No. 17-1515

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARY BARCHOCK; THOMAS WASECKO; STACY WELLER

Plaintiffs-Appellants,

v.

CVS HEALTH CORPORATION; THE BENEFITS PLAN COMMITTEE OF CVS HEALTH CORPORATION; GALLIARD CAPITAL MANAGEMENT, INC.

Defendants-Appellees.

Appeal from the United States District Court for the District of Rhode Island, Case No. CA 16-61ML, The Honorable Mary M. Lisi, Senior Judge

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The Chamber of Commerce of the United States of America and the American Benefits Council's Motion for Leave to Participate as *Amici Curiae*

Pursuant to Federal Rules of Appellate Procedure 27 and 29, the Chamber of Commerce of the United States of America (the "Chamber") and the American Benefits Council (the "Council") respectfully move for leave to file an *amicus* brief in the above-captioned case in support of Defendants-Appellees and affirmance. Counsel for the Chamber and the Council has contacted counsel for the parties requesting consent to file an *amicus* brief. Defendants-Appellees consent, but Plaintiffs-Appellants do not.

As required by Federal Rule of Appellate Procedure 29(b), the Chamber and the Council have an interest in the outcome of this litigation, and believe the proposed *amicus* brief will help the Court decide the case. *See Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) ("[O]ur court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted.").

For the reasons set forth below, the Chamber and the Council meet the requirements of Federal Rule of Appellate Procedure 29(a) to participate as *amici curiae* in this case:

1. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefits programs governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. ("ERISA").

2. The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee-benefit plans. Its approximately 430 members are primarily large, multistate employers that provide employee benefits

to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

3. The Chamber and the Council frequently participate as *amici curiae*, including in cases with the potential to significantly affect the design and administration of employee-benefit plans. This is such a case, and it presents two questions of enormous practical importance to *amici* and their members: (1) whether courts should focus on an ERISA fiduciary's process rather than the results of that process when resolving challenges to the fiduciary's adherence to the duty of prudence when making investment decisions with respect to a stable-value fund, and (2) whether courts should refuse to presume imprudence when plan fiduciaries' investment decisions deviate from industry averages. The answers to these questions directly implicate the interests of the Chamber, the Council, and their members.

4. *Amici*'s proposed brief explains why a decision from this Court endorsing Plaintiffs-Appellants' hindsight-based theory of ERISA fiduciary liability or their proposed presumption of imprudence would saddle the Chamber and the Council's members with increased plan-administration and litigation costs. It will further

show why this burden is incompatible with ERISA's text and purposes. Moreover, it will illustrate that the increased costs that would follow from reversal would not inure to the benefit of employees, but would largely amount to deadweight losses in transaction costs that would diminish value. A decision for Plaintiffs-Appellants would undermine ERISA's core purpose of encouraging plan fiduciaries to offer plan participants a variety of investment options of varying risk levels tailored to the needs and circumstances of the particular plan and its participants. It would also defeat Congress's goal of minimizing the administrative and financial burdens on plan administrators—burdens ultimately borne by plan participants.

5. The Chamber and the Council will present to the Court the broader view of how its decision could affect plan administrators and participants generally. *See Neonatology Assocs.*, 293 F.3d at 132 ("[A]n amicus may provide important assistance to the court [by] explain[ing] the impact a potential holding might have on an industry or other group.") (quotations omitted). The Court's resolution of the questions presented here will govern plan-fiduciary decisions with respect to all types of investments—not just stable-value funds—and the Chamber and the Council are particularly well-positioned to discuss the consequences that the Court's decision will likely have for all ERISA fiduciaries administering plans in the First Circuit.

6. Granting this motion will neither delay nor disrupt the proceedings. The Chamber and the Council submit the proposed *amicus* brief seven days after Defendants-Appellees filed their principal brief. This motion and the proposed *amicus* brief are thus timely under Federal Rule of Appellate Procedure 29(a). Furthermore, the Chamber the Council's proposed *amicus* brief avoids duplicating the parties' arguments and instead provides context on how the Court's decision will likely impact all plan fiduciaries and participants—not just those currently before the Court.

