No. 25-2131

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRACALENTE and BORIS GDALEVICH, individually and as representatives of a class of similarly situated persons, on behalf of the Cisco Systems, Inc. 401(k) Plan,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:22-cv-04417-EJD

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

Dated: August 18, 2025

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutory and Regulatory Authorities

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents 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. Many of its members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

An important function of the Chamber is to represent its members' interests in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly participates as *amicus curiae* in this Court and in others on issues that affect benefit-plan design or administration. *See, e.g.*, *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Anderson v. Intel Corp. Inv. Policy Comm.*, 137 F.4th 1015 (9th Cir. 2025); *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018).

The Chamber files this brief to provide the Court with greater context regarding the operation of ERISA's process-based directive, and to explain why a discrete period of supposed comparative underperformance by an investment option in the plan line-up does not plausibly suggest a fiduciary breach.

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). 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 to fund the preparation or submission of this brief.

INTRODUCTION

Plaintiffs effectively ask this Court to declare off-limits the Blackrock LifePath Index Funds ("BlackRock TDFs"), which year after year have been one of the most popular and highly regarded suites of Target Date Funds ("TDFs") on the market. In Plaintiffs' view, the Cisco Systems, Inc.'s 401(k) plan (the "Plan") should not have retained the BlackRock TDFs, notwithstanding their stellar rating and annual amassing of billions in new assets. Their justification? For minor periods of time, the BlackRock TDFs purportedly underperformed a handful of other highly regarded TDFs on the market. On that basis, Plaintiffs believe they can dictate plan fiduciaries' investment decisions and drag courts into that endeavor with them.

That is not how ERISA works. In enacting ERISA, Congress recognized that there are any number of reasonable investment decisions, and those decisions will themselves turn on a variety of plan-specific features and the exercise of reasonable judgment by fiduciaries. The Supreme Court likewise recognized this reality just a few Terms ago, reminding courts that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to 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). It is wholly consistent with ERISA (indeed, encouraged) for fiduciaries to exercise their discretion to carefully account for the needs and characteristics of their participant base, as well as the various pros

and cons of different investment options. Against that backdrop, when plaintiffs ask courts to infer that fiduciaries were asleep at the wheel by pointing to the performance or costs of the challenged funds *in comparison to* other funds, those allegations can in no way be probative of a fiduciary's imprudence when the alternatives are not apt comparators in terms of their investment strategy. Without the requirement of a meaningful benchmark, plaintiffs would be free to declare that certain investments are, in their view, per se off limits. Or, equally troubling, a plaintiff could open the door to discovery merely by finding *some alternative* among the thousands on the market that performed better during some cherry-picked window of time. This approach would remove any objective guardrails on a plausibility analysis the Supreme Court has repeatedly cautioned is critical to "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

In short, Plaintiffs' approach is at odds both with ERISA's embrace of flexibility and discretion, and with the Supreme Court's repeated recognition that ERISA claims, just like any others, must satisfy the *Twombly/Iqbal* pleading standard to survive a motion to dismiss. Indeed, this Court confirmed as much just this spring, explaining that there is no ERISA exception to Rule 8—and that when plaintiffs' allegations turn even in part on a comparative analysis (as the allegations did here), then the plaintiffs' proposed benchmark must be a *meaningful* comparator.

See Anderson v. Intel Corp. Inv. Pol'y Comm., 137 F.4th 1015, 1024 (9th Cir. 2025). The district court correctly applied that analysis here, and this Court should affirm.

ARGUMENT

I. Cisco's decision to retain the BlackRock TDFs is an example of exactly how ERISA should operate.

A. ERISA prioritizes flexibility and discretion for plan sponsors and fiduciaries.

When Congress enacted ERISA, it "did not require employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17; *see also* H.R. Rep. No. 93-533, at 218 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. Congress knew that if it adopted a system that was too inflexible or "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations," often during periods of considerable market uncertainty. H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries must account for present and future participants' varying objectives, administrative efficiency, and the need

to "protect[] the financial soundness" of plan assets. *Id.* And they do not make decisions with the benefit of a crystal ball. As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility—"greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." U.S. Dep't of Labor, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981).

Neither Congress nor DOL provides a list of required or forbidden investment options or investment strategies. Rather, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, . . . plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans." U.S. Dep't of Labor, Advisory Op. No. 2006-08A, at 3 (Oct. 3, 2006), https://bit.ly/3pnva5z. Indeed, DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992).

