23-1082 (L), 23-1172 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH VELLALI, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

NANCY S. LOWERS, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

JAN M. TASCHNER, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

JAMES MANCINI, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

Plaintiffs-Appellants-Cross-Appellees,

RANAY P. CIRILLO, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan, TARA HEARD, Individually and as representative of a class of participants and beneficiaries on behalf of the Yale University Retirement Account Plan,

Plaintiffs,

v.

YALE UNIVERSITY, MICHAEL A. PEEL, THE RETIREMENT PLAN FIDUCIARY COMMITTEE,

Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the District of Connecticut
No. 3:16-cv-01345-AWT (Hon. Alvin W. Thompson)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ERISA INDUSTRY COMMITTEE, AND AMERICAN BENEFITS COUNCIL AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Each of the *Amici Curiae* individually certifies that it is a non-profit corporation, that it does not have a parent corporation, and that no publicly held corporation has ten percent or greater ownership.

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INTEREST OF THE *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.

The ERISA Industry Committee (ERIC) is a national non-profit business trade association representing approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families.

The American Benefits Council (the Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's more than 430 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families.

Many of *Amici's members* maintain, administer, or provide services to employee-benefit plans governed by the Employee Retirement Income Security Act

[1] All parties consent to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *Amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

of 1974 (ERISA), covering virtually all Americans who participate in employer-sponsored programs. Consequently, *Amici* regularly file *amicus curiae* briefs in cases, like this one, that raise issues of concern to those who sponsor and administer services to ERISA-governed benefit plans. *See, e.g.*, *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Cunningham v. Cornell Univ.*, 86 F.4th 961 (2d Cir. 2023). This brief focuses on one important issue about which the Secretary of Labor filed an amicus brief in this case: whether, if defendants bear the burden of disproving that any fiduciary breach caused a loss to the plan, the district court correctly instructed the jury that the defendants meet their by showing that a fiduciary following a prudent process "could have" made the same decisions as the defendants.

SUMMARY OF THE ARGUMENT

ERISA makes fiduciaries monetarily liable only for losses that actually "result[ed] from" a breach of fiduciary duty. 29 U.S.C. § 1109(a). Congress adopted that limitation because in benefit plan management, as in court, some errors are harmless. Sometimes, a fiduciary breaches the duty of prudence by bungling the process steps but still winds up with an objectively prudent decision—*i.e.*, one that prudent fiduciaries could well have made after a fully ERISA-compliant process. That is particularly true in the context of selecting retirement-plan products and vendors, given the fierce competition that exists among retirement-plan providers on both performance and price. The plan might suffer losses, because even the wisest and most prudent choices can yield disappointing outcomes. But, in those circumstances, the losses do not result from the breach. The breach was harmless.

That doesn't mean that participants are deprived of *all* remedies in the event of harmless breaches. Section 1109(a) specifically provides that equitable remedies, including injunctive relief and removal of a breaching fiduciary from her position, do not turn on losses resulting from the breach. Such equitable remedies are governed by principles of equity and doctrines that guide the imposition of injunctions, not by loss-causation requirements. This makes good sense: an equitable remedy may be appropriate to protect a plan from a fiduciary who has breached in the past and is likely to breach in the future even when the imprudence did not cause any loss. But there is no reason to impose a monetary remedy when the fiduciary's breach turned out to be harmless. Exposing fiduciaries to excessive litigation risk—including liability when their breach did not cause a loss—would jeopardize ERISA's goals of encouraging employers to create plans and keeping insurance coverage costs under control. "The causation requirement of § 1109(a) acts as a check on [ERISA's] broadly sweeping liability, to ensure that solvent companies remain willing to undertake fiduciary responsibilities with respect to

ERISA plans." *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 106 (2d Cir. 1998) (majority concurrence).[2]

This Court previously held in a binding majority decision that "[c]ausation of damages is … an element of the claim, and the plaintiff bears the burden of proving it" when seeking to recover losses for breach of ERISA's fiduciary duty, expressly rejecting the argument of the plaintiff (and Secretary of Labor, appearing as an *amicus*) "for a shift of the burden of proof on the issue of causation," *Silverman*, 138 F.3d at 105-06 (majority concurrence); *id.* at 105 & n.9 (Leval, J., writing for the Court) (referencing this as the "majority" holding and noting his dissenting minority view). Without overruling that precedent *en banc*, this Court has nonetheless more recently embraced a burden-shifting framework in which "the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty." *Sacerdote v. New York Univ.*, 9 F.4th 95, 113 (2d Cir. 2021). Applying that framework, the district court instructed the jury that the defendants can satisfy this burden by showing that a prudent fiduciary could have made the same decisions as the defendants.

