No. 25-498

IN THE

Supreme Court of the United States

WINSTON R. ANDERSON, ET AL.,
Petitioners,

v.

INTEL CORP. INVESTMENT POLICY COMMITTEE, ET AL.,
Respondents.

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

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN RETIREMENT ASSOCIATION, BUSINESS ROUNDTABLE, COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS, THE ERISA INDUSTRY COMMITTEE, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND STABLE VALUE INVESTMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America, American Retirement Association, Business Roundtable, Committee on Investment of Employee Benefit Assets, The ERISA Industry Committee, Securities Industry and Financial Markets Association, and Stable Value Investment Association (collectively, "Amici") are the nation's leading organizations representing American businesses that sponsor, provide products and services to, and insure ERISA-governed retirement plans.

Amici's members directly sponsor or support retirement plans covering virtually every American participating in employer-sponsored benefit programs. They are dedicated to protecting employer-sponsored benefit plans and developing and advancing policies to strengthen Americans' retirement security. Accordingly, Amici frequently participate as *amici* in ERISA cases concerning employee-benefit plan design or administration. *E.g.*, *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025); *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

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[1] No counsel for a party authored any part of this brief. No party or counsel for a party, and no person other than *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs ask this Court to deem imprudent a set of funds selected by the fiduciaries for two Intel Corporation retirement plans ("the Intel funds"). These funds were custom-tailored following the 2008 financial crisis to carry a lower risk profile that would protect against losses during a bear market (and, accordingly, would yield lower returns during a bull market). The Intel funds fulfilled that goal—performing as designed—and yet plaintiffs now ask this Court to declare them off-limits. Their justification? The Intel funds purportedly underperformed a handful of cherry-picked off-the-shelf funds, and plaintiffs view the underlying hedge funds and private-equity investments to be categorically imprudent. On that basis, plaintiffs believe they can second-guess the Intel fiduciaries' investment decisions and entice this Court into that endeavor with them.

That is not how ERISA works. In enacting ERISA, Congress provided flexibility to plan sponsors and fiduciaries and *encouraged* innovation. It recognized that there are any number of prudent investment decisions, and those decisions will turn on a variety of plan-specific features and the exercise of reasonable judgment by fiduciaries in a constantly changing market. Indeed, this Court recognized as much just a few Terms ago, reminding courts that "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. It is wholly consistent with ERISA (indeed, encouraged) for fiduciaries to exercise their

discretion to account for the needs and characteristics of their participant base, as well as the various pros and cons of different investment options. Courts are not investment analysts tasked with second-guessing these decisions with the benefit of hindsight and selecting their own preferred funds for 401(k) plans. Nor are fiduciaries tea-leaf readers, able to forecast the future.

Against this backdrop, where (as here) plaintiffs ask courts to infer imprudence based on the performance or costs of challenged funds or services *in comparison to* others, courts have properly rejected those allegations as implausible when the comparators are not actually comparable. Just as comparing the one-mile times of a sprinter and a marathon runner says nothing about which runner is the better athlete, comparing the performance of two different products with different performance goals says nothing about which product is better or worse. Nor does it tell a court anything about whether the choice of one or another falls within a reasonable range of fiduciary judgments. And it certainly does not indicate whether the fiduciaries had a reasonable process for selecting or monitoring funds—the question ERISA's duty of prudence is actually about.

That is why courts have required plaintiffs *who proffer comparisons* as circumstantial allegations of breach to ensure that those comparisons are meaningful. That is all the Ninth Circuit did here, and properly so. Without the requirement of a meaningful benchmark, a plaintiff could open the door to discovery merely by finding *some alternative* among the thousands on the market that performed better during some cherry-picked window of time. This hindsight-

based approach would remove any objective guardrails on the plausibility analysis this Court has said is critical to "divide the plausible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. at 425.

Yet this is precisely what plaintiffs propose. In the district court, they asked the court to infer that Intel's fiduciaries lacked a prudent fiduciary process by alleging that the Intel funds performed poorly relative to a set of cherry-picked alternative funds. They then tried to change course on appeal, complaining that the district court erred by evaluating the plausibility of *those proffered comparisons*, rather than by examining whether private-equity and hedge-fund investments are all but categorically off-limits. The Ninth Circuit rejected those arguments, holding plaintiffs to the way *they chose to plead their case*. Now in this Court, plaintiffs try to have it both ways—they (falsely) claim that the Ninth Circuit imposed an absolute "meaningful benchmark" requirement and ignored their non-performance-based allegations while also advancing a theory that the riskiness and novelty of the Intel funds alone is sufficient to state a claim.

Whether judged individually or together, these allegations miss the mark. Under *Twombly* and *Iqbal*, courts must make a context-based assessment of whether a complaint's allegations are plausible, and not merely possible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Because ERISA is concerned with the *process* used to select investments, enforcing this standard is particularly important where, as here, plaintiffs attempt to plead not through direct allegations of process, but through circumstantial allegations of underperformance. When plaintiffs try to plead

imprudence based on performance comparisons, at a minimum they must establish that their proffered comparator funds are actually comparable. Where they fail to do so, plaintiffs cannot prop up their allegations by mounting an impermissible categorical attack on the types of investments at issue.

At every step, plaintiffs' approach is at odds both with ERISA's embrace of flexibility and discretion, and with this Court's repeated recognition that ERISA claims, just like any others, must pass the *Twombly* and *Iqbal* pleading standards to survive a motion to dismiss. Both the district court and the Ninth Circuit correctly applied that analysis here, and this Court should affirm.

