

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13381

ROBINHOOD FINANCIAL LLC,
Plaintiff-Appellee,

v.

WILLIAM F. GALVIN, in his official
capacity, and THE MASSACHUSETTS
SECURITIES DIVISION OF THE OFFICE
OF THE SECRETARY OF THE COMMONWEALTH,
Defendants-Appellants.

On Appeal From A Judgment Of The Superior Court

**BRIEF OF AMICI CURIAE
AARP, AARP FOUNDATION, AND
THE NATIONAL CONSUMER LAW CENTER IN SUPPORT
OF DEFENDANTS-APPELLANTS FOR REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act. In accordance with Mass. R. App. P. 20(c)(5), AARP and AARP Foundation state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than AARP and AARP Foundation, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

The National Consumer Law Center (“NCLC”) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of Section 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock. In accordance with Mass. R. App. P. 20(c)(5), NCLC

states that this brief was not authored in whole or in part by any party or its counsel, and that no person other than NCLC, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

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INTERESTS OF AMICI CURIAE

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

AARP's and AARP Foundation's efforts to increase the financial security of older adults have included litigating and participating as amici curiae in cases focused on the appropriate standard of care for financial professionals providing investment advice. Amici participated in litigation regarding the U.S. Department of Labor's 2016 Fiduciary Rule, seeking to intervene in *Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018), and as amici defending New York State's Suitability and Best Interest Rule for life insurance and annuity products, *Independent Insurance Agents and Brokers on New York Inc., et al. v. New York State Dep't of Fin. Sers.*, 195 A.D.3d 83, 146 N.Y.S.3d 348 (2021), *rev'd*, 39 N.Y.3d 56, 200 N.E.3d 537 (2022). Amici urge this Court to reverse the lower court, and uphold the Massachusetts Fiduciary Rule, 950 MASS.

CODE REGS. 12.200 (2023), to ensure that Massachusetts residents, including nearly 800,000 AARP members, receive the sound investment advice they need to achieve financial security in retirement.

The nonprofit National Consumer Law Center (“NCLC®”) is recognized nationally as an expert in consumer law issues. Since 1969, NCLC has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC’s expertise includes policy analysis and advocacy, consumer law and energy publications, litigation, expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. A major focus of NCLC’s work is to increase public awareness of, and to advocate protections against, deceptive sales and financing schemes. NCLC publishes a twenty-two volume Consumer Credit and Sales Legal Practice Series which includes Unfair and Deceptive Acts and Practices (10th ed. 2021), to assist attorneys whose clients have been victimized by unfair, fraudulent, or deceptive practices. NCLC frequently appears as amicus curiae in consumer law cases before

trial and appellate courts throughout the country. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Preparing for financial security in retirement is a substantial challenge for many Americans. First, it is difficult to simply find money to invest, whether due to insufficient income, rising education costs, or, today, high interest rates and inflation.¹ Then, for those workers able to save, there is the second challenge of deciphering which investments fit their long-term needs as a matter of risk and reward. The investment market today is complex and rapidly evolving, making it difficult for even the most savvy individual investor to fully understand complex financial products and their attendant risks.

Massachusetts has offered a helping hand of immense value to its citizens as they navigate these waters – the adoption of a rule requiring all financial professionals to follow a uniform fiduciary standard of care when offering investment advice. Over the years, studies conducted by public interest groups and government agencies have confirmed, repeatedly, that the average individual investor struggles to understand the duties owed to them by the financial

¹ See Sarah O'Brien, *54% of adults say they have stopped or reduced their retirement savings contributions due to inflation, study shows* (Oct. 28, 2022), <https://www.cnbc.com/2022/10/28/inflation-causes-54percent-of-adults-trimming-or-stopping-retirement-savings.html>

professionals they consult when seeking investment advice. U.S. Sec. and Exch. Comm'n, *Study on Investment Advisers and Broker-Dealers* at 101 (2011) (the "913 Study"); <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>; AARP, *Independent Testing Shows SEC's Proposed Customer Relationship Summary Form May Add to Investor Confusion* (Sep. 12, 2018).² While many investors assume all financial professionals are required to act solely in the investor's best interest when giving advice, that is not always the case. Broker-dealers, for instance, are often permitted to consider their own interest in equal measure when recommending investments, if making certain disclosures and satisfying other less-stringent tests. In those circumstances, there is substantially greater risk that investors receiving such "conflicted" advice will be steered to investments that, for example, cost thousands of dollars more per year in fees than offerings of similar investment value.

