No. 16-1293

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Appellant,

v.

RJR PENSION INVESTMENT COMMITTEE; RJR EMPLOYEE BENEFITS COMMITTEE; R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY,

Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina
Hon. N. Carlton Tilley, Jr.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* SUPPORTING APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

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No. 16-1293 Caption: Tatum v. RJR Pension Investment Committee, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William M. Jay Date: August 15, 2016

Counsel for: Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

****

I certify that on August 15, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ William M. Jay
(signature)

August 15, 2016
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1293 Caption: Tatum v. RJR Pension Investment Committee, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Benefits Council
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** (the Chamber) is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its members include many employers that offer ERISA-governed benefit plans to their employees, as well as insurers who fund and/or administer such plans. An important function of the Chamber is to represent the interests of the business community in matters before Congress, the Executive Branch, and the courts, raising issues of national concern to its members.

The **American Benefits Council** (the Council) is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

Each organization regularly participates as *amicus curiae* in this Court and in other courts on issues that affect employee benefit plan design or administration, including *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016), and *Bond v. Marriott International, Inc.*, 637 F. App'x 726 (4th Cir. 2016). They have previously participated in this dispute as *amici curiae*, both before this Court and before the Supreme Court of the United States.

Members of the Chamber and the Council are among the plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, an employee-benefits system that is not "so complex that administrative costs, or litigation expenses," unduly burden corporate sponsors. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted). A key element of that carefully balanced system is the provision in 29 U.S.C. § 1109(a) making a fiduciary liable for losses to an ERISA plan *only* to the extent those losses "result[ed] from" the fiduciary's own "breach" of duty—*i.e.*, if the fiduciary made an "objectively imprudent" decision. *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011). But when this case was last on

appeal, this Court held that plaintiffs may recover damages from fiduciaries without satisfying this loss causation requirement, even for "objectively prudent" decisions—decisions that a prudent fiduciary could have made. That rule is just the type of rule that "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Thus, plan sponsors and plan fiduciaries alike, including members of the Chamber and the Council, have a strong interest in explaining why this Court's previous treatment of this issue is inconsistent with ERISA and with the Supreme Court's most recent holdings on the subject in *Dudenhoeffer* and *Amgen*.

Amici's interest is heightened by the fact that ERISA was adopted to create a *uniform* federal system of rights and obligations, sparing nationwide and multistate employers (including many Chamber and Council members) the unnecessary administrative cost of complying with many different legal regimes. Congress's goal is undermined when the law varies from circuit to circuit. Chamber and Council members thus have an interest in explaining why the loss causation standard previously applied in this Circuit is inconsistent with not only the Supreme Court's interpretation, but also the standard applied by other circuits.

INTRODUCTION

ERISA makes fiduciaries liable *only* for losses that actually "result[] from" a breach of fiduciary duty. 29 U.S.C. § 1109(a). Congress adopted that limitation because, as in court, some errors are harmless. The Supreme Court has now made clear in two decisions that a mere possibility of harm is not enough: a fiduciary's procedural error results in no harm when the fiduciary's substantive decision is objectively prudent, such that the fiduciary could have made the same decision irrespective of any procedural mistakes. Under those circumstances, the decision does not result from the error, and neither do any losses.

Two years ago, this Court unnecessarily limited the earlier of those Supreme Court decisions (*Dudenhoeffer*) in a footnote, deeming it applicable only to ERISA claims involving a fiduciary's failure to act on "insider information." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 364 n.14 (4th Cir. 2014) ("*Tatum IV*"). Since then, in *Amgen* the Supreme Court has refuted any notion that *Dudenhoeffer* was so limited. Summarily reversing another court of appeals for disregarding *Dudenhoeffer*, the Court made clear that *Dudenhoeffer* "set forth the standards for stating a claim for breach of the duty of prudence" across the board, not just in insider-information cases. 136 S. Ct. at 758.

Amgen makes clear that this Court's basis for distinguishing *Dudenhoeffer*

was misplaced, and these two Supreme Court cases together make clear that the standard of loss causation this Court previously applied was mistaken. This Court held that an ERISA defendant, to demonstrate that her decision was "objectively prudent," must prove that a prudent fiduciary "would have" made the exact same investment decision. The Supreme Court read the statute differently, and for good reason: this Court's interpretation would essentially read the loss-causation requirement out of the statute.

