No. 18-2569

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LAURA DIVANE, APRIL HUGHES, KATHERINE D. LANCASTER, and JASMINE WALKER,

Plaintiffs-Appellants,

v.

NORTHWESTERN UNIVERSITY, NORTHWESTERN UNIVERSITY RETIREMENT INVESTMENT COMMITTEE, PAMELA S. BEEMER, RONALD R. BRAEUTIGAM, and KATHLEEN HAGERTY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Civ. Action No. 1:16-cv-08157, Hon. Jorge L. Alonso

BRIEF FOR AARP, AARP FOUNDATION AND THE PENSION RIGHTS CENTER AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

DARA S. SMITH*
WILLIAM ALVARADO RIVERA
AARP FOUNDATION
601 E St. NW
Washington, DC 20049
202-434-6280
dsmith@aarp.org

KAREN W. FERGUSON
PENSION RIGHTS CENTER
1730 M Street, N.W.
Suite 1000
Washington, DC 20036
202-296-3776
kferguson@pensionrights.org

Attorneys for *Amici Curiae*
*Counsel of Record

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2569

Short Caption: Divane, et al v. Northwestern University, et al

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Dara S. Smith Date: January 22, 2019

Attorney's Printed Name: Dara S. Smith

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ______

Address: AARP Foundation Litigation, 601 E Street, N,.W., Washington, D.C. 20049

Phone Number: 202-434-6280 Fax Number: 202-434-6424

E-Mail Address: dsmith@aarp.org

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None

Attorney's Signature: s/ William Alvarado Rivera Date: January 22, 2019

Attorney's Printed Name: William Alvarado Rivera

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** XX

Address: AARP Foundation Litigation, 601 E Street, N,.W., Washington, D.C. 20049

Phone Number: 202-434-3392 Fax Number: 202-434-6424

E-Mail Address: warivera@aarp.org

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i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: s/ Karen W. Ferguson Date: January 22, 2019

Attorney's Printed Name: Karen W. Ferguson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** XX

Address: Pension Rights Center
1730 M Street, N.W., Suite 1000, Washington, D.C. 20036

Phone Number: 202-296-3776 Fax Number: 202-833-2472

E-Mail Address: kferguson@pensionrights.org

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STATEMENT OF INTEREST [1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation fight for the availability, security, and adequacy of public and private pensions and health, disability, and other employee benefits, including through participation as amici curiae in state and federal courts.

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of workers, retirees, and their families. The Center advocates for the interests of retirement plan participants and beneficiaries before Congress, administrative agencies, and the courts. Numerous laws, regulations, and court cases are traceable to Center

[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than Amici, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(a)(4)(E).

initiatives. As the nation's retirement landscape has shifted from employer-paid and employer-guaranteed traditional pensions to primarily employee-paid retirement savings arrangements where participants assume investment risks and responsibilities, judicial attention has increasingly focused on the obligations of plan fiduciaries to prudently select and monitor investment options. This scrutiny is critical if 401(k) and 403(b) plan participants are to obtain realistic returns, net of fees, on their contributions. The Pension Rights Center has testified before Congress and government agencies, and filed amicus curiae briefs, on the importance of ensuring that retirement savings plan investment and management fees are no higher than necessary, that they are fully disclosed, and that participants are offered appropriate investments that are periodically monitored. This case highlights the critical role played by participants in enforcing these all-important fiduciary requirements.

Amici submit this brief to address the district court's application of an incorrect and overly stringent pleading standard that imperils the effective enforcement of the Employee Retirement Income Security Act of 1974 ("ERISA"), 21 U.S.C. §§ 1001, et seq. ERISA establishes critical protections for participants in private, employer-sponsored employee benefit plans, including requirements that fiduciaries prudently choose investments and control costs in such plans. These

protections are a matter of vital concern to workers of all ages and to retirees especially, their economic security depending heavily on the performance of those investments.

SUMMARY OF THE ARGUMENT

When Congress drafted ERISA, it provided a private right of action for plan participants to hold plan fiduciaries liable for breaches. ERISA § 502(a); 29 U.S.C. § 1132(a). For a cause of action based on a breach of fiduciary duty, plaintiffs must show that defendants are plan fiduciaries, that defendants breached their fiduciary duties, and that plaintiffs were harmed as a result of the breach. *Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 465 (7th Cir. 2005).

