Exhibit A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALEXANDRO GONZALEZ, on behalf of himself and all others similarly situated, *Plaintiff,* v. JPMORGAN CHASE BANK, N.A., *et al.*, *Defendants*.	Case No. 2:25-cv-01889-WJM-JRA

[PROPOSED] BRIEF OF THE STABLE VALUE INVESTMENT ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DISMISSAL

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INTEREST OF *AMICI CURIAE*[1]

The Stable Value Investment Association ("SVIA") is dedicated to educating employers, employees, government officials, and the public about the importance of saving for retirement and the contribution stable-value ("SV") investment products can make toward financial security. SVIA's membership represents all segments of the stable-value investment community, including public and private plan sponsors, insurance companies, banks, investment managers, and consultants. SVIA members collectively manage more than $800 billion in SV products offered in more than 244,000 defined contribution plans. SVIA's research and data give it the perspective to advocate for a sound framework for evaluating claims concerning the inclusion of SV investments as part of a diversified 401(k) plan line-up.

The Chamber of Commerce of the United States of America (the "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.

The Chamber and SVIA submit this brief to provide crucial context about retirement-plan management, the wealth and diversity of SV options for retirement-

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

plan lineups, and how this case is situated in the broader litigation landscape challenging ERISA fiduciaries' investment decisions.

INTRODUCTION

This case is part of an ongoing surge in putative class actions challenging the management of employer-sponsored retirement plans. This explosion in litigation is not "a warning that retirees' savings are in jeopardy." Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://tinyurl.com/469xhac8 ("*Excessive Fee Litigation*"). To the contrary, "in nearly every case, the asset size of many of these plans being sued has increased—often by billions of dollars"—over the last decade. *Id*. Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management and investment strategies, and ignore critical context regarding investment management and defined-contribution-plan administration to create an illusion of mismanagement and imprudence.

The complaints typically follow a familiar playbook, often loaded with inferences unsupported by the plaintiffs' conclusory factual allegations. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the investment options made available to retirement plan participants by focusing on one or two factors about investment products or services out of the myriad factors plan fiduciaries are required to consider—typically fees or performance. And then,

offering a few cherry-picked comparators and a cherry-picked window of time, the plaintiffs allege that plan fiduciaries *must* have had a flawed decision-making process because they did not choose one of the plaintiffs' preferred alternatives.

This case—one of a spate of recent lawsuits targeting plan fiduciaries' decisions concerning SV investments[2]—is no different. SV investments intentionally focus on asset *preservation*, not aggressive growth. They offer bond-like returns together with principal preservation and liquidity for participants and can be an extremely useful component of a balanced and diversified portfolio, particularly for participants in or near retirement. About 75% of plans feature SV investments, and these products vary considerably across key characteristics, including rates of return, fee structure, issuer diversification, asset transparency and ownership, and exit provisions—all of which make a particular SV investment more or less attractive depending on the circumstances and needs of a plan and its participants. Ignoring this context, the Complaint provides almost *no* description of the JPMorgan Stable Value Fund ("SVF") it calls imprudent, and what it does say is

[2] *See also* Compl., *Carter v. Sentara Healthcare Fiduciary Comm.*, No. 25-cv-00016, (E.D. Va. Jan. 8, 2025), ECF No. 1; Compl., *Jacobs v. Hackensack Meridian Health, Inc.*, No. 25-cv-01272 (D.N.J. Feb. 14, 2025), ECF No. 1; Compl., *Clinton v. Baxter Int'l Inc.*, No. 25-cv-03368 (N.D. Ill. Mar. 28, 2025), ECF No. 1; Compl., *Tedford v. Equitable Fin. Life Ins. Co.*, No. 25-cv-02180 (D.N.J. Mar. 31, 2025), ECF No. 1; Compl., *Plummer v. Bob Evans Rests., LLC*, No. 25-cv-00506 (S.D. Ohio May 8, 2025), ECF No. 1; Compl., *Reven v. Cigna Grp. 401(k) Plan Ret. Plan Comm.*, No. 25-cv-02465 (E.D. Pa. May 14, 2025), ECF No. 1.

incoherent and contradictory. Moreover, it focuses entirely on *one* feature of the JPMorgan SVF—its "crediting rate" or rate of return—over a snapshot timeframe (much of which overlaps with particularly volatile market periods, including a uniquely high-interest-rate environment and the COVID pandemic), and it juxtaposes the JPMorgan SVF's crediting rate with those of a few other SV investments in the same period without regard to those funds' other characteristics.

