EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID DAGGETT, individually, and as a representative of a Class of Participants and Beneficiaries of the Waters Employee Investment Plan, Plaintiff, v. WATERS CORPORATION, WATERS TECHNOLOGIES CORPORATION, BOARD OF DIRECTORS OF WATERS TECHNOLOGIES CORPORATION, and EMPLOYEE BENEFITS ADMINISTRATION COMMITTEE OF WATERS TECHNOLOGIES CORPORATION, Defendants.	Civil Action No. 1:23-cv-11527-JGD

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The Chamber's members include many employers that offer employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and companies that provide services to such plans. Given the importance of the laws governing fiduciary conduct to its members, the Chamber regularly participates as *amicus curiae* in ERISA cases at all levels of the federal court system, including cases addressing the standard for pleading fiduciary breach claims based on circumstantial allegations of imprudence. The Chamber submits this brief to provide additional context regarding the wide range of investment options and service arrangements available to plan fiduciaries, the variety of plan-specific factors that reasonably may influence fiduciaries' choices among those options, and the broader fiduciary litigation landscape.

INTRODUCTION

ERISA provides a safeguard for Americans' retirement savings while encouraging employers to provide retirement benefits to their employees. As an essential part of this regime,

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ERISA imposes on fiduciaries a context-driven duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This standard recognizes the role of discretion in fiduciary decision-making and the "range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).

Despite the flexibility built into the statutory prudence standard, the last several years have seen an explosion of ERISA litigation seeking to second-guess plan fiduciaries' decisions in hindsight. Many of these lawsuits question the prudence of particular plan investments by reference to a handful of other options that delivered higher returns over a select period of time, asserting that the fiduciaries should have seen the higher returns coming. Other complaints focus on plan service providers, identifying a few other plans that allegedly may have paid lower fees and asserting that the plan's fiduciaries should have obtained the same fee, regardless of the services provided. Many cases, like this one, challenge both plan investments *and* service arrangements. These suits typically do not involve any direct allegations of a defective fiduciary process. Rather, the plaintiffs ask courts to infer from the choices themselves that plan fiduciaries must have breached their duties in evaluating the investments and services available to the plan.

This case is no different. Plaintiff alleges that the fiduciaries of the Waters Employee Investment Plan (the "Plan") violated ERISA by imprudently retaining the Fidelity Freedom Funds as the Plan's target-date offering from 2017 to 2022, and by failing to negotiate lower total recordkeeping and administrative fees. Plaintiff's claims, like so many others, are not supported by any direct allegations about the processes through which the Freedom Funds were

selected or retained or the Plan's service arrangements were entered. In support of his investment claim, plaintiff simply identifies *one* different target date fund ("TDF") suite that delivered higher returns than the Freedom Funds over the relevant period, and alleges that *one* of the Freedom Fund vintages (the 2025 fund) had lower returns than some alternatives at one point in time while outperforming many others. In support of his service fee claim, plaintiff simply identifies a handful of other plans that purportedly paid lower total recordkeeping and administrative fees than the Plan did (without regard to the specific services received in exchange for those fees).

Permitting such claims to proceed would divorce the prudence standard from its focus on process, turning oversight of plan investments into a short-term performance contest and pushing fiduciaries to prioritize rock-bottom fees over all other considerations when it comes to the selection of plan services. In reality, fiduciary decision-making is far more complex. The market offers a wide range of investment products and services for fiduciaries to consider, and fiduciaries face multi-faceted choices in evaluating those offerings. Different fiduciaries may easily take different paths after doing so, but that does not mean their process was defective. Plan participants differ in myriad ways, too—from their financial needs to their interests, sophistication, and technological proficiency. As a result, an investment option or service arrangement that is right for one plan may not be a good fit for another. Even among similarly situated plans, there are often many reasonable ways to run an effective plan that will help participants build retirement savings. The inevitable result is that essentially every plan will offer investment options that do not turn out to have the highest returns over any given period, or will opt for services that cost more than some other plans' arrangements. But such variations in outcomes do not make the reasoned processes that produced them imprudent.

