No. 13-1360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Plaintiff-Appellant,

v.

RJR PENSION INVESTMENT COMMITTEE; RJR EMPLOYEE BENEFITS COMMITTEE; R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL URGING AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-1360 Caption: Richard G. Tatum v. RJR Pension Investment Committee et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Hollis T. Hurd Date: August 1, 2013

Counsel for: Chamber of Commerce of the United

CERTIFICATE OF SERVICE

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I certify that on August 1, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Hollis T. Hurd
(signature)

August 1, 2013
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 13-1360 Caption: Richard G. Tatum v. RJR Pension Investment Committee et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Benefits Council
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Hollis T. Hurd Date: August 1, 2013

Counsel for: Amicus American Benefits Council

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 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. The Chamber regularly advocates on issues of vital concern to the business community, and has frequently participated as *amicus curiae* before this Court and numerous others.

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 350 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans. The Council frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

As employers, the businesses represented by the Chamber and the Council sponsor hundreds of thousands of employee benefit plans, both pension and

welfare, that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), including its fiduciary responsibility provisions. It is vital to the continued operation of these employee benefit plans, for the benefit of both employers and employees, that the fiduciary responsibility provisions of ERISA continue to be applied as written and as they have been applied for nearly 40 years since ERISA was enacted.

In this case, Appellant and his *amici* propose a radical interpretation of the "prudent man" rule under ERISA that cannot be derived from ERISA and, if adopted, would threaten the creation and maintenance of employee benefit plans. In particular, their proposed new interpretation would create an unworkable standard for fiduciary responsibility, thus creating uncertainty for fiduciaries, inviting litigation even where the decisions of the fiduciaries have clearly been prudent, unnecessarily putting fiduciaries at risk of personal liability, raising the cost of administering employee benefit plans (including the insurance or indemnification needed to enable fiduciaries to serve), and thus discouraging the formation and continued maintenance of employee benefit plans.

The interest of the Chamber and the Council is to explain that the standard proposed by Appellant and his *amici* is not founded in ERISA, is unworkable, and would seriously impair the functions of ERISA-covered employee benefit plans.[1]

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[1] As required by Rule 29(c)(5), *amici curiae* state that: (a) no party's counsel authored this brief in whole or in part, (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and (c) no person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

INTRODUCTION

The fiduciary in this case faced a classic fiduciary decision—essentially, whether to hold or sell an investment. The district court concluded that both options were prudent but that the fiduciary failed to make adequate investigation before making the choice. Because both options were prudent, however, the district court concluded that the failure to investigate did not cause any loss to the plan—exactly the analysis that this Court required in *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (2011).

The first question presented by Appellant invites the Court to invent a new standard of fiduciary responsibility under ERISA, which might be called "comparative" or "relative" prudence. Specifically, Appellant and his *amici* urge the Court to hold that where a fiduciary under ERISA is faced with a decision in which both options are prudent but he fails to investigate them adequately, a court must inquire into which option was "more prudent" and then impose liability on the fiduciary if he chose the "less prudent" option. Thus, liability would attach even though the option chosen was, in fact, prudent.

Appellant articulates his proposed new standard thus: "A showing that a prudent fiduciary 'would,' more likely than not, have made the same decision is required . . ." Brief of Appellant at 7. *Amici* AARP and National Employment Lawyers Association articulate it thus: "[A] fiduciary's investment decision

[should be found] imprudent if a hypothetical prudent fiduciary more likely than not would not have made the same investment decision" and an "investment should be deemed objectively imprudent unless a hypothetical fiduciary more likely than not would have made the same investment decision . . ." Brief of AARP and National Employment Lawyers Association as *Amici Curiae* at v and vi.