Two trends have exacerbated the difficulty for investors saving for their futures. First, workers today are increasingly responsible for selecting their own investments for retirement savings, given the decline of professionally managed "defined benefit" pensions. Today, 401(k) plans are the employer retirement plan of choice, requiring workers to choose for themselves among investment options at

² <https://press.aarp.org/2018-9-12-Independent-Testing-Shows-SECs-Proposed-Customer-Relationship-Summary-Form-May-Add-Investor-Confusion>

work and, upon retirement, further choose whether to “roll over” their investments, and, if so, where to place those funds. Second, technology has made market access now easier than ever, permitting individual investors to buy and trade complex financial products with just the click of a button. Without appropriate guardrails, investors can easily be led into higher cost funds or underappreciate the risks or costs associated with particular investments or trades. Statistics show that even modest financial missteps can have dramatic impacts on overall savings over time.

The Massachusetts Fiduciary Rule will have a tremendous impact in helping investors in the Commonwealth save for their future. The Rule would significantly lessen the consequences of investor confusion regarding professionals’ differing roles and standards and the detrimental costs of conflicted advice because all financial professionals would be required to put the investor’s interest first when recommending investments. AARP, AARP Foundation, and NCLC respectfully urge this Court to overturn the ruling below and to reinstate the Massachusetts Fiduciary Rule.

BACKGROUND

Investor advocates have long offered a simple solution to protect investors from receiving conflicted advice – implementation of a uniform fiduciary rule for all financial professionals providing investment advice. But, despite overwhelming public support for such a rule, government attempts to implement one have been

unsuccessful. The Fifth Circuit overturned the Department of Labor’s (“DOL”) initial efforts to impose a fiduciary standard in 2018. *See Chamber of Commerce v. DOL*, 885 F.3d 360 (5th Cir. 2018). In February 2023, a federal court in Florida invalidated DOL guidance explaining that financial professionals giving advice regarding the “roll over” of retirement funds to new investments can be subject to a fiduciary duty in certain circumstances. *See Am. Sec. Ass’n v. United States Dept. of Lab.*, No. 22-cv-330, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023).

In 2019, the Securities and Exchange Commission (“SEC”) had both the authority (under Dodd-Frank) and the opportunity to take the reins on implementing a fiduciary standard. The results of its own study under Section 913 of Dodd-Frank (the “913 Study”) concluded that “retail customers do not understand and are confused by . . . the standards of care applicable to investment advisers and broker-dealers” and are harmed as a result. *See* 913 Study at 101.³ Despite these findings, the SEC declined to impose a fiduciary duty, and instead promulgated Regulation Best Interest (“Reg BI”). Feedback from investor advocate groups was that Reg BI did not go far enough in protecting investors. It does not define its namesake term “best interest” and it permits broker-dealers to consider *their own* interests when making investment recommendations. Sec’y of the Commonwealth of Mass. William Galvin, Comment Letter on Proposed

³ <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>

“Regulation Best Interest” and Related Rules 2 (Aug. 7, 2018), <https://www.sec.gov/comments/s7-07-18/s70718-4177382-172364.pdf>. Moreover, Reg BI does *not* require broker-dealers to eliminate conflicts of interest, instead merely requiring them to disclose their conflicts and implement mitigation measures, despite overwhelming evidence that the average individual investor does not understand conflict disclosures. 17 C.F.R. § 240.151-1(a)(2)(iii)(B) (2019).

Against this backdrop, the Secretary of the Commonwealth used his authority to protect investors in the Commonwealth. To alleviate the financial hardships that can result from conflicted advice, the Secretary promulgated the Massachusetts Fiduciary Rule. The Rule paves the way for a more transparent market in the Commonwealth, one in which investors can more confidently assume they are receiving unbiased advice as they save for their futures.

