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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 (WESTERN DIVISION)

15 MICHELLE MILLS, COY SARELL,  
16 CHAD WESTOVER, BRENT  
17 ALESHIRE, BARBARA KERSHNER,  
18 PAULA SCHAUB, and JENNIFER  
19 SILVA, individually and as  
20 representatives of a class of participants  
21 and beneficiaries on behalf of the  
22 Molina Salary Savings Plan,

23 Plaintiffs,

24 v.

25 MOLINA HEALTHCARE, INC., THE  
26 BOARD OF DIRECTORS OF  
27 MOLINA HEALTHCARE, INC., THE  
28 MOLINA SALARY SAVINGS PLAN  
INVESTMENT COMMITTEE, NFP  
RETIREMENT, INC., and  
FLEXPATH STRATEGIES, LLC,

Defendants.

Case No. 2:22-cv-01813-SB-GJS

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

Hearing: November 18, 2022  
Time: 8:30 am  
Judge: Hon. Stanley Blumenfeld Jr.  
Dept.: Courtroom 6C

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on November 18, 2022, at 8:30 a.m., in the Courtroom of the Honorable Stanley Blumenfeld, Jr., whether virtually or in Courtroom 6C located in the First Street Courthouse, 350 W. 1st Street, Los Angeles, CA 90012, proposed amicus curiae the Chamber of Commerce of the United States of America (Chamber) will and hereby does move this Court for an order granting its Motion for Leave to Participate as Amicus Curiae. 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.

This motion is based on the ground that the pleading standard for ERISA fiduciary-breach claims is an important issue with ramifications beyond this case. As the world's largest business federation—many of whose 300,000 direct members maintain or provide services to retirement plans—the Chamber has a unique perspective on the issues presented by the pending motions to dismiss. The Chamber's brief thus seeks to provide useful context that will assist the court in resolving the issues presented by the motions to dismiss.

This Motion is based on this Notice of Motion; the accompanying Memorandum of Points and Authorities; the proposed amicus brief (Exhibit A to the Motion for Leave); the pleadings and records on file with this Court; and any evidence and argument that may be presented at or before the hearing on this matter. The parties' L.R. 7-3 conference took place by videoconference on October 18, 2022.

1  
2 Dated: October 19, 2022

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**MEET AND CONFER CERTIFICATION**

Pursuant to L.R. 7-3 and the Court's Standing Order 6(a)(ii), I, Jaime A. Santos, certify that the parties met by videoconference on October 18, 2022, thoroughly discussed each and every issue raised in the motion, and attempted in good faith to resolve the motion in whole or in part.

Dated: October 19, 2022

/s/ Jaime A. Santos

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## MEMORANDUM OF POINTS AND AUTHORITIES

Amicus participation is appropriate where, as here, the “amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *WildEarth Guardians v. Haaland*, 561 F. Supp. 3d 890, 905-06 (C.D. Cal. Sept. 20, 2021) (internal quotation omitted). “There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court.” *Id.* at 905. District courts thus have “broad discretion to appoint amici curiae.” *Duronslet v. Cnty. of Los Angeles*, 2017 WL 5643144, at \*1 (C.D. Cal. Jan. 23, 2017) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)); *see also Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, 2011 WL 5865296, at \*1 (S.D.N.Y. Nov. 22, 2011) (recognizing that “[t]here is no governing standard” dictating “the procedure for obtaining leave to file an amicus brief in the district court”).

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  
 2 support PBGC in its efforts to protect retirement incomes, submits comments to the  
 3 Department of the Treasury on plan administration and qualification, and provides  
 4 testimony to DOL's standing ERISA Advisory Council. *See, e.g.*, Electronic  
 5 Disclosure by Employee Benefit Plans (Nov. 22, 2019), <https://bit.ly/3CWJ8UE>;  
 6 Comments on the Interim Final Regulation for the Special Financial Assistance  
 7 Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021),  
 8 <https://bit.ly/3pvgpPJ>; Permanent Relief for Remote Witnessing Procedures (Sept.  
 9 29, 2021), <https://bit.ly/3yE5g3u>; Statement of the U.S. Chamber of Commerce  
 10 Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug.  
 11 27, 2021), <https://bit.ly/3TmzbVL>. The Chamber has also published literature  
 12 proposing initiatives to encourage and bolster the employment-based retirement  
 13 benefits system in the United States, and is frequently quoted as a resource on  
 14 retirement policy. *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto*  
 15 *Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23,  
 16 2021), <https://bit.ly/3Tg6g69>; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up*  
 17 *With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), <https://bit.ly/3MecArL>.

