
WILLIAM ALVARADO RIVERA
DEAN GRAYBILL
DARA S. SMITH
AARP FOUNDATION
601 E Street, NW
Washington DC 20049
(202) 434-2060
msignorille@aarp.org

April 26, 2018

Counsel for Movant-Proposed Intervenor

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because it contains 5,181 words, exclusive of the portions excluded by Rule 32(f). I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2016 in 14-point Baskerville font.

April 26, 2018

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the foregoing motion with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

Addendum

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EXHIBIT A

DECLARATION OF MARTHA M. BOUDREAU

I, Martha M. Boudreau, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am Executive Vice President and Chief Communications and Marketing Officer at AARP. I am responsible for all aspects of AARP's membership, and I manage a team of over 350 employees working on membership services, membership publications, and membership acquisition and renewal, including communications to and from our members, member relations, and seeking input from our members to help guide the operations and activities of AARP.

2. AARP has 37,352,192 members as of April 9, 2018.

3. "Regular Membership" in AARP is available to any person of the age of fifty (50) years or older. When an individual applies and pays dues for membership, their spouse or partner's membership, if desired, is also included, and both are members in good standing. The spouse, if over the age of 50, is then a Regular Member with all the benefits and privileges thereof.

4. AARP is a nonprofit, nonpartisan organization dedicated to empowering people to choose how they live as they age. AARP champions positive social change and delivers value through advocacy, information, and service. AARP's vision is a society in which everyone lives with dignity and purpose, and fulfills their goals and dreams.

5. Members are an essential part of AARP's ability to achieve its mission. Speaking on behalf of its tens of millions of members gives AARP significant power and reach in advocating for social change at the local, state, and national levels. Members also provide grassroots activism, volunteer work, and input into the problems faced by Americans as they age, which helps shape AARP's social change agenda.

6. The AARP Board of Directors is composed of volunteers who must be regular members of AARP. As explained in full in the AARP bylaws, the Board is vested with authority over "the direction of the affairs and resources of AARP." The Board also appoints Board members.

7. AARP regularly conducts a Member Opinion Survey, which informs AARP about the opinions, perceptions, and experiences of its members. The most recent survey was conducted in 2016. Through the survey, thousands of AARP members share with AARP information regarding their top interests and concerns, the challenges they face, their life experiences, their reasons for renewing membership, and a wide variety of other subjects. In 2016, approximately 23,000 members responded with their experiences, perspectives, interests, and opinions. AARP staff typically utilize the survey results to inform organizational strategy and guide membership marketing efforts with key segment/modeling data on the needs and wants of AARP members.

8. AARP responds to the views, concerns, and interests of its members in virtually all aspects of its services and programmatic operations. AARP is focused on listening to its members through a plethora of channels beyond the Member Opinion Survey, including:

a. **ATOM (Attitude, Trend, and Opinion Monitor) Survey** – This monthly survey is AARP's primary vehicle for tracking critical member and prospective member attitudes and opinions. Each monthly survey includes a 5-7 question module focused on a special topic that changes each month.
b. **Volunteer Opinion Survey** – This annual tracking survey gathers evaluation feedback from AARP volunteers about the strengths and weaknesses of volunteer programs such as Driver Safety and Tax-Aide. The purpose is to identify and track over time areas of strength in AARP volunteer programs as well as areas where improvements may be warranted.
c. **What Are Our Members & Others Saying** – The AARP Voice of the Consumer team collects and analyzes information from calls, emails and social media posts to identify insights and trends.
d. **Social media** – AARP has a social media presence across numerous platforms, including Facebook and Twitter. The AARP National Office's Facebook page alone has over one million followers. AARP has a dedicated social media response team that addresses member and non-member questions about the organization and its work.
e. **Tele-Town Halls** - Twice a month, the Office of Volunteer Engagement holds Tele-Town Halls exclusively for AARP volunteers. The calls offer an opportunity for them to hear from AARP experts and share questions and comments.
f. **Article/Blog Comments on AARP.org –** Nearly every article on AARP.org has a comment page. Some articles garner hundreds of comments from readers.
g. **AARP Communities** – Integrated Communications and Marketing runs online message boards. They provide an open forum in which participants can discuss a wide range of topics. AARP staff moderate these conversations between members and provide helpful links to articles as well as answer questions.
h. **Traditional member correspondence** – Member Correspondence, with the assistance of the Office of Policy Development and Integration, maintains a cadre of responses to common member questions and comments about AARP policy issues. In 2016, AARP sent 6,184 total policy form letters to members.