For this reason, although allegations of imprudence may be based on circumstantial facts, to state a claim, a plaintiff must plausibly allege that no prudent fiduciary could have made the same choice when the decision was made—*i.e.*, that the fiduciary's decision was "outside [the] range of reasonableness." *Luckett v. Wintrust Fin. Corp.*, No. 22-cv-03968, 2023 WL 4549620, at *3 (N.D. Ill. July 14, 2023); *see also, e.g.*, *Kurtz v. Vail Corp.*, 511 F. Supp. 3d 1185, 1200–01 (D. Colo. 2021).[2] Where a plaintiff fails to do so, dismissal is warranted.

ARGUMENT

I. ERISA's Prudence Standard Recognizes That Fiduciaries Often Have a Range of Reasonable Choices Available to Them and Does Not Dictate Any Particular Approach If Fiduciaries Use a Sound Decision-Making Process

ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Inherent in this standard is Congress's recognition that fiduciary decision-making is driven by context, and that there often is no one objectively "right" choice. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) ("Because the content of the duty of prudence turns on the circumstances ... prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific"). That is because fiduciary decision-making frequently involves the "balancing of competing interests under conditions of uncertainty." *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006).

The prudence standard is "one of *conduct*," not results. *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009); *see Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) ("The process is what ultimately matters, not the results."); *PBGC ex rel. St. Vincent Cath.*

[2] Unless otherwise noted, all internal quotations and citations are omitted.

Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 716 (2d Cir. 2013) (prudence standard focuses on "fiduciary's conduct," *i.e.*, the process or "methods" employed). By focusing on process rather than outcomes, the prudence standard recognizes that similarly situated fiduciaries may reach different conclusions when faced with the same questions, and that the decisions of one fiduciary cannot be condemned solely because another fiduciary of a different plan took a different tack. And because ERISA does not seat fiduciaries "on a razor's edge" when making decisions, courts review those decisions under a "deferential" standard. *Armstrong*, 446 F.3d at 732–33; *see Hughes*, 595 U.S. at 177 (courts evaluating ERISA claims must consider "the range of reasonable judgments a fiduciary may make").

"Whether a fiduciary's actions are prudent cannot be measured in hindsight." *Bunch*, 555 F.3d at 7. The test instead is "how the fiduciary acted viewed from the perspective of the time of the challenged decision[.]" *Id.*; *see also Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1146 (10th Cir. 2023) ("Ultimately, the duty requires prudence, not prescience."). A plaintiff therefore cannot state a claim for breach of fiduciary duty merely by pointing to the ultimate performance of an investment. *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1167 (6th Cir. 2022).

II. Plaintiff's Allegations Regarding the Fidelity Freedom Funds Reflect Pleading Deficiencies Typical of Recent Litigation Concerning Plan Investment Options

Recent suits against ERISA plan fiduciaries often follow a familiar pattern in challenging investment options offered to participants. Plaintiffs, with the benefit of hindsight, identify one or more alternatives that outperformed the challenged fund and ask courts to infer that plan fiduciaries must have had a flawed decision-making process because they did not choose those alternatives. This common approach leaves virtually no investment, and thus no plan, safe from suit. With countless investment options available in the marketplace, it is nearly certain that plaintiffs will be able to identify at least one better-performing fund (and often several) in

hindsight—and there will also be many worse-performing funds. Yet these performance patterns are not knowable before-the-fact, and hindsight performance critiques say nothing about whether the challenged investments were reasonable options to offer. Such outcome-driven attacks are a legally and logically flawed basis for challenging any investment decision, but they are particularly misplaced when applied to TDFs given the wide variation among those investment vehicles and the range of factors that can reasonably influence fiduciaries' choice among them.

A. TDFs Pursue a Range of Strategies to Address the Various Risks Retirement Investors Face Over Their Lifetimes, and Fiduciaries Have Discretion to Choose the Approach That Suits Their Plan and Its Participants

