No. 24-3014

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL D. JOHNSON, *et al.*,

Plaintiffs-Appellants,

v.

PARKER-HANNIFIN CORPORATION, *et al.*

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 21-cv-256, The Honorable Bridget Meehan Brennan

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, ERISA INDUSTRY COMMITTEE, AMERICAN BENEFITS COUNCIL, AND COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The Aerospace Industries Association of America, Inc. is a not-for-profit trade association. It has no publicly owned parent corporation, subsidiary, or affiliate, nor has it issued shares or debt securities to the public. No publicly held company owns 10% or more of any stock in AIA.

The National Association of Manufacturers is a 501(c)(6) non-profit trade association located in the District of Columbia. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

The ERISA Industry Committee is a non-profit organization that does not have a parent corporation and does not issue public stock.

The American Benefits Council is a non-profit corporation, it does not have a parent corporation, no publicly held corporation owns ten percent or more of its stock, and it is not a subsidiary or affiliate of a publicly held corporation.

The Committee on Investment of Employee Benefit Assets Inc. is a non-profit organization that does not have a parent corporation and does not issue public stock.

Dated: December 23, 2024

s/ Jaime A. Santos
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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION 2

ARGUMENT 4

I. Courts should not infer imprudence from performance-based comparisons without, *at minimum*, ensuring plaintiffs are plausibly alleging an apples-to-apples comparison..4

A. The "meaningful benchmark" requirement properly accounts for the wide range of reasonable judgments fiduciaries may make in choosing one investment strategy over another. 5

B. Reductive comparisons to industry averages should have no place in a plausibility analysis..7

II. The majority's approach will confuse lower courts and litigants, encourage meritless ERISA lawsuits, and undermine ERISA's focus on flexibility and fiduciary discretion. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................2

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)....................7, 11

Brown v. Am. Life Holdings, Inc.,
190 F.3d 856 (8th Cir. 1999)....................10

In re Citigroup ERISA Litig.,
104 F. Supp. 3d 599 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016)....................10

Evans v. Akers,
534 F.3d 65 (1st Cir. 2008)....................11

Forman v. TriHealth, Inc.,
40 F.4th 443 (6th Cir. 2022)....................2, 9

Hughes v. Nw. Univ.,
595 U.S. 170 (2022)....................7, 8

Kendall v. Pharm. Prod. Dev., LLC,
2021 WL 1231415 (E.D.N.C. Mar. 31, 2021)....................8

McCaffree Fin. Corp. v. ADP, Inc.,
2023 WL 2728787 (D.N.J. Mar. 31, 2023)....................8

In re RadioShack Corp. ERISA Litig.,
547 F. Supp. 2d 606 (N.D. Tex. 2008)....................10

Rodriguez v. Hy-Vee, Inc.,
2022 WL 16648825 (S.D. Iowa Oct. 21, 2022)....................8

Smith v. CommonSpirit Health,
37 F.4th 1160 (6th Cir. 2022)....................2, 3, 5, 7, 8

PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705 (2d Cir. 2013) 10, 11, 12

Thompson v. Avondale Indus., Inc., 2000 WL 310382 (E.D. La. Mar. 24, 2000) 10

Statutes

29 U.S.C. § 1132(e)(2)...9

Other Authorities

Economic Research Working Paper Series, *Retail Financial Innovation and Stock Market Dynamics: The Case of Target Date Funds* (Oct. 2020), https://bit.ly/3AlW47T 11

George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?* Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDr1 9

Robert Steyer, *Justices Show Supreme Reluctance When They Get ERISA Assignments*, Pensions&Investments (Oct. 28, 2019), https://bit.ly/4gRGFM7...3

U.S. Dep't of Labor, *Target Date Retirement Funds—Tips for ERISA Plan Fiduciaries* (Feb. 2013), https://bit.ly/3imKQqY 5, 6, 8

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations.

The Aerospace Industries Association of America, Inc. is a not-for-profit trade association representing the interests of more than 300 of the nation's major aerospace and defense manufacturers and suppliers.

The National Association of Manufacturers is the voice of the manufacturing community and the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and all 50 States.

The ERISA Industry Committee 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.

The American Benefits Council is a national non-profit organization. The Council's more than 430 members sponsor or provide services to retirement plans

[1] No party opposes the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

and health and welfare plans covering virtually all Americans who participate in employer-sponsored programs.