That approach cannot be sufficient to plead a plausible fiduciary-breach claim. Congress designed ERISA to give fiduciaries flexibility to weigh *all* the relevant circumstances in choosing a plan lineup. Accordingly, the Supreme Court recognizes that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," and so 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). Evaluation of an investment decision is thus "largely a process-based inquiry," *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022), and the "focus[] [is] on a fiduciary's *conduct* in arriving at an investment decision, not on its *results*," *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*PBGC*") (emphasis added; citation omitted).

Under this standard, the Complaint's acontextual, hindsight-driven, and exclusive focus on the crediting rate over a cherry-picked window of time is

especially inappropriate, given that SV investments are meant to prioritize stability and asset preservation together with positive, low-volatility returns over a long-term investment horizon, not short-term growth at all cost. Whether a plan should offer an SV investment that has a slightly lower crediting rate over another SV investment with materially distinct features is precisely one of the "difficult tradeoffs" fiduciaries are meant to weigh in their discretion. *Hughes*, 595 U.S. at 177.

Rigorously policing meritless allegations like these at the pleading stage matters. The ongoing tidal wave of litigation has left fiduciaries exposed to potential liability for virtually any choice they make, frustrating the flexibility and discretion ERISA is supposed to promote, and driving up insurance rates, litigation costs, and administrative burdens to the point where employers (particularly smaller, less-resourced ones) may be discouraged from offering plans at all.

ARGUMENT

I. Hindsight-based attacks on fiduciary decision-making are at odds with ERISA's process-based approach.

A. ERISA encourages the creation of benefit plans by affording flexibility and discretion to 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) (emphasis added). 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. Congress

knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering [ERISA] plans in the first place." *Id.* at 517 (citation omitted).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions, often during considerable market uncertainty, and accommodate "competing considerations." H.R. Rep. No. 96-869(I), at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. It designed a 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). Congress viewed this flexibility as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 21 (1972).

Given the need for flexibility regarding the breadth of fiduciary decisions that must be made, especially in the face of market uncertainty, 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); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). Neither Congress nor the Department of Labor ("DOL") provides a list of required or forbidden investment options, investment strategies, service

providers, or compensation structures. And when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). 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). Instead, it has focused on diversification and participant choice.

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). Discretion is critical to the entire ERISA framework, particularly because there virtually never is a single "right" answer to the questions fiduciaries must answer. There are thousands of reasonable investment options with different investment styles and risk levels. For example, and particularly relevant here, recent statistics show that over 244,000 plans (about 75% of all plans) offered SV investments, into which employees have invested over $800 billion in retirement savings.[3]

Given the vast array of options and the need to tailor solutions to participants and their diverse interests, plan fiduciaries are best positioned to weigh the pros and cons of various choices—often with assistance from investment professionals. If a

[3] SVIA, *What Is Stable Value?* (June 9, 2025), https://tinyurl.com/y3jtu7wb; SVIA, *Stable Value at a Glance* (Apr. 10, 2025), https://tinyurl.com/2693p6xc.

fiduciary is subjected to constant litigation and Monday-morning quarterbacking over his decisions—with the benefit of hindsight and not based on "the circumstances as they reasonably appear[ed] to him at the time when he does the act," *Smith*, 37 F.4th at 1164 (quoting Restatement (Second) of Trusts § 174 cmt. b (1959))—that would eviscerate the discretion at the core of the statutory framework.

B. ERISA does not police investment *outcomes*, but instead simply requires a prudent fiduciary *process*.

Because Congress has afforded fiduciaries significant discretion, "courts look to '*process* rather than *results*'" when evaluating an imprudent-fiduciary claim "and inquire 'whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.'" *Cho v. Prudential Ins. Co. of Am.*, 2021 WL 4438186, at *7 (D.N.J. Sept. 27, 2021) (emphasis added) (citation omitted). This "context-sensitive" analysis therefore focuses on "the circumstances ... prevailing *at the time the fiduciary acts*." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (emphasis added) (quotation marks omitted).