18 Given its perspective and deep understanding of the issues involved in these  
 19 cases, the Chamber regularly participates as amicus curiae in cases involving  
 20 employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*,  
 21 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving  
 22 challenges to defined-contribution plan line-ups and service-provider arrangements);  
 23 *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading  
 24 fiduciary-breach claim involving employer stock); *Smith v. CommonSpirit Health*,  
 25 37 F.4th 1160 (6th Cir. 2022) (standard for pleading fiduciary-breach claim involving  
 26 401(k) plan fees and investment line-up); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d  
 27 Cir. 2019) (same); *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same).  
 28 District courts in several recent cases have granted the Chamber leave to participate

1 as an amicus at the motion-to-dismiss stage. As one court explained, “the proposed  
 2 amicus brief could provide the Court wi[th] a broader view of the impact of the issues  
 3 raised in the case”—“an appropriate basis to allow amicus participation.”  
 4 *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF. No. 44  
 5 (denying plaintiffs’ motion for reconsideration of the order granting the Chamber’s  
 6 motion for leave to file); *see also Singh v. Deloitte*, No. 21-8458 (S.D.N.Y. Apr. 14,  
 7 2022), ECF No. 41 (granting the Chamber’s motion for leave to file over the  
 8 plaintiffs’ opposition); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr.  
 9 4, 2022), ECF No. 38 (same). As these decisions reflect, amicus briefs are routinely  
 10 accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.,*  
 11 *New York v. U.S. Dep’t of Labor*, No. 18-1747 (D.D.C. Nov. 9, 2018) (minute order);  
 12 *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 65;  
 13 *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22.

14 Because of the Chamber’s unique membership, which represents nearly all of  
 15 those in the private-sector retirement community, the Chamber’s collective  
 16 knowledge about the management of retirement plans, the legal issues surrounding  
 17 ERISA, and the types of allegations commonly included in these types of complaints  
 18 extends beyond any single defendant or group of defendants named in a particular  
 19 case. The Chamber seeks to provide a broader perspective on the key threshold issue  
 20 of when circumstantial allegations of a violation of ERISA are plausible in the  
 21 context of plan-management decisionmaking and the overall context of ERISA class-  
 22 action litigation. And as the Supreme Court has instructed, that context is key—  
 23 courts are supposed to undertake a “careful, context-sensitive scrutiny of [the]  
 24 complaint’s allegations,” *Fifth Third*, 573 U.S. at 425, just as they are supposed to  
 25 consider “context” in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v.*  
 26 *Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining  
 27 that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662  
 28 (2009), applies to ERISA cases).



1 The Chamber’s brief will therefore “contribute in clear and distinct ways” to  
 2 the Court’s analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*,  
 3 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber’s motion for leave to file);  
 4 *see also Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128,  
 5 132 (3d Cir. 2002) (Alito, J.) (an amicus brief may assist the court “by explain[ing]  
 6 the impact a potential holding might have on an industry or other group”) (quotation  
 7 marks omitted). “Even when a party is very well represented, an amicus may provide  
 8 important assistance to the court.” *Id.*; *see also Duronslet*, 2017 WL 5643144, at \*2.  
 9 And here, the Chamber’s perspective and expertise will serve several functions courts  
 10 have identified as useful: It “explain[s] the broader regulatory or commercial  
 11 context” in which this case arises; “suppl[ies] empirical data” informing the issue on  
 12 appeal; and “provid[es] practical perspectives on the consequences of particular  
 13 outcomes.” *Prairie Rivers Network*, 976 F.3d at 763.

