19-1401

In the
Supreme Court of the United States

APRIL HUGHES, KATHERINE D. LANCASTER, AND JASMINE WALKER

Petitioners,

v.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

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

BRIEF OF SAMUEL HALPERN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

GREGORY Y. PORTER
MARK G. BOYKO
BAILEY & GLASSER LLP
1055 Thomas Jefferson St., N.W.
Suite 540
Washington, D.C. 20007
202-463-2101
gporter@baileyglasser.com
mboyko@baileyglasser.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. Interest of *Amicus Curiae*[1]

Through Prudent Expert, LLC, established in 2015, *Amicus* Samuel Halpern serves in two capacities: as an advisor to ERISA investment fiduciaries and as an expert witness in lawsuits about fiduciary practices and due diligence regarding retirement plan investments. Mr. Halpern has more than 45 years of experience as a private sector investment professional and executive and (early in his career) a practicing attorney concentrating on retirement plan investments. His legal experience includes working in the Office of the Solicitor, U.S. Department of Labor, in the late 1970s and early 1980s, litigating actions to enforce ERISA's fiduciary duty provisions. His investment career began in the mid-1980s with the broker dealer, investment bank and asset manager Bear, Stearns & Co., where he helped establish and manage a subsidiary that acted as an investment consultant and fiduciary to a wide range of ERISA and other investors, including many participant-directed defined contribution plans. He and a partner subsequently purchased the firm, renamed it "Independent Fiduciary Services, Inc.," built and managed it and eventually sold it to a public company.

Most of his professional experience concerns investors and investments regulated by ERISA, including defined contribution plans. The primary focus of his career has been providing investment counseling services to "governing fiduciaries" who

[1] No counsel for a party authored this brief in whole or in part and no person other than amicus and his counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk.

oversee ERISA plan investments (such as investment committees, boards of trustees and other decision-makers comparable to the Northwestern University Retirement Investment Committee). Depending on the precise role and duties of his firm, such services took any one of several forms including acting as (i) an institutional investment consultant and "investment advice fiduciary" to ERISA plans under 29 U.S.C. § 1002(21)(A); (ii) an "independent fiduciary" for ERISA plans; (iii) an investment manager under ERISA, 29 U.S.C. § 1002(38); and/or (iv) a named fiduciary under 29 U.S.C. § 1102(a).

Amicus has extensive experience with many of the central investment considerations and circumstances involved in this matter, specifically, selecting and monitoring target date funds and balanced funds for defined contribution plans, evaluating competing investment candidates across the marketplace, identifying and controlling investment and administrative fees and expenses, negotiating with service providers (such as investment firms and recordkeepers) over the costs and other terms of their products and services (including paying directly in "hard dollars" compared to paying indirectly through "soft dollars" or revenue sharing arrangements), and related matters. Over the years, *Amicus* has been personally and substantially involved in evaluating, advising on, or executing the investment practices and processes of investment funds totaling over $1 trillion in asset value.

Throughout his career, *Amicus* has concentrated not only on the substantive arrangements that governing fiduciaries put in place for a plan's investment and administrative programs, but also on the procedures, processes and practices those fiduciaries observe in arriving at those arrangements. Sometimes this distinction is described as the difference between "substantive prudence" (the decision reached, the investment fund or service provider chosen) versus "procedural prudence" (the process the fiduciary employed to reach that decision).[2] *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007) (fiduciaries must employ "appropriate methods to investigate the merits of the investment"). Thus, the experience and perspective of *Amicus* regarding this case—especially his observations about fiduciary procedure and process—are highly relevant to assessing how the Seventh Circuit's decision squares with reasonable standards of care for plan fiduciaries.

Amicus submits this brief because, in his view, the Seventh Circuit's decision overlooks the critical need for governing fiduciaries to observe reasonable practices and ignores petitioners' specific allegations that tend to show that respondents departed from reasonable practices. Moreover, if left intact, the decision below will erode existing fiduciary standards, while reversing it would only recognize and confirm those existing standards.