Because there are numerous reasonable ways to administer an ERISA plan, many binary decisions—such as whether to offer higher-cost investments that pay revenue sharing and thus defray plan administrative costs, or lower-cost investments that do not pay revenue sharing and thus necessitate administrative expenses to be paid from participants' individual accounts—may essentially be a coin toss: of 100 prudent fiduciaries, 50 would choose the lower-cost share classes and 50 would choose the higher-cost share classes. Under the *Tatum IV* standard, a fiduciary that employed an inadequate decision-making process could be liable no matter which share class she selected, even though both decisions were objectively prudent.

And the vast majority of decisions that fiduciaries make are not binary. For such multi-faceted decisions—such as which investment options to offer under a plan (among thousands available) or which service providers to hire for investment

management, recordkeeping, or accounting services—it is virtually impossible to show that a fiduciary "would have" made the same decision *rather than chosen another of the many prudent options available*.

Reading ERISA in a way that effectively abolishes the loss-causation element also encourages the filing of actions after virtually *any* change in the stock market, and it significantly raises the cost of administering an ERISA plan. This result is not what Congress intended in seeking "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted) (second alteration in original).

This Court should follow the standard set by the Supreme Court and other courts of appeals: it should affirm based on the district court's unchallenged finding that the decision the defendants made—to divest an undiversified single-stock fund—was one that a prudent fiduciary could have made.

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE SUPREME COURT'S "COULD HAVE" STANDARD FOR BREACH OF THE DUTY OF PRUDENCE.

The Supreme Court has expressly stated a rule of decision that resolves this case: when analyzing a claim that an ERISA fiduciary breached the duty of prudence in deciding not to divest company stock, the question is "whether . . . a

prudent fiduciary in the defendant's position *could not have concluded* that [an alternative investment decision] would do more harm than good." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2473 (2014) (emphasis added). In other words, if a fiduciary using a prudent decision-making process "could have" decided that the defendant's investment decision was a prudent one, then the defendant cannot be liable for breach of the duty of prudence under ERISA.

A divided panel of this Court previously declined to follow *Dudenhoeffer*, essentially limiting it to its facts, and instead adopted a diametrically opposite rule. Instead of asking whether a prudent fiduciary could have made the same decision the defendants made, it asked whether a prudent fiduciary could have made a *different* decision. The panel held that the fiduciary escapes loss causation only if it can show that it "*would have* . . . reached the same decision had it undertaken a proper investigation," and "at the time and in the manner" that the defendant did. *Tatum IV*, 761 F.3d at 364, 368. That inverts what the Supreme Court said and puts the burden of uncertainty squarely on the fiduciary.

Thus, a fiduciary faced with a challenge to her decision to invest in a particular mutual fund would have to show that at least 51% of fiduciaries would have chosen that same fund after a prudent investigation into the funds available on the market. An expert's testimony that the choice was reasonable under accepted fiduciary standards would not do; the expert would have to testify that she would

have made the same choice herself. In other words, under the *Tatum IV* standard the defendant would lose even though her choice of a mutual fund was objectively prudent, simply because others might have made other choices that were *also* prudent.

As explained below, the Supreme Court and other courts of appeals have since rejected not only this Court's narrow reading of *Dudenhoeffer*, but also the drastic and misguided rule that this Court adopted instead. This Court should follow those subsequent decisions and re-align itself with the standard employed by the Supreme Court and the other courts of appeals.

A. This Court Is No Longer Bound by *Tatum IV*, And The Supreme Court's "Could Have" Standard Now Controls.

Just a month before this Court issued the divided panel opinion in *Tatum IV* (and three months after this Court heard oral argument), the Supreme Court decided *Dudenhoeffer*. The Court directed lower courts to apply a "could have" standard in assessing a claim that a fiduciary breached ERISA's duty of prudence. 134 S. Ct. at 2462. While this Court briefly distinguished *Dudenhoeffer* in a footnote, a subsequent Supreme Court decision shows that distinction is no longer tenable.

In *Dudenhoeffer*, the Court considered a claim that the fiduciary of an "employee stock ownership plan" (ESOP) breached the duty of prudence by investing in the company's own stock. The plaintiff contended that the fiduciary

should have known, from public and nonpublic information, that the stock was overvalued. *Id.* at 2464.[2] Several circuit courts had applied a "presumption of prudence" to ESOP fiduciaries, and the Supreme Court rejected that presumption, holding that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that," by statute, "an ESOP fiduciary is under no duty to diversify the ESOP's holdings." *Id.* at 2467.