Plaintiff's claim here concerns the Fidelity Freedom Funds—a suite of TDFs offered in the Plan from 2017 until 2022. TDFs offer a long-term, all-in-one investment solution, holding a mix of stocks, bonds, and other investments that automatically adjusts over time as the participant ages. *See* U.S. Dep't of Labor, EBSA, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* at 1 (Feb. 2013), https://bit.ly/3mPRxjC ("*Tips for ERISA Plan Fiduciaries*"). A TDF's initial asset allocation usually consists mostly of equity investments (*i.e.*, stocks), which typically have greater returns potential than other asset classes but also carry greater investment risk. *Id.* As the target retirement date approaches (and, for some TDFs, continuing beyond that date), the fund's asset allocation shifts to include a higher proportion of more conservative investments, like bonds. *Id.* TDFs "can be attractive investment options for employees who do not want to actively manage their retirement savings," and many plan sponsors select TDFs as the default investment option for those plan participants who do not affirmatively make an investment election. *Id.*; *see* 29 C.F.R. § 2550.404c-5(e). Largely for these reasons, TDFs have come to dominate the retirement investment landscape, with $3.27 trillion in total assets invested in TDF strategies as of year-end 2021. Morningstar, *2022 Target-Date Strategy Landscape* at 1 (Mar. 23, 2022), https://bit.ly/3HhLXzW ("*Morningstar Target-*

Date Landscape").

With such large amounts of participant assets allocated to them, TDFs provide an attractive target for opportunistic plaintiffs looking to claim massive damages based on asserted underperformance compared to other available options. But such comparisons frequently ignore that TDFs follow many different strategies for allocating and adjusting risk over the life of the funds, which is decades long and can be expected to cover a variety of market environments. As a result, TDFs often vary significantly in their asset allocation "glide paths" (the change in their mix of investments over time), and different TDFs may have materially different asset allocations for the same vintage (*e.g.*, the 2025 fund). *See* SEC and DOL, Notice of Hearing, Hearing on Target Date Funds and Similar Investment Options, at 1–2 (May 19, 2009), https://bit.ly/3ubDWHR.

One dimension across which TDFs commonly differ is in the size of their allocation to equities at any given point along the glide path. *See, e.g.*, *Morningstar Target-Date Landscape* at 36–38. As the U.S. Government Accountability Office has explained: "Differences in the size of the equity component throughout the TDF's glide path may be rooted in different goals and in the treatment of various considerations such as the risk of losing money because of financial market fluctuations—investment risk—and the risk that a participant could outlive his or her assets—longevity risk." U.S. Gov't Accountability Off., GAO-11-118, *DEFINED CONTRIBUTION PLANS - Key Information on Target Date Funds as Default Investments Should Be Provided to Plan Sponsors and Participants* at 11 (Jan. 2011), https://bit.ly/3b7HjbP. In addition to the level of equity concentration, TDF suites can also vary in their relative exposure to domestic versus international equity, their weighting across the small-, mid-, and large-cap segments of the U.S. equity market, their tilt toward growth versus value equity

strategies, and their exposure to alternative asset classes—all of which "can significantly affect the way a TDF performs." *Tips for ERISA Plan Fiduciaries* at 1; *see also, e.g.*, *Morningstar Target Date Landscape* at 40 (illustrating range of asset classes included in fixed-income component of various TDF suites). And beyond asset allocation, TDFs may also differ in whether they invest in actively- or passively-managed underlying funds, or a mix of both. *See* Am. Compl. ¶ 153; *Morningstar Target Date Landscape* at 13; *see also, e.g.*, *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021).

Plan fiduciaries can reasonably weigh these various TDF features differently, as reflected in the array of choices available in the market. *See* Am. Compl. ¶ 177 (identifying two dozen TDF suites as proposed comparators for the Freedom Funds); *Morningstar Target-Date Landscape* at 20 (identifying forty-five available TDF mutual fund suites as of year-end 2021); *see also* Callan, *DC Trends Survey Highlights Plans' Focus for 2020*, bit.ly/46I2ZTJ (noting roughly 20 percent of plans used a custom TDF solution). There is no one universally accepted "best" TDF strategy for every retirement plan, but a "range of reasonable judgments a fiduciary may make" considering her plan's particular circumstances. *Hughes*, 595 U.S. at 177.