7. For these reasons, the Chamber and the Council respectfully request that the Court grant them leave to participate as *amici curiae* and accept the proposed *amicus* brief, which accompanies this motion.

Dated: October 9, 2017

Respectfully submitted,

/s/ Evan A. Young

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 833 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: October 9, 2017

/s/ Evan A. Young
Evan A. Young

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All interested parties are registered CM/ECF users.

/s/ Evan A. Young
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Plaintiffs-Appellants,

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Brief of *Amici Curiae* Chamber of Commerce of the United States of America and American Benefits Council Supporting Defendants-Appellees and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* certifies that they have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

Dated: October 9, 2017

/s/ Evan A. Young
Evan A. Young

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amici curiae are the Chamber of Commerce of the United States of America (the "Chamber") and the American Benefits Council (the "Council").[1] The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefits programs governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"). The Council is a national non-profit organization dedicated to protecting and fostering privately sponsored employee-benefit plans. Its approximately 430 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide ser-

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Plaintiffs-appellants do not consent to the filing of this brief. As set forth in the accompanying motion, pursuant to Federal Rule of Appellate Procedure 29(a)(2)-(3), *amici* have requested leave to file this brief.

vices to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The Chamber and the Council frequently participate as *amici curiae*, including in cases with the potential to significantly affect the design and administration of employee-benefit plans. This is such a case, and it presents two questions of enormous practical importance to *amici* and their members: (1) whether courts should focus on an ERISA fiduciary's *process* rather than the *results* of that process when resolving challenges to the fiduciary's adherence to the duty of prudence when making investment decisions with respect to a stable-value fund, and (2) whether courts should refuse to presume imprudence when plan fiduciaries' investment decisions deviate from industry averages. The answers to these questions directly implicate the interests of *amici* and their members (and the many employees who benefit from ERISA plans administered by *amici*'s members).

The district court's decision rejecting plaintiffs' hindsight-based theory of ERISA fiduciary liability and that theory's proposed presumption of imprudence properly construes the statute and avoids serious distortions that would harm the public. If this Court were to embrace plaintiffs' theory of fiduciary liability, *amici* and their members would face increased costs associated with plan administration and litigation, none of which are compatible with ERISA's text or its purposes. Those increased costs would not inure to the benefit of employees, but would

largely amount to deadweight losses in transaction costs that would *diminish* value. Even more likely, plan administrators would simply decline to offer investment options that are especially valuable to millions of Americans trying to save for retirement.

Nor does ERISA permit (much less require) plaintiffs' odd theory that courts should punish plan fiduciaries who make investment decisions that do not line up with peer averages. Under the statute, fiduciaries are to account for the individual circumstances of a plan and the particular needs of plan participants when making investment decisions. Plaintiffs' proposed rule, by contrast, would force plan fiduciaries to focus instead on the decisions that their peers make. But those decisions were made under different circumstances, with distinct plan objectives, and to benefit plan participants with different needs. Plaintiffs' proposed presumption would undermine ERISA's core purpose of encouraging plan fiduciaries to offer plan participants a *variety* of investment options of varying risk levels tailored to the needs and circumstances of the particular plan and its participants. It would also defeat Congress's goal of minimizing the administrative and financial burdens on plan administrators—burdens ultimately borne by plan beneficiaries.

For the reasons stated in this brief, *amici* respectfully urge the Court to affirm.

ARGUMENT

I. The law—backed by sound policy—focuses on the fiduciary's *process*, not ultimate *results*.

When reviewing claims of imprudent investment management, courts focus on a fiduciary's conduct in arriving at an investment decision—not on the investment's results. This principle is familiar in the law. Whether a defendant is liable for a car crash turns on the reasonableness of her conduct, not the fact that a crash happened—otherwise, strict liability would be the norm rather than the very unusual exception. The theory of fiduciary liability underlying plaintiffs' complaint directly contravenes that principle. Specifically, plaintiffs urge the Court to infer imprudence from a comparison of the performance of the stable-value fund at issue here to the performance of other stable-value options. ERISA's plain text (like common sense) forecloses that claim, and allowing it to proceed would undermine the core purposes of the statute. The district court was right to reject it.