The Court went on to explain how that across-the-board standard of prudence should be applied. It held that "lower courts faced with such claims"—claims that a fiduciary should have done something different and thus breached the duty of prudence—"should . . . consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not have* concluded that [the alternative course of action] would do more harm than good to the fund." *Id.* at 2472-73 (emphasis added). Thus, if a prudent fiduciary "could have" rejected the plaintiff's preferred alternative decision and made the same investment decision as the defendant, then the plaintiff does not have a claim for breach of the duty of prudence.

The *Tatum IV* panel considered *Dudenhoeffer* and acknowledged its use of

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[2] Of note, even the plaintiffs in *Dudenhoeffer* presupposed that a fiduciary could have addressed that overvaluation in any of several different ways. *See* 134 S. Ct. at 2464 ("The complaint . . . alleges that a prudent fiduciary in petitioners' position would have responded to this information *in one or more of the following [4] ways*." (emphasis added)).

the "could have" standard, but it held that that standard governed only allegations "that a fiduciary failed to act on *insider information*." 761 F.3d at 366 n.14. On that basis the panel held that *Dudenhoeffer*'s adoption of the "could have" standard "does not cast doubt on our instruction that a 'would have' standard applies to determine loss causation *after* a fiduciary breach has been established." *Id.*

The Supreme Court has since removed that basis for distinguishing *Dudenhoeffer*. In *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016), the Supreme Court considered another claim for breach of ERISA's duty of prudence, this time based on a fiduciary's decision to keep a company stock fund on the list of investment options, notwithstanding information that federal law *required* to be publicly disclosed and that (the plaintiffs contended) affected the stock price. *Harris v. Amgen, Inc.*, 788 F.3d 916, 937 (9th Cir. 2014), *rev'd*, 136 S. Ct. 758 (2016). Contrary to the *Tatum IV* panel's assumption, the Court made clear that *Dudenhoeffer* "set forth the standards for stating a claim for breach of the duty of prudence" more generally and that the *Dudenhoeffer* standard was "fully applicable" to the different set of facts at issue in *Amgen*. 136 S. Ct. at 758.[3]

[3] To be sure, both *Dudenhoeffer* and *Amgen* involved plans' investments in company stock, whereas the plan at issue in this case involved single-company stock that no longer qualified as an ESOP investment. But that distinction is irrelevant given the Court's holding in *Dudenhoeffer* that "the same standard of prudence applies to all ERISA fiduciaries" with the narrow exception of the subsidiary duty to diversify. 134 S. Ct. at 2467.

Following *Dudenhoeffer*, the Court in *Amgen* squarely rejected a prudence standard akin to the "would have" standard that the *Tatum IV* panel adopted. The Ninth Circuit previously held that the plaintiffs pleaded a claim for breach of the duty of prudence because it was "quite plausible . . . that defendants could remove the Fund from the list of investment options without causing undue harm to plan participants." 788 F.3d at 938. Thus, to the Ninth Circuit, the defendants could be liable if they had a "plausible" alternative course of action. The Supreme Court reversed, holding in a curt, per curiam opinion that the Ninth Circuit's decision diluted the *Dudenhoeffer* standard. It held that assessing whether it was "quite plausible" that removing company stock would have been a prudent alternative missed the mark; instead, the lower courts should have determined whether the plaintiffs adequately alleged "that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2463).

This Court must follow the Supreme Court's intervening decision in *Amgen* rather than continue to follow the *Tatum IV* panel's "would have" standard. A panel's decision is no longer binding on later panels once the Supreme Court hands down "a superseding contrary decision." *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993). Notably, the superseding Supreme Court decision need not *directly reverse* a decision by this Court or encounter identical issues.

Rather, where the Supreme Court "rejected the reasoning" on which a prior panel's opinion was based, a later panel may—indeed, must—align itself with Supreme Court precedent rather than contrary circuit precedent. *Id.*

This standard is certainly met here. The Supreme Court's decision in *Amgen* made clear that a limited reading of *Dudenhoeffer* is untenable and also squarely rejected a standard that was virtually identical to the standard established by the *Tatum IV* panel. Under those circumstances, it is this Court's responsibility to "seriously confront[] the significance of the [Supreme Court] cases called to its attention." *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011).