B. A Hindsight-Based Comparison of a TDF Suite's Performance Against One or More Other Options Over a Given Period of Time Does Not Plausibly Suggest a Process Failure

Allegations of imprudence focused on hindsight performance comparisons ignore the multi-faceted nature of fiduciary decision-making and the wide range of reasonable options available to retirement plan fiduciaries. ERISA affords fiduciaries the flexibility to consider multiple factors when making investment decisions. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."); *Reetz v. Lowe's Cos.*, No. 5:18-CV-00075-KDB-DCK, 2021 WL 4771535, at *56

(W.D.N.C. Oct. 12, 2021) ("ERISA does not require fiduciaries to … prioritize raw returns over other considerations[.]"), *aff'd sub nom. Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171 (4th Cir. 2023). When it comes to TDFs in particular, courts have recognized that plaintiffs cannot state a claim by alleging differences in returns while closing their eyes to differences among available TDF strategies. *See Smith*, 37 F.4th at 1165–68; *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822–23 (8th Cir. 2018).[3]

The ease with which plaintiffs can exploit the variation across TDFs to paint a false picture of imprudence is underscored by the fact that the supposedly imprudent Fidelity Freedom Funds are one of the most popular TDF suites on the market, and received a "Silver" rating from Morningstar—the same rating plaintiff's proposed prudent alternative, the American Funds TDFs, received throughout most of the relevant period. *See Morningstar Target-Date Landscape* at 11; *see also* Morningstar, *2021 Target-Date Strategy Landscape* at 10 (Mar. 2021), https://bit.ly/34Rss2r. Courts have rejected attempts to use similar cherry-picked performance comparisons to attack highly rated and widely adopted TDFs from respected investment

[3] *See also, e.g.*, *Davis v. Salesforce.com, Inc.*, No. 21-15867, 2022 WL 1055557, at *1 n.1 (9th Cir. Apr. 8, 2022); *Lard v. Marmon Holdings, Inc.*, No. 1:22-cv-4332, 2023 WL 6198805, at *4–5 (N.D. Ill. Sept. 22, 2023); *Bracalente v. Cisco Sys., Inc.*, No. 5:22-cv-04417-EJD, 2023 WL 5184138, at *4 (N.D. Cal. Aug. 11, 2023); *Fitzpatrick v. Nebraska Methodist Health Sys., Inc.*, No. 8:23CV27, 2023 WL 5105362, at *7–8 (D. Neb. Aug. 9, 2023); *Anderson v. Advance Publ'ns, Inc.*, No. 22 Civ. 6826 (AT), 2023 WL 3976411, at *3–4 (S.D.N.Y. June 13, 2023); *Beldock v. Microsoft Corp.*, No. C22-1082JLR, 2023 WL 3058016, at *3 (W.D. Wash. Apr. 24, 2023); *Hall v. Capital One Fin. Corp.*, No. 1:22-cv-00857-MSN-JFA, 2023 WL 2333304, at *6–7 (E.D. Va. Mar. 1, 2023); *Tullgren v. Booz Allen Hamilton, Inc.*, No. 1:22-cv-00856-MSN-IDD, 2023 WL 2307615, at *6–7 (E.D. Va. Mar. 1, 2023); *Ruilova v. Yale-New Haven Hosp., Inc.*, No. 3:22-cv-00111-MPS, 2023 WL 2301962, at *14 (D. Conn. Mar. 1, 2023); *Locascio v. Fluor Corp.*, No. 3:22-CV-0154-X, 2023 WL 320000, at *6 (N.D. Tex. Jan. 18, 2023); *Coyer v. Univar Sols. USA Inc.*, No. 1:22 CV 0362, 2022 WL 4534791, at *6 (N.D. Ill. Sept. 28, 2022); *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 579 F. Supp. 3d 1133, 1151–52 (N.D. Cal. 2022); *Parmer*, 518 F. Supp. 3d at 1306–07; *Wehner v. Genentech, Inc.*, No. 20-cv-06894-WHO, 2021 WL 507599, at *8 (N.D. Cal. Feb. 9, 2021); *Patterson v. Morgan Stanley*, No. 16-cv-6568 (RJS), 2019 WL 4934834, at *14 (S.D.N.Y. Oct. 7, 2019).

managers, including the Fidelity Freedom Funds, BlackRock LifePath Index Funds, T. Rowe Price Retirement Funds, and JPMorgan SmartRetirement Funds.[4] The twisted logic of these allegations is evident from the frequency with which TDF offerings held up as superior alternatives in one case are condemned as unreasonable choices in another.[5] This dynamic has made it nearly impossible for fiduciaries to avoid being sued, no matter how careful their process and how reasonable their decisions.