9. Informed by these channels, AARP constantly creates and adjusts its many programs and services. For instance, AARP has created AARP Frontline, an application that allows AARP to capture member ideas and input through volunteers and staff nationwide. AARP has expanded Fraud Watch Network to respond to member input indicating that members want AARP to provide them with more information about how to protect themselves from fraud. The Member Opinion Survey showed that AARP's work to combat fraud is a major value that members see in AARP membership.

10. AARP membership dues accounted for approximately 300 million dollars in 2016, which was approximately 19 percent of AARP's total revenue.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 10, 2018.

Martha M. Boudreau

EXHIBIT B

DECLARATION OF DAVID CERTNER

I, David Certner, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am Legislative Counsel and Legislative Policy Director for Government Affairs at AARP. I have served in this role since 2009. I am counsel for AARP's legislative, regulatory, and policy efforts at the federal and state level, as well as for litigation opportunities before the courts. I have worked at AARP since 1982. From 1982 until 1993, I was a Legislative Representative. From 1993 until 2000, I was Senior Coordinator for Economic Issues. From 2000-2008, I was Director of Federal Affairs.

2. I was a Member of the Department of Labor's ERISA Advisory Council from 1992-1994, serving as Chairman in 1994. I am a fellow of the American College of Employee Benefits Counsel.

3. For nearly 20 years, AARP has been at the forefront of education, research, and advocacy on retirement savings and ensuring that individuals can find sound investment advice that is in their best interests.

4. In 2001, AARP submitted testimony to Congress on the Retirement Security Advice Act explaining the importance of insulating consumers from conflicted advice by financial services professionals. AARP's Executive Director and CEO also sent letters to Representative Sam Johnson of the House Subcommittee on Employer-Employee relations and to John Boehner, Chairman of the House Committee on Education and the Workforce, arguing that the Retirement Security Advice Act "would encourage plans to provide advice subject to inherent financial conflicts" which "is inconsistent with ERISA's longstanding protections for plan participants." The letters explained that most individuals—particularly low-income individuals—have inadequate knowledge about retirement investments and their impact on retirement income, and can benefit from quality non-conflicted investment advice.

5. Also in 2001, AARP's Executive Director and CEO sent a letter to Senators Jeff Bingaman and Susan Collins supporting the Independent Investment Advisors Act. The letter explained that education alone was not enough to help individuals make "investment decisions necessary to ensure an adequate level of retirement benefits" and advocated for investment advisers to be subject to ERISA's fiduciary standards and "free from financial conflict." The letter noted, "ERISA has long recognized that financial conflict gives rise to divided loyalties, and thus poses the risk that actions will not be taken in the sole interest of the participant . . . Encouraging independent, unbiased investment advice will better enable employees to improve their long-term retirement security[.]"

6. In 2002, AARP's president testified before Senate Banking, Housing, and Urban Affairs Committee that as Americans increasingly rely on personal investment for their financial needs in retirement, effective financial literacy programs and services must be developed—but that

such programs and services "should not be viewed by anyone as a substitute for clear and strong oversight and enforcement of investor protection laws and regulations." The testimony emphasized the need "for 'non-conflicted' financial literacy programs and services" as well. Also in 2002, AARP's president testified before the Senate Committee on Governmental Affairs regarding retirement security lessons learned. Among other things, this testimony supported individualized investment advice for employees only when such advice was subject to ERISA's fiduciary rules.

7. AARP's president also delivered remarks to the First Investor Summit convened in 2002 by the SEC explaining the challenges faced by investors seeking accurate information. AARP noted that "Individual investors . . . do not expect perfection in the information or advice offered to them. Rather, what they expect—and have every right to expect—is a fair, non-conflicted and consistent scheme for weighing the investment risks they are about to assume." AARP stressed that "what is truly at stake" is "the individual investor's belief in our standards of fair play."

8. In 2003, an AARP Board member testified on AARP's behalf before the House Financial Services Committee on the role private insurance products play in retirement planning. This testimony noted that "the responsibility for the selection among a complex array of insurance companies, and policy options within insurance product lines, shifts to the individuals and their families while they are—at the same time—attempting to manage their daily financial affairs," emphasizing the need to "increase consumer awareness of insurance alternatives for assembling and managing the necessary financial assets for a secure retirement" and advocating for "high quality 'non-conflicted' financial literacy programs."

