

No. 12-1452

IN THE SUPREME COURT OF ILLINOIS

JESSE WHITE, in His Official Capacity as Illinois Secretary of State;
THE ILLINOIS DEPARTMENT OF SECURITIES; and
TANYA SOLOV, in Her Official Capacity as the Director of the
Illinois Department of Securities,

Defendants-Appellant,

v.

RICHARD LEE VAN DYKE,
d/b/a Dick Van Dyke Registered Investment Advisor,

Plaintiff-Appellee.

On Appeal from the Appellate Court of Illinois, Fourth District
No. 4-14-1109
The Honorable John W. Turner Presiding

There on Appeal from the Circuit Court of Sangamon County
No. 14-MR-305
The Honorable John W. Belz Presiding

***AMICUS CURIAE BRIEF OF AMERICAN COUNCIL OF LIFE
INSURERS IN SUPPORT OF PLAINTIFF-APPELLEE AND IN
SUPPORT OF AFFIRMANCE OF THE DECISION BELOW***

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in state, federal, and international forums for public policy that supports the industry marketplace and the policyholders that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care, and disability income insurance, and reinsurance, representing 95 percent of industry assets, 93 percent of life insurance premiums, and 98 percent of annuity considerations in the United States.

The life insurance industry provides products that are central to the retirement needs of U.S. residents. 75 million American families depend on the life insurance industry for financial and retirement security. The life insurance industry pays out \$1.7 billion every day through payments from life insurance, annuities, long-term care insurance, disability income insurance, and other types of insurance products. More than 16% of Americans' long-term savings is in permanent life insurance and retirement annuities. In 2014 alone, life insurance companies paid annuity beneficiaries \$74 billion in annuity benefit payments.

The ACLI's members have a strong interest in the maintenance of a stable, competitive, vibrant, well-regulated market for annuities. This amicus brief supports the current comprehensive regulation of fixed indexed annuities by the Illinois Department of Insurance and focuses on the importance of annuities to the financial health and stability of retired Americans, and the potential disruptive consequences of holding that the annuities at issue in this case are securities under Illinois law.

ARGUMENT

Americans are living longer but saving less, and having adequate and stable income during retirement, which annuities can provide, is a critical concern. Americans purchased almost \$61 billion of fixed indexed annuities (“FIAs”) during 2016, demonstrating that consumers view FIAs as a very important tool for retirement savings and guaranteed income. The sale of FIAs has been comprehensively and well regulated in Illinois and other states by the state insurance departments for many years. It is important that the regulation of FIAs be stable and consistent, so as not to disrupt the use of this important product by consumers.

Appellant and its supporting *amici* fail to identify any deficiency in the regulation of FIAs by the Illinois Insurance Department, and FIAs have been treated as insurance products and not securities for many years under Illinois law, the laws and regulations of other states, and the federal securities laws. There is no need to add another burdensome layer of regulation for FIAs. While citing distinguishable federal court authorities for the proposition that FIAs are securities under federal law, most of which concern variable annuities instead of FIAs, Appellant and its supporting *amici* inexplicably fail to disclose contrary subsequent federal authorities that are expressly applicable to FIAs. In 2010 Congress codified the traditional understanding that FIAs are not securities under federal securities laws, and the chair of the U.S. Securities and Exchange Commission stated that the regulation of FIAs would be left to their traditional regulators, the state insurance departments.

I. The Emerging Retirement Financing Crisis

The median retirement account balance of all working-age households is a paltry \$3,000, and \$12,000 for near-retirement households, and four out of five working

households have retirement savings less than one times their annual income.¹ Based on 401(k)-type account and IRA balances alone, some 92 percent of working households do not meet conservative retirement savings targets for their age and income.² Even when counting their entire net worth, 65 percent still fall short. About one-half of U.S. workers participate in a workplace retirement plan, but more than 30 million full-time, private-sector workers ages 18 to 64 lack even access to an employer-based plan.³ 60% of all households have no savings in a defined contribution plan,⁴ and nearly 45% of all working-age households do not own any assets in a retirement account.⁵

While Baby Boomers generally have greater savings than younger workers, half of Baby Boomers have \$100,000 or less saved for retirement.⁶ Almost 60% plan on relying heavily on Social Security for retirement income, 30% have postponed their retirement, 30% have stopped contributing to retirement accounts, many have a significant level of debt, and many already have raided their retirement accounts for health care, housing, or other expenses, significantly reducing what they have for their

¹ Nari Rhee, *The Retirement Savings Crisis: Is It Worse Than We Think?* National Institute on Retirement Security, at 1 (June 2013), available at http://www.nirsonline.org/wp-content/uploads/2017/06/retirementsavingscrisis_final.pdf.

² *Id* at 14.

³ The Pew Charitable Trusts, *Who's In, Who's Out: a look at access to employer-based retirement plans and participation in the states* ("Pew") at 1 (January 2016), available at http://www.pewtrusts.org/~media/assets/2016/01/retirement_savings_report_jan16.pdf.

⁴ U.S. Gov't Accountability Office, GAO-16-408, *Retirement Security: Low Defined Contribution Savings May Pose Challenges* (May 2016) at 11, available at <http://www.gao.gov/assets/680/676942.pdf>.

⁵ Rhee, at 8-9.

⁶ Austin Smith, *Half of American baby boomers face a frightening retirement reality*, USA Today (Dec. 9, 2016), available at <https://www.usatoday.com/story/sponsor-story/motley-fool/2016/12/09/half-american-baby-boomers-face-frightening-retirement-reality/94813358/>.

retirement years.⁷ 65% believe that they could work until age 65 and not have sufficient retirement funds.⁸

There are two basic types of retirement plans prevalent in the United States: defined benefit plans; and defined contribution plans. Sometimes called traditional pension plans, defined benefit plans typically have been funded and professionally managed by employers, with the employers assuming the risk of inadequate funding and investment risks, providing relatively stable benefit payments throughout retirement.⁹

Defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans¹⁰ and do not necessarily provide stable retirement benefits. They are funded primarily by the employees, who make the investment decisions, take the investment risks, and eventually receive the balance of the plan accounts, plus or minus investment gains and losses. Certain types of retirement plans must offer the option to take benefits as a lifetime or survivor annuity.¹¹

⁷ Sean Williams, *Baby Boomers' Retirement Woes Summed Up in 5 Statistics: Financially speaking, baby boomers may be in quite a bit of trouble* (May 15, 2016), available at <https://www.fool.com/retirement/general/2016/05/15/baby-boomers-retirement-woes-summed-up-in-5-statis.aspx>.