Allegations of imprudence based on a fund's realized returns are all the more problematic where, as here, they primarily rest on a comparison to the performance of a *single* alternative that outperformed virtually every other option over a particular period of time. *See* Am. Compl. ¶¶ 172–73 (identifying American Funds TDFs as "an alternative prudent investment"); *Morningstar Target Date Landscape* at 22 (noting that as of year-end 2021, the American Funds TDFs, on average, had higher returns than 98 percent of peer funds over the trailing 10-year period). With the benefit of hindsight, one can readily identify within a set of diverse TDFs

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[4] *See, e.g.*, *Smith*, 37 F.4th at 1165–68 (affirming dismissal of claims regarding Freedom Funds); *Tullgren*, 2023 WL 2307615, at *6–7 (dismissing claims regarding BlackRock TDFs); *Tobias v. NVIDIA Corp.*, No. 20-CV-06081-LHK, 2021 WL 4148706, at *13 (N.D. Cal. Sept. 13, 2021) (dismissing claims regarding T. Rowe Price TDFs); *Davis v. Salesforce.com, Inc.*, No. 20-cv-01753-MMC, 2021 WL 1428259, at *5–6 (N.D. Cal. Apr. 15, 2021) (dismissing claims regarding JPMorgan SmartRetirement TDFs), *rev'd in part on other grounds*, No. 21-15867, 2022 WL 1055557 (9th Cir. Apr. 8, 2022).

[5] *Compare, e.g.*, Am. Compl. ¶¶ 146–50, *Wehner v. Genentech, Inc.*, No. 20-cv-06894-WHO, ECF No. 46 (N.D. Cal. Mar. 2, 2021) (identifying BlackRock TDFs as an allegedly superior investment alternative) *with* Am. Compl. ¶¶ 26–54, *Tullgren*, No. 1:22-cv-00856-MSN-IDD, ECF No. 38 (E.D. Va. Dec. 15, 2022) (challenging retention of BlackRock TDFs as imprudent); and *compare* Second Am. Compl. ¶¶ 54, 56 72, 94, *McGinnes v. FirstGroup Am,, Inc.*, No. 1:18-cv-0326-TSB, ECF No. 71 (S.D. Ohio Sept. 30, 2021) (identifying T. Rowe Price TDFs as a prudent investment alternative) *with* Am. Compl. ¶¶ 105–10, *Tobias v. NVIDIA Corp.*, No. 4:20-cv-6081-LHK, ECF No. 51 (N.D. Cal. Nov. 12, 2021) (challenging T. Rowe Price TDFs as imprudent). The Freedom Funds, too, have been cited as a prudent investment alternative in other litigation. *See* Compl. ¶ 93, *Russell v. Ill. Tool Works, Inc.*, No. 1:22-cv-02492, ECF No. 1 (N.D. Ill. May 11, 2022).

some options—indeed, all but the very best-performing funds—that "underperformed" compared to others over a given timeframe. But while it is easy enough to identify the best-performing funds in hindsight after returns have been realized, it is far more difficult to predict which funds will deliver the highest returns going forward. *See Seawell v. Brown*, No. C-1-08-614, 2010 WL 11561287, at *8 (S.D. Ohio Sept. 9, 2010). Past performance is not a reliable indicator (let alone a guarantee) of future results, as both the Department of Labor ("DOL") and Securities and Exchange Commission emphasize. *See* 29 C.F.R. § 2550.404a-5(d)(1)(ii)(A); 17 C.F.R. § 230.482(b)(3)(i). That is why ERISA does not require fiduciaries to "reflexively jettison investment options in favor of the prior year's top performers." *Patterson*, 2019 WL 4934834, at *11.

Particularly for multi-asset-class investments like TDFs, relative performance patterns commonly shift over time as market conditions evolve. For that reason, performance comparisons are particularly uninformative where, as here, they look at only trailing performance metrics at the end of a particular period. *See* Am. Compl. ¶ 173 (comparing cumulative returns of Freedom Funds and American Funds TDFs from June 30, 2017 through December 31, 2022). Examination of other performance information from within the relevant period illustrates the point—and paints a more nuanced picture about the relative performance of the Freedom Funds and American Funds TDFs. Within the period from 2017 through 2022, there were years when the Freedom Funds had higher returns than the American Funds TDFs, years when the American Funds TDFs had higher returns than the Freedom Funds, and years in which the results were mixed depending on the particular vintage.