In Part I of the Argument, we demonstrate that "comparative" or "relative" prudence finds no support in the text of ERISA, the legislative history (or the common law of trusts from which the rules of fiduciary responsibility were borrowed), the regulations under ERISA, or case law under ERISA. We also point out that, when the district court in *Plasterers* adopted a test based on whether a prudent fiduciary "likely" would have chosen a particular option, this Court expressly rejected that analysis and stated that no liability attaches as long as the option chosen was objectively prudent, regardless of how likely or unlikely it might be that a hypothetical prudent fiduciary would have chosen it.

In Part II of the Argument, we explain why the "more likely than not" test proposed by Appellant would be unworkable and unfair, even if restricted to cases where the fiduciary failed to make adequate investigation. Appellant's test would impose liability on a fiduciary who was faced with two or more *prudent* options unless he or she chose the option that was "more likely than not" to have been

chosen by a hypothetical prudent fiduciary. But the only way to to whether a hypothetical prudent fiduciary "more likely than not" would have made a given decision is to know how *all* prudent fiduciaries would have made that decision.

A given option is "more likely than not" to have been chosen by a hypothetical prudent fiduciary only if more than half of all prudent fiduciaries would have chosen that option. For example, if 70 percent of all prudent fiduciaries would have chosen "hold" and 30 percent of all prudent fiduciaries would have chosen "sell," it is clear that a prudent fiduciary "more likely than not" would have chosen "hold" (even though both options were prudent). In that case, a fiduciary who chose "sell" would be liable under Appellant's proposed test, because he chose the option that was less likely to be chosen by a prudent fiduciary. But there is no practical way for a fiduciary to know beforehand, or a court to know after the fact, what percentage of all fiduciaries would have chosen which options.

Besides being unworkable, Appellant's proposed test is also unfair, particularly to employees. That is because employees in one plan will get damages while employees in another will not, just because the fiduciary in one plan failed to make adequate investigation, even though the fiduciaries of both plans made the same prudent decision. And the decision is unfair to employers as well, because it will stimulate fiduciary litigation over prudent decisions, enable plaintiffs to

surmount summary judgment more easily, and drive higher and higher damage awards and settlements, again over prudent decisions.

Appellant and his *amici* attempt to derive their proposed standard of comparative or relative prudence from a nearly subatomic examination of the meaning of the words "would" and "could" in *Fowler's Modern English Usage* and under the laws of torts and legal malpractice. As *amici curiae*, the Chamber and the Council offer the Court a larger perspective, starting with the text of ERISA.

ARGUMENT

I. THERE IS NO SUPPORT FOR APPELLANT'S "COMPARATIVE" OR "RELATIVE" PRUDENCE STANDARD IN THE STATUTE, LEGISLATIVE HISTORY, REGULATIONS, OR CASE LAW.

The statute is always the starting point. ERISA states the duty of prudence as follows:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (B) 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 . . .

ERISA sec. 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). In that charge, there are no comparatives or superlatives. Congress refers to "a" prudent man, not "every"

prudent man or "the most" prudent man or even "the majority" of prudent men. It says that a fiduciary must use the prudence that "a" prudent man would use in the circumstances.

Under ERISA, it is enough for a fiduciary to perform as "a" prudent man would have performed. He does not bear the burden of proving that he performed as the majority of prudent men would have performed and certainly not that he performed as the most prudent man would have performed (if indeed it were possible to determine what the most prudent man would have done).

If grammar is the test, the Court should note that "would" does not stand alone. It is merely the subjunctive mood of the verb "use," indicating a hypothetical situation. The statute calls for a fiduciary to apply the same prudence that a prudent man "would use." If applying the same prudence that a prudent man "would use" results in identifying more than one prudent option, nothing in the statute—least of all the word "would"—calls for determining which option is "more prudent" or "less prudent" than any other.