At the pleading stage, "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior," in part because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016) (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, (8th Cir. 2009)). In this case, Plaintiffs pled not only known facts about Defendants' specific investment choices, but also numerous other facts "indirectly showing unlawful behavior," such as comparisons with the approach of similarly situated fiduciaries. However, the district court, disregarding this Court's directive, nevertheless agreed with

Defendants that Plaintiffs failed to state a claim because they had failed to allege sufficient facts "specific to the defendants and the plans in this case[,]" *see Divane v. Nw. Univ.*, No. 1:16-cv-08157, 2018 U.S. Dist. LEXIS 87645, at *5 (N.D. Ill. May 25, 2018). The missing facts would be details about Defendants' internal processes and methods solely in Defendants' possession, and that plaintiffs could not obtain without discovery.

Additionally, the district court misinterpreted *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011), construing its rulings far more broadly than the Court ever suggested was appropriate in that case. Although the Court in *Loomis* relied in part on participants' access to low-cost index funds as one rationale for rejecting the plaintiffs' claims in that case, nowhere did the Court state the district court's interpretation—that a fiduciary can escape liability for including a high-cost, poor-performing investment option in a plan as long as that plan offers at least one other appropriate choice. *Loomis* does not stand for this proposition, especially given that in that case, defendants had prudently monitored, selected funds, and educated plan participants. By contrast, the amended complaint in this case alleges a failure to monitor, select prudent investment options, and advise plan participants so they can choose the most prudent investment options for their circumstances. *See* Plaintiffs' Amended Complaint ("Am. Comp."), *Divane v. Northwestern University*, No. 1:16-cv-

08157 (N.D. Ill Dec. 12, 2016), ECF 38, ¶¶ 106, 131, 167, 183. The district court, citing *Loomis*, also improperly rejected out of hand plaintiffs' theory that the sheer number of options (over 200 in one plan) contributed to a breach of fiduciary duty.

Finally, allowing Plaintiffs to proceed furthers a key Congressional purpose in enacting ERISA: to protect plan participants from fiduciaries' abuses. ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The district court's overly-strict pleading standards appear to have been informed by the court's mistaken assumption that a central purpose of ERISA was to prevent litigation against employers. That was not the case, and pleading standards in ERISA cases should be construed broadly to effectuate Congress's remedial purpose and ensure ERISA's consistent enforcement.

ARGUMENT

I. THE DISTRICT COURT APPLIED AN OVERLY STRINGENT PLEADING STANDARD THAT UNDERMINES PRIVATE PLAINTIFFS' ENFORCEMENT OF THEIR RIGHTS UNDER ERISA.

A. The district court's pleading standard exceeds the standards set by Seventh Circuit precedent.

To successfully plead a breach of fiduciary duty claim under ERISA, plaintiffs must show that defendants are plan fiduciaries, that defendants breached their fiduciary duties, and that plaintiffs were harmed as a result of the breach. *Brosted*, 421 F.3d at 465. "It [was] enough to allege facts from which a factfinder could infer

that the process was inadequate." *Allen*, 835 F.3d at 678. A plaintiff need *not* plead specific facts about the breach, such as defendants' decision-making strategies. In *Allen v. GreatBanc Trust Company*, this Court held that the district court applied too stringent a pleading standard, erroneously "assum[ing] that the plaintiff was required to describe directly the ways in which appellees breached their fiduciary duties." *Id.* (citing *Braden*, 588 F.3d at 595). The district court in this case made a similar mistake, apparently embracing Defendants' view that Plaintiffs had to plead specific information regarding the processes and methods fiduciaries used to arrive at the challenged decision. *See* Defendant's Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint, Complaint (hereinafter, "Defs'. Mot. to Dis. Am. Comp."), *Divane v. Northwestern University,* No. 1:16-cv-08157 (N.D. Ill Nov. 7, 2016), ECF 27 at 13. Under this Court's precedent, no such specifics are required; "[r]ather, it is 'sufficient for a plaintiff to plead facts indirectly showing unlawful behavior.'" *Allen,* 835 F.3d at 678 (citing *Braden,* 588 F.3d at 595).