B. Other Courts of Appeals Are Already In Line With The Supreme Court's "Could Have" Standard.

Not a single other court has employed the "would have" standard since *Dudenhoeffer*. To the contrary, the Second Circuit recently applied *Amgen* in a procedural-prudence case in which the plaintiffs alleged that plan fiduciaries failed to "conduct 'an appropriate independent investigation' into the riskiness of Lehman stock." *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016). Citing *Amgen*, the court affirmed dismissal of the plaintiffs' duty-of-prudence claims as failing to meet "the *Fifth Third* standard" because "[a] prudent fiduciary *could have concluded* that divesting Lehman stock" would have been imprudent. *Id.* at 68 (emphasis added).

Tatum IV itself was already out of step with other circuits. *See, e.g.*, *Kuper*

v. Iovenko, 66 F.3d 1447, 1460 (6th Cir. 1995) (to establish loss causation, evidence must show "that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident"), *abrogated on other grounds by Dudenhoeffer*, 134 S. Ct. 2459; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 306 (5th Cir. 2000) (fiduciary is liable for losses if "a prudent person *would not*" have made the same choice) (emphasis added)); *see also Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) ("I know of no case in which a trustee who has happened—through prayer, astrology or just blind luck—to make (or hold) objectively prudent investments (*e.g.*, an investment in a highly regarded 'blue chip' stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand."). The weight of authority only underscores the need for this Court to adopt the Supreme Court's prudence standard. *Cf. Faust v. S. Carolina State Highway Dep't*, 721 F.2d 721 F.2d 934, 940 (4th Cir. 1983) (following intervening Supreme Court authority and noting that "our conclusion on this point is in accord with every other court of appeals which has considered this issue"). The decision in *Amgen* frees this Court to get back into step with the Supreme Court and other circuits. It should take this opportunity to do just that.

II. THIS COURT'S PRE-*AMGEN* STANDARD CONFLICTS WITH THE PURPOSE AND OBJECTIVES OF ERISA.

A. The Pre-*Amgen* "Would Have" Standard Is Unworkable.

Tatum IV requires a defendant to prove "that a prudent fiduciary *would have* made the same decision." 761 F.3d at 364. And "the same decision" apparently means the same decision in every detail: the *Tatum IV* panel faulted the district court for not "determining whether the evidence established that a prudent fiduciary, more likely than not, would have [acted] *at the time and in the manner* in which [petitioners] did." *Id.* (emphasis added). The panel declined to look at whether the challenged decision was, in substance, a prudent one. What mattered instead was whether the hypothetical prudent fiduciary would have followed every footstep of the path the defendants chose, right down to "time" and "manner" of implementation.

That artificial burden will be impossible for most defendants to bear in practice. Plaintiffs regularly accuse fiduciaries of failing to conduct a sufficiently thorough investigation before making a decision for an ERISA plan. But in these cases, the underlying decision is almost never a neatly binary one.[4] Instead, fiduciaries face a multitude of possible courses of action; even after completing an

[4] As Judge Wilkinson noted in his *Tatum IV* dissent, even in cases involving binary decisions there is no "sense, let alone justice in penalizing a fiduciary" where fewer than 51% of *prudent* fiduciaries would make the same decision as an ERISA defendant, yet that is what the panel majority's more-likely-than-not standard requires. 761 F.3d at 378 (Wilkinson, J., dissenting).

objectively prudent investigation, there are still many different service providers, investment options, and benefit designs from which to choose. And different (though equally prudent) fiduciaries might choose different options.

Yet under this Court's pre-*Amgen* standard, having many good options is a serious problem rather than a blessing. The *Tatum IV* panel expressly held that a defendant cannot prevail by showing that it chose one of the many options that a prudent fiduciary "could have" selected—*i.e.*, options that were themselves *objectively prudent*. Instead, the defendant must prove that a prudent fiduciary "would have" made precisely the same choice. If there is no single prudent choice, then that hurdle will be insurmountable. And in reality, there is almost never just one prudent choice.

Take, for example, the facts of this case. Under the *Tatum IV* standard, the defendants could avoid damages only if they could disprove loss causation, by "establishing that a prudent fiduciary, more likely than not, would" not only "have divested the Nabisco Funds," but would have done so "at the time and in the manner in which RJR did." 761 F.3d at 364; *accord id.* at 368. But there are innumerable ways to vary the "time" and "manner" of implementing a divestment decision. If there had been a 49% likelihood that a fiduciary following a prudent process would have acted just as defendants did; a 25% likelihood that it would have reached the same decision as petitioners but acted more quickly; a 25%

chance that it would have reached the same decision but acted more slowly; and only a 1% chance that it would have decided not to divest, the defendants still would not have carried their burden.

