No. 19-1401

IN THE
Supreme Court of the United States

APRIL HUGHES, *et al.*, *Petitioners,*

v.

NORTHWESTERN UNIVERSITY, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, BUSINESS ROUNDTABLE, ERISA INDUSTRY COMMITTEE, PROFESSIONAL LIABILITY UNDERWRITING SOCIETY, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America, American Council of Life Insurers, American Property Casualty Insurance Association, Business Roundtable, ERISA Industry Committee, Professional Liability Underwriting Society, and Securities Industry and Financial Markets Association are the nation's leading organizations representing American businesses that sponsor, provide services to, and insure ERISA-governed retirement plans.

Amici's hundreds of thousands of collective members directly sponsor or support retirement plans covering virtually every American participating in employer-sponsored benefit programs. They are dedicated to protecting employer-sponsored benefit plans and developing and advancing policies to strengthen Americans' retirement security. Accordingly, they frequently participate as *amici* in ERISA cases concerning employee-benefit plan design or administration. *See, e.g.*, *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Tibble v. Edison Int'l*, 575 U.S. 523 (2015).

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[1] All parties consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF THE ARGUMENT

This case involves one of the most basic, but important, questions in ERISA litigation today: what facts must a plaintiff allege to state a plausible claim that her retirement plan's fiduciaries breached their duty of prudence in maintaining the plan's investment line-up or its arrangements with service providers?

The reason why this seemingly technical question is so important is simple: ERISA class actions are one of the fastest-growing areas of litigation. What began as a trickle in the early 2000s (mostly lawsuits against large public companies) has in recent years become a tidal wave. Cases increased five-fold from 2019 to 2020, targeting not just for-profit businesses large and small, but also healthcare systems, universities, and other nonprofits[2]—even the Red Cross.[3]

Congress designed ERISA to provide plan sponsors and fiduciaries with wide discretion and flexibility. That way, plans could be designed based on the unique circumstances of each plan and the unique needs and preferences of each plan's participants. And because maintaining retirement benefits is completely voluntary, a flexible system helped to ensure that ERISA would not be "so complex that administrative costs, or litigation expenses" would discourage employers from

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[2] AIG, *Understanding the Rapid Rise in Excessive Fee Claims* (2021), https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/pension-trustee-excess-fees-fiduciary-whitepaper.pdf; Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://news.bloomberglaw.com/employee-benefits/401k-fee-suits-flood-courts-on-pace-for-fivefold-jump-in-2020.

[3] *In re Am. Nat'l Red Cross ERISA Litig.*, No. 1:21-cv-00620-EGS (D.D.C.).

sponsoring plans in the first place. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). ERISA does not require or forbid any specific investment option or service-provider arrangement. Instead, under ERISA process is king—ERISA simply requires fiduciaries to use a prudent *process* for making decisions.

ERISA class-action complaints, however, typically include *no* allegations about process and focus entirely on outcomes that the plaintiffs claim (with 20/20 hindsight) were suboptimal. These complaints generally compare the fees or performance of particular investments against the fees or performance of one or more of the thousands of alternative investments available in the market. Or they compare the fees paid to a plan's recordkeeper to the recordkeeping fees paid by a different plan or reported in a median survey of some subset of plans. Then they ask courts to infer from those outcomes that plan fiduciaries' decision-making *process* must have been inadequate, and they seek hundreds of millions of dollars in "losses" from the individuals serving as fiduciaries.

Amici file this brief to provide a roadmap for evaluating the plausibility of inference-based claims like those asserted in petitioners' complaint and the countless other ERISA class-action complaints that have flooded federal courts in recent years. Rule 8(a)'s plausibility requirement, elucidated by *Twombly* and *Iqbal*, provides the appropriate framework for evaluating these types of complaints. Under ERISA as elsewhere, circumstantial allegations should be rigorously analyzed, *in context*. For claims of fiduciary breach, context includes both the broad discretion and flexibil-

ity that fiduciaries enjoy under ERISA, and the realities of plan management that fiduciaries face. Fiduciaries choose among many reasonable options—often thousands—and consider a variety of factors, of which cost is only one. Cheapest is not always best.

ERISA plaintiffs have convinced some courts to adopt a lower pleading standard in ERISA cases—an ERISA exception to Rule 8(a)'s plausibility pleading as articulated in *Twombly* and *Iqbal*. *See Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019); *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 108 & n.47 (2d Cir. 2021) (citing *Sweda).* But this Court has already explained why a "careful, context-sensitive scrutiny of a complaint's allegations" is particularly important in ERISA cases: because fiduciaries commonly find themselves "between a rock and a hard place," sued no matter *what* decision they make. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424-425 (2014).

That is equally true of challenges to plan line-ups and service-provider relationships, which have flooded courts in recent years. Fiduciaries, attempting to fulfill their fiduciary obligations and take into account the unique context and needs of their plans and participants, as ERISA and the Department of Labor (DOL) have instructed, risk a lawsuit any time they consider any factor other than cost. That constant threat is untenable for plans and harmful for participants. It is leading to less innovation, less participant choice, less-tailored plans, and a virtual inability of plans to obtain adequate insurance coverage. This means that plan sponsors are bearing the brunt of huge "administration costs" and "litigation expenses" that Congress was specifically trying to avoid. *Conkright*, 559 U.S. at 517.