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

26 Finally, the proposed amicus brief is being filed well before Plaintiffs’  
 27 opposition is due and therefore will not delay resolution of this motion. And although  
 28 Plaintiffs in this case have decided to oppose the Chamber’s motion for leave to file,



1 this Court has frequently permitted amici to participate in its proceedings, including  
 2 over an opposition from one of the parties. *See, e.g., Stoyas v. Toshiba Corp.*, 2021  
 3 WL 2315200, at \*1 (C.D. Cal. June 7, 2021) (granting motion for leave to file over  
 4 an opposition); *Duronslet*, 2017 WL 5643144, at \*2 (same).

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

8  
 9 Respectfully submitted,

10 Dated: October 19, 2022

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury that the foregoing is true and correct.  
Executed this 19th day of October, 2022.

/s/ Jaime A. Santos

# EXHIBIT A

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INVESTMENT COMMITTEE, NFP  
RETIREMENT, INC., and  
FLEXPATH STRATEGIES, LLC,

Defendants.

Case No. 2:22-cv-01813-SB-GJS

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

Hearing: November 18, 2022  
Time: 8:30 am  
Judge: Hon. Stanley Blumenfeld Jr.  
Dept.: Courtroom 6C

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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.<sup>1</sup> 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 bedrock 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.

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<sup>1</sup> 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.

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

13 No plan, regardless of size or type, is immune from this type of challenge. It  
14 is *always* possible for plaintiffs to use the benefit of hindsight to identify, among the  
15 almost innumerable options available in the marketplace, a better-performing or less-  
16 expensive investment option or service provider than the ones plan fiduciaries chose.  
17 That is not sufficient under the pleading standard established in *Hughes v.*  
18 *Northwestern University*, 142 S. Ct. 737, 740 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662  
19 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

20 If these types of conclusory and speculative complaints are sustained, plan  
21 participants will be the ones who suffer. Fiduciaries will be pressured to limit  
22 investments to a narrow range of options at the expense of providing a diversity of  
23 choices with a range of fees, risk levels, and potential performance upsides, as ERISA  
24 expressly encourages and most participants want. Fiduciaries will also be  
25 discouraged from considering new funds or making available innovative strategies  
26 or products—innovations that ERISA's flexible fiduciary standards are supposed to  
27 *encourage*—lest they be charged with allegations of imprudence based solely on the  
28 funds' status as purportedly “novel” or “untested.” Second Amended Complaint

1 (“SAC”) ¶ 46. Moreover, these lawsuits frequently operate on a cost-above-all  
 2 mantra—despite the admonition by the Department of Labor (“DOL”) that fees  
 3 should be only “one of several factors” in fiduciary decisionmaking. DOL, *A Look*  
 4 *at 401(k) Plan Fees* 1 (Sept. 2019), <https://bit.ly/3fP8vuH> (“401(k) Plan Fees”).  
 5 “[N]othing in ERISA requires every fiduciary to scour the market to find and offer  
 6 the cheapest possible fund (which might, of course, be plagued by other problems).”  
 7 *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). But given many plaintiffs’  
 8 heavy emphasis on cost, these lawsuits pressure fiduciaries to forgo packages that  
 9 include popular and much-needed services, including financial-wellness education  
 10 and enhanced customer-service options.

11 If the recent flood of litigation has taught us anything, it is that it is impossible  
 12 for plan fiduciaries to prevent themselves from becoming the subject of a lawsuit—  
 13 no matter how rigorous their process, no matter the quality of the funds they choose,  
 14 and no matter how carefully they monitor the market. This lawsuit is a perfect  
 15 example: Plaintiffs allege that Plan fiduciaries must not have been monitoring the  
 16 funds in the Plan because they switched to lower-cost share classes mere *months* after  
 17 they became available. SAC ¶ 117. If anything, however, this allegation  
 18 *affirmatively demonstrates* prudence by showing that Plan fiduciaries were carefully  
 19 reacting to market conditions, and in fact selected Plaintiffs’ preferred options  
 20 expeditiously. Yet, despite their diligence, Defendants still found themselves the  
 21 targets of a lawsuit. Plan sponsors and fiduciaries today truly are, as the Supreme  
 22 Court has observed, “between a rock and a hard place.” *Fifth Third Bancorp v.*  
 23 *Dudenhoeffer*, 573 U.S. 409, 424 (2014).