To satisfy this standard, Plaintiffs may "allege facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718 (2d Cir. 2013) (citing *Gray v. Citigroup Inc. (In re Citigroup ERISA Litig.),* 662 F.3d 128, 141 (2d Cir. 2011)). This is sufficient "even

absent any well-pleaded factual allegations relating directly to the methods employed by the ERISA fiduciary[.]" *Pension Benefit Guar. Corp.*, 712 F.3d at 718. This pleading standard enables plan participants who have been injured as a result of a breach of fiduciary duty to fulfill ERISA's remedial purpose (*see infra*, Part III), while still requiring that they provide more than "mere conclusory statements." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs' Amended Complaint clears this relatively low bar because it alleges facts that, if proved, would show that a reasonable fiduciary would have made different decisions. For example, Plaintiffs allege that, by entering into the bundled arrangement that required the plan to include the TIAA-CREF Stock Account and use TIAA as record keeper, Defendants locked Plaintiffs into funds that Defendants did not even analyze. *See* Am. Comp. ¶ 131. "Because Defendants allowed CREF Stock to be locked into the Plans, Defendant could not satisfy its duty to evaluate the option for inclusion and retention in the Plans, whether it was prudent at the time of inclusion and whether it should be removed if imprudent." *Id.* These allegations clearly state a claim that a reasonable fiduciary would have performed this investigation and assessed the arrangement before including it simply because it was part of a bundle.

Plaintiffs further allege that "Defendants retained multiple investment options in each asset class and investment style until October 2016, thereby depriving the Plans of their ability to qualify for lower cost share classes of certain investments, while violating the well-known principle for fiduciaries that such a high number of investment options causes participant confusion and inaction." *Id.* at ¶ 266. The reason this theory of breach is viable is discussed below (*see infra*, Part II.B-C), but at the very least, the sufficiency of its detail is unassailable under the proper pleading standard. Given the information available to Plaintiffs at the pleading stage, Plaintiffs provided ample information to survive a motion to dismiss. *See also, id.* ¶¶ 187, 235, 249, 250, 251, 267.

B. Plaintiffs cannot be required to plead facts unattainable to private litigants at the pleading stage, particularly when information is held exclusively by defendants.

The district court dismissively characterized the pleadings in this case as merely stating "plaintiffs' opinions both on ERISA law and on a proper long-term investment strategy for average people who lack the time to select either individual stocks or actively-managed mutual funds." *Divane,* 2018 U.S. Dist. LEXIS 87645, at *5. To survive dismissal under the district court's pleading standard, Plaintiffs would have had to plead information other than the fee ranges and available alternative investment products, that is nonetheless "specific to the defendants and

the plans in this case[,]" such as the processes and methods that fiduciaries used to arrive at the challenged decision. *Id.* As in *Braden*, this is information typically "kept secret" and that Plaintiffs "could not possibly show at this stage in the litigation." 588 F.3d at 602.[2] "It would be perverse to require plaintiffs bringing [such claims] to plead facts that remain in the sole control of the parties who stand accused of wrongdoing." *Id.*

In place of pleading the specific decisions of Defendants that led to Plaintiffs' injury, Plaintiffs pled various means by which the Plan *could have* performed better and could have had lower fees, demonstrating that all were possible under the circumstances. *See, ex.* Am. Comp. ¶ 109 ("in contrast with the comprehensive plan reviews conducted by the similarly situated fiduciaries described [in ¶¶ 45-79] Defendants failed to adequately engage in a similar analysis."); *see also* ¶¶ 148-152, 154, 183-184, 208, 214-215. This type of pleading provided in Plaintiff's Complaint should survive a motion to dismiss because it alleges facts that, if proved, show that prudent fiduciaries would have made alternative decisions.

---

[2] Through the course of discovery, pending the district court's decision on the motion to dismiss, Plaintiffs were able to discover information regarding Defendants' decision-making processes, which display a failure to assess the investment option at issue. This is the type of information Plaintiffs assert was unavailable and should not have been required at the pleading stage.