This Court should provide clear instruction to lower courts that circumstantial allegations in ERISA complaints should be evaluated with the same context-sensitive scrutiny as circumstantial allegations in antitrust or discrimination complaints. A claim does not satisfy Rule 8(a)'s plausibility requirement when the facts alleged do not make an imprudent plan-management process any more likely than a prudent one. Under a proper application of that long-established pleading standard, petitioners' complaint was properly dismissed.

ARGUMENT

I. The rigidly outcome-focused nature of most ERISA class-action complaints is contrary to ERISA's focus on process and flexibility.

ERISA's duty of prudence requires a careful process; it does not require particular outcomes. In creating a *voluntary* system of employer-provided benefits, Congress gave plan sponsors and fiduciaries flexibility and discretion to make decisions based on the unique characteristics of their individual plans and participants. Consistent with that discretion, ERISA does not impose liability on fiduciaries who use a prudent process for selecting and monitoring designated investment options and service providers.

Many ERISA class-action complaints, like petitioners', seek to reverse that grant of discretion. Where ERISA focuses on process, they focus on outcomes—and petitioners are asking this Court to adopt a pleading rule that does the same. They fault fiduciaries for failing to make specific choices or achieve specific results that plaintiffs or their counsel view as optimal.

Then they ask courts to infer that the fiduciaries' process must have been inadequate—using hindsight to strip away discretion.

A. ERISA's text and structure give broad discretion to fiduciaries.

ERISA adopted a voluntary system of employer-provided benefits. Congress knew that if it created a system that was too "complex," or created significant "administration costs" or "litigation expenses," it would "unduly discourage employers from offering … plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress therefore created a system imbued with flexibility and discretion: just as ERISA does not require employers to establish plans, it also does not "mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Congress viewed this flexibility as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972). Each plan is unique, and each plan's participants may have a different range of financial sophistication, risk sensitivities, retirement needs, and investment goals and preferences.

Thus, fiduciaries have broad discretion to make decisions tailored to their specific participants: what investment options to offer from among the many thousands available in the market (how many, which types,

at what risk/reward levels, and at what fee levels)[4]; what services to make available; who should provide those services; and how to compensate those service providers. ERISA does not dictate the answers to any of these questions. Instead, Congress chose the flexible "prudent man" standard, requiring only that fiduciaries make decisions using "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity … would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a).

Under this standard, fiduciaries are judged not for the outcome or "results" of their decisions, but by the process or "methods" by which they make them. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013); *see also Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). ERISA does not forbid or mandate specific investments or service-provider arrangements. And 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*

[4] Notably, ERISA's fiduciary duties attach only with respect to "designated investment alternatives." 29 C.F.R. § 2550.404c-1(e)(4)); U.S. Br. 24. Where plans provide for an "open architecture" structure that uses "brokerage windows" or "self-directed brokerage accounts," participants can gain access to thousands of investments that are not designated and need not be individually monitored by a fiduciary. 29 C.F.R. § 2550.404a-5(h)(4) (excluding these types of open-architecture products from the definition of "designated investment alternative").

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).

DOL has declined to provide even *examples* of appropriate investment options out of fear that doing so would "limit … flexibility in plan design." 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992). Instead, it has focused on diversification and participant choice. For example, in promulgating regulations under 29 U.S.C. § 1104(c), which provides fiduciaries with a safe harbor from liability where participants exercise control over the assets in their individual accounts, DOL required plans to offer "a broad range of investment alternatives," including "at least three" with "materially different risk and return characteristics," and provide participants with "sufficient information to make informed investment decisions." 29 C.F.R. § 2550.404c-1(b)(3)(i). This flexible approach, it said, would "better serve the needs of both plan sponsors and participants and beneficiaries than would an approach which attempts to specify particular investment alternatives." 57 Fed. Reg. at 46,919.

That broad latitude extends both to fiduciaries' determination of what factors to "take into account" as part of a prudent decision-making process and also to their substantive decisions about what "investment strategies" are "appropriate [for] their plans" when designating investment options. DOL, Advisory Op. 2006-08A, at 3 (Oct. 3, 2006), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/2006-08a.pdf. If, for example, "the population is mostly young and has time to

grow assets, the investment lineup can focus more on accumulation."[5]

Fiduciaries have the same latitude in retaining service providers. DOL has made clear that services "may be provided through a variety of arrangements."[6] For example, DOL recognizes that, depending on a fiduciary's evaluation of the needs of the plan and its participants, it may choose either a fixed-fee structure, which generally requires the deduction of a fixed amount from each participant's account, or it can choose a bundled-pricing arrangement through which fees are covered by revenue-sharing—a common practice whereby an investment manager shares a percentage of the fees it receives from plan investments with the plan's recordkeeper.[7] Under a revenue-sharing

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[5] Rebecca Moore, *Essential Considerations for DC Plan Investment Lineups*, PlanSponsor (June 8, 2021), https://www.planspon sor.com/in-depth/essential-considerations-dc-plan-investment-li neups/.

[6] DOL, *A Look at 401(k) Plan Fees* 3 (Sept. 2019), https:// www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/re-source-center/publications/a-look-at-401k-plan-fees.pdf ("*A Look at Fees*").