9. The Associate Executive Director of AARP also wrote a letter in 2003 to the Speaker of the House opposing the Pension Security Act of 2003 because it would permit conflicted advice. The letter argued that the bill was contrary to ERISA and described "numerous examples of problems associated with conflicts of interest that underscore why disclosure alone will not always mitigate the potential problems that will arise." The letter concluded that "[i]ndividualized investment advice is important, but we should encourage quality investment advice without the potential for conflict of interest, rather than an approach that would encourage advice by those with an interest in their own financial products."

10. Also in 2003, AARP's Associate Executive Director wrote a letter to the Chairman of the SEC opposing a rule that would blur "the legal distinction between broker-dealers and investment advisers" because of the urgent need to protect investors from conflicted advice. The letter expressed concern that "broker-dealers would be exempt from complying with the basic investor protections provided for in the Advisory Act" and that this change would significantly weaken investor protections. AARP's Director of Advocacy also sent a letter to the Chair of the House Financial Services Committee supporting the Mutual Fund Integrity and Fee Transparency Act of 2003's provisions that would require fee disclosures by money managers calling themselves "advisers," who have conflicts of interest. The letter explained that "this

upgrade in investor protection is warranted in view of the continuing evolution in market practices and the growth in market size" and the "importance of the market to the economic security of all Americans—including the retirement security of older persons[.]"

11. In 2004, AARP submitted comments regarding the SEC's proposed rules that developed disclosure documents for broker-dealers to provide to their mutual fund customers. The comments supported more robust disclosure requirements but advocated that the SEC require brokers-dealers to "disclose more conflicts of interests." The comments also urged the SEC to require these disclosures at an early enough time to permit investors to consider the information disclosed when making investment decisions. The comments also included AARP's studies on investor understanding of their investment options, which showed that investors sorely needed more information.

12. AARP engaged in robust advocacy regarding the Pension Protection Act of 2006, including opposing its provisions loosening restrictions on conflicted advice. AARP expressed concern to the Ranking Minority Member of the Committee on Education and the Workforce that the Conference Report "goes too far in modifying current conflict of interest prohibitions by permitting financial service firms to provide conflict-tainted investment advice. The scandals of the past decade have taught us that conflicts of interest are at the heart of financial scandals, and we should be strengthening, not weakening, protections to individuals in the marketplace."

13. In 2007, AARP commissioned a report to determine the extent to which 401(k) plan participants were aware of fees associated with their accounts and whether they knew how much they were actually paying in fees. The report revealed participants' lack of knowledge about fees as well as their desire for a better understanding of fees. In response to these findings, the report suggested that information about plan fees be distributed regularly and in plain English, including a chart or graph that depicts the effect that the total annual fees and expenses can have on a participant's account balance. Most respondents did not know how much they paid in fees and expenses and had difficulty understanding the standard forms proposed by the Department of Labor. AARP discussed the results of this report in a submission to the Employee Benefits Security Administration, advocating for stronger and clearer disclosure requirements.

14. In 2008, AARP requested a hearing before the Department of Labor about the proposed regulations and class exemptions implementing the Pension Protection Act. I testified on AARP's behalf that the DOL had acted in an arbitrary and capricious manner and left workers with insufficient protections. In particular, I testified that the regulatory proposals would "permit advisers to steer participants towards investments that are more lucrative to the adviser and the affiliate" and circumvent measures put in place to ensure "unbiased, independent advice" using a computer model. I also explained that eliminating advisors' conflicts of interest is critical to protecting ERISA plan participants because these conflicts of interest were "at the very heart of the financial scandals that have rocked the nation—scandals that began with Enron and Worldcom and now have permeated through Lehman Brothers, AIG, and much of Wall Street[.]"

AARP also submitted public comments on the proposed regulations raising similar concerns. These regulations that would have weakened consumer protections were ultimately rescinded without implementation.

15. In 2009, an AARP National Policy Council volunteer testified on AARP's behalf before the House Ways and Means Committee on issues surrounding investment advice. The testimony highlighted as one of the top issues facing investors the need for independent—i.e., unconflicted—advice. It emphasized that "[c]onflicts of interest are particularly disturbing when they impact participants' retirement accounts. A review of the recent market upheaval and scandals should make it obvious that conflict-driven advice should be avoided, and common sense compels far more substantial and significant participant protections than the [Pension Protection Act] provides."