II. Summary of Argument

Amicus's experience in observing, advising and counseling ERISA fiduciaries and his knowledge and understanding of prevailing practices and standards yield three key observations: (1) plan fiduciaries following reasonable investment practices

[2] Fidelity Plan Sponsor Webstation: "What do I need to do if I'm a fiduciary?", available at: https://sponsor.fidelity.com/pspublic/pca/psw/public/library/manageplans/if_i_am_a_fiduciary.html (last visited, Sept. 7, 2021).

thoroughly, objectively and independently evaluate the range and suitability of each individual investment option they include on a plan's menu, rather than including unsuitable options and imposing on participants the burden of avoiding those while seeking acceptable ones; (2) heightening the pleading standard to require participants to plead facts they cannot yet (before discovery) reasonably know threatens to undermine their rights; and (3) despite Respondents' concern, the practical impact of a series of class action lawsuits against defined contribution plan fiduciaries alleging violations of ERISA's duties of prudence and loyalty regarding plan fees and investments tends to vindicate participant rights and buttress Americans' retirement savings, rather than "unduly discourag[ing] employer[s] from offering ERISA plans." Brief in Opposition to Petition for Writ of Certiorari at 3.

III. Argument

In the experience of *Amicus*, retirement plan fiduciaries generally and routinely evaluate, select, and monitor each fund in a defined contribution plan because they generally want to ensure that every investment fund on the menu is prudent. This is good practice and good policy. Because that is the prevailing standard, reversing the decision below is likely to have little impact on prevailing practice and to impose little new burden on plan fiduciaries. Upholding the decision below, however, will lower fiduciary standards of care and erode the important gains in defined contribution plan management achieved over the past two decades.

Retirement plan participants count on plan fiduciaries to offer prudent investment options. Giving governing fiduciaries a "pass" on carefully evaluating all funds they place on a plan's menu, as long as some funds on the menu are reasonable, would eviscerate basic standards of investment due diligence. Excusing plan fiduciaries from thorough due diligence would harm plan participants and frustrate Congress' goal of preserving retirement plan assets.

The Seventh Circuit's decision also imposes on plan participants two unreasonable burdens: first, a burden of pleading facts about fiduciary process that are largely unknowable before discovery and second, a burden of due diligence in selecting among a menu of investment options that properly lies with plan fiduciaries. *Amicus* is concerned that applying a standard of pleading requiring participants to allege evidence concerning the details of the due diligence processes and practices of governing fiduciaries even before the benefit of extensive discovery would set an impossibly high standard at the pleadings stage. Such a requirement would effectively foreclose most plan participants, who are not plan insiders, from enforcing their legal rights to hold fiduciaries accountable for failing to act solely in their interest and with sufficient care, skill, prudence and diligence.

According to the Investment Company Institute, defined contribution retirement plans held approximately $9 trillion in assets as of 2019 on behalf of more than 100 million active participants, former employees, and retirees.[3] *Amicus* notes that these constituents tend to rely on plan fiduciaries to develop a suitable menu of investment options and over time, carefully to monitor and, as appropriate, replace those options when circumstances warrant. Participants also rely on plan fiduciaries to negotiate or otherwise establish arrangements with service providers such as asset managers and recordkeepers that are effective and reasonably-priced. Plan participants typically lack the investment expertise, technical resources, legal skills, and related capabilities necessary to thoroughly evaluate investment options and arrangements with service providers, particularly for plans as large as the ones involved here. They generally lack access to the meeting minutes, reports and related materials presented to the governing fiduciaries of their respective defined contribution plans and thus, do not know the particulars of whatever process of due diligence the fiduciaries employ (or fail to employ) when performing their duties.