ARGUMENT

I. The Massachusetts Fiduciary Rule Will Substantially Reduce Investor Confusion and Help Ensure that Investors Receive the Best Possible Investment Advice

One of the SEC’s central findings in the Dodd-Frank Section 913 Study was that widespread confusion plagues investors seeking financial advice. *See generally*, 913 Study. They struggle to differentiate between different types of financial professionals and the duties those professionals owe them. *Id.* at 94-100. When it comes to financial conflicts of interest, investors are rarely in a position to

detect subtle conflicts or understand more complex ones, much less compute the mathematical impact of such advice on their investment returns over time. Even when conflicts are disclosed, the disclosures often are lengthy and filled with jargon that is beyond the average investor's understanding.

The Massachusetts Fiduciary Rule will substantially reduce this confusion and its consequences by requiring all financial professionals providing advice to operate under a fiduciary duty. While the Massachusetts Rule uses disclosure requirements for conflicts of interest that cannot be eliminated or avoided, the Rule is clear that disclosure alone does “not meet or demonstrate the duty of loyalty,” 950 MASS. CODE REGS. 12.207(c), and that financial professionals giving investment advice must make recommendations “without regard to the financial or any other interest of any party other than the customer.” *Id.* at 12.207(b)(3). As a result, investors in the Commonwealth can have confidence that any financial professional they consult for investment advice is giving them unconflicted recommendations that are in investors' best interest.

A. The Massachusetts Fiduciary Rule Remedies the Consequences of Investor Confusion Regarding Standards of Care Because All Financial Professionals Providing Advice Will Be Acting as Fiduciaries

As the Massachusetts Securities Division noted, many individual investors simply do not understand the difference between various categories of financial professionals, or the different standards that apply to them. Mass. Sec. Div.,

Adopting Release on Amendments to Standard of Conduct Applicable to Broker-Dealers and Agents—950 Mass. Code Regs. 12.200, at 4 (Feb. 21, 2020); Galvin, Comment on “Regulation Best Interest” Rule, at 5. In one study conducted by the SEC, investors who consulted with financial professionals in the past could not confirm whether the consult was with a broker-dealer or an investment advisor. 913 Study at 93-100. Even when given fact sheets explaining the difference between broker-dealers and investment advisors, participants still could not distinguish the two. *Id.* Investors believe the titles are too similar to distinguish and therefore interchangeable. *Id.* at 97-99; AARP, Comment Letter on Proposed “Regulation Best Interest” Rule 21 (Aug. 7, 2018), <https://www.sec.gov/comments/s7-07-18/s70718-4184390-172575.pdf>.

Even if more savvy investors can distinguish between broker-dealers and investment advisors, they still have difficulty differentiating what standard of care each owes to them. Many investors mistakenly believe that financial professionals, regardless of their title, are always supposed to make decisions in the investor’s favor. Section 913 Study at 99. Typical investors do not even know what it means to have a “fiduciary duty.” AARP, *Independent Testing*. In a test conducted by AARP, only a few recognized a fiduciary duty as an obligation to put the investor’s interest first. *Id.* When asked to define fiduciary, most investors simply “guess[ed]” it referred to “some sort of legal monitoring or regulation,” and would

need to perform a google search to understand its meaning. Kleimann Commc'n Group, *Final Report on Testing of Proposed Customer Relationship Summary Disclosures* 15 (2018).⁴

Moreover, it is common for investors to mistakenly believe that a “best interest” standard provides greater protection than a fiduciary standard (*i.e.* “[i]f I’m looking at my best interest, . . . [this] would be better for me.”). AARP, *Independent Testing*. Investors can also mistakenly assume that the terms “best interest” are directly related to their legal obligations, not the obligations of a broker-dealer. Kleimann, *Report* 9, 14, 16. For instance, investors often confuse “best interest” to mean that they are legally required to maximize their own investment accounts. *Id.*

Much of this confusion stems from common industry practices that center on misleading professional titles and marketing campaigns. Galvin, Comment on “Regulation Best Interest” Rule, at 5 (citing Angela Hung *et al.*, RAND Corporation, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* 19 (2008)).⁵ It is routine for leading investment firms to advertise that broker-dealers provide advice and suggest that broker-dealers’ relationships with investors are ones centered on trust and reliance (*i.e.* “our clients always come

⁴ <https://consumerfed.org/wp-content/uploads/2018/09/testing-of-proposed-customer-relationship-summary-disclosures-report.pdf>

⁵ https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf

first.”). Micah Hauptman & Barbara Roper, Consumer Fed’n of Am., *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways* 3, 7-13 (2017), https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf. Words typically used to describe broker-dealers imply they are trustworthy counselors rather than salespersons. For instance, broker-dealers are commonly described as financial consultants, investment consultants, retirement counselors, and wealth managers. Galvin, Comment on “Regulation Best Interest” Rule, at 8; Consumer Fed’n of Am., *Advisor or Salesperson?* 6.