16. The Senior Vice President for Government Relations and Advocacy sent a letter in 2009 to Representative Rob Andrews, Chairman of the House Subcommittee on Health, Employment, Labor and Pensions, thanking him and other members of the Subcommittee for holding a business meeting on the Conflicted Investment Advice Prohibition Act of 2008. The letter explained that the proposed legislation "would give employers a pragmatic method for providing conflict-free investment advice that is in the best interest of their employees."

17. AARP and its members vigorously supported the current Fiduciary Rule from its initial proposal through its defense in federal court. AARP submitted public comments supporting the first iteration of the rule proposed in 2010. The comments praised the proposed rule as doing "a much better job" than prior proposals "of balancing participant protections with the narrow Congressional exemptions from the fiduciary duty rules." The comments also advocated for even stronger protections and clearer requirements.

18. AARP commented again in 2011 supporting the Department of Labor's review of the 1975 regulations, advocating for narrower exemptions, broader protections, and a broad construction of ERISA's fiduciary requirements in accordance with the statute's intent. I presented oral testimony before the Employee Benefit Security Administration expressing the pressing need for a review of the 1975 regulations and supporting the Department's decision to update the current definition of fiduciary to better protect the interests of plans and their participants and beneficiaries. I explained that "if an entity informs a fiduciary—such as a trustee –or a participant that the fiduciary or participant should purchase a certain investment (XYZ stock), and the entity receives payment, directly or indirectly, through the plan for providing that advice (such as a commission if the fiduciary or participant purchases XYZ stock), then the entity is a fiduciary.".

19. In 2013, AARP surveyed over 1,400 adults who had money saved in either a 401(k) or a 403(b) plan. More than nine in ten (93 percent) respondents favored requiring retirement advice to be in their sole interest, and fewer than four in ten (36 percent) respondents indicated they

would trust the advice from an adviser who is not required by law to provide advice that is in their best interests.

20. In 2015, President Obama announced at AARP's national headquarters in Washington, DC, that he was directing the Department of Labor to propose the current rule.

21. When the Department of Labor proposed the rule in 2015, I was the first witness to testify at the Department of Labor's hearing. My testimony described the White House Council of Economic Advisors' estimate that conflicted retirement investment advice costs investors an estimated $17 billion each year, which makes the need for a robust fiduciary standard urgent. The testimony explained that along with high fees and expenses, investors are at risk of being steered into higher-risk or lower-performing investments or paying excessive transaction costs.

22. AARP submitted public comments voicing vigorous support for the rule, arguing that the 1975 regulations on investment advice are outdated and don't adequately protect the millions of Americans who are now in charge of their own retirement investment decisions through IRAs and 401(k) plans. Drawing on decades of experience and expertise about retirement savings and the need for unconflicted advice, AARP explained how the proposed rule is consistent with ERISA and the Department of Labor's authority, and how it would protect consumers in the modern individual account based retirement system, where defined benefit plans are all but obsolete.

23. AARP members actively supported the rule during the open comment period in 2015. Close to 100,000 AARP members took over 200,000 actions in support of the rule in 2015, including submitting close to 60,000 messages to the U.S. Department of Labor, and delivering over 26,000 petitions to the House Financial Services Committee.

24. AARP performed a survey after the rule was promulgated demonstrating that an overwhelming percentage of respondents were in favor of the rule and believe it is important for financial advisers to give financial advice in a client's best interests. Among those individuals who have received professional financial advice, the support was the deepest, with nearly 8 in 10 (78 percent) strongly agreeing with the rule. In addition, AARP conducted research showing that plan sponsors generally favor the rule. In a survey of over 3,000 plan sponsors of all sizes, nearly nine in ten (89 percent) plan sponsors said that they would favor requiring giving advice that is in the sole interest of plan participants.

25. AARP used its communication channels to inform AARP members and the broader public about the benefits of the rule, including multiple articles in AARP's Bulletin, which is mailed to all 38 million members. AARP has worked in collaboration with organizations such as Yahoo Finance to produce educational videos regarding the rule and its benefits.

26. AARP developed a tool that walks investors through the questions they should ask a prospective or existing financial adviser. The tool helps users understand the adviser's

credentials, how he or she is compensated, and the adviser's obligations to the individual. It reminds the user that some advisers are required to act in their best interests, while others are simply required to offer suitable investments, and that this can mean being offered an investment consistent with their interests but that could result in higher compensation for the adviser and lower return for them.

27. AARP submitted public comments opposing the Department of Labor's delay in enforcing the rule, arguing that "The time is now to protect hard-earned retirement savings of participants and beneficiaries." Emphasizing the urgency of implementing the rule's protections for investors, AARP explained that "The financial services industry generally agrees that investment advice should be given in the best interests of the participant and retirement investor" and that "the cost of the delay to investors is more significant than the cost to the financial services industry."