---

[3] "The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2017", at 12 (Aug, 2020) (showing $9.1 trillion in defined contribution assets in 2019), available at: https://www.ici.org/system/files/attachments/pdf/20_ppr_dcplan_profile_401k.pdf (last visited Sept. 7, 2021); Vanguard, "How America Saves", at 7 (2020), available at: https://institutional.vanguard.com/ngiam/assets/pdf/has/how-america-saves-report-2020.pdf (last visited Sept. 7, 2021).

a. Governing fiduciaries following reasonable practice include only suitable investment options on a plan's investment menu and engage in careful comparison shopping and negotiation

Thorough due diligence entails selecting, monitoring and periodically replacing investment funds and excluding unreasonable options.

Governing fiduciaries who adhere to reasonable investment practice carefully select, monitor, and periodically replace (as appropriate) all investment options offered as "Designated Investment Alternatives" in a defined contribution plan. Thus, when following prevailing practice, whichever options participants choose, the entire range of options has been diligently screened by the governing fiduciaries. Take, for instance, a plan with fifteen investment options, including a dozen the governing fiduciaries carefully and objectively selected. Reasonable practice does not countenance the fiduciaries throwing darts to select the last three, simply because some participants might sidestep them.

The Seventh Circuit concluded that because the Defendant fiduciaries offered a wide range of investment options, the allegation that some of the options were inappropriate did not state a claim of an ERISA violation. According to that Court, the wide range of options "eliminat[es] the claim that plan participants were forced to stomach an unappetizing menu." 953 F.2d 980, 991. However, this turns upside down the relative duties of fiduciaries and participants and misstates the issue.

If a restauranter offers a seafood buffet with contaminated oysters and clams, it is of little comfort to those who get food poisoning that by contrast, the lobster and crab were just fine.

In 1979, the Department of Labor (the "Department") issued a regulation spelling out that fiduciaries responsible for an investment portfolio are obligated to give "appropriate consideration" to the facts and circumstances relevant to each "particular investment," including the role that the investment decision plays in the overall portfolio. 29 C.F.R. 2550.404a-1. "Appropriate considerations" may include a multitude of factors, but core considerations of defined contribution plan fiduciaries include the risk-return expectations of the investment, as well as diversification and liquidity. Each individual investment must be "reasonably designed… to further the purposes of the plan." *Id.*

In *Amicus's* experience, defined contribution plan fiduciaries meet their investment obligations in various ways, generally revolving around carefully selecting and monitoring each fund offered on the plan's menu, taking into account investment performance, fees, and suitability. Guidance directed to fiduciaries reminds them that "[o]f all the responsibilities an investment committee will undertake, none is as important as the selection of investment options offered to plan participants."[4] Fiduciaries making investment selections for defined contribution plans are trained that, "[t]he fund selection process should begin with a systematic

---

[4] Rocco DiBruno, BEST PRACTICES FOR 401(K) PLAN INVESTMENT COMMITTEES, Market Place Books, 2006, at p. 37.

screening process to identify the universe of funds that meet … specific criteria" and that the criteria should focus on "past performance, expense ratio, and volatility."[5] They are also trained to monitor investments and fees, regularly and take "appropriate action" if performance lags compared to "other comparable investment vehicles."[6]

In sum, diligence with respect to each fund is the prevailing standard, meaning prudent plan fiduciaries would not face additional burdens and costs if the decision below is reversed. The alternative, littering an investment menu with funds that the governing fiduciaries have not carefully vetted, and which pose a trap for unwary, less well-informed participants, is not acceptable and would do much to erode participants' retirement security.

Carefully considering investment costs to participants.

One obvious aspect of a fiduciary's investment role is to select investment funds which, under all the circumstances, are less costly to participants than comparable alternatives. Thus, if the net economic cost to a participant is lower with an institutionally-priced share class of a given mutual fund than a retail-priced class in the same fund, reasonable practice (and common sense) call for the fiduciary to select that lower-cost share class.[7]

---

[5] *Id*. at 39–41.
[6] *Id*. at 42.
[7] Depending on the exact circumstances, the net economic cost to a participant of a plan that adopts a revenue sharing arrangement that employs a retail fund with a higher gross expense ratio may be more or less costly than a hard dollar arrangement using an institutional fund with a lower expense

