No. 17-1693

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES ELLIS and WILLIAM PERRY, individually and as representatives of a class of similarly situated persons;

Plaintiffs-Appellants,

v.

FIDELITY MANAGEMENT TRUST COMPANY

Defendant-Appellee.

Appeal from the United States District Court for the District of Massachusetts, Case No. 15-14128-WGY, The Honorable William G. Young, District 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 brief as *amici curiae* in the above-captioned case in support of Defendant-Appellee and affirmance. Counsel for the Chamber and the Council sought consent to file an *amicus* brief from counsel for the parties. Defendant-Appellee has consented, but Plaintiffs-Appellants have declined to consent.

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. For example, they recently filed a joint *amicus* brief in this Court in *Barchock v. CVS Health Corp.*, No. 17-1515, a pending appeal that raises similar issues to this case, but in a different procedural posture and against a different type of defendant.

4. Like *Barchock* and many other cases in which the Chamber and the Council have filed *amicus* briefs, this case also affects their members and warrants this short brief. This case presents three questions of enormous practical importance to *amici* and their members:

- whether courts asked to resolve challenges to a fiduciary's adherence to the duty of prudence when making investment decisions with respect to a stable-value fund should focus on an ERISA fiduciary's *process* rather than the *results* of that process;

- whether ERISA requires fiduciaries who deem a particular risk allocation to be appropriate to nonetheless adopt riskier investment strategies, such that a "too conservative" risk allocation is a *per se* breach of fiduciary duty; and

- whether plaintiffs can prove a breach of ERISA's fiduciary duty of loyalty without demonstrating that a fiduciary put the fiduciary's interests *ahead of* the interests of plan beneficiaries.

The answers to these three questions directly implicate the interests of the Chamber, the Council, and their members—and indeed the vitality of this country's system of providing for retirement benefits.

5. *Amici*'s proposed brief explains why a decision from this Court endorsing Plaintiffs-Appellants' hindsight-based theory of ERISA fiduciary liability, their proposed presumption of imprudence, or their unduly expansive view of the duty of loyalty would saddle the Chamber and the Council's members with increased plan-administration and litigation costs, and their employees with decreased options for retirement savings. The brief will further show why these burdens would not benefit employees or plans but would be deadweight losses through transaction costs—and that these burdens are incompatible with ERISA's text and purposes. 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—a goal that, if fund managers like Defendant-Appellee are penalized as Plaintiffs-Appellants hope, could not be achieved.

6. The Chamber and the Council will present to the Court the broader view of how its decision could affect plan administrators and participants (as well as fiduciaries who manage funds) 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 and beyond.

7. Granting this motion will neither delay nor disrupt the proceedings. The Chamber and the Council submit the proposed *amicus* brief seven business days after Defendant-Appellee filed its principal brief.[*] This motion and the proposed *amicus* brief are thus timely under Federal Rule of Appellate Procedure 29(a). Furthermore, the Chamber's and the Council's proposed *amicus* brief does not merely duplicate any arguments made by the parties, but provides context on how the Court's decision will likely affect all plan sponsors, fiduciaries, and participants—not just those currently before the Court.

[*] Defendant-Appellee tendered its brief on November 3, 2017. Because seven days after that, November 10, 2017, was Veterans Day, a federal holiday, *amici* are filing this motion on the first business day after that legal holiday. *See* Fed. R. App. P. 26(a)(1).

8. 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: November 13, 2017

Respectfully submitted,

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As Amici Curiae Supporting Defendant-Appellant and Affirmance

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,017 words, not counting the items excluded by Federal Rule of Appellate Procedure 32(f).

This motion complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 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: November 13, 2017

/s/ Evan A. Young
Evan A. Young

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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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Brief of the Chamber of Commerce of the United States of America
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As *Amici Curiae* Supporting Defendant-Appellee and Affirmance

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CORPORATE DISCLOSURE STATEMENT

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

Dated: November 13, 2017

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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

[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 have declined to 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.

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.

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. Like *Barchock v. CVS Health Corp.*, No. 17-1515, an appeal raising similar issues that is currently pending in this Court and in which the Chamber and the Council recently submitted a joint *amicus* brief, this is such a case. Presented here are three questions of enormous practical importance to *amici* and their members:

(1) whether courts asked to resolve challenges to a fiduciary's adherence to the duty of prudence when making investment decisions with respect to a stable-value fund should focus on an ERISA fiduciary's *process* rather than the *results* of that process;

(2) whether ERISA requires fiduciaries who deem a particular risk allocation to be appropriate to nonetheless adopt riskier investment strategies, such that a "too conservative" risk allocation is a *per se* breach of fiduciary duty; and

(3) whether plaintiffs can prove a breach of ERISA's fiduciary duty of loyalty without demonstrating that a fiduciary put the fiduciary's interests ahead of the interests of plan beneficiaries.