The Committee on Investment of Employee Benefit Assets Inc. is a group of 120 Chief Investment Officer Fiduciaries who are responsible for overseeing a substantial portion of the assets held in the private-sector retirement system.

Many of *Amici*'s members maintain, administer, or provide services to ERISA-governed employee-benefit plans. *Amici* have a strong interest in ERISA litigation and file this brief to offer context for this Court's consideration of Defendants' petition for rehearing en banc.

INTRODUCTION

The well-established plausibility standard requires plaintiffs to plead sufficient *facts* to allow the court to infer "that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As this Court has recognized, this rigorous analysis is particularly important in ERISA cases, given the "range of reasonable judgments a fiduciary may make based on her experience and expertise." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1165 (6th Cir. 2022) (quoting *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022)); *accord Forman v. TriHealth, Inc.*, 40 F.4th 443, 448 (6th Cir. 2022).

The majority did not follow this "well-worn trail" here. *CommonSpirit*, 37 F.4th at 1165. Although a "context-sensitive scrutiny" of ERISA allegations is

paramount, *CommonSpirit*, 37 F.4th at 1164-1165 (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)), the majority's approach ignores the relevant context: different investments have different goals and use different asset allocations to reach those goals. Accordingly, differences in performance do not mean that one investment is superior or inferior, much less that a fiduciary who chose one investment over another was asleep at the wheel. That is why, when an ERISA plaintiff attempts to plead a fiduciary breach by way of performance or comparisons, courts have insisted that the comparison be apples-to-apples—including this Court, until the majority's decision here.

The majority's decision throws this Court's ERISA pleading precedents into disarray. It will confuse lower courts and litigants and encourage plaintiffs to forum-shop meritless cases to courts in this Circuit. And while some may look forward to an endless supply of ERISA cases on their docket, *contra* Robert Steyer, *Justices Show Supreme Reluctance When They Get ERISA Assignments*, Pensions&Investments (Oct. 28, 2019), https://bit.ly/4gRGFM7, pleading standards that encourage the filing of weak ERISA complaints are inconsistent with the discretion ERISA affords fiduciaries, and bad for plan sponsors and participants. This Court should grant rehearing en banc to bring this Court's caselaw back in line with Supreme Court precedent and resolve the conflicts created by the majority's decision.

ARGUMENT

I. Courts should not infer imprudence from performance-based comparisons without, *at minimum*, ensuring plaintiffs are plausibly alleging an apples-to-apples comparison.

Fiduciaries have broad discretion to choose among thousands of options in a thriving investment-management marketplace. With the benefit of hindsight, it is *always* possible for plaintiffs to identify a cheaper or better-performing alternative, allowing plaintiffs to paint *any* decision as an imprudent one. Thus where, as here, ERISA plaintiffs attempt to plead a fiduciary breach not by direct allegations of the fiduciaries' decisionmaking process—which is what actually matters under the statute, as Judge Murphy's dissent explains (at 29)—but rather by asking a court to *infer* an imprudent process based on performance or fee comparisons, the "meaningful benchmark" requirement serves a critical gatekeeping role in the pleading analysis. To be sure, there is reason to be highly skeptical of drawing any inference of imprudence from the mere fact that a fund had worse investment returns or lower fees than another. But if courts are going to entertain this type of inference-by-comparison approach, then *at minimum* they must ensure that the inference is based on an apples-to-apples comparison.

A. The "meaningful benchmark" requirement properly accounts for the wide range of reasonable judgments fiduciaries may make in choosing one investment strategy over another.

The "meaningful benchmark" requirement is particularly important in the context of underperformance claims. Investment performance among different products can vary at different times and in different market conditions. Often, performance differentials are wholly expected or even intended because different products are geared toward customers of different ages, in different financial situations, and with different risk tolerances.