Investment industry literature stresses the impact of costs. In the context of participant-directed plans, the Department of Labor has long recognized the "cumulative effect on fees and expenses on retirement savings can be substantial;" that investment fees are by far the largest component of plan fees and expenses; that fiduciaries should "[b]e aware that higher investment management fees do not necessarily mean better performance"; and that active asset management generally entails higher fees than passive management.[8] Similarly, the leading mutual fund research firm, Morningstar, recognizes that, "[p]rice is one of the best predictors of a fund's future returns. That's because a fund's costs come right off the top of its total returns."[9]

Fiduciary Practice and Comparison Shopping

Another obvious aspect of a fiduciary's investment role is what might be called a duty of comparison shopping, i.e., a duty to carefully, thoroughly, and objectively evaluate competing

---

ratio. Whether the governing fiduciaries have conducted a thorough and sound evaluation of the net economic impact on participants of those two different types of arrangements—considering all relevant facts, with appropriate lines of analysis and input from qualified experts—can be determined only after discovery.

[8] *See "Understanding Retirement Plan Fees and Expenses"*, Department of Labor, at 2, 4, 6, 9 (Dec. 2011) ("*Understanding Fees*"), *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-retirement-plan-fees-and-expenses.pdf (last visited Sept. 7, 2021).

[9] Karen Wallace, *Key Factors for Evaluating Mutual Funds*, Morningstar.com (July 30, 2020) ("Morningstar Key Factors"), available at https://www.morningstar.com/articles/990067/keyfactors-for-evaluating-mutual-fund (last visited Sept. 7, 2021).

investment funds in the marketplace before selecting one for a plan's investment menu. This is not only a matter of common sense and common practice; it is also recognized by the Chartered Financial Analyst Institute—the widely-recognized professional organization for the institutional investment industry.

The CFA Institute's published standards of conduct emphasize the importance of thorough research and investigation, attentiveness to facts and objectivity in investment due diligence.[10]

The CFA "Standards of Professional Conduct" state, in pertinent part:

I. PROFESSIONALISM

…………

> ***B. Independence and Objectivity.*** *Members and Candidates must use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities.*

III. DUTIES TO CLIENTS

> ***A. Loyalty, Prudence, and Care.*** *Members and Candidates have a duty of loyalty to their clients and*

---

[10] *CFA Standards of Practice Handbook*, CFA Institute at 8–10 (11th ed. 2014) ("CFA Handbook"), *available at* https://www.cfainstitute.org/-/media/documents/code/code-ethics-standards/standards-practice-handbook-11th-ed-eff-July-2014-corr-sept-2014.ashx (last visited Sept. 7, 2021). Many investment consultants who advise substantial 401(k) plans and individuals who serve on the investment committees of some especially large 401(k) plans, are CFA charterholders.

> *must act with reasonable care and exercise prudent judgment. Members and Candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests.*
>
> V. *INVESTMENT ANALYSIS, RECOMMENDATIONS, AND ACTIONS*
>
> ***A. Diligence and Reasonable Basis.*** *Members and Candidates must:*
>
> ***1.*** *Exercise diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions.*
>
> ***2.*** *Have a reasonable and adequate basis, supported by appropriate research and investigation, for any investment analysis, recommendation, or action.*[11]

Based on *Amicus's* considerable experience, the duty of comparison shopping applies not only to selecting and monitoring investment funds for a defined contribution plan; it also applies to fiduciary decision-making when selecting a recordkeeper for

[11] *See* CFA Handbook at 8–10.

such a plan. When selecting a recordkeeper, this process often takes form in preparing a thorough written request for proposals; issuing it to a range of competitive candidates; carefully evaluating the responses; arriving at a "short list" of candidates; recommending finalists; and ultimately, the governing fiduciaries making their final selection.