ARGUMENT

I. ERISA prioritizes flexibility and discretion for plan sponsors and fiduciaries.

ERISA's duty of prudence requires a careful process, not a particular outcome. When Congress enacted ERISA, it "did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). Rather, it crafted a statute intended to encourage employers to offer benefit plans while 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," often during

periods of considerable market uncertainty. H.R. Rep. No. 96-869, at 67 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. They must account for present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. *Id.* They have to balance, for example, participants' desire to maximize returns when the market is strong with a desire to minimize losses in a down market. As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility—"greater flexibility, in the making of investment decisions …, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." DOL, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). Congress viewed this flexibility as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972).

Fiduciaries thus have broad discretion to make decisions tailored to their participants. These decisions run the gamut, including everything from the general investment policies and purpose of the plan, to the appropriate number and types of investment options to offer, to the selection of *particular* investment options within the chosen categories, including default options (if any) for participants who have not decided how to allocate their individual investment accounts. ERISA does not dictate a single "right" answer for any of these decisions. To the contrary, each decision involves "difficult tradeoffs," *Hughes*, 595 U.S. at 177, especially in the face of market turmoil. Recognizing as much, Congress enacted the flexible "prudent man" standard,

requiring only that fiduciaries make decisions using "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity … would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). In selecting this standard to define the scope of the duties that fiduciaries owe to plans and their participants, Congress provided fiduciaries with the "flexibility" necessary to determine how best to manage their plans. *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983).

The broad discretion conferred by Congress is the "sine qua non of fiduciary duty." *Pohl v. Nat'l Benefits Consultants*, 956 F.2d 126, 129 (7th Cir. 1992). This discretion is critical to the entire framework. Given the vast array of investment products and services and participants' widely diverse needs, fiduciaries are best positioned to weigh the pros and cons of various choices—often with assistance from consultants and other investment professionals. As DOL has explained, "subjecting a fiduciary to constant Monday morning quarterbacking over its decisions, with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework." Fiduciary Duties in Selecting Designated Investment Alternatives ("*DIA Proposed Rule*"), 91 Fed. Reg. 16088, 16092 (Mar. 31, 2026). After all, a fiduciary's decisions must be evaluated based on "the circumstances as they reasonably appear[ed] to him at the time when he does the act and not at some subsequent time when his conduct is called in question." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022) (quoting Restatement (Second) of Trusts § 174 cmt. b. (1959)).

II. Hindsight-based attacks are not cognizable under ERISA.

As this Court recently confirmed in *Hughes v. Northwestern University*, 595 U.S. 170 (2022), there is no ERISA exception to Rules 8 and 12(b)(6). Prior to *Hughes*, some circuit courts appeared to adopt the position that ERISA claims were exempt from the plausibility pleading requirement established by Rule 8(a), *Twombly*, and *Iqbal*. *See Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019); *Sacerdote v. N.Y.U.*, 9 F.4th 95, 108 n.47 (2d Cir. 2021). This Court squarely rejected that position, holding that courts must "apply[] the pleading standard discussed in" *Twombly* and *Iqbal*. *Hughes*, 595 U.S. at 177.

This Court further emphasized that ERISA claims "will necessarily be context specific," recognizing that fiduciaries may make a wide "range of reasonable judgments" in circumstances that "implicate difficult tradeoffs." *Id.* In other words, there may be perfectly justifiable reasons for a fiduciary's decision to offer one investment option over another, even if another option ultimately performs better or has a lower fee. And when that is the case—when circumstantial allegations of fiduciary malfeasance are entirely consistent with lawful fiduciary behavior—the claim is properly dismissed. *See Hikma Pharms. USA Inc. v. Amarin Pharma, Inc.*, 146 S. Ct. 1391, 1399 (2026) (plaintiffs must "rule out 'obvious alternative explanation[s]' for the defendant's conduct" (citation omitted)).

A. ERISA does not police investment outcomes but rather focuses on a sound fiduciary process.

ERISA "requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). And so, claims for breach of fiduciary duty "focus[] on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2d Cir. 2013) (citation omitted). Under this framework, "the proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transaction." *Harris v. Amgen, Inc.*, 788 F.3d 916, 936 (9th Cir. 2015) (citation and quotation marks omitted), *rev'd and remanded on other grounds by* 577 U.S. 308 (2016).

Therein lies the deficiency of many ERISA complaints, including this one. While ERISA's fiduciary standards focus on process, ERISA complaints asserting claims for fiduciary breach rarely include any allegations about process. Some assert per se attacks against particular fiduciary decisions—with no allegations that fiduciaries failed to consider the relevant factors or weigh relevant considerations. More often, they ask the Court to *infer* an imprudent process based on circumstantial, outcome-focused allegations comparing the fees or performance of funds in a plan line-up against the fees or performance of a different option available on the market. Under either route, fiduciaries are subject to challenge for nearly any decision they make.

Plaintiffs use both tactics here, but these approaches are no more successful together than they are individually. First, the Ninth Circuit properly rejected plaintiffs' pleading-by-inference approach after applying the same careful, context-sensitive scrutiny the district court employed. This review allows courts to determine whether circumstantial allegations plausibly suggest that fiduciaries were acting improperly, or instead reflect a non-actionable disagreement with fiduciaries' discretionary decisions. Second, plaintiffs' per-se attack on an investment approach that they disfavor has no basis in ERISA, and conflicts with the statute's focus on process. *See* pp. 5-7, *supra*.