Given this focus on process, the most natural way to "plead a breach of the duty of prudence" is to "allege[] facts that would directly show that the fiduciaries employed unsound methods in making their investment decisions." *Anderson v. Intel Corp. Inv. Pol'y Comm.*, --- F. 4th ---, 2025 WL 1463295, at *4 (9th Cir. May 22, 2025) ("*Intel*") (collecting examples). To be sure, it is not automatically "fatal" when a complaint "contains no factual allegations referring *directly* to [the

fiduciary's] knowledge, methods, or investigations at the relevant times." *PBGC*, 712 F.3d at 718. Sometimes "a plaintiff can make circumstantial factual allegations from which the court may reasonably infer from what is alleged that the process was flawed." *Intel*, 2025 WL 1463295, at *4 (quotation marks omitted). But "[w]hen an ERISA plaintiff attempts to do so by relying on a theory that a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund," then at a bare minimum "that plaintiff must provide a sound basis for comparison." *Id.* (quotation marks omitted).

Reciting what makes for a viable claim clarifies what does not. For one thing, "plaintiffs cannot rely, after the fact, on" disappointing plan performance, shorn of context. *PBGC*, 712 F.3d at 718 (quotation marks omitted). "Not only is hindsight 20/20, but it also does not meet the plausibility requirement." *Cho*, 2021 WL 4438186, at *8. "Nor is it necessarily sufficient to show that better investment opportunities were available at the time of the relevant decisions." *PBGC*, 712 F.3d at 718. Likewise, a "[p]laintiff does not adequately plead a claim merely by alleging that cheaper alternative investments exist in the marketplace." *Cho*, 2021 WL 4438186, at *9 (quotation marks omitted). Again, if "a plaintiff asks a court to infer that a fiduciary used improper methods based on the performance of the investments[] ... he must compare that performance to funds or investments that are meaningfully similar." *Intel*, 2025 WL 1463295, at *5.

Courts have applied this standard across a variety of ERISA cases. For example, courts have made short work of allegations that focus on a single metric, like a fund's performance, without any contextual analysis for why the fund might reasonably have been included among a plan's offerings.[4] Courts have also consistently held that inapt comparisons among materially different products cannot support a plausible claim of imprudence,[5] even when the comparators can be lumped into the same broad category and are offered by the same provider.[6]

The upshot of these cases is clear. To state a plausible imprudent-fiduciary claim, ERISA plaintiff must either plead *direct* factual allegations of an imprudent

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[4] *E.g.*, *Anderson v. Advance Publ'ns, Inc.*, 2023 WL 3976411, at *3 (S.D.N.Y. June 13, 2023) (collecting cases); *Smith*, 37 F.4th at 1166 (rejecting notion that "a showing of imprudence [could] come down to simply pointing to a fund with better performance").

[5] *E.g.*, *Intel*, 2025 WL 1463295, at *5 ("putative comparators were not truly comparable because they had different aims, different risks, and different potential rewards" (quotation marks omitted)); *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 (8th Cir. 2020) (allegations about the performance of funds with "different aims, different risks, and different potential rewards that cater to different investors" say nothing about whether "one is better or worse than the other"); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [challenged funds] were an imprudent choice at the outset.").

[6] *E.g.*, *Davis v. Salesforce.com, Inc.*, 2022 WL 1055557, at *2 n.1 (9th Cir. Apr. 8, 2022) (affirming district court's rejection of plaintiff's comparison between passively and actively managed JPMorgan target-date funds or "TDFs"); *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"); *Meiners*, 898 F.3d at 823 (plaintiff improperly compared Wells Fargo TDFs to Vanguard TDFs "with a different investment strategy").

process, or else must have *strong circumstantial pleadings* that the fiduciary's investment choices were poor when measured against an array of meaningfully similar comparators. Hindsight-based allegations that ignore the circumstances and considerations around a particular fiduciary choice are insufficient.

II. Attacking the use of a particular SV product in a vacuum based on hindsight differences in crediting rates is insufficient to state a claim.