⁸ Transamerica Center for Retirement Studies, *Perspectives on Retirement: Baby Boomers, Generation X, and Millennials (17th Annual Transamerica Retirement Survey of Workers)*, at 8 (August 2016), available at <https://www.transamericacenter.org/retirement-research/17th-annual-retirement-survey/perspectives-on-retirement-by-generation>.

⁹ *Types of Retirement Plans*, U.S. Dep't. Labor, available at <https://www.dol.gov/general/topic/retirement/typesofplans>; *Choosing a Retirement Plan: Defined Benefit Plan*, IRS, available at <https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-defined-benefit-plan>.

¹⁰ *Types of Retirement Plans*, U.S. Dep't. Labor, available at <https://www.dol.gov/general/topic/retirement/typesofplans>.

¹¹ 26 U.S.C. § 401(a)(11) (2014); U.S. Gov't Accountability Office, *supra* note 4, at 6.

Small businesses are much less likely to have any type of employer-sponsored retirement plan than large businesses.¹² Trying to help encourage saving for retirement, governments have adopted simplified plans for individuals and small businesses, including the federal Simplified Employee Pension (SEP) plan, the Simple IRA Plan, the myRA retirement account,¹³ and Illinois' recently adopted Secure Choice Savings Program.¹⁴

There has been a marked decline in defined benefit plans, with many plan sponsors freezing or expecting to freeze their plans.¹⁵ Many state-sponsored defined benefit plans are underfunded in the range of \$800 billion to \$4 trillion.¹⁶ Even sponsors of “healthy” defined benefit plans have been freezing or closing their plans for cost and liability reasons.¹⁷ The percentage of all workers participating solely in a defined benefit plan declined from 28% of the workforce in 1979 to only 2% in 2013, while at the same time the percentage of workers participating solely in a defined contribution plan rose

¹² Pew, *supra* note 3, at 9-11.

¹³ *Id.* at 1, 11.

¹⁴ See 820 ILCS 80/1 (Source: P.A. 98-1150).

¹⁵ Barbara A. Butrica, Howard M. Iams, Karen E. Smith & Eric J. Toder, *The Disappearing Defined Benefit Pension and its Potential Impact on the Retirement Income of Baby Boomers*, 69 Social Security Bulletin 3 at 1, 3 (2009), available at <https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html>.

¹⁶ Brian O’Connell, *State Pension Plans Worse Than Workers and Advisors Realize*, AdvisorNews, Aug. 11, 2017, <http://advisornews.com/innarticle/state-pension-plans-worse-workers-advisors-realize>.

¹⁷ Alicia H. Munnell, Francesca Golub-Sass, Mauricio Soto & Francis Vitagliano, *Why Are Healthy Employers Freezing Their Pensions?*, Center for Retirement Research at Boston College, No. 44 (March 2006), available at http://crr.bc.edu/wp-content/uploads/2006/03/ib_44_508c.pdf.

from 7% in 1979 to 34% in 2013.¹⁸ This trend “has had profound implications for the retirement income security of working households.”¹⁹

II. Annuities Are An Important Lifetime Income Product

Annuities can help retirees spread their savings over retirement. The American Academy of Actuaries grades annuities as the best “insured solution” for both “longevity guarantee,” i.e., guaranteeing that one will not outlive one’s assets, and “credit risk/market risk protection,”²⁰ yet many retirement plans do not provide any lifetime income options.²¹

A. Fixed and Variable Annuities

The features and characteristics of annuities, including FIAs, are described in a Buyer’s Guide to Equity-Indexed Annuities (“Buyer’s Guide”), a document prepared by the National Association of Insurance Commissioners, an association of the state insurance commissioners, and modified by and posted on the website of the Illinois Department of Insurance.²²

An annuity is a contract with an insurance company pursuant to which the insurance company makes a series of regular income payments to the contract owner or named beneficiary in a fixed amount at regular intervals in return for either a single premium payment or a series of premium payments. During the accumulation period of a

¹⁸ Employee Benefit Research Institute, *What Are the Trends in U.S. Retirement Plans?* available at <https://www.ebri.org/publications/benfaq/index.cfm?fa=retfaq14>.

¹⁹ Rhee, *supra* note 1, at 6.

²⁰ American Academy of Actuaries, *Retiree Lifetime Income: Product Comparisons*, Lifetime Income Initiative Issue Brief, October 2015, available at http://www.actuary.org/files/Product_Comparison_IB_102215.pdf.

²¹ U.S. Gov’t Accountability office, GAO-16-433, 401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants, (August 2016), at 12-39, available at <http://www.gao.gov/assets/680/678924.pdf>.

²² See *Life Insurance and Annuities Information*, Illinois Department of Insurance, available at http://insurance.illinois.gov/Life_Annuities/consumerLife.html.

fixed deferred annuity, the insurance company will credit the account with interest at rates set by the company or in a way spelled out in the annuity contract. The company guarantees that it will credit no less than a minimum interest rate stated in a fixed annuity contract over the entire time that the annuity remains in force. The insurer bears the investment risk associated with the declared interest/earnings rate, which is guaranteed for that upcoming year (or another stated period). The value of the account is contractually guaranteed never to fall, even in a sharply declining stock market, since the insurance company bears all of the investment risk.

When the annuity reaches the payout phase, the annuity owner selects the duration of the payments desired, usually a fixed number of years or for life, which, given the value of the annuity, helps to determine the amount of each payment that the annuity owner or named beneficiary receives. Those payment amounts are contractually guaranteed by the insurer.

