UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FRED BAUMEISTER, et al.,	
Plaintiffs,	Civil Action No. 21-cv-6505
vs.	Hon. John Robert Blakey
EXELON CORPORATION, et al.,	
Defendants.	

MOTION FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file a brief as *amicus curiae* in the above-captioned case in support of Defendants' motion to dismiss. The proposed *amicus* brief is attached as Exhibit A. Defendants have consented to the filing of this brief. Counsel for Plaintiffs informed counsel for the Chamber that Plaintiffs do not consent to the Chamber's motion.

Amicus participation is appropriate where, as here, "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *The Chamberlain Grp., Inc. v. Interlogix, Inc.*, No. 01 C 6157, 2004 WL 1197258, at *1 (N.D. Ill. May 28, 2004) (internal quotations omitted). "[T]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court," and district courts thus "have broad discretion" to assess whether *amicus* participation will be "of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, No. 11 Civ. 6746(RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011).

The Chamber's *amicus* brief provides a unique perspective informed by its position as the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan sponsors, asset managers, recordkeepers, consultants, and other service providers.

Since ERISA was enacted, the Chamber has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the Department of

Labor (DOL) engages in notice-and-comment rulemaking,[1] provides information to the Pension Benefit Guaranty Corporation (PBGC) to support PBGC in its efforts to protect retirement incomes,[2] submits comments to the Department of the Treasury on plan administration and qualification,[3] and provides testimony to DOL's standing ERISA Advisory Council.[4] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[5] and is frequently quoted as a resource on retirement policy.[6]

Given its perspective and deep understanding of the issues involved in these cases, the Chamber regularly participates as *amicus curiae* in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for

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[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://www.uschamber.com/sites/default/files/final_electronic_delivery_proposed_regulation_comments_11.22.19.pdf.

[2] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://www.pbgc.gov/sites/default/files/sfa-ifr-comment-us-chamber-and-others.pdf; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015), https://www.pbgc.gov/documents/Multiemployer%20-Comments-to-PBGC-on-Partitions-RIN-1212-AB29-Partitions-of-Eligible-Multiemployer-Plans.pdf.

[3] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://www.uschamber.com/sites/default/files/final_september_remote_notarization_letter.pdf.

[4] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://www.uschamber.com/sites/default/files/final_august_2020_gaps_in_retirement_savings_dol_testimony.pdf.

[5] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://www.uschamber.com/sites/default/files/legacy/reports/1204Private_Retirement_Paper.pdf.

[6] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://news.bloomberglaw.com/daily-labor-report/who-wins-who-loses-with-auto-retirement-savings-plan-proposal; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://news.bloomberglaw.com/daily-labor-report/retirement-industry-hustles-to-keep-up-with-dols-rules-tsunami.

pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up);[7] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). Courts have found the Chamber's amicus participation helpful given its role and institutional knowledge about plan management and fiduciary practice—in a recent case, the district court not only granted the Chamber leave to participate as an amicus at the motion-to-dismiss stage,[8] but even expressly raised the Chamber's arguments at the motion hearing. *See Carrigan v. Xerox Corp.*, No. 21-1085-SVN (D. Conn. Nov. 10, 2021), ECF No. 54 (Chamber brief).[9]

Because of the Chamber's unique membership, which represents nearly all of those in the private-sector retirement community, the Chamber's collective knowledge about the management of retirement plans, the legal issues surrounding ERISA, and the types of allegations commonly included in these types of complaints extends beyond any single defendant or group of defendants named in a particular case. The Chamber seeks to provide a broader perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of plan-management decisionmaking and the overall context of ERISA class-action litigation. And as the Supreme Court has instructed, that context is key—courts are supposed to

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[7] In *Sweda*, the Chamber's motion for leave to file an *amicus* brief was granted over the plaintiffs' opposition.

[8] *Amicus* briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747-JDB (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229-RBJ (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32-JPJ (W.D. Va. Sept. 9, 2021), ECF No. 22.