B. ERISA does not countenance the use of inapt comparators to plead by inference.

Plaintiffs take aim at the Ninth Circuit's "meaningful benchmark" requirement as "illogical, unworkable, and unnecessary." Pet. Br. 45. But *plaintiffs* chose to plead their case by asking the district court to infer an imprudent process through allegations that the Intel funds underperformed certain alternatives. The district court did not independently impose an apt-comparator requirement; it simply responded to the way plaintiffs chose to plead their claims with the requisite analysis of their plausibility. Just as antitrust plaintiffs cannot plausibly show collusion merely by pleading that two firms took the same action, neither can ERISA plaintiffs plausibly show a breach of fiduciary duty merely by pleading that different fiduciaries selected *different* options. *See Twombly*, 550 U.S. at 554, 567.

Plaintiffs' apples-to-oranges comparisons are misguided, but common in ERISA class-action complaints. ERISA plaintiffs often use outcomes as a proxy for fiduciary misfeasance. But the whole point of ERISA's fiduciary standards is that they do not compel any particular outcome and do not permit fiduciary decisions to be judged in hindsight. Moreover, plaintiffs' comparison-based approach to pleading typically focuses on only one or two factors—*e.g.*, investment performance or fees—whereas DOL instructs fiduciaries to consider those factors *alongside many others*. *See* DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* 2 (Feb. 2013)[2] ("*TDF Tips*").

At the very least, however, courts that allow ERISA plaintiffs to plead by comparison commit no error by refusing to infer fiduciary misfeasance without *at least* requiring the comparisons to be *apt*. Without a baseline of *like* alternative investments, courts cannot even infer that the plan's performance was lacking or the fees charged for a product or service were excessive, let alone that these outcomes were the result of an imprudent process for selecting or monitoring the plan line-up.

1. ERISA focuses on process, but complaints alleging fiduciary breach—including the complaint here—are typically silent on the process employed by fiduciaries. Instead, plaintiffs construct an after-the-fact comparison of the fees or performance of the challenged funds to alternatives in the market, and

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[2] https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds-erisa-plan-fiduciaries-tips.pdf.

then ask courts to infer that fiduciaries *must* have been asleep at the wheel in managing the plan.

This approach is on shaky footing from the start. By using outcomes as a proxy for process, plaintiffs attempt to peg their claims to a metric—results—that has no place in the analysis. If, as this Court has explained, "the content of the duty of prudence turns on the circumstances prevailing at the time the fiduciary acts," *Hughes*, 595 U.S. at 177 (alteration and quotation marks omitted), plaintiffs should not be able to survive a motion to dismiss by using post-hoc results as a substitute for process. Even assuming results might play some role in the analysis, plaintiffs often improperly rely on a single results-based metric. The Intel fiduciaries, for example, prioritized a lower risk profile in the wake of the 2008 financial crisis. Plaintiffs' allegations that the Intel funds failed to outperform the market ignore the fundamental obligation of fiduciaries to account for a *range* of factors when selecting funds—not performance alone.

DOL has made this point consistently and repeatedly. Most recently, DOL emphasized in the preamble to a proposed rule that "under a prudence inquiry, there is no one single right answer given the almost innumerable appropriate options available to fiduciaries." *DIA Proposed Rule*, 91 Fed. Reg. at 16091. And longstanding DOL guidance directs fiduciaries to account for a variety of factors when choosing and monitoring investments, including "participation in a traditional defined benefit pension plan offered by the employer, salary levels, turnover rates, contribution rates and withdrawal patterns." DOL, *TDF Tips* 2. As DOL expressed to this Court in *Hughes*, "prudent fiduciaries must consider all relevant factors," among

them, "potential for higher return, lower financial risk, more services offered, or greater management flexibility." U.S. Br. at 20, *Hughes v. Nw. Univ.*, No. 19-1401 (U.S. Sept. 10, 2021) (citation omitted).

An outcome-focused approach to pleading a breach of a process-focused fiduciary duty is inconsistent with these principles. It is always possible to cherry-pick historical data that makes a fiduciary's choices appear suboptimal given a 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 due to its low (and government-subsidized) fees. Plaintiffs in ERISA class actions regularly use the TSP as a comparator to argue that an investment underperformed or had excessive fees.[3] But even the TSP could be made to appear mismanaged by cherry-picking comparators with fees that are significantly lower[4]:

[3] *See, e.g.*, *Brotherston v. Putnam Invs.*, Appellants' Br., 2017 WL 5127942, at *23 (1st Cir. Nov. 1, 2017) (describing TSP as "quintessential example of a prudently-designed plan"); *Thrift Savings Plan*, Tex. State Sec. Bd., https://www.ssb.texas.gov/investors/military/thrift-savings-plan ("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.").

[4] The data for this table are based on the most recently available figures as of July 7, 2026.

Fund	Expense Ratio
TSP Fixed Income Index Investment Fund (F Fund)[5]	0.035%
iShares Core US Aggregate Bond ETF[6]	0.030%
Vanguard Total Bond Market Index Fund (Institutional Plus Shares)[7]	0.020%
TSP Common Stock Index Investment Fund (C Fund)[8]	0.035%
Fidelity 500 Index Fund[9]	0.015%
iShares S&P 500 Index Fund (Class K)[10]	0.030%

As this example shows, when 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. Condoning this approach would open the floodgates to lawsuits against virtually every plan.