A variable annuity has a separate account into which premium payments are placed. There is an accumulation period during which the account will be invested directly in stock, bond, or other investment options selected by the annuity owner from options made available by the insurance company. The value of the account varies every year based on the performance of the investment options chosen by the annuity owner. The value of the account may rise or fall based upon the investment experience. The amount of the income payments may be either fixed or variable, changing with the continuing change in the value of the account. Unlike a fixed annuity, with a variable annuity there is no guarantee of any minimum payments, or even that one will recoup the

premium payments paid over time through income payments, since the annuity owner typically bears all of the investment risk.

B. Fixed Indexed Annuities

FIAAs are a type of fixed annuity as to which the amount of interest credited to the annuity account may be either a fixed rate or may be determined with reference to a stock or other market index, such as the Standard and Poor's 500 Composite Stock Price Index. The amount credited to the account, if any, is determined based upon a formula in the annuity contract and positive changes in the index to which the annuity is linked. The owner of an FIA owns an insurance contract, not a share of an index fund or underlying investments. The insurance company decides how the premiums are invested and assumes all of the investment risk. The crediting rate is guaranteed to never be less than zero, even if the market declines and the index change is negative for the crediting period. As with other fixed annuities, principal and prior credited interest are always protected from market losses.

One significant difference between FIAAs and variable annuities is the extent to which the annuity account value is exposed to loss due to investment risk. Generally, the gains credited from an index in an FIA in a given period are locked in at the end of the period, meaning that if the market and the index decline in value during the next time period, the FIA account will not decline in value. By contrast, since variable annuities are directly invested in market stocks, bonds or funds, if the market declines the value of a variable annuity's account also declines in value. FIAAs therefore provide one an ability to participate in a portion of market gains with a guarantee that none of the current value will be lost in a declining market.

C. Consumers Have Voted With Their Dollars In Purchasing FIAs

FIAs are an increasingly important part of how Americans finance their retirement. In 2016 Americans purchased approximately \$60.9 billion of FIAs, and \$108 billion of all types of fixed annuities. 98% of the purchasers of such annuities were 45 years old or older, and over half of the purchasers were 65 or older.²³ Illinois residents purchased over \$3.99 billion of fixed annuities during 2016.²⁴ The perceived importance by consumers of FIAs is illustrated by the steadily increasing sales of this particular type of annuity across the United States. Sales of FIAs have steadily increased, as have FIA sales as a percentage of total annuity sales. For example, in 2016, total annuity sales totaled \$211.4 billion. Of that total, \$109.3 billion (52%) were fixed annuities, and \$102.1 billion (48%) were variable annuities. 55% of the fixed annuity sales, or \$60.9 billion, were FIAs. Sales of FIAs have grown substantially over the years.

Year	Total Fixed Indexed Annuity Premium	Fixed Indexed Annuities as a Percentage of Total Annuity Premiums
2016	\$60.9 billion	27.4%
2015	\$54.5 billion	23.1%
2014	\$48.2 billion	20.4%
2013	\$39.3 billion	17.1%

FIAs have features that make them attractive for many retirees: the option to receive lifetime income of a pre-determined guaranteed amount; the ability to lock in

²³ National Association for Fixed Annuities, *2016 State-By-State Fixed Annuity Sales Study* at summary page, available at <http://www.nafa.com/online/library/2016-NAFA-Annual-Sales-Study.pdf>. The breakdown of FIA sales by state is not readily available.

²⁴ *Id.* at summary page and 1.

prior stock market gains; protection against losses due to any stock market declines, at a time when many investors become increasingly adverse to stock market volatility and risks; and participation in a portion of any stock market gains.

III. FIAs Have For Many Years Been Comprehensively Regulated As Insurance Products, Not Securities, Under Illinois Law

The content, marketing, sale, and administration of FIAs have been comprehensively regulated for many years as annuities by the Illinois Department of Insurance, and other well-established state laws, for the benefit of both consumers and the insurance industry, *inter alia*:

- FIA contracts must be filed with and approved by the Director of the Department of Insurance, based upon a detailed seven page checklist of specific provisions that the Department of Insurance requires be included in such annuities;²⁵
- All annuity contracts, including FIA contracts, must contain certain provisions determined by the Illinois General Assembly to be important and necessary;²⁶
- The advertising and sale of annuities, including FIAs, are subject to regulations promulgated by the Department of Insurance;²⁷
- The suitability of recommendations for purchasers of annuities, including FIAs, are subject to regulations promulgated by the Department of Insurance;²⁸

²⁵ See the Illinois Insurance Department's "Individual Equity Indexed Annuity Review Requirements Checklist" available at

https://insurance.illinois.gov/LAH_HMO_IS3_Checklists/LAH-Checklist.html.

²⁶ See 215 ILCS 5/226 (Source: P.A. 82-594); 215 ILCS 5/229.4a (Source: P.A. 93-873 effective August 6, 2004 and 94-1076, effective December 29, 2006).

²⁷ See 50 Ill. Adm. Code 909.85 (2018) (Source: Added at 31 Ill. Reg. 12732, effective January 1, 2008).

²⁸ See 50 Ill. Adm. Code 3120.50 (2018) (Source: Amended at 35 Ill. Reg. 16087, effective September 26, 2011).

- The website of the Department of Insurance makes available to consumers a buyer's guide to FIAs, which was prepared by the National Association of Insurance Commissioners;²⁹
- Persons who solicit and sell annuities, including FIAs, must be licensed by the Department of Insurance,³⁰ comply with pre-licensing and continuing education requirements,³¹ and are subject to examination, investigation, and disciplinary proceedings by the Department of Insurance;³²
- The Illinois Consumer Fraud and Deceptive Business Practices Act provides a private cause of action for certain deceptive sales practices;³³
- The compliance of insurance companies and selling agents with the requirements for FIAs is subject to examinations and other investigations conducted by the Department of Insurance;³⁴
- The financial conduct and stability of insurance companies that issue FIAs is regulated and supervised by the Department of Insurance to ensure that they will have the financial strength to perform the promises made to the purchasers of FIAs;³⁵ and
- The Illinois Life and Health Guaranty Association provides limited financial protection for the owners of annuities, including FIAs, issued by insurance companies which become insolvent and are ordered to be liquidated by the Illinois courts.³⁶

²⁹ See *Life Insurance and Annuities Information*, Illinois Department of Insurance, available at http://insurance.illinois.gov/Life_Annuities/consumerLife.html.