[9] The transcript from the court's February 15, 2022 motion hearing has not yet been released.

undertake a "careful, context-sensitive scrutiny of [the] complaint's allegations," *Fifth Third Bancorp*, 573 U.S. at 425, just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

The Chamber's brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an *amicus* brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132. And here, the Chamber's perspective and expertise will serve several functions courts have identified as useful: It "explain[s] the broader regulatory or commercial context" in which this case arises; "suppl[ies] empirical data" informing the issue on appeal; and "provid[es] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

Specifically, the proposed *amicus* brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiffs' allegations here, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the issues presented here, and therefore in many instances have not have been cited or discussed by the parties. Given the extensive collective experience of the Chamber's members in both retirement-plan management and ERISA litigation, the Chamber offers a distinct vantage point that it believes will be of value to the Court as it considers Plaintiffs' complaint and whether it surpasses the plausibility threshold.

Finally, the proposed *amicus* brief is being filed well before Plaintiffs' opposition is due and therefore will not delay resolution of this motion. *See United States v. Bd. of Educ. of the City of Chi.*, No. 80 C 5124, 1993 WL 408356, at *3 (N.D. Ill. Oct. 12, 1993) (explaining that timeliness is one of the relevant factors in determining whether to permit *amicus* participation). And although Plaintiffs in this case have decided to oppose the Chamber's motion for leave to file, this Court has frequently permitted *amici* to participate in its proceedings, including over an opposition from one of the parties. *See, e.g.*, *Anheuser-Busch, Inc. v. Schnorf*, No. 10-cv-1601 (N.D. Ill.), ECF No. 89 (June 1, 2010) (motion for leave granted over an opposition); *The Chamberlain Grp., Inc.*, 2004 WL 1197258, at *1 (same).

For these reasons, the Chamber respectfully requests that the Court grant it leave to participate as *amicus curiae* and accept the proposed *amicus* brief, which accompanies this motion.

Dated: March 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the court's CM/ECF system on March 4, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

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EXHIBIT A

UNITED STATES DISTRICT COURT
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Defendants.	)	

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as *amicus curiae* in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to provide context on retirement-plan management and how this case is situated in the broader litigation landscape.

INTRODUCTION

This case is one of many in a recent surge of 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://bit.ly/3hNXJaW ("*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 universally understood principles of plan management, and ignore judicially noticeable information demonstrating the flawed nature of many plaintiffs' allegations in an effort to create an illusion of mismanagement and imprudence.

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The complaints typically follow a familiar playbook, often loaded with legal conclusions but few factual allegations specific to the particular plan at issue. Using the benefit of hindsight, these lawsuits challenge the decisions plan fiduciaries made about the investment options to make available to retirement plan participants or the arrangements fiduciaries negotiate with the plan's service provider. The complaints typically point to alternative investment or service options (among tens of thousands of investment options offered in the investment marketplace and the dozens of service providers with a wide variety of service offerings and price points), and allege that plan fiduciaries *must have* had a flawed decisionmaking process because they did not choose one of those alternatives. They then lean heavily on ERISA's perceived complexity to open the door to discovery, even where their conclusory allegations are belied by publicly available data.

No plan, regardless of size or type, is immune from this type of challenge. It is *always* possible for plaintiffs to use the benefit of hindsight to identify, among the almost innumerable options available in the marketplace, a better-performing or less-expensive investment option or service provider than the ones plan fiduciaries chose. That is not sufficient under the pleading standard established in *Hughes v. Northwestern University*, 142 S. Ct. 737, 740 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

If these types of conclusory and speculative complaints are sustained, plan participants will be the ones who suffer. The suits pressure fiduciaries to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, fee structures, risk levels, and potential performance upsides, as ERISA expressly encourages and as most participants want. These lawsuits also operate on a cost-above-all mantra—despite the Department of Labor's admonition that fees should be only "one of several factors" in fiduciary decisionmaking.[2] And given the plaintiffs' often single-minded emphasis on cost, these lawsuits pressure fiduciaries to forgo packages that include popular and much-needed services, including financial-wellness education and enhanced customer-service options.