This flexibility extends to a variety of areas. For example, plan fiduciaries must make decisions concerning, among other things:

- the general investment policies and purposes of the plan;
- the appropriate number of investment options to make available to plan participants (some plans offer a dozen, others offer more);
- the risk levels of investment options to offer (ranging from very conservative capital-preservation options intended to avoid loss, to aggressive growth strategies);

- the investment styles to include (potentially including domestic equity funds, international funds, asset allocation funds, bond funds, and target-date funds, among others);
- the structure of the investment options (such as mutual funds, separate accounts, target-date funds, or collective trusts);
- the share class of investment funds to offer; and
- the default investment option, if any, for plan participants who have not made a decision about how to allocate their individual investment accounts.

These decisions all involve "difficult tradeoffs," *Hughes*, 595 U.S. at 177, especially in the face of market turmoil. Recognizing as much, Congress chose the "prudent man" standard to define the scope of the duties fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a). This standard is designed to provide fiduciaries with the "flexibility" necessary to determine how best to manage their plans. *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983).

As courts have recognized, the broad discretion conferred by Congress is the "sine qua non of fiduciary duty." *Pohl v. Nat'l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992). This discretion is critical to the entire framework, particularly because there virtually never is a single "right" answer to the questions fiduciaries must answer given the almost innumerable options available to them. In light of the vast array of options that exist for investment products and services, the need for fiduciaries to tailor solutions to their participants, and the widely diverse nature of those participants, fiduciaries are best positioned to weigh the pros and cons of various choices—often with assistance from consultants and other

investment professionals (as the Plan used here, Cisco Br. 11). If a fiduciary is subjected in litigation to constant Monday morning quarterbacking over her decisions—with the benefit of 20/20 hindsight rather than based on "the circumstances as they reasonably appear[ed] to him at the time when he does the act and not at some subsequent time when his conduct is called in question," *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022) (quoting Restatement (Second) of Trusts § 174, comment b (1959))—that would eviscerate the discretion that is at the core of the statutory framework.

At bottom, fiduciaries have a wide range of reasonable options for almost any decision they make. Different plans will take different approaches; each plan is unique, and each plan's participants have a different range of financial sophistication, risk sensitivities, retirement needs, and investment preferences. Thus, the Supreme Court has directed courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177.

B. A plan's retention of the BlackRock TDFs does not plausibly suggest that Plan fiduciaries failed to comply with ERISA's fiduciary obligations.

The principles discussed above doom Plaintiffs' challenge to the Plan's selection and retention of the BlackRock TDFs. Far from permitting an inference of imprudence, viewed in context the Plan's decision reflects the type of discretion that

fiduciaries must exercise every day in deciding among many reasonable investment options available in the highly competitive fund marketplace, each of which may have its own pros and cons. An overly simplistic performance comparison, like Plaintiffs employed here, ignores the variety of considerations that inform reasonable judgments of the available market options. And courts "must give due regard" to these reasonable judgments when evaluating the plausibility of ERISA fiduciary-breach claims. *Anderson*, 137 F.4th at 1021 (citation omitted).

1. TDFs are a general class of investments that vary along several axes.

The term TDF describes a broad category of investments that employ a variety of approaches, including different investment styles and diversified investment types, to both optimize growth and manage risk in relation to an investor's "target" retirement date. When designing TDFs, fund managers use different approaches to change a fund's asset allocation as a participant nears retirement—referred to as the fund's "glide path." *See* U.S. Dep't of Labor, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* 1 (Feb. 2013), https://bit.ly/3imKQqY ("DOL, *TDF Tips*"). Early in the glide path, when a participant is farther from retirement, TDFs generally take on higher risk—by, for example, concentrating more heavily in equity investments, "which often have greater potential for higher returns but also can be more volatile and carry greater investment risk." *Id.* Closer to retirement, "the fund's asset allocation shifts to include a higher proportion of more conservative

investments, like bonds and cash instruments, which generally are less volatile and carry less investment risk." *Id.* Given these features, TDFs "can be attractive investment options for employees who do not want to actively manage their retirement savings." *Id.*[2]

While TDFs all fall within the same "general framework," there are "considerable differences among TDFs offered by different providers, even among TDFs with the same target date." DOL, *TDF Tips* 1. Given these differences, fiduciaries selecting a TDF have to consider myriad factors, including investment returns, fees, glide path (either through or to retirement), and investment strategy. *Id.* at 2. They must also account for plan-specific information, such as "how well the TDF's characteristics align with eligible employees' ages and likely retirement dates." *Id.* at 2.