24 Against this backdrop, it is critical that courts do not shy away from the  
 25 “context-specific inquiry” that ERISA requires. *Hughes*, 142 S. Ct. at 740; *see also*  
 26 *Fifth Third Bancorp*, 573 U.S. at 425. As the Supreme Court recently made  
 27 explicit—and as circuit courts have repeatedly emphasized since—ERISA cases are  
 28 subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 142

1 S. Ct. at 742; *see also* *Matousek v. MidAmerican Energy Co.*, \_\_ F.4th \_\_, 2022 WL  
2 6880771, at \*1 (8th Cir. Oct. 12, 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570, 577  
3 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022).  
4 When a plaintiff does not present direct allegations of wrongdoing and relies on  
5 circumstantial allegations that are “just as much in line with” plan fiduciaries’ having  
6 acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550  
7 U.S. at 554.

8 The allegations in many of the cases in this wave of litigation, including this  
9 one, fail this standard twice over. First, the complaints’ circumstantial allegations  
10 are often equally (if not far more) consistent with lawful behavior, and therefore  
11 cannot “nudge[] the[] claims across the line from conceivable to plausible.”  
12 *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion  
13 fiduciaries have in making decisions based on their experience and expertise, and in  
14 light of the context of their plan.

## 15 ARGUMENT

### 16 **I. There is no ERISA exception to Rule 8(a)’s pleading standard.**

17 The last 15 years have seen a surge of ERISA litigation challenging 401(k)  
18 plan fees and performance. *See, e.g.*, George S. Mellman and Geoffrey T.  
19 Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center  
20 for Retirement Research at Boston College (May 2018), <https://bit.ly/3fUxDR1>  
21 (documenting the rise in 401(k) complaints from 2010 to 2017). What began as a  
22 trickle has become a flood, with 190 lawsuits filed since 2020. *See West Corp. Inks*  
23 *\$875,000 Deal in Class Challenge to 401(k) Fees*, Bloomberg Law (June 29, 2022),  
24 <https://bit.ly/3VsmOcy>. These cases generally do not develop organically based on  
25 plan-specific details, but rather are advanced as prepackaged, one-size-fits-all  
26 challenges. As a result, they typically rely on generalized allegations that do not  
27 reflect the context of the actual plan whose fiduciaries are being sued.

1 The Supreme Court has taken several recent opportunities to address the  
2 standard for pleading a fiduciary-breach claim under ERISA. Each time, it has  
3 stressed that ERISA suits are no different from any others: To survive a motion to  
4 dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly*  
5 and *Iqbal*. *Hughes*, 142 S. Ct. at 742. Given the variety among ERISA plans, the  
6 wide discretion fiduciaries have when making decisions on behalf of tens of  
7 thousands of employees with different investment needs and risk tolerances, and the  
8 risk that any ERISA suit can be made to appear superficially complicated, applying  
9 Rule 8(a) to ERISA claims requires a close evaluation of “the  
10 circumstances ... prevailing at the time the fiduciary acts” and a “careful, context-  
11 sensitive scrutiny of a complaint’s allegations.” *Fifth Third*, 573 U.S. at 425.  
12 “[C]ategorical rules” have no place in this analysis—particularly because “the  
13 circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts  
14 must give due regard to the range of reasonable judgments a fiduciary may make  
15 based on her experience and expertise.” *Hughes*, 142 S. Ct. at 742. If anything, the  
16 discretion and flexibility ERISA affords should make pleading through hindsight-  
17 based circumstantial allegations *more* difficult, not less.

18 **A. These lawsuits often manufacture factual disputes that do not**  
19 **survive plausibility scrutiny.**

20 The shared problem with many of these lawsuits is exemplified by a feature  
21 that appears in most of the complaints. Plaintiffs typically create a chart (or many  
22 charts) purporting to compare some of the investment options in the plan under attack  
23 to other options available on the market that allegedly out-performed or had lower  
24 fees than the plan’s options during a cherry-picked time period. *See, e.g.*, SAC ¶ 117.  
25 They then use the charts to barrel past dismissal, asking the Court to infer that plan  
26 fiduciaries must have been asleep at the wheel and requesting discovery to prove it.  
27 Inferring imprudence from this tactic ignores the realities of plan management and  
28

1 ERISA’s statutory structure—important context the Supreme Court has instructed  
2 lower courts to consider. *See Hughes*, 142 S. Ct. at 740; *Fifth Third*, 573 U.S. at 425.