The same challenge would exist in the many cases brought by ERISA plaintiffs challenging the *failure to divest*, *e.g.*, *In re 2014 Radioshack ERISA Litig.*, No. 4:14-cv-959-O, 2016 WL 1166344, at *7 (N.D. Tex. Jan. 25, 2016) (plaintiffs alleged that defendants failed to divest from employer stock as the company declined), or the failure to divest *at the right time*, *Harzewski v. Guidant Corp.*, 489 F.3d 799, 800 (7th Cir. 2007) (plaintiffs alleged that "fiduciaries acted imprudently in failing to dispose of that stock between October 1, 2004, and November 3, 2005"), or even the failure to divest *at the right speed*, *In re BP P.L.C. Sec. Litig.*, 866 F. Supp. 2d 709, 730 (S.D. Tex. 2012) (plaintiffs alleged that fiduciaries should have divested more rapidly), *vacated and remanded sub nom. Whitley v. BP, P.L.C.*, 575 F. App'x 341 (5th Cir. 2014). In these cases, requiring a defendant to prove a singular prudent decision to divest, time period in which to divest, and rate of divestiture is an unreasonable, if not impossible, expectation.

Other fact patterns that often recur in ERISA litigation similarly illustrate the problems with the *Tatum IV* panel's holding. For example, class-action plaintiffs often challenge a fiduciary's decision to offer particular investment options to

401(k) plan participants.[5] In these cases, fiduciaries often have countless prudent options available to them—more than 8,000 mutual funds alone. Investment Company Institute, *2016 Investment Company Fact Book*, at 170, 172 (56th ed.), *available at* https://www.ici.org/pdf/2016_factbook.pdf. Because no fiduciary has a crystal ball, someday some of those choices may dip in value; that is how markets function. Proving that a majority of fiduciaries engaging in a prudent decision-making process would have chosen *these precise* investments is impossible, because there are thousands of prudent investment options available to plan fiduciaries. So, if the "would have" test were the rule in these cases, then the plaintiffs could have pursued full recovery of their claimed losses upon proof of procedural imprudence, even if the investments were, in fact, entirely prudent.

The "would have" standard will also effectively eliminate the element of loss causation in the many cases challenging fiduciaries' selection of a plan's service providers—recordkeepers, investment advisors, insurers, auditors, outside

[5] *See, e.g.*, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434-37 (3d Cir. 1996) (plaintiffs alleged that fiduciaries inadequately investigated plan's investment in particular investment contracts); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 903 (8th Cir. 2002) (plaintiffs alleged that fiduciary failed to adequately investigate a $20 million investment before committing plan funds); *Plasterers'*, 663 F.3d at 213 (plaintiffs alleged that fiduciary failed to adequately review and investigate the plan's investment strategy and selections).

counsel, etc.[6] For any one of these services, there may be *hundreds* of competent providers. In such cases, it would again be impossible to prove that *most* prudent fiduciaries would have, more likely than not, selected the *exact same* service provider that the defendant chose. Hence, even where a plan fiduciary has chosen an indisputably reputable provider and the plan has paid market rate for its services, under the *Tatum IV* panel's rule, the fiduciary could be subject to liability and damages for that choice based on procedural-prudence claims of the sort Judge Cudahy has called "nitpicking." *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 801 (7th Cir. 2011) (opinion concurring in part and dissenting in part).

In sum, the "would have" standard ignores the realities of administering an ERISA plan. Because fiduciaries typically have a multitude of prudent options from which to choose, many defendants will find it virtually impossible to satisfy the *Tatum IV* test even when they have chosen an option that meets any objective test for prudence. Objective prudence will be defeated by the sheer multiplicity of options—and loss causation will be a toothless limitation on liability in the vast

[6] For example, in *Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998), a plan participant alleged that plan fiduciaries failed to exercise procedural prudence in selecting service providers for employee health and pension plans because the fiduciaries did not engage in comparative shopping or solicit alternative bids. *Id.* at 288, 294, 300; *see also George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798 (7th Cir. 2011) (401(k) plan participants alleged that plan fiduciaries acted imprudently in failing to solicit competitive bids for recordkeepers once every three years).

majority of duty-of-prudence cases.

