No. 21-2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK ROZO,
Plaintiff-Appellant,
v.

PRINCIPAL LIFE INSURANCE COMPANY,
Defendant-Appellee,

Appeal from the United States District Court
for the Southern District Of Iowa – Des Moines
No. 4:14-CV-00463-JAJ

BRIEF OF *AMICI CURIAE*
THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND
THE AMERICAN BENEFITS COUNCIL
IN SUPPORT OF DEFENDANT-APPELLEE

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Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amici* are not subsidiaries of any other corporation, and that no publicly held company has 10% or greater ownership in either of the *amici*.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. Many of the Chamber's members maintain or provide services to ERISA-governed benefit plans, so the Chamber regularly participates as *amicus curiae* in cases that affect employee-benefit design or administration.

The American Benefits Council ("Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored

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[1] No party's counsel authored this brief either in whole or in part, and no party or party's counsel, or person or entity other than *amici*, their members, and their counsel, contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief. *See* Fed. R. App. 29(a)(2), (a)(4)(E).

employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs. The Council regularly participates as *amicus curiae* in cases affecting employee benefits.

The Chamber and the Council previously filed *amicus* briefs in an earlier appeal in this case, *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020) ("*Rozo I*"), and in another appeal involving similar claims against a different fund provider, *Teets v. Great-West Life & Annuity Insurance Co.*, 921 F.3d 1200 (10th Cir. 2019). They submit this brief to situate the present appeal within the broader landscape of ERISA litigation and to highlight the importance of properly construing the fiduciary duty of loyalty in these circumstances in light of the statute's objectives.

SUMMARY OF ARGUMENT

In recent years there has been an explosion of fiduciary duty claims against sponsors of defined contribution benefit plans and service providers to those plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). Because plaintiffs often recycle generic allegations, they face few obstacles in filing a complaint. At the same time, if the case survives a motion to dismiss, the costs of discovery fall overwhelmingly on defendants. The plaintiffs' bar has taken advantage of this asymmetry by filing hundreds of lawsuits, bringing serial claims against defendants.

The flood of ERISA cases has clogged dockets and imposed significant costs on plan sponsors and service providers. But it has done little to enhance the availability or scope of retirement benefits for American workers. In many respects, the real beneficiaries have been a small cadre of plaintiffs' lawyers.

The claims in this case represent one particularly problematic example of this trend. Plaintiff, a participant in the Western Exterminator Company Employees' 401(k) Profit Sharing Plan, contends that Principal Life Insurance Co. ("Principal") violated ERISA by exercising its contrac-

tual right to periodically reset the crediting rate for its product, the Principal Fixed Income Option ("PFIO"). In *Rozo I*, this Court held that Principal was a fiduciary each time it set the crediting rate for the PFIO. 949 F.3d at 1075. On remand, the trial court found that Principal's rate-setting process reasonably accounted for the risks and costs of the PFIO and resulted in a desirable, competitive product for participants. The court's exhaustive factual findings make clear that Principal comported with its fiduciary obligations.

On appeal, Plaintiff does not claim that it was imprudent to offer the PFIO to participants. Nor does he claim that Principal failed to disclose the terms on which the PFIO would be offered or failed to follow that process when setting the product's crediting rate. Instead, Plaintiff contends that ERISA required the court to decide what Principal's forward-looking predictions about its PFIO product "should" have been because Principal, supposedly impermissibly, considered its own risks and costs as part of the rate-setting process.

The implications of Plaintiff's argument are nonsensical. Considering risks and costs is a fundamental component of sound and prudent management. A provider who did not consider these factors would not

long stay in business; and sponsors and participants who desired to use these products (and whose oversight constrains a provider's ability to ignore market incentives) would be out of luck.