28. In 2017, AARP's Director of Financial Security and Consumer Affairs submitted testimony to the House Financial Services Capital Markets Subcommittee opposing Congress' legislative effort to preempt the rule. The testimony explained that "[t]o dilute or rescind the fiduciary rule is simply too costly to retirement investors. Retirement investors are at risk of a 1 percent drop in annual returns on retirement savings without the rule. Increasingly, the way that most Americans save and invest is through their employer sponsored retirement plans, most typically a 401(k) type savings plan. The Government Accountability Office (GAO) has estimated that $20,000 in a 401(k) account that had a one percentage point higher fee for 20 years would result in an over 17 percent reduction in the account balance, a loss of over $10,000. We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. Conflicted advice resulting in higher fees and expenses can have a huge impact on retirement income security levels." The testimony also noted the escalating risk due to increased baby boomer retirement rates in the coming years, as well as the particular adverse effects of conflicted advice on low-to-middle-income individuals and small investors. Many individual AARP members attended the hearing in support of this testimony.

29. Hundreds of AARP members wrote letters to Congress opposing legislative and regulatory efforts to rescind, weaken, or supersede the rule, expressing fear for their retirement security and advocating for advisers to act in their best interests.

30. In addition to its legislative, regulatory, and grassroots advocacy, research, and public information campaign, AARP has vigorously advocated in amicus briefs to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive. *E.g.*, *Kopp v. Klein*, 722 F.3d 327 (5th Cir. 2013); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299 (5th Cir. 2007); *La. Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529 (5th Cir. 2006): *Glista v. UNUM Life Ins. Co. of Am.*, 378 F.3d 113 (1st Cir. 2004);

Mitchell Energy & Dev. Corp. v. Fain, 311 F.3d 685 (5th Cir. 2002). Since 1993, AARP has filed in almost every ERISA case before the Supreme Court. *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993).

31. More specifically, AARP has been a vocal advocate for robust construction of fiduciary duties and the Fiduciary Rule in particular through amicus curiae briefs in a wide array of federal cases. In addition to this case, AARP filed amicus briefs in both other appellate cases concerning the validity of the Fiduciary Rule: *National Association for Fixed Annuities v. DOL*, No. 16-5345 (DC Cir.), *Market Synergy Grp., Inc. v. DOL*, No. 17-3038 and 2018 U.S. App. LEXIS 6209 (10th Cir.). AARP filed amicus briefs in the district courts in both of these cases as well. AARP also filed amicus briefs arguing for broad interpretation of ERISA's fiduciary obligations to be consistent with the intent of Congress to increase protections for participants. *E.g.*, *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014); *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338, *reh'g en banc granted,* 418 F.3d 429 (5th Cir. 2005), *vacated and remanded*, 442 F.3d 311 (5th Cir. 2006), *Howard v. Shay*, 100 F.3d 1484 (9th Cir. 1996). Throughout the litigation concerning the Fiduciary Rule in the Courts of Appeals, AARP has led the coalition of amici supporting the rule's validity and helping to inform courts nationwide about the rule's crucial impact on broad swaths of the country's population that would benefit from unconflicted advice to support their retirement security.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 13, 2018.

David Certner

EXHIBIT C

DECLARATION OF ALBERT GHARAKHANIAN

I, Albert Gharakhanian, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member in good standing of AARP.

2. I reside in Virginia.

3. I am self-employed as an engineering consultant. I have a 401(k) plan through my business, and I have been making contributions to the 401(k) plan for 6 years. I have a prior 401(k) from a previous employer, which was called Northeast Utilities at the time and is now called Eversource. I made contributions to that account for 15 years. I also have a 401(k) plan through a previous employer, Dominion Energy, to which I contributed for ten years. I also have an individual retirement account through Fidelity, which I contributed to before 401(k) plans existed.

4. My savings for retirement is primarily in these accounts. Outside of my home, they are my greatest financial asset.

5. I plan to retire in the next couple of years, and I will need to begin withdrawing money from these accounts. I will use this money to pay for my living expenses and to pass on money to my children. I am particularly concerned about being able to afford medical costs and long-term care.

6. When I retire, I will want to consolidate my retirement accounts and roll the money in my 401(k)s into an individual retirement account. I'm unsure whether I should invest in bonds, mutual funds, ETFs, or other investment vehicles such as CD's.