Concluding that this is insufficient because Plaintiffs should have described facts they could not possibly have known in advance of discovery would make private enforcement—a critical mechanism to ensuring ERISA's vitality—infeasible. That is the practical result of the district court's decision, and it should be corrected.

II. THE DISTRICT COURT WRONGLY INTERPRETED THIS COURT'S OPINION IN *LOOMIS* AS CATEGORICALLY FORECLOSING PLAINTIFFS' CLAIMS.

The district court incorrectly interpreted and applied *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011), by: (1) treating a range of expense ratios as *per* se reasonable, regardless of current market conditions, available alternative options, and other circumstances; (2) excusing fiduciaries from liability for problems with any given investment product so long as at least one prudent options for plaintiffs was also available; and (3) implicitly foreclosing all claims that a plan offered an overwhelming, unmanageable number of options without sufficient education, selectivity, and monitoring. These incorrect interpretations shut the door on many potentially meritorious claims.

A. No specific expense ratio is reasonable as a matter of law in all cases because reasonableness must be assessed in light of the market and comparable products at the particular time.

The district court incorrectly concluded that a particular expense ratio—one that was within the total fee range at issue in *Loomis*, where the Court found no

evidence of breach[3]—is, as a matter of law, reasonable *in every case*. But *Loomis* did not purport to create a fixed range of reasonable fees for all time, in all circumstances. Rather, "set against the backdrop of market competition" at the time, *Loomis* determined that the fees related to the funds in question were not so unreasonably high as to signify a breach in and of themselves. *Loomis*, 658 F.3d at 670; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition."). Applying the fee range from *Loomis* in a vacuum, and without considering other factual circumstances, is inappropriate.

Here, Plaintiffs' Amended Complaint provided the contemporaneous "backdrop of market competition" against which the district court should have analyzed the fees. *See Loomis* 658 F.3d at 670. Plaintiffs provided the dollar values of the fees at issue—as high as $4.1 million paid per year for the Retirement Plan and $900,000 for the Voluntary Savings Plan—in comparison to the market rate of both plans *combined*, which was $1.05 million per year. Plaintiffs' Memorandum in

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[3] Plaintiffs' Opening Brief explains the district court's analysis of *Loomis* and the fee ranges at issue in further detail. Pl. Opening Br. at 26-27. Notably, Amici agree with Plaintiffs that this comparison would be inapt even if comparing the ranges directly were otherwise appropriate—in comparing total fees to recordkeeping fees alone, the district court compared apples to oranges.

Opposition to Defendants' Motion to Dismiss Amendment Complaint, (hereinafter Pls.' Opp. to Mot. to Dis. Am. Comp."), ECF 66 at 16. The district court should have taken into account the vast difference between the market rate for recordkeeping fees and the fees paid by these funds.

Moreover, unlike *Loomis*, Plaintiffs in this case alleged that Defendants breached their fiduciary duty by failing to monitor investment options—another theory of breach entirely. For example, the Amended Complaint alleges that the fiduciaries failed to calculate how much TIAA received in revenue sharing and direct payments. Am. Comp. ¶ 248. As Plaintiffs correctly point out in their opposition to Defendants' motion to dismiss, without this information, plan administrators could not determine if the recordkeeping fee was reasonable. Pls. Opp. to Mot. to Dis. Am. Comp., at 16. This Court's precedent does not create a blanket rule that would require courts to ignore these circumstances and find no breach whenever the products offered fall within a fixed range of expense ratios.

B. *Loomis* does not suggest that fiduciaries bear no liability for deficiencies in investment products so long as participants chose those products, and the Plan offered at least one prudent option.

Defendants in this case have argued that, because Plaintiffs themselves chose to invest in the TIAA-CREF Stock Account, the assets were in the participants' control, and fiduciaries bore no responsibility for them. *See* ERISA § 404(c), 29

U.S.C. § 1104(c) (exception to strict fiduciary standards where participant or beneficiary controls the assets). The district court endorsed this view, emphasizing that "no one was required to choose" the TIAA-CREF Stock Account or to keep TIAA-CREF as record keeper. *Divane*, 2018 U.S. Dist. LEXIS 87645, at *20. So, the district court concluded, the decision to invest in this account was at the discretion of the plan participants, which absolved plan administrators of any further duties or liability.