³⁰ See 215 ILCS 5/500-15 (Source: P.A. 92-386, effective January 1, 2002).

³¹ See 50 Ill. Adm. Code 3119.10 (2018) (Source: Amended at 34 Ill. Reg. 5856, effective April 7, 2010).

³² See, e.g., 215 ILCS 5/132 *et seq.* (Source: P.A. 87-108); 215 ILCS 5/500-110 (Source: P.A. 92-386, effective January 1, 2002 and 93-32, effective July 1, 2003); 215 ILCS 5/500-70 (Source: P.A. 96-736, effective July 1, 2010); 215 ILCS 5/500-140 (Source: P.A. 92-386, effective January 1, 2002).

³³ See 815 ILCS 505/2 (Source: P.A. 87-108); 815 ILCS 505/5 (Source: P.A. 84-748).

³⁴ See 215 ILCS 5/401-407.2; 215 ILCS 5/132 *et seq.* (Source: P.A. 87-108)

³⁵ See, e.g., 215 ILCS 5/35A-1 *et seq.* (Source: P.A. 88-364) (regarding risk-based capital); 215 ILCS 5/126.9 *et seq.* (Source P.A. 90-418, effective August 15, 1997) (regarding investments of life insurance companies); 215 ILCS 5/129 *et seq.* (Source: P.A. 98-910, effective July 1, 2015) (regarding risk management and own risk and solvency assessment).

³⁶ See *Policyholder Protection*, Illinois Life and Health Insurance Guaranty Association, available at <http://www.ilhiga.org/Custom/Index/312>.

Some of these protections have been in effect for 30 years or more, and some of these protections are not included in Illinois or federal securities laws and regulations.

Under Illinois law, indexed annuities *are*, and have consistently been treated as, insurance products and *not* securities. The relevant statutes, regulations, and statements of the Department of Insurance and even of the Securities Department all support this conclusion.

A. Annuities Are Insurance Products Under Illinois Law

Annuities are regulated by the Insurance Code, *see* 215 ILCS 5/1 *et seq.*, and by the Department of Insurance. 20 ILCS 1405/1405-5. Under the Insurance Code, “[n]o company shall be authorized to transact any kind or kinds of business other than those enumerated in its respective class, or classes, except as otherwise specifically provided in this [Insurance] Code” 215 ILCS 5/5(2). Those permitted “[c]lasses of insurance” include, *inter alia*, life insurance, which is defined to include “annuity contracts” 215 ILCS 5/4(a).

Annuities are subject to a complex and robust regulatory scheme. “A person may not sell, solicit, or negotiate insurance,” which includes annuities, without being licensed to do so by the Department of Insurance. 215 ILCS 5/500-15(a). All life insurance policies, including annuity contracts, must be registered with the Department of Insurance and approved by the Director. 215 ILCS 5/143. The Insurance Code dictates standard provisions that must be contained in annuity contracts. *See, e.g.*, 215 ILCS 5/226. This specifically includes non-forfeiture provisions that must appear in contracts for deferred annuities, of which FIAs are one variety. 215 ILCS 5/229.4a. The fact that such regulation is meaningful and not superficial is well illustrated by the detailed seven

page checklist published by the Department of Insurance and used by that Department in the evaluation of annuity contract forms for approval for sale in Illinois.³⁷

Regulations promulgated by the Department of Insurance complete the regulatory scheme, providing standards for the advertisement and marketing of annuities, 50 Ill. Adm. Code 909.85 (2018), and setting forth the duties of insurers and insurance producers with respect to the suitability of particular annuities for particular purchasers. 50 Ill. Adm. Code 3120.50 (2018). The Director of Insurance is given broad powers to investigate violations of these statutes and regulations and order appropriate remedial action. *See* 215 ILCS 5/401-407.2.

FIA's, as a type of annuity, are insurance products under Illinois law, a fact that has been repeatedly recognized by the Department of Insurance, the Securities Department, and the courts. The Department of Insurance has issued a bulletin that expressly states that indexed annuities are insurance contracts regulated by the Insurance Department:

This bulletin clarifies that annuity contracts pursuant to which benefits are dependent upon the performance of a securities or other index ***have been, are, and will continue to be***, regulated by the Illinois Division of Insurance as insurance contracts.

Annuity contracts are classified as insurance under Section 5/4, Class 1.(a) of the Illinois Insurance Code [215 ILCS 5/4, Class 1.(a)], and that section contains ***no exclusion for indexed annuities***.

Bulletin 2009-5, 2009 WL 1110560 (IL INS BUL) (2009) (emphasis added).

The Buyer's Guide for Equity Indexed Annuities on the Department of Insurance's web site states that such annuities are insurance contracts. The Department

³⁷ *See* the Illinois Insurance Department's "Individual Equity Indexed Annuity Review Requirements Checklist" available at https://insurance.illinois.gov/LAH_HMO_IS3_Checklists/LAH-Checklist.html.

of Insurance has enacted regulations requiring that insurance producers who sell annuities must be trained on how “indexed annuity contract provisions affect consumers.” 50 Ill. Adm. Code 3120.60(c)(4)(C) (2018).

Appellant and its supporting *amici* do not deny, nor could they, that courts, statutes, regulations, the Insurance Department, and the Securities Department have repeatedly recognized that FIAs are insurance products. In one of its own rulings, the Securities Department recognized that the indexed annuities at issue “had been approved by the Illinois Department of Insurance” *Senior Financial Strategies, Inc.*, File No. 0800064, 2011 WL 3295987, ¶ 20 (Ill. Sec. Dept. May 24, 2011). In another, it described a respondent as being “in the business of selling *insurance products including . . . equity indexed annuities*” *John F. Kavalec*, File No. 0600386, 2007 WL 4792541, ¶ 15 (Ill. Sec. Dept. Dec. 6, 2007) (emphasis added). In yet another, it noted that “Respondent . . . advised [clients] to liquidate funds from a security . . . *in order to purchase an index annuity*,” conduct it described as giving “investment advice to sell securities *in order to purchase insurance products*” *Russell Armstrong, And Gov’t Benefit Advisors, LLC and Its Managers, Officers, Affiliates, Subsidiaries, Representatives, Successors, and Assigns*, File No. 1200262, 2015 WL 1265737, at *1-2 (Ill. Sec. Dept. Feb. 3, 2015) (emphasis added).