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[2] This requirement has been framed in a variety of ways, including causation of damages, loss causation, causal connection, causal link, resulting loss, etc. *See, e.g.*, *Silverman*, 138 F.3d at 104 (2d Cir. 1998) ("causal link"); *Trustees of Upstate N.Y. Engineers Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016) ("causal connection"); *Sacerdote v. New York Univ.*, 9 F.4th 95, 113 & nn.68, 71 (2d Cir. 2021). *Amici* use "loss causation," though the difference between these terms is semantic rather than substantive.

The plaintiffs (and the Secretary) take issue with that instruction, arguing that the defendants should have been required to prove that a prudent fiduciary "would have" (not "could have") made the exact same decisions. But that standard finds no foothold in ERISA. Assuming a burden-shifting framework for loss-causation, the standard applied by the district court is sensible: if the decisions could have been reached through a prudent process, then the defendants' *lack* of a prudent process was a harmless error, rather than the cause of any loss. ERISA recognizes that fiduciaries confront myriad decisions with no single right answer—particularly in the context of selecting investment options, service providers, and negotiating compensation arrangements in the context of fierce competition that typifies the modern-day retirement-plan marketplace. In almost every situation, fiduciaries have a slew of reasonable options on their menu. From the statute's point of view, one prudent choice is not any better than another prudent choice. Even when the fiduciary's decisionmaking process is lacking, the final decision is objectively prudent if it falls within the range of reasonable choices that a prudent fiduciary could make. In that scenario, whatever losses may occur cannot be attributed to the procedural breach. The district court's "could have" standard thus follows from ERISA's respect for the wide range of prudent options available to a fiduciary and Section 1109(a)'s requirement that liability attaches only where the loss *results from* the breach.

The standard that the plaintiffs and the Secretary propound not only would impose monetary liability on fiduciaries even for objectively prudent decisions, but it would be wildly impractical. The plaintiffs and the Secretary say that the defendants must prove that a hypothetical prudent fiduciary would have made the exact same decisions as the defendants—right down to the same timing and manner—in a counterfactual scenario where a different process were used. Yet for any given choice, a prudent process (of which there are many) can lead to dozens, hundreds, or thousands of reasonable options and permutations. There is simply no way for a fiduciary to prove that a prudent fiduciary *would have* made precisely the same choices at the same times. This is a burden that is built to never be met.

The plaintiffs' standard would also increase the pressure on fiduciaries to capitulate to "settlement extortion" efforts by plaintiffs with weak claims because no case would be worth the risk of trial. *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. ("PBGC")*, 712 F.3d 705, 719 (2d Cir. 2013). That would incentivize the plaintiffs' bar to bring meritless suits and lead plan fiduciaries to restrict the products and services they make available to participants. The ballooning litigation risk could lead plan sponsors to decrease many popular features of 401(k) plans, like generous employer matches. For small plans it may discourage employers from offering ERISA plans at all—the *opposite* of what Congress was trying to achieve. Indeed, the plaintiffs' rule "would impose high insurance costs upon" ERISA fiduciaries "and hence upon ERISA plans themselves," undermining Congress's "goal of containing pension costs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) (citation omitted).

The better rule is the one that fits comfortably with Section 1109(a). No harm results from a fiduciary's procedural breach when the decision is objectively prudent, meaning that it is among the range of reasonable decisions that a prudent fiduciary could have made. If this Court reaches the district court's instruction on damages, it should affirm.

ARGUMENT

The district court instructed the jury under the framework announced by this Court in *Sacerdote v. New York University*, 9 F.4th 95 (2d Cir. 2021), which provided that, once plaintiffs prove breach and "a loss, the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty." *Id.* at 113 (footnote omitted).

Amici respectfully disagree that ERISA calls for this burden-shifting regime, which has no support in the text of the statute. The "ordinary default rule" thus controls: the "burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. 49, 56, 58 (2005). That is what this Court previously held when it squarely rejected arguments by the Secretary of Labor (appearing as an *amicus*) in favor of a burden-shifting regime and squarely held that "Congress has placed the burden of proving causation on the *plaintiff*," not the defendant. *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 105-06 (2d Cir. 1998) (majority concurrence); *id.* at 105 & n.9 (Leval, J., writing for the Court) (referencing this as the holding of "a majority of our panel" though noting his dissent).[3] No party challenges the burden-shifting framework at this stage in the appeal, however. *See* Yale Br. 23 n.3. Thus, although this Court may wish to address this intra-circuit conflict in an appropriate case or at later stages of this case, the issue is not presented here.