Target date funds ("TDFs")—the investments at issue here—provide a perfect example. TDF managers use different investment approaches to design a fund's asset allocation to change as a participant nears retirement—referred to as the fund's "glide path." *See* U.S. Dep't of Labor, *Target Date Retirement Funds–Tips for ERISA Plan Fiduciaries* 1 (Feb. 2013), https://bit.ly/3imKQqY ("DOL, *TDF Tips*"). While TDFs all fall within the same "general framework," there are "considerable differences among TDFs offered by different providers, even among TDFs with the same target date." *Id.*

Among numerous other differences, the underlying asset classes can involve either passive or active management. When the underlying funds are actively managed, a "manager actively makes investment decisions" for those funds "in an effort to maximize return." *CommonSpirit*, 37 F.4th at 1163. Actively managed

funds have the potential to outperform the market, but they come with the concomitant risk of underperformance and typically a higher price point. *See id.* By contrast, passively managed funds consist of underlying funds with "a fixed portfolio structured to match the overall market or a preselected part of it." *Id.* Because passively managed funds are designed to track markets rather than outperform them, investment-management fees are lower, as is the risk of underperformance. *See id.*

Given these differences and others, it is entirely unsurprising to see performance differences between different TDF suites. The funds perform differently because they *are* different and are *intended* to perform differently in different markets. Moreover, fiduciaries selecting a TDF suite are required to consider much more than performance—they also consider fees, glide path, investment strategy, risks, underlying asset allocations, fund manager reputation, and more. *See* DOL, *TDF Tips* 2-3. And they must account for plan-specific information, such as "how well the TDF's characteristics align with eligible employees' ages and likely retirement dates." *Id.* at 2.

The "meaningful benchmark" analysis ensures that courts consider this context in determining whether the circumstantial facts alleged could just as easily suggest entirely lawful fiduciary behavior—*e.g.*, that weighing all the relevant factors led fiduciaries to a different fund than a plaintiff might have chosen—or whether the alleged facts provide the "something more" to plausibly suggest

unlawful behavior. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And again, the Supreme Court has repeatedly admonished that courts *must* take into account the relevant "context" when evaluating the plausibility of ERISA claims, because "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177.

For that reason, the "meaningful benchmark" analysis *must* occur at the pleading stage, rather than years (and millions of dollars) later at trial, as the majority suggests (at 12). Indeed, this Court has already recognized as much: "disappointing performance by itself does not conclusively point towards deficient decision-making, especially when accounting for 'competing explanations' and other 'common sense' aspects of long-term investments." *Smith*, 37 F.4th at 1167 (citation omitted). "In context, such allegations standing alone do not move the claim from possible and conceivable to plausible and cognizable." *Id.* The majority all but ignored this directive.

B. Reductive comparisons to industry averages should have no place in a plausibility analysis.

The majority also leaned heavily on a performance comparison involving an S&P index, which is not even an actual fund—it is a composite representing a broad universe of TDFs with different glidepaths, investment strategies, and asset-

allocation decisions. Dissent 36. It therefore cannot possibly provide an apples-to-apples comparison that would satisfy the "meaningful benchmark" requirement.

Courts have overwhelmingly recognized that performance comparisons to industry averages present precisely the same defects as apples-to-oranges comparisons between funds with different investment styles, goals, and strategies for reaching those goals. Accordingly, they have rejected comparisons to S&P indices and similar performance or fee averages, which fail to provide a "sufficiently similar" comparison to the challenged product or service. *Kendall v. Pharm. Prod. Dev., LLC*, 2021 WL 1231415, at *7 (E.D.N.C. Mar. 31, 2021); *see also Hall v. Capital One Fin. Corp.*, 2023 WL 2333304, at *7 (E.D. Va. Mar. 1, 2023) (collecting cases rejecting "the S&P Indices" as "meaningful benchmarks" for a TDF suite); *McCaffree Fin. Corp. v. ADP, Inc.*, 2023 WL 2728787, at *15 (D.N.J. Mar. 31, 2023); *Rodriguez v. Hy-Vee, Inc.*, 2022 WL 16648825, at *8 (S.D. Iowa Oct. 21, 2022).

By definition, half of TDFs will fall below an industry average at any given time, but TDFs are specifically designed to "offer a long-term investment strategy." DOL, *TDF Tips* 1; *see also Smith*, 37 F.4th at 1166 ("a five-year snapshot" says little about a fund "that is supposed to grow for fifty years"). Accordingly, inferring an imprudent process from the fact that a fund's performance was lower than a general

industry average for a snapshot in time is precisely the type of acontextual second-guessing the Supreme Court has eschewed. *Hughes*, 595 U.S. at 177.