The Securities Department has continued to treat indexed annuities as insurance products during the appeal of this case. In an order issued in *Armstrong* eight months after the Appellate Court handed down the decision currently being appealed here, the Securities Department again discussed “*insurance products*, such as *index annuities*.” 2017 WL 2496381, at *3 (Ill. Sec. Dept. Apr. 10, 2017) (emphasis added).

Furthermore, Illinois courts have consistently recognized that annuities, including indexed annuities, are policies of insurance. See *Babiarz v. Stearns*, 2016 IL App (1st) 150988, ¶ 36; *In re Nitz*, 317 Ill. App. 3d 119, 128 (2d Dist. 2000) (“An annuity policy is an insurance policy”) (citations and quotation marks omitted); *Henderson v. Roadway Exp.*, 308 Ill. App. 3d 546, 552 (4th Dist. 1999) (same). Thus, FIAs have consistently been recognized as insurance products in Illinois by statutes, regulations, the Insurance Department, the Securities Department, and the courts.

B. FIAs Are Not Securities Under Illinois Law

While it has never seriously been doubted that FIAs are insurance products, it is equally clear from the language of the Securities Law that FIAs are *not* securities under Illinois law. The Securities Law’s definition of a security does not mention any sort of annuity. See 815 ILCS 5/2.1. This definition, however, does include “face-amount certificate” contracts. *Id.* In turn, “face amount certificate contract” is defined to include “any form of annuity contract (*other than an annuity contract issued by a life insurance company* authorized to transact business in this State)” 815 ILCS 5/2.14 (emphasis supplied). While the Securities Law includes annuities in the definition of a “face amount certificate contract” as a type of security, it expressly and specifically excludes from the definition of a security any annuity “issued by a life insurance company authorized to transact business in this State,” i.e., an insurance company that is subject to the regulation of the Insurance Department. It is undisputed that the FIAs in Mr. Van Dyke’s case were issued by a life insurance company authorized to conduct business in Illinois, and it should be undisputed that they are not securities given the definition of a security in the Securities Law.

Neither Appellant nor its supporting *amici* cites a single case from any jurisdiction finding that FIAs are securities, and the Securities Law specifically exempts all annuities issued by Illinois admitted insurers from its coverage. 815 ILCS 5/2.14. Because the statutory language makes it so clear that FIAs are insurance products and not securities, these basic facts have rarely been challenged in court, and every Illinois appellate court to have considered the question, including in this matter, has found that FIAs are not securities. *Van Dyke v. White*, 2016 IL App (4th) 141109, ¶ 24; *Babiarz*, 2016 IL App (1st) 150988, ¶ 36 (indexed annuities “are insurance products exempt from the Illinois Securities Law of 1953”); *Rasgaitis v. Waterstone Fin. Grp., Inc.*, 2013 IL App (2d) 111112, ¶ 37 (limitations period found in securities law did not apply to complaint regarding sale of FIAs, as these FIAs were not securities).

In deciding that the FIAs at issue in this matter are securities, the Securities Department did not engage in and articulate a legal or factual analysis at any level of depth, but instead simply quoted the definition of “security” found in 815 ILCS 5/2.1 and stated in a conclusory manner that “[t]he Indexed Annuities that are the subject of this Matter are securities subject to the Act.” *Van Dyke*, 2016 IL App (4th) 141109, ¶ 27. Given the lack of an articulated analysis in this decision, it is not persuasive and is owed no deference.

Two additional principles make it clear that the Court should not defer to the Securities Department’s determination that the FIAs in this matter are securities. First, such deference only applies if the law is ambiguous. In a very recent case this Court held that “if the meaning of [a statute] is plain, there is no need for statutory construction, and thus, no deference to the agency is due.” *Bd. of Educ. of Springfield Sch. Dist. No. 186 v.*

Attorney Gen. of Illinois, 2017 IL 120343, ¶ 23. This principle clearly governs the issue before this Court. The Securities Law is plain that an annuity issued by an insurance company is not a security, and there is no ambiguity to resolve. *See* 815 ILCS 5/2.14, 2.18.

Second, deference is shown only to state agencies “charged with the administration and enforcement of” particular statutes, largely because of such agencies’ “experience and expertise” with such statutes. *Abrahamson v. Illinois Dep’t of Prof’l Regulation*, 153 Ill. 2d 76, 98 (1992). The Illinois General Assembly determines which agency(ies) are charged with administration and enforcement responsibilities for different activities or products, and the General Assembly has spoken very clearly with respect to annuities, without specifically carving out FIAs for different or special treatment. The Securities Department not only has not been granted the authority to approve or otherwise regulate annuities issued by insurers, it has been expressly excluded from such regulation based upon the statutory definition of “security,” and it does not possess experience or expertise in this area. Instead, that authority, experience, and expertise rests with the Department of Insurance. Thus, the Securities Department’s determination in this matter that the FIAs at issue are securities is owed no deference.

Should this Court hold that FIAs are securities under Illinois law it would espouse a position that is contrary to the laws of most states, which expressly exclude all annuities generally from the definition of the term “security.” The vast majority of states have adopted variants of the Uniform Securities Act. Section 401(m) of the Uniform Securities Act (1956), as amended, contains an express exclusion for all annuities in the definition of security: “‘Security’ does not include any insurance or endowment policy or

annuity contract under which an insurance company promises to pay [a fixed sum of] money either in a lump sum or periodically for life or for some other specified period.”³⁸ The 2002 version of the Uniform Securities Act contains an almost identical provision.³⁹ While some states have modified the definition of security to expressly either include or exclude variable annuities from the definition of securities, all fixed annuities, including FIAs, typically are included in the exclusion from what is a security.⁴⁰

Appellant and its supporting *amici* have not cited any court decisions from any other state holding FIAs to be securities. Imposing a substantially different regulatory structure in Illinois for FIAs would be disruptive to the market and not in the interests of consumers, when such products have been well regulated for decades as insurance products by the Illinois Insurance Department.