Instead, the question addressed by the parties—and by this brief, as well as the Secretary's—is what the defendants had to prove to meet this burden of disproving loss causation. The district court instructed the jury that the defendants had to prove "that a fiduciary following a prudent process *could have* made the same decisions as to recordkeeping and administrative fees as the defendants." SA122 (emphasis added). This standard is faithful to ERISA's text and purpose, which affords fiduciaries the flexibility to choose among a wide range of reasonable options and limits monetary liability to losses that actually "result[] from" a breach of

[3] The majority holding is binding precedent and should trump *Sacerdote*. *See Deem v. DiMella-Deem*, 941 F.3d 618, 625 (2d Cir. 2019) (when two panel decisions conflict, this Court has "no choice but to follow" the earlier opinion (citation omitted)).

fiduciary duty. It is also firmly grounded in this Court's precedent. There was no error in the district court's instruction.

This Court should reject the extraordinary "would have" standard urged by the plaintiffs and the Secretary. That standard is plainly unworkable, because it would require fiduciaries to prove an absurd counterfactual—that in an alternate universe with a different investigation and decisionmaking process, 51% of prudent fiduciaries *would have* made the exact same choices (among innumerable possible options) at the exact same time as those made by the defendants. This standard would be practically unattainable in the vast majority of suits involving discretionary investment management decisions involving diversified portfolios and would greatly intensify the extortionate dynamics that force fiduciaries to settle very weak claims rather than face exorbitant discovery and the possibility of damages untethered to any actual loss. The district court's instruction should be affirmed.

I. ERISA encourages the creation of benefit plans by affording flexibility and discretion to plan sponsors and fiduciaries.

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, ERISA was crafted to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17. Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations." H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. Sponsors and fiduciaries must account for present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* Congress thus designed a statutory scheme that affords plan sponsors and fiduciaries "greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." U.S. Dep't of Labor, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981).

This flexibility is far-reaching and extends to negotiating terms with service providers. Fiduciaries must decide what services to offer (simple recordkeeping, individualized financial advice, participant loans, a brokerage window, etc.); who should provide those services; and how to compensate service providers (flat fees, percentage-of-asset fees, per-service fees, etc.). When negotiating these arrangements, fiduciaries must select the duration of service-provider agreements. Fiduciaries also must keep in mind how often they want to consider potential new service providers and whether to switch providers based on the results of those evaluations. These decisions implicate numerous competing considerations, including cost, quality, scope of services, and the need to facilitate a constructive working relationship between the plan and its providers.

Take investment-management fees, for example. "Whether fees are excessive or not is relative 'to the services rendered,'" because "it is not unreasonable to pay more for superior services." *Cunningham v. Cornell Univ.*, 86 F.4th 961, 978 (2d Cir. 2023) (quoting *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)). But superiority of services is necessarily a judgment call, one that implicates "the plan's strategic goals relative to their selected comparators." *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022). Thus, "[a] plan fiduciary might prudently seek value in actively managed funds—whether aggressively bullish or highly defensive—that might charge higher expense ratios due to the requisite skills of their management teams." *Id.* This exemplifies the truism that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022).

The same is true of fees for recordkeeping and other administrative services. As the Department of Labor (DOL) acknowledges, fees are only "one of several factors" fiduciaries "need to consider in deciding on service providers."[4]

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[4] U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities* 6 (Sept. 2021), https://bit.ly/3rjBA83. And in the investment context, as elsewhere, "cheaper is not necessarily better." U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1, 9 (Sept. 2019), https://bit.ly/3NwDLiN.

Recordkeeping services are highly customizable depending on, *e.g.*, the needs of each plan, the size and features of its participant population, and the capabilities and resources of the plan's administrator and the sponsor's HR department. Moreover, myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[5] DOL therefore notes "that plan fiduciaries are not always required to pick the least costly provider. Cost is only one factor to be considered in selecting a service provider."[6]

Given the breadth of decisions fiduciaries make in the face of market uncertainty and the need for flexibility, Congress chose the "[p]rudent man" standard to define the scope of the duties that fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a); *see Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982) (explaining that Congress adopted the "prudent man" standard to ensure "the flexibility essential to effective and responsible financial management of the plan"). This flexibility means that fiduciaries have a wide range of reasonable

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[5] *See, e.g.*, Sarah Holden et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, at 4, ICI Research Perspective (June 2021), https://bit.ly/3vnbCU3.