This problem is even more pronounced for allegations of underperformance. Fiduciaries can identify fees in advance, but they cannot predict future performance. And no fund consistently outperforms in every category at all times. Thus, with the benefit of hindsight, it is all too easy for plaintiffs to cherry-pick a time period during which one out of thousands of other

[5] https://www.tsp.gov/funds-individual/f-fund/?tab=fees.
[6] https://www.morningstar.com/etfs/arcx/agg/price.
[7] https://www.morningstar.com/funds/xnas/vbmpx/price.
[8] https://www.tsp.gov/funds-individual/c-fund/?tab=fees.
[9] https://www.morningstar.com/funds/xnas/fxaix/price.
[10] https://www.morningstar.com/funds/xnas/wfspx/price.

funds performed better. That is why "a showing of imprudence cannot 'come down to simply pointing to a fund with better performance.'" *Forman v. TriHealth*, 40 F.4th 443, 448-449 (6th Cir. 2022).[11] That holds all the more true when (as here) a plaintiff's claim of imprudent selection relies on performance data that post-dates the fiduciary's selection decision. Put simply, plaintiffs' allegations boil down to nothing more than complaints that "with the prescience of a crystal ball's forecast of the future, the [plan] managers could have delivered better returns for the investors." *See Barchock v. CVS Health*, 2017 WL 9324762, at *7 (D.R.I. Jan. 31, 2017).

This plead-by-performance-comparisons approach is also at odds with fundamental market principles. Performance often varies over time, and chasing performance—*i.e.*, switching investment strategies to pursue the fund performing well at the time or in the recent past—is "generally doomed to some kind of failure." Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017).[12] Put differently, "[p]recipitously selling a well-constructed portfolio in response to disappointing short-term losses … is one of the surest ways to frustrate the long-term growth of a retirement plan." *Smith*, 37 F.4th at 1166. Indeed, when addressing the negative ramifications of a surge of underperformance cases, investment analyst Morningstar (which plaintiffs cite

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[11] *See, e.g.*, *Gonzalez v. Northwell Health*, 632 F. Supp. 3d 148, 163-165 (E.D.N.Y. 2022); *Dorman v. Charles Schwab*, 2019 WL 580785, at *6 (N.D. Cal. Feb. 8, 2019); *Cho v. Prudential Ins.*, 2021 WL 4438186, at *9 (D.N.J. Sept. 27, 2021).

[12] https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2017-02-08/chasing-performance-is-a-quick-way-to-disaster.

repeatedly in their brief) expressed concerns that plan fiduciaries would feel pressured to engage in "performance-chasing and swapping out target-date strategies more often than they should." Megan Pacholok et al., *2023 Target-Date Strategy Landscape* 31, Morningstar (Mar. 28, 2023).[13]

In short, a single, outcome-based criterion—performance especially—should not be sufficient to nudge a claim over the line from possible to plausible. That is why plaintiffs are wrong to suggest that under a meaningful-benchmark approach, a plaintiff would state a viable claim if a "complaint alleges that there is one target-date fund out there that performed slightly better and had a similar bond-to-equity ratio and similar risk profile." Pet. Br. 47. While the aptness of comparators is certainly a *necessary* prerequisite to plausibly pleading a fiduciary breach using a comparative approach, it is not *sufficient* in and of itself. And again, it is plaintiffs' responsibility to plead facts that "rule out 'obvious alternative explanation[s]' for the defendant's conduct." *Hikma*, 146 S. Ct. at 1399 (citation omitted). The desire to reduce the risk of loss in a down market (while knowing it will sacrifice growth in a bull market), or a considered decision to maintain a historically well-performing fund during periods of underperformance, are both obvious alternative explanations that are not ruled out by post-hoc performance-based allegations.

2. The use of impermissible hindsight and improper focus on one factor to the exclusion of all others should doom any attempt to plead by performance

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[13] https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/blt879461b1430dbde5/6442b988398bc14b3cffe380/Target_Date_Landscape.2023.pdf.

comparisons. At a minimum, though, plausibility requires that courts ensure the identified comparators are *actually* comparable. This "meaningful benchmark" standard is critical to whether plaintiffs have pushed their allegations over the plausibility line. *Twombly*, 550 U.S. at 560. Otherwise, a fiduciary's decision "could just as well" reflect an entirely rational, permissible decision, *id.* at 557—namely, that a fiduciary committee made a different choice because its weighing of all the factors led it to a different fund.

This comparator-plausibility analysis is not overly fact-intensive. Courts simply probe whether plaintiffs have plausibly alleged that their comparators are in fact comparable. This case provides an apt example. As the Ninth Circuit explained, plaintiffs could have compared the Intel funds to Intel's own "customized benchmarks, made up of a 'composite of the underlying … benchmarks' for each asset class included in the Intel funds, which it disclosed to plan participants and beneficiaries." Pet.App. 13a. These benchmarks had "the same asset allocation as the Fund's target asset allocation and use[d] index returns to represent the performance of the asset classes." *Id.* The custom benchmark thus employs the same goals and investment strategies as the selected funds—precisely what fiduciaries and courts *should* consider when evaluating whether the chosen strategy is being executed appropriately. Conspicuously, however, plaintiffs never alleged that the Intel funds underperformed their *actual* benchmark. *See id.* at 13a-14a.

Instead, Plaintiffs "sought to compare Intel's funds to equity-heavy retail funds that pursued different objectives—typically revenue generation." Pet.App.