Outperforming Fund: Fidelity Freedom Funds (K) vs. American Funds TDFs (R5)[6]						
TDF Vintage	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
2020 Fund	Fidelity	American	Fidelity	Fidelity	American	American
2030 Fund	Fidelity	American	Fidelity	Fidelity	American	American
2040 Fund	Fidelity	American	Fidelity	American	American	American
2050 Fund	American	American	Fidelity	American	American	Fidelity
2060 Fund	American	American	Fidelity	American	American	Fidelity

The same issue also affects plaintiff's comparison of the 2025 vintage of the Freedom Funds against various other 2025 funds.[7] Again, plaintiff looks only at trailing performance data as of a single point in time. *See* Am. Compl. ¶ 177. Even then, plaintiff's allegations show that the 2025 vintage of the Freedom Funds performed *better* than roughly half of plaintiff's comparison group based on his self-serving performance metrics. *Id.* ¶¶ 177, 179. And other performance measures from within the relevant period again illustrate the arbitrariness of plaintiff's limited comparison. For example, as shown below, the 2025 vintage of the Freedom Funds (selected by plaintiff as his exemplar) had annual returns in the top three among plaintiff's

[6] Year-end annual returns data was obtained by entering the five-letter mutual fund ticker into the publicly available Morningstar database (www.morningstar.com) for the following funds: (1) Fidelity Freedom Funds (Class K): 2020 TDF (FSNOX), 2030 TDF (FSNQX), 2040 TDF (FSNVX), 2050 TDF (FNSBX), 2060 TDF (FNSFX); and (2) American Funds Target Retirement Date Series (Class R5): 2020 TDF (RECTX), 2030 TDF (REETX), 2040 TDF (REGTX), 2050 TDF (RETIX), 2060 TDF (REMTX).

[7] Beyond its focus on trailing performance as of a single point in time, plaintiff's additional comparison is flawed in at least two other respects: plaintiff performs the comparison for only one vintage of the Freedom Funds without regard to whether that vintage is representative of the suite as a whole, and the complaint does not establish that the proposed comparators employ strategies similar to the Freedom Funds. *See Matousek*, 51 F.4th at 281 (elaborating on "meaningful benchmark" requirement). Among other potential differences, the complaint itself shows that plaintiff's comparators include several TDF suites that invest in passively managed underlying funds (*i.e.*, funds that aim to track the performance of a market index), while the Freedom Funds invest in actively managed funds that aim to beat the performance of a market index over the long-term. *See* Am. Compl. ¶¶ 151 (alleging that the Plan invested in the "active" Freedom Funds), 177 (including several "index" TDFs among proposed comparison group).

proposed 25-fund comparison group in two of the six years during the relevant period, and annual returns in the top ten in four out of six years. Notably, the performance of the 2025 vintage of the TDF suite plaintiff highlights as an alleged prudent alternative—the American Funds TDFs—was similarly varied relative to plaintiff's comparator group: The American Funds 2025 TDF generated top-three returns twice and top-ten returns four times, with lower returns in the other two years. In three out of six years, the 2025 vintage of the Freedom Funds performed better than the corresponding vintage of the American Funds TDFs among plaintiff's comparator set, while in the other three years, the opposite was true.

Fidelity Freedom 2025 (K) vs. American Funds 2025 (R5): Annual Performance Rank Among 25 TDFs in Am. Compl. ¶ 177						
TDF	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
Fidelity	3	19	10	3	10	23
American	15	2	20	8	5	3

The potential for such variation in results across time periods underscores the importance of context in evaluating investment performance, and illustrates the dangers of relying on isolated hindsight-based performance figures to infer that fiduciaries "should" have chosen one option over another. *See Dorman v. Charles Schwab Corp.*, No. 17-cv-00285-CW, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019) (dismissing claim and noting that challenged funds outperformed comparators in certain years); *Patterson*, 2019 WL 4934834, at *11 (same).

