EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

RANDALL W. RUEBEL, MARIO HUDSON, and TAMMY L. JOHNSON, individually, and as representatives of a Class of Participants and Beneficiaries of the Tyson Foods, Inc. Retirement Savings Plan, Plaintiffs, v. TYSON FOODS, INC. and BOARD OF DIRECTORS OF TYSON FOODS, INC., Defendants.	Case No. 5:23-cv-05216-TLB

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.[1] Given the importance of the laws governing fiduciary conduct to its members, many of which maintain or provide services to retirement plans, the Chamber regularly participates as amicus curiae in ERISA cases at all levels of the federal-court system, including those addressing the pleading standard for fiduciary-breach claims. The Chamber submits this brief to provide context on retirement-plan management and how this case is situated in the broader litigation landscape challenging ERISA fiduciaries' plan-management decisions.

INTRODUCTION

This case is just one of many in a wave of ERISA class-action complaints designed to extract costly settlements by challenging the management of employer-sponsored retirement plans—specifically, the payment of allegedly excessive recordkeeping fees. This explosion in litigation "is not a warning that retirees' savings are in jeopardy."[2] To the contrary, "in nearly every case, the asset size of many of these plans being sued has increased—often by billions of dollars."[3] Nevertheless, many of these suits cherry-pick particular data points, disregard bedrock principles of plan management, and myopically focus on a plan's fees while ignoring the varying

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than Amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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

[3] *Excessive Fee Litigation* 3.

levels of quality and scope of plan services available in the marketplace.

These complaints typically follow a familiar playbook, often loaded with legal conclusions but few factual allegations specific to the plan at issue. Using the benefit of hindsight, these lawsuits challenge plan fiduciaries' decisions about the arrangements fiduciaries negotiated with a service provider, selecting an arbitrary figure as a purportedly "reasonable" fee that plan fiduciaries failed to achieve. The complaints typically point to alternative service arrangements among dozens of service providers with a wide variety of service offerings and price points, and allege that plan fiduciaries *must have* had a flawed decisionmaking process because they did not choose one of those alternatives. They then lean heavily on ERISA's perceived complexity to open the door to discovery, even where their conclusory allegations are belied by publicly available data and inconsistent with information about the plan that participants receive under ERISA and Department of Labor (DOL) regulations. No plan, regardless of size or type, is immune from this type of challenge. It is *always* possible for plaintiffs to use the benefit of hindsight to identify, among the almost innumerable options available in the marketplace, a less-expensive service provider than the ones plan fiduciaries chose. That is not sufficient under the pleading standard established in *Hughes v. Northwestern University*, 595 U.S. 170, 172-173 (2022), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

If these conclusory and speculative complaints are sustained, plan participants will be the ones who suffer. Fiduciaries will be pressured to limit service offerings to a narrow range of barebones options at the expense of providing a diversity of choices, as ERISA expressly encourages and most participants want. These lawsuits also operate on a cost-above-all mantra—but even in its guidance to plan participants, DOL expressly acknowledges that fees should be only

"one of several factors" in decisionmaking.[4] Moreover, "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). Yet, given many plaintiffs' single-minded emphasis on cost, these lawsuits pressure fiduciaries to forgo packages that include popular and much-needed services, including financial-wellness education and enhanced customer-service options.

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" that ERISA requires. *Hughes*, 595 U.S. at 173; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). As the Supreme Court recently made explicit, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 595 U.S. at 177. When a plaintiff does not present direct allegations of wrongdoing and relies on circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is required. *See Twombly*, 550 U.S. at 554.

ARGUMENT

I. There is no ERISA exception to Rule 8(a)'s pleading standard.

The last 15 years have seen a surge of ERISA class-action litigation challenging 401(k) and 403(b) plan fees and performance.[5] Four dozen new lawsuits were filed in 2023, which, although lower than the near-record number of complaints filed in 2022, "still reflects the higher filing frequency of the last eight years in which 463 excess fee cases have been filed."[6] Indeed,

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

[5] *See* George Mellman & Geoffrey Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Ctr. for Ret. Res. Boston Coll. (May 2018), https://bit.ly/3fUxDR1 (documenting rise in 401(k) complaints from 2010 to 2017); *Excessive Litigation Over Excessive Plan Fees in 2023*, Chubb, https://bit.ly/3qN4rnL (documenting rise in 401(k) and 403(b) litigation).

[6] Daniel Aronowitz, *Summary of 2023 Excess Fee and Performance Litigation*, Encore Fiduciary (Jan. 8, 2024), https://bit.ly/42IIrcW ("*Summary of 2023 Litigation*").

approximately "33%[] of large plans in America have been sued for alleged excessive fees in the last eight years."[7] These lawsuits have been filed against employers in every industry. These cases generally do not develop organically based on plan-specific details, but rather are advanced as prepackaged, one-size-fits-all challenges. As a result, they typically rely on generalized allegations that do not reflect the context of the actual plan whose fiduciaries are being sued.