In particular, TDFs vary along two primary axes. First, TDFs typically follow one of two distinct investment strategies—"to" retirement or "through" retirement. A TDF that is managed "to" retirement "reduces the TDF's equity exposure over time to its most conservative point at the target date." *Id.* By contrast, a "through"

[2] TDFs are one of only three types of investments that DOL permits to be a "default" for participants who do not affirmatively designate investments for their retirement contributions. 29 C.F.R. § 2550.404c-5(e)(4). Of those three options, TDFs "have become the most popular choice," with upwards of 70% of plan sponsors indicating that they selected TDFs as the default. Noah Zuss, *QDIA Basics*, PlanSponsor (Feb. 23, 2022), https://bit.ly/44PdiUq. The BlackRock TDFs are the Plan's default investment option here. ER-42 ¶ 35.

TDF "reduces equity exposure through the target date so it does not reach its most conservative point until years later." *Id.* at 1. These strategies reflect different approaches to balancing risks: "A 'to' objective is focused on limiting the volatility or the variability of outcomes for the investor up to retirement, while a 'through' objective drives growth for participant balances for several years and then allows them to be converted into income through retirement." Amanda Umpierrez, *Evaluating 'To' vs. 'Through' Glide Paths*, PlanSponsor (Feb. 17, 2021), https://bit.ly/44FnrTw ("Umpierrez, *Evaluating Glide Paths*").

As DOL has explained, the choice between "to" versus "through" reflects different investment strategies and approaches to risk. DOL, *TDF Tips* 1. DOL recognizes that "there are considerable differences among TDFs offered by different providers," and thus fiduciaries should "understand these differences." *Id.* However, DOL does not express any preference for "to" versus "through" TDFs, let alone suggest that one is an imprudent choice. Rather, a choice between "to" versus "through" is a choice between "different philosoph[ies] about how assets should be invested after a participant ceases to earn a paycheck." BlackRock, *Reexamining "To Versus Through" – New Research Into an Old Debate* 3 (May 2014), https://bit.ly/3pMfzRV.

Beyond the design of the glidepath, the underlying asset classes can involve either passive management for index TDFs or active management for actively

managed TDFs. When the underlying funds are actively managed, a "manager actively makes investment decisions" for those funds "in an effort to maximize return." *Smith*, 37 F.4th at 1163. Actively managed funds have the potential to outperform the market, but they come with the concomitant risk of underperformance and typically a higher price point. *See id.* By contrast, passively managed funds consist of underlying funds with "a fixed portfolio structured to match the overall market or a preselected part of it." *Id.* Because passively managed funds are designed to track markets rather than outperform them, investment-management fees are typically lower, as is the risk of underperformance. *See id.*

2. The BlackRock TDFs have consistently been one of the lowest-cost and highest-rated TDF suites on the market.

Even putting aside the specific deficiencies in Plaintiffs' legal theory, *see infra*, Part II, Plaintiffs' decision to target the Plan's selection of the BlackRock TDFs is confounding. The BlackRock TDFs have an exemplary reputation—a reputation that has been reaffirmed year after year since Plaintiffs first filed suit in 2022. To start, Plaintiffs' Third Amended Complaint cites repeatedly to analysis and reports from Morningstar, a well-regarded investment analysis firm. *See, e.g.*, ER-39 ¶ 28; ER-40 ¶ 28 & nn.6, 8; ER-43 ¶ 38 n.10; ER-51 ¶ 47; *see also* ER-20 (granting request by *both parties* to take judicial notice of Morningstar materials). And year after year, Morningstar has awarded the BlackRock TDFs its highest possible "Gold" rating. Megan Pacholok & Karen Zaya, *The Best Target-Date*

Funds for 2022 and Beyond, Morningstar (Mar. 23, 2022), http://bit.ly/45bI65p ("*2022 Morningstar Review*"). In the years following Plaintiffs' decision to file suit, BlackRock TDFs "held on to their coveted Gold ratings," remaining "top options for investors searching for a target-date fund" in 2023, 2024, and 2025. Megan Pacholok & Karen Zaya, *The Best Target-Date Funds for 2023 and Beyond*, Morningstar (Mar. 28, 2023), https://bit.ly/44AcJxQ ("*2023 Morningstar Review*"); *see also* Megan Pacholok, *The Best Target-Date Funds for 2024*, Morningstar (Mar. 26, 2024), http://bit.ly/3J6MxWp ("*2024 Morningstar Review*"); Janet Yang Rohr, *The Best Target-Date Funds: Morningstar's Top-Rated Strategies for Your Retirement*, Morningstar (June 18, 2025), http://bit.ly/45qgI2f ("*2025 Morningstar Review*").