A. Plaintiffs' results-oriented theory of fiduciary liability is inconsistent with ERISA's fiduciary standard and cases interpreting it.

This Court has recognized that the "'test of prudence—the Prudent Man Rule—is one of *conduct*, and not a test of the result of performance of the investment.'" *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) (quotations omitted)). As such, "'[w]hether a fiduciary's actions are prudent cannot be measured in hindsight . . . .'" *Id.* (quoting *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th

Cir. 2007)). Instead, the "test [is] how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994) (quotations omitted)).

While this process-focused fiduciary-liability standard makes common sense and harmonizes with basic principles of liability in other contexts, it is also the approach demanded by ERISA's plain text. Section 404(a)(1)(B) requires that fiduciary conduct be judged according to circumstances "then prevailing"—not results later-occurring. 29 U.S.C. § 1104(a)(1)(B). This longstanding rule is based in part on the view that courts are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them," *Jones v. Harris Assocs.*, 559 U.S. 335, 353 (2010) (quotations omitted). Under ERISA, *fiduciaries* must make those judgments using a prudent process, and courts should not place them "on a razor's edge" in doing so. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). For that reason, courts do not "substitute [their] judgment" for that of fiduciaries. *Caterino v. Barry*, 8 F.3d 878, 883 (1st Cir. 1993).

The Seventh Circuit has applied this process-not-results principle to reject a similar attempt to base an ERISA fiduciary-liability claim on a plan's performance relative to that of supposed peer plans. *See DeBruyne v. Equitable Life Assurance*

Soc'y of the U.S., 920 F.2d 457, 465 (7th Cir. 1990) ("[T]he ultimate outcome of an investment is not proof of imprudence."). As that Court rightly recognized, assertions about the performance of other plans "say little about the wisdom" of a particular plan's investments—"only that it may not have followed the crowd." *Id.*

Ignoring this settled rule, plaintiffs would have this Court recognize fiduciary-imprudence claims anytime the results of an ERISA fiduciary's investment decisions compare unfavorably to the results of other similarly-situated stable-value fund fiduciaries' decisions. Beyond being directly contrary to ERISA's plain text, plaintiffs' claim of hindsight-based liability would undermine ERISA's core purposes and ultimately harm the very plan beneficiaries that ERISA intends to protect.

B. A results-oriented approach to ERISA's fiduciary standard would upset the underlying purposes of ERISA.

1. Plaintiffs' hindsight-based liability theory would undermine the uniformity and predictability ERISA was designed to foster.

One of Congress's core purposes in passing ERISA was to create "a uniform body of benefits law," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990), with "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (citations omitted). Besides being a goal in and of itself, predictability "induc[es] employers to offer benefits" and to

maintain high levels of benefits. *Id.*; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001) (Congress intended ERISA to "'minimiz[e] the administrative and financial burdens' on plan administrators—burdens ultimately borne by the beneficiaries" (quoting *Ingersoll-Rand Co.*, 498 U.S. at 142)).

Plaintiffs' results-oriented approach to assessing ERISA fiduciary liability would make predicting liability impossible. No matter how prudent a plan fiduciary's investment decision may have been "under the circumstances then prevailing," he could never escape the looming threat that later-emerging results might render otherwise-prudent investment decisions retroactively imprudent when viewed in hindsight.

If ERISA's "under the circumstances then prevailing" standard were replaced with plaintiffs' hindsight-based rule, plaintiffs could subject plan fiduciaries to costly litigation anytime plan participants were disappointed with investment results. Even without that rule, plaintiffs consistently challenge the decisions of plan fiduciaries regardless of the thoroughness of the process the defendant-fiduciary followed. As a review of recent claims brought in this area demonstrates, that approach makes it virtually impossible for ERISA fiduciaries to avoid costly litigation no matter their approach to asset-allocation decisions. Some plaintiffs, like those that brought this case, claim that plan fiduciaries have managed stable-value

funds too conservatively.[2] Others allege that defendants took too much risk when managing a stable-value fund.[3] In some instances, ERISA fiduciaries have simultaneously defended *both* types of claims, giving new meaning to the concept of being stuck between a rock and a hard place. In *Evans v. Akers*, which involved claims that fiduciaries breached ERISA duties by maintaining a "heavy investment in Grace securities when the stock was no longer a prudent investment," this Court observed that "[a]nother suit challenging the actions of Plan fiduciaries" had "asserted a diametrically opposed theory of liability"—"that the Plan fiduciaries had imprudently divested the Plan of its holdings in Grace common stock despite the