7. I am looking for financial advice about this transaction, and I don't have a relationship with an advisor now. I regularly receive mail from various providers offering to provide consultation and manage my accounts. I need to know how much money I should withdraw, what options I should be using for long-term capital gains, how to reduce my tax liability.

8. In the past, I've done my own research on how to invest my money. As I'm transitioning to retirement, the stakes are high, and I will need expert advice to make my choice about where and how to invest my retirement money.

9. I am concerned about the fact that many people calling themselves advisors do not have to act in my best interests. I am worried that they might inappropriately direct me towards higher-fee accounts, including actively-managed funds that financially benefits them instead of me. In my previous encounters with financial organizations, I have been steered towards accounts that have high fees, and I am concerned about making sure that doesn't happen again. I want to make sure that this time, I seek advice from someone who has my best interests in mind, but right now, I'm not sure who has to do that under the law. I am an expert in my field, and I always give the best advice I can; I expect that people giving me advice in a field in which I am not an expert will do the same for me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10 day of April, 2018.

Albert Gharakhanian

EXHIBIT D

DECLARATION OF ANNA DURESSA PUJAT

I, Anna Duressa Pujat, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member in good standing of AARP.

2. I maintain my active AARP membership by enjoying discounts, responding to surveys about member opinions, following news updates, and participating in lobbying efforts via phone, e-mail, and letter writing campaigns.

3. I reside at:

   201 Saint Clair Drive
   Saint Simons Island, GA 31522-1049
   Phone: (912) 638-5623

4. I am a retired former librarian. I was formerly employed by Hackensack University Medical Center in New Jersey as Director of the Medical Library for 27 years. I made contributions to a 403(b) account through that employer for 20+ years. I was also formerly employed by the College of Coastal Georgia as a Public Service Librarian for 5 years, and I made contributions to a 401(k) through my employer. I rolled that account over into a Roth IRA. And, I was also previously employed by Sea Island Company as Concierge for 2 years, where I made contributions to a 401(k) through my employer. I rolled that account over into a Roth IRA as well.

5. My retirement savings are primarily in my IRA. Outside of my home, this is my greatest financial asset. My husband and I depend on this money for our basic needs and financial security.

6. When I rolled over my 403(b) account, I was ripped off twice. First, Mutual Benefit Life Insurance ("MBLI") made risky real estate investments. The company had to file for bankruptcy and the state of New Jersey bailed it out, though our accounts were frozen for 7 years. Finally, the accounts were purchased by Sun Life and this was the second rip off. Sun Life sent out glossy brochures describing their accounts and services but there was no way to tell how much I would pay in service fees. I asked another advisor to look at it and he had to take it to his office for analysis. Then we received more bad news. The accounts were very expensive to the annuitant. With great difficulty and a hefty service charge I finally received my money from Sun Life. Later I read a business magazine article that confirmed that the MBLI deal was bad for the annuitants but good for other investors.

7. I am suspicious about the motives of any financial advisor since my experience. I want people to know that investors often don't know what is happening with their accounts until something goes wrong. You don't know you're being ripped off until it actually

happens, and investment companies make it difficult to find out. Even with the information at one's disposal, it can be hard to fully comprehend.

8. I have now retired and I am looking for financial advice about other investment options to make sure that I'm doing as well as possible with my retirement money in terms of risk, fees, and growth.

9. I am aware of the "fiduciary rule," though I have been hesitant to seek financial advice while not knowing whether the rule's protections are in place. I wish that such a rule was in place for MBLI and Sun Life when I was dealing with them. These companies did not put my financial interests first.

10. Last year, when companies were preparing to comply with the rule, my current financial advisor took time to explain retirement account options to me and my husband. Before that time, we never knew how much our financial advisor received from our account. Our financial advisor told us that because of the fiduciary rule, he is now offering a fee-based service so we know exactly how much he is paid. Our advisor explained to us that he felt more comfortable giving advice under the fiduciary rule because he could recommend any investment—not just one that paid him more. He told us that there are differences in how individuals or institutions, like a bank, will approach investment advice. He gave me the impression that the fiduciary rule is in his best interest as well as in ours.

11. Even though I trust my financial advisor, at times I am confused about whether my individual advisor or the Raymond James Financial Services company itself earns fees from my account. I still don't understand what percentages of my account are subtracted for each fee. Moreover, my advisor has his own company, though he works as a representative of Raymond James, which has been difficult for me to make sense of.