Moreover, if a plaintiff could obtain judgment on a breach of loyalty claim merely by showing that a fiduciary *considered* such factors, without also showing that the fiduciary took steps that put its own interests *ahead* of plan participants, then virtually no fiduciary could satisfy the loyalty standard. ERISA would turn federal judges into central planners, deciding retrospectively whether and to what extent business judgments might have come out differently. For good reason, nothing in ERISA requires such a self-defeating result.

ARGUMENT

I. The Explosion Of Abusive ERISA Litigation Has Had Significant Negative Consequences.

This case is part of an explosion of fiduciary breach lawsuits that has engulfed plan sponsors, investment advisors, investment managers, and others. The claims in these cases allege that fiduciaries have breached duties of prudence and loyalty and committed prohibited transactions by offering investments or services that plaintiffs' lawyers deem unsatisfactory. But plaintiffs almost never allege specific facts about the

process that a defendant followed in discharging its fiduciary duties. In fact, plaintiffs often admit that they have no direct evidence of fiduciary misconduct. Plaintiffs typically rely on generic allegations, circumstantial inferences, and arguments that appear technical or fact-laden at first glance to survive a motion to dismiss. If they are successful, plaintiffs then use discovery to exert maximum settlement pressure.

Litigating fiduciary breach cases is very expensive for defendants, who must deal with voluminous discovery requests and retain costly experts. Conversely, plaintiffs have almost no substantial document production obligations, and because they often recycle theories and claims, bear little corresponding burden. Facing the likelihood that plaintiffs will "us[e] discovery to impose asymmetric costs on defendants," *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013), defendants frequently are pressured to settle meritless claims.

In recent years, this trend has accelerated even more, with 65 putative class actions challenging 401(k) plan fees in the first eight months of 2020 alone. Jacklyn Wille, Bloomberg News, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020* (Aug. 31, 2020),

https://bit.ly/3t0A8Y3. In addition, the plaintiffs' bar has shifted its focus from larger corporate plans to a "growing number of smaller retirement plans and other plan types." AIG, *Fiduciary Liability Insurance: Understanding the Rapid Rise in Excessive Fee Claims* 2 (2021), https://bit.ly/3juWWvK. Increasingly, "[r]egardless of plan type, plan size or jurisdiction, no retirement plan or plan fiduciary is immune." *Id.* This is antithetical to Congress' goal in enacting ERISA to incentivize the voluntary provision of private retirement savings plans.

A. Stable Value Funds Provide A Popular Target For ERISA Plaintiffs.

ERISA cases involving stable value funds—the type of product at issue in the present suit—are no exception to these trends.

Typically, stable value funds "invest in a mix of short- and intermediate-term securities, such as Treasury securities, corporate bonds, and mortgage-backed securities." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806 (7th Cir. 2013). "Because they hold longer-duration instruments," these funds "generally outperform" other conservative, principal-protecting options. *Id.*; *see also Tibble v. Edison Int'l*, 711 F.3d 1061, 1084 (9th Cir. 2013).

Consistent with economic theory, longer-duration investments carry additional risk because of the possibility that interest rates or economic conditions will change. To mitigate this risk, protect principal, and ensure stable returns, the provider of a stable value fund guarantees a set rate of return for a particular period. The provider assumes the risk that the performance of the assets underlying the stable value fund during that period will not be sufficient to cover the guarantee and the costs of providing it. In exchange, individuals who choose these options accept a lower rate of return compared to higher-risk options.

ERISA does not require plans to offer any particular type of product, but many sponsors have decided to offer stable value funds after assessing the pros and cons of such offerings. Stable value funds provide "principal protection and liquidity to individual investors, and steady returns that are roughly comparable to intermediate-term bond yields, but do not exhibit the volatility of intermediate-term bond total rates of return." David. F. Babbel & Miguel A. Herce, *Stable Value Funds Performance*, 6 RISKS, No. 1, at 2–3 (2018), https://bit.ly/2WzNi1Y. Participants in defined contribution plans have elected to invest over $900 billion in

these options. Lee Barney, Plan Sponsor, *The Benefits of Stable Value Funds for Plan Participants* (Apr. 16, 2021), https://bit.ly/2WLO4t0.