[7] DOL, Advisory Op. 1997-15A, at 1-2 (May 22, 1997), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/reso urce-center/advisory-opinions/1997-15a; DOL, *Advisory Council Report of the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices* (June 18, 2009), https://www.dol.gov/ agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2007-fi duciary-responsibilities-and-revenue-sharing-practices; Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 20 (2019), https://www2.deloitte.com/us/en/pages /human-capital/articles/annual-defined-contribution-benchmark-ing-survey.html ("*Deloitte Benchmarking Survey*").

model, higher-balance participants with larger investments in funds that provide revenue-sharing are responsible for a higher proportion of fees.[8]

Nor has DOL set particular compensation levels as *per se* or presumptively reasonable or excessive. While explicitly recognizing that "cheaper is not necessarily better,"[9] DOL considers service-provider compensation to be so context-dependent that it generally *refuses to opine on* whether a compensation arrangement is reasonable; instead, it instructs "the appropriate plan fiduciaries" to make that determination.[10]

Courts must evaluate the plausibility of ERISA claims in light of this unique statutory and regulatory structure.

B. ERISA class-action complaints commonly focus on outcomes, rather than process.

Whereas ERISA focuses on process, rather than outcomes, ERISA class-action complaints—including petitioners'—generally allege *no* facts about process. Instead, they focus entirely on cookie-cutter attacks on investment performance or fees that the plaintiffs believe are suboptimal. For example, they often allege that certain investment options were more expensive than or underperformed one or more of the thousands

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[8] DOL, Field Assistance Bulletin No. 2003-03 (May 19, 2003), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2003-03 ("FAB No. 2003-03").
[9] *A Look at Fees* 1.
[10] DOL, Advisory Op. 2007-04A, 2007 WL 2373491, at *3 (July 18, 2007).

of funds available on the market,[11] or that the plan's service-provider arrangements did not employ the compensation structure or fee level negotiated by a different plan or reported in a median survey of some subset of plans. *See, e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823-824 (8th Cir. 2018); *White v. Chevron Corp.*, 752 F. App'x 453, 455 (9th Cir. 2018).

Then, the plaintiffs ask the court to *infer* from those outcomes that the plan's fiduciaries had an imprudent decision-making process. *E.g.*, Pet. Br. 31, 35, 37. And while fiduciaries' actions are supposed to be evaluated "based upon information available to the fiduciary at the time of each investment decision," these allegations operate "from the vantage point of hindsight," cherry-picking a time period when the investment's historical performance maximizes "loss" calculations. *PBGC*, 712 F.3d at 716 (citation omitted).

Some courts, faced with long complaints filled with seemingly complex comparative data, appear to have thrown up their hands, deeming ERISA class-action complaints almost categorically unsuitable for resolution at the motion-to-dismiss stage. *See, e.g.*, *Brotherston v. Putnam Invs., LLC*, 2016 WL 1397427, at *1 (D. Mass. Apr. 7, 2016) (two-paragraph denial). But as explained below, this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Fifth Third Bancorp*, 573 U.S. 409, provide the tools necessary to evaluate plead-

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[11] There are nearly 10,000 mutual funds alone. Investment Company Institute, *Investment Company Fact Book* 40 (61st ed. 2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf ("*Investment Company Fact Book*").

ing-by-inference complaints under Rule 8(a). The supposed complexity of retirement-plan management provides no reason for a contrary ERISA-specific rule. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

II. ERISA complaints should be given the same context-sensitive scrutiny as other complaints that seek inferences of wrongdoing from circumstantial allegations.

This Court has already established a clear roadmap for evaluating pleading-by-inference complaints: circumstantial allegations must be carefully scrutinized in context, and any inferences of wrongdoing must be *plausible* in light of that context, not merely conceivable. ERISA cases should be treated no differently.

A. Caselaw applying Rule 8(a)'s plausibility standard provides a roadmap for evaluating ERISA class-action complaints.

Pleading-by-inference is not unique to ERISA. The plaintiffs likewise attempted to plead-by-inference in *Twombly*, a case claiming a conspiracy to restrain trade based on circumstantial descriptions of parallel conduct without any direct allegations of an agreement among competitors. This Court instructed lower courts that circumstantial allegations should be rigorously analyzed, in "context," to determine whether they plausibly suggest wrongdoing or are instead equally suggestive of lawful behavior. 550 U.S. at 554, 557. When the alleged facts, even when accepted as true, are "just as much in line with" lawful behavior—when there is an "obvious alternative explanation" to the inference of wrongdoing the plaintiffs seek—the

complaint fails Rule 8(a)'s plausibility requirement and must be dismissed. *Id.* at 554, 567. In light of the statutory context of antitrust laws and the pragmatic realities of market competition, this Court held that the plaintiffs' allegations of parallel conduct did not "nudge[] their claims across the line from conceivable to plausible." *Id.* at 564-570.

The Court undertook the same analysis in *Iqbal*, a case alleging intentional discrimination against Arab Muslim men. As in *Twombly*, the Court examined the legal and factual context (a discrimination challenge to post-9/11 security measures) and held that there was an "obvious alternative explanation": a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." 556 U.S. at 682 (citation omitted). The inference the plaintiffs sought was not plausible, and the complaint had to be dismissed.

Lower courts have applied the same analysis to inference-seeking circumstantial allegations in RICO cases, *e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014), retaliation cases, *e.g.*, *George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013), discrimination cases, *e.g.*, *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873 (7th Cir. 2012), and securities cases (even outside the context of heightened pleading), *e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013). For good reason—in all of these contexts, plaintiffs frequently rely on circumstantial allegations to raise an inference of misconduct, rather than directly alleging unlawful acts. But "[w]hen faced with two possible explanations, only one of which can be true and only one of which results in

liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation." *Century Aluminum*, 729 F.3d at 1108 (citation omitted). Instead, "[s]omething more is needed." *Id.*

B. Many common allegations in ERISA complaints resemble the allegations rejected as implausible in *Twombly* and *Iqbal*.