[6] U.S. Dep't of Labor, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan* 1, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf (last accessed Mar. 12, 2024).

options for almost any decision they make. The bottom line is that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177.

II. The loss-causation requirement is an essential component of Congress's effort to limit monetary liability for fiduciary breaches.

ERISA imposes monetary liability on fiduciaries *only* for losses that actually "result[ed] from" a breach of fiduciary duty. 29 U.S.C. § 1109(a). That loss-causation requirement is the crucial element that prevents a windfall recovery by participants beyond the benefits promised under a plan. It also protects fiduciaries from being forced to insure the plan against anything that *might* go wrong (like a drop in the market) following a lapse in process.

Keeping fiduciary liability within reasonable bounds is fundamental to ERISA's design. As this Court has explained, "[t]he causation requirement of § 1109(a) acts as a check on [ERISA's] broadly sweeping liability, to ensure that solvent companies remain willing to undertake fiduciary responsibilities with respect to ERISA plans." *Silverman*, 138 F.3d at 106 (majority concurrence). ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Limiting the monetary liability of fiduciaries is a key part of "the balance between [the] competing goals that … Congress has struck." *Id.* at 263. Ratcheting up fiduciaries' exposure to "liability would impose high insurance costs upon" ERISA fiduciaries, "and hence upon ERISA plans themselves"—which runs directly counter to Congress's "goal of containing pension costs." *Id.* at 262-63 (citation omitted).

Section 1109(a) strikes the appropriate balance by making loss causation a prerequisite to monetary liability for fiduciary breach. Congress adopted the loss-causation requirement because it knew that some errors are harmless. There is no sense in "imposing a monetary penalty for imprudent but harmless conduct," the Seventh Circuit has observed, because "honest but potentially imprudent trustees are adequately deterred … by the knowledge that imprudent conduct will usually result in a loss to the fund, a loss for which they will be monetarily penalized." *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir. 1987). A monetary penalty for harmless mistakes achieves nothing.

Moreover, Section 1109(a) expressly supplies *other* remedies for breaches of fiduciary duty that do not result in any losses—"including removal of such fiduciary." 29 U.S.C. § 1109(a). The statute contains no causation requirement for this kind of injunctive relief. *See Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (explaining that a fiduciary who committed a procedural breach but wound up with "objectively prudent investments" may nevertheless be subject to "an action to enjoin or remove the trustee”). Section 1109(a) thus draws a sharp line between the remedies of monetary liability and injunctive relief, requiring loss causation only for the former.

This statutory scheme makes intuitive sense. “If trustees act imprudently, but not dishonestly, they should not have to pay a monetary penalty for their imprudent judgment so long as it does not result in a loss to the Fund.” *Brock*, 830 F.2d at 647. On the other hand, when considering “the appropriate injunctive relief, it is irrelevant that the honest but imprudent actions of the trustees resulted in no loss to the fund” because the fiduciaries’ “propensity to engage in imprudent conduct” presents a risk of dissipating the fund’s assets going forward. *Id.*

III. Assuming a burden-shifting framework, the district court correctly instructed the jury that disproving loss causation requires defendants to show that a prudent fiduciary “could have” made the same decisions.

A. The “could have” standard follows from ERISA’s design and this Court’s precedent.

ERISA’s duty of prudence “focuses on the *process* of the fiduciary’s conduct preceding the challenged decision.” *PBGC*, 712 F.3d at 730 (emphasis added). But a procedural breach does not necessarily mean that the ultimate decision was a bad one. It simply means that the fiduciary’s decisionmaking process was deficient. As then-Judge Scalia noted in the investment context, even a faulty process can sometimes wind up—“through prayer, astrology or just blind luck”—with “objectively prudent investments (*e.g.*, an investment in a highly regarded ‘blue chip' stock)." *Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part).