While Reg BI prohibits broker-dealers from using the title advisor, they can still use the word in connection with marketing communications or to indicate membership in a professional organization (e.g., “Member of the National Association of Insurance and *Financial Advisors*”). Nat’l Ass’n of Ins. and Fin. Advisors, *SEC Clarifies Rules on Use of the Term “Advisor”* 3 (May 3, 2020).⁶ (emphasis added). And, for the 50% of broker-dealers who are dually registered as investment advisors, they are free to describe themselves as advisors, further compounding the confusion. FINRA, *2022 FINRA Industry Snapshot*, <https://www.finra.org/sites/default/files/2022-03/2022-industry-snapshot.pdf>; *Sec.*

⁶ <http://advocacy.naifa.org/news/sec-clarifies-rules-on-use-of-the-term-advisor>

and Exch. Comm'n, *Guidance for Frequently Asked Questions on Regulation Best Interest* (2020), <https://www.sec.gov/tm/faq-regulation-best-interest>.

Massachusetts' Fiduciary Rule will alleviate much of the consequences of this confusion by imposing a simple and clear directive to all financial professionals who give investment advice in the state: place the investor's interest before your own.

B. Evidence Shows That Relying Solely on Disclosures to Protect Investors from the Harms of Conflicted Advice is Less Effective Than Imposing a Fiduciary Duty

Currently, financial professionals are required to disclose their conflicts of interest, but studies demonstrate that investors have difficulty understanding these disclosures and the true impacts of conflicted advice. The Massachusetts Fiduciary Rule will eliminate the need for investors to navigate complex conflict disclosure statements because advice will be free of conflict, and in the investors' best interest.

Many investors have trouble understanding conflict disclosures. Galvin, Comment on "Regulation Best Interest" Rule, at 5. Understandably, many lack education about certain financial terms and "cannot understand the industry jargon." 913 Study at 116; AARP, Comment on "Regulation Best Interest" Rule, at 14. For instance, a recent study revealed that despite requiring investors to read conflict disclosure documents carefully, they still could not comprehend the

content. AARP, *Independent Testing*. In another study, investors even erroneously thought the conflicts disclosed were for the purpose of showing examples of when conflicts would actually benefit them. Kleimann, *Report 22*.

Disclosures have substantial limitations in conveying complex financial information digestible to the average investor. Galvin, Comment on “Regulation Best Interest” Rule, at 5. The sheer amount of information they may contain can overwhelm individual investors and cause them to miss important information. 913 Study at 116. It is also common for investors to not even read disclosures. *Id.* at 116-17, 128-29; Pew Charitable Trusts, *Choice of Financial Adviser Can Dramatically Affect Retirement Savings 2* (2022), https://www.pewtrusts.org/-/media/assets/2022/07/choiceoffinancialadvisercandramaticallyaffectretirementsavings_v4.pdf. For example, studies have shown that only a third of retirement plan participants read their disclosures. Pew, *Choice of Adviser 2*. Consequently, investors are often not aware of the fees charged to their retirement accounts. *Id.* at 8. This can lead to paying unnecessary fees and significant reductions to savings over time. *Id.* at 8.

While the Massachusetts Fiduciary Rule includes a disclosure component, it also makes clear that mere disclosure does *not* satisfy the duty of loyalty and that financial professionals must recommend investments without regard to their own interests. 950 MASS. CODE REGS. 12.207(b)(3), (c). Together, these provisions of

the Rule will substantially reduce the risk that investors will opt for high-fee or other undesirable investments because they have failed to understand the gravity of financial conflicts hinted at in bewildering financial disclosures.

II. The Massachusetts Fiduciary Rule is Necessary to Protect Massachusetts Investors in a Rapidly Evolving and Complex Financial Market

The Massachusetts Fiduciary Rule is needed more than ever today, given the unprecedented degree to which workers are expected to make their own independent investment choices, and the number and complexity of the choices they face. Massachusetts' Fiduciary Rule imposes guardrails essential for investor protection in this process.