The growth in stable value funds has coincided with a boom in opportunistic litigation. Defendants have been sued for failing to investigate stable value funds;[2] choosing other conservative options;[3] offering funds that were too risky or not risky enough;[4] and offering a proprietary fund.[5] The list goes on. Sometimes, the same stable value fund or provider offered as evidence of prudence in one case is offered as evidence of imprudence in another. In *Becker v. Wells Fargo & Co.*, for instance, the plaintiff brought claims challenging the decision to offer the Wells Fargo Stable Value Fund to participants. 2021 WL 1909632, at *1 n.1 (D. Minn.

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[2] *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 212–13 (D. Mass. 2020).

[3] *Schultz v. Edward D. Jones & Co., L.P.*, 2018 WL 1508906, at *2 (E.D. Mo. Mar. 27, 2018); *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1333 (N.D. Ga. 2017); *Wildman v. Am. Century Servs., LLC*, 237 F. Supp. 3d 902, 915 (W.D. Mo. 2017).

[4] *Abbott*, 725 F.3d at 814; *Sandoval v. Exela Enters. Sol'ns, Inc.*, 2020 WL 9259108, at *6-7 (D. Conn. Mar. 30, 2020); *Davis v. Stadion Money Mgmt., LLC*, 2020 WL 1248580, at *1 (D. Neb. Mar. 16, 2020); *Austin v. Union Bond & Tr. Co.*, 2014 WL 7359058, at *14 (D. Or. Dec. 23, 2014); Cmplt. (ECF 1), *In re JPMorgan Stable Value Fund ERISA Litig.*, No. 1:12-cv-02548 (S.D.N.Y. Apr. 3, 2012)

[5] *Stark v. Keycorp*, 2021 WL 1758269, at *10 (N.D. Ohio May 4, 2021); *Karpik v. Huntington Bancshares, Inc.*, 2019 WL 7482134, at *6–7 (S.D. Ohio Sept. 26, 2019).

May 12, 2021). Meanwhile, in *McGinnes v. FirstGroup America, Inc.*, different plaintiffs alleged that the plan's previous "diverse portfolio of well-established funds," including "a stable value fund managed by Wells Fargo," had "served the Plan participants well" and did not require replacement. 2021 WL 1056789, at *2 (S.D. Ohio Mar. 18, 2021).

As these examples show, ERISA defendants often face "diametrically opposed" theories of liability. *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008). As a result, fiduciaries find themselves between a proverbial "rock and a hard place," facing a lawsuit no matter what course they take. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014).

B. Abusive Litigation Hurts Fiduciaries, Providers, And Participants.

Just as litigation against public officials "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government," *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009), so too does litigation against plan fiduciaries distract them from the important business of managing retirement plans in participants and beneficiaries' sole interest.

As courts have recognized, "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 about its methods and knowledge at the relevant times." *PBGC*, 712 F.3d at 719. The expense of discovery alone can be prohibitive. In one case, a defendant reportedly projected $5 million in discovery costs before the court ruled on a motion to dismiss. Jon Chambers, SageView, *ERISA Litigation in Defined Contribution Plans: Background, History, Current Status and Risk Management Techniques* 10 (Mar. 2021), https://bit.ly/3mP3BD9.

Abusive litigation also has indirect, but equally significant, impacts. In 2015—before the latest surge in fiduciary litigation—surveys already showed that many plan sponsors were "as concerned about litigation" as they were about "failing to meet their participants' retirement goals." Robert Steyer, Pensions & Investments, *Litigation Heavy on Minds of Defined Contribution Execs* (Mar. 23, 2015), https://bit.ly/38tDs4A. Now, defendants "in the sweet spot" for an ERISA lawsuit are being advised to increase insurance limits preemptively to cover potential claims, Amanda Umpierrez, Plan Sponsor, *Benefit Plan Fiduciaries and Service Providers Anticipating New Litigation Risks* (June 15, 2021),

https://bit.ly/3ztKx0G, and insurers have passed on "higher rates and reduced capacity" to companies as a result of unpredictable liability. Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3DzZWPl.