Now suppose there is a market downturn and those objectively prudent investments happen to lose money, as even the most careful investments sometimes do. In that case, there would be a breach and a loss—but the loss did not "result[] from" the breach within the meaning of 29 U.S.C. § 1109(a). The breach itself was harmless because it produced objectively prudent investments, putting the plan in the same position as other plans whose trustees adhered to a prudent process. The loss resulted from the market downturn. These "are not the sort of losses contemplated by the § 1109 remedial scheme, since it is unreasonable to fault a prudent investment strategy for the statistical reality that even the best-laid investment plans often go awry." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 376 (4th Cir. 2014) (Wilkinson, J., dissenting).

The same is true with respect to the selection of a service provider, like a recordkeeper. Because recordkeeping services are chosen by fiduciaries and cost money (rather than earn money), it will be simple work for a plaintiff to show the fact of *some* loss after a breach. It will probably also be simple work for a plaintiff to show that the recordkeeping services chosen came at a higher cost or with fewer benefits than *some* alternative available on the market at any given time given the wide array of options available at a variety of price points. But if the recordkeeping options chosen were a reasonable choice at a competitive price point that could have been chosen through a prudent process, the procedural breach falls comfortably within the "no harm" bucket, in which case personal liability for damages is not appropriate.

When courts have spoken of the defendants' burden to disprove loss causation, they have referred to this same concept of a procedural breach that leads to "objectively prudent" decisions: "the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was *objectively prudent*." *Sacerdote*, 9 F.4th at 113 n.71 (quoting *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. 2018) (emphasis added)).

To determine whether a fiduciary's decision was objectively prudent (despite the deficient process leading up to it), the relevant question is whether a similarly situated fiduciary following a prudent process *could have* made the same decision. After all, for any decision, there is a sweeping "range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177. Any choice within that reasonable range is objectively prudent. That is why the Supreme Court has repeatedly held that a claim for breach of the duty of prudence requires showing "that a prudent fiduciary in the same position *could not have* concluded that the alternative action would do more harm than good." *Amgen Inc.*

v. Harris, 577 U.S. 308, 311 (2016) (per curiam) (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 429-30 (2014) (quotation marks omitted) (emphasis added). It is the "could have" standard that determines whether a decision is objectively prudent.

This Court has already said as much in its *Sacerdote* decision. There, this Court faulted the district court for "fail[ing] to shift the burden onto the defendant" when it required the plaintiffs "to prove that the alternative fee ranges proposed by their expert were the *only* plausible or prudent ones." *Sacerdote*, 9 F.4th at 113 (quotation marks omitted). By implication (after accounting for the burden shift), it was the defendants' burden to disprove that the alternative fee ranges were the *only* prudent ones. The *Sacerdote* defendants were not required to prove that they *would have* adopted those other prudent fee ranges had they used a prudent process. Rather, they had to show only that a prudent fiduciary could have chosen fee ranges more favorable to the defendants than the ones proposed by the plaintiffs. That is a "could have" standard.

The ensuing illustration in *Sacerdote* reinforces this point:

> [I]f a plaintiff proved that it was imprudent to pay $100 for something but that it would have been prudent to pay $10, it is not the plaintiff's burden to prove that it would also have been imprudent to pay every price between $11 and $99. It is on the defendant to prove that there is some price higher than $10 that it *would have been prudent to pay*.

Id. at 113-14 (emphasis added). The final words make clear that the defendants' burden is not to prove the singular option of what necessarily would have transpired had a prudent process been followed. Rather, the defendants need only establish that a particular decision "would have been prudent" for a hypothetical prudent fiduciary to make—*i.e.*, that some prudent fiduciary *could have made it*.

Plaintiffs (at 20) and the Secretary (at 13) ignore this important passage of *Sacerdote* and instead focus on a quotation from the First Circuit's decision in *Brotherston*, commenting that "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles"; rather, "it makes much more sense for the fiduciary to say what it claims it would have done and for the plaintiff to then respond to that." *Id.* at 113 (brackets omitted; quoting *Brotherston*, 907 F.3d at 38). But the point of this passage in *Brotherston* was to explain why, in the First Circuit's view, "common sense" supported a burden-shifting framework. 907 F.3d at 38. It does not elaborate on the substantive legal standard, much less insist that the fiduciary prove the precise funds it would have selected absent a breach.[7]

[7] Indeed, elsewhere *Brotherston* states that there would be no loss causation if "[a] prudent investor *may have* selected fee-burdened funds, perhaps even [the defendant's] specific funds, that over the relevant years performed worse than market index funds for reasons that would have been reasonably unforeseeable to or discounted by the prudent investor." 907 F.3d at 34 (emphasis added).