A. As the case law repeatedly stresses, courts must consider context when determining whether imprudent-fiduciary allegations pass muster under Rule 12(b)(6). *Dudenhoeffer*, 573 U.S. at 425; *Hughes*, 595 U.S. at 177. And situating the Complaint's allegations in the larger context of SV investments leads to a clear conclusion: the Complaint's allegations fall far short of the plausibility standard.

SV investments are "unique investment product[s]" that "provide bond-like returns" while preserving principal, and thus "provide[] to investors an attractive risk/return profile."[7] They are also quite popular: as of 2024, "approximately 3 out of 4" defined-contribution plans offer some stable-value investment.[8] "Millions of plan participants" choose to invest in SV investments "to achieve their desired risk tolerance" in growing their retirement savings,[9] and they have invested well over

[7] SVIA, *Who Invests in Stable Value and Why?* (July 7, 2021), https://tinyurl.com/55yy9zxa; SVIA, *Stable Value at a Glance* (Dec. 31, 2024), https://tinyurl.com/yyt37f94 ("*Stable Value at a Glance 2024*").
[8] *Stable Value at a Glance 2024*.
[9] SVIA, *Stable Value Market Segments* (Dec. 31, 2022), https://tinyurl.com/5xj79ksu.

$800 billion in SV investments offered in more than 244,000 plans, *see* p. 7, *supra*.

Because SV investments "provide an attractive principal preservation investment, insulating plan participants from day-to-day market volatility while providing them with relatively steady returns," they are "ideally suited for plan participants seeking to protect their retirement savings and provide a source of income during retirement." *Who Invests in Stable Value and Why?* Unsurprisingly, then, "data shows that stable value investors are predominantly represented by older plan participants, as those 60 years and older own approximately half of stable value assets and those who are 50 years and older own approximately 85% of stable value assets." *Id*. Yet there are also "plan participants seeking to be more aggressive with their retirement investing" who invest in SV products as part of their overall retirement portfolio "since stable value has a low correlation to more volatile, higher returning investments like equities." *Id*. So "younger investors are also discovering stable value's benefits and critical role in their retirement portfolios." *Id*.

But SV products are not all the same—instead, they are as diverse as the employees who invest in them. Roughly speaking, SV products fall into three large buckets—(1) individually managed accounts, (2) pooled SV investments, and (3) insurance-company general and separate accounts—although there are many nuances and subdivisions within these broad categories. *See Stable Value Market Segments*. The first two categories are often referred to as "synthetic" SV products.

Each of these categories has a distinctive structure that may cause them to be better suited for a particular plan and its participants. Individually managed accounts are "[t]ypically offered by an investment manager and managed for a specific plan's participants." *Stable Value Market Segments*. These accounts allow for significant customization but tend only to be available for plans with substantial assets. Pooled SV investments, in turn, are "[t]ypically offered by an investment manager and combine[] the assets of unaffiliated plans into one fund." *Id*. These funds are generally used by plans that do not meet the minimum size for an individually managed account or do not require plan-specific customization. Finally, as their name suggests, insurance-company SV investments are usually "[o]ffered and guaranteed by a single insurance company," and are either "backed by [the insurance company's] general account" (general-account SV products) or are offered and guaranteed "from a separate account" (separate-account SV products). *Id*.

Even *within* each category, the options vary widely with respect to key characteristics. Start with the different kinds of "crediting rates" these different categories of SV products tend to provide investors. For some SV investments, like general-account products, the crediting rates are "[d]eclared in advance" and "guaranteed regardless of the performance of the underlying assets." *Stable Value Market Segments*. By contrast, individually managed accounts and pooled investments offer crediting rates that are determined by a formula and vary

incrementally (for example, month by month) "[b]ased on the actual performance of the underlying assets." *Id*. Hence the *timing* of when an investment is made into an SV product is critical as well, as it can determine (perhaps permanently) the specific returns obtained.