Although sponsors, fiduciaries, and providers bear the brunt of this litigation spree, participants are ultimately harmed. There is a real risk that small or mid-sized entities may decide not to offer, or will discontinue offering, benefit plans under ERISA. Meanwhile, those that continue to sponsor plans will have to pay more to procure services, indemnification, and insurance, which may require diverting resources from other important employee-benefit programs, such as matching contributions or enhanced benefits. And the prospect of being named as a defendant in a meritless suit makes it more difficult for companies to find qualified individuals willing to serve as fiduciaries or on committees.

Providers like Principal also must respond to litigation costs. These costs lead to less attractive products, reduced innovation, and higher expenses—another way in which litigation harms plan participants.

Further complicating matters, the outcomes of fiduciary duty cases can be highly unpredictable, making it difficult for providers to determine

whether and to what extent they will be subject to ERISA's fiduciary duty framework. *Compare Rozo I*, 949 F.3d at 1075, *with Teets*, 921 F.3d at 1217–21. And even fiduciaries are subject to variable and inconsistent determinations as to what constitutes prudent or loyal behavior.

As courts have repeatedly stated, ERISA was intended to "assur[e] a predictable set of liabilities" for plan fiduciaries. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002); *accord, e.g.*, *Ellis v. Liberty Life Assurance Co. of Boston*, 958 F.3d 1271, 1288–89 (10th Cir. 2020) (favoring a "clear, uniform rule" that furthers "predictable obligations and reduced administrative costs central to ERISA"); *Riley v. Metropolitan Life Ins. Co.*, 744 F.3d 241, 248 (1st Cir. 2014) ("One of ERISA's main purposes is the promotion of 'predictability.'"). Congress thus deliberately "sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (cleaned up). Ironically, the current state of affairs—with aggressive and emboldened plaintiffs' lawyers bringing waves of lawsuits for *in terrorem* value, and plan sponsors and other defendants scrambling

to manage litigation risks—is precisely what Congress sought to avoid in passing ERISA.

II. Plaintiff's Misunderstanding Of The Duty Of Loyalty Would Exacerbate Litigation Abuses.

The foregoing trends are troubling enough on their own, but Plaintiff's arguments in this appeal threaten to make them worse.

ERISA imposes a duty on fiduciaries to act loyally and in participants and beneficiaries' sole interest. 29 U.S.C. § 1104(a)(1). Plaintiff contends that Principal violated this duty by "considering its own return, its own risks, and its own costs" in setting the crediting rate for the PFIO product. Pl. Br. 2. Because Principal is a fiduciary, the argument goes, Principal was not allowed to consider these factors "at all." *Id.* Plaintiff even contends that steps Principal took to ensure the soundness of its product in response to the *2008 financial crisis* are evidence of disloyalty because they "underscore[] that Principal worried about its own risks and costs." *Id.* at 31 n.3.

This theory warps ERISA beyond recognition. Considering expected expenses and costs—and adjusting projections about expenses and costs as new information comes to light—does not violate a fiduciary's duty of loyalty. It is *part* of the duty of loyalty. ERISA specifically states that

loyalty entails not only acting "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries," but also "(ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

Thus, as the district court properly recognized, "Rozo's narrow focus on the payment of the maximum possible [crediting rate] is undermined by the statute itself, because a participant also has an interest in payment of reasonable expenses of administering the plan. No plan could continue, if those expenses were not paid." *Rozo v. Principal Life Ins. Co.*, 2021 WL 1837539, at *15 (S.D. Iowa Apr. 8, 2021).