Petitioners' complaint, and similar allegations common in other ERISA class-action complaints, taken in the context of ERISA's fiduciary standards and the realities of plan management, closely resemble the types of implausible allegations with obvious alternative explanations this Court rejected in *Twombly* and *Iqbal*.

1. Investment Fees.—Like many ERISA complaints, petitioners' complaint seeks an inference of a deficient process based on allegations that funds in the plan's line-up had higher expense ratios than alternatives in the market.[12] JA71, 89-96, 122-126; *see, e.g.*, *White*, 752 F. App'x at 455. But inferring imprudence from fees in this context is implausible.

First, "nothing 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); *accord PBGC*, 712 F.3d at 718; *Meiners*, 898 F.3d at 823-824. There are many sound

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[12] A fund's "expense ratio" is the sum of an investment's fees expressed as a percentage of assets under management. *See, e.g.*, *Obeslo v. Great-W. Life & Annuity Ins. Co*, 6 F.4th 1135, 1155 n.15 (10th Cir. 2021); *A Look at Fees* 6.

reasons why a prudent fiduciary, crafting and monitoring a plan line-up as a whole, would include some options that do not have rock-bottom fees, particularly when those options appear alongside lower-cost options—fiduciaries must "consider each plan investment as part of the plan's entire portfolio."[13]

Fiduciaries may wish to offer actively managed options, which make up 60% of the $24.9 trillion invested in mutual funds and exchange-traded funds each year.[14] Active management is more expensive but offers the opportunity for higher upsides or less-severe downsides than funds that merely duplicate a market index, like the S&P 500. *See A Look at Fees* 7. Or they may wish to offer mutual funds, which come with greater transparency, ease of valuation, and regulatory safeguards than other types of institutional products, which tend to have lower expense ratios. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671-672 (7th Cir. 2011). Or, having received information about the various market options, they may simply believe that the chosen funds fall within the wide range of reasonableness. As the government agrees, there are nearly limitless prudent reasons for retaining some funds besides the cheapest options in a diversified plan line-up, and doing so does not plausibly suggest an imprudent process. U.S. Br. 20.

Second, it is all too easy to make a fiduciary's choices look suboptimal in hindsight, because plain-

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[13] DOL, *Meeting Your Fiduciary Responsibilities* 3 (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf ("*Fiduciary Responsibilities*").

[14] *Investment Company Fact Book* 49.

tiffs' counsel can cherry-pick any alternative investment as their comparator. Take the federal Thrift Savings Plan (TSP), which plaintiffs often tout as the "gold standard" and use as a comparator in challenging a plan's performance or fees.[15] Even the TSP could be made to look mismanaged by cherry-picking comparators with *even lower* fees at a given point in time[16]:

Fund	**Expense Ratio**
TSP Fixed Income Index Investment Fund (F Fund)	0.06%
iShares Core US Aggregate Bond ETF	0.04%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares)	0.03%
TSP Common Stock Index Investment Fund (C Fund)	0.051%
Fidelity 500 Index Fund	0.015%
iShares S&P 500 Index Fund (Class K)	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund)	0.068%
Fidelity Extended Market Index Fund	0.036%

[15] *See, e.g.*, Appellants' Br., *Brotherston v. Putnam Invs., LLC,* 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "a quintessential example of a prudently-designed plan"). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses for TSP-offered funds.

[16] *See* Individual Funds, Thrift Savings Plan, https://www.tsp.gov/funds-individual/ (last updated Dec. 31, 2020).

There are thousands of funds available in the market, with fees that change over time. If fees were the only relevant measure, it would always be possible to find a supposedly "better" fund. That is not a plausible sign of imprudence—fees are only "one of several factors" that fiduciaries are supposed to consider. *A Look at Fees* 1.

2. Investment performance.—ERISA complaints like petitioners' (JA126-150) also commonly ask courts to infer a deficient process because some funds in the plan line-up had suboptimal returns, often during cherry-picked time periods. This inference—which petitioners appear to have abandoned in this Court and the government does not endorse—is just as flawed as the fee-based challenges discussed above.

The notion that fiduciaries act imprudently by not chasing performance is a misguided investment approach "generally doomed to some kind of failure."[17] It hinges on the idea that future performance can be predicted from past performance—something that only clairvoyant fiduciaries could accomplish with any accuracy. *See* Vanguard, *Quantifying the Impact of Chasing Fund Performance* (Apr. 2014), https://www.vanguard.com.hk/documents/quantifying-the-impact-en.pdf. But fiduciaries are expected to act with "prudence, not prescience." *PBGC*, 712 F.3d at 716 (citation omitted). Investing for retirement is a *long-term* endeavor; selling low and buying high is a

[17] Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2017-02-08/chasing-performance-is-a-quick-way-to-disaster.

recipe for locking in losses. That is why prudent fiduciaries consider past performance as only one of many factors when evaluating an investment line-up.

Furthermore, "underperformance" is often alleged using comparators that are not just cherry-picked but also inapposite—*e.g.*, by comparing the performance of a "growth" fund with the performance of a "value" fund or a fund that measures its own performance using different benchmarks. *See, e.g.*, *Meiners*, 898 F.3d at 823. A fund's failure to reach a goal it never had cannot plausibly suggest that the fund was included through a deficient process.