A. The Massachusetts Fiduciary Rule Helps Mitigate the Risk of Workers Having to Make Their Own Investment Choices with the Decline of Traditional Pensions Entirely Managed by Employers

Amassing adequate savings for retirement is becoming more difficult given the dramatic shift away from employer sponsored pension plans towards defined contribution plans, or no plan at all. As recently as 1980, nearly 85% of private sector workers at large and medium companies were enrolled in a defined benefit plan – a traditional pension plan in which the employer promises to pay a specific amount during retirement based on an employee's salary and years of service.

Anne Obersteadt et al., NAIC, *State of the Life Insurance Industry: Implications of Industry Trends* 50 (2013). But today, just forty (40) or so years later, defined

benefit plans are a rarity, with only 15% of private sector workers having access to one. U.S. Bureau of Labor Statistics, Employee Benefits Survey Latest Numbers, <https://www.bls.gov/ebs/latest-numbers.htm>.

Most employers who offer a retirement plan have shifted toward defined contribution plans (*e.g.*, 401(k)s). While these plans are valuable tools to encourage savings,⁷ they have shortcomings. These plans place the onus for not only saving,⁸ but also making investment choices, on the employee. Many workers are unsure how much of their paycheck to save and have trouble determining which investment options are best suited for their risk tolerance, or how to best diversify their holdings. For many who are comfortable making the investment choices required by defined contribution plans, the plans will not provide enough funds to fully cover expenses in retirement, and employees must find other saving

⁷ *American Views on Defined Contribution Plan Saving*, <https://www.ici.org/system/files/2023-01/23-ppr-dc-plan-saving.pdf> at 2 (noting that nine out of ten individuals with a defined contribution plan said it helped them think about their financial future and made saving easier, and five out of ten said they likely would not be saving if it wasn't for their defined contribution plan).

⁸ Defined contribution plans are voluntary and require employees to self-select the amount of pre-tax dollars to contribute to the plan from each paycheck. Those employees who need every dollar of their paycheck to make ends meet may not have the luxury of contributing a portion of their salary to a retirement plan. *See, e.g.,* Monique Morissey, *The State of American Retirement Savings*, <https://files.epi.org/pdf/136219.pdf> at 13 (noting that 9 out of 10 families in the top income fifth had retirement savings compared with only 1 in 8 for those with income in the bottom fifth). As a result, some studies suggest that defined contribution plans have increased gaps in retirement preparedness based on income, race, ethnicity, education, and marital status. *Id.* at 2.

vehicles to ensure they do not outlive their money. See Annie Nova, *Many younger baby boomers may outlive their 401(k) savings, new research finds. Here's why* (Aug. 25, 2022), <https://www.cnbc.com/2022/06/19/401k-plans-may-not-last-long-enough-in-retirement.html>.

An even more sobering reality is that a significant number of Americans do not have access to *any* employee sponsored retirement plan, whether it be defined benefit or defined contribution. If they are going to invest for retirement, it will be entirely on their own. As of July 2022, nearly half of all private-sector workers in the United States worked for an employer that offered no plan at all. David John et al., *Payroll Deduction Retirement Programs Build Economic Security* (July 11, 2022), <https://doi.org/10.26419/ppi.00164.001>. In Massachusetts, 43% of private sector workers did not have access to an employer plan. David John et al., *Payroll Deduction Retirement Programs Build Economic Security: Massachusetts Fact Sheet* (Aug. 2022).⁹ Lower income individuals and those with less formal education are the most likely to fall into this category. Seventy-two percent of Massachusetts workers without a high school degree did not have access to an

⁹ <https://www.aarp.org/content/dam/aarp/ppi/2022/state-fact-sheets/massachusetts.doi.10.26419-2Fppi.00164.023.pdf>

employer provided plan, and 74% of Massachusettsans who do not have access to a plan make \$50,000 or less per year. *Id.*¹⁰

The scarcity of defined benefit plans, coupled with limited or no access to defined contribution plans, has made it clear that all Americans, including Massachusettsans, must take the reins in saving for their own retirement. They can no longer rely solely, if at all, on an employer sponsored plan. As workers venture out on their own to amass savings, it is important that they can trust the financial professionals giving them advice. Massachusetts' Fiduciary Rule ensures that will be the case for residents of the Commonwealth.