B. The Pre-*Amgen* Standard Permits Some ERISA Plan Participants, But Not Others, To Recover For The Exact Same Investment Decision, and Would Turn Duty-of-Prudence Claims Into a Pure Question of Procedural Adequacy.

The "would have" standard adopted by the *Tatum IV* panel is also inequitable from a plan participant perspective. Imagine two identical plans. Each plan's fiduciary selects the same Vanguard mutual fund as an investment option—Fiduciary A after a thorough investigation and Fiduciary B after an inadequate investigation. Following a downturn in the market that causes the Vanguard mutual fund's price to drop, participants in each plan sue, alleging a breach of the duty of prudence in selecting that fund. Under the *Tatum IV* standard, participants of Plan A would not be able to recover for the decrease in their Vanguard fund investments, but participants of Plan B almost surely would be able to because it would be virtually impossible for Fiduciary B to prove that 51% of prudent fiduciaries would have offered *that specific Vanguard fund* to plan participants (even though prudent Fiduciary A *did* make that same choice). Whether the plan participants could recover following a stock drop would depend *entirely* on whether the fiduciary's *process* was adequate. *See Tatum IV*, 761 F.3d at 369 ("[A] fiduciary need only adhere to its ERISA duties to avoid liability."). But the entire point of the loss-causation requirement is that *proving a breach is not enough*, because some breaches are harmless.

C. The Pre-*Amgen* Standard Exposes ERISA Plan Sponsors And Fiduciaries To Undue Administrative And Litigation Costs.

When Congress enacted ERISA, not only did it seek to ensure nationwide uniformity, it also "sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted) (alterations in original); *accord Dudenhoeffer*, 134 S. Ct. at 2470 (same); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (same). The *Tatum IV* rule creates precisely the type of discouragement that Congress sought to avoid.

1. This Court's Pre-*Amgen* Standard Creates An Incentive To Bring Procedural Challenges After *Any* Change In Stock Price Or Change In The Market.

By requiring loss causation, Congress gave courts a powerful tool to weed out ERISA strike suits, filed by counsel attracted not by the legal merits but by the sheer magnitude of potential recovery after every substantial stock drop. By essentially eliminating the element of loss causation for procedural-prudence claims, *Tatum IV* encourages plaintiffs' counsel to "file first and build claims later" whenever an investment dips in value—and makes those suits far easier for plaintiffs to litigate and win. Such lawsuits are already common when a company that has an ESOP or simply offers corporate stock as an investment option for its

401(k) plan suffers a significant decline in its stock value.[7] The *Tatum IV* rule opened an even broader set of stock investments to such lawsuits: now, so long as discovery provides some evidence of imperfect process at some point along the way, plaintiffs can recover the full extent of the participants' investment losses, *even if the decision to retain the ESOP or stock fund was objectively prudent*.[8]

In many cases, therefore, this Court's pre-*Amgen* rule will turn a perfectly ordinary market correction into an enormous windfall for plaintiffs—which in turn creates a powerful incentive to bring even the most tenuous claims, because the expected value is high even after discounting for the low probability of winning a

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[7] *See* José Martin Jara, *What Is the Correct Standard of Prudence in Employer Stock Cases*?, 45 J. Marshall L. Rev. 541, 544 (2012) (reporting that "over the past decade," settlements in ERISA stock-drop cases "have totaled over $1 billion"); René E. Thorne et al., *ERISA Stock-Drop Cases: Evolution and Future*, Law360.com, Dec. 11, 2008, http://www.law360.com/articles/80013/erisa-stock-drop-cases-evolution-and-future (discussing the dramatic increase in stock-drop cases filed in 2007 and 2008); *see also, e.g.*, *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 956-58 (W.D. Tenn. 2010) (plaintiffs included, in an ESOP stock-drop action, a claim for failure to engage in a prudent process before selecting affiliated funds, rather than similar investments offered by unaffiliated advisors, for plan participants as an alternative to company stock).

[8] The requirement of proving procedural imprudence will serve little deterrent effect. Courts commonly (though incorrectly) allow breach-of-fiduciary-duty claims to proceed into discovery where plaintiffs allege no facts about a fiduciary's decision-making process whatsoever, based solely on circumstantial allegations of fund underperformance or the existence of lower-fee alternatives. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009).

meritless suit.[9] And where it does not result in a windfall judgment, it will almost certainly result in a boom in strike suits and settlements given the extraordinary cost of defending an ERISA action and the potential of tens of millions of dollars in liability faced by ERISA fiduciaries for their objectively prudent decisions. *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* (*"St. Vincent"*), 712 F.3d 705, 719 (2d Cir. 2013) (noting that many ERISA cases result in what the Second Circuit has dubbed "settlement extortion"—the use of "discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit").