3 To start, plaintiffs’ attorneys can easily cherry-pick historical data to make a  
4 fiduciary’s choices look suboptimal given the near-infinite combination of  
5 comparator options and time periods. Take the federal Thrift Savings Plan (“TSP”),  
6 often held out as the “gold standard” for retirement plans and regularly used by  
7 plaintiffs as a comparator to argue that an investment underperformed or had  
8 excessive fees.<sup>2</sup> *See, e.g., Brotherston v. Putnam Invs., LLC*, Appellants’ Br., No.  
9 17-1711, 2017 WL 5127942, at \*23 (1st Cir. Nov. 1, 2017) (describing TSP as “a  
10 quintessential example of a prudently-designed plan”); *see also* Thrift Savings Plan,  
11 Tex. State Sec. Bd., <https://bit.ly/3wE4MXA> (“The TSP is considered the gold  
12 standard of 401(k)s because it charges extremely low fees and offers mutual funds  
13 that invest in a cross-section of the stock and bond markets.”). But even the TSP  
14 could be made to look like a mismanaged plan by cherry-picking comparators with  
15 fees that are significantly lower than the TSP’s<sup>3</sup>:

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25 <sup>2</sup> The TSP is a particularly inapt exemplar given that the U.S. government subsidizes  
26 administrative and investment-management expenses, thereby inflating the plan’s  
net-of-fees investment performance.

27 <sup>3</sup> The data for this table is based on the most recently available figures as of March  
28 1, 2022.



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

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, just as one could always identify a worse-performing fund.

Moreover, plaintiffs frequently compare apples and oranges: comparing the performance of Fund A with one investment style and performance benchmark to that of Fund B, which has a different investment style and performance benchmark. *See, e.g., Matousek*, 2022 WL 6880771, at \*4 (rejecting comparators where plaintiffs failed to allege that they held “similar securities,” had “similar investment strategies,” or “reflect[ed] a similar risk profile”). Here, for example, Plaintiffs’ chosen

1 comparators performed differently precisely because they had different features,  
2 including different glidepaths, different asset allocations, and different risk levels.  
3 SAC ¶¶ 92-106; *see also Parmer v. Land O’Lakes, Inc.*, 518 F. Supp. 3d 1239, 1306  
4 (D. Minn. 2021) (identifying different “glide path strategies” as a differentiating  
5 feature among purportedly similar plans).

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

7 The allegations in these complaints also often fail to grasp a fundamental tenet  
8 of ERISA—namely, the “range of reasonable judgements a fiduciary may make” and  
9 the “difficult tradeoffs” inherent in fiduciary decisionmaking. *Hughes*, 142 S. Ct. at  
10 742. That fiduciaries did not select what turned out to be the lowest-cost or best-  
11 performing option does not suggest that their process was imprudent. There will  
12 always be a plan with lower expenses and a plan—typically many plans—with higher  
13 ones, just as there will always be a fund that performs better and many funds that  
14 perform worse. There is no one prudent fund, service provider, or fee level that  
15 renders everything else imprudent. Instead, there is a wide range of reasonable  
16 options, and Congress vested fiduciaries with flexibility and discretion to choose  
17 from among those options based on their informed assessment of the needs of their  
18 plan and its unique participant base.

19 The complaints themselves reflect a range of assessments, as one complaint’s  
20 supposedly imprudent choice is often another complaint’s prudent exemplar.  
21 Plaintiffs in many cases allege imprudence based on defendants’ decision to offer  
22 actively managed funds. *See, e.g.,* Compl. ¶¶ 79-82, 93, 100, 109-116, *Baumeister*  
23 *v. Exelon Corp.*, No. 21-6505 (N.D. Ill.), ECF No. 1. But plaintiffs have also alleged  
24 the exact opposite—a breach of fiduciary duty based on a plan’s decision to include  
25 passively managed funds rather than actively managed ones. *See Ravarino v. Voya*  
26 *Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79-83. This same  
27 phenomenon plays out with respect to plan performance. General Electric was sued  
28 in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan.