In addressing the standard for pleading a fiduciary-breach claim under ERISA, the Supreme Court has stressed that ERISA suits are not subject to a lower pleading standard: To survive a motion to dismiss, plaintiffs must satisfy the Rule 8 pleading standard articulated in *Twombly* and *Iqbal*. *Hughes*, 595 U.S. at 177; *see also Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022) (directing courts to apply "well-worn trail" from *Twombly* and *Iqbal* when evaluating analogous ERISA class actions). As the Eighth Circuit explained, when attempting to plead a fiduciary-breach claim by comparing the decisions made by one plan's fiduciaries to the decisions made by another plan's, then at the very least the "key to nudging an inference of imprudence from possible to plausible is providing 'a sound basis for comparison—a meaningful benchmark'—not just alleging that 'costs are too high, or returns are too low.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (citation omitted). Given the variety among ERISA plans, the wide discretion fiduciaries have when making decisions on behalf of tens of thousands of employees with different investment needs and risk tolerances, and the risk that any ERISA suit can be made to appear superficially complicated, applying Rule 8(a) to ERISA claims requires a close evaluation of "the circumstances … prevailing at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—particularly because "the

[7] *Id.*

circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177. If anything, the discretion and flexibility ERISA affords should make pleading through hindsight-based circumstantial allegations *more* difficult, not less.

The allegations in many of these cases fail this standard twice over. First, the complaints' circumstantial allegations are often equally (if not far more) consistent with lawful behavior, and therefore cannot "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Second, the allegations frequently ignore the discretion fiduciaries have in making decisions based on their experience, expertise, and the context of their particular plan.

A. These lawsuits often attempt to manufacture factual disputes that do not survive minimal scrutiny.

Plaintiffs rely entirely on the allegation that plan fiduciaries should have negotiated a lower recordkeeping fee no matter what. To try to make out a claim solely on this basis, Plaintiffs follow the improper apples-to-oranges approach commonly used in these suits—comparing plans' recordkeeping fees, with no meaningful allegations regarding those recordkeepers' services, and without even applying Plaintiffs' own definition of "RKA" fees consistently across the Tyson and comparator plans. *See* Mem. in Supp. 2, 9-10. This approach cannot nudge Plaintiffs' claims over the line from possible to plausible, as shown by the courts that have dismissed a series of highly similar recordkeeping challenges in the past year. *See Singh v. Deloitte LLP*, 2023 WL 4350650, at *3 (S.D.N.Y. July 5, 2023) (explaining there is no basis to infer imprudence "without information as to the type and quality of the services provided"), *appeal docketed*, No. 23-1108 (2d Cir. Aug. 3, 2023); *Krutchen v. Ricoh USA, Inc.*, 2023 WL 3026705, at *2 (E.D. Pa. Apr. 20, 2023) (recognizing fiduciaries may "reasonably choos[e] to pay more for higher quality services"), *appeal docketed*, No. 23-1928 (3d Cir. May 23, 2023); *Perkins v. United Surgical Partners Int'l*,

2023 WL 2899539, at *6 (N.D. Tex. Mar. 10, 2023) (dismissing excessive-fee claim where plaintiffs failed to "plead that the administrative fees [were] excessive in relation to the *specific services* the recordkeeper provided to the *specific plan* at issue"), *appeal docketed*, No. 23-10375 (5th Cir. Apr. 11, 2023); *Gonzalez v. Northwell Health*, 2022 WL 4639673, at *10 (E.D.N.Y. Sept. 30, 2022) ("A plaintiff 'must plead administrative fees that are excessive in relation to the *specific* services the recordkeeper provided to the *specific* plan at issue.'").

Plaintiffs baldly assert that recordkeeping "services are essentially fungible" and "recordkeepers primarily differentiate themselves based on price." Am. Compl. ¶¶ 57-58. Plaintiffs offer no basis for this conclusory allegation, which defies economic reality. Plaintiffs assert "the NEPC Reports stand for the proposition that the standard of care for prudent fiduciaries is to recognize that fee comparisons for Bundled RKA are meaningful without any investigation related to the serviced [sic] received by each specific plan." Am. Compl. ¶ 47. But the same report Plaintiffs cite (at ¶ 45) says exactly the opposite: "All plans are not created equal. Higher (or lower) record-keeping fees are a function of plan size and complexity, and the package of services the plan sponsor has contracted for." App.0260. Recordkeeping services are highly customizable depending on, for example, each plan's needs, its participant population, the plan administrator's capabilities and resources, and the sponsor's human-resources department. Myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services. [8] According to DOL, services "may be provided through a variety of arrangements"; neither recordkeepers nor recordkeeping services are interchangeable widgets, and "generally the more services provided,