Furthermore, it will *always* be possible for a plaintiff, with the benefit of 20/20 hindsight, to find *some* option (or many options) among the thousands on the market that outperformed investments in *any* given plan. Indeed, one complaint's supposedly underperforming option is often another complaint's better-performing exemplar. For example, while some lawsuits allege that offering Fidelity Freedom Funds suggests imprudence,[18] others hold out those same funds as models of prudent plan management.[19]

Fiduciaries are not guarantors of optimal plan performance; every plan line-up will include funds with

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[18] *E.g.*, Compl. ¶¶ 22-26, *Maisonette v. Omnicom Grp. Inc.*, No. 1:20-cv-06007-CM (S.D.N.Y. July 31, 2020), ECF No. 1.

[19] *E.g.*, Am. Compl. ¶ 160, *Anderson v. Intel Corp. Inv. Pol'y Comm.*, No. 5:19-cv-04618-LHK (N.D. Cal. Mar. 22, 2021), ECF No. 113; *compare also Becker v. Wells Fargo & Co.*, 2021 WL 1909632, at *1 n.1 (D. Minn. May 12, 2021) (alleging imprudence from offering Wells Fargo Stable Value Fund), *with McGinnes v. FirstGroup Am., Inc.*, 2021 WL 1056789, at *2 (S.D. Ohio Mar. 18, 2021) (Wells Fargo Stable Value Fund is part of a "diverse portfolio of well-established funds").

periods of suboptimal performance. Under *Twombly*, hinging a prudence claim on circumstantial allegations of underperformance—allegations that are "just as much in line with" a prudently run plan as with an inference of misconduct—is insufficient to state a claim. 550 U.S. at 554.

3. Service-provider arrangements.—Like many ERISA plaintiffs, petitioners challenge the arrangements fiduciaries negotiate with third parties that provide services to plans (including recordkeeping services). Most plaintiffs complain about fiduciaries' failure to obtain services at the same fee level as one or more of the other 700,000+ retirement plans in the country,[20] or they complain that a plan's negotiated fees are excessive according to median surveys of some subset of plans or some seemingly arbitrarily chosen level that plaintiffs often nakedly contend is "reasonable"—typically $25, $35, or $45 per participant. Some complain about plan fiduciaries' decision to pay for recordkeeping expenses through revenue-sharing (described *supra,* pp. 9-10), rather than negotiating "fixed" recordkeeping fees that are the same for each participant and paid from their individual plan accounts. But inferring imprudence from these types of allegations requires one to ignore obvious realities of plan management and ERISA's statutory structure.

First, neither recordkeepers nor recordkeeping services are interchangeable widgets—recordkeeping services are highly customizable depending on the needs

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[20] DOL, *EBSA Fact Sheet* (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf.

of each plan, its participant population, the capabilities and resources of the plan's administrator or the sponsor's human-resources department, and other factors. Myriad possible services are available at different fee levels, including:

- core operational services (maintaining plan records, processing enrollment, processing investment elections and contributions, issuing account statements, processing transactions);
- participant communication (employee meetings, call centers, voice-response systems, web access);
- participant education, including access to online financial tools;
- implementation of plan mergers, lineup changes, and terminations;
- brokerage windows;
- loan processing;
- insurance and annuity services; and
- compliance services, including preparation and distribution of legally required notices.[21]

Different types of investment vehicles might also cost more to recordkeep than others, and not every recordkeeper is able—or willing—to recordkeep every type of investment, such as TIAA's guaranteed-benefit annuities that involve greater recordkeeping legwork

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[21] *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://www.ici.org/system/files/2021-06/per27-06.pdf.

than mutual funds. *See Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 303 (S.D.N.Y. 2018), *aff'd,* 9 F.4th 95 (2d Cir. 2021). Thus, "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models."[22]

Second, fee arrangements between plans and recordkeepers are often extraordinarily complicated, with myriad ways that compensation can be structured, which makes comparisons impossible without far more facts than plan size. For example, fiduciaries may negotiate for "all-in" recordkeeping fees to cover all of the services described above, or they may negotiate a recordkeeping fee that covers a subset of these services and agree to separate, fee-for-service charges on the remaining service offerings.

And sometimes a single vendor provides services that are not traditionally provided by a recordkeeper, and those services are included in pricing.[23] When a recordkeeper is, for example, "also an investment manager for several of [a plan's] investment funds," it "only make[s] sense that the fees it charge[s] … exceed [the fees] charged by a simple administrative services provider." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *8 (S.D.N.Y. May 4, 2021). The same is true when a recordkeeper is also retained to be a third-party plan administrator or trustee.

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[22] Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 3, Euclid Specialty (Dec. 2020), https://www.euclidspecialty.com/wp-content/uploads/2021/04/Euclid-Specialty-Whitepaper-Exposing-Excessive-Fee-Litigation-1-1.pdf.

[23] *Deloitte Benchmarking Survey* 25.

Furthermore, as discussed above, plans may have either fixed- or bundled-pricing structures and may pay for recordkeeping services through hard-dollar payments, revenue-sharing, or some combination of the two. *See supra* pp. 9-10. Many plans also obtain a credit—of sometimes many millions of dollars or more—when the revenue-sharing obtained by their recordkeeper exceeds the amount required to cover the cost of the recordkeeping services, and that credit can be allocated back to participant accounts. *See Deloitte Benchmarking Survey*, Exs. 7.6, 7.7 (35% of plans in 2019 received a revenue-sharing rebate and allocated credits to participants 42% of the time).