As Morningstar has explained, its high rating for a TDF suite reflects the suite's high potential to "beat its average peer across vintages" and "its costless category index," after adjusting for risk. Jason Kephart & Megan Pacholok, *The Best Target-Date Funds for 2021 and Beyond*, Morningstar (Mar. 18, 2021), http://bit.ly/3JevDoN. As one of only a handful of funds in any given year to earn the "coveted" gold rating, the BlackRock TDF fund "benefits from an exceptional team, robust resources, and a well-calibrated approach." *2023 Morningstar Review*; *see also* Megan Pacholok & Karen Zaya, *Target-Date Strategy Landscape: 2023*, Morningstar, (Mar. 28, 2023), https://bit.ly/3R37UK8 ("*Morningstar 2023*

Landscape Report") at 16. In particular, the BlackRock "best-in class retirement team continues to trailblaze in the target-date industry," including by making changes "to pinpoint the optimal duration and credit risks along the glide path." *2024 Morningstar Review*; *see also 2025 Morningstar Review* (explaining that the BlackRock TDFs "display the hallmarks of first-class target-date options" through their "distinctive and well-researched asset-allocation glide paths" and the "low-cost, efficiently run index-based funds [that] serve as their building blocks").[3]

The market reflects this reputation: Due to its "stable net year-over-year inflows," the BlackRock TDFs have remained among the most popular TDFs on the market. *Morningstar 2023 Landscape Report* at 6. Perhaps most telling is the *new* capital the BlackRock TDFs have attracted in recent years. In 2023, BlackRock amassed over $17 billion in new target-date fund assets, putting it in the top five of the market overall. *Id.* This trend accelerated in 2024, when BlackRock amassed nearly $20 billion in new target-date fund assets—the second highest among available target-date funds. Janet Yang Rohr et al., *2025 Target-Date Fund Landscape*, Morningstar (Apr. 2025), http://bit.ly/4ovfn2W, at 16. In a nutshell, then, Plaintiffs are asking this Court to categorially conclude that it was imprudent

[3] This conclusion is not limited to Morningstar: Investment analysts consistently identify the BlackRock TDFs as a wise investment choice. *See, e.g.*, Nellie S. Huang, *Six of the Best Target-Date Funds to Buy Now for Your Retirement*, Kiplinger Personal Finance (Mar. 31, 2025), http://bit.ly/41uBKvs (identifying BlackRock TDFs as one of six TDFs to invest in for retirement).

for the Plan to continue to invest in one of the most popular funds on the market with a consistently stellar reputation.

II. Hindsight-based attacks like Plaintiffs' are not cognizable under ERISA.

Despite this stellar reputation, Plaintiffs point to the purported underperformance of the BlackRock TDFs to argue that the Plan should have jettisoned this option after just a few years. Plaintiffs' efforts to second guess fiduciary judgment using hindsight-based performance comparisons come nowhere near plausibly alleging a fiduciary breach—in particular because Plaintiffs have entirely failed to allege a meaningful benchmark for conducting that comparison.

A. Using inapt comparators in an attempt to plead by inference is inconsistent with ERISA and the heavy weight of authority.

In light of the discretion afforded to fiduciaries, claims for breach of fiduciary duty focus "on 'a fiduciary's conduct in arriving at an investment decision, not on its results.'" *Anderson*, 137 F.4th at 1021 (citation omitted) (quoting *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*")). "ERISA 'requires prudence, not prescience.'" *Id.* (quoting *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990)). As a result, "the proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transactions." *Harris v. Amgen, Inc.*, 788 F.3d 916, 936 (9th Cir. 2015)

(citation modified), *rev'd and remanded on other grounds by* 577 U.S. 308 (2016). In other words, fiduciaries are judged not for the outcome of their decisions but for the *process* by which those decisions were made.