C. FIAs Are Not Securities Under Federal Securities Law

While federal securities law is not directly applicable to this case, “Illinois courts have consistently looked to the corresponding provisions of the federal Act in interpreting the Illinois Securities Law.” *JJR, LLC v. Turner*, 2016 IL App (1st) 143051, ¶ 30. As in Illinois, FIAs historically have not been treated as securities under federal law, and the current status of FIAs under federal securities law is abundantly clear and unambiguous –

³⁸ Available at <http://www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritiesAct1956withcomments.pdf>.

³⁹ See www.uniformlaws.org/shared/docs/securities/securities_final_05.pdf.

⁴⁰ See *e.g.*, Ark. Code Ann. § 23-42-102(17)(B) (2018) (expressly including variable annuities in the exclusion from the definition of security); Cal. Corp. Code § 25019 (2018); Iowa Code Ann. § 502.102(28)(b) (2018); Ky. Rev. Stat. Ann. § 292.310(19) (2018) (expressly including variable annuities in the exclusion from the definition of security); Pa. Cons. Stat. Ann. Tit. 70, § 1-102(t)(iii) (2018) (expressly including annuities such as variable annuities with segregated funds in the exclusion from the definition of security).

FIAs are not securities. In part, this has been the result of an exemption from the 1933 Act for the following:

Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.

15 U.S.C. § 77c(a)(8) (2012). This exemption was bolstered when the U.S. Securities and Exchange Commission issued Rule 151 to specifically provide a safe harbor for certain annuities under section 77c(a)(8). *See* 17 C.F.R. § 230.151 (2018).

In 2009, concerned that Rule 151 may not provide adequate guidance as to whether fixed indexed annuities were exempt from the 1933 Act, the SEC gave notice of the adoption of a new rule, Rule 151A, which was intended to provide “greater clarity with regard to the status of indexed annuities under the federal securities laws” *Indexed Annuities and Certain Other Insurance Contracts*, 74 Fed. Reg. 3,138-01 (Jan. 16, 2009). “We have observed the development of indexed annuities for some time and have become persuaded that guidance is needed with respect to their status under the federal securities laws.” *Id.* at 3140. However, the SEC withdrew Rule 151A and abandoned it after it was vacated by the United States Court of Appeals for the D.C. Circuit. *Indexed Annuities*, 75 Fed. Reg. 64642-01 (Oct. 20, 2010) (notice of withdrawal). *See American Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166 (D.C. Cir. 2010).

In 2010, the enactment of the Dodd-Frank Act removed any doubt with respect to this issue, by specifically providing that all FIAs issued by insurers and subject to the jurisdiction of state insurance regulators that satisfy stated requirements are exempt from the 1933 Act under 15 U.S.C. § 77c(a)(8). Pub. L. No. 111-203, Title IX, § 989J. The

requirements include: that the annuities comply with the state nonforfeiture laws and the Model annuity suitability regulations, both of which have been part of the laws and regulations of Illinois for the regulation of all annuities for many years;⁴¹ and that the value of the annuity will not vary based upon the value of a separate account, a distinguishing feature of a variable annuity which the record does not show to be present for the annuities at issue. Shortly thereafter, SEC Chair Mary Schapiro acknowledged that the SEC was foreclosed from regulating FIAs and that state insurance regulators, not securities regulators, “clearly have a responsibility” to regulate FIAs.⁴² Were Illinois to begin to treat FIAs as securities, it would be adopting a position that is contrary to that of other states and contrary to clearly established federal law.

D. FIAs Are Not Investment Contracts Under Illinois or Federal Law

In its *amicus* brief, the Public Investors Arbitration Bar Association begins a section with the heading “Other Courts Have Concluded EIAs are Investment Contracts,” but it cites no cases where this actually occurred and cites one case in which the court found that FIAs were *not* securities.⁴³ Appellant asks the court to ignore the exemption from the Illinois Securities Law (and the 1933 Act) on the theory that although FIAs cannot be treated as securities because they are face-amount certificates, they should be

⁴¹ See 215 ILCS 5/229.4a (requiring non-forfeiture provisions in all annuity contracts) and the suitability requirements found in 50 Ill. Adm. Code 3120.50 (2018) (Source: Amended at 35 Ill. Reg. 16087, effective September 26, 2011).

⁴² C-SPAN Video Library, *SEC Oversight: Hrg Before the Subcomm. on Capital Mkt's, Ins. and Gov't Sponsored Enterprises of the H. Comm. on Fin. Serv's* (July 20, 2010) at 1:32-1:34, available at <http://www.c-span.org/video/?294638-1/securities-exchange-commission-oversight&start=5328>.

⁴³ See *Amicus Curiae* Brief of Public Investors Arbitration Bar Ass'n, at 10-11 (filed Nov. 2, 2017); *Malone v. Addison Ins. Mktg., Inc.*, 225 F. Supp. 2d 743, 754 (W.D. Ky. 2002) (holding that FIAs were “excluded from the definition of ‘security’” and “are protected by Rule 151 Safe Harbor”).

treated as securities because they are investment contracts. Brief of Defendant-Appellant Jesse White (“Appellant’s Br.”) at 26-29. This attempt to get around the clear intent of the Illinois General Assembly to exempt all annuities regulated by the state insurance department, codified in 815 ILCS 5/2.14, should not be allowed. Even if the Court were to ignore that exemption, however, FIAs would still not be investment contracts and thus would not be securities under the Securities Law.

1. All of the cases cited to support the argument that FIAs are investment contracts are factually inapposite.

As described in the Buyer’s Guide, one of the fundamental distinctions between a fixed annuity and a variable annuity is who bears the risk of investment losses. The owner of a fixed annuity does not have a risk of loss if the products in which the insurance company invests the premium payments declines in value; the insurance company bears that risk of loss, and the annuity owner is contractually guaranteed not to lose money. On the other hand, the owner of a variable annuity does bear the risk of loss if the products in which the premium payments are invested decline in value. Appellant and its supporting *amici* completely disregard this basic difference between fixed and variable annuities, which is a foundational factor in determining whether a particular “investment” is an investment contract and a security.