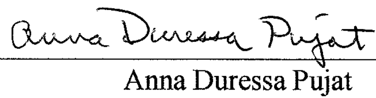
12. My past experiences make me an especially cautious investor. I think I have taken steps for myself that are good—a fee-based account, for example. Nevertheless, because of what I've experienced, I know that anyone can be fooled, and I'm concerned about making new mistakes that could jeopardize my financial future and my husband's if my advisor turns out not to be acting in my best interests. Moreover, I am concerned about what could happen if I have to get a new advisor when I am older and less aware.

13. I don't know if my advisor is currently complying with the fiduciary rule. I received my most recent account statement from Raymond James Financial Services on April 9, 2018. The account statement typically includes a company newsletter with industry updates for investors. I understand that there was a recent court decision that would strike down the fiduciary rule. This month's newsletter made no mention of the recent court decision or any recent changes in the company's or advisor's obligations. I have received no other e-mail or phone updates from the company. I tend to worry about relying on my current advisor's or any replacement advisor's advice about new investments without the rule in

place. Having the fiduciary rule would give me confidence that I am receiving the financial guidance I know I need.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of April, 2018.



Anna Duressa Pujat

EXHIBIT E

DECLARATION OF MARY JO SIMON

I, Mary Jo Simon, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member in good standing of AARP.

2. I am a resident of San Rafael, California. I have personal knowledge of the facts set forth in this declaration. If called to testify, I could and would testify competently to the facts stated herein.

3. I am 82 years old. I have a high school education. I worked for 22 years for Fireman's Fund Insurance Company ("FFIC") in Novato, California, primarily as a secretary and administrative associate. I had never had any training in investment or finance. When my late husband was living, he took care of virtually all of our financial affairs, but he also had no training in investment or finance.

4. During my employment, I was a participant in a 401(k) plan and a retirement plan. I deferred a portion of my salary into the 401k plan every year that I was eligible to do so in order to save for retirement. My late husband and I began receiving advice from a broker while I was still working as to a relatively small amount of money that we had saved outside of retirement plans.

5. My husband died in 2000. Upon his death, I was the beneficiary of his 401k account. I was advised by the broker to transfer my husband's 401k into an IRA, which I did. I then relied on the broker's advice in investing those funds.

6. In 2001, when I retired from the company, I rolled my 401k account and the funds to which I was entitled under my company's retirement plan (which I understand to be a "cash balance" plan) into an IRA. I then began following the advice of the broker as to how to invest that money.

7. On more than one occasion, my late husband and I told the broker that we were "ultra-conservative" investors who wanted to avoid risk. After my husband's death, I continued to inform the broker of this. My late husband and I, and later, just I, were assured by the broker that he would invest our funds in safe, secure, low-risk investments.

8. Ultimately, upon the broker's recommendations, all of the funds that had been rolled over from my late husband's and my retirement plan accounts, with the exception of small amounts that were invested in annuities, were invested in what I later learned were "private placement" investments, although I had never heard that term at the time that the investments were made on the broker's advice and I still do not fully understand it. I also later learned that he and/or an associate of his had financial interests of one sort or another in those investments.

9. I was living primarily on the income from my investments, but then, with the exception of small payments on the annuities, all of them stopped paying me in 2008. Almost all of the investments ultimately failed, and I received very little of my principal back. According to an expert who was retained by an attorney representing me, I lost $434,197

in principal and investment return, calculated as of late 2014, of which I have recovered only $84,069.09 to date. This resulted in my losing approximately 80 per cent of the income that I was living on during retirement. As a result, I have not experienced the quality of life that I had expected for my retirement.

10. I believe that I lost nearly all of my retirement savings because I was given and relied upon investment advice from a broker that was not in my best interest.

11. For nearly 10 years I have been involved in litigation to recover these losses. I expect to recoup a significant portion of my lost investments in the near future. I will need to preserve and, if possible, grow those funds in order to pay what I owe and will owe to the senior citizens facility in which I now live. (I had to sell my house and move to that facility as a result of the brokers' bad advice.)

12. Upon recovery, I intend to invest these monies in my IRA. Accordingly, I will need financial advice about investing the funds. Although I feel well-advised by my present broker, it certainly cannot hurt to have that broker and others subjected to a standard of acting in my best interest. I do not know what the future may bring, and my ability to live in the way that I had anticipated during retirement is dependent on my investment of this money.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Rafael, California, on April 13, 2018.