II. The majority's approach will confuse lower courts and litigants, encourage meritless ERISA lawsuits, and undermine ERISA's focus on flexibility and fiduciary discretion.

Weak pleading standards encourage meritless lawsuits, and *inconsistent* pleading standards are equally bad. Reading this Court's decisions in *CommonSpirit, Forman*, and this case will leave one hopelessly confused about what is—and is not—sufficient to state a plausible fiduciary-breach claim premised on purportedly excessive fees or underperformance.

That confusion breeds unpredictability, and unpredictability encourages weak cases that cherry-pick aspects of favorable decisions while ignoring the unfavorable ones, hoping that the district judge assigned to the case is more aligned with the majority here than the panels in *CommonSpirit* and *Forman*. That is not how litigation is supposed to work.

Worse yet, given ERISA's broad venue provision, 29 U.S.C. § 1132(e)(2), intra-circuit and inter-circuit splits create substantial incentives for plaintiffs to forum-shop. And given the explosion of ERISA lawsuits in recent years,[2] the ability

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[2] George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDr1

to forum-shop will affect not just *where* cases are filed, but also *which* cases are brought to begin with.

That dynamic undermines the principles of discretion and flexibility that ERISA affords to fiduciaries. As history shows, plan fiduciaries are sued seemingly no matter *what* decision they make. They are sued for offering multiple investments in a particular investment style, and for offering *only one* investment in a given investment style.[3] They are sued for failing to divest from stocks with declining share prices or high risk profiles,[4] and for failing to *hold onto* such stock because high risk can produce high reward.[5] They are sued for making available investment options that plaintiffs' lawyers deem too risky,[6] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[7] They have even

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[3] *Compare* First Am. Compl. ¶¶ 68-71, in *Davis v. Salesforce.com, Inc.*, No. 3:20-cv-01753-MMC (N.D. Cal. Oct. 23, 2020), ECF No. 38, *with* Am. Compl., *In re GE ERISA Litig.*, No. 1:17-cv-12123-IT (D. Mass. Jan. 12, 2018), ECF No. 35.

[4] *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (plaintiffs alleged defendants failed "to divest the plans of all RadioShack stock … despite the fact that they knew the stock price was inflated").

[5] *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged fiduciaries "prematurely" divested ESOP stock).

[6] *See, 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.* ("*PBGC*"), 712 F.3d 705, 711 (2d Cir. 2013).

[7] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (assuming "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl.,

simultaneously defended against "diametrically opposed" liability theories, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't." *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

The pressure created by these suits undermines ERISA's central focus on fiduciary discretion. The more that specious complaints survive dismissal, the more a fiduciary might feel she has no choice but to shy away from independent thinking and tailored solutions based on the needs of her plan. The result will be a loss of new, highly beneficial options for plan participants. Indeed, TDFs themselves were once an innovative approach to retirement investing, and now they dominate the market. *See* Jonathan A. Parker et al., National Bureau of Economic Research Working Paper Series, *Retail Financial Innovation and Stock Market Dynamics: The Case of Target Date Funds* 1 (Oct. 2020), https://bit.ly/3AlW47T.

Finally, these second-guessing lawsuits impose enormous costs on plan sponsors. As the Supreme Court recognized in *Twombly*, enforcing the plausibility pleading rule is necessary to guard against speculative suits that "push cost-conscious defendants to settle even anemic cases." 550 U.S. at 558-59. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant. *PBGC*, 712 F.3d at 719. While

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Barchock v. CVS Health Corp., No. 1:16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (claiming imprudence from investment of the plan's stable value fund in money market funds and cash management accounts).

discovery is sometimes appropriate—where claims are plausibly alleged without hindsight bias or speculation—the price of discovery "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *Id.* at 719 (citation omitted).

Neither ERISA nor the pleading standards articulated by the Supreme Court (and previously adopted by this Court) support such a result. This Court's approach to Rule 12(b)(6) motions in ERISA cases must be careful to guard against it.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted,

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December 23, 2024

RULE 32(A) CERTIFICATE OF COMPLIANCE

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 2,591 words, excluding the parts exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2024, a copy of the foregoing was filed electronically through the Court's CM/ECF system, which will send a notification to all counsel of record.

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