Although ERISA's fiduciary standards focus entirely on process, ERISA complaints asserting claims for fiduciary breach rarely focus on process. Instead, they ask the Court to *infer* an imprudent process based on circumstantial, outcome-focused allegations comparing the fees or performance outcome of the plan fiduciaries' decision against the fees or performance of a different option available on the market. *Anderson*, 137 F.4th at 1022.[4]

This approach is on shaky footing from the get-go. By using outcomes—whether performance or fees—as a proxy for process, plaintiffs attempt to peg their claims to a metric that courts have been clear has no place in the analysis. If, as the Eighth Circuit has explained, it is "the process" that "ultimately matters, not the results," *Matousek v. MidAm. Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022), plaintiffs should not be able to survive a motion to dismiss by then using results as a stand-in for process.

[4] As Cisco details in its brief, here Plaintiffs in fact had access to information about the Plan's process in light of the discovery it received in the case. Cisco Br. 45-52. These materials reinforce the conclusion that Plaintiffs did not and could not plausibly allege that the Plan Committee lacked a prudent process or failed to comply with the IPS for the reasons described in Cisco's brief.

The assume-breach-based-on-outcomes approach is particularly problematic in the context of performance-based comparisons, as Plaintiffs rely on here. It is easy to cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, just as one could always identify a worse-performing fund. But with dozens of TDFs on the market, it cannot be that a court can infer that fiduciaries were acting imprudently simply because a particular suite was purportedly outperformed by a handful of other suites during a discrete time period. *See, e.g.*, *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448-49 (6th Cir. 2022) ("[A] showing of imprudence cannot come down to simply pointing to a fund with better performance." (quotation marks omitted)).

That is all the more true given the range of investment options available for TDFs. Funds with "different glide paths … also have different risk-return profiles." *Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1180 (11th Cir. 2024), *petition for cert. pending*, No. 22-13643 (filed Dec. 3, 2024). A "more aggressive target date fund" will do better "when the equity market is hot"; a "more conservative" fund will do better "when the market is down." *Id.* In addition, whether a fund uses a "to" or a "through" glide path "can significantly impact relative performance closer to retirement." *Morningstar 2023 Landscape Report* at 29. That does not mean that

one option is better than the other, let alone that one option is outside "the range of reasonable judgments a fiduciary may make based on her experience and expertise" after considering the "difficult tradeoffs" involved. *Hughes*, 595 U.S. at 177; *see supra*, pp. 8-11.

Moreover, it is well-established that chasing performance (*i.e.*, switching investment strategies to pursue the fund performing well at the time) is a misguided investment approach "generally doomed to some kind of failure." Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R. As the Sixth Circuit has recognized, "[p]recipitously selling a well-constructed portfolio in response to disappointing short-term losses, as it happens, is one of the surest ways to frustrate the long-term growth of a retirement plan." *Smith*, 37 F.4th at 1166. Indeed, in addressing the negative ramifications of the recent surge of underperformance cases, Morningstar highlighted its specific concern that plan sponsors will feel pressured to engage in "performance-chasing and swapping out target-date strategies more often than they should." *Morningstar 2023 Landscape Report* at 31.

Switching strategies would have been a particularly poor choice here given BlackRock's extensive focus on research-driven developments. *See supra*, pp. 11-14; *see also Morningstar 2024 Review* (noting that "[a]n innovative group manages the BlackRock LifePath Index target-date series with a research-driven approach,"

leading to BlackRock's "set[ting] the standard" in first making several key changes in asset allocation). Had the Plan changed funds at the first sign of (minor) underperformance, it would have deprived participants of the benefit of BlackRock's ongoing—and highly effective—adjustments to the underlying investments in response to changing market conditions. Cisco Br. 3, 12.

Relying solely on one factor—performance—as a proxy for process ignores fiduciaries' obligation to account for a full range of factors when selecting funds. As DOL has explained, "prudent fiduciaries must consider all relevant factors," including fees, "potential for higher return, lower financial risk, more services offered, or greater management flexibility." U.S. Br. 20, *Hughes v. Nw. Univ.*, No. 19-1401 (U.S. May 21, 2021), https://bit.ly/3Zf8C7I (citation omitted). DOL's guidance thus directs fiduciaries to account for a variety of factors when choosing and monitoring investments, including plan-specific factors "such as participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates, contribution rates and withdrawal patterns." DOL, *TDF Tips* 2.