ERISA class-action complaints often seek an inference of imprudence from the choice of a bundled-pricing structure in lieu of fixed pricing. But DOL recognizes that different structures may be appropriate, depending on the needs and circumstances of the plan. *E.g.*, FAB No. 2003-03. A prudent fiduciary might conclude that, all else being roughly equal, bundled pricing is preferable to fixed-dollar pricing because bundled pricing is asset-based and, thus, typically results in participants with higher account balances paying a greater proportion of recordkeeping expenses. *See Loomis*, 658 F.3d at 672-673.

Third, as is true of investment options, "cheaper is not necessarily better," because service offerings and service levels differ between service providers. *A Look at Fees* 1. That is why fees are "just one of several factors fiduciaries need to consider in deciding on service providers." *Fiduciary Responsibilities* 5. The fee arrangement of any one plan or even a subset of plans indicates little about whether an arrangement is reasonable for the plan whose fiduciaries are being sued,

much less plausibly suggests that the fiduciaries' decision-making *process* is imprudent.[24]

4. Tenure of service-provider relationships.—Recent lawsuits, including petitioners', have also sought an inference of an imprudent process from longstanding relationships between plan and service providers, or from a fiduciary's failure to rebid its service-provider contracts every few years. *See, e.g.*, JA83, 93, 96; *Marks v. Trader Joe's Co.*, 2020 WL 2504333, at *6 (C.D. Cal. Apr. 24, 2020). This inference is anything but reasonable.

Although recordkeeping contracts vary in length, *half of plans* report having "been with the same recordkeeper for more than 10 years." *Deloitte Benchmarking Survey* 25. And for good reason: changing recordkeepers can be enormously disruptive and confusing to participants. That is because many participants' primary interactions with their plan is through their recordkeeper, interacting with the recordkeeper's web-based portal, customer service agents, or even investment specialists. Changing recordkeepers can be as disruptive to participants as changing doctors.[25]

Equally specious is the notion that not requiring a recordkeeper to competitively bid every few years suggests that fiduciaries are running on auto-pilot. As

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[24] The government agrees with this reasonable principle with respect to fund expense ratios, U.S. Br. 20, but oddly does not with respect to recordkeeping expenses, which are far more individualized and customizable.

[25] *See* Segal Grp., *Changing DC Plan Recordkeepers Can Be Complex* (2021), https://www.segalco.com/media/2443/changing-dc-plan-recordkeepers.pdf (noting the risks associated with a conversion, including disruption to participant accounts, blackout periods, lost data, and misunderstood communications).

courts have noted, "nothing in ERISA compels periodic competitive bidding." *E.g.*, *White v. Chevron Corp.*, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016). There are many ways fiduciaries can prudently monitor service providers short of an expensive and time-consuming bidding process. They can, for example, obtain market data from consultants, obtain benchmarking studies, or periodically renegotiate their service and compensation arrangements as the plan's needs evolve—just as Northwestern did. JA447-448.

The government, attempting to engage in regulation by amicus brief, endorses the proposition that imprudence can be inferred from not requiring competitive bidding. U.S. Br. 27-28. That position is surprising: despite promulgating myriad regulations and guidance about monitoring service-provider compensation, DOL has never—not even through informal guidance, much less rulemaking—suggested that periodic competitive bidding is necessary (or even that a lack of competitive bidding is presumptively imprudent). Instead, DOL has consistently embraced a flexible approach, requiring existing providers to disclose information about their fees and services to plans to ensure fiduciaries can evaluate the reasonableness of the service-provider arrangement, *see, e.g.*, 29 C.F.R. § 2550.408b-2, advising fiduciaries that obtaining formal bids is *one option* that fiduciaries "may want to" use *when initially retaining service providers*, and stating that fiduciaries should "[p]eriodically review the

performance of your service providers"[26]—without dictating (or even recommending) any particular mechanism for doing so. Should DOL wish to change its longstanding position, it should do so through rulemaking, with notice and comment, not through an assertion in an amicus brief unaccompanied by any reasoning or explanation.

4. Share-class selections.—As in this case, many plaintiffs seek an inference of imprudence from allegations that fiduciaries offered retail share classes of mutual funds that have higher expense ratios than institutional share classes of the same fund. The government, too, endorses this inference, stating (at 21) that "there is no apparent justification" for choosing retail share classes when institutional classes are available. But the government ignores an *obvious* explanation (even aside from the minimum-investment requirements discussed by respondents (at 37-40)) that DOL has long permitted: a decision to pay for recordkeeping expenses through revenue-sharing.

Petitioners are correct that expense ratios are typically higher for retail share classes than for institutional share classes. This price difference reflects the fact that expense ratios are composed of both investment management fees and administrative fees. The investment-management fee must be the same for all fund investors, irrespective of share class. *See* 17 C.F.R. § 270.18f-3(a)(1). But the portion assessed for

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[26] DOL, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf; *see also Fiduciary Responsibilities* 2, 6 (similar).

administrative expenses can vary by share class. *See id.*

Retail share classes frequently provide revenue-sharing, which, as discussed above, may be credited to the plan to cover recordkeeping fees that participants would otherwise have to bear, and may even result in revenue-sharing rebates to participant accounts. *See supra* pp. 9-10, 22. This fee-sharing reflects the reality that, for plan investments, the plan's recordkeeper performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider. For institutional share classes, that reality is already reflected in the lower expense ratio, which is why institutional share classes provide far less, if any, revenue-sharing.