Negotiating contractual terms

The fiduciary's duties concerning selection of a recordkeeper includes negotiating suitable contract terms, such as fees and expenses. Especially with plans that have substantial assets, such as the billions of dollars' worth of assets in the Northwestern plans involved here, the fiduciaries generally have substantial negotiating power and do not hesitate to use it. This may include negotiating not only fees and costs, but also the terms of add-ons that the recordkeeper candidate wants and the plan's governing fiduciaries may or may not prefer. In *Amicus's* experience, even with modest-sized participant-directed plans, governing fiduciaries may succeed in negotiating more flexibility than the service provider wants. For instance, *Amicus's* firm advised a plan with only $50 million in assets that adopted a bundled arrangement with a service provider that offered an attractive overall fee if—and supposedly only if—the plans' investment options were limited to that provider's investment funds. In fact, *Amicus* assisted the governing fiduciaries in successfully negotiating to include a third-party fund, while still maintaining the same overall fee arrangement.

b. At the pleading stage, participants cannot reasonably know details concerning the processes and due diligence that the governing fiduciaries employed (or failed to employ) in reaching their decisions

As previously explained, determining whether a fiduciary has met or failed to meet reasonable standards of due diligence turns essentially on her conduct, rather than the substance of her final decision. Even if a blindfolded person hits the bull's-eye on a target, that hardly means she used a satisfactory process for achieving that result.

The foregoing discussion about the process for selecting and monitoring investment funds, comparative shopping and negotiation, all revolve around the *procedures* governing fiduciaries use rather than the resulting *substantive* outcomes. At the pleading stage, even assuming participants know the identity of the funds, administrative arrangements and the cost structures of both, participants cannot reasonably be expected to know the details of whatever process the governing fiduciaries employed or failed to employ in arriving at those results.

In Northwestern's case, the Seventh Circuit concluded that "[g]iven the favorable terms and attractive offerings of the Traditional Annuity, it was prudent for Northwestern to accept conditions that would ensure the Traditional Annuity remained available to participants." 953 F.3d at 989. However, in reaching that conclusion, the Court leap-frogged a host of issues concerning the (mis)conduct of the plans' governing fiduciaries. How thoroughly did the fiduciaries analyze and understand the terms of the Traditional Annuity and the Stock Fund, and how they compared to other products available in the marketplace? What analysis of those other products did the Northwestern fiduciaries undertake, using what resources and lines of analysis? What efforts did they make to negotiate adjustments to the conditions that TIAA-CREF sought? From a practical perspective, without answers to these and related questions, it is impossible to determine the sufficiency of the processes and due diligence of the Northwestern fiduciaries employed.

c. Awareness of the risks of class action litigation encourages governing fiduciaries and their advisers to take special care in performing their duties

Beginning around 2006, class action litigation turned a spotlight on defined contribution plan fees and fiduciary oversight. Over the last fifteen years, dozens of lawsuits have been filed against fiduciaries for large plans alleging excessive plan fees, many settling for tens of millions of dollars and several going to trial, with outcomes for and against the plaintiffs. In 2019, ERISA fiduciary breach settlements and judgments concerning 401(k) plans and 403(b) plans totaled $193 million.[12] While this may sound like a large sum, in context, it is not. There were approximately $8.8 trillion in 401(k) and

---

[12] Jacklyn Wille, "ERISA Class Settlements Rebounded to $449 Million In 2019", Bloomberglaw.com (Dec. 26, 2019), available at https://news.bloomberglaw.com/employee-benefits/erisa-class-settlements-rebounded-to-449-million-in-2019 (last visited Sept. 7, 2021).

403(b) styled defined contribution plans that year (now $9.9 trillion) and over 100 million workers and retirees participating in those plans.[13] In other words, the aggregate value of settlements and judgments in 2019—a record high—was less than $2.00 per participant account.