III. Administrative Services Vary from Plan to Plan, and Excessive Fee Claims Must Be Analyzed in View of the Particular Services Rendered to a Particular Plan

Just as plan fiduciaries have a wide range of investment options available to them—and may reasonably come to different conclusions about which of those options best serves their participants' needs—there is no single package of administrative services common to every plan. While all plans need certain basic recordkeeping services (such as maintaining plan records,

processing participant investment elections and contributions, and issuing account statements), demand for other available services may vary considerably from plan to plan based on factors such as the size of the plan, the participant base, and plan-specific features like the ability to invest in company stock. *See* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* at 3 (Sept. 2019), https://bit.ly/3fP8vuH ("*A Look at 401(k) Plan Fees*"). For example, fiduciaries may need to make decisions about the scope and method of participant communications (including employee meetings, call centers, voice-response systems, or web access), participant education and advice (including online or face-to-face), brokerage windows, loan processing, ERISA-required participant notices, or insurance and annuity services. *See* Sarah Holden, et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, 2020, 27 ICI Research Perspective at 4 (June 2021), https://bit.ly/3IwR5Av. Differences in the specific services obtained by different plans naturally influence the total administrative fees they pay, making examination of the specific services a critical component of any fee comparison.

How fiduciaries evaluate each of these service features will depend in significant part on the particular needs and characteristics of their plan and its participants. For example, some fiduciaries considering whether to offer participant education services may determine that such services are unnecessary, particularly if their plan's participants tend to be sophisticated investors. Other fiduciaries may view the same services as vital, especially if their plan's participants generally have limited investment experience. And some plans may have a diverse participant population with varied investment knowledge, further complicating the determination of whether the potential benefits of educational services justify the associated fees. The choices do not stop there. Plan fiduciaries who determine that participant educational services *would* be useful then face a series of decisions about what form those services should take, which may also

depend on the particular makeup of their plan's participant base.

Numerous considerations similarly bear on fiduciary decisions about which plan service providers to hire. Cost is of course an important factor—but, as the DOL has repeatedly advised, "cheaper is not necessarily better." *A Look at 401(k) Plan Fees* at 1; *see* U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities* at 6 (2021), https://bit.ly/3kh7LB3; U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses* at 9–10 (Dec. 2011), bit.ly/3PRgiLY. Experience is another factor to be considered, and fiduciaries may reasonably put a premium on a provider's history serving similar plans, record of customer service, or professional reputation. *See* U.S. Dep't of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, bit.ly/3Zs7sHC. The desire to avoid disruption for participants (among other factors) can also reasonably lead fiduciaries to retain an incumbent provider, rather than jumping to a new one that offers marginally lower fees. *See, e.g.*, *Miller v. Packaging Corp. of Am.*, No. 1:22-cv-271, 2023 WL 2705818, at *7 (W.D. Mich. Mar. 30, 2023) ("[T]here are many reasons why a fiduciary might reasonably conclude that it is more prudent to keep a known provider than transition to a new one at a lower price."). And, of course, some providers may not offer all the features that particular fiduciaries require or desire, and thus may not be a viable option for their plan at all, even if they are an ideal choice for a different plan with different needs. Rarely is there a single "right" decision, and there is no one-size-fits-all approach that works for every plan.

Recognizing these complexities, courts have emphasized that it is not enough for plaintiffs alleging imprudence based on purportedly excessive service provider fees simply to identify one or more other plans that paid less. To state a claim, a plaintiff must plausibly allege that the fees in question "were excessive relative to the services rendered." *Young v. Gen.*

Motors Inv. Mgmt. Corp., 325 F. App'x 31, 33 (2d Cir. 2009) (Sotomayor, J.); *see Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-80 (7th Cir. 2022); *Smith*, 37 F.4th at 1169. Such allegations must address "the *specific* services … provided to the *specific* plan at issue." *Gonzalez v. Northwell Health*, 632 F. Supp. 3d 148, 167 (E.D.N.Y. 2022). In other words, a complaint cannot allege only "that a cost disparity exists [between plans]; rather, the complaint must state facts to show the … services being compared are, indeed, comparable. The allegations must permit an apples-to-apples comparison." *Matney*, 80 F.4h at 1149; *see also, e.g.*, *Matousek*, 51 F.4th at 279–80 ("[T]he key to stating a plausible excessive-fees claim is to make a like-for-like comparison.").