The legislative history is likewise confined to the process of applying the prudence that "a" prudent man would use, with no reference to which prudent options might be favored by the majority of prudent men. The formulation of the duty of prudence in ERISA as enacted is word-for-word identical to the formulation in the very first bill introduced. H.R. 2, as introduced on January 3,

1973, § 111(b)(1)(B), *reprinted in* I Legislative History of the Employee Retirement Income Security Act of 1974 (hereinafter "Legis. Hist.") at 3, 42 (1976). On the Senate side, the first bill introduced said only "care" instead of "care, skill, prudence and diligence" but otherwise was identical to the House bill (and the final statute) in calling for comparison to "a prudent man." S. 4 as introduced on January 4, 1973, § 15(b)(1)(A), I Legis. Hist. at 170. Every subsequent bill and every accompanying report likewise considered a fiduciary's duty to have been met if "a" prudent man might have done the same.[2] The legislative history is bereft of any statement, or even hint, about comparative or relative prudence, such as requiring that the decision taken be the one that a majority of some real or hypothetical cohort of prudent men would have taken.

The prudent man rule was borrowed from the common law of trusts (*see supra* note 1), and thus it is reasonable to inquire whether the common law of trusts includes any notion of comparative or relative prudence. Bogert[3] expresses the prudent man rule in language nearly identical to the language of ERISA, as follows: "In his management of the trust, the trustee is required to manifest the

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[2] *See*, *e.g.*, I Legis. Hist. at 307-308, 566, 632, 1441; II Legis. Hist. at 1727, 2285, 2360, 2368, 3300, 3308, 3378-79; and III Legis. Hist. at 3773, 3950, and 4569.

[3] The U. S. Supreme Court has long favored Bogert as an aid in interpreting the fiduciary provisions of ERISA by reference to the common law of trusts. *See*, *e.g.*, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *Conkright v. Frommert*, ___ U.S. ___ (2010).

care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." G. Bogert and G. Bogert, *The Law of Trusts and Trustees* § 541, p. 167 (2d rev. ed. 1993).[4] Again and again Bogert refers to "a" prudent man; nowhere is there any hint of comparing a fiduciary against all prudent men (real or imaginary) and attempting to judge whether his decision would have been the decision of more than half of them.

Nor does comparative or relative prudence appear in any regulation of the U.S. Department of Labor ("DOL"). Seventeen regulations issued by DOL under ERISA use the word "prudent." But none of them embraces (or even acknowledges the possibility of) any such concept as relative or comparative prudence, such that a fiduciary could be liable for choosing a prudent option if it was the "less prudent"—but still ultimately prudent—option.

Tellingly, the brief *amicus curiae* of the Acting Secretary of Labor, while it endorses Appellant's proposed test of "more likely than not," does so by simple assertion, with no attempt to draw it from the ERISA statute, from the legislative history or common law of trusts, from any regulation of the DOL, or from any case

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[4] The phrase "ordinarily prudent man" refers, not to degrees of prudence, but to the prudence of an ordinary man as opposed to an expert: "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." *Ibid*. (quoting Lord Blackburn from *Speight v.Gaunt*, 1883, 9 A.C. 1, 19, 20).

law. The endorsement of the Acting Secretary of Labor—apparently a litigating position generated just for the purpose of this case—is not entitled to any deference.[5] In fact, if this Court were to accord any weight to DOL's push for Appellant's proposed test, it would be allowing the DOL to regulate under ERISA without going through the notice and comment process normally required for substantive regulations.

Finally, the courts have not adopted any concept of relative or comparative prudence as part of the common law of ERISA. We are unaware of a single court that has adopted the standard urged by Appellant and his *amici* in this appeal.

On the contrary, this Court implicitly rejected any test based on probabilities in its recent decision in *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (2011). In *Plasterers*, the fiduciaries chose a conservative investment scheme (certificates of deposit and Treasury bills), in order to protect against loss, and pursued it for 20 years without investigating alternatives that might have offered higher returns (with higher risk, of course). The district court concluded that they breached their fiduciary duty and awarded damages.

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[5] "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *See also Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1141 n.13 (4th Cir. 1995).