At bottom, the text of Section 1109(a) makes plain that liability attaches only for losses "resulting from" a breach of fiduciary duty. Relieving the plaintiff of the burden to prove this loss causation is already in tension with the text of the statute and the default rule governing statutes that fail to specify which party has the burden of proof. Going a step further and permitting liability for fiduciaries who have *proven* that their decisions were objectively prudent—and so the breach could not have caused any loss—is completely untethered to ERISA's text or structure.

Searching for a way around the statute, the Secretary (at 11-13) seeks refuge in the law of trusts. That approach is doubly wrong. First, the Secretary's authorities *post-date* ERISA. When ERISA was enacted, the Restatement of Trusts did not espouse any burden-shifting rule to begin with, much less impose an all-but-impossible "would have" standard for defendants to satisfy. *See* Restatement (Second) of Trusts § 205 (1959);[8] *see also U.S. Life Ins. Co. in City of N.Y. v. Mechs. & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982) (rejecting burden-shifting argument as a "novel proposition"); *In re Beebe's Estate*, 52 N.Y.S.2d 736, 741-42 (N.Y. Sur. 1943) (dismissing objections to approval of trust accounts because the objectors did not "sustain[] the burden of proving that the loss claimed to have been

[8] The Secretary relies (at 11, 12, 21 n.7) on the Third Restatement, published in 2012, which is part of the body of modern Restatements that have been criticized as revising the law rather than restating it. *See, e.g.*, *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

suffered by the trust was proximately caused by some act, fault or omission of the trustee"), *decree aff'd*, 268 A.D. 1051 (N.Y. App. Div. 1945). The Secretary's post-ERISA authorities therefore can hardly illuminate the meaning of § 1109(a).

Second, the language of the statute is not so easily waved away. As the Supreme Court has repeatedly emphasized in the ERISA context, "trust law does not tell the entire story" because "the language of the statute, its structure, or its purposes" may well "require departing from common-law trust requirements." *Conkright*, 559 U.S. at 516 (quoting *Varity*, 516 U.S. at 497); *see also Silverman*, 138 F.3d at 106 (majority concurrence). So even if trust law supported the Secretary's argument, it would not justify "read[ing] the words 'resulting from' right out of the statute." *Tatum*, 761 F.3d at 376 (Wilkinson, J., dissenting).

B. The "would have" standard is simply unworkable.

The alternative standard urged by the plaintiffs and the Secretary collapses under its own weight. According to the plaintiffs, the district court should have instructed the jury that the defendants had "to prove that a fiduciary who acted prudently 'would have' made *the same decisions at the same time and in the same manner* as Defendants." Opening Br. 33-34 (emphasis added). In the vast majority of cases, this standard would be virtually impossible to meet. *Cf. Shinseki v. Sanders*, 556 U.S. 396, 408 (2009) (rejecting "harmless error" standard that "imposes an unreasonable evidentiary burden" because harmless-error doctrine should not set an "evidentiary 'barrier so high that it could never be surmounted'" (citation omitted)). That is certainly true of cases, like this one, where plaintiffs sue plan fiduciaries over their choice of investment options or service and compensation arrangements for plan service providers.

A finding of breach typically focuses on a lapse in the fiduciary's process, such as failing to use "the appropriate methods to investigate and determine the merits" of a decision. *PBGC*, 712 F.3d at 716 (citation omitted). But the underlying decision is almost never binary. Even after prudently investigating, there is still an array of different providers, investment options, and services from which to choose. Naturally, different (though equally prudent) fiduciaries might choose different options, all of them objectively prudent. And, of course, fiduciaries are making these decisions in the face of fierce market competition in which dozens (or even hundreds) of providers are competing on price, quality, and performance.

Having many good options should be a blessing for fiduciaries, but the plaintiffs' preferred standard would turn that into a curse. According to the plaintiffs, defendants cannot prevail by showing that, whatever the flaws in their decisional procedures, they chose one of the many reasonable options that a prudent fiduciary "could have" selected—*i.e.*, options that were objectively prudent. Instead, defendants must prove that, more likely than not, a hypothetical prudent fiduciary "would have" made *precisely the same choice, at the same time, and in the* *same manner*. If there is no single prudent choice, that hurdle will be insurmountable.

