21-805

In the United States Court of Appeals for the Second Circuit

MELISSA HALEY, *individually and on behalf of others similarly situated*,

Plaintiff-Appellee,

v.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AMERICAN BENEFITS COUNCIL, SOCIETY OF PROFESSIONAL ASSET MANAGERS AND RECORDKEEPERS, AMERICAN COUNCIL OF LIFE INSURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Securities Industry and Financial Markets Association ("SIFMA"), the American Benefits Council (the "Council"), the Society of Professional Asset Managers and Recordkeepers (the "SPARK Institute"), the American Council of Life Insurers ("ACLI"), and the Chamber of Commerce of the United States of America (the "Chamber") are all not-for-profit organizations. Each certifies that it has no parent corporation and no publicly-held corporation owns ten percent or more of its stock.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici SIFMA, the Council, the SPARK Institute, ACLI, and the Chamber are national nonprofit organizations whose members include retirement plan sponsors and providers of retirement plan services. *Amici* urge the Court to reverse the district court's unprecedented order, which permits a participant in a single retirement plan to broadly litigate the fiduciary judgments for thousands of absent plans through an action against a nonfiduciary service provider.

SIFMA is the voice of the U.S. securities industry, representing broker-dealers, banks, and asset managers who serve retirement plans and other clients with trillions of dollars in assets. The Council is a national nonprofit dedicated to protecting employer-sponsored benefit plans; its members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs. The SPARK Institute is a nonprofit association of retirement plan service providers and investment managers collectively serving approximately 95 million employer-sponsored plan participants; its mission is to develop and advance policies to strengthen Americans' retirement security. ACLI is a trade association with approximately 290 member companies that offer life

[1] All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E) and L.R. 29.1(b), counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part, and that no person other than *amici*, their non-party members, or their counsel contributed money that was intended for preparing or submitting this brief.

insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance. The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations, many of whom sponsor employee retirement plans.

Amici frequently participate in ERISA lawsuits, like this one, that raise substantial issues bearing on the ability of companies to sponsor employee benefit plans and to obtain critical services for them, based on the particular needs of the plans and their participants. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016); *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Divane v. Nw. Univ.*, 953 F.3d 980 (7th Cir. 2020); *Laurent v. PricewaterhouseCoopers LLP*, 945 F.3d 739 (2d Cir. 2019); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018); *Barchock v. CVS Health Corp.*, 886 F.3d 43 (1st Cir. 2018); *Bond v. Marriott Int'l, Inc.*, 637 F. App'x 726 (4th Cir. 2016); *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A)*, 768 F.3d 284 (3d Cir. 2014); *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014). This Court previously granted SIFMA, the Council, the SPARK Institute, and ACLI leave to file *amicus* briefs in this case at the petition stage. Order, No. 20-4117, Dkt. 66 (2d Cir. Mar. 30, 2021).

INTRODUCTION

ERISA seeks to safeguard the rights of participants in employee benefit plans while "encourag[ing] the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quotation omitted). In service of both those interests, the statute tailors the duties imposed on ERISA fiduciaries to the needs and circumstances of their particular plans, recognizing that every plan is different—and differently situated. A service provider arrangement may be right for one plan but not for another. Reasonableness thus is not evaluated based on outcomes alone, divorced from the circumstances of a particular plan, but rather is considered in view of fiduciaries' loyal and diligent efforts to procure services to meet their plans' needs. The statute's flexible, context-driven standard makes real-world sense to help fiduciaries best serve the interests of their plans—and it also ensures that fiduciaries are not exposed to undue liability for having forgone alternatives that were unsuitable for (or even unavailable to) their plans. In this way, the statute ensures that the threat of litigation does not chill the provision of employee benefits so critical to millions of American workers. *See id.* ("Congress 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." (cleaned up)).