This interpretation of *Loomis* would provide fiduciaries with a virtual free pass to include as investment options any and all funds that cross their desks. So long as the Plan offered *any* investment option that would have been beneficial for the participants, it would not matter if all of the other options (including those that participants chose) were undisputedly bad investments—there could be no breach of fiduciary duty. This is not, and cannot be, *Loomis*'s holding. Not only would it eviscerate a fundamental remedial purpose of ERISA—protecting employees' retirement benefits (*see infra,* Part III)—but also, it would be inconsistent with the important duty-to-monitor standard the Supreme Court established in *Tibble v. Edison International.* 135 S. Ct. 1823, 1829 (2015) ("the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones").

Rather, the *Loomis* decision held that, under the circumstances where plan administrators *did* appropriately monitor investment products and advise plan participants regarding the most advantageous investment option for them, they did not breach their fiduciary duty:

> Nor is it an argument that Exelon has left participants adrift and apt to blunder into the high-expense funds when they would be better off with the low-expense funds . . .Both Exelon and the funds distribute literature and hold seminars for the participants, educating them about how the funds differ and how to identify the low-expense vehicles.

Loomis, 658 F.3d at 671.

Here, in contrast to *Loomis*, Plaintiffs alleged that plan fiduciaries failed to give adequate advice to plan participants, included underperforming products, and failed to negotiate for better ones, in part because so many investment options were offered that plan administrators could not possibly have monitored and advised about each one properly. Am. Comp. ¶¶ 106, 131, 167, 183.

Loomis, contrary to the district court's opinion, also did not view it as "paternalistic" to impose on fiduciaries a duty beyond merely offering a range of low- to high-risk options. True, the *Loomis* court expressed distaste for plaintiffs' claims that plan administrators should offer only "captive funds" (*e.g.*, funds tailored specifically to employees). *See Divane*, 2018 U.S. Dist. LEXIS 87645, at *21 (quoting

Loomis 658 F.3d at 673-4). However, in *Loomis*, unlike here, there was "no question" that the defendants were also monitoring each of the investment options they offered to ensure that none were imprudent. *Loomis*, 658 F.3d at 671. Defendants were also providing advice by distributing literature, holding seminars, and informing plan participants about the performance of their investments so that they could individually make the best investment for themselves—among a group of prudent options. *Id*. The Court did not indicate that plan administrators who weed out bad investment options are acting beyond what Congress intended when it established the fiduciary duty under ERISA; in fact, the Court was reassured that the administrators *were* performing these functions as required. *Id.* Consistent with that approach, even post-*Loomis*, plan fiduciaries continue to have a duty to plan participants to monitor all investment options and to remove poorly performing and unreasonably high fee options when it is prudent to do so.

The district court, to illustrate the disadvantages of restricted choice, cites Warrant Buffet's advice to the public to invest in low-cost index funds, while choosing the higher-cost managed-investments approach for himself. *See Divane*, 2018 U.S. Dist. LEXIS 87645, at *21. ("Warren Buffet, who has (famously) planned for his wife's money to be invested in low-cost index funds after death has (also famously) become one of the world's most-successful investors by choosing

individual stocks that are undervalued[.]") However, the fact that some participants may prefer more high-risk, high-reward options does not absolve plan administrators of their duty to evaluate and monitor the quality of those investment options they select, whether low-risk or high-risk. Nor does it absolve fiduciaries of their responsibility to advise participants, who generally have far less financial acumen than Warren Buffet, about the advantages and disadvantages of the various options among those selected. The Court's precedent cannot reasonably be read to give fiduciaries this sort of free pass.

C. Plaintiffs should have the opportunity to prove a theory of breach that offering an excessive number of options may hamper fiduciaries' ability to properly select and monitor such investments and educate participants on their risks and rewards and may decrease many investors' ability to choose the best investment.