Sometimes revenue-sharing credits to a plan on retail shares can exceed the expense-ratio difference between institutional and retail share classes. Indeed, some plaintiffs have complained about plans' failure to offer *higher-expense-ratio retail share classes*, on the theory that doing so would have resulted in a lower "Net Investment Expense" for the funds. *See, e.g.*, Compl. ¶¶ 154, 170-85, *Reichert v. Juniper Networks, Inc.*, No 3:21-cv-06213-JD (N.D. Cal. Aug. 11, 2021), ECF No. 1; Am. Compl. ¶¶ 128-168, *Albert v. Oshkosh Corp.*, No. 1:20-cv-00901-WCG (E.D. Wis. Aug. 31, 2020), ECF No. 20.

That is not to say a plaintiff could *never* plausibly allege an imprudent process based on share-class allegations. If, for example, a complaint alleged that a plan sponsor had voluntarily elected to pay all plan recordkeeping expenses (as a minority of sponsors

do[27]) and yet the plan fiduciaries chose to offer *only* retail share classes and rebated no revenue-sharing credits back to participants, then the complaint might state a plausible fiduciary-breach claim. But given the discretion fiduciaries have in deciding how to structure service-provider compensation and the economic realities of revenue-sharing based on share classes, "[s]omething more" than the choice of retail share classes is necessary to nudge an imprudence claim over the line from conceivable to plausible. *Century Aluminum*, 729 F.3d at 1108.

C. There should be no ERISA exception to Rule 8(a)'s plausibility requirement.

Each of the above examples of common class-action allegations simply describe common characteristics of many prudently run plans. In the context of a statute that gives enormous flexibility and discretion to fiduciaries, and that focuses on *process* rather than *outcomes*, common plan characteristics should not suffice to open the doors to discovery.

Nevertheless, some courts have declined to undertake a context-sensitive analysis of ERISA class-action allegations. At least one circuit has even "decline[d] to extend" *Twombly*'s "obvious alternative explanation" pleading rule, finding it categorically inapplicable in ERISA cases, *Sweda*, 923 F.3d at 326—an outcome expressly at odds with *Iqbal*, 556 U.S. at 684. Not even petitioners invite the Court to adopt *Sweda*'s

[27] *See Deloitte Benchmarking Survey* 20.

diluted standard—although their *amici* do, but their reasons are misplaced.[28]

First, they argue that a more permissive standard is necessary because participants lack information about the "inner workings" of their plans without discovery. AAJ Br. 24 (citation omitted). Rule 8(a)'s plausibility requirement already takes this into account by allowing plaintiffs to plead using circumstantial allegations—but only where the inference of unlawful conduct is *plausible*. Moreover, ERISA and DOL regulations create *extensive* disclosure requirements permitting participants to obtain all kinds of information about their plan, other plans, and their plan's service providers[29]—access to information that antitrust and other plaintiffs whose claims are governed by the same pleading standard do not have.

Second, they argue that a rigorous scrutiny of circumstantial allegations in ERISA cases is inconsistent with ERISA's participant-protective "purpose." Pet. Br. 47; AAJ Br. 10-12. But as this Court recognized in *Fifth Third Bancorp*, 573 U.S. at 425, a "careful, context-sensitive scrutiny of a complaint's allegations" is *particularly* important in ERISA cases. Given the lack

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[28] The amicus brief filed by the American Association for Justice (AAJ)—the advocacy arm of the plaintiffs' bar—is devoted to "pre-butting" our arguments here but in fact attacks a straw man, arguing that we seek to impose a heightened pleading standard in ERISA cases. That is wrong—indeed, backwards: AAJ and its allies have convinced some courts to apply a *less* strict pleading standard in ERISA cases. As discussed above, the Court should apply its long-established framework for evaluating *any* inference-based claims.

[29] *See, e.g.*, 29 U.S.C. § 1024; 29 C.F.R. § 2550.404a-5.

of specific statutory mandates or prohibitions, fiduciaries often find themselves "between a rock and a hard place," sued no matter what decision they make. *Id.* at 424.

Fiduciaries are sued for failing to divest from risky or dropping stock,[30] and for failing to *hold onto* such stock because high risk can produce high reward.[31] They are (like respondents here) sued for offering more than one investment option in the same style,[32] but also for including *only one option* in each investment style.[33] They are sued for *not* offering Vanguard mutual funds,[34] and other times *because they offered* Vanguard mutual funds.[35] Some plaintiffs allege that plans offered imprudently risky investments,[36] while others allege that fiduciaries were imprudently *cautious* in their investment approach.[37] The *same exact*

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[30] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

[31] *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).

[32] *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).

[33] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 1:17-cv-12123-DJL (D. Mass. Jan. 12, 2018), ECF No. 35.

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

[35] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 4:16-cv-00793-PJH (N.D. Cal. Sept. 30, 2016), ECF No. 41.

[36] *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*, 712 F.3d at 711.

[37] *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. 1:16-cv-00061-ML-PAS (D.R.I. Feb. 11, 2016), ECF No. 1

funds have alternatively been alleged to be a clear sign of imprudence, or of a prudently managed plan. *See supra* p. 18 & nn.18-10. And in some instances, fiduciaries have simultaneously defended against "diametrically opposed" theories of liability, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[38]

This dynamic—with new and often contradictory circumstantial theories of imprudence popping up every year—has created an untenable situation for fiduciaries, whose jobs have become virtually impossible. It creates huge barriers for plan sponsors attempting to recruit individuals (like human-resources professionals) to serve as plan fiduciaries, knowing that at any time they could be sued in an ERISA class action—an event that has very real consequences when a fiduciary tries to refinance her home mortgage, start a business, or apply for a loan for her children's college expenses. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (noting the "tremendous power to harass" individual fiduciaries in this way).