Indeed, with respect to TDFs in particular, DOL guidance advises fiduciaries engaging in periodic TDF reviews to consider "whether there have been any significant changes in the information fiduciaries considered when the option was selected or last reviewed." DOL, *TDF Tips* 2. For example, "if a TDF's investment strategy or management team changes significantly, or if the fund's manager is not

effectively carrying out the fund's stated investment strategy, then it may be necessary to consider replacing the fund." *Id.* Or "if your plan's objectives in offering a TDF change, you should consider replacing the fund." *Id.* Noticeably absent from this guidance is any suggestion that fiduciaries should focus myopically on performance, much less *short-term* performance, and drop a TDF suite from the Plan lineup based on recent underperformance compared to peers—even if the TDF suite is performing *precisely* as intended based on the suite's fund strategy. To infer a breach of ERISA's process-based fiduciary obligations based on this myopic focus would be just as short sighted.

B. Claims that attempt to plead imprudence from circumstantial, outcome-based facts must allege something more than allegations that are equally consistent with lawful behavior.

When courts do consider whether outcome-based allegations permit a plausible inference of breach, it is critical that they employ a "careful, context-sensitive scrutiny of a complaint's allegations" to "divide the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425. The Supreme Court could not have made this clearer in its recent *Hughes* decision. Prior to *Hughes*, some courts appeared to adopt the position that ERISA claims were exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. *See Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019); *Sacerdote v. New York Univ.*, 9 F.4th 95, 108 n.47 (2d Cir. 2021). *Hughes* squarely rejected this position, holding that

courts must "apply[] the pleading standard discussed in" *Iqbal* and *Twombly*. 595 U.S. at 177. It also cautioned, citing its prior decision in *Dudenhoeffer*, that evaluating ERISA claims "will necessarily be context specific." *Id.* at 742. It emphasized the wide "range of reasonable judgments a fiduciary may make" in a given situation, noting that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Id.* In other words, there may be perfectly justifiable reasons for a fiduciary's decision to offer one investment option over another, even if another option ultimately performs better. And when that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary breach are consistent with entirely lawful fiduciary behavior—the claim is properly dismissed.

Post-*Hughes*, it is clear that *Twombly* and this Court's post-*Twombly* precedents should apply with full force in ERISA cases—as this Court confirmed in *Anderson*, 137 F.4th at 1021. As this Court explained, because prudence is evaluated "prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved, it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results—whether higher returns, lower risks, or reduced costs—by choosing different investments." *Id.* Instead, a plaintiff must provide 'some further factual enhancement' to take the claim across 'the line between possibility and plausibility.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2025)); *see also Chevron*, 752 F. App'x at

454-55 (allegations that do not make "it more plausible than not that any breach of a fiduciary duty ha[s] occurred" are insufficient to make out a claim under ERISA).

C. When Plaintiffs' allegations rely on a comparison to other funds, *Twombly* requires that comparison to be meaningful.

A meaningful-benchmark analysis is a critical part of the traditional *Twombly/Iqbal* framework in ERISA cases where plaintiffs attempt to plead a fiduciary breach based on alleged underperformance. *Anderson*, 137 F.4th at 1023. Plaintiffs' brief resisted this standard, arguing at length that a "meaningful benchmark" analysis is "inappropriate" at the pleading stage, at least where an ERISA plaintiff does not rely *solely* on underperformance allegations to plead her claims. *See, e.g.*, Opening Br. 47-57; *see also id.* at 4 n.4, 4-5, 25-26, 27, 28, 29-30, 40. But the district court simply responded to the way *Plaintiffs attempted to plead their case from the beginning*—by seeking inferences of an imprudent fiduciary *process* from allegations (spanning dozens of pages) that the BlackRock TDFs underperformed a set of "Comparator TDFs." ER-209-234.

In fact, after Plaintiffs filed their opening brief this Court rejected Plaintiffs' precise argument and embraced a "meaningful benchmark" analysis at the pleading stage where, as here, "a plaintiff asks a court to infer that a fiduciary used improper methods based on the performance of the investments." *Anderson*, 137 F.4th at 1023. As the Court explained, "[t]he key to nudging an inference of imprudence from possible to plausible is providing a sound basis for comparison—a meaningful

benchmark—not just alleging that costs are too high, or returns are too low." *Id.* at 1022 (citation modified) (quoting *Matousek*, 51 F.4th at 278). And the Court expressly recognized that this analysis is appropriate if a plaintiff relies on those inferences to support her claims even "in part." *Id.* at 1023.