Though the district court feared discouraging fiduciaries from offering *enough* options, a separate problem arises when plans offer too *many* options. One plan at issue offered over 200 options, imposing facially obvious burdens of proper evaluation and monitoring. As discussed below, behavioral science also suggests a further factor that courts may properly take into consideration--that offering an excessive number of options can also hamper investor decision-making. Of course, this is not to suggest a bright-line rule in which a specific number of investment options is inherently too many. Rather, given ERISA's remedial purpose (*see infra*,

Part III), courts should afford plaintiffs an opportunity to prove that offering an excessive number of investment options in certain circumstances can contribute to fiduciary breach.

Indeed, empirical studies support the conclusion that such claims could, in appropriate circumstances, be well-founded. Many behavioral economics studies, including some in the context of employee benefit funds, have concluded that when people are given too many options, they simply freeze up and make no choice at all. Richard H. Thaler and Shlomo Benartzi, "The Behavioral Economics of Retirement Savings Behavior," AARP, January 2007, at v (hereinafter, "Thaler and Benartzi");[4] John Turner, "Designing 401(K) Plans That Encourage Retirement Savings: Lessons from Behavioral Finance," AARP Public Policy Institute, March 2006, at 6 ("One study [found] a negative correlation between the number of investment options offered in the plan and participation rates.").[5] When plans offer more investment options, a higher rate of prospective participants choose not to participate. *Id.*

When employees are already plan participants, and, thus, they *must* make decisions, bad choices may be more common when the plan offers more investment options. One study found that when the plan offers multiple options, participants

[4] https://assets.aarp.org/rgcenter/econ/2007_02_savings.pdf.
[5] https://assets.aarp.org/rgcenter/econ/ib80_pension.pdf.

most often take the "buffet" approach,[6] investing some of their money into each option. This approach has diminishing returns as the number of options increase. Thaler and Benartzi at 7; *see also id.* (in the 401(k) context, there is "a positive correlation between the fraction of equity funds offered and the resulting allocation to equities for plans that offer up to 10 investment choices, but the correlation is no longer significant in plans with more than 10 funds."). Additionally, when a plan offers too many investment options for participants to consider or understand fully, "human inertia often causes [workers] never to revisit their choices. Often time, their portfolios can end up being heavily weighted in riskier stocks, putting their nest egg in jeopardy." Gary Koenig, "You Just Need a Little Nudge," AARP.[7]

Providing information to plan participants may not effectively ameliorate this problem. "Many employers have tried to educate their employees to make better decisions or supplied tools to help them improve their choices. The empirical evidence does not suggest that this can solve the problems [] raised." Thaler and Benartzi at 20. Even with appropriate monitoring and education, when plan participants face an overwhelming number of investment options, they still make

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[6] Thaler and Benartzi provide the relatable experience of a buffet dinner, where if the number of choices is small, patrons "take a little bit of each item," but when the number of options gets large, people have to devise other simplifying strategies, "such as to take one item from each category." Thaler and Benartzi at 7.

[7] https://www.aarp.org/money/investing/info-2017/behavioral-economics.htm.

bad investment decisions. With this information on the behavioral science of decision making in the ERISA context, plan fiduciaries, as part of their duties owed to plan participants should be encouraged to take into consideration the likelihood that participants will be unable to make sound decisions when too many options are offered to them.

Again, this is not to suggest a bright-line rule in which a specific number of investment options is inherently too many. Plaintiffs alleging a breach of fiduciary duty based on a "too many options" theory would still be required to prove that under the circumstances, the number of options made it too difficult or impossible for participants to choose effectively—either because the funds were impossible to monitor properly, were chosen injudiciously, or were so numerous that participants simply could not make a meaningfully informed choice. Still, they should have a chance to prove such a claim, and *Loomis* does not foreclose that path.

III. ALLOWING PLAINTIFFS TO PROCEED PROMOTES ERISA'S CORE PURPOSE: TO PROTECT PLAN PARTICIPANTS FROM ADMINISTRATORS' FAILURE TO PERFORM THEIR FIDUCIARY DUTIES.

