IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THERESA L. RODRIGUEZ, et al., Plaintiffs, v. HY-VEE, INC., et al., Defendants.	)	4:22-cv-00072-RGE-HCA **MOTION OF 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 (the "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, an *amicus* can offer "a unique perspective," "expertise," and "helpful information" to the Court. *North Dakota v. Heydinger*, 2013 WL 593898, at *7 (D. Minn. Feb. 15, 2013); *accord ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, 2010 WL 1840301, at *9 (D. Minn. May 7, 2010); *Swinton v. SquareTrade, Inc.*, 2018 WL 8458862, at *8 (S.D. Iowa Sept. 21, 2018), *aff'd*, 960 F.3d 1001 (8th Cir. 2020). "[T]here is no governing standard" dictating "the procedure for obtaining leave to file an amicus brief in the district court," *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), and "District Courts have broad discretion in deciding whether to accept amicus briefs." *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 2011 WL 13285400, at *5 (S.D. Iowa Feb. 18, 2011) (citation omitted).

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

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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.

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 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). District courts in several recent cases have granted the Chamber leave to participate as an *amicus* at the motion-to-dismiss stage. As one court explained, "the proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation." *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill. Mar. 11, 2022), ECF. No. 44 (denying plaintiffs' motion for reconsideration of the order granting the

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[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.

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

Chamber's motion for leave to file); *see also Singh v. Deloitte LLP*, No. 21-8458 (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366 (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same).[8]

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 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.*

[8] As these decisions reflect, *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 (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229 (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32 (W.D. Va. Sept. 9, 2021), ECF No. 22.

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; *see also United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 2012 WL 3065517, at *6 (E.D. Mo. July 27, 2012) (allowing *amicus* participation from parties with "knowledge, experience, and perspective related to the matters in th[e] case").

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.*, 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.*, *United States v. Hart*, 417 F. Supp. 1314, 1316 n.1 (S.D. Iowa 1976) (granting motion for leave to file *amicus* brief over opposition); *Lubavitch of Iowa, Inc. v. Walters*, 684 F. Supp. 610, 615 n.5 (S.D. Iowa 1988) (referring to positions of *amici* and noting that the court "appreciate[s] the able legal briefing of amici curiae"); *Lyon v. Grossheim*, 803 F. Supp. 1538, 1553 & n.35 (S.D. Iowa 1992) (relying on facts and data provided in *amicus* briefs).

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.

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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 Southern District of Iowa by using the Court's CM/ECF system on May 10, 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: May 10, 2022

/s/ Mark E. Weinhardt
Mark Weinhardt

IN THE UNITED STATES DISTRICT COURT
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THERESA L. RODRIGUEZ, et al., Plaintiffs, v. HY-VEE, INC., et al., Defendants.	)	4:22-cv-00072-RGE-HCA **BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

The Chamber of Commerce of the United States of America, pursuant to its contemporaneously filed Motion for Leave to Participate as *Amicus Curiae*, respectfully submits this brief as *amicus curiae* in the above-captioned case in support of Defendants' motion to dismiss.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing 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.[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 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.

[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 plan at issue. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the investment options made available to retirement plan participants or the arrangements fiduciaries negotiated with the plan's service provider. The complaints typically point to alternative investment options or service arrangements (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. Fiduciaries will be pressured to limit investments to a narrow range of options at the expense of providing a diversity of choices with a range of fees, risk levels, and potential performance upsides, as ERISA expressly encourages and most participants want. These lawsuits also operate on a cost-above-all mantra—despite the admonition by the Department of

Labor ("DOL") that fees should be only "one of several factors" in fiduciary decisionmaking.[2] "[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). But given many plaintiffs' 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 nearly 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 they choose, and no matter how low the fees they negotiate. This lawsuit is a perfect example: while ERISA plaintiffs commonly sue plan fiduciaries for offering mutual funds rather than separate accounts or collective investment trusts (under the theory that separate-account products are cheaper for participants to invest in), *Excessive Fee Litigation* 9, the Hy-Vee plan fiduciaries here *did* offer the latter types of investment vehicles and *still* found themselves the targets of excessive-fee allegations, Compl. ¶ 66. 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*, 573 U.S. at 425. As the Supreme Court recently made explicit, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 142 S. Ct. at 742. When a plaintiff does not present direct allegations of wrongdoing and relies on circumstantial allegations that are "just as much in

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

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 16 months have seen more of the same, including a barrage of lawsuits filed against employers in every industry, including those that have been hit the hardest by the pandemic. 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 the actual plan whose fiduciaries are being sued.

The Supreme Court has taken several recent opportunities to address the standard for pleading a fiduciary-breach 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 fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment needs and risk tolerances, and the risk that

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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).

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 "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 complaints' circumstantial allegations 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 in making decisions based on their experience and expertise, and in light of the context of their 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 most 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. ¶¶ 66–67. They then use the charts to try and 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. *See Hughes*, 142 S. Ct. at 740; *Fifth Third*, 573 U.S. at 425.