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[2] *See Ellis v. Fid. Mgmt. Tr. Co.*, No. 1:15-cv-14128-WGY, 2017 WL 2636042, at *8 (D. Mass. June 19, 2017) (currently pending on appeal in this Court as No. 17-01693) (plaintiffs allege that Fidelity, the trustee of a collective investment trust in which plaintiffs' plans invested, managed the trust too conservatively, as compared to other stable-value funds); *Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006) (rejecting plaintiffs' claim that notwithstanding "years of lower performance," an "investment strategy" that was based on "find[ing] long-term, conservative reliable investments that would do well during market fluctuations" was "unreasonable [and] imprudent").

[3] Third Am. Compl. at 3, *Whitley v. J.P. Morgan Chase Bank*, 1:12-cv-02548 (S.D.N.Y. Dec. 16, 2014), ECF No. 182 (alleging fiduciaries managed stable-value fund in "inherently risky" manner); *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (involving claim that fiduciaries were imprudent in making risky investment decisions).

company's solid potential to emerge from bankruptcy . . . ." 534 F.3d 65, 68 (1st Cir. 2008).[4]

Recognizing the dilemma ERISA fiduciaries often face, courts have refused to place ERISA fiduciaries on such a "razor's edge." *See, e.g.*, *Armstrong*, 446 F.3d at 733. Courts also recognize, however, that placing such pressure on ERISA fiduciaries undermines the purposes of the statute and ultimately harms plan beneficiaries. *Egelhoff*, 532 U.S. at 149-50 (citations omitted).

Litigation, even of non-meritorious claims, always comes at a cost. "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Unfortunately, increased litigation costs and liability risks inevitably disserve plan participants. Increased costs mean reduced employer contributions and greater plan expenses. And if the costs of maintaining plans become overly burdensome, employers may be forced to reduce their sponsorship of retirement plans entirely or to cut back on the variety of investment options they offer. *See, e.g.*, *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (with ERISA, Congress tried to avoid creating "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare

[4] Importantly, plaintiffs' hindsight-based view of fiduciary liability, if accepted, could apply to any type of investment—not just stable-value funds.

benefit plans in the first place"); *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (result of litigation was that "IBM eliminated the cash-balance option for new workers and confined them to pure defined-contribution plans").

2. Plaintiffs' hindsight-based liability theory would discourage the creation and maintenance of defined-contribution plans.

"ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quotations omitted). It was designed to prevent "administrative costs [and] litigation expenses [from] unduly discourag[ing] employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497; *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 42 (1987) (emphasizing Congress's focus on balancing "the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans.") (citations omitted).

ERISA's legislative history confirms this point:

> It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5167, *and in* 3 Legis. Hist. of ERISA, at 4763 (1976) (statement of Rep. Ullman, Member, House Comm. on Ways and Means).

Plaintiffs' results-oriented liability theory would upset that balance by rendering ERISA plan fiduciaries guarantors of plan performance regardless of the prudence of the process the fiduciary followed "under the circumstances then prevailing." *See Roth*, 16 F.3d at 920 (recognizing that ERISA does not make fiduciaries "guarantors" and emphasizing that "[t]he basis for personal liability in each case is the breach of duty, which is not a guarantee but a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably"). Faced with such a perilous fiduciary standard, fewer and fewer individuals would be willing to assume the risks associated with serving as a plan fiduciary. And the few fiduciaries willing to take such a risk would insist (at a minimum) on either insurance or indemnification—expenses that plan participants would ultimately bear. *See* John Carl, *ERISA Fidelity Bond vs. Fiduciary Liability Insurance*, Napa Net Daily (Aug. 3, 2016), http://www.napa-net.org/news/technical-competence/case-of-the-week/case-of-the-week-erisa-fidelity-bond-vs-fiduciary-liability-insurance/ ("Evolving demands have led to important expansions in fiduciary liability insurance coverage.").