A. Plaintiff Misinterprets The "Eye Single" Standard.

Plaintiff argues on appeal that Principal is liable for breach of the duty of loyalty because that duty requires fiduciaries to act with an "eye single" to participants' interests. Pl. Br. 2, 24, 31, 33. *Amici* agree with the proposition that fiduciaries must keep their eyes focused on participants' interests whenever acting in a fiduciary capacity. But as shown below, Plaintiff's misinterpretation of that standard expands its application in ways that hurt fiduciaries and participants alike.

The "eye single" phrase comes from the Second Circuit's decision in *Donovan v. Bierwirth*, which stated that "officers of a corporation who are trustees of its pension plan" must make decisions "with an eye single to the interests of the participants and beneficiaries." 680 F.2d 263, 271 (2d Cir. 1982). As support for this proposition, the court cited three trust law treatises. *Id*. The Supreme Court has cautioned, however, that "trust law does not tell the entire story" about ERISA's fiduciary duties. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

In particular, trust law disallows a trustee from creating even a potential conflict of interest, whereas ERISA specifically contemplates that "a fiduciary may have financial interests adverse to beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). And this principle applies not only "for the employer or plan sponsor," but also for "persons who provide services to an ERISA plan." *Id.*

It is thus well-established that while ERISA requires a fiduciary to place the interests of participants first when making fiduciary decisions, the statute does *not* "require a fiduciary to don the commercial equivalent of sackcloth and ashes." *Vander Luitgaren v. Sun Life Assur. Co. of Can.*, 765 F.3d 59, 65 (1st Cir. 2014). Instead, ERISA's duty of loyalty requires

"that the fiduciary not place its own interests *ahead* of those of the Plan beneficiary." *Id*. (emphasis added).

This means that a fiduciary does not violate its duty of loyalty simply because an action it determines best promotes participants' interests also "incidentally benefits the corporation." *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 302 (5th Cir. 2000); *see also, e.g.*, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 421 n.6 (4th Cir. 2007) (rejecting the claim that a fiduciary breaches its duty of loyalty by being an officer or director of the plan sponsor "simply because an officer or director has an understandable interest in positive performance of company stock"); *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984) ("It is no violation of a trustee's fiduciary duties to take a course of action which reasonably best promotes the interest of plan participants simply because it incidentally also benefits the corporation."). *Bierwirth* itself recognized that the "eye single" standard does not mean that fiduciaries breach their duties if they undertake an action in the interests of plan participants that "incidentally benefits the corporation or . . . themselves." 680 F.2d at 271.

Courts also should be cautious in reading *Bierwirth* too broadly. "The level of precaution necessary to relieve a fiduciary of the taint of a

potential conflict should depend on the circumstances of the case and the magnitude of the potential conflict." *Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997). *Bierwirth* and *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984)—another of Plaintiff's key cases—both involved the "'unusual situation'" of "the commitment of plan assets to corporate control contests in which the plan trustees' jobs were at stake." *Metzler*, 112 F.3d at 213 (quoting *Bierwirth*, 680 F.2d at 271–73). This appeal, involving run of the mill business judgments, is worlds away from that scenario.

Unlike *Bierwirth*, the prospects for an actual conflict of interest in this case are remote. Although Principal has discretion to set the crediting rate for its PFIO product, that discretion is hardly unlimited. As shown below, both plan sponsors, who exercise oversight over their plan's offerings, and participants, who have choice in where to allocate their retirement contributions, serve as important backstops. As the First Circuit has explained, if a provider sets a crediting rate too low, "it risks losing out as plan sponsors choose what options to offer plan participants." *Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 9 (1st Cir. 2018). And if a provider wants to find ways to increase its own compensation, "there

are presumably many ways to do so" without "making a fund uncompetitive with those offered by other companies." *Id.*