This Court decided that it was error to award damages for breach of fiduciary duty, even though the fiduciaries failed in their duty to investigate alternatives, because there was no finding that their conservative investment scheme was itself imprudent:

> The district court failed to analyze whether the purported losses to the Plan in fact resulted from breaches of duty by the Former Trustees. The finding that the Former Trustees breached their fiduciary duties to investigate and diversify did not establish as a matter of law *that the actual investments were imprudent* and *liability can only attach if in fact that is the case*. Accordingly, in order to hold the Former Trustees liable for damages based on their given breach of fiduciary duty, the district court must first determine that *the Former Trustees' investments were imprudent*.

663 F.3d at 217 (emphasis added). As for the standard to be applied in judging whether the actual investment scheme was imprudent, this Court called for the standard set forth in the statute—whether "a" prudent man would have made the same decision:

> "Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability [under § 1109(a)] if a hypothetical prudent fiduciary would have made the same decision anyway." *Roth v. Sawyer–Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994).

663 F.3d at 218.

But this Court went further and implicitly rejected the concept of relative or comparative prudence. It noted, critically, that the district court had dismissed as

"unlikely" the possibility that a prudent man could have made the decision to invest exclusively in CDs and Treasury bonds for 20 years:

> The district court . . . expressly left open the possibility that after satisfying their duty to investigate, the Former Trustees "might well have, although it seems somewhat unlikely, but they have [*sic*] might well have arrived at the strategy that, in fact, they continued over time, although I think that's unlikely."

663 F.3d at 219. In effect, the district court had applied a "more likely than not" test—willing to recognize as a valid defense only options that a prudent fiduciary likely would have chosen. It explicitly refused to consider the prudence of the course actually chosen by the defendants in that case because it was "unlikely" that a prudent fiduciary would have chosen that course. That sounds like the test urged on the Court by Appellant and his *amici*.[6]

But in *Plasterers* this Court rejected that test and insisted that prudence is an objective standard—whether "a" prudent man might have made that decision, without regard to how likely or unlikely that decision might have been in comparison to other prudent men. That portion of the Court's opinion in *Plasterers* reflects the universal understanding that prudence under ERISA calls

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[6] The Acting Secretary of Labor writes that entertaining a "broader range of possibilities from the most to the least probable consequences of a prudent investigation . . . creates too low a bar, allowing breaching fiduciaries to avoid financial liability based even on remote possibilities." Brief of Seth D. Harris at 23.

for judgment as to whether "a" prudent man would have made the same decision, not a majority of prudent men or any other relative or comparative standard.

From this recap of the statute, legislative history, regulations, and case law on fiduciary responsibility under ERISA, an obvious question confronts Appellant and his *amici*. ERISA was enacted nearly 40 years ago, in September 1974. If Congress intended, and section 404(a)(1)(B) of ERISA provides, for fiduciaries to be measured against a standard of relative or comparative prudence—potentially liable for damages in making an admittedly prudent decision if it was not the "most prudent" decision—wouldn't someone have noticed before now?

II. "COMPARATIVE" OR "RELATIVE" PRUDENCE WOULD BE UNWORKABLE AND WOULD IMPAIR THE OPERATIONS OF EMPLOYER-SPONSORED PLANS.

The rule of comparative or relative prudence urged upon the Court by Appellant and his *amici* is easy to articulate but would be difficult (in many circumstances impossible) to apply. The phrase "more likely than not" sounds reassuringly familiar, but in the context of fiduciary responsibility it would amount to a requirement that the fiduciary's decision be the decision that more than half of all prudent fiduciaries would have made—in other words, that the fiduciary rank in the top 50 percent of all prudent fiduciaries facing that decision. Those grading the SAT exam can determine the top 50 percent easily, because they know the scores posted by all those who took the test. But the "top 50 percent" test, urged by

Appellant and his *amici*, could not practically be applied to an investment decision, much less all the other decisions faced by ERISA fiduciaries in administering their plans without polling every other fiduciary in the United States.