As Congress acknowledged when passing ERISA, and as courts interpreting its fiduciary-responsibility provisions have emphasized, ERISA plans are themselves benefits that employers voluntarily offer their employees. Litigation that punishes employers based on 20/20 hindsight creates precisely the perverse incentives that Congress sought to avoid through ERISA. As the Seventh Circuit aptly put it, "[l]itigation cannot compel an employer to make plans more attractive . . . . It is possible, though, for litigation about pension plans to make everyone worse off." *Cooper*, 457 F.3d at 642. Plaintiffs' hindsight-based standard would contravene ERISA's plain text and the statute's core purposes. The Court should reject it.

II. Courts should not presume imprudence when plan fiduciaries' approaches to asset allocation—or the results of those approaches—deviate from peer averages.

Plaintiffs argue that courts may presume that an ERISA fiduciary followed an imprudent process when the fiduciary's investment decision "deviate[s] . . . substantially" from industry averages and yields lower returns than funds taking on more risk. Br. 19. ERISA prohibits such a presumption, and like plaintiffs' results-based theory of liability, their proposed presumption of imprudence would undermine ERISA's core purposes, ultimately harming the plan participants that ERISA was designed to protect.

A. ERISA's text and structure prohibit a presumption of imprudence based on a fund's deviation from industry averages.

ERISA requires fiduciaries to take into account the individual "circumstances" of the plan and its participants. *See* 29 U.S.C. § 1104(a)(1)(B). Plan administrators' conduct must be judged in context, considering the particular plan's "character" and "aims." *Id.* Plaintiffs' preferred presumption of imprudence would shift the focus instead to the decisions of other ERISA fiduciaries facing different circumstances, under plans with different objectives, and serving plan participants with different needs.

Such a shift would be at odds with the entire statutory scheme. ERISA mandates clear disclosure to participants. All plans must be in writing and must specify the basis on which payments are made. 29 U.S.C. §§ 1022, 1102(a), 1102(b)(4). The required disclosures "advance[] the Congressional purpose of protecting beneficiaries of ERISA plans by insuring that employees are fully and accurately appraised of their rights under the plan." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112 (2d. Cir. 2003) (quotations omitted). The disclosures provide clear parameters for the plan administrators' conduct, allowing "employers to establish a uniform administrative scheme." *Egelhoff*, 532 U.S. at 148 (quotations omitted). Plan participants have a statutory remedy when plan administrators run afoul of those required disclosures. *See* 29 U.S.C. § 1132.

Under the presumption of imprudence that plaintiffs propose, however, plan administrators could be subjected to costly litigation based on a standard defined entirely by reference to the decisions of fiduciaries of other, unrelated plans, rather than the terms and disclosures of the plan involved. Beyond being incompatible with ERISA's text and structure, such a presumption would have serious negative consequences for plan fiduciaries and participants alike.

B. A presumption of imprudence based on deviation from industry averages would pose serious practical problems for plan fiduciaries while driving up plan costs.

A presumption of imprudence based on a fund's deviation from industry averages would leave some plan fiduciaries with an untenable Hobson's choice: (1) follow the herd and risk liability for breach of their fiduciary duty to make individualized judgments regarding the best interest of plan participants, or (2) make those individualized judgments and risk liability anytime plaintiffs could show that, in doing so, a plan administrator deviated from a made-up industry "norm."

Even worse, plan fiduciaries seeking to abide by such a standard would face one inscrutable question after another:

- Which funds are sufficiently similar to each other to count as "peers" for purposes of the presumption?
- What constitutes a typical or average approach to any given plan-administration decision?
- How much "deviation" from such an approach is acceptable?

With no principled way to answer these questions or (more importantly) to guess how a court might answer them, plan fiduciaries would feel compelled to continuously monitor the decisions and approaches of the fiduciaries of all plans even remotely similar to their own without any real sense of what they were looking for. And in the event that they spotted anything a court or a plaintiff might view as a trend in decisions or approaches, plan fiduciaries would feel they have no choice but to follow the trend mindlessly, even if the more popular approach was not, in their judgment, best for their plan or its participants.