If the recent flood of litigation has taught us anything, it is that it is impossible for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit—no matter how rigorous their process, no matter the high quality of the funds that they choose, and no matter how low the fees they negotiate. This lawsuit is a perfect example: This Court dismissed an earlier suit alleging that Exelon acted imprudently by offering publicly available retail investment funds instead of institutional or custom options. *See Loomis v. Exelon*, 658 F.3d 667, 670 (7th Cir. 2011) (affirming dismissal). Defendants later chose to offer custom investment options, and Plaintiffs here allege that Defendants acted imprudently by introducing the very types of options the prior plaintiffs said were missing. Compl. ¶ 6. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" that ERISA requires. *Hughes*, 142 S. Ct. at 740; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). As the Supreme Court recently made explicit, ERISA cases are subject to the pleading standard articulated in *Ashcroft* and *Iqbal*. *See Hughes*, 142 S. Ct. at 742. When a plaintiff does not present direct allegations of wrongdoing and relies on

[2] Department of Labor, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/3fP8vuH (*401(k) Plan Fees*).

circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550 U.S. at 554.

ARGUMENT

I. There is no ERISA exception to Rule 8(a)'s pleading standard.

The last 15 years have seen a surge of ERISA litigation.[3] What began as a steady increase has exploded in the past two years, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year.[4] The last 14 months have seen more of the same, including a barrage of lawsuits filed against universities, nonprofits, and healthcare systems that have seen their resources particularly taxed during the pandemic—including Rush University Medical Center and Henry Ford Health System. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges. As a result, they typically rely on generalized allegations that do not reflect the context of a particular plan.

The Supreme Court has taken several recent opportunities to address the standard for sufficiently alleging a claim under ERISA. Each time, it has stressed that ERISA suits are no different from any others: To survive a motion to dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly* and *Iqbal*. *Hughes*, 142 S. Ct. at 742.[5] Given the variety among ERISA plans, the wide discretion plan fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment styles and risk tolerances, and the risk

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[3] *See, e.g.*, George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the rise in 401(k) complaints from 2010 to 2017).

[4] *See Understanding the Rapid Rise in Excessive Fee Claims* 2, AIG, https://bit.ly/3k43kt8; *see also* Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5.

[5] The Court thus rejected some circuits' suggestion that a lower pleading standard applies in ERISA cases. *See Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019).

that any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of "the circumstances … prevailing at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—particularly because, as the Court has recognized, "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*, 142 S. Ct. at 742. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

The allegations in many of the cases in this wave of litigation fail this standard twice over. First, the circumstantial allegations in these complaints are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have to make decisions based on their experience and expertise, and in light of the context of a particular plan.

A. These lawsuits often manufacture factual disputes that do not survive minimal scrutiny.

The shared problem with many of these lawsuits is exemplified by a feature that appears in the majority of the complaints. Plaintiffs typically create a chart (or many charts) purporting to compare some of the investment options in the plan under attack to other options available on the market that allegedly out-performed or had lower fees than the plan's options during a cherry-picked time period. *See, e.g.*, Compl. ¶¶ 111-112, 153-155. They then use the charts to barrel past dismissal, asking the Court to infer that plan fiduciaries must have been asleep at the wheel and requesting discovery to prove it. Inferring imprudence from this tactic ignores the realities of plan management and ERISA's statutory structure—important "context" the Supreme Court has instructed lower courts to consider.

To start, plaintiffs' attorneys can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. Take the federal Thrift Savings Plan ("TSP"), often held out as the "gold standard" for retirement plans and regularly used by plaintiffs as a comparator to argue that an investment underperformed or had excessive fees.[6] Even the TSP could be made to look like a mismanaged plan by cherry-picking comparators with fees that are significantly lower than the TSP's[7]:

Fund	Expense Ratio
TSP Fixed Income Index Investment Fund (F Fund) https://www.tsp.gov/funds-individual/f-fund/?tab=fees	0.058%
iShares Core US Aggregate Bond ETF https://www.morningstar.com/etfs/arcx/agg/price	0.040%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares) https://www.morningstar.com/funds/xnas/vbmpx/price	0.030%
TSP Common Stock Index Investment Fund (C Fund) https://www.tsp.gov/funds-individual/c-fund/?tab=fees	0.043%
Fidelity 500 Index Fund https://www.morningstar.com/funds/xnas/fxaix/price	0.015%
iShares S&P 500 Index Fund (Class K) https://www.morningstar.com/funds/xnas/wfspx/price	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund) https://www.tsp.gov/funds-individual/s-fund/?tab=fees	0.059%
Fidelity Extended Market Index Fund https://www.morningstar.com/funds/xnas/fsmax/price	0.040%

[6] *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, Appellants' Br., No. 17-1711, 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"); *see also* Thrift Savings Plan, Tex. State Sec. Bd., https://bit.ly/3wE4MXA ("The TSP is considered the gold standard of 401(k)s because it charges extremely low fees and offers mutual funds that invest in a cross-section of the stock and bond markets."). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the plan's net-of-fees investment performance.