Although Plaintiff claims that the crediting rate "determines Principal's profit," that is true only in a mathematical, not a proximate, sense. What "determines" a provider's profit is not actually the crediting rate, but (i) the return on the underlying investments minus (ii) the crediting rate and the expenses of providing that guarantee. A provider's ongoing projections of returns and expenses are therefore closely aligned with participants' interests. In sharp contrast to *Bierwirth*, this is not a case where it is "almost impossible to believe" that the defendant's motive for acting "was for any purpose other than" advancing its self-interest. *Ellis*, 883 F.3d at 6 (quoting *Bierwirth*, 680 F.2d at 275).[6]

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[6] Plaintiff's arguments in support of his prohibited transaction claim misstate the law for similar reasons. ERISA provides that a fiduciary with respect to a plan shall not "deal with the assets of the plan in his own interest or for his own account.'" 29 U.S.C. § 1106(b)(1). But a fiduciary that takes steps to "minimize its cost" does not engage in prohibited self-dealing under this section. *Hannan v. Hartford Fin. Servs., Inc.*, 688 F. App'x 85, 90–91 (2d Cir. 2017). One of Plaintiff's core cases recognizes that the "same" investigation needed for loyalty claims will frequently decide whether a fiduciary "dealt with the plan assets 'in his own interest'" under § 1106(b)(1). *Leigh*, 727 F.2d at 126.

B. Plaintiff Fails To Consider ERISA's Larger Structure.

Plaintiff's argument also ignores Congress's expectation that courts would interpret ERISA's fiduciary standards "bearing in mind the special nature and purpose of employee benefit plans." *Varity*, 516 U.S. at 497 (quoting H.R. Conf. Rep. 93-1280 at 302); *accord Acosta v. Pac. Enters.*, 950 F.2d 611, 618 (9th Cir. 1991). Two features are relevant here.

First, ERISA requires that every plan have one or more "named fiduciaries." *Intel Corp. Inv. Policy Committee v. Sulyma*, 140 S. Ct. 768, 773 (2020); 29 U.S.C. § 1102(a). These fiduciaries—typically the plan sponsor or a related entity—are assigned "detailed duties and responsibilities," including ensuring "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251–52 (1993). Sponsors and fiduciaries deciding whether to select or retain a given stable value fund as part of a plan's investment menu necessarily take a hard look at

all aspects of the fund, including its crediting rate, when deciding whether to include the option in their plans.[7]

Second, in the case of participant-directed plans, ERISA vests considerable responsibility for selecting investments with participants. Although fiduciaries are initially responsible for providing participants with a reasonable array of appropriate investment options, ERISA ultimately assumes that *participants* are in the best position to make choices among these options about how to save for retirement based on their own needs and circumstances. ERISA thus "encourages sponsors to allow more choice to participants in defined-contribution plans," *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011), providing that fiduciaries shall not be liable for any losses that result from a participant or beneficiary's exercise of control over the assets in his or her account. 29 U.S.C. § 1104(c)(1)(A).

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[7] ERISA also recognizes that persons other than named fiduciaries (or their appointees) can be fiduciaries, but only "to the extent" that the person exercises that discretionary authority or control over Plan assets. 29 U.S.C. § 1002(21)(A); *see also Rozo I*, 949 F.3d at 1073; *Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 18 (1st Cir. 1998). Moreover, with limited exceptions, like the appointment of an investment manager, 29 U.S.C. §§ 1002(38), 1105(d)(1), the named fiduciary generally remains responsible for ensuring that the plan is prudently managed.

To qualify for this safe harbor, a plan must provide "a broad range of investment alternatives." 29 C.F.R. § 2550.404c-1(b)(1)(ii). Regulations provide that a plan provides a broad range of investment alternatives when each participant or beneficiary has a "reasonable opportunity" to (A) materially affect the potential return and the degree of risk in their account; (B) choose from at least three diversified investments with materially different risk and return characteristics; and (C) minimize the risk of large losses. *Id.* § 2550.404c-1(b)(3). Stable value funds—which as explained above are liquid, low yielding, and steady and predictable investment options that function as ballast for many participants—are one type of product that fiduciaries can offer to satisfy these requirements. *Ellis*, 883 F.3d at 3; *supra* pp. 7–9.

