No. 26-1391

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REID GRITSAVAGE, as the Representative of a Class of Similarly Situated Persons, and on Behalf of the Auto-Owners Insurance Company Retirement Savings Plan,

Plaintiff-Appellant,

v.

AUTO-OWNERS INSURANCE COMPANY; ADMINISTRATIVE COMMITTEE OF THE AUTO-OWNERS INSURANCE COMPANY RETIREMENT SAVINGS PLAN,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids, No. 25-cv-973 (Jarbou, J.)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Jordan F. Bock
Drew DiMaiti
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Jaime A. Santos
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., N.W.
Suite 600 South
Washington, DC 20004
(202) 416-6818

Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036

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Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

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The Chamber of Commerce of the United States of America (Chamber) is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. *See, e.g.*, *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Donelson v. Meijer, Inc.*, No. 26-1098, ECF No. 20 (6th Cir.).

SUMMARY OF ARGUMENT

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements by challenging the management of employer-sponsored retirement plans. But unlike the typical ERISA class action that challenges the prudence of a plan's investment lineup or recordkeeping fees, Plaintiff here does not allege that any investment option in the Auto-Owners Plan was imprudent. Instead, Plaintiff contends that Defendants failed to act prudently

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than amicus curiae, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

because they did not unilaterally reallocate participants' individual account balances when participants had chosen not to do so themselves. That unprecedented theory has no support in ERISA's text or any decision from any court, and this Court should reject it.

ERISA prioritizes flexibility for employers and employees alike. For defined-contribution plans in particular, Congress created a system by which employers select a menu of prudent options, and employees have discretion to choose among those options. On the employer side, plan sponsors and fiduciaries have wide latitude in structuring a plan and making decisions about what investments should be included in the plan lineup. ERISA therefore directs courts to evaluate fiduciary conduct based on what a prudent fiduciary would have done under like circumstances at the time of the decision, not with the benefit of hindsight. Applying this process- and context-based standard, courts recognize 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*, 595 U.S. at 177.

Where a fiduciary has fulfilled its obligation to provide a menu of prudent options, it is then up to the participant to choose among those options. *Id.* at 176-177. That approach makes sense. Participants make decisions on any number of dimensions—among them, their own risk tolerance, investment goals, and broader financial security. Individual participants are in the best position to select an investment allocation based on their particular circumstances, rather than being required to follow an investment allocation selected by the plan fiduciaries. While plans necessarily have default investments in place, the participant retains ultimate control over her investments.

Here, Defendants fulfilled their duty under ERISA by offering an entirely conventional investment lineup with a suite of low-cost index funds, a suite of target-date funds, and a stable value investment. Each option serves a distinct function and caters to participants with different investment goals, time horizons, and risk tolerances. Stable value funds in particular are well-suited for participants seeking to preserve capital and avoid market volatility—including participants approaching retirement or managing concentrated risk elsewhere in their portfolio—as well as participants who prefer steady, predictable returns.

Plaintiff's complaint sidesteps any challenge to the Plan's actual lineup and instead targets the percentage of total plan assets held in a particular investment—the Auto-Owners Stable Value Fund (the "Stable Value Fund"). But Plaintiff never alleges that *his own account* was inappropriately allocated, that any individual participant held more stable value exposure than was prudent, or that any portion of the aggregate allocation reflected anything other than participants' own choices. Indeed, the complaint is silent as to how much of the Plan's stable value balance traces back to when the Stable Value Fund was the Plan's default option or to participants' affirmative decisions to invest in the Stable Value Fund.

At bottom, Plaintiff faults Auto-Owners for not independently reallocating participants' assets when participants themselves chose not to do so. But a hallmark of defined-contribution plans is that "*plan participants* retain the right to choose which fund is appropriate for them" based on their own investment preferences and risk tolerance. *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022) (emphasis added). The notion that fiduciaries should disregard participant directives and make paternalistic, independent decisions about how *they think* participants should be investing is unsupported—and, indeed, alarming. Plaintiff's theory would steamroll participant choice, requiring plan fiduciaries to make allocation decisions that run counter to participants' own actions.