And in these types of cases, there is almost never just one prudent choice. A plan fiduciary is confronted with *thousands* of reasonable investment options with different investment styles and risk levels—nearly 9,000 mutual funds alone,[9] several thousand of which are offered in retirement plans—and innumerable ways to put together a plan that enables employees to save for retirement. Similarly, there are a host of reasonable arrangements that a plan may negotiate to manage administrative and recordkeeping fees. *See Hughes*, 595 U.S. at 173-74 (discussing various common practices for investment management fees and recordkeeping fees); *Cunningham*, 86 F.4th at 969-70 (same). Insisting that fiduciaries must prove that a prudent fiduciary would, more likely than not, have made the *exact same* selection from among the myriad potential configurations—at the same time and in the same manner to boot—is a hopeless task.

Consider the facts here. The complaint was filed in 2016, challenging the defendants' decisions over the prior *six years*. *See* Opening Br. 3. The district court certified a class covering 2010-2023. *See id.* at 11. With respect to recordkeeping services, the plaintiffs fault the plan for not soliciting competitive bidding through a

[9] Investment Company Institute, *Investment Company Fact Book 17* (63rd ed. 2023), https://www.ici.org/system/files/2023-05/2023-factbook.pdf.

request for proposal (RFP). *See* SA19, 67. The defendants did put out an RFP in 2014, *see* SA46, but the plaintiffs argued that they should have broadened the RFP and solicited competitive bids sooner. The plaintiffs specifically alleged that "[a] competitive bidding process for the Plan's recordkeeping services would have produced a reasonable recordkeeping fee for the Plan." A115 (¶128).

Plaintiffs' extreme position raises a host of complicated potentially relevant questions: When, precisely, should the defendants have issued the RFPs? How broadly should they have been distributed? How many proposals would have been submitted, and which providers would have submitted them? Is there in fact *any* consensus on only a single outcome resulting from that alternative process that would be viable? Not even the plaintiffs claim that these questions are susceptible of pinpoint answers. For any given fiduciary decision, there are multiple prudent processes to monitor recordkeeping fees that diligent fiduciaries could have taken and myriad objectively prudent outcomes (service packages, compensation structures and amounts) that diligent fiduciaries could have made. It is virtually impossible for defendants to prove that a prudent fiduciary would have made *the very same* decisions as they did, much less at exactly the same time.

Claims that fiduciaries imprudently monitored plan investment options present an even more nightmarish evidentiary burden. As noted above, even just considering mutual funds, there are many thousand excellent options on the market at any given point in time—not to mention separate accounts, collective investment trusts, target-date suites, and more. It would be impossible to prove that, using a different process, more than 50% of the time the fiduciaries would have chosen *the exact same line-up* among the thousands of prudent combinations available.

The standard proposed by the plaintiffs and the Secretary would essentially eliminate the loss causation requirement in Section 1109(a). That cannot be right. Nor is it logical. Their "would have" standard imposes on a fiduciary the burden to show that it was 51% likely that a hypothetical prudent fiduciary would have made the same decision. But given the myriad options available in the modern-day retirement marketplace, it is hard to imagine a *majority* of fiduciaries coalescing around a single decision as prudent. And "[w]hat sense, let alone justice, is there in penalizing a fiduciary merely for acting in accordance with a view that happens to be held by a bare minority?" *Tatum*, 761 F.3d at 378 (Wilkinson, J., dissenting).

Contrary to the accusations of the plaintiffs and the Secretary, the district court's "could have" standard does not call for flights of fancy to indulge the most "remote and speculative possibilities." Opening Br. 21; *see also* Secretary Br. 16 (similar)=. Indeed, that "is a serious mischaracterization" of the standard adopted by the district court. *Tatum*, 761 F.3d at 377 (Wilkinson, J., dissenting). The district court's "could have" standard, like all legal standards, is grounded in reality. *Contra* Opening Br. 21 (positing the case of "an unemployed personal injury victim with no discernible athletic ability" who "*could* have become a superstar professional athlete"). As in other areas where an objective reasonableness test employs a "could have" standard, the term "could" is understood to mean "could realistically"—not the stuff of tinfoil hats. *See, e.g.*, *Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (explaining that a sham antitrust lawsuit "must be objectively baseless in the sense that no reasonable litigant *could realistically* expect success on the merits" (emphasis added)).

C. The "would have" standard would amplify the pressure of extortionate settlements in ERISA litigation and force plan sponsors to incur undue insurance costs.