Fee structures vary, too: individually managed accounts and pooled funds tend to use set, "disclosed" fees, whereas general-account products (and some separate-account products) use a "[s]pread," under which "compensation is the difference between actual investment earnings and [the] declared rate[]" for the fund, a figure that often "is not required to be disclosed." *Stable Value Market Segments*. For these types of SV products, the issuing insurance company bears all investment risk for offering the promised returns regardless of market conditions. As a result, the insurer retains any surplus return above the crediting rate as compensation and absorbs any losses if actual investment performance falls short. Different SV investments have different exit provisions as well—some (like many individually managed accounts) can provide for "[t]ermination at market value at any time" (which could result in a loss of principal) or termination at contract value over a period of 12 to 24 months; others (like many general- and separate-account products) "require structured payout over multiple years" in order to receive a total plan withdrawal at book value, enabling the issuer to invest in longer-term underlying investments, which can make higher crediting rates possible than if plan sponsors

could exit the fund at will. *Id*. These types of termination provisions limit a plan's flexibility to shift from one SV product to another while preserving principal.

This variation means that the choice of a particular SV product depends on context and investor-specific considerations, as each variation is an intentional trade-off made for specific strategic reasons. If a strictly guaranteed rate of return seems more suitable for a plan and its participants, a general-account product might be attractive. If maximum liquidity is a greater virtue depending on the characteristics of the plan and the experienced judgment of fiduciaries, an individually managed account might rank higher on the list. If maximum transparency into assets and fee structures is a higher priority, fiduciaries might go with an individually managed or pooled fund. Of course, as already discussed, fiduciaries must balance *all* these considerations (and more) to determine what blend of return level, compensation structure, asset transparency, and liquidity makes sense for their plan, and then must consider how any particular SV option balances with the rest of the plan's investment menu. And that does not even take into account the characteristics (including reputation and history) of a particular insurer or financial-services company making available the SV investment.

Despite these variations, all SV products are designed to provide a safe place for retirement savings and competitive rates of return over an investment cycle.

B. As even this high-level introduction to SV products makes clear, the

acontextual, broad-brush allegations in the Complaint are wholly insufficient to establish that the JPMorgan SVF was imprudently chosen by the plan's fiduciaries.

Plaintiff concedes he cannot allege any facts that *directly* support the fiduciary-breach claims—he avers that he has no knowledge of the Defendants' decision-making process at all. Compl. ¶ 75. So, his only hope is to plead strong "circumstantial factual allegations from which the court may reasonably infer from what is alleged that the process was flawed." *Intel*, 2025 WL 1463295, at *4 (quotation marks omitted). For multiple reasons, he has failed to do so.

To start with, Plaintiff's description of the JPMorgan SVF is cursory and incoherent. The Complaint refers to the JPMorgan SVF as a "'synthetic' stable value fund[]," Compl. ¶ 83, without offering further significant detail—even though, as already explained, "synthetic" SV investments consist of at least two large, distinct categories (individually managed accounts and pooled funds), each with their own characteristics (and many additional sub-categories within them), *see* pp. 12-15, *supra*. The Complaint (¶ 86) further muddles the issues by complaining about the "spread" compensation given to the insurance companies holding the JPMorgan SVF's assets—an assertion that, given the Complaint's allegation that the JPMorgan SVF is a "synthetic," does not make sense, since for synthetic SV products, the *plans* themselves, not the insurance companies, hold the assets, and compensation is structured through fixed and fully disclosed *fees*, not *spread*, *see* p. 14, *supra*.

Given these cursory and contradictory allegations, it is essentially impossible to determine whether Plaintiff has compared the JPMorgan SVF's crediting rates to those of "meaningfully similar" SV investments. *Intel*, 2025 WL 1463295, at *5. Indeed, Plaintiff just lists a handful of SV investments, baldly alleges they are "identical or substantially identical" to the JPMorgan SVF, and points out in a chart that these other funds had slightly higher crediting rates during a four-year timeframe. Compl. ¶¶ 88-89. That is not enough: "simply labeling funds as 'comparable' or 'a peer' is insufficient to establish that those funds are meaningful benchmarks against which to compare the performance of" the JPMorgan SVF. *Intel*, 2025 WL 1463295, at *5 (citation omitted); *see also* pp. 9-10, *supra*. Plaintiff has not even tried to allege that these comparators are synthetic products, much less show that the various specific material characteristics of these other SV investments (*e.g.*, product structure, timing, asset transparency and ownership, liquidity, and credit risk) are at all comparable.

Moreover, *all* the Complaint examines is return by comparing crediting rates during a cherry-picked window of time. Compl. ¶¶ 89-90. But regardless what kind of investment product is at issue, "a showing of imprudence cannot come down to simply pointing to a fund with a better performance" or return rate over some slice of time. *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448-449 (6th Cir. 2022) (quotation marks omitted); pp. 9-10, *supra*. And that principle should have special force here.