This theory would also place fiduciaries in a Catch-22. In the past, employers who have required asset reallocations have faced lawsuits from participants who allege that they suffered financial losses due to those reallocation decisions. *See, e.g.*, *Bidwell v. Univ. Med. Ctr.*, 685 F.3d 613 (6th Cir. 2012); *Camera v. Dell Inc.*, 2014 WL 960897 (W.D. Tex. Feb. 26, 2014). Plaintiff's theory would put a target on plan fiduciaries' backs for *failing to do* what other fiduciaries have been sued *for doing*. In other words, crediting Plaintiff's novel theory would intensify the very damned-if-you-do, damned-if-you-don't dynamic that makes it impossible for fiduciaries to do their jobs. This bind already creates significant barriers to recruiting qualified plan fiduciaries, drives up the cost of fiduciary liability insurance, and pressures plan fiduciaries to *limit* the choices available to participants. And it does nothing to protect participants. This Court should reject Plaintiff's unprecedented and paternalistic theory of fiduciary breach.

ARGUMENT

I. ERISA's process-based approach 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 516-517. Congress knew that if it adopted a system that was too "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). ERISA therefore "represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) (citation and quotation marks omitted).

In crafting ERISA, Congress recognized 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. That is particularly true for fiduciaries of defined-contribution plans, which are specifically designed to allow *participants* to be in the investing driver's seat—to decide (based on their own individual goals, preferences, and investment portfolio as a whole) how *they* want to allocate their tax-deferred retirement account. Among other considerations, fiduciaries must account for present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* They have to balance, for example, participants' desire to maximize returns when the market is strong with a desire to minimize losses in a down market. Congress therefore designed a statute that affords plan sponsors and fiduciaries "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 Lab., 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).

The decisions fiduciaries must make in managing a defined-contribution plan run the gamut, including everything from the general investment policies and purpose of the plan, to the appropriate number and type of investment options to offer, to the selection of *particular* investment options within the chosen categories, including default options (if any) for participants who have not decided how to allocate their individual investment accounts. There are thousands of reasonable investment options with different investment styles and risk levels—and nearly innumerable ways to put together a plan that enables employees to save for retirement based on their own individual situations.

ERISA does not dictate a single "right" answer for any of these decisions. To the contrary, each decision involves "difficult tradeoff[]," *Hughes*, 595 U.S. at 177, especially in the face of market turmoil. That is why the Supreme Court has admonished courts evaluating claims of fiduciary breach to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* As DOL has explained, "subjecting a fiduciary to constant Monday morning quarterbacking over its decisions, with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework." Fiduciary Duties in Selecting Designated Investment Alternatives ("*DIA Proposed Rule*"), 91 Fed. Reg. 16088, 16092 (Mar. 31, 2026). It is also why the duty of prudence is "a process-based inquiry," *Smith*, 37 F.4th at 1166, that focuses on the fiduciary's "real-time decision-making process" rather than any hindsight-based metric, *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448 (6th Cir. 2022).

Accordingly, to state a viable claim for breach of ERISA's fiduciary duties, plaintiffs must plead either direct allegations of an inadequate process or circumstantial allegations that permit a plausible inference that fiduciaries were asleep at the wheel. For complaints that lack direct allegations of an inadequate process, both this Court and the Supreme Court have emphasized that determining whether a fiduciary breached the duty of prudence "requires 'careful, context-sensitive scrutiny of a complaint's allegations' in order to 'divide the plausible sheep from the meritless goats.'" *Smith*, 37 F.4th at 1164 (quoting *Dudenhoeffer*, 573 U.S. at 425); *see also Hughes*, 595 U.S. at 177 ("the appropriate inquiry will necessarily be context specific"). Because, as mentioned above, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," *id.*, there may be perfectly justifiable reasons for a fiduciary's decision to pursue one course of action over another, even if the unchosen path ultimately would have been preferable with the benefit of hindsight or if a given participant would have preferred the alternative route. When that is the case—*i.e.*, when an ERISA plaintiff's circumstantial allegations of fiduciary malfeasance are consistent with entirely lawful fiduciary behavior—the claim is properly dismissed. *See Hikma Pharms. USA Inc. v. Amarin Pharma, Inc.*, 608 U.S. 580, 589-590 (2026) (requiring plaintiff "to rule out 'obvious alternative explanation[s]' for the defendant's conduct" (citation omitted and alteration in original)).