And there is no limit to the procedural-breach claims that a plaintiff can bring, especially when essentially unconstrained by any loss-causation limit. Some plan participants may allege that a fiduciary was imprudent in failing to divest from risky or dropping stock[10]—but others, like the plaintiffs here, allege that a plan fiduciary was imprudent in failing to *hold onto* such stock, because high risk

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[9] As this Court has cautioned, "whether a fiduciary's actions are prudent cannot be measured in hindsight." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007); *accord Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997). But that is exactly what the "would have" standard will encourage.

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

can produce high reward.[11] Some plan participants allege that fiduciaries are imprudent in making risky investments[12]—but others allege that fiduciaries are overly cautious in their investment approach.[13] In some instances, fiduciaries have simultaneously defended *both* types of suits, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[14] That is why courts have repeatedly noted the "razor's edge" on which ERISA fiduciaries often find themselves. *E.g.*, *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006).

The Supreme Court recognized precisely this dilemma in the ESOP context. In *Dudenhoeffer*, the Court acknowledged that "an ESOP fiduciary who fears that

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[11] *E.g.*, *Thompson v. Avondale Indus., Inc.*, No. Civ.A.99-3439, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely divest[ed] ESOP stock").

[12] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015); *St. Vincent*, 712 F.3d at 711.

[13] *See Brown v. Am. Life Holdings, Inc.*, 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 Corp.*, No. 16-cv-61, ECF No. 1 (D.R.I. filed Feb. 11, 2016) (alleging plan fiduciaries breached the duty of prudence by investing portions of the plan's "Stable Value Fund" in conservative money market funds and cash management accounts).

[14] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008) (involving claims that fiduciaries breached ERISA duties by maintaining a "heavy investment in Grace securities when the stock was no longer a prudent investment" and noting "[a]nother suit challenging the actions of Plan fiduciaries" that "asserted a diametrically opposed theory of liability"—"that the Plan fiduciaries had imprudently *divested* the Plan of its holdings in Grace common stock despite the company's solid potential to emerge from bankruptcy").

continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of [the duty of prudence], but if he stops investing and the stock goes up he may be sued for disobeying the plan documents." 134 S. Ct. at 2470. But it is by no means unique to ESOPs given the existence of thousands of mutual funds, all of which perform slightly differently and any one of which might be better, at a given time, than other options available on the market.

Emboldened by the *Tatum IV* rule, plaintiffs will bring challenges to investment decisions that courts have long assured fiduciaries are objectively prudent. Indeed, the prior panel's decision virtually assures it. Even when the only alternatives are prudent ones, the mere multiplicity of options may prevent the fiduciary from meeting the "would have" standard.

This is a case in point. The plaintiffs here complain about a fiduciary's decision to divest from a single-stock fund—one that had dropped considerably due to the risks the company faced—and to offer a diversified fund instead. This anti-diversification theory is at odds with every court that has ever considered such a claim, including this Court. Investments options that offer only a single stock are, by definition, "*not* prudently diversified." *Dudenhoeffer*, 136 S. Ct. at 2465. That is why this Court observed that "placing retirement funds in *any* single-

stock fund carries significant risk, and so would seem *generally imprudent* for ERISA purposes." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d at 423-24 (emphases in original); *accord Armstrong*, 446 F.3d at 732 ("[T]here is a sense in which, because of risk aversion, [a single-stock fund] is imprudent per se."). And where, as here, the "stock at issue is volatile or the company's prospects in peril," the "risks of concentration are especially great." *Id.*[15]

If prudence did not generally steer fiduciaries firmly away from single-stock investments, then Congress would not have had to create a statutory exception to the prudent diversification requirement for ESOPs. Congress did so not because diversification is bad *generally*, but because other considerations justify laying aside diversification *only* for the sake of encouraging employee ownership in the company. *See Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 409 (7th Cir. 2006) ("[I]t is unrealistic to suppose that the ESOP form was chosen because the employees wanted to bear unnecessary risk. The goal of an ESOP is to give employees not the thrills of gambling but a larger stake in the company's fortunes

[15] Notably, the *Tatum IV* panel's suggestion that a fiduciary could maintain an imprudent single-stock fund as long as the rest of the plan line-up is prudent, *Tatum IV*, 761 F.3d at 367, is in tension with this Court's previous focus on individual funds rather than the entire lineup. *See DiFelice*, 497 F.3d at 423 ("[A] fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds, which individuals may *or may not* elect to combine with a company stock fund, could theoretically, in combination, create a prudent portfolio.").