In particular, it is not practicable to know, or even to estimate with any hope of accuracy, how all the fiduciaries of ERISA plans would have decided between two or more prudent options. Under the ERISA standard of "a" prudent man, an expert may testify that he would have made that decision or he knows prudent men who would have made that decision (or have in fact made that decision), thereby establishing that "a" prudent man would have chosen that option. But under Appellant's test, that testimony would be unavailing, because it does not establish where that decision would have ranked among all the prudent choices available to prudent fiduciaries. Requiring an expert to testify about what *all* prudent men would have done, particularly how many of them would have chosen each available option, would be a purely speculative exercise.

Sampling is not a feasible answer. It raises difficult questions about who was polled, how they were selected, what their background and experience are, whether the decisions they have made are comparable (or instead are hypothetical), if hypothetical how much time *they* took to investigate the matter, whether they were informed of all the considerations, among many others. And what if the decision faced by our fiduciary is unique or close to it, as in the present case,

meaning there is no cohort of fiduciaries facing the same decision from which to develop a percentile ranking?

And those are the difficulties applying the "top 50 percent" standard just to a binary decision such as "hold or sell." If the choice were not a simple binary decision but instead a choice among three or more options, the "more likely than not" standard could actually be impossible to apply. For example, if the choice were among three prudent options, and one-third of prudent fiduciaries would have chosen each one, then *none* of the fiduciaries would be able to pass a "more likely than not" test (because, by definition, two-thirds of all prudent fiduciaries would have chosen a different option).

This point is particularly relevant to investment decisions, because a fiduciary has literally tens of thousands of single company securities, mutual funds, and other investments among the choices available to the fiduciary, many hundreds of which might be appropriate for a particular investment program. In many situations, there is a range of prudent options, not just one, as the brief *amicus curiae* of the Acting Secretary of Labor concedes: "[I]t is true that several prudent courses of action are often available to a fiduciary." Brief of Seth D. Harris, at 22. It is a fatal flaw in the theory proposed by Appellant and his *amici* that their approach simply cannot accommodate a range of prudent options.

Appellant and his *amici* may respond that their test is not for everyday breaches of fiduciary duty; it would apply only where the fiduciary failed to make an adequate investigation of the matter and so would not be an everyday problem for the courts. The quick and complete answer is that, whether the problem occurs frequently or infrequently, their proposed standard is simply unworkable. An unworkable standard does not get better looking by coming around less frequently.

But a standard based on comparative or relative prudence would be a problem every day for fiduciaries. It is a fact of life that every new requirement calls for new compliance procedures. How would a fiduciary on any given day make sure that his or her decision would rank him or her among the top 50 percent of all fiduciaries making the same decision (as necessary to avoid liability for even prudent decisions in case a plaintiff might allege inadequate investigation)? It is a rhetorical question, of course, because there is no reliable (or economical) way for a fiduciary to do that.[7]

It would also produce incongruous outcomes. For example, suppose that two fiduciaries facing the same question under identical circumstances make the same decision. Suppose that the decision is objectively prudent. Suppose that one

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[7] Naturally, such a rule would generate a "herd mentality," as fiduciaries would quickly realize that anyone in the minority has a *per se* breach of fiduciary duty hanging over their head, ready to crash down on them if any participant can prove inadequate investigation. Creating an irresistible rush for all investment fiduciaries to do exactly the same thing cannot be good for participants in the long run.

fiduciary made an adequate investigation before making the decision, but the other fiduciary did not. Now suppose that the decision they made falls in the bottom half of all the decisions that prudent fiduciaries would have made in that same situation (putting aside the impossibility of knowing that, just for argument's sake).

Under the standard proposed by Appellant and his *amici*, the fiduciary who made adequate investigation would be insulated from liability, but the fiduciary who did not make an adequate investigation would be personally liable for any losses. Just as incongruously, the employees in one plan would get money damages, while the employees in the other plan would not, even though both sets of employees experienced the same, prudent decision.