II. Plaintiff's unilateral-fiduciary-reallocation theory flies in the face of ERISA's flexible, process-based standard.

Here, Plaintiff provided neither direct allegations of an inadequate process nor circumstantial allegations from which a court could infer that plan fiduciaries were shirking their process-based responsibilities. Indeed, Plaintiff himself concedes that he does not allege any facts regarding Defendants' decision-making process. *E.g.*, Class Action Complaint, No. 1:25-cv-00973, ECF No. 1, PageID 19-20 ¶ 57 (W.D. Mich. Aug. 19, 2025) (hereafter "Complaint") ("Plaintiff does not have actual knowledge of the details of Defendants' decision-making processes …."). Instead, he suggests that the district court should have *inferred* an imprudent process from the simple fact that Defendants declined to unilaterally change participants' own allocations for their individual plan accounts. *See id.* (alleging "Plaintiff has drawn reasonable inferences regarding these processes"); *id.* at 17-19 ¶¶ 51-56; Opening Br. 6-7. By "opt[ing] to forego a re-enrollment process for participants" after Defendants added Vanguard Target Date Funds ("TDFs") to the Plan, Plaintiff says, Defendants maintained an imprudent concentration of assets in the Stable Value Fund. Complaint, PageID 11-12 ¶¶ 38-39. Plaintiff thus asks this Court to hold that ERISA required Defendants to override participants' investment choices and reallocate participant investments consistent with a single participant's preferred approach. That theory finds no support in ERISA's text, its regulatory framework, any decision from any court, or common sense.

A. Stable value funds are a well-established investment option for participants seeking to preserve capital.

Despite implying that stable value investment options are inappropriate, Plaintiff never actually alleges that the Plan's investment lineup (including the designation of the Plan's Stable Value Fund as an investment option) was in any way imprudent. To the contrary, Plaintiff expressly disclaims any theory that "the inclusion of [the Auto-Owners Stable Value Fund], standing alone, constitutes a breach of fiduciary duty." Opening Br. 11 (citation omitted and alteration in original). With good reason: ERISA does not countenance categorical attacks on particular investment options and, regardless, stable value funds are a well-established and popular investment option used by retirement plans across the country. *See, e.g.*, Vanguard, *How America Saves 2025*, at 67 (Aug. 5, 2025), https://tinyurl.com/yc4eu4y (stable value options are available to 85% of defined-contribution plan participants).

Stable value funds are a widely accepted investment option consisting of "a bond portfolio that provides investors with capital protection and consistent interest payments." Carol M. Kopp, *Stable Value Funds: Definition, Benefits, Risks, and Investment Guide* (May 24, 2026), Investopedia, https://tinyurl.com/34rdn8fc. Because stable value investments provide "higher rates of interest [than money market funds] with little or no fluctuation in price," they are a "good choice for conservative investors, workers nearing retirement, and anyone looking to stabilize their portfolio during times of market volatility." Mark P. Cussen, *The Role of Stable Value Funds in Your 401(k)* (July 18, 2024), Investopedia, https://tinyurl.com/mr7fd3mv; *see also Barchock v. CVS Health Corp.*, 886 F.3d 43, 50 (1st Cir. 2018) (explaining that conservatism consistent with a stable value fund's disclosed objectives "is no vice"). Reflecting these benefits, eight in ten defined-contribution plans offer a stable value option, and millions of plan participants have invested well over $800 billion in stable value products. MetLife, *2024 Stable Value Study*, at 3 (July 23, 2024), https://tinyurl.com/5ftb3axs.