[7] The data for this table is based on the most recently available figures as of March 1, 2022.

As this example shows, when plaintiffs' attorneys zero in on a single metric for comparison—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. The same is true of charts purporting to identify a "superior" alternative measured by recent investment returns. With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, but chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time—is a misguided investment approach "generally doomed to some kind of failure."[8]

Moreover, plaintiffs frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark with that of Fund B, which has a demonstrably different investment style and performance benchmark. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting plaintiffs' reliance on "inapt comparators"); *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1239, 1306 (D. Minn. 2021) (similar). These barebones comparisons are particularly unhelpful with respect to recordkeeping fees. As the Department of Labor (the agency charged with enforcing ERISA) has explained, services "may be provided through a variety of arrangements,"[9] and neither recordkeepers nor recordkeeping services are interchangeable widgets. To the contrary, recordkeeping services are highly customizable depending on, for example, the needs of each plan, its participant population, the capabilities and resources of the plan's administrator, and the sponsor's human-resources department. *See Excessive Fee Litigation* 3 (recognizing that "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models"). Moreover, myriad services are available at different fee levels, among them core operational

[8] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://bit.ly/3IhKn0R.
[9] *401(k) Plan Fees* 3.

services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[10]

Further underscoring the unreliability of these comparisons, in many cases the plaintiffs' allegations of excessive fees are directly contradicted by publicly available documents. Here, for example, a study that Plaintiffs themselves incorporate in the Complaint demonstrates that the fees for Defendants' selected funds were far below the average market rate. *Compare* Compl. ¶ 111, *with* Investment Company Institute, *Retirement Assets Total $34.9 Trillion in Fourth Quarter 2020* (Mar. 18, 2020). Nevertheless, when confronted with publicly available sources or documents incorporated by reference into the complaint that make clear their allegations are deficient (or demonstrably wrong), plaintiffs often ask the court to close its eyes to that contextual information and claim a factual dispute that must be resolved through discovery. The Supreme Court has said the opposite—that "context" *must* be considered at the 12(b)(6) stage in order to "divide the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425.

B. Fiduciaries have discretion to make a range of reasonable choices.

The allegations in these complaints also often fail to grasp a fundamental tenet of ERISA—namely, the "range of reasonable judgements a fiduciary may make" and the "difficult tradeoffs" inherent in fiduciary decisionmaking. *Hughes*, 142 S. Ct. at 742. That fiduciaries did not select what turned out to be the lowest-cost or best-performing option does not suggest that cherry-picked comparators were in fact "better" overall. There will always be a plan with lower expenses and a plan—typically many plans—with higher ones, just as there will always be a fund that performs better and many funds that perform worse. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options,

[10] *See, e.g.*, Sarah Holden et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, at 4, ICI Research Perspective (June 2021), https://bit.ly/3vnbCU3.

and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base.

The complaints themselves reflect a range of assessments, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. Plaintiffs here allege imprudence based on Defendants' decision to make available actively managed funds. *See* Compl. ¶¶ 79-82, 93, 100, 109-116. But plaintiffs in other cases have alleged a breach of fiduciary duty based on a plan's decision to include passively managed funds rather than actively managed ones—the exact opposite of the allegations here. *See Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79-83. This same phenomenon plays out with respect to plan performance. General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 3:17-cv-01960-CAB-BLM (S.D. Cal.), ECF No. 1. But a different case held up *that exact fund* as a "superior performing alternative[]." Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 1:20-cv-12216-LTS (D. Mass.), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for failing to divest from risky or dropping stock,[11] or for failing to *hold onto* such stock because high risk can produce high reward.[12] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[13] while others complain that including *only one option* in each investment style is imprudent.[14] In many cases, plaintiffs allege that fiduciaries

[11] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).
[12] *E.g.*, *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).
[13] *See, e.g.*, *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).
[14] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

were imprudent because they should have offered Vanguard mutual funds,[15] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[16] Some plaintiffs allege that plans offered imprudently risky investments,[17] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[18] And in some instances, fiduciaries have simultaneously defended against "diametrically opposed" theories of liability, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[19] This dynamic has made it incredibly difficult for fiduciaries to do their job—and it has made it *impossible* for fiduciaries to avoid being sued, no matter how careful their process and no matter how reasonable their decisions.

