EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RUTH WILLIAMS and LISA MAULE, individually and on behalf of all others similarly situated, Plaintiffs, v. CENTENE CORPORATION, THE BOARD OF DIRECTORS OF CENTENE CORPORATION, THE CENTENE CORPORATION RETIREMENT PLAN INVESTMENT COMMITTEE, and JOHN DOES 1-30, Defendants.	Case No. 4:22-CV-00216-SEP

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

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Because of 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, all of which demonstrate 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]

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

"[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: Plaintiffs allege that the Plan contracted for recordkeeping fees of $33 annually per participant, FAC ¶ 91 n.10—*below* the $35 annual fee that Plaintiffs' counsel alleged was a reasonable benchmark in another case. *See Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *14-15 (N.D. Cal. Sept. 13, 2021) (dismissing plaintiffs' excessive-fee claim where Plaintiffs "provide[d] no basis for how they arrived at the $35 per participant figure" and "failed to plead" that the fees were "excessive in relation to the specific services the recordkeeper provided to the specific plan at issue"). Despite that, the plan fiduciaries still found themselves subject to suit. 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

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 18 months have seen more of the same. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges that do not reflect the context of the plan at issue.

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 not subject to a lower pleading standard: 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; *see also Smith v. CommonSpirit Health*, __ F. 4th __, 2022 WL 2207557, at *4 (6th Cir. June 21, 2022) (directing courts to apply the "well-worn trail" from *Twombly* and *Iqbal* when evaluating analogous ERISA class actions).[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 any ERISA suit can be made to appear

[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] *Hughes* 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).

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 attempt to 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.*, FAC ¶¶ 66-67, 85, 91, 99. 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%

As this example shows, when plaintiffs' attorneys zero in on a single metric for

[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.

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. Thus, "allegations 'that costs are too high, or returns are too low' fail to support an inference of misconduct." *Riley v. Olin Corp.*, 2022 WL 2208953, at *7 (E.D. Mo. June 21, 2022) (citation omitted). As the Sixth Circuit recently articulated, "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty." *Smith*, 2022 WL 2207557, at *4. And 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"). Claims involving allegations of excessive recordkeeping fees make clear why these types of barebones comparisons are singularly unhelpful. As DOL has explained, services "may be provided through

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

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 Smith*, 2022 WL 2207557, at *6 (rejecting recordkeeping-fee claim where the plaintiff "fail[ed] to give the kind of context that could move this claim from possibility to plausibility"); *Excessive Fee Litigation* 3 (recognizing that "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models"). Moreover, contrary to the Plaintiffs' naked assertion here that the services selected by a large plan "do not affect" the plan's recordkeeping fees (FAC ¶ 78), 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] Indeed, DOL and a host of courts—including in this district—have recognized that "generally the more services provided, the higher the fees." *401(k) Plan Fees* 3; *see also Riley*, 2022 WL 2208953, at *4 ("To plead a meaningful benchmark, the plaintiff must plead that the administrative fees are excessive in relation to the *specific services* the recordkeeper provided to the *specific plan* at issue.") (internal quotation omitted). Given the wide range of services, providers, and fee arrangements, it is implausible to suggest everything in excess of a single fee level is imprudent. *See, e.g.*, *Matney v. Barrick Gold of N. Am.*, 2022 WL 1186532, at *13 (D. Utah Apr. 21, 2022) (dismissing with prejudice recordkeeping allegations "based on generalizations, assumptions, and unsuitable comparisons").

Plaintiffs here also ask the Court to infer an imprudent fiduciary process based on what

[9] *401(k) Plan Fees* 3.
[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.

they call "total plan costs," expressed as a percentage of total plan assets, that they allege are "much higher" than the "total" costs of comparator plans. FAC ¶¶ 71-74. But this too ignores the wide variation that exists among plans and the services they choose to retain from a variety of providers. 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 at the time.[11]

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 many cases allege imprudence based on defendants' decision to offer actively managed funds. *See, e.g.*, Compl. ¶¶ 79-82, 93, 100, 109-116, *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. ¶¶ 157-167, *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. Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[12] while others

[11] Indeed, when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *Helping Workers Save For Retirement: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions*, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

[12] *See, e.g.*, *Sweda v. Univ. of Pa.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).

complain that including *only one option* in each investment style is imprudent.[13] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[14] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[15] Some plaintiffs allege that plans offered imprudently risky investments,[16] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[17] 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."[18] 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—including DOL's instruction that fees are only one of *several factors* that should be considered,[19] 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

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[13] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.
[14] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).
[15] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.
[16] *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); *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v.Morgan Stanley Inv. Mgmt. Inc.,* 712 F.3d 705, 711 (2d Cir. 2013)..
[17] *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).
[18] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).
[19] *401(k) Plan Fees* 1.

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 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. First, these lawsuits impose pressure on plan fiduciaries to manage plans based solely on cost, undermining 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. 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. 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).

Second, the litigation surge has upended the insurance industry for retirement plans,

pushing 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). Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage").

If employers need to absorb the cost of higher insurance premiums and higher deductibles, many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And for small plans, if the sponsor "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. 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).

CONCLUSION

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

Dated: June 24, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Missouri by using the court's CM/ECF system on June 24, 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: June 24, 2022

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