Both of these features of 401(k) plans—front-line oversight by named fiduciaries, and a desire to offer participants a broad range of investment alternatives to choose from—underscore why having courts second-guess the crediting rates paid by a stable value fund is unnecessary and contrary to participants' interests. As the First Circuit has explained, "[i]f informed plans or their participants do not want such funds, they

will not select them over the innumerable options available." *Ellis*, 883 F.3d at 9.

In *Ellis*, the First Circuit rightly "balk[ed]" at the notion that a stable value fund provider violated ERISA's duty of loyalty by picking "too conservative" a benchmark for its stable value fund (supposedly to increase the provider's own compensation). 883 F.3d at 9. As the court explained, stable value funds "are generally presented as one of the more conservative options for investors who prefer asset preservation to the risk of pursuing greater returns." *Id.* "A conservative benchmark for a fund that places principal preservation as its primary goal warns the investor not to expect robust returns, and aligns expectations and results in a manner that is unlikely to harm or disappoint any investor who selects the fund." *Id.*

The same considerations are present here. Although Plaintiff contends that Principal acted disloyally by not setting the crediting rate higher (ignoring Principal's inability to make these determinations in hindsight), the point of the PFIO—or any plan offering, for that matter—is not to maximize expected returns at all costs. Sponsors offer stable value funds not to ensure supersize returns but to provide participants

with investment alternatives for diversification and principal protection. ERISA itself requires fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C). Similarly, participants who select these funds do not expect to eke out every last basis point of performance. Rather, they expect to receive modest returns with less risk.

Exposing the illogic of his position, Plaintiff contends that it was error to conclude that "no breach occurred because participants received the type of investment they wanted." Pl. Br. 34. But giving participants "the type of investments they want" is squarely in line with ERISA's goals. Congress sought "to strike an appropriate balance between the interests of employers . . . in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights *and just expectations*." H.R. Rep. 93-533, at 218 (1973) (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. ERISA rejects Plaintiff's "paternalistic approach" and "le[aves] [the] choice to the people who have the most interest in the outcome." *Loomis*, 658 F.3d at 673–74.

C. Plaintiff's Rule Would Be Impossible To Administer.

Plaintiff's interpretation of the duty of loyalty is also untenable because of its practical consequences, for courts and defendants alike. Plaintiff seeks a remand "so that the court can determine the crediting rate that a loyal fiduciary would have set." Pl. Br. 32. His interpretation of the duty of loyalty would require judges not only to act routinely as psychologists, deciding whether a fiduciary acted for proper reasons even when the action aligned with participants' interests, but also central planners, regularly reexamining and second-guessing countless business judgments in hindsight.

Deciding what the crediting rate for a product like the PFIO should be is no straightforward task. Decisionmakers must repeatedly estimate future returns, default rates, regulatory requirements, the cost of capital, investment inflows and outflows, competing products, and more. Each of these predictions requires a high degree of technical expertise, experience, and judgment. Accordingly, different decisionmakers can reach different conclusions about the proper way to price a stable value product even if they are all acting loyally and in good faith. *Cf. Barchock v. CVS Health Corp.*, 886 F.3d 43, 53–55 (1st Cir. 2018) (rejecting allegations

that provider violated its fiduciary duty by departing from the average cash-equivalent allocation for stable value funds).