B. The Massachusetts Fiduciary Rule will Protect Investors Exploring New Market Opportunities

Individual investors currently have unprecedented direct access to the market and are exploring non-traditional ways to save for their futures. As investors in the Commonwealth venture into this uncharted territory, the Massachusetts Fiduciary Rule will help protect them from the consequences of conflicted advice.

¹⁰ See also David John et al., *Payroll Deduction Retirement Programs Build Economic Security* (July 11, 2022) (noting that nationally, 81% of the individuals who do not have access to employer-provided retirement plans make less than \$50,000 per year, and 76% of workers who have less than a high school degree will not have an employer-sponsored savings option).

Quick and direct access to the market has been aided by the rapid proliferation of online or app-based trading platforms that allow investors to execute trades without speaking directly to a broker. Today, online trading through a website is the most common method for placing trades, followed by trading on a mobile app. Judy T. Lin et al., *Investors in the United States: The Changing Landscape* 10 (Dec. 2022).¹¹ Between 2018 and 2022, the use of a mobile app to execute a trade increased substantially from 30% to 44%. *Id.*

Increased access to the market has many benefits for individual investors, but it still carries the risk that brokers can offer conflicted advice. Individual investors are now flocking to online broker-dealer trading platforms that no longer charge fees for each individual trade. Wayne Duggan, *Could the SEC End Payment for Order Flow?* (Aug. 22, 2022).¹² But the broker-dealers operating these platforms still earn money from investor trades through a practice called “payment for order flow,” in which the broker (*e.g.*, Robinhood) receives a rebate from the third-party who execute the trades. *Id.* This payment system is lucrative for brokerages. In 2021, for example, Robinhood made approximately \$974 million, or about half of its total revenue, from payments for order flow. *Id.* However, it can create conflicts and lead to suboptimal execution prices on trades for investors

¹¹ <https://www.finrafoundation.org/sites/finrafoundation/files/NFCS-Investor-Report-Changing-Landscape.pdf>

¹² <https://www.forbes.com/advisor/investing/payment-for-order-flow/>.

because brokers have an incentive to seek out the third party who will provide the best rebate for them, rather than the best trade execution price for its clients. *Id.*

(noting the SEC’s current focus on payment for order flow, including fining Robinhood \$65 million in late 2020 for certain payment for order flow practices.)

Further, although trades executed through online and app-based brokerages are often done without an individual consult with a broker, the platforms offer various investment recommendations, often in the form of lists of “top stocks” or “popular” investments displayed on their homepages. Investors place significant emphasis on these lists when determining which trades to execute. In a recent study by FINA, 13% of individuals said they rely a “great deal” on “popular stock lists displayed on a mobile app” when making investment decisions, and 25% of individuals said they “somewhat” rely on those suggestions. Lin, *Changing Landscape* at 19. Among the individuals who traded in “meme stocks,”¹³ or stocks that gain viral popularity online, 75% of them relied on investments displayed in the mobile app when making trades. *Id.* at 20. Robinhood, which now offers a retirement savings account, recently boasted that nearly 50% of the first one million investors to sign-up used its customized recommendation tool to build their portfolio, rather than choosing their own investments. Alex Orlotani, *Half of IM*

¹³ Adam Hayes, *What are Meme Stocks, and Are They Real Investments?* (Sept. 12, 2022), <https://www.investopedia.com/meme-stock-5206762>.

Robinhood IRA Savers Pick In-App Investment Recommendation (Jan. 13, 2023), <https://www.planadviser.com/half-1m-robinhood-ira-savers-pick-app-investment-recommendation/>.

As more and more investors gain access to the market and explore online and mobile trading apps, it is important that appropriate guardrails are in place for their protection, particularly because some tech-based broker platforms may target investors who lack both experience in investing and knowledge of sound investing principles. Moreover, investors easily assume that online or app-based brokerages are acting in their best interests because they offer commission free trading and recommend investments. The Massachusetts Fiduciary Rule will help protect investors entering this new market frontier.