1 See Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 17-01960 (S.D. Cal.), ECF No. 1.  
2 But a different case held up *that exact fund* as a “superior performing alternative[.]”  
3 Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 20-12216 (D. Mass.), ECF  
4 No. 1.

5 As these complaints demonstrate, ERISA fiduciaries making discretionary  
6 decisions are at risk of being sued seemingly no matter what decisions they make.  
7 While most plaintiffs sue plans for charging allegedly excessive fees in the hopes of  
8 outperformance, a new wave of suits charge defendants with following the  
9 purportedly “in vogue” trend of “chas[ing]” low fees rather than focusing on funds’  
10 “ability to generate return.” See, e.g., Compl. ¶ 29, *Tullgren v. Booz Allen Hamilton*  
11 *Inc.*, No. 22-856 (E.D. Va.), ECF No. 1. Likewise, plaintiffs sue fiduciaries both for  
12 failing to divest from risky or dropping stock, and for failing to *hold onto* such stock  
13 because high risk can produce high reward. Compare *In re RadioShack Corp. ERISA*  
14 *Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008), with *Thompson v. Avondale Indus.,*  
15 *Inc.*, 2000 WL 310382, at \*1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that  
16 fiduciaries “prematurely” divested ESOP stock). Some plaintiffs allege that it is  
17 imprudent for a plan to offer more than one investment option in the same style, while  
18 others complain that including *only one option* in each investment style is imprudent.  
19 Compare *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at \*10 (E.D. Pa. Sept. 21,  
20 2017), *rev’d in part*, 923 F.3d 320 (3d Cir. 2019), with Am. Compl. ¶ 52, *In re GE*  
21 *ERISA Litig.*, No. 17-cv-12123 (D. Mass.), ECF No. 35. In many cases, plaintiffs  
22 allege that fiduciaries were imprudent because they should have offered Vanguard  
23 mutual funds, but others complain that defendants were imprudent *because they*  
24 *offered* Vanguard mutual funds. Compare *Moreno v. Deutsche Bank Ams. Holding*  
25 *Corp.*, 2016 WL 5957307, at \*6 (S.D.N.Y. Oct. 13, 2016), with Am. Compl. ¶ 108,  
26 *White v. Chevron Corp.*, No. 16-0793 (N.D. Cal.), ECF No. 41. And in some  
27 instances, fiduciaries have simultaneously defended against “diametrically opposed”  
28 liability theories, giving new meaning to the phrase “cursed-if-you-do, cursed-if-you-

1 don't." *See Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008). This dynamic has made  
2 it incredibly difficult for fiduciaries to do their job—and it has made it virtually  
3 impossible for fiduciaries to avoid being sued, no matter how careful their process  
4 and how reasonable their decisions.

5 Accordingly, it is critical for courts to consider context—things like DOL's  
6 instruction that fees are only one of *several factors* that should be considered, *401(k)*  
7 *Plan Fees* 1; publicly available information demonstrating that a complaint's  
8 supposed comparators are inapposite; industry data showing that services (and their  
9 pricing) vary widely; the performance ebbs and flows that are common  
10 characteristics of investment management; and the wide discretion granted to  
11 fiduciaries by Congress all bear on whether fiduciary-breach claims are plausible.  
12 Nevertheless, some courts have declined to consider context when evaluating  
13 plausibility, suggesting that doing so would require the court to resolve a purported  
14 dispute of fact. That approach cannot be squared with the Supreme Court's direction  
15 to "give due regard to the range of reasonable judgments a fiduciary may make,"  
16 recognizing that a bare allegation that one fiduciary made a decision different from  
17 another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 142 S. Ct.  
18 at 742.