DOL has likewise recognized that "stable value products and other capital preservation investment vehicles may be prudent for some participants or beneficiaries." Default Investment Alternatives Under Participant Directed Individual Account Plans ("*QDIA Rule*"), 72 Fed. Reg. 60,452, 60,452 (Oct. 24, 2007). While DOL declined to extend safe-harbor status to stable value funds and other similar capital preservation investment vehicles, DOL made clear that these funds "may nonetheless constitute part of the investment portfolio of a qualified default investment alternative." *Id.*; Response Br. 37. Plaintiff relies on the regulation to suggest Defendants had an affirmative duty over a decade later to transfer existing balances out of the Stable Value Fund, Opening Br. 5-6 & n.2, but DOL said just the opposite. The regulation expressly permits plans to retain stable value funds as a qualified default investment alternative for investments made before the regulation became effective. *QDIA Rule* at 60,460. Indeed, DOL expressly cautioned that "[n]othing in this regulation is intended to suggest or require that a plan fiduciary change an otherwise prudent selection of a stable value product for a plan's default investment option." *Id.* at 60,476 n.50. Far from "discourag[ing] future, long-term investment in stable value funds," Opening Br. 5-6 & n.2, DOL recognized that stable value funds are a beneficial component of a balanced investment portfolio, *QDIA Rule* at 60,452.

A balanced investment portfolio is precisely what Defendants provide here. In addition to the Stable Value Fund, the Plan offers two additional categories of funds: index funds and TDFs. *See* Complaint, PageID 6 ¶ 19. These options helped round out the Plan lineup—a wholly unremarkable collection of funds that provided participants a standard suite of investment options from which to pick and choose based on their individual goals and risk tolerances.

Index funds "create a fixed portfolio structured to match the overall market or a preselected part of it, … require little to no judgment, and … have grown in popularity as an alternative to active management." *Smith*, 37 F.4th at 1163 (citation and quotation marks omitted). In other words, an index fund tracks the performance of a specific market index through a passive strategy, offering "instant diversification through a single investment" with lower management expenses and lower portfolio turnover. Adam Hayes, *Investing in Index Funds: Key Benefits and*

Drawbacks Revealed (July 30, 2026), Investopedia, https://tinyurl.com/385ka9zv. Because index funds track the market, they are appropriate for investors who are comfortable tethering their investments to market performance. *Id.*

TDFs serve yet a different function. TDFs are a broad category of investments that use different approaches and investment types to 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 (or passes) retirement—referred to as the fund's "glide path." *See* DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* (Feb. 2013) (*TDF Tips*), https://tinyurl.com/5n8txxn8. TDF "managers change the allocation of the underlying investments that they hold over time, say by selling funds that hold stocks to buy a greater proportion of funds that hold bonds or cash." *Smith*, 37 F.4th at 1164. That automatic rebalancing makes TDFs a convenient, hands-off option for many participants. But because TDFs are structured around a projected retirement date, rather than a participant's complete financial circumstances (*e.g.*, the participant's risk tolerance, household assets, or liquidity needs), TDFs may not be the optimal choice for some participants.

Together, these three options provide participants with different choices along the risk-return spectrum. Participants who prioritize capital preservation—including participants nearing retirement or carrying greater risk elsewhere in their portfolio—

may prefer stable value funds over equity-heavy alternatives. In contrast, participants who prioritize asset growth and greater diversification may prefer index funds, while TDFs allow for a customized approach targeted to a particular retirement date. These options each serve different needs for different participants, and ERISA does not rank one option above another simply because they serve different goals. The "suitability of any one fund for any one pensioner [is] a complex inquiry that has the capacity to vary as much as human DNA from one individual to another." *Smith*, 37 F.4th at 1163.