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).

ERISA does not permit (much less require) plaintiffs' odd theory that courts

should punish fiduciaries who make investment decisions whose risk allocation is regarded as "too conservative" or "too aggressive" compared to that of other funds. Accepting plaintiffs' theory of liability would undermine ERISA's core purpose of encouraging fiduciaries to offer plan participants a *variety* of investment options of varying risk levels.

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 properly 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 in tort, for instance, turns on the reasonableness of her conduct, not the fact that the plaintiff suffered an alleged injury—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 claim that Fidelity violated its fiduciary duty of prudence by being insufficiently aggressive. They argue that it *too conservatively* managed a stable-value fund—an investment vehicle offered as a "safe" investment option for 401(k) plans. Their "evidence" is that other stable-value funds that took riskier

approaches earned greater returns. ERISA's plain text (like common sense) forecloses such a claim. Allowing it to proceed would undermine the core purposes of the statute, and the district court rightly rejected 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).

This process-focused fiduciary-liability standard not only makes common sense and harmonizes with basic principles of liability in other contexts; it is also the approach demanded by ERISA's plain text. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring fiduciary conduct to be evaluated according to "then prevailing" circumstances, not after-the-fact results). And others courts, such as the Seventh Circuit, have 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 funds. *See, e.g.*, *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 funds "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 hindsight shows that an ERISA fiduciary's approach—"too conservative" here, but perhaps "too aggressive" in the next case—deviated from some Goldilocks "just right" measure of risk. 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.

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). Plaintiffs' results-oriented approach to assessing ERISA fiduciary liability would make predict-

ing liability impossible. Rather, the only certain thing would be that litigation will always be lurking over the horizon no matter how prudent a fiduciary's investment decision may have been "under the circumstances then prevailing." *See* 29 U.S.C. § 1104(a)(1)(B).

As a review of recent claims brought in this area demonstrates, adopting the hindsight-based approach would make it virtually impossible for ERISA fiduciaries to avoid costly litigation. Some plaintiffs, like those that brought this case, claim that fiduciaries have managed funds too conservatively.[2] Others allege that defendants took too much risk.[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

[2] *See Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D.R.I. Jan. 31, 2017) (currently pending on appeal in this Court as No. 17-1515) (plaintiffs allege that plan fiduciary managed stable-value fund 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).

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

Placing such pressure on ERISA fiduciaries undermines the purposes of the statute and ultimately harms plan beneficiaries. If later-emerging results could render otherwise-prudent investment decisions retroactively imprudent when viewed in hindsight, no fiduciary could limit its liability, no matter how well it had thought through its decisions. Faced with this type of litigation risk, investment managers inevitably would raise the prices on products sold to ERISA plans provided by employers—ultimately to the ultimate detriment of both participants and sponsors. *Cf. 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").[5]

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

[5] *Amici*'s brief in *Barchock* (at pp. 10-12) describes additional reasons, relevant in that appeal, that hindsight-based liability is antithetical to the core premises and purposes of ERISA.

II. Evidence that an ERISA fiduciary followed a more conservative strategy than others in the industry does not demonstrate or even suggest imprudence.

Plaintiffs argue that Fidelity acted imprudently by managing a stable-value fund more conservatively than industry peers. Liability based solely on deviation from what others in the industry do would undermine ERISA's core purposes just as plaintiffs' hindsight-based liability theory would. Plaintiffs' theory would ultimately harm the plan participants ERISA was designed to protect.

A. ERISA 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, fiduciaries 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, fiduciaries 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 stable-value

fund's deviation from some zone of "proper" risk—not too risk-averse but presumably not too risk-seeking either. Imposing liability on such a ground, however, would thwart ERISA's mandate that each fiduciary make investment choices based on *its individual plan's* needs, not the theoretical needs of the nation as a whole. If fiduciaries risked liability whenever the amount of risk they take when making investment decisions is outside the risk level undertaken by others, there would naturally be a rush toward the mean. After all, the law would punish those who find themselves having been outside of a statistical range, the contours of which the judiciary would only later announce.

These particular plaintiffs complain about a "too conservative" strategy (because it now turns out that more risk would have generated higher returns), while others could complain about a "too aggressive" strategy (after a market period in which less risk would have generated higher returns). If the courts allow plaintiffs to eliminate both ends of the bell curve, then the *next* iteration will cover less territory, as fiduciaries rush to avoid the tails. But there will still be a bell curve, and plaintiffs will still challenge the tails of that new curve. This iterative process can only end in the enforcement of some unbending average to which all fiduciaries must adhere. This consequence would destroy (1) the ability of fiduciaries to respond to the individual needs of a given plan and (2) the ability of plan sponsors even to have options that they greatly desire but that diverge from the mean. In

this sense, the issue in *Barchock*—involving alleged liability for deviating from an industry "average"—is just the final manifestation of the theory embraced by plaintiffs here. The willingness to entertain claims based on plaintiffs' theory would create a legally imposed incentive structure to eliminate any possible characterization as an "outlier."