14a. These purported comparators "were not truly comparable because they had 'different aims, different risks, and different potential rewards.'" *Id.* (citing *Davis v. Wash. Univ.*, 960 F.3d 478, 485 (8th Cir. 2020)). Plaintiffs ask this Court to ignore these features on a motion to dismiss, but Rule 12(b)(6) requires the opposite—"context" *must* be considered at the pleadings stage. *Dudenhoeffer*, 573 U.S. at 425.

3. Plaintiffs object that a "meaningful benchmark" approach imposes a heightened standard "that performance allegations be pleaded with particularity." Pet. Br. 41. Not so. Ensuring that any comparison is meaningful is a threshold requirement for alleged underperformance to even theoretically be a meaningful proxy for an imprudent fiduciary process. A few examples help to explain why.

Consider target-date funds ("TDFs"), a popular option for retirement plans that Intel employed here. TDFs are a broad category of investments that use different approaches and investment types to both optimize growth and manage risk in relation to an investor's "target" retirement date. When designing TDFs, fund managers use different approaches to change a fund's asset allocation as a participant nears (or passes) retirement—referred to as the fund's "glide path." *See* DOL, *TDF Tips* 1. Fiduciaries selecting a TDF have to consider a range of factors, including whether the fund uses a "through" or "to" glide path. *Id.* at 2. TDFs with a "to retirement" strategy "reduce[] the TDF's equity exposure over time to its most conservative point at the target date" (*i.e.*, the retirement date). *Id.* A TDF with a "through retirement" approach "reduces equity exposure through

the target [retirement] date so it does not reach its most conservative point until years later." *Id.*

These strategies reflect different approaches to balancing risks: "A 'to' objective is focused on limiting the volatility or the variability of outcomes for the investor up to retirement, while a 'through' objective drives growth for participant balances for several years and then allows them to be converted into income through retirement." Amanda Umpierrez, *Evaluating 'To' vs. 'Through' Glide Paths*, PlanSponsor (Feb. 17, 2021).[14] As DOL has explained, the choice between "to" versus "through" reflects different investment strategies and approaches to risk. DOL, *TDF Tips* 1. Accordingly, comparing the investment returns of a TDF with a "to retirement" strategy to those of a TDF with a "through retirement" strategy does not provide any meaningful information about the performance of the TDFs. Those TDFs perform differently because they *are* different and are *intended* to perform differently.

It would obviously make no sense to infer that a center is underperforming because she made fewer three-point shots than a point guard. Just the same, it makes no sense to infer fiduciary misfeasance because a "to" TDF purportedly underperforms a "through" TDF in the run-up to the target (retirement) date for a particular fund. Rather, different returns for different funds that were intended to perform differently simply reflect that the plan's fiduciaries—informed by the characteristics of the plan and its participant population—permissibly selected a different investment strategy. That is why courts have overwhelmingly

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[14] https://www.plansponsor.com/in-depth/evaluating-vs-glide-paths/.

rejected inapt comparisons in challenges to fiduciaries' decisions to select and retain TDFs. *See, e.g.*, *Abel v. CMFG Life Ins.*, 2024 WL 307489, at *4-6 (W.D. Wis. Jan. 26, 2024) (collecting cases); *Anderson v. Advance Publ'ns*, 2023 WL 3976411, at *3-4 (S.D.N.Y. June 13, 2023).

TDFs vary along a second axis as well: the underlying asset classes can reflect active management, passive management, or some combination thereof. When the underlying funds are actively managed, a "manager actively makes investment decisions" for those funds "in an effort to maximize return." *Smith*, 37 F.4th at 1163. Actively managed funds have the potential to outperform the market but typically come with 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.*

As DOL recently explained, a fiduciary could "prudently conclude that the value of the[] diversification benefits" produced by including both active and passive funds could justify "the selection of an actively managed fund that charges higher fees than a passive counterpart." *DIA Proposed Rule*, 91 Fed. Reg. 16088 at 16098. DOL specified, however, that in selecting the funds, the fiduciary should compare passively managed funds to other passively managed funds, and actively managed funds to other actively managed funds. *See id.* That makes sense: Given their different investment strategies, courts have repeatedly recognized that actively managed funds "cannot be meaningfully compared" to passively managed funds. *E.g.*, *Patterson v. Morgan Stanley*, 2019 WL 4934834, at *12 (S.D.N.Y. Oct. 7, 2019).

Stable-value funds offer another useful example. These funds are unique products that "provide bond-like returns" while preserving principal, and thus "provide[] … investors an attractive risk/return profile."[15] Because they prioritize asset preservation rather than aggressive growth, these funds cannot meaningfully serve as comparators for funds driven by raw performance. Indeed, performance-based challenges to stable-value funds make little sense—it would be like comparing the first drafts of two different appellate briefs by examining which brief had better-Bluebooked citations. And as with TDFs, there are significant differences among stable-value products. These products fall roughly into three categories: (1) individually managed accounts, (2) pooled stable-value investments, and (3) insurance-company general and separate accounts. *See* SVIA, *Stable Value Market Segments* (Dec. 31, 2022).[16] Each category has a distinctive structure that may cause it to be better suited for a particular plan and its participants. *Id.* For some stable-value investments, investment returns (called crediting rates) are determined in advance; others can vary based on the performance of the underlying assets. *See id.* Some stable-value investments have strict exit provisions, while others permit plans to withdraw from investments at will. *Id.* Thus, for example, if a strictly guaranteed rate of return is better-suited for a particular plan, then a general-account product might be more attractive. If

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[15] SVIA, *Who Invests in Stable Value and Why?* (July 7, 2021), https://www.stablevalue.org/who-invests-in-stable-value-and-why/; SVIA, *Stable Value at a Glance* (Mar. 31, 2026), https://www.stablevalue.org/stable-value-at-a-glance/.