Despite expressly asking this Court to remand "so that the court can determine the crediting rate that a loyal fiduciary would have set" (Pl. Br. 32), Plaintiff does not—and cannot—explain how a court would decide what alternative rates a hypothetically "loyal fiduciary" would have set if it had ignored its costs and risks when setting rates for its product. Calling this counterfactual a "remedies" question rather than a "breach" question is no answer. At either stage, federal courts are not equipped to reliably assess, years after the fact, whether a "loyal" fiduciary would have set a crediting rate of 1.45% instead of 1.50% or ascribed 10 bps instead of 15 bps in reserves to account for a particular identified risk. ERISA recognizes this, which is why it requires judges to decide only whether a fiduciary's actions to defray plan expenses were "reasonable." 29 U.S.C. § 1104(a)(1)(A)(ii); *see also, e.g.*, *id.* § 1108(c)(2) (exemption for fiduciary's receipt of "reasonable compensation" for services rendered in the performance of duties to the plan).

What is more, because Plaintiff affirmatively contends that pricing decisions are "not binary" and "exist on a continuum" (Pl. Br. 36 n.5),

there is no logical stopping point to this exercise. Every plaintiff could claim that a fiduciary should have found some way to adjust the dial slightly. No defendant could ever prove that a particular rate could not have been tweaked without "destroy[ing] the product" (*id.*)—nor would any reasonable investment manager apply that criterion in deciding how to price a product or account for future risks.

ERISA does not and should not be interpreted to turn judges into *de facto* rate-setting agencies. As courts have repeatedly warned, judges are "ill-suited" to act "as central planners, identifying the proper price, quantity, and other terms of dealing" in complex commercial arrangements. *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also, e.g.*, *NCAA v. Alston*, 141 S. Ct. 2141, 2163–64 (2021) ("judges make for poor 'central planners' and should never aspire to the role"); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates.").

Plaintiff's approach would be debilitating for businesses as well as courts. It is commonplace in the financial services industry for the interests of asset managers and other providers to be aligned with those of plan participants. For example, in many cases fiduciaries may select or recommend their own products if they are prudent or desirable options, even if the fiduciary (like any other market participant) benefits when participants use their products. The Department of Labor has recognized that it would be "contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor." U.S. Dep't of Labor, *Participant Directed Individual Account Plans*, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991); *see also, e.g.*, 29 U.S.C. § 1108(b)(8) (allowing a plan to use a sponsor's collective investment trusts).

These practices are frequently desirable, as a rising tide lifts all boats. But Plaintiff's rule would turn these practices and more into sources for endless controversy. If fiduciaries to ERISA plans have to relitigate reasonable business judgments every time that a plaintiff argues that the judgment was reached out of "self-interested motivations" (Pl. Br. 2), then fiduciaries will decline to offer their services to ERISA

plans, change their services, or raise their prices—even though doing so would ultimately harm participants.

Although the problems with Plaintiff's interpretation of ERISA's duty of loyalty are acute for providers like Principal, they are by no means limited to that context. Plaintiffs almost always bring loyalty claims in ERISA fiduciary duty cases, often based on generic allegations or mere supposition that a defendant was motivated by the prospect of incidental benefits to themselves or others. Plaintiff's draconian interpretation of the "eye single" standard therefore would call upon the courts to second-guess business determinations in a whole host of fiduciary duty cases. This Court should be loath to adopt a rule that would be impossible to administer, encourage wasteful litigation, and has no discernible benefit to plans or participants.

CONCLUSION

The Court should affirm the judgment below.

Dated: September 16, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Nancy G. Ross, counsel for *amici curiae*, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 5,737 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate. The electronic brief has been scanned by Microsoft Windows Defender Antivirus with threat definition version 1.349.801.0 (updated September 15, 2021), which did not detect a virus.

Dated: September 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused 10 paper copies of the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by overnight mail.

I also certify that, on this date, I caused paper copies of the foregoing brief to be served on counsel for the parties at the addresses below.

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RE: 21-2026 Frederick Rozo v. Principal Life Insurance Co.

Dear Counsel:

The amicus curiae brief of the Chamber of Commerce of the United States of America and American Benefits Council has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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