Given these perverse incentives, a presumption of imprudence based on a plan fiduciary's failure to make "average" decisions undoubtedly would create significant administrative expenses, "unduly discourag[ing] employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (quotations omitted); *accord Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (same); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (same); *Varity Corp.*, 516 U.S. at 497 (same). Because the presumption of imprudence that plaintiffs endorse would create precisely the perverse incentives that Congress sought to avoid in creating ERISA in the first place, this Court should reject it.

C. Plan fiduciaries must have a variety of tools at their disposal to accomplish plan objectives in ever-changing circumstances.

ERISA's "flexible" prudence standard reflects the obligation applicable to every ERISA fiduciary to consider the specific "character and aims of the particular type of plan he serves." *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011) (quotations omitted). Consistent with that mandate, plan administrators seek to offer plan participants a variety of investment options based on the needs of their workforce. *Id.* at 327. Without the discretion inherent in ERISA's flexible prudence standard, plan administrators would not be able to make individual judgments about the needs of plans and participants. For example, a young workforce (*e.g.*, Google) may have different needs than an older workforce (*e.g.*, a typical industrial plant). Similarly, a particularly investment-savvy workforce might have different needs than the typical workforce.

Yet plaintiffs' attempt to impose fiduciary liability based on a presumption of imprudence triggered by a stable-value fund's deviation from industry averages would thwart ERISA's mandate that fiduciaries make investment choices based on their individual plan's needs. Indeed, it would encourage ERISA fiduciaries to *ignore* the specific "character and aims of the particular type of plan [they] serve," *id.* at 322, and instead to mindlessly follow the crowd even when doing so would, in the fiduciary's individual judgment, be contrary to the best interests of plan participants. If plan administrators risked liability anytime they made non-average

decisions with respect to the appropriate amount of risk to taken when making investment decisions, they would naturally seek to make "average" decisions. As a result, familiarity with the operative industry averages would replace familiarity with unique plan objectives and participant needs as the driving force behind plan fiduciaries' risk-allocation assessments. Courts should not apply a legal standard that pressures plan administrators to make "average" choices that, in their judgment, may not be best for their particular plans.

Instead, this Court should reject plaintiffs' proposed presumption and reaffirm the flexible prudence standard that has long facilitated plan administrators' ability to offer plan participants a variety of investment options reflecting varying goals and risk levels. Charting a conservative course through a period of turbulent market volatility, for example, is a legitimate option for plan fiduciaries. Plan administrators frequently employ stable-value funds as the "safe" option in their investment lineups and value the flexibility to pick among options within a given asset class. Depending on their individual plan needs and investment lineups, some may prefer a conservative stable-value strategy, while others may prefer a less-conservative approach.

A plan administrator whose investment lineup already contains a safe-value option, for example, might decide that a less-conservative stable-value option is appropriate under the circumstances. After the financial crisis, by contrast, the

availability of a very conservative safe-investment option was particularly important to many plan administrators and participants. *See, e.g.*, Nancy Trejos, *Retirement Savings Lose $2 Trillion in 15 Months*, Washington Post (Oct. 8, 2008). Even investments "widely considered more stable" were "hit hard." *Id.* This dramatic and unexpected turn of events resulted in a heightened desire among some plan administrators to be able to offer even safer investment options to plan participants. *Id.* There was nothing imprudent about that approach. ERISA fiduciaries are not required to take on *increased* risk simply because other plan fiduciaries have concluded that, considering the "character" and "aims" of their own plans, doing so is in the best interests of *their* plan participants. *See, e.g.*, *Jenkins*, 444 F.3d at 925-26 (explaining that notwithstanding "years of lower performance," an "investment strategy" that was based on "find[ing] long-term, conservative reliable investments that would do well during market fluctuations" was neither "unreasonable [n]or imprudent").

CONCLUSION

The judgment below should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: October 9, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. All interested parties are registered CM/ECF users.

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