[16] https://www.stablevalue.org/wp-content/uploads/StableValueMarketSegments-1.pdf.

maximum liquidity is a greater virtue for a particular plan, then an individually managed account might rank higher.

Under plaintiffs' approach, however, a plaintiff could make out a claim of imprudence based on allegations that one stable-value fund outperforms another, notwithstanding that the difference in performance might reflect entirely appropriate differences in the design and purpose of the funds. As courts have consistently held, apples-to-oranges comparisons and bare complaints about "underperformance" by an investment product with the goal of asset preservation do not pass muster. *See Barchock v. CVS Health*, 886 F.3d 43, 48-54 (1st Cir. 2018); *Tedford v. Equitable Fin. Life Ins.*, 2026 WL 1398640, at *4 (D.N.J. May 19, 2026).

The same is true of any type of custom fund, including the Intel funds at issue here. A plan fiduciary might sensibly decide that the best option for their participants is to craft a custom fund—for example, a fund designed to cushion the blow of any significant market downturns following the 2008 financial crisis. Comparing these funds to off-the-shelf alternatives does not provide any insight as to whether the process behind the decision to retain the custom funds was prudent.

At bottom, a comparison of two non-comparable funds says nothing about whether a fiduciary might have employed an imprudent selection or monitoring process. Because these allegations do not move a claim over the line from possible to plausible, they cannot provide plaintiffs with a ticket past the motion to dismiss and into discovery. The Ninth Circuit thus correctly held that plaintiffs' allegations of

underperformance, untethered from any meaningful comparator, were insufficient under *Twombly* and *Iqbal*.

C. Plaintiffs' attacks on particular investment strategies are anathema to the flexibility and discretion ERISA provides.

The only additional allegation plaintiffs raise to support their claim of imprudence is an effectively categorical attack on investment in hedge funds and private-equity investments. Whether framed as a challenge to the types of investments or to the novelty of those investments, plaintiffs' allegations fail under ERISA. And plaintiffs are simply wrong that the Ninth Circuit improperly held that any allegations that are not apt comparators must be "disregarded." Pet. Br. 43; *accord id.* at 3, 8, 9, 25, 45. That is a straw-man argument of the worst kind. Instead, the Ninth Circuit recognized—properly—that "*per se*" and "generalized attacks" on common investment strategies do nothing to nudge plaintiffs' inapt-comparison allegations over the plausibility line. Pet.App. 16a-18a.

1. Plaintiffs' challenge to private-equity or hedge-fund investments cannot be squared with the fundamental premise that there are a "range of reasonable judgments a fiduciary may make." *Hughes*, 595 U.S. at 177. Neither Congress nor DOL provides a list of required or forbidden investment options, investment strategies, service providers, or compensation structures. In fact, 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, Educ., Lab. & Pensions*, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Lab.). Thus, as DOL has explained, "ERISA contains no categorical restrictions in investment type." *DIA Proposed Rule*, 91 Fed. Reg. 16088 at 16091. Rather, "[w]ithin the framework of ERISA's prudence, exclusive purpose and diversification requirements, … plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans." DOL, Advisory Op. No. 2006-08A, at 3 (Oct. 3, 2006).[17] Indeed, DOL has declined to provide even *examples* of appropriate investment options, because doing so would "limit … flexibility in plan design," 57 Fed. Reg. 46,906, 46,919 (Oct. 13, 1992).

When addressing private-equity investments in particular, DOL emphasized that the question was not whether the investment was prudent in the abstract, but whether fiduciaries made the decision to offer such a fund through "an objective, thorough, and analytical process that considers all relevant facts and circumstances." DOL, *Information Letter 06-03-2020*, 2020 WL 8366126, at *2 (June 3, 2020) ("DOL, *2020 Information Letter*"); *see also DIA Proposed Rule*, 91 Fed. Reg. 16088 at 16090 (reiterating in the context of private equity DOL's "historically neutral and principles-based approach to fiduciary investment decisions"). As is true of a wide variety of plan line-up

[17] https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/department-of-labor-employee-benefits-security-advisory-opinion-2006-08a.pdf.

decisions, those facts and circumstances include consideration of "the risks and benefits associated with the investment alternative," diversification goals, the expertise and experience of the fund manager, the characteristics and needs of the plan and its participants, etc. DOL, *2020 Information Letter* *3-4.

DOL recited many of the points made by the 2020 Information Letter in its 2021 Supplemental Statement, including explaining that when fiduciaries "consider *any* investment for an individual account plan menu, they must engage in an objective, thorough, and analytical process that evaluates anticipated opportunities for investment diversification and enhanced investment returns." DOL, *Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives*, 2021 WL 6750836, at *1 (Dec. 21, 2021) (emphasis added).[18] And since the Intel funds' creation, fiduciaries have increasingly determined that investments in private equity can form part of a balanced portfolio for plan participants. *See* Vanguard, *Private Assets in Defined*

[18] DOL later rescinded the Supplemental Statement, acknowledging that, despite the quoted language, it had been too dismissive of alternative investment options. Employee Benefits Security Administration, *U.S. Department of Labor Rescinds 2021 Supplemental Statement on Alternative Assets in 401(k) Plans* (Aug. 12, 2025), https://www.dol.gov/newsroom/releases/ebsa/ebsa-20250812. DOL's rescindment announcement reiterated that, "[w]hen evaluating any particular investment type, a plan fiduciary's decision should consider all relevant facts and circumstances and will necessarily be context specific." *Id.*