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., 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 in cases where plaintiffs' attorneys use 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. 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 fees and/or performance of Fund A with one investment style and performance benchmark with that of Fund B, which has a different investment style and performance benchmark. *See, e.g.*, *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306 (D. Minn. 2021) (rejecting plaintiffs' reliance on comparator funds that were not "meaningful benchmarks"); *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1108 (D. Colo. 2020) (rejecting plaintiffs' reliance on "inapt comparators"). These types of barebones comparisons are particularly unhelpful with respect to recordkeeping fees. As DOL 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

[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.

different service models"). Moreover, contrary to the Plaintiffs' naked assertion here that recordkeeping services are largely homogeneous (Compl. ¶¶ 77–80), myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[10] Plaintiffs make no attempt here to identify what services the comparator plans provided, instead focusing solely on cost (Compl. ¶¶ 88–98) and offering one conclusory assertion that the "Plan's demographics matches favorably with the Fidelity plan's demographics," with no additional explanation. Compl. ¶ 95. While ERISA plaintiffs often ask courts to ignore these practical realities on a motion to dismiss, the Supreme Court has said the opposite—that "context" *must* be considered at the 12(b)(6) stage. *Fifth Third*, 573 U.S. at 425.

Plaintiffs here also ask the Court to infer an imprudent fiduciary process based on what they call "total plan fees," expressed as a percentage of total plan assets, that they allege are "excessive" when compared to the "total" fees of comparator plans. Compl. ¶¶ 70–74. But this too ignores the wide variation that exists among plans and the services they choose to retain. Plans do not charge (and participants do not pay) a "total" plan fee. Rather, retirement plans pay fees to various third parties that provide all kinds of services used by plans and their participants—things like investment-management fees, recordkeeping fees, or individual service fees for, *e.g.*, taking out a participant loan or using a managed-account product—and then some or all those fees may be allocated among participants' individual accounts or deducted from investment returns. *See generally 401(k) Plan Fees* 3–8. The "total" fees ultimately borne by the plan and its participants will vary widely depending on which investments a plan decides to offer; whether the plan sponsor

[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.

voluntarily decides to pay for those services itself; whether plan fiduciaries choose to make available optional features paid for by individual participants who choose to take advantage of those services; the extent to which those optional features are used; the quality of those services; and so on.

Simply asserting that the aggregate of fees paid by any participant to any fund or service provider is "excessive" compared to some unspecified plan(s) is meaningless. It is akin to saying that one household's "total" household expenses are excessive because they are greater than the monthly expenditures of another household—completely disregarding factors such as whether the first household has multiple school-aged children, whether the second household benefits from solar panels that effectively subsidize electricity costs, and so on. These types of allegations—which seek to entirely divorce the fees from the quality and nature of services offered—do not permit a plausible inference of an imprudent fiduciary process.

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 their process was imprudent. 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, 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. For example, plaintiffs in some cases allege imprudence based on defendants' decision to offer actively managed funds. *See, e.g.*, Compl. ¶¶ 79–82, 93, 100, 109–16, *Baumeister v. Exelon Corp.*, No. 21-6505 (N.D. Ill.), ECF No. 1. But other cases have alleged the exact opposite—a fiduciary breach based on a plan's decision to include passive index funds rather than actively managed ones. *See Ravarino v. Voya Financial, Inc.*, No. 21-1658 (D. Conn.), ECF No. 1 ¶¶ 79–83. This same phenomenon plays out with respect to recordkeeping fees. Last year Henry Ford was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157–67, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that exact plan* as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), 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

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[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] In some instances, fiduciaries have simultaneously defended against "diametrically opposed" liability theories, 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 jobs—and it has made it virtually impossible for fiduciaries to avoid being sued, no matter how careful their process and how reasonable their decisions.

Accordingly, it is critical for courts to consider context—such as the DOL'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 plausibility, suggesting that doing so would

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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.

require the court to resolve a purported dispute of fact. That approach cannot be squared with 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 services, 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 v. Frommert*, 559 U.S. 506, 517 (2010).

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 DOL 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"); Charles Filips et al.,

Options When Fiduciary Insurance Is Too Expensive 1, PlanSponsor (Mar. 8, 2022), https://bit.ly/3q1vgRU (responding to an inquiry from a plan sponsor that was no longer able to afford fiduciary insurance).

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.[21] In short, these suits impose significant costs on plan sponsors—and, by extension, plan participants and beneficiaries—often without producing any 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.

[21] Congress is in fact trying to do the opposite. The recently enacted Setting Every Community Up for Retirement Enhancement Act of 2019 increases the tax incentives available for small employers that sponsor eligible employer plans and creates a structure for pooled employer plans, allowing unrelated employees to join together to participate in a single defined contribution plan. *See* Public L. 116–94, 133 Stat. 2534 (2019), §§ 101, 104–105. These lawsuits run counter to Congress's goal to expand—rather than shrink—the number of employees who are able to participate in retirement plans.

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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 Southern District of Iowa by using the Court's CM/ECF system on May 10, 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: May 10, 2022

/s/ Mark E. Weinhardt
Mark Weinhardt