In conflict with these basic principles, the district court's class certification order ventures to judge the reasonableness of thousands of disparate plan arrangements without considering any plan-specific circumstances, and without the participation of the fiduciaries who procured those arrangements for the benefit of their plans. Plaintiff-Appellee Melissa Haley, an individual participant in a single 403(b) retirement plan, alleges that her plan's fiduciaries violated their duties by enlisting the plan in defendant-appellant TIAA's participant loan program. But plaintiff did not sue the fiduciaries who made that choice. Instead, she seeks to hold TIAA liable as a nonfiduciary for facilitating the loans she obtained from her plan on terms that she contends were unreasonable—and she convinced the district court to certify a class of every *other* retirement plan in the country that uses these TIAA services, approximately 8,000 plans with nearly half a million loans. But there is no common unreasonableness question to be answered in this case. Although the adoption of TIAA's services by thousands of plans against the backdrop of market competition is strong evidence of *reasonableness*, those independent fiduciary judgments cannot be deemed *unreasonable* without evaluating the plan-specific considerations that factored into the fiduciaries' decisions (as well as evidence of the nonfiduciary defendant's knowledge of plan-specific facts)—and the class certification order's contrary conclusion merits reversal.

The district court's decision also proceeds on a basic misunderstanding of ERISA prohibited-transaction claims. The court brushed aside critical class-dividing evidence as relevant only to the application of a prohibited-transaction exemption—but under the statute's structure, there is no ERISA violation if an exemption applies, making the exemptions central to any finding of liability. Whether an exemption renders a transaction permissible (not prohibited) is not an issue that can be resolved after the liability phase of trial—it is *the* critical liability question, and it unquestionably depends on evidence specific to individual plans. What's more, the ability to rely on these exemptions is vital to plans' ability to obtain important and necessary services (including participant loan services of any kind). Permitting a class judgment that does not reach that question is analytically wrong; but more importantly, it will impair plans' ability to obtain those crucial services for the benefit of their participants, and it may discourage the offering of plans altogether.

A final word on the class proceeding contemplated by the order below: markedly absent from it will be the plan fiduciaries who negotiated and executed these service provider arrangements. Yet it is those fiduciaries who are in the best position to provide evidence about the factors that led them to conclude the arrangements were reasonable, whose bargains stand to be undone by this litigation, and who face potential liability themselves from a judgment in plaintiff's

favor. Adjudicating the thousands of prohibited-transaction claims that plaintiff proposes to draw into the class without plan-specific evidence or fiduciary participation violates fundamental due process, not to mention the requirements of Rule 23.

The district court's conclusion that it could adopt a one-size-fits-all approach through a single action against a nonfiduciary service provider subverts ERISA's basic design, which asks plan fiduciaries to make informed decisions based on the particular needs of their plan. No one is well served by the district court's unwarranted expansion of the class device to adjudicate in one swoop thousands of fiduciary decisions that by law must be made and considered individually. This Court should reverse the district court's certification order.

ARGUMENT

The district court's certification of a nationwide multi-plan class of nonfiduciary claims pushes the boundaries of class-action law well beyond what Rule 23 permits. A single individual cannot adequately represent thousands of employee retirement plans to which she has no connection, to pursue a liability theory that ordinarily requires proof that each plan's fiduciaries breached their obligations by engaging in unlawful transactions, without plan-level determinations that are impossible in a class proceeding of this scale. And the absent fiduciaries whose decisions will be on trial will have no avenue to defend

them—nor any say in whether the defendant will cave to the extraordinary settlement pressure a certified class of this scale exerts.

I. A Nonfiduciary's "Knowing Participation" in ERISA Violations Cannot Feasibly Be Adjudicated in a Multi-Plan Class Action

The district court brushed aside the individual questions that will drive this litigation: (1) whether the fiduciaries of TIAA's client plans caused nonexempt prohibited transactions, and (2) whether TIAA knowingly participated in those alleged violations. Those questions lie at the heart of the claims asserted in this lawsuit, and their proper consideration would require thousands of individualized evidentiary proceedings, in total conflict with the class device. Ignoring these concerns was an abuse of discretion.

1. All fiduciaries of ERISA-governed retirement plans are obligated to act prudently and diligently in the sole interests of their plan's participants and beneficiaries. 29 U.S.C. § 1104(a)(1); *see Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 618 (2d Cir. 2006) (Sotomayor, J.). The statute itself makes clear that those duties are plan-specific. Fiduciaries must act "with the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent man *acting in a like capacity and familiar with such matters* would use in the conduct of an enterprise *of a like character and with like aims