Contribution Plans (Oct. 2025) (discussing merits of private asset investments).[19]

So long as a fiduciary engages in this reasoned decisionmaking process, DOL has noted, "[t]here may be many reasons why a fiduciary may properly select an asset allocation fund with a private equity component as a designated investment alternative for a participant directed individual account plan." DOL, *2020 Information Letter*, 2020 WL 8366126, at *4. Thus, the mere fact that a plan fiduciary elects to invest in funds with a private-equity component—something that DOL has repeatedly said ERISA permits—could not reasonably suggest fiduciary wrongdoing any more than the mere fact that a plan fiduciary elects to make available a stable-value fund, a passively managed TDF, or any number of other funds.

2. As DOL's guidance makes clear, "categorical rules" have no place in ERISA fiduciary-breach challenges.[20] There are thousands of reasonable investment options with different investment styles and risk levels—nearly 9,000 mutual funds alone, several

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[19] https://corporate.vanguard.com/content/dam/corp/public-policy/policy-research/private_assets_in_defined_contribution_plans_benefits_risks_and_implications.pdf.

[20] Petitioners claim (at 23-24) they are not advocating a rule of *per se* imprudence, but their arguments say otherwise. Petitioners maintain, for example, that "hedge funds" writ large "provided worse returns at a higher cost than traditional bonds without mitigating risk any better." *Id.* at 37. And while they suggest it was not categorically off limits for "fiduciaries to include *any* hedge funds or private equity investments in their funds," they object to any decision to allocate the same percentage "of assets to these types of investments." *Id.* at 24 (emphasis added). The upshot of these arguments is a bright-line rule rendering fiduciaries' decisions categorically imprudent, regardless of the process employed.

thousand of which are offered in retirement plans, not to mention the countless customizable options that plan fiduciaries could design—and nearly innumerable ways to put together a plan that enables employees to save for retirement. Different plans will take different approaches; each plan is unique, and each plan's participants have a different range of financial sophistication, risk sensitivities, retirement needs, and investment preferences. "There are simply too many relevant considerations for a fiduciary, for [a] bright-line approach to prudence to be tenable." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013) (citing *Braden v. Wal-Mart Stores*, 588 F.3d 585, 596 (8th Cir. 2009)), *vacated on other grounds*, 575 U.S. 523 (2015).

DOL recently reiterated that "section 404(a)(1)(B) of ERISA is plainly neutral to types or classes of designated investment alternatives that a fiduciary selects for the plan's menu, so long as the fiduciary's selection process adheres to section 404(a)(1)(B)'s articulated standard of care." *DIA Proposed Rule*, 91 Fed. Reg. at 16094. Thus, in DOL's view, it runs counter to ERISA to mount an attack that certain investments are categorically unsuitable for retirement-plan investment. And mounting such an attack nearly a decade *after* the relevant decision was made, based on market conditions and outcomes known only with the benefit of hindsight, clearly runs afoul of ERISA's directive that fiduciaries' actions should be judged based on "the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B).

3. In a closely related attack, plaintiffs maintain that Intel's plan fiduciaries behaved imprudently because they employed a purportedly "novel" and "unusual" strategy for a default investment. *E.g.*, Pet.

Br. 15, 48; *see also id.* at 19 (objecting to "Intel's fiduciaries' unusual strategy"). In other words, regardless of the nature of the underlying funds, plaintiffs contend that their novelty alone renders them unacceptable.

This theory is likewise a perversion of ERISA. Indeed, plaintiffs would penalize Intel for doing precisely what ERISA encourages of fiduciaries: innovating and creating solutions using their expertise and knowledge about the participants in their particular plan. Yet Congress *prioritized* innovation and flexibility, recognizing it as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 21 (1972).

Accordingly, it is no surprise that neither ERISA nor DOL forbids or discourages custom solutions created by fiduciaries for their plans. Quite the contrary: in the context of TDFs, for example, DOL has expressly noted that while off-the-shelf, or "pre-packaged," TDFs are available—often at a very low fee—"custom" TDFs crafted specifically for a particular plan, based on the specific needs of the plan, "may offer advantages" that fiduciaries should consider despite the additional "costs and administrative tasks" involved. DOL, *TDF Tips* 3.

III. Allowing hindsight-based disagreement with discretionary fiduciary decisions would undermine ERISA's focus on flexibility and discretion.

The plausibility pleading rule helps to discourage meritless lawsuits against ERISA fiduciaries whenever

they fail to follow a particular plaintiff's preferred investment approach. As this case demonstrates, employers can—and will—be sued, essentially no matter how they exercise their discretionary responsibilities. Fiduciaries are sued for offering numerous investments in the same style, and for offering only one investment in a given investment style;[21] for failing to divest from stocks with declining share prices or high risk profiles,[22] and for failing to *hold onto* such stock because high risk can produce high reward;[23] for making available investment options that plaintiffs' lawyers deem too risky,[24] and conversely for taking what other plaintiffs' lawyers deem an overly cautious approach.[25] Plaintiffs' approach would place fiduciaries in a Catch-22 where they are sued for

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[21] *Compare* First Am. Compl. ¶¶ 68-71, *Miguel v. Salesforce.com*, 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.

[22] *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").