The "need for a relevant comparator with similar objectives—not just a better-performing plan or investment—is implicit in ERISA's text. "By making the standard of care that of a hypothetical prudent person 'acting *in a like capacity* … in the conduct of an enterprise *of a like character* and *with like aims*,' the statute makes clear that the goals of the plan matter." *Id.* at 1022. DOL regulations recognize the same: a fiduciary satisfies the duty of prudence if she determines that a chosen investment "is reasonable designed, as part of the portfolio …, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain … *compared to* the opportunity for gain … associated with *reasonably available alternatives with similar risks*." 29 C.F.R. § 2550.404a-1(b)(2)(i) (emphasis added); *see also Anderson*, 137 F.4th at 1022. Without a baseline of *like* alternatives investments, ERISA plaintiffs cannot even plead comparative underperformance, much less plausibly allege an inference that plan fiduciaries were asleep at the wheel based solely on the outcome of their investment decisions.

The "meaningful benchmark" analysis therefore is not "foreclose[d]" by *Hughes*, as Plaintiffs suggest (51); instead, it is *critical* to whether plaintiffs have

pushed their allegations over the plausibility line. *See Anderson*, 137 F.4th at 1022. Otherwise, a fiduciary's decision could just as easily (if not more easily) reflect that a plan made a different decision because weighing all the relevant factors led them to a different fund. *See id.* For that reason, the "meaningful benchmark" analysis *must* occur at the pleading stage, rather than, as Plaintiffs suggest (at 56-57), later in the case. Evaluating comparators is not an inappropriately fact-intensive inquiry; rather, courts ask only whether the plaintiffs have themselves *plausibly alleged* that their comparators are in fact comparable, taking into account the relevant context, such as published information about a fund's investment strategy.

This case provides an apt example. There is "no one-size-fits-all approach," but a meaningful benchmark must "hold similar securities, have similar investment strategies, and reflect a similar risk profile." *Matousek*, 51 F.4th at 280-81. Comparing funds with "different aims, different risks, and different potential rewards that cater to different investors" says nothing about whether "one is better or worse than the other," much less whether fiduciaries' process for maintaining the fund was infirm. *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 (8th Cir. 2020); *see also Anderson*, 137 F.4th at 1023, 1025 (quoting *Davis*); *Smith*, 37 F.4th at 1166.

To start, the mere fact that the comparator funds are TDFs cannot satisfy the meaningful-benchmark requirement. TDFs are a diverse category of funds, with

different goals, investment approaches, and underlying funds. *See supra*, pp. 8-11. Recognizing as much, both this Court and the Sixth Circuit have rejected as comparators TDF suites with different investment strategies—even when offered by the same provider. *See Davis v. Salesforce.com*, 2022 WL 1055557, at *1 n.1 (9th Cir. Apr. 8, 2022) (affirming the district court's rejection of plaintiff's comparison between passively and actively managed JPMorgan TDFs); *see also Smith*, 37 F.4th at 1167 (performance differences between active and passive Fidelity TDFs were insufficient to support a claim of imprudence given their "distinct goals and "distinct strategies"). Here, the BlackRock TDFs use a "to" retirement strategy; all four comparators use a "through" retirement strategy. Cisco Br. 33. It is thus entirely unsurprising to see performance differences between them: they perform differently because they *are* different and *are intended* to perform differently. *Supra*, pp. 9-10.

On top of that, the funds underlying the T. Rowe Price and American Funds TDFs are actively managed funds, which courts have repeatedly recognized "cannot be meaningfully compared" to passively managed funds. *See Smith*, 37 F.4th at 1167; *see also Davis*, 2022 WL 1055557, at *1 n.1. Lower-cost passive funds try to "avoid the risk of active management underperformance and style drift," while higher-cost active funds "provide more diversified asset class exposure while offering the potential for excess returns." ER-40 at ¶ 29; *see also supra*, pp. 10-11. Plaintiffs maintain (at 11) that the Committee here "failed to appreciate the crucial

distinction between a true passive investment and TDFs that involve active decisions." But while Plaintiffs are correct that the design of the *glidepath* involves active decisions, the funds that managers select to implement that glidepath can be passive, active, or a mix. And here, the BlackRock TDFs—unlike the T. Rowe Price and American Funds TDFs—are composed entirely of passive funds. Cisco Br. 32. Again, it is not at all surprising that TDFs investing in funds that are managed entirely differently will then perform differently.