This Court has recognized the "ominous" prospects facing defendants in ERISA fiduciary-breach suits. *PBGC*, 712 F.3d at 719. Unless the suit is defeated at the motion-to-dismiss stage, the pressure to settle is overwhelming—even when the claims are meritless. Discovery is decidedly asymmetrical and exposes "the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Id.* Given the central role that experts play in the litigation, costs in even the simplest of ERISA class actions easily run into the millions of dollars for a defendant.[10] This "elevates the possibility that 'a plaintiff with a largely groundless claim'" may pursue discovery as "an *in*

[10] *See* Chubb, *Excessive Litigation Over Excessive Plan Fees In 2023*, at 3 (Apr. 2023), https://bit.ly/433OJ6V; Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://bit.ly/3h5mssJ.

terrorem increment of the settlement value." *PBGC*, 712 F.3d at 719 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

To put it bluntly, "litigation is very, very expensive."[11] After a failed motion to dismiss, therefore, an ERISA defendant "has every incentive to settle quickly to avoid (1) expensive discovery and further motion practice, (2) potential individual liability for named fiduciaries, and (3) the prospect of damages calculations, after lengthy litigation, with interest-inflated liability totals." *Sweda v. Univ. of Pa.*, 923 F.3d 320, 340-341 (3d Cir. 2019) (Roth, J., concurring in part and dissenting in part) (footnote omitted). And "[t]his pressure to settle increases with the size of the plan, regardless of the merits of the case." *Id.* at 341. Consequently, ERISA plaintiffs and their lawyers are frequently incentivized to offer massively inflated damages models—seeking hundreds of millions of dollars in recovery (on top of the tens or hundreds of millions of dollars plan sponsors contribute to plans they *voluntarily* establish). No surprise, then, that these kinds of ERISA class action cases often settle—for millions apiece. *See* Chubb, *Excessive Litigation Over Excessive Plan Fees In 2023*, at 2-3 (Apr. 2023), https://bit.ly/433OJ6V).

[11] Natalya Shnitser, *The 401(k) Conundrum in Corporate Law*, 13 Harv. Bus. L. Rev. 289, 320 (2023) (quoting Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg L. (Oct. 18, 2021), https://bit.ly/307mOHg).

It takes little imagination to see how these dynamics would be turbo-charged by a rule that shifts the burden to the fiduciaries to *disprove* loss causation under a "would have" standard that is near-impossible to meet. The ability of "plaintiffs with weak claims to extort settlements" would spike. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). Not only is that deeply unfair in its own right, but it would also undermine Congress's purpose "to ensure that solvent companies remain willing to undertake fiduciary responsibilities with respect to ERISA plans." *Silverman*, 138 F.3d at 106 (majority concurrence).

Moreover, it would force both the fiduciaries and the plan sponsors to incur "high insurance costs," which jeopardizes Congress's "goal of containing pension costs." *Mertens*, 508 U.S. at 262-63 (citation omitted). The recent surge in ERISA fiduciary litigation has already "[h]arden[ed]" and "[s]cramble[d]" the fiduciary-insurance industry.[12] The risks of litigation have pushed insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits."[13]

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[12] Judy Greenwald, Business Insurance, *Litigation Leads to Hardening Fiduciary Liability Market* (Apr. 30, 2021), https://bit.ly/3ytoRBX; Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg L. (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance).

[13] Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 4, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW.

These consequences harm participants. If employers need to absorb the litigation risks and costs of higher insurance premiums, then many employers will inevitably offer less generous benefits. The shadow of litigation is already encouraging plan fiduciaries to limit the plan's service offerings to the barebones services required to run a plan at the lowest cost possible to minimize the litigation risk. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, … options [that] could potentially enhance expected returns in well-managed and monitored portfolios." George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Ctr. for Retirement Research at Boston College 5 (May 2018), https://bit.ly/3fUxDR1. Now, however, fiduciaries overwhelmingly choose purportedly "'safe' funds over those that could add greater value." *Id.*

For smaller employers, the ramifications are even starker: if they "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees."[14] That result would undermine a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans to employees.

[14] Aronowitz, *supra*, note 12 at 4.

ERISA does not establish a burden-shifting framework at all, much less one that is impossible to meet and that dramatically increases liability exposure for fiduciaries. The Court should decline the invitation to go down this road and affirm the district court's more sensible path.

CONCLUSION

This Court should affirm the judgment below.

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Respectfully submitted,

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This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,996 words, excluding the parts exempted by Rule 32(f).

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I, Jaime A. Santos, hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 18, 2024.

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