Instead, this Court should reaffirm the flexible prudence standard that has long facilitated fiduciaries' 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. If fund managers are held liable for being "too conservative," plan sponsors that reasonably seek to offer just that sort of conservative choice will find that such options are no longer available to them.

Fiduciaries, in other words, need flexibility to respond to the genuine needs of those they serve. After the financial crisis, for example, 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 for even safer investment options for plan participants. *Id.* There was nothing imprudent about that approach. ERISA fiduciaries should not be required to take on *increased* risk simply because other plan fiduciaries do so after considering the "character" and "aims" of their own plans and 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").

B. Liability based on adopting "too conservative" a risk allocation would pose serious practical problems for fiduciaries while driving up plan costs.

Accepting plaintiffs' theory of liability would leave some fiduciaries with an untenable 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 solely for not aligning with the herd.

Even worse, 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 determining what amount of risk the industry as a whole adopts?
- What constitutes a typical approach to any given investment decision?
- Just 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, fiduciaries would feel compelled to continuously monitor the decisions and approaches of the fiduciaries of all funds 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, fiduciaries would feel no choice but to follow the trend mindlessly, even if the more popular approach was not, in their judgment, in the best interest of the participants they serve.

III. ERISA fiduciaries do not violate the duty of loyalty unless they place their own interests ahead of plan beneficiaries'.

The district court rejected plaintiffs' claim that Fidelity's conservative approach also violated the fiduciary duty of loyalty because plaintiffs failed to produce evidence that Fidelity placed its own interests ahead of plaintiffs'. Plaintiffs phrase their theory as barring fund managers from considering their own interests, but their argument necessarily reduces to holding that a breach of the duty of loyalty lurks whenever a fund manager's self-interest is even *aligned* with those of plan participants. After all, nothing more than that alignment exists here. Adopting such a startling principle would affirmatively harm plan participants, not help

them.

Plan sponsors often want fund managers' interests to be aligned with those of the participants. Far from seeking judicial protection from any such alignment, sponsors pursue it. They may enter into asset-based fee arrangements (or other contractual provisions that do not wholly divorce the fund managers' interest from how investment decisions are made) precisely *because* that ensures a clear and healthy line of incentives. But plaintiffs' theory means that a manager that considers its own interests even when doing so is entirely consistent with advancing the plan's interests would be in breach of its duty of loyalty. In turn, the rule would discourage would-be fiduciaries even from offering essential plan-related services and would raise the costs of plan administration—costs ultimately borne by the plan participants supposedly aided by the plaintiffs' proposed rule. From the perspective of plan sponsors, like many of *amici*'s members, therefore, the plaintiffs' approach to fund managers' duty of loyalty is decidedly harmful.

To be clear, *amici* do not even regard this question as open. No one disputes that Section 404(a) of ERISA requires fiduciaries to honor the duty of loyalty by "discharg[ing] his duties with respect to a plan solely in the interest of the participants." 29 U.S.C. § 1104(a)(1). But this Court is not writing on a blank slate. It already has held that the mere fact that an ERISA fiduciary receives a benefit from a given investment decision does not inexorably establish disloyalty; rather,

ERISA "require[s] . . . that the fiduciary not place its own interests *ahead of* those of the Plan beneficiary." *Vander Luitgaren v. Sun Life Assurance Co. of Can.*, 765 F.3d 59, 65 (1st Cir. 2014) (emphasis added). But "[i]t is no violation of a trustee's fiduciary duties to take a course of action which reasonably best promotes the interest of plan participants simply because it incidentally also benefits the corporation." *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984). Any other approach assumes a zero-sum game—any benefit to the fund manager must mean some harm to the employee. Common sense (and the statute) permit no such assumption, however.

What makes plaintiffs' theory especially dangerous is that fee arrangements like the one at issue here are commonplace in the workaday world. They do not put the fund manager's interest ahead of the participants' interests but merely *align* all interests. Forbidding all such arrangements would not promote, but would impede, ERISA's core purpose of "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). Plan sponsors remain free to take different approaches if they so choose. But plaintiffs' proposed rule would transform the ordinary contractual arrangements that make virtually all ERISA plans possible into badges of disloyalty, which can only mean that fiduciaries like Fidelity will either be unable to offer essential services or will do so at far,

far higher costs. Such an outcome would benefit neither plans nor their participants.

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 3,389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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: November 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 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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