. . . .”). The ESOP exception to the duty to diversify proves the general rule. Yet in this case the plaintiffs allege that the fiduciaries should have kept the single-stock fund *even after it no longer qualified as an ESOP*. Only a truly aberrant rule could make that theory a basis for liability.

Plaintiffs’ contention on appeal that *di*vestment decisions should be held to a higher standard than *in*vestment decisions provides another example. Based on ERISA precedent, including the Supreme Court’s decision in *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), plan fiduciaries hoping to avoid litigation will be quick to remove any investment options that appear to be imprudent due to even short-term underperformance when compared to other funds available in the market. As this case demonstrates, though, plan fiduciaries can no longer rest assured that such a risk-averse approach will protect them from being haled into protracted litigation. Plaintiffs here argue that plan fiduciaries may prudently divest only under “circumstances on par with ‘massive fraud in the company’ or ‘reason to think that the company was likely to go bankrupt.’” Br. of Appellants 46. Such a rule has no basis in ERISA, nor do plaintiffs cite a single case utilizing such a standard. Moreover, Plaintiffs’ theory would encourage, if not require, fiduciaries to stand by and do nothing as stocks tumble during a crash.

2. **The Pre-*Amgen* Standard Will Make Serving As A Fiduciary Unacceptably Risky.**

ERISA requires loss causation precisely so that fiduciaries do not become

guarantors of ERISA plan performance. That is why, as courts have long recognized, the fiduciary duty of care "requires prudence, not prescience." *DeBruyne v. Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990). But given the perverse incentives that the *Tatum IV* panel's "would have" standard will likely create, fiduciaries face a real risk of being held to a guarantor role, which will no doubt increase the expenses of administering an ERISA plan. In order to protect against windfall judgments, plan fiduciaries and the plan sponsors that appoint or engage them may allocate substantial resources to ensuring that the fiduciaries' decision-making process is not only prudent, but as close to bulletproof as possible. Without a meaningful element of loss causation, any procedural deviation could result in massive liability, so fiduciaries must spend their time flyspecking their own decisions and papering the record thoroughly even in the easiest cases—the cases in which the fiduciary is selecting among a number of indisputably prudent options.

Even if sponsors and fiduciaries do engage in a process sufficiently thorough to protect themselves against liability, they still will face significant "undu[e]" litigation expenses. *Conkright*, 559 U.S. at 516-17. Because the "would have" standard creates incentives for plaintiffs' lawyers to file suit in the pursuit of a windfall award whenever the market drops, just defending such suits entails significant cost: "[T]he prospect of discovery in a suit claiming breach of fiduciary

duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *St. Vincent*, 712 F.3d at 719.

For the large number of plan sponsors that are small or mid-sized businesses,[16] there is a real risk that these additional undue administrative and litigation costs may discourage them from offering, or continuing to offer, benefits under ERISA—just as Congress feared. *See Conkright*, 559 U.S. at 517. And the risk and expense that the *Tatum IV* rule creates threaten harm to the sponsors, fiduciaries, *and beneficiaries* of every plan subject to that rule—harm from crimping investment decisions; raising the costs of services, indemnification, and insurance; and ultimately diverting resources from other key aspects of employee benefit programs, such as 401(k) matching contributions or subsidization of healthcare premiums. That result is thoroughly at odds with Congress's design.

CONCLUSION

This Court should follow the loss-causation standard set by the Supreme Court in *Dudenhoeffer* and *Amgen*, and affirm based on the district court's factual finding that a reasonably prudent fiduciary performing a proper investigation could

[16] *See* Deloitte Development LLC, *Annual Defined Contribution Benchmarking Survey* 6 (2014), *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-cons-annual-defined-contribution-benchmarking-survey2013-081914.pdf (more than one-third of plan sponsors surveyed employed 500 or fewer employees).

have made the same investment decision that RJR made.

Dated: August 15, 2016

Respectfully submitted,

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AMICI CURIAE'S CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the Brief of Amici Curiae complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word count of Microsoft Word 2010, the word-processing system used to prepare the brief, the brief contains 6,980 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: August 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that August 15, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system.

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