B. Plaintiff's unsupported theory would require fiduciaries to override participants' decisions.

Given the benefits of stable value funds, it is no surprise that Plaintiff does not even attempt to challenge their inclusion in a diversified Plan lineup. Plaintiff instead quibbles with the amount of Plan assets invested in the Stable Value Fund—and, in particular, with Defendants' decision not to take it upon themselves to reallocate participant investments to achieve a lower allocation in the Stable Value Fund. In Plaintiff's view, the Plan's fiduciaries should have unilaterally reduced the percentage of investments in the Stable Value Fund once Defendants added other options to the Plan lineup—regardless of participants' preferences or risk tolerances. Complaint, PageID 11-12 ¶¶ 37-40. This theory is unprecedented and would undermine participants' agency over their own investment decisions.

1. As a threshold matter, Plaintiff's theory is fatally underdeveloped. Plaintiff does not identify what would have been an appropriate stable value allocation for any particular participant, much less that Plaintiff's individual account (or the account of any other particular participant) exceeded that amount. Indeed, he alleges nothing whatsoever about *how his account* was invested. His theory is entirely opaque.

Compounding that problem, Plaintiff never suggests that the Plan's challenged asset allocation is the result of *the Plan*'s allocation of assets, as opposed to individual participant choice. The root of Plaintiff's theory dates back to 2014, when the Plan introduced the Vanguard TDF suite and designated those funds, rather than the Stable Value Fund, as the Plan's default. Opinion & Order Granting Motion to Dismiss, No. 1:25-cv-00973, ECF No. 33 at 2-3 PageID 188-189 (W.D. Mich. Apr. 7, 2026) (hereafter "Opinion & Order"). Plaintiff merely assumes that the Plan's current allocations are a result of the Plan's default investment choice over a decade ago, but Plaintiff alleges no facts to show that the Plan's allocations are something other than the intervening decade of participant choice. *Id.* at 4, 10, PageID 190, 196. As the district court explained, the "mere fact that the stable value fund was once the plan default provides no basis for inferring how much of the assets invested in the fund were legacy default contributions." *Id.* at 10, PageID 196.

2. More fundamentally, though, Plaintiff's unilateral-fiduciary-reallocation theory has no support in the statute, DOL regulations, or precedent. Plaintiff's basic theory appears to be that the Plan's fiduciaries should have ensured that the allocation of assets in the Stable Value Fund did not exceed some (unspecified) amount of the Plan's total assets—and that they should have done so by changing participants' investment allocations without their request.

Plaintiff's theory ignores the many reasons why Plan participants might choose to invest in the Stable Value Fund at various allocation levels. *See supra*, p. 10. For one, some participants may have a lower risk tolerance and concerns about the market, particularly given the turmoil of the past decade. *See* SVIA, *5 Reasons To Include Stable Value in Your Portfolio* (Apr. 1, 2024), https://www.stablevalue.org/5-reasons-to-include-stable-value-in-your-portfolio/. Investors close to retirement might be interested in a less risky, more secure allocation to ensure that they can retire on their chosen timeline. *See id.* (explaining that "[s]table value is an attractive choice for investors in and near retirement as they shift from accumulating savings to thinking about how to generate retirement income and fund their retirement"). And investors who invest their non-plan assets in more aggressive growth funds may prefer to invest their Plan assets in conservative investments to balance their overall portfolio. *See id.*

That is precisely what the district court recognized here. As the court explained, "[i]f most of the contributions parked in the [S]table [V]alue [F]und belong to employees near retirement age, for example, then there may be nothing imprudent about leaving those assets undisturbed." Opinion & Order at 11, PageID 197. To the contrary, "to forcibly transfer those employees' account balances to a TDF would expose them to higher risks just when those employees are more likely to prioritize preservation over appreciation." *Id.* And that is just one example of the fatal flaws in Plaintiff's theory—there are any number of other reasons why Plan participants might sensibly choose to invest in the Stable Value Fund. At bottom, Plaintiff himself may prefer a lower allocation of his retirement savings in a capital-preservation fund—and he is free to allocate *his* account accordingly. But his personal investment preferences are not the benchmark for a prudent process.