Mary Jo Simon

EXHIBIT F

DECLARATION OF DEBRA WHITMAN

I, Debra Whitman, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an Executive Vice President and the Chief Public Policy Officer at AARP. I lead AARP's policy development, analysis and research, as well as our global thought leadership efforts to support and advance the interests of individuals age 50+ and their families. I oversee AARP's Public Policy Institute, AARP Research, Office of Policy Development and Integration, Thought Leadership, and AARP International.

2. The development of AARP's public policy positions is central to AARP's mission. AARP has recently updated its public policy development process to keep the organization at the vanguard of issues that shape the lives of Americans as they live and age, now and in the future.

3. AARP's process for developing policy is overseen by AARP's all-volunteer Board of Directors which reviews recommendations and approves policy for the organization to ensure commitment to the organization's mission and purpose. The Board includes members from a variety of professional and geographic backgrounds to obtain a range of viewpoints and perspectives, and to reflect the diversity of AARP's membership.

4. The process of developing AARP's public policy recommendations is facilitated by the Office of Policy Development and Integration (OPDI), under my direction as the Chief Public Policy Officer.

5. OPDI coordinates and synthesizes the extensive input and views of AARP members and other people age 50 and older in order to analyze policy options and develop policy solutions that address the needs of the 50+ population. AARP members, staff and volunteers, as well as internal and external policy experts from across the country, contribute to the formulation of AARP's policy.

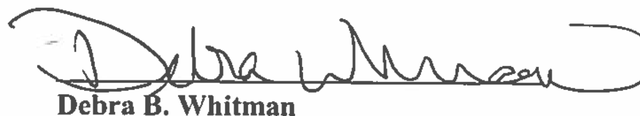
6. The policy development process capitalizes on AARP listening to our diverse membership through many different channels. AARP has offices in all 50 states, DC and the territories which are highly active in communities nation-wide. AARP has also enhanced its research capacity and regularly surveys our members and the 50+ population on key issues. In addition, AARP has expanded its presence and engagement on social media platforms as well as our real-time response capabilities allowing the organization to receive ongoing input and feedback from our members.

7. AARP members are a critical component of our policy development as are our volunteers from around the country who provide rapid input to policy development. In addition, we solicit the input of individual volunteers with knowledge and experience in any given area for feedback on specific policy issues we are considering. Staying in close touch with the interests and concerns of people age 50+ allows us to quickly gather the views of a diverse cross-section of volunteers, members, and the public to inform our policy analysis and recommendations.

8. AARP is committed to integrating input from members, member volunteers, and our volunteer leaders such as our Board of Directors which approves all of our public policy positions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2018.



Debra B. Whitman

EXHIBIT G

DECLARATION OF MICHELE WARGLO-SUGLERIS

I, Michele Warglo-Sugleris, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member in good standing of AARP.

2. I reside at 5927 St. Laurent Drive, Agoura Hills, California, 91301.

3. I am a registered nurse employed in a Kaiser Permanente hospital. I have a 401(k) plan through Kaiser, and I have been making contributions to the 401(k) plan for 22 years.

4. My savings for retirement is entirely in this account. Outside of my home, this is my greatest financial asset.

5. While I will have access to a pension and Social Security, it would be significantly more difficult for my husband and I to meet our basic needs and financial security throughout my retirement without the assets in my 401(k). I need to plan for unexpected developments over the course of many years, including health care and living expenses.

6. I intend to retire from active bedside nursing in two to three years, so I am doing my financial planning for retirement now. I am currently looking at my options for what to do with my 401(k) when I retire, and many options are available. When I look at my employer's website explaining various investment options, I find it overwhelming. I will want to move the money out of the 401(k) so that I can begin to draw on it, but I am not sure how or when to do that, or where to put it.

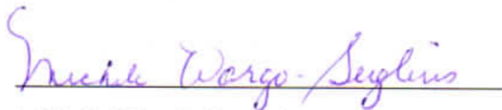
7. I am looking for financial advice about this specific transaction, and I don't currently have a relationship with a financial planner. I'm not knowledgeable about financial transactions, and I need to understand how my investment might affect my taxes, how much money I will be earning, and what options involve different levels of risk. I am considering consulting an accountant who prepares my taxes, but I am not sure if that's the best decision.

8. I have received marketing materials from many companies calling themselves financial advisers who have offered different products and advice.

9. I do not know who will give me advice that is in my best interests, and I am concerned about the financial consequences for me and my family if I act on advice that is not in my best interests.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13 day of April, 2018.



Michele Warglo-Sugleris