Since fiduciary breach litigation gained prominence in 2006, performance of defined contribution plans has markedly improved. Prior to 2006, the returns of defined contribution plans, like 401(k) plans and 403(b) plans, trailed that of traditional defined benefit pension plans by an average of 1.8 percentage points per year.[14] After 2006, the difference narrowed to 0.46 percentage points. The 1.34 percentage point improvement on $9.5 trillion in defined contribution plan assets represents an increase of more than $100 billion

---

[13] U.S. Government Accountability Office, "Defined Contribution Plans: Federal Guidance Could Help Mitigate Cybersecurity Risks in 401(k) and Other Retirement Plans", GAO-21-25 published Feb. 11, 2021, available at https://www.gao.gov/products/gao-21-25 (last visited Sept. 7, 2021); Investment Company Institute ("ICI"), 2021 Investment Company Fact Book at 182, available at https://www.ici.org/system/files/2021-05/2021_factbook.pdf (last visited Sept 7, 2021), Congressional Research Service, "U.S. Retirement Assets in 2020", (May 6, 2021), available at https://www.everycrsreport.com/files/2021-05-06_IN11659_6f14a45b140bf1f601972f2972ec5e5846c79b82.pdf (last visited Sept. 7, 2021); ICI, "Retirement Assets Total $35.4 Trillion in First Quarter 2021", (June 16, 2021), available at https://www.ici.org/statistical-report/ret_21_q1 (last visited Sept. 7, 2021)

[14] CEM Benchmarking, Inc., "Defined Contribution Plans Have Come a Lone Way!", at 1 (Feb, 2018), available at: https://www.cembenchmarking.com/research/DC_plans_have_come_a_long_way.pdf (last visited Sept 7, 2021).

annually across all 401(k) and 403(b) plans—an average of approximately $1,000 *per account*. As Petitioner notes, the Department has explained that a lower return of 1 percentage point per year can reduce an employee's account balance at retirement by 28%. Petitioner Brief at 7, citing *DOL, A Look at 401(k) Plan Fees*. Given that performance improvements exceed 1% annually, the evidence suggests to *Amicus* that providing meaningful opportunities for defined contribution fiduciary breach litigation plays an important role in improving America's retirement landscape.

In addition to improved performance, fees have come down sharply. In 2006, New England Pension Consultants, LLC ("NEPC") conducted a survey of defined contribution plans and found average record-keeping fees were $118 per plan participant and the median plan weighted average expense ratio was 57 basis points.[15] In 2014, the same NEPC survey found the median per-participant record-keeping fees were $70 and the median plan-weighted average expense ratio was 49 basis points.[16] In other words, record-keeping fees have declined 40% since 2006 and total plan fees have declined by 14%. The improvements in performance and fees far outstrip any costs associated with class actions brought to enforce § 404 of ERISA.

---

[15] "NEPC 2014 Defined Contribution Plan & Fee Survey: What Plan Sponsors Are Doing Now", at 1–3 (Oct. 2014), available at: https://cdn2.hubspot.net/hubfs/2529352/Blog/2014_10_nepc_2014_defined_contribution_plan_and_fee_survey-_what_plan_sponsors_are_doing_now.pdf (last visited Sept. 7, 2021)
[16] *Id.* at 3.

Litigation is frequently identified as one of the leading reasons for the improvements in defined contribution plan performance and fees since 2006.[17] In the experience of *Amicus*, governing fiduciaries and their advisers—consultants and lawyers alike—are keenly aware of the issues and types of (mis)conduct that may spur class action litigation, and this often motivates them to carefully perform their duties. In *Amicus's* practice, a wide range of plan sponsors, governing fiduciaries and the financial services community have monitored fee litigation closely from the moment the first of these cases was filed in 2006. Consultants and lawyers have emphasized in the years since that conflict-free, regular scrutiny of fees is critical to avoiding suit. Several ERISA legal conferences each year devote substantial time to fee litigation.

Amicus believes awareness of the risk of class action litigation and sensitivity to the issues such litigation often involves, enhances the care of governing fiduciaries. It is *Amicus's* view that, rather than an impediment to retirement security or a cause for "unduly discourage[ing] employers from offering ERISA plans," such litigation is, on balance, a positive factor contributing to retirement security.