Moreover, on a common-sense level, Plaintiff's theory that fiduciaries are compelled by ERISA to supersede participants' investment decisions is alarming, to say the least. *See* Opinion & Order at 7, PageID 193. As the district court recognized, "no court … has ever held that an ERISA plan sponsor *must* reallocate assets routed by default to a low-risk investment option into a higher-yield QDIA after it is added to the plan menu." *Id*. (emphasis added). To the contrary, where a plan has offered a set of prudent fund options (as is the case here, *see supra*, pp. 10-13), this Court has recognized that "*plan participants* retain the right to choose which fund is appropriate for them." *Smith*, 37 F.4th at 1166 (emphasis added). Once fiduciaries have provided prudent options, nothing in ERISA *requires* fiduciaries to make the final investment-selection decision on behalf of plan participants.

Indeed, Plaintiff's approach would upend settled understanding of ERISA's fiduciary obligations. *See supra*, pp. 9, 14-15. A recognized "component of the duty of prudence" is "a fiduciary's obligation to assemble a diverse menu of options"—a menu that provides participants with the "ultimate choice" over their investments. *Hughes*, 595 U.S. at 176. While "investor choice" does not abrogate fiduciaries' responsibility to remove imprudent options, the selection among prudent options remains in the hands of plan participants. *See id.* Plaintiff's theory would turn this bedrock principle on its head, requiring fiduciaries not only to provide a menu of prudent options, but further to supersede participants' investment decisions.

This approach puts fiduciaries in an untenable position. Fiduciaries would have to guess at the optimal investment choice for participants, directly contrary to ERISA's prohibition on hindsight-based liability. That is hard enough for any single participant—and impossible when considering the diversity of participants with different investing needs. If fiduciaries guessed wrong for any population of participants, they could then be subject to a suit for a breach of fiduciary duties.

Indeed, fiduciaries have been sued for reallocating plan investments in the exact circumstances Plaintiff challenges here. In *Bidwell*, for example, the plaintiffs allocated 100% of their investments to the plan's stable value fund, then the plan's default fund. *Id.* 685 F.3d at 615. The plan subsequently designated a different fund as the plan's default and transferred "all existing investments" in the stable value fund to the new default absent contrary instructions from a participant. *Id.* at 615-616. The plaintiffs did not learn of the transfer until after it occurred and promptly returned their assets to the stable value fund. *Id.* at 616. But "[d]ue to market fluctuations in the interim, … both [plaintiffs] suffered financial losses prior to the return of their funds to the [] Stable Value Fund" and brought suit. *Id.*

The plan sponsor faced similar allegations in *Camera*, in which plan participants sued the plan sponsor for selecting a particular deadline for reallocating participant assets from the company stock plan. 2014 WL 960897, at *3. As the court explained in rejecting these allegations, "[a] prudent fiduciary is not required to micromanage each participant's assets and find a way to maximize the return on each participant's voluntary contribution." *Id.* ERISA requires fiduciaries to offer a prudent menu of investment options and "remove an imprudent investment from the plan within a reasonable time." *Hughes*, 595 U.S. at 176. It does *not* require that fiduciaries themselves play investment advisor and select among a range of prudent options. Doing so would subject fiduciaries to essentially endless liability, as participants would always be able to find a combination of investment decisions that could have led to better outcomes.

In that sense, Plaintiff's theory is of a piece with the surge of recent lawsuits that have subjected fiduciaries to liability no matter what decision they make. Over the past few decades, fiduciaries have been sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[2] for failing to divest from stocks with declining shares or high risk profiles;[3] for failing to *hold onto* such stock because high risk can produce high reward;[4] for making available investment options that plaintiffs' lawyers deem too risky;[5] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[6]

[2] *Compare* First Am. Compl. ¶¶ 68-71, *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-1753, ECF No. 38 (N.D. Cal. Oct. 23, 2020), *with* Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 1:17-cv-12123, ECF No. 35 (D. Mass. Jan. 12, 2018).