[8] *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.

the higher the fees." *401(k) Plan Fees* 3. Thus, "[w]ithin the 'careful, context-sensitive scrutiny' the Supreme Court mandates in evaluating ERISA claims, vaguely alleging recordkeeping services are fungible does not plausibly allege a breach." *Krutchen*, 2023 WL 3026705, at *2 ("If 'bare allegations' about differences in fees and corresponding services were sufficient, any plaintiff could access discovery by so pleading."); *Probst v. Eli Lilly & Co.*, 2023 WL 1782611, at *10 (S.D. Ind. Feb. 3, 2023) (rejecting allegations that "all mega plans receive nearly identical recordkeeping services and that any difference in services was immaterial to the price of those services"). Given the wide range of services, providers, and fee arrangements, it is implausible to suggest that everything in excess of a single fee level (without any basis) is imprudent.

Plaintiffs' approach underscores a broader deficiency in ERISA excessive fee suits—namely, plaintiffs' manipulation of hindsight analysis to make *any* fiduciary decision appear imprudent. To execute this strategy, many plaintiffs typically create a chart (or many) purportedly to compare some of the investment options in the plan under attack to other available options that allegedly out-performed or had lower fees than the plan's options during a cherry-picked time period. *See, e.g.*, Am. Compl. ¶¶ 87-90. Plaintiffs frequently compare plans that are dissimilar to the plan at issue. Indeed, Plaintiffs here seek to compare the Tyson Plan—which, as of 2022, had 67,276 participants and approximately $3.2 billion in assets, Am. Compl. ¶¶ 40-41—to plans with either significantly fewer or more plan participants—in this case, for instance, a plan with only 46,995 participants and a plan with 98,051 participants. Am. Compl. ¶ 89. Plaintiffs tellingly omit any reference to these allegedly comparable plans' assets or the services that participants in these plans enjoy. *Compare* Am. Compl. ¶ 89, *with* Compl. ¶ 90; *see also* Mem. in Supp. 2, 5-6, 8-10, 14-15. Plaintiffs then use these charts to try to barrel past dismissal, asking courts to infer fiduciaries must have been asleep at the wheel and requesting discovery to prove it. Inferring

imprudence from this tactic ignores the realities of plan management and ERISA's statutory structure—important context the Supreme Court has instructed courts to consider. *See Hughes*, 595 U.S. at 172-174; *Fifth Third*, 573 U.S. at 425.

To start, plaintiffs can easily cherry-pick historical data to make a fiduciary's choices look suboptimal given the near-infinite combination of comparator options and time periods. Take the federal Thrift Savings Plan ("TSP"), often held out as the "gold standard" for retirement plans and regularly used by plaintiffs as a comparator to argue that an investment underperformed or had excessive fees.[9] Even the TSP could be made to look like a mismanaged plan by cherry-picking comparators with fees that are significantly lower than the TSP's[10]:

Fund	**Expense Ratio**
TSP Fixed Income Index Investment Fund (F Fund) https://www.tsp.gov/funds-individual/f-fund/?tab=fees	0.048%
iShares Core US Aggregate Bond ETF https://www.morningstar.com/etfs/arcx/agg/price	0.030%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares) https://www.morningstar.com/funds/xnas/vbmpx/price	0.030%
TSP Common Stock Index Investment Fund (C Fund) https://www.tsp.gov/funds-individual/c-fund/?tab=fees	0.048%
Fidelity 500 Index Fund https://www.morningstar.com/funds/xnas/fxaix/price	0.015%
iShares S&P 500 Index Fund (Class K) https://www.morningstar.com/funds/xnas/wfspx/price	0.030%
TSP Small Cap Stock Index Investment Fund (S Fund) https://www.tsp.gov/funds-individual/s-fund/?tab=fees	0.048%
Fidelity Extended Market Index Fund https://www.morningstar.com/funds/xnas/fsmax/price	0.035%

[9] *See, e.g.*, *Brotherston v. Putnam Invs.*, Appellants' Br., 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing the TSP as "a quintessential example of a prudently-designed plan"); *see also* Thrift Savings Plan, Tex. State Sec. Bd., https://bit.ly/3wE4MXA ("The TSP is considered the gold standard of 401(k)s because it charges extremely low fees and offers mutual funds that invest in a cross-section of the stock and bond markets."). The TSP is a particularly inapt exemplar given that the U.S. government subsidizes administrative and investment-management expenses, thereby inflating the plan's net-of-fees investment performance.

[10] The dataset for this table is based on the most recently available figures as of April 12, 2024.