Indeed, as a leading, independent retirement plan research center wrote, "the greater scrutiny by plaintiff attorneys in 401(k) litigation" has yielded "increased visibility of all plan fees" and a "clear benefit of the increased transparency is lower fees."[18]

---

[17]Brief of Cambridge Fiduciary Services LLC as *Amicus* Curiae in Support of Petitioners, *Tibble v. Edison Int'l*, 2014 WL 7166530 (Dec. 9, 2014).

[18] George S. Mellman & Geoffrey T. Sanzenbecher, "401(k) Lawsuits: What Are The Causes and Consequences?", Center

From 2000 to 2016, investment fees in 401(k) plans declined from 77 basis points to 48 basis points—a decline of 37.5%.[19] And recordkeeping fees declined by approximately 19% during the same period.[20] "Thus, it appears that fees have declined across the board, so plan participants are receiving a higher proportion of the total returns on their investments."[21] Lawsuits attacking defined contribution plan fees "have been accompanied by an increase in the use of passive investment options and a fall in investment and administrative fees and it does not seem unreasonable to assume that the threat of litigation plays a role." *Id.*

Respondents have expressed concern that fiduciary breach litigation discourages employers from offering 401(k) and 403(b) plans, but the evidence is to the contrary. Defined contribution plans today represent a greater percentage of America's total retirement assets than they did before litigation began. More employers offer such plans and more participants are utilizing them.[22] In addition, the total combined contribution rate—the percentage of salary employees and employers contribute into their defined contribution plans each year—has increased since litigation in the field began.[23]

---

for Retirement Research, Boston College (May 2018, No. 18-8), at 5, available at: http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf (last visited Sept. 7, 2021).

[19] *Id.*, Figure 5.

[20] *Id.* at 6.

[21] *Id.*

[22] *Id.* at 2.

[23] J. Poterba, S. Venti & D. Wise, "Rise of 401(k) Plans, Lifetime Earnings, And Wealth at Retirement", Nat'l Bureau of Economic Research, at 22 (May, 2007), available at:

Large employers are common defendants in litigation of this type. Nevertheless, between 2006, when class action litigation of this type began, and today, defined contributions plans have become more and more popular with large employers, and are now offered by nearly every "Fortune 500" company.[24] In 2006, fewer than 80 million Americans had defined contribution retirement savings, while today well over 100 million do.[25]

Amicus has not encountered any employer attempting to end a defined contribution plan due to feared litigation, nor is he aware of any employers who have done so. Rather, defined contribution plans have been almost unanimously adopted by large employers and universities, such as Northwestern, with no indication of actual reluctance for that to continue or diminution of the contributions employers are willing to make into those plans.

---

https://www.nber.org/papers/w13091 (last visited Sept. 7, 2021) (median employer and employee contribution rates in 2003 were 9.8%); Vanguard Institutional Investor Group, "How America Saves 2020", at 5 (median employer and employee contribution rates in 2019 were 10.0%) available at: https://institutional.vanguard.com/ngiam/assets/pdf/has/how-america-saves-report-2020.pdf (last visited Sept. 7, 2021).

[24] Brenda McFarland, "Retirement offerings in the Fortune 500: 1998–2019", WillisTowersWatson, June 25, 2020, at Fig. 1, available at: https://www.willistowerswatson.com/en-US/Insights/2020/06/retirement-offerings-in-the-fortune-500-1998-2019 (last visited Sept. 7, 2021).

[25] Employee Benefits Security Administration, United States Department of Labor, "Private Pension Plan Bulletin Historical Tables and Graphs 1975–2018", Jan, 2021, at Table E4, available at: https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf (last visited Sept. 7, 2021).

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: September 10, 2021
Respectfully submitted,

/s/ Gregory Y. Porter

Gregory Y. Porter
Mark G. Boyko
Bailey & Glasser, LLP
1055 Thomas Jefferson Street, NW
Suite 540
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103
gporter@baileyglasser.com
mboyko@baileyglasser.com