It also creates enormous settlement pressure. As *Twombly* recognized, enforcing pleading rules is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-559. In ERISA cases, "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests

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(challenging investment of stable value fund in conservative money market funds and cash management accounts).

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

about its methods and knowledge at the relevant times." *PBGC*, 712 F.3d at 719. This "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence." *Id.* (citation omitted).

Fiduciary insurance cannot provide a meaningful safety net here as it can in other contexts. The massive and unpredictable risks of ERISA class-action litigation have "wreaked havoc on the market for fiduciary liability insurance,"[39] pushing fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits."[40] The burden is falling on plan sponsors, not insurers.

These outcomes are exactly what Congress sought to avoid in enacting a *voluntary* system of employer-provided benefits that aimed to "induc[e] employers to offer benefits by assuring a predictable set of liabilities" through a system "that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the

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[39] Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg (Oct. 18, 2021), https://news.bloomberglaw.com/employee-benefits/spike-in-401k-lawsuits-scrambles-fiduciary-insurance-market; *see also* Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://www.businessinsurance.com/article/20210430/NEWS06/912341566/Litigation-leads-to-hardening-fiduciary-liability-market.

[40] *Aronowitz*, *supra*, at 4.

first place." *Conkright*, 559 U.S. at 517 (brackets omitted). That is because ERISA was not enacted with a single-minded focus on expanding employee protections at all costs, as petitioners suggest. ERISA passed unanimously in the Senate and nearly unanimously in the House[41] for a reason—it was the product of legislative compromise. ERISA represents "a careful balancing," intended to encourage employers to offer plans while protecting the benefits promised to employees. *Conkright*, 559 U.S. at 516-517 (citation omitted). Indeed, ERISA's employee-protective elements were primarily concerned with "preventing an employer from pulling the rug out from under promised retirement benefits" due to inadequate vesting protections, *Nemaizer v. Baker*, 793 F.2d 58, 69 (2d Cir. 1986) (quotation marks omitted)—not penalizing fiduciaries for making discretionary decisions that individual participants and their counsel later deem suboptimal.

III. Inferring fiduciary breach from common characteristics of prudently managed plans harms plans and participants.

Even if ERISA had represented Congress's single-minded focus on enhancing employee protections, it would not warrant adopting a pleading standard that infers imprudence from fee- or performance-based circumstantial allegations. Doing so would *harm* participants, not help them.

Some of the most important aspects of ERISA are the values of innovation, diversification, and participant choice. *See supra* pp. 6-9. Indeed, ERISA *requires* diversification. 29 U.S.C. § 1104(a)(1)(C). But

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[41] 120 Cong. Rec. 29963 (1974); 120 Cong. Rec. 29215-29216 (1974).

the thrust of many ERISA complaints, including petitioners', is that fiduciaries who take into account considerations other than costs *must* be acting imprudently—notwithstanding DOL's contrary directive. *See supra* p. 10.

When courts infer imprudence from these types of circumstantial allegations—placing a judicial imprimatur on the notion that specific funds, services, fee levels, or service-provider arrangements are presumptively imprudent—the collective impact is to implicitly pressure plan fiduciaries to chase investment performance, select only a narrow universe of low-fee funds or bare-bones services, and exclude innovative investment options and service-provider arrangements that could benefit participants. Even though DOL has declined to endorse or forbid any particular investment option, provider-compensation arrangement, or fee level as *per se* or even presumptively prudent or imprudent, some courts are having exactly that type of regulatory impact—without the safeguards in place (including notice and comment) to ensure sound decision-making.

In a purported effort to protect plaintiffs' retirement funds, many of these lawsuits pressure fiduciaries away from exercising their "responsibility to weigh … competing interests and to decide on a [prudential] financial strategy." *Brown*, 2021 WL 1758898, at *7. If those theories are endorsed, the result will be to pare down the investment choices available to plan participants—in contravention of the statute's encouragement to "allow more choice to participants." *Loomis*, 658 F.3d at 673-674. Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset

class choice by including specialty assets, such as industry-specific equity funds, commodities-based funds, and narrow-niche fixed income funds[,] options [that] could potentially enhance expected returns in well-managed and monitored portfolios."[42] Now fiduciaries overwhelming choose purportedly "'safe' funds over those that could add greater value." *Id.*

The same is true of service-provider selections: if a plaintiff can open the doors to discovery simply by alleging that a plan has higher recordkeeping fees than some arbitrarily chosen level, then every fiduciary will be encouraged to prioritize cost above all else—even if that means compromising on service quality or excluding innovative services (like financial-wellness education and web-based financial tools) that would benefit participants.

Furthermore, for the 34% of plan sponsors that are small or mid-sized businesses,[43] there is a real risk that costs inflated through the need to defend meritless lawsuits (with no ability to obtain adequate insurance) may discourage them from offering, or continuing to offer, retirement benefits—just as Congress feared. *See Conkright*, 559 U.S. at 517. And for others, these suits impair the flexibility that Congress provided to fiduciaries; raise the costs of services, indemnification, and insurance; and ultimately divert resources from other key aspects of employee-benefit

[42] George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?* 5, Center for Retirement Research at Boston College (May 2018), https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.
[43] *See* Deloitte Benchmarking Survey 7.

programs, such as 401(k) matching contributions or employer contributions toward healthcare coverage.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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