After all, if one thing unites SV investments, it is their dependability as asset-*preservation* products. *See* pp. 11-15, *supra*. That cardinal feature surely deserves significant weight when evaluating a fiduciary's choice of SV product; market-beating returns are not the goal. As discussed, the statutory and regulatory framework encourages fiduciaries to examine *all* features of potential investment choices, not just raw performance, and DOL provides a safe harbor if certain plans offer "a broad range of investment alternatives," including "at least three" with "materially different risk and return characteristics," each of which when combined with investments in the other alternatives "tend to minimize through diversification the overall risk of a participant's portfolio," 29 C.F.R. § 2550.404c-1(b)(2)-(3)—including options that, like SV investments, prioritize asset preservation over maximizing returns. As courts have recognized, an acontextual, time-limited focus on performance or return rate is almost always guaranteed to fail the plausibility standard, but it is *especially* problematic in the context of a challenge to the choice of an SV investment.[10] This Court should reaffirm that principle here.

[10] *Accord Barchock v. CVS Health Corp.*, 886 F.3d 43, 49-53 (1st Cir. 2018) (affirming dismissal of SV claim based on crediting rate and emphasizing that "conservativism in the management of a stable value fund—when consistent with the fund's objectives disclosed to the plan participants—is no vice"); *Lalonde v. Mass Mut. Ins. Co.*, 728 F. Supp. 3d 141, 156-57 (D. Mass. Mar. 29, 2024) (dismissing SV claim because "simply selecting two alleged comparator funds with higher credit return rates over a seven-year period is the type of hindsight-based allegation which is insufficient to support a plausible inference of breach").

III. Lawsuits like this one will harm plan participants and beneficiaries.

The surge of meritless ERISA lawsuits like this has real consequences: it puts fiduciaries in a bind and makes offering plans prohibitively costly and risky. That is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright*, 559 U.S. at 517.

By focusing myopically on one factor and ignoring context, ERISA plaintiffs can manufacture claims based on virtually every possible fiduciary choice. And one complaint's supposedly imprudent choice is often another's prudent exemplar. For example, in 2017, plaintiffs sued General Electric for offering the GE RSP U.S. Equity Fund in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 17-cv-01960 (S.D. Cal. Sept. 26, 2017), ECF No. 1. In another case, plaintiffs held up *that very fund* as a "superior performing alternative[]." *See* Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 20-cv-12216 (D. Mass. Dec. 14, 2020), ECF No. 1. Fiduciaries have even had to defend against "diametrically opposed" claims, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[11]

The same Scylla-and-Charybdis danger pervades SV cases: some plaintiffs, as here, have claimed that fiduciaries have been too *cautious* with their SV

[11] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

investments,[12] while others allege exactly the opposite.[13] The only certainty fiduciaries are left with is that they will be sued no matter what they decide.

The ongoing wave of ERISA litigation has also "wreaked havoc on the market for fiduciary liability insurance." Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://tinyurl.com/46wk8zuv. Because ERISA litigation has become so common, fiduciary-liability insurers have been forced "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4. If they are forced to absorb the cost of higher insurance premiums and higher deductibles, many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrator fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And while large employers may have some capacity to absorb some of these costs, for smaller employers who "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Id*. Put simply, suits like

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[12] *E.g.*, *Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 9 (1st Cir. 2018) (alleging SV investment was managed too conservatively compared to others); *Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006) (similar); Compl., *Barchock v. CVS Health Corp.*, No. 16-cv-00061, (D.R.I. Feb. 11, 2016), ECF No. 1 (similar).

[13] *E.g.*, Third Am. Compl. ¶ 7, *Whitley v. J.P. Morgan Chase & Co.*, 12-cv-02548 (S.D.N.Y. Dec. 16, 2014), ECF No. 182 (alleging "inherently risky" SV product).

this one impose prohibitive costs on plan sponsors—and, by extension, plan participants and beneficiaries—with no offsetting benefits.

CONCLUSION

The Court should dismiss the Complaint.

Dated: June 9, 2025

Respectfully submitted,

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