The district court, though recognizing that one purpose of ERISA was to protect retirees, appeared to give undue weight to a secondary consideration: "Congress's hope that litigation would not discourage employers from offering plans." *Divane*, 2018 U.S. Dist. LEXIS 87645, at *38. Though Congress surely tried

to craft a statute that would not encourage frivolous litigation, it did not enact ERISA to limit litigation. Rather, ERISA's purpose is to protect plan participants' retirement security. ERISA § 2(b), 29 U.S.C. § 1001(b). This remedial purpose requires broad construction, including realistic, attainable pleading requirements.

A. Congress created ERISA's fiduciary duty to protect participants' retirement security.

Congress crafted ERISA's fiduciary duty standard to protect participants' savings from abuses by fiduciaries. ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw*, 463 U.S. at 90 ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) ("ERISA's fiduciary standards 'will prevent abuses of the special responsibilities borne by those dealing with plans.'"). Prior to ERISA, no federal standards required benefit plans, or the people administering them, to pay promised benefits to plan participants. *See, e.g.*, Jeffrey Lewis, et al., EMPLOYEE BENEFITS LAW xcix-ci (4th ed. 2012). As a reaction to events such as the Studebaker Motor Company's plant closure, the sale of P. Ballantine and Sons,[8] the trial of Jimmy Hoffa, and other instances of kickbacks, embezzlement, and mismanagement discovered in other benefit plans, Congress wanted to "make as

[8] In both instances, pension plans were terminated with insufficient assets, leaving many employees with little or no pension.

certain as possible that pension fund assets would be adequate" to meet expected benefits payments by requiring that fiduciaries act in the best interests of participants. *Nachman Corp. v. Pension Benefit Guar. Corp.,* 446 U.S. 359, 374 n.22, 375 (1980) (quoting 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 1599-1600 (1976)); James A. Wooten, Symposium, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. 683, 694-695 (2001). As such, the primary purpose of ERISA and the fiduciary standard is to protect employees' assets. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("ERISA protects employee pensions and other benefits by . . . setting forth certain general fiduciary duties applicable to the management of both pension and non-pension benefit plans.").

In short, it is well settled that one of ERISA's core purposes is to remedy participants' injuries resulting from a breach of duty by plan fiduciaries. *See, e.g., LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir. 1997) ("As this Court has recognized, Congress intended ERISA's definition of fiduciary 'to be broadly construed.'"); *see also Cefalu v. B.F. Goodrich Co*., 871 F.2d 1290, 1294 (5th Cir. 1989); *Farrell v. Auto. Club of Mich*., 870 F.2d 1129, 1134 (6th Cir. 1989); *Jackson v. Martin Marietta Corp*., 805 F.2d 1498, 1499 (11th Cir. 1986); *Belland v. Pension Ben. Guar. Corp*., 726 F.2d 839, 848 (D.C. Cir. 1984). Acknowledging Congress's purpose, this Court

explained in *Kross v. W. Elec. Co., Inc.* that "ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants." 701 F.2d 1238, 1242 (7th Cir. 1983).

B. ERISA's fiduciary duties are more important than ever because defined contribution plans are constantly increasing, and participants rely heavily on the quality of their investments.

Defined *contribution* plans like the plan at issue here—where employees choose investment options and are at market risk—differ significantly from the defined *benefits* plans more common in past decades, in part because they involve a fundamental reallocation of investment risk. *LaRue v. DeWolff, Boberg & Assocs., Inc*. 552 U.S. 248, 255 n.5 (2008). With the increasing number of defined contribution plans, more plan participants bear the risk associated with the performance of the funds in which their money is invested. *See* Edward A. Zelinsky, "The Defined Contribution Paradigm," 114 YALE L.J. 451, 453 (2004) ("The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee[.]"). Although employee benefit funds may have an accumulation of money sometimes into the millions of dollars, individual accounts are modest, and plan participants rely on them greatly.

The quality of performance hugely affects the benefits that participants receive upon retirement. *Tibble*, 135 S. Ct. at 1826.