The main Illinois case cited by Appellant is *Daleiden v. Wiggins Oil Co.*, 118 Ill. 2d 528 (1987), in which this Court found that payment for a leasehold interest in an oil and gas venture, coupled with paying drilling expenses to explore for oil and gas, constituted a security, with the success or the failure of the venture based solely on the efforts of others. *Id.* at 531, 540. Because the Securities Law explicitly includes “fractional undivided interest in oil, gas, or other mineral lease, right, or royalty” in its

definition of “security,” *id.* at 536, the question before the Court was whether money investors paid for the costs of drilling, operating, and plugging oil and gas wells should be treated differently than the cost of acquiring an interest in these wells. *Id.* at 532. The Court ultimately decided that it should not be, as the investors had to pay these drilling, operating, and plugging costs in order to realize any return on their investment. *Id.* at 539. Notably, the plaintiffs were seeking rescission of their investment, the only relief specifically provided for by the Securities Law. *Id.* at 529, 532; *Lucas v. Downtown Greenville Investors Ltd. P’ship*, 284 Ill. App. 3d 37, 52 (2d Dist. 1996). This is a logical form of relief for a risky venture such as oil and gas drilling where investors risk the loss of their entire investment. But this sort of risk simply does not exist with respect to FIAs, as their standard terms, as described in the Illinois Buyer’s Guide, guarantee policyholders not only that their policy values will never drop below the initial premiums paid, but also that they cannot lose gains accrued in prior years. Thus, *Daleiden* does not support Appellant’s position.

The only other Illinois case cited by Appellant finding that an investment was an “investment contract” and thus a security is *Integrated Research Servs., Inc. v. Illinois Sec’y of State, Sec. Dept.*, 328 Ill. App. 3d 67 (1st Dist. 2002), in which the court found this to be true of an investment in a foreign currency trading account over which the investment firm had complete discretion in making trades. This investment, in which investors could lose a substantial portion of their principal based on the choices of the firm that controlled the account and movements in currency markets, is nothing like FIAs in which the entire principal and any periodic gains are guaranteed, and thus *Integrated Research Services* does not support a conclusion that the FIAs at issue here are securities.

Moving to federal authorities, Appellant cites *SEC v. Variable Annuity Life Insurance Company of America*, 359 U.S. 65 (1959), in which the U.S. Supreme Court determined that a variable annuity was a security. As explained *supra* Part II.A and II.B, variable annuities are significantly different than FIAs, and these differences are illustrated by many of the facts emphasized by the Court in *Variable Annuity*. First, the Court noted that while the investment of funds underlying traditional annuities are conservative, premiums for the variable annuity in question were “invested to a greater degree in common stocks and other equities” *Id.* at 69. Second, the Court noted that “benefit payments vary with the success of the investment policy.” *Id.* at 69. Third, and most significantly, the Court stated that the variable annuity “place[d] all the investment risks on the annuitant, none on the company,” *id.* at 71, because the holder of such an annuity was given “an interest in a portfolio of common stocks or other equities—an interest that has a ceiling but no floor.” *Id.* at 72.

None of these facts that were so important to the Courts in finding that the variable annuity at issue was a security apply to FIAs. Illinois law regulates how insurance companies, including those that issue annuities, may invest policy premiums to ensure that such companies will be able to meet their obligations to policyholders, and the law does not distinguish between sellers of traditional fixed annuities and FIAs. *See* 215 ILCS 5/126.9 *et seq.* (investment practices of life insurance companies).

Similarly, as described in the Illinois Buyer’s Guide, the owner of an FIA does not own “an interest in a portfolio of common stocks or other equities,” but instead owns a contractual right to be paid according to a formula provided by the FIA contract. The “floor” that the Court found did not exist for the variable annuity *does* exist for FIAs in

the guarantee that the value of an FIA will not go below the amount paid in premium, regardless of how badly the chosen index or the insurer's investments perform, as described in the Illinois Buyer's Guide. The investment risk that the Court found was on the investors in variable annuities is thus entirely on the insurer issuing FIAs. The policyholder takes no such risk; no matter how much the index or the investments made by the insurer with the policy premiums decline in value, the policyholder is guaranteed not to lose any money. In fact, the insurer takes the risk that its own investment returns will be insufficient to pay the interest required by the fixed annuity contracts. *See Malone v. Addison Ins. Mktg., Inc.*, 225 F. Supp. 2d 743, 751 (W.D. Ky. 2002) (finding that issuer of FIAs "bore as much or more of the risk than" the policyholder, as if it "was unable to surpass this indexed rate in its own investment of the [policyholder's] premium, then it was the loser").

Similarly, in *Securities & Exchange Commission v. United Benefits Life Ins. Co.*, 387 U.S. 202 (1967), the Court considered another variable annuity and found it to be a security, and it again relied upon numerous attributes of that variable annuity that simply are not present in FIAs. The Court noted that the premium for the variable annuity was placed in an account that the defendant "maintain[ed] separately from its other funds" and invested directly, including in common stocks. *Id.* at 205. The Court further relied on the fact that "the insurer promise[d] to serve as an investment agency and allow the policyholder to share in its investment experience," *id.* at 208, and that the variable annuity and products like it were "pitched to the same consumer interest in growth through *professionally managed investment*" as was provided by mutual funds. *Id.* at 211 (emphasis supplied). The Court itself distinguished the variable annuity before it

from traditional fixed annuities, which do not present the same risk of loss to the annuity owner, and as to which “it is essential that the premiums both cover expenses and produce a fund sufficient to support the promised benefits,” a fund in which “[t]he policyholder has no direct interest” *Id.* at 208.

Once again, none of these facts—facts upon which the Court relied in finding that the variable annuity was a security—apply to FIAs. FIA premiums are not placed in separate accounts or invested on behalf of the policyholder, FIA policyholders do not “share in [the] investment experience” of the issuer, and FIAs do not involve a “professionally managed investment,” as the insurer does not invest anything on behalf of the policyholder. Further, as with the traditional annuities that the Court found *did not* need the special protections applied to securities, the holder of an FIA “has no direct interest in the fund” *Id.* at 208. This is consistent with the Illinois Buyer’s Guide, that states that while the owners of variable annuities own stocks, bonds, and other investments, the owners of fixed annuities do not, instead owning an insurance contract.

Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127 (7th Cir. 1986) is also inapposite. The court initially found that the product involved was not a security, *id.* at 1133, but reversed itself on rehearing based solely on the discovery of one new fact: the insurer had complete, “unfettered discretion” to determine whether to pay certain “excess interest” offered under the contract on past contributions. *Id.* at 1141. This has no application to FIAs, as insurance companies issuing FIAs have no such discretion in determining the amounts credited to policy values; these credits are determined by the application of contractually agreed upon formulas to indexes over which the insurers have no control, as described in the Illinois Buyer’s Guide.

The only case Appellant cites that actually involves FIAs is *American Equity*, in which the court vacated the SEC's proposed Rule 151A treating FIAs as securities under federal securities law. *American Equity*, 613 F.3d at 179. While the court, applying the strong deference shown to determinations of federal agencies under *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), found that some of the SEC's conclusions regarding FIAs were "reasonable," it vacated the rule because the SEC's "consideration of the effect of Rule 151A on efficiency, competition, and capital formation was arbitrary and capricious." *American Equity*, 613 F.3d at 173, 175, 177. As explained above, the SEC then withdrew Rule 151A and abandoned any further efforts to regulate FIAs.

2. The Dodd-Frank Act conclusively establishes that the FIAs at issue here are not securities under federal law even if they are investment contracts.

As discussed *supra* at 19, the enactment of the Dodd-Frank Act specifically provides that all FIAs issued by insurers and subject to the jurisdiction of state insurance regulators that satisfy stated requirements are exempt from the 1933 Act under 15 U.S.C. § 77c(a)(8). Pub. L. No. 111-203, Title IX, § 989J. It is nonsensical to contend that annuities that are exempt from the 1933 Act nevertheless are securities because they are investment contracts. Appellant's argument, based upon authorities considering distinguishable variable annuity products, which were decided prior the enactment of the Dodd-Frank Act, simply cannot establish a "back door" that effectively overrules the later enacted Dodd-Frank Act. The FIAs here are not securities under the 1933 Act.

IV. Treating Fixed Indexed Annuities As Securities Would Unnecessarily Upset The Well-Established Regulatory Structure And The Consumer Market For Retirement Annuities For No Discernible Benefit

Given the often volatile investment markets it is critically important for those in or near retirement to have the option of a relatively safe place for a portion of their hard earned investments, insulated from the sometimes dramatic market swings and accompanying value changes that can cause deep anxiety and damage the financial security of one's retirement. The billions of dollars of sales of FIAs demonstrate that they are an increasingly important segment of the retirement financing market. It is important that the market for FIAs remain strong, stable, and soundly regulated. Appellant has not identified any significant deficiency or gap in the current regulation of FIAs as insurance products in the State of Illinois. If this Court were to accept the Securities Department's claim that FIAs are also securities, an entirely new layer of regulation and oversight would necessarily be added to FIAs and the professionals who sell or provide advice regarding these products, disrupting and adding unnecessary cost to the well-established and well-regulated market for FIAs for no discernable benefit.

First, individuals who currently sell FIAs and the firms for which they work would be prohibited from selling FIAs unless they obtained new, additional licenses. *See* 815 ILCS 5/8(A) (describing registration requirements for securities dealers, salespersons, investment advisers, and investment adviser representatives). Since nothing in the State's position suggests that FIAs are not or should not continue to be regulated as insurance products or that those who sell them should not continue to be regulated as insurance producers, sellers of FIAs would have to comply with the licensing, practices, and other requirements of both the Insurance and the Securities Departments. Similar to the requirements for licensing by the Insurance Department, licensing by the Securities

Department requires passing a set of examinations, paying fees, and renewing registration annually, 14 Ill. Adm. Code 130.832, and, for securities dealers, brings with it certain record keeping requirements. 815 ILCS 5/8(I).

Second, those who sell FIAs would be subject to an additional set of rules as well as the prospect of administrative, civil, or even criminal actions for violations of these rules, requiring substantial efforts to understand and comply with such requirements. *See* 815 ILCS 5/12-14. They would also have a different, and potentially conflicting, set of defenses, such as limitations periods, that they could use when accused of such violations. *Compare, e.g.,* 735 ILCS 5/13-214.4 (two-year limitations period for all causes of action against an insurance producer concerning a policy of insurance) *with* 815 ILCS 5/13 (three-year limitation period for violations of Securities Law).

Finally, the regulation of FIAs by two different departments raises the prospect that some of the requirements imposed by the Insurance and Securities Departments may be inconsistent. Uncertainty or inconsistency in the regulation of FIAs by the Insurance and Securities Departments would be deleterious to consumers, insurance companies, and those who sell FIAs. Additional and potentially inconsistent regulation is likely to increase the cost of FIAs for insurance companies, those who sell FIAs, and consumers, thus making FIAs, a retirement income product of substantial and increasing popularity with consumers, less accessible. Neither Appellant nor its supporting *amici* has articulated either any need for this change of regulation, or any benefits that might accrue from such a change in regulation.

FIAs and the people who sell them are already subject to complex and robust regulation and oversight by the Illinois Department of Insurance. *See supra* Part III.A.

That Department has significant experience and expertise, gained over many decades, regulating annuities, including FIAs, and overseeing the entities and individuals who issue and sell them. At best, a holding that FIAs are securities under Illinois law will lead to the imposition of a redundant and unnecessarily expensive and complicated securities regulatory regime in addition to the existing insurance regulatory regime for which the Illinois General Assembly and the Department of Insurance have already provided, with no discernable benefit to consumers or the insurance industry. The extra compliance costs that necessarily will come from this will inevitably make FIAs less accessible to Illinois consumers who, as explained above, need more rather than fewer lifetime income options as they plan for retirement. *See supra* Part I.

CONCLUSION

For all of the foregoing reasons, ACLI respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages.

/s/ Jason R. Brost
Jason R. Brost

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 24, 2018, I electronically filed and served upon the Clerk of the Illinois Supreme Court the foregoing ***Amicus Curiae* Brief of American Council of Life Insurers in Support of Plaintiff-Appellee and in Support of Affirmance of the Decision Below**, and on the same day emailed a pdf of the same to the following counsel of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jason R. Brost
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