As this example shows, when plaintiffs' attorneys zero in on a single metric for comparison—in the above example, fees—they will *always* be able to find a supposedly "better" fund among the thousands on the market. With the benefit of hindsight, one can always identify a better-performing fund during a cherry-picked time period, just as one could always identify a worse-performing fund. Thus, "allegations 'that costs are too high, or returns are too low' fail to support an inference of misconduct." *Riley v. Olin Corp.*, 2022 WL 2208953, at *7 (E.D. Mo. June 21, 2022) (citation omitted).

B. Fiduciaries have discretion to make a range of reasonable choices.

The allegations in these complaints also often fail to grasp a fundamental tenet of ERISA—namely, the "range of reasonable judgements a fiduciary may make" and the "difficult tradeoffs" inherent in fiduciary decisionmaking. *Hughes*, 595 U.S. at 177. That fiduciaries did not select what turned out to be the lowest-cost service provider does not suggest that their process was imprudent. There will always be a plan with lower expenses and a plan—typically many plans—with higher ones, just as there will always be a fund that performs better and many funds that perform worse. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base at the time.[11]

The complaints themselves reflect a range of assessments, as one complaint's supposedly

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

imprudent choice is often another complaint's prudent exemplar. For example, Henry Ford Health System was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health System*, No. 2:21-cv-11023 (E.D. Mich.) (filed May 5, 2021), ECF No. 1. But another complaint holds up *that exact plan* as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn.) (filed Aug. 11, 2021), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[12] while others complain that including *only one option* in each investment style is imprudent.[13] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[14] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[15] Some plaintiffs allege that plans offered imprudently risky investments,[16] while others allege that fiduciaries were *imprudently cautious* in their investment

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

[13] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

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

[15] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

[16] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v.Morgan Stanley Inv. Mgmt. Inc.,* 712 F.3d 705, 711 (2d Cir. 2013).

approach.[17] In some instances, fiduciaries have simultaneously defended against "diametrically opposed" liability theories, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[18] This dynamic has made it incredibly difficult for fiduciaries to do their jobs—and it has made it virtually impossible for fiduciaries to avoid being sued, no matter how careful their process and how reasonable their decisions. Plan sponsors and fiduciaries today truly are, as the Supreme Court has observed, "between a rock and a hard place." *Fifth Third*, 573 U.S. at 424.

Accordingly, it is critical for courts to consider context—including DOL's instruction that fees are only one of *several factors* that should be considered.[19] These other factors also include publicly available information demonstrating that a complaint's supposed comparators are inapposite, industry data showing that services (and their pricing) vary widely, performance ebbs and flows that are common characteristics of investment management, and the wide discretion granted to fiduciaries by Congress. These considerations all bear on whether fiduciary-breach claims are plausible. Nevertheless, some courts have declined to consider context when evaluating plausibility, suggesting that doing so would require the court to resolve a purported dispute of fact. That approach cannot be squared with the Supreme Court's direction to "give due regard to the range of reasonable judgments a fiduciary may make," recognizing that a bare allegation that one fiduciary made a decision different from another fiduciary is insufficient to survive a motion to dismiss. *Hughes*, 595 U.S. at 177.

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[17] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

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

[19] *401(k) Plan Fees* 1.

II. These lawsuits will harm participants and beneficiaries.

This surge of litigation has significant negative consequences for plan participants and beneficiaries. First, these lawsuits impose pressure on plan fiduciaries to manage plans based solely on cost, undermining one of the most important aspects of ERISA: the value of innovation, diversification, and employee choice. Plaintiffs often take a cost-above-all approach, filing strike suits against any fiduciaries that consider factors other than cost—notwithstanding ERISA's directive that fiduciaries do precisely that. *See White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). A plan sponsor may, for example, feel pushed toward the lowest-cost option, even though DOL has acknowledged "that cheaper is not necessarily better." *See 401(k) Plan Fees* 1. In a purported effort to safeguard retirement funds, plaintiffs actually pressure fiduciaries *away from* exercising their "responsibility to weigh … competing interests and to decide on a (prudent) financial strategy." *Brown v. Daikin Am., Inc.*, 2021 WL 1758898, at *7 (S.D.N.Y. May 4, 2021).

Second, the litigation surge has upended the insurance industry for retirement plans, pushing fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance). Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage").

If employers need to absorb the cost of higher insurance premiums and higher deductibles,

many employers will inevitably have to offer less generous plans—reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would elect to do so, and reducing the services available to employees. And for small plans, if the sponsor "cannot purchase adequate fiduciary liability insurance to protect their plan fiduciaries, the next step is to stop offering retirement plans to their employees." *Excessive Fee Litigation* 4. This outcome is wholly at odds with a primary purpose of ERISA—to *encourage* employers to voluntarily offer retirement plans and a diverse set of options within those plans. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

CONCLUSION

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

Dated: April 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Arkansas by using the court's CM/ECF system on April 12, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

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