Without the "through" comparators, Plaintiffs have *no* comparator benchmark funds. And without the actively managed funds, Plaintiffs' allegations boil down to an assertion that, during some brief periods of time, the BlackRock TDFs did not perform as well as *two* passively managed "*through* retirement" TDFs. But "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty." *Smith*, 37 F.4th at 1166. Notably, Plaintiffs *could* have compared the BlackRock to their own custom benchmark, as the Plan's IPS required. Cisco Br. 7. Having chosen not to do so, Plaintiffs cannot allege that the BlackRock TDFs underperformed in light of their own particular investment strategy. *See Anderson*, 137 F.4th at 1023 (noting that the plaintiff's "putative

comparators were not truly comparable" where he avoided Intel's "customized benchmarks" in favor of "funds that pursued different objectives").

III. Allowing hindsight-based disagreement with discretionary fiduciary decisions would undermine ERISA's focus on flexibility and discretion.

The plausibility pleading rule is necessary to ensure that ERISA fiduciaries are not targeted for class-action litigation whenever they fail to follow a particular plaintiff's preferred investment approach. As this case demonstrates, employers can—and will—be sued, no matter how they exercise their discretionary responsibilities. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[5] for failing to divest from stocks with declining share prices or high risk profiles,[6] and for failing to *hold onto* such stock because high risk can produce high reward;[7] for making

[5] *Compare* First Am. Compl. ¶¶ 68-71, in *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-01753-MMC (N.D. Cal. Oct. 23, 2020), ECF No. 38, *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass. Jan. 12, 2018), ECF No. 35.

[6] *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (plaintiffs alleged that defendants failed "to divest the plans of all RadioShack stock … despite the fact that they knew the stock price was inflated").

[7] *E.g.*, *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).

available investment options that plaintiffs' lawyers deem too risky,[8] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[9]

This same phenomenon plays out with respect to fund performance, as this case reveals. In a separate underperformance case pending before this Court, Plaintiffs' counsel in fact selected the BlackRock LifePath TDF suite as one of the "peer TDFs" that Plaintiffs alleged would have been a more appropriate plan option. *See* Opening Br. at 13-14, *Wehner v. Genentech, Inc.*, Case No. 24-2630 (9th Cir. July 16, 2024), ECF No. 8. That is not an anomaly: General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 3:17-cv-1960-CAB-BLM (S.D. Cal. Sept. 26, 2017), ECF No. 1. But a different case held up *that exact fund* as a "superior performing alternative[]." Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 1:20-cv-12216-LTS (D. Mass. Dec. 14, 2020), ECF No. 1.

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[8] *See, e.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *PBGC*, 712 F.3d at 711.

[9] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-60 (8th Cir. 1999) (assuming without deciding that "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached the duty of prudence by investing portions of the plan's stable value fund in conservative money market funds and cash management accounts).

This dynamic—with new and often contradictory circumstantial theories of imprudence popping up every year—has placed fiduciaries "between a rock and a hard place," *Fifth Third*, 573 U.S. at 424, or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). The pressure created by these suits also undermines ERISA's central focus on innovation, diversification, and employee choice. *See supra*, pp. 5-7. The more that specious complaints survive dismissal, the more a fiduciary might feel that she has no choice but to shy away from any form of innovative thinking about what option makes the most sense for the participants in a particular plan. And as this case demonstrates, even *not being* particularly innovative—offering one of the highest-rated, most-popular TDF suites on the market—will not allow a plan fiduciary to avoid a lawsuit.

Finally, these second-guessing lawsuits impose enormous costs on plan sponsors. As the Supreme Court recognized in *Twombly*, enforcing the plausibility pleading rule is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719. While discovery is sometimes appropriate—in cases that are plausibly pled without hindsight bias or speculation—the price of discovery (financial and otherwise) "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply

take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *PBGC*, 712 F.3d at 719 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). And with those increases in costs come a decreased likelihood that large employers will continue offering generous voluntary retirement benefits (such as generous employer contributions or paying for retirement-plan services that employees prefer), and that small employers will feel comfortable taking the risk of exposure to litigation created by the simple act of voluntarily sponsoring a retirement plan for employees.

Neither ERISA nor the pleading standards articulated by the Supreme Court support such a result, and this Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it. *Hughes* requires that courts apply *Twombly*'s "plausibility" standard to ERISA cases—precisely what the district court did here. 595 U.S. at 177.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,975 words, excluding the parts exempted by Rule 32(f).

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