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

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

[5] *See, e.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015).

[6] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (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*") (emphasis in original); Compl., *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061, ECF No. 1 (D.R.I. Feb. 11, 2016) (alleging plan fiduciaries breached duty of prudence by investing portions of plan's stable value fund in conservative money market funds and cash management accounts).

As one recent example, take collective investment trusts (CITs). CITs are "institutional investment vehicles" that are "only accessible to certain types of investors, including participants in employer-sponsored retirement plans." T. Rowe Price Participant Insights, *Collective Investment Trusts* at 1 (2021), https://tinyurl.com/yrf4d3hx. These trusts "are managed by banks or trust companies that 'pool' retirement plan assets into a single portfolio that is invested with a specified investment philosophy and strategy" and "may invest in a wide range of active or passive investment vehicles." *Id.* For over a decade, plaintiffs have targeted fiduciaries for offering mutual funds rather than the CIT versions of the same investment, because mutual funds commonly involve higher fees but offer similar performance to CITs. *See, e.g.*, *Davis v. Salesforce.com, Inc.*, 2020 WL 5893405, at *6 (N.D. Cal. Oct. 5, 2020); *Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *9 (N.D. Cal. Sept. 13, 2021). Recently, however, plaintiffs have begun claiming the *exact opposite*—namely, that offering CITs instead of mutual funds is a categorical sign of imprudence because mutual funds offer much greater transparency regarding fees, performance, and investment terms than CITs do. *See, e.g.*, *Clark v. Centene Corp.*, No. 3:25-cv-09743 (N.D. Cal.); *Ventura v. Lithia Motors, Inc.*, No. 2:26-cv-01786 (C.D. Cal.). Neither choice should subject fiduciaries to a strike suit; CITs and mutual funds simply offer different trade-offs, and a reasonable fiduciary could prudently choose *either* option depending on the needs of their plan and its participants.

As these examples demonstrate, plan fiduciaries reasonably fear litigation no matter what decisions they make. And those fears have a very real *personal* dimension given many plaintiffs' practice of suing not just companies that sponsor retirement plans but also individual fiduciaries under new and often contradictory circumstantial theories of imprudence. These lawsuits create huge barriers for plan sponsors attempting to recruit individuals (like human-resources professionals) to serve as plan fiduciaries, knowing that at any time they could be sued in an ERISA class action—an event that has very real consequences when a fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting "tremendous power to harass" individual fiduciaries in this way).

This dynamic has also caused a "sea change" in the fiduciary-insurance industry. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), Business Insurance, https://tinyurl.com/33e9wfbp; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market* (Oct. 18, 2021), Bloomberg Law, https://tinyurl.com/5b9rurw3. The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* at 4 (Dec. 2020), Euclid Specialty, https://tinyurl.com/y5d94r9f. These consequences harm participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. And for smaller employers, the ramifications are even starker: if they "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Id.* That result would undermine a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans to their employees.

In short, neither ERISA nor the pleading standards articulated by the Supreme Court support Plaintiff's unprecedented theory. This Court should affirm.

CONCLUSION

This Court should affirm the judgment below.

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Respectfully submitted.

/s/ *Jaime A. Santos*
Jaime A. Santos
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., N.W.
Suite 600 South
Washington, DC 20004
(202) 416-6818

Rohiniyurie Tashima
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036

Jordan F. Bock
Drew DiMaiti
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 5,298 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Jaime A. Santos*
Jaime A. Santos

CERTIFICATE OF SERVICE

I, Jaime A. Santos, hereby certify that on September 25, 2026, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Jaime A. Santos*
Jaime A. Santos