## 19 **II. These lawsuits will harm participants and beneficiaries.**

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

1 participants. This outcome is wholly at odds with a primary purpose of ERISA—to  
2 *encourage* employers to voluntarily offer retirement plans and a diverse set of options  
3 within those plans. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

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

6 The pressure created by these suits undermines one of the most important  
7 aspects of ERISA: the value of innovation, diversification, and employee choice.  
8 Plaintiffs often take a cost-above-all approach, filing strike suits against any  
9 fiduciaries that consider factors other than cost—notwithstanding ERISA’s direction  
10 to do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at \*10 (N.D.  
11 Cal. Aug. 29, 2016). An investment committee may, for example, feel pressured by  
12 the threat of litigation to offer only “a diversified suite of passive investments,”  
13 despite “actually think[ing] that a mix of active and passive investments is best.” *See*  
14 David McCann, *Passive Aggression*, CFO (June 22, 2016), <https://bit.ly/2Sl55Yq>  
15 (lawsuits push fiduciaries toward the “lowest-cost fund,” which is not always “the  
16 most prudent” option). Likewise, these suits affect the recordkeeping services  
17 fiduciaries select, pushing plan sponsors toward the lowest-cost option, even though  
18 DOL has acknowledged “that cheaper is not necessarily better.” *See 401(k) Plan*  
19 *Fees* 1. The collective impact of these lawsuits is to pressure plan fiduciaries to chase  
20 investment performance or the lowest-cost fees or services, whether or not doing so  
21 is in participants’ interest. In a purported effort to safeguard retirement funds,  
22 plaintiffs actually pressure fiduciaries *away from* exercising their “responsibility to  
23 weigh ... competing interests and to decide on a (prudent) financial strategy.” *Brown*  
24 *v. Daikin Am., Inc.*, 2021 WL 1758898, at \*7 (S.D.N.Y. May 4, 2021).

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

26 The litigation surge has upended the insurance industry for retirement plans.  
27 Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business  
28 Insurance (Apr. 30, 2021), <https://bit.ly/3ytoRBX>. The risks of litigation have



1 pushed fiduciary insurers “to raise insurance premiums, increase policyholder  
2 deductibles, and restrict exposure with reduced insurance limits.” *Excessive Fee*  
3 *Litigation* 4; see also Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary*  
4 *Insurance Market*, Bloomberg Law (Oct. 18, 2021), <https://bit.ly/307mOHg>  
5 (discussing the “sea change” in the market for fiduciary insurance); Robert Steyer,  
6 *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20,  
7 2021), <https://bit.ly/39W996Y>. Plans are now at risk of not being able to “find[]  
8 adequate and affordable fiduciary coverage because of the excessive fee litigation.”  
9 *Excessive Fee Litigation* 4; see also Jon Chambers, *ERISA Litigation in Defined*  
10 *Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), <https://bit.ly/2SHZuME>  
11 (fiduciary insurers may “increasingly move to reduce coverage limits, materially  
12 increase retention, or perhaps even cancel coverage”); Charles Filips et al., *Options*  
13 *When Fiduciary Insurance Is Too Expensive* 1, PlanSponsor (Mar. 8, 2022),  
14 <https://bit.ly/3q1vgRU> (responding to an inquiry from a plan sponsor that was no  
15 longer able to afford fiduciary insurance).

16 If employers need to absorb the cost of higher insurance premiums and higher  
17 deductibles, many employers will inevitably have to offer less generous plans—  
18 reducing their employer contributions, declining to cover administrative fees and  
19 costs when they otherwise would elect to do so, and reducing the services available  
20 to employees. And while large employers may have some capacity to absorb some  
21 of these costs, many smaller employers do not. If smaller plan sponsors “cannot  
22 purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the  
23 next step is to stop offering retirement plans to their employees.” *Excessive Fee*  
24 *Litigation* 4. Congress is in fact trying to do the opposite. The Setting Every  
25 Community Up for Retirement Enhancement Act of 2019 increases the tax incentives  
26 available for small employers that sponsor eligible employer plans and creates a  
27 structure for pooled employer plans, allowing unrelated employees to join together  
28 to participate in a single defined contribution plan. See Public L. 116-94, 133 Stat.

1 2534 (2019), §§ 101, 104-105. These lawsuits run counter to Congress’s goal to  
2 expand—rather than shrink—the number of employees who are able to participate in  
3 retirement plans. In short, these suits impose significant costs on plan sponsors—  
4 and, by extension, plan participants and beneficiaries—often without producing  
5 concomitant benefit.

6 **CONCLUSION**

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

12 Respectfully submitted,

13  
14 Dated: October 19, 2022

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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 Central District of California by using the CM/ECF system on October 19, 2022. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct.  
Executed this 19th day of October, 2022.

/s/ Jaime A. Santos

Jaime A. Santos