III. Massachusetts Fiduciary Rule is Necessary to Combat the High Costs of Conflicted Advice

The Massachusetts Fiduciary Rule is an important measure combatting the pernicious consequences of conflicted advice, which erodes account balances and undermines individual financial security. In Massachusetts alone, the cost of conflicted advice was estimated at \$491 million per year, as of 2017. Heidi Shierholz & Ben Zipperer, *Here is what's at stake with the conflict of interest ('fiduciary') rule* (May 30, 2017), <https://www.epi.org/publication/here-is-whats-at-stake-with-the-conflict-of-interest-fiduciary-rule/>. One common risk of conflicted advice is pushing investors into higher fee accounts. Even seemingly

modest increases in fees can have significant impacts on an investment portfolio. SEC Office of Investor Education and Advocacy, *How Fees and Expenses Affect Your Investment Portfolio* 3.¹⁴ A recent SEC bulletin explains that just a 1% fee on a \$100,000 account that generates 4% per year will reduce the total account balance by \$28,000 over twenty (20) years. Not only do investors lose out on the \$28,000 paid in fees, they also lose out on any money that would have been earned on the fee itself. *Id.*

Retirees, or those on the verge of retirement, are especially likely to seek assistance from a financial professional. Mark Lush et al., *Investing 2020: New Accounts and the People Who Opened Them* 8 (Feb. 2021)¹⁵ (noting that 53% of investors who were prompted to open an account based on the advice of a financial professional were over sixty (60)). One common reason for consulting a financial professional at retirement age is to seek advice on whether to roll over savings from an employer-sponsored plan to an individual retirement account. The roll over industry is massive and moves huge sums of money each year. From 2009 to 2018, rollovers accounted for more than 95% of traditional individual retirement account inflow each year. Pew Charitable Trusts, *Small Differences in Mutual*

¹⁴ https://www.sec.gov/investor/alerts/ib_fees_expenses.pdf

¹⁵ https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf

Fund Fees Can Cut Billions From Americans' Retirement Savings (Jun. 2022) at 3.¹⁶ In 2018 alone, investors rolled nearly \$517 billion from employer retirement plans into individual retirement accounts. *Id.* Retirees are not actually required to roll over their employer-sponsored accounts, but they are frequently urged to do so via marketing campaigns by financial firms. *Id.* at 4. The decision to execute a roll over can significantly impact a retiree's account balance over time. One analysis suggests that over twenty-five (25) years, investors who rolled over assets in just 2018 alone could lose \$45.5 billion in savings due to increased fees and lost earnings on fees. *Id.* at 9; *see also id.* at 6-9 (providing examples of how modest fees erode recent retirees' overall savings, including how a .19% fee increase due to a rollover would result in \$20,513 less in savings over twenty-five (25) years on a \$250,000 account that earns 5% per year, and a 1.35% increase would reduce the savings in the same account by \$137,630 in the same time period).

When conflicted advice and fees erode financial nest eggs, there is an attendant cost to society, as the government tries to make up the difference via public benefits. Older adults with inadequate retirement savings must increasingly turn to these benefits later in life, including Medicaid, Supplemental Security Income, Supplemental Nutritional Assistance, and housing assistance. William

¹⁶ https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf

Shiflett & Catherine Harvey, AARP Pub. Pol’y Inst., *The US Could Save \$33 Billion by Helping People Save for Their Own Retirement 1* (2018), <https://www.aarp.org/content/dam/aarp/ppi/2017/National.pdf>. If retirees had just \$1,000 per year more of retirement income, the U.S. could save \$33 billion in public benefit expenditures – underscoring just how precious every dollar lost to fees can be – both to the individual and society at large. *Id.* The Massachusetts Fiduciary Rule addresses and seeks to minimize both types of costs, to ensure a prosperous retirement for Massachusetts residents.

CONCLUSION

For the reasons discussed above, amici respectfully urge this Court to reverse the lower court and uphold the Massachusetts Fiduciary Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word in 14-point Times New Roman. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of words to be counted in this brief is 4412.

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CERTIFICATE OF SERVICE

I, hereby certify that on this 12th day of April 2023, I served the within Brief of Amicus Curiae AARP, AARP Foundation, and NCLC In Support of Defendants-Appellants for Reversal by causing it to be delivered by eFileMA.com to all counsel of record.

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