Plan participants contribute portions of their own salaries to the plans to provide for their futures. They rely heavily on plan administrators to ensure that their money remains safe and secure, and that their plans will be able to provide for them upon retirement, and they entrust their money to plan fiduciaries based on the assumption that fiduciaries are administering the plans prudently and solely in the participants' best interest. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Although the funds themselves might have large sums of money, individuals often rely on their fractions of plan assets as one of their primary sources of income during retirement.

The move toward defined contribution plans makes the focus on Congress's true purpose even more critical because of the increased risk to plan participants, whom ERISA was intended to protect. A reasonable, realistic pleading standard is consistent with Congress's intent to hold plan fiduciaries liable for their failure to monitor and educate the plan participants about the best investment options for them, even when participants do not know all the details of the fiduciaries' actions when they bring suit.

C. ERISA relies on plan participant enforcement, and, thus, claims such as Plaintiffs' are vital to the successful enforcement of ERISA.

Congress gave civil enforcement rights to the Secretary of Labor, plan participants, beneficiaries, and plan fiduciaries. ERISA § 502(a); 29 U.S.C. § 1132(a). Section 502 is the only civil enforcement provision focused on fiduciary obligations related to the financial integrity of benefit plans; thus, these four parties are the only ones able to enforce ERISA. *Varity Corp.*, 516 U.S. at 512; *see also* S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms).

Congress gave private litigants the same enforcement rights as the Department of Labor. *See* ERISA § 502(a); 29 U.S.C. § 1132(a). Congress's creation of these enforcement rights expressed its intent to enable plan participants, as private litigants, to bring cases against fiduciaries who have breached their duties to the same extent that the Department of Labor might bring such an action. *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5037,

5107. That is sensible because no one can police a plan as diligently as its participants.

Heightened pleading standards like those used by the district court would curtail private litigants, who lack the government's investigatory tools and cannot plead proprietary facts in a complaint, from bringing meritorious cases. Not only is that result legally incorrect, but also, it is also problematic from a practical enforcement standpoint. The Department of Labor has consistently had inadequate resources to police the retirement system. *See*, e.g., U.S. Dep't of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992); U.S. Gen. Accounting Office, 4 GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION – OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. Gov't Accountability Office, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION – ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 10, 28 (2007); *see also,* Karen L. Handorf and Daniel R. Sutter, *Watch These ERISA Cases in 2019*, Cohen Milstein, (Jan. 1, 2019).[9]

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[9] https://www.cohenmilstein.com/update/%E2%80%9Cwatch-these-erisa-cases-2019%E2%80%9D-law360.

Thus, for ERISA to be enforced as Congress intended, plan participants must have a navigable path to file breach of fiduciary claims, given the sometimes limited information to which they are privy. *See Jander v. Retirement Plans Comm. of IBM*, 910 F.3d 620, 624 (2d Cir. 2018) (noting private actions by beneficiaries are "important mechanisms for furthering ERISA's remedial purpose."); *Braden*, 588 F.3d at 597 n.8 ("The Secretary of Labor, who is charged with enforcing ERISA . . . depends in part on private litigation to ensure compliance with the statute. To that end, the Secretary has expressed concern over the erection of 'unnecessarily high pleading standards' in ERISA cases."); Preventing plan participants from enforcing their rights under ERISA due to a failure to plead facts unattainable to them, and solely in the possession of plan fiduciaries, undermines Congress's intent when it passed ERISA and will hinder the overall enforcement of ERISA, thereby further increasing the risk that individual workers face when entrusting plan administrators with their savings.

CONCLUSION

For the forgoing reasons, the Court should reverse the district court's decision and remand to give Plaintiffs an opportunity to prove their case.

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Respectfully Submitted,

/s/ Dara S. Smith
Dara S. Smith
William Alvarado Rivera
AARP Foundation
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2060
dsmith@aarp.org

Karen W. Ferguson
Pension Rights Center
1730 M Street, N.W.
Suite 1000
Washington, DC 20036
Tel. (202) 296-3776
kferguson@pensionrights.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,352 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font.

Dated: January 22, 2019

/s/ Dara S. Smith
Dara S. Smith
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing Brief for Amici Curiae AARP and AARP Foundation Supporting Appellants with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Dara S. Smith
Dara S. Smith