As that example illustrates, adoption of relative or comparative prudence would create a perverse incentive for participants to sue for damages for breach of fiduciary responsibility even where the decision was admittedly prudent. Under comparative or relative prudence, recovery could still be had—even if the decision was objectively prudent—as long as the fiduciary failed to make an adequate investigation of the options.

Every complaint would thereafter allege not only imprudence but also, as a backup, inadequate investigation. And the addition of an allegation of inadequate investigation would have another benefit to plaintiffs as well: the intensely factual nature of the claim of inadequate investigation would likely present issues of fact

that would preclude summary judgment. As a result, the stakes would be raised, along with the settlement value of the cases, to the advantage of the plaintiff's ERISA litigation bar.

Appellant's proposed test of relative or comparative prudence is particularly troublesome given the wave of insidious "stock drop" cases that are infecting the courts and threatening the voluntary employer-based retirement system. Fiduciaries of company stock funds are routinely sued for not removing a company stock fund whenever the price of company stock falls. Companies feel intense pressure to settle these cases—notwithstanding their lack of merit—because they can be extremely expensive to litigate, generally involve exorbitant claims for damages, and are very disruptive to business. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment* (NYU Sch. of Law Pub. Law & Legal Theory Working Paper No. 08-03, Law & Econ. Working Paper No. 08-06, 2009) (finding that the mean gross settlement in ERISA stock drop cases from 1993 through 2007 was more than $31.6 million). The last thing a fiduciary needs is a vague and likely insurmountable hurdle—trying to predict (and if necessary prove) what decision a majority of fiduciaries would have made.

A good question is who would ever agree to serve as a fiduciary in the environment envisioned by Appellant and his *amici*—an environment where even

admittedly prudent decisions could be attacked and there was no way for a fiduciary to know whether he or she was in the top 50 percent of all prudent fiduciaries in making that decision. Ultimately, the burden would fall on the employers who sponsor the plans, because the employers typically buy fiduciary liability insurance for the fiduciaries or agree to indemnify them. In either case, the cost would necessarily soar, making it ever more costly for an employer to maintain an employee benefit plan.

The inevitable result would be a shifting of resources away from actually providing benefits to participants and toward protecting fiduciaries, who would refuse to serve without added protection. Ironically, therefore, the standard of comparative or relative prudence, by increasing the cost of maintaining plans, might actually decrease (or at least stunt the growth of) employee benefits, to the detriment of the participants themselves and contrary to the intent of Congress in ERISA to foster the creation and maintenance of employee benefit plans.

Amici AARP and the National Employment Lawyers Association argue that, whatever its imperfections, their theory of liability for prudent decisions taken after inadequate investigation is necessary for deterrence, lest fiduciaries falter in their responsibility to make investigation. Brief of *Amici Curiae* AARP and National Employment Lawyers Association at 14-17. But that was the view of the district court in *Plasterers*, which this Court expressly rejected:

> "The only possible statutory purpose for imposing a monetary penalty for imprudent but harmless conduct would be to deter other similar imprudent conduct. However, honest but potentially imprudent trustees are adequately deterred from engaging in imprudent conduct by the knowledge that imprudent conduct will usually result in a loss to the fund, a loss for which they will be monetarily penalized. This monetary sanction adequately deters honest but potentially imprudent trustees. Any additional deterrent value created by the imposition of a monetary penalty is marginal at best. *No ERISA provision justifies the imposition of such a penalty*."

663 F.3d at 217-218 (quoting from *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir.1987)) (emphasis added).

CONCLUSION

For the reasons noted above, the Court should affirm the judgment of the district court on the first question presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because this brief contains 5,108 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Times New Roman 14-point font.

This the 1st day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2013, I electronically filed the foregoing **BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

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