Courts rightly have not permitted plaintiffs to get around that fundamental pleading requirement with bare assertions that the services provided to different plans are materially the same and any variations "in the level and quality" of those services have "no material impact on fees," *Miller*, 2023 WL 2705818, at *5—a contention that "defies common sense," *Krutchen v. Ricoh USA, Inc.*, No. CV 22-678, 2023 WL 3026705, at *2 (E.D. Pa. Apr. 20, 2023); *see* Am. Compl. ¶¶ 106–117, 130-131 (making similar allegations here).[8] It is because there often *are*

[8] *See also, e.g.*, *Sigetich v. Kroger Co.*, No. 1:21-cv-697, 2023 WL 2431667, at *9 (S.D. Ohio Mar. 9, 2023) (allegations that "any minor variations in the level and quality of RK&A services described above and provided by recordkeepers has little to no material impact on the fees charged by recordkeepers" were "wholly conclusory"); *Probst v. Eli Lilly & Co.*, No. 1:22-cv-01106-JMS-MKK, 2023 WL 1782611, at *10 (S.D. Ind. Feb. 3, 2023) (allegations "that all mega plans receive nearly identical recordkeeping services and that any difference in services was immaterial to the price of those services" were "wholly conclusory" and did not plausibly show that fees were "excessive relative to the services rendered"); *Singh v. Deloitte LLP*, 650 F. Supp. 3d 259, 267 (S.D.N.Y. 2023) ("The plaintiffs' allegation that all recordkeepers offer the same range of services does not mean that all plans employing a particular recordkeeper receive an identical subset of services within that range."); *Guyes v. Nestle USA, Inc.*, No. 20-CV-1560-WCG-SCD, 2022 WL 18106384, at *4 (E.D. Wis. Nov. 21, 2022) (allegation that plan "received a standard package of [recordkeeping] services" did not support inference that fees "were excessive relative to the recordkeeping services received" (alteration in original)); *Mator v. Wesco Distrib., Inc.*, No. 2:21-CV-00403-MJH, 2022 WL 3566108, at *4–5, *7 (W.D. Pa. Aug.

meaningful differences across providers that the DOL "expressly recommends considering more than just price—including the quality of their services and customer satisfaction—when selecting recordkeepers." *Id.*; *see supra* at 15. And it is because there often *are* meaningful differences in the services provided to different plans that courts require plaintiffs to address "the *specific* services … provided to the *specific* plan at issue." *Gonzalez*, 632 F. Supp. 3d at 167; *see also, e.g.*, *Matney*, 80 F.4th at 1148–49. As the DOL has noted, and basic economic principles suggest, all else equal, "generally the more services provided, the higher the fees." *A Look at 401(k) Plan Fees* at 3; *see also Miller*, 2023 WL 2705818, at *5 ("It is common sense that a recordkeeper who provides more services per participant will generally charge a higher fee."); *Sigetich*, 2023 WL 2431667, at *9 (highlighting indications "that even minor variations in services impact per participant recordkeeping fees").

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As the Supreme Court has emphasized, motions to dismiss are an "important mechanism for weeding out meritless claims" in ERISA class actions. *Dudenhoeffer*, 573 U.S. at 425. A pleading standard under which bare hindsight performance critiques suffice to unlock the doors to discovery does not serve that essential screening function, nor does an inquiry under which it is enough merely to allege that a few plans paid less in service provider fees. There will virtually always be some investment option that delivered higher returns in hindsight, and some plan with cheaper service provider arrangements—making it all too easy for the plaintiffs' bar to generate either type of attack on nearly any plan. It is therefore critical that courts evaluating allegations of imprudence do so with "due regard" for the inherent complexity of fiduciary decision-making

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18, 2022) (dismissing claims based on conclusory allegations that other recordkeepers "provided identical or similar services of the same quality").

and the "range of reasonable judgments" fiduciaries may make, and with the surrounding, plan-specific "context" in mind. *Hughes*, 595 U.S. at 177.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant defendants' motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I caused the foregoing to be filed with the Clerk of the Court for the United States District Court for the District of Massachusetts by using the court's CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Gregory J. Comeau
Gregory J. Comeau