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

[24] *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*, 712 F.3d at 711.

[25] *See Brown v. Am. Life Holdings*, 190 F.3d 856, 859-60 (8th Cir. 1999) (assuming without deciding that "the fiduciary duty of prudent diversification can be breached by maintaining an investment portfolio that is *too safe and conservative*"); Compl., *Barchock v. CVS Health*, No. 1:16-cv-00061-ML-PAS (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached duty of prudence by investing portions of plan's stable value fund in conservative money market funds and cash management accounts).

including non-publicly traded investments in their plans and then sued for choosing *not* to include those same investments.

As one recent example, take collective investment trusts (CITs). CITs are "institutional investment vehicles" that are "only accessible to certain types of investors, including participants in employer-sponsored retirement plans." T. Rowe Price Participant Insights, *Collective Investment Trusts* (2021).[26] These trusts "are managed by banks or trust companies that 'pool' retirement plan assets into a single portfolio that is invested with a specified investment philosophy and strategy" and "may invest in a wide range of active or passive investment vehicles." *Id.* For over a decade, plaintiffs have targeted fiduciaries for offering mutual funds rather than the CIT versions of the same investment, because mutual funds commonly involve higher fees but offer similar performance to CITs. *See, e.g.*, *Davis v. Salesforce.com*, 2020 WL 5893405, at *6 (N.D. Cal. Oct. 5, 2020); *Tobias v. NVIDIA Corp.*, 2021 WL 4148706, at *9 (N.D. Cal. Sept. 13, 2021). Recently, however, plaintiffs have begun claiming the *exact opposite*—namely, that offering CITs instead of mutual funds is a categorical sign of imprudence because mutual funds offer much greater transparency regarding fees, performance, and investment terms than CITs do. *See, e.g.*, *Clark v. Centene Corp.*, No. 3:25-cv-09743 (N.D. Cal.); *Ventura v. Lithia Motors*, No. 2:26-cv-01786 (C.D. Cal.). As this example shows, neither choice should subject fiduciaries to a strike suit; CITs and mutual funds simply offer different trade-offs, and a reasonable fiduciary could prudently choose

[26] https://www.troweprice.com/content/dam/fai/Investments/CIT/CIT_Participant_Whitepaper.pdf.

either option depending on the needs of their plan and its participants.

This dynamic—with new and often contradictory circumstantial theories of imprudence emerging each year—has created an untenable situation for fiduciaries, whose jobs have become virtually impossible. It creates huge barriers for plan sponsors attempting to recruit individuals (like HR professionals) to serve as fiduciaries, knowing that at any time they could be sued—an event with very real consequences when trying to refinance a home mortgage, start a business, or apply for a child's college loan. *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at *1 (S.D.N.Y. Jan. 19, 2018) (fiduciaries named as defendants "will be required to list the lawsuit on every auto, mortgage or student financial aid application they file"). This Court too has recognized that fiduciaries may "find[] [themselves] between a rock and a hard place." *Dudenhoeffer*, 573 U.S. at 424.

The pressure created by these suits also undermines ERISA's focus on innovation, diversification, and employee choice. *See* pp. 5-7, *supra*. The more that specious complaints survive dismissal, the more a fiduciary might feel she has no choice but to offer, for example, only a "diversified suite of passive investments"—despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016).[27] Indeed, that is already happening. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset class choice by including specialty assets, such as industry-specific equity funds,

[27] https://www.cfo.com/news/passive-aggression/661627/.

commodities-based funds, and narrow-niche fixed income funds," "options [that] could potentially enhance expected returns in well-managed and monitored portfolios." George Mellman et al., *401(k) Lawsuits: What Are the Causes and Consequences?* 5, Ctr. for Ret. Res. (May 2018).[28] Now fiduciaries overwhelmingly choose purportedly "'safe' funds over those that could add greater value." *Id.* Fiduciaries should not be penalized for thinking strategically about the particular funds that may work best for their participants.

Finally, the pressure created by these lawsuits imposes enormous costs on plan sponsors. As *Twombly* recognized, 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 560. In ERISA cases, discovery is entirely asymmetrical and comes at an "ominous" price, easily running into the millions of dollars for a defendant faced with even weak claims. *PBGC*, 712 F.3d at 719; *see also* Chubb, *Excessive Litigation Over Excessive Plan Fees in 2023* at 3 (2023).[29] While discovery is "sometimes appropriate"—in cases plausibly pled without hindsight bias or speculation—the price of discovery (financial and otherwise) "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.'" *PBGC*, 712 F.3d at 719

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[28] https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.

[29] https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/excessive-litigation-over-excessive-plan-fees-infographic.pdf.

(quoting *Dura Pharm. v. Broudo*, 544 U.S. 336, 347 (2005)). With that increased burden comes a decreased likelihood that large employers will continue offering generous voluntary retirement benefits (such as generous employer contributions or funding retirement-plan services that employees prefer). And smaller employers with fewer resources may no longer feel comfortable taking the risk of exposure to litigation created by voluntarily sponsoring a retirement plan.

Neither ERISA nor the pleading standards articulated by this Court supports such a result. Both the district court and the Ninth Circuit carefully applied this Court's precedents by requiring plaintiffs to provide allegations that meet *Twombly*'s "plausibility standard." This standard cannot be satisfied by hindsight-based allegations untethered to any meaningful comparator, nor by categorical attacks on particular categories of investments—precisely as the district court and the Ninth Circuit recognized here.

CONCLUSION

This Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted.

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