Accordingly, it is critical for courts to consider context—things like the Department of Labor's instruction that fees are only one of *several factors* that should be considered,[20] publicly available information demonstrating that a complaint's supposed comparators are inapposite, industry data showing that services (and their pricing) vary widely, the performance ebbs and flows that are common characteristics of investment management, and the wide discretion granted to fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible. Nevertheless, some courts have declined to consider context when evaluating whether a plaintiff's claims are plausible, suggesting that it merely creates a dispute of fact. That approach cannot be squared with

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[15] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

[16] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

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

[18] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

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

[20] *401(k) Plan Fees* 1.

the Supreme Court's direction to "give due regard to the range of reasonable judgments a fiduciary may make," recognizing that a bare allegation that one fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct. at 742.

II. These lawsuits will harm participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. These lawsuits impose pressure on plan fiduciaries to make decisions based on how to avoid litigation by prioritizing cost, such as the cost of recordkeeping fees, above all else. The changing litigation landscape also increases the cost of fiduciary liability insurance, leaving employers with less money to provide benefits for employees—such as matching contributions or paying for administrative expenses. And for smaller employers, retirement plans might become cost-prohibitive or simply not worth the risk of litigation. The result will be fewer employers sponsoring plans, less generous benefits, and reduced choice for participants. This outcome 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.

A. These lawsuits pressure plan sponsors to manage plans based solely on cost.

The pressure created by these suits undermines one of the most important aspects of ERISA: the value of innovation, diversification, and employee choice. Plaintiffs often take a cost-above-all approach, filing strike suits against any fiduciaries that consider factors other than cost—notwithstanding ERISA's direction to do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). An investment committee may, for example, feel pressured by the threat of litigation to offer only "a diversified suite of passive investments," despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq (lawsuits push fiduciaries toward the "lowest-cost fund," which is not always "the most prudent" option).

Likewise, these suits affect the recordkeeping services fiduciaries select, pushing plan sponsors toward the lowest-cost option, even though the Department of Labor has acknowledged "that cheaper is not necessarily better." *See 401(k) Plan Fees* 1. The collective impact of these lawsuits is to pressure plan fiduciaries to chase investment performance or the lowest-cost fees or services, whether or not doing so is in participants' interest. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

B. Changes in the liability-insurance market will harm participants.

The litigation surge has upended the insurance industry for retirement plans. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX. The risks of litigation have pushed fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y. Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage").

If employers need 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 administrative 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, many smaller employers do not. If smaller plan sponsors "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Excessive Fee Litigation* 4. In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—often without producing concomitant benefit.

CONCLUSION

For the foregoing reasons, adopting anything less than the "context-specific inquiry" of ERISA complaints prescribed by the Supreme Court in *Hughes* and *Fifth Third* would create precisely the types of negative consequences that Congress intended to avoid in crafting ERISA. *Amicus* urges the Court to adopt and apply that level of scrutiny to this case.

Dated: March 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the court's CM/ECF system on March 4, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: March 4, 2022

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FRED BAUMEISTER, et al.,	)	
Plaintiffs,	)	Civil Action No. 21-cv-6505
vs.	)	Hon. John Robert Blakey
EXELON CORPORATION, et al.,	)	
Defendants.	)	

[PROPOSED] ORDER

The Motion for the Chamber of Commerce of the United States of America for Leave to Participate as *Amicus Curiae* is hereby GRANTED. The Court GRANTS the Chamber of Commerce *amicus curiae* status and GRANTS its request to file a brief in support of the motion to dismiss filed by Defendants. The Clerk is directed to accept the proposed brief for filing.

IT IS SO ORDERED.

SIGNED this _____ day of ____________, 2022.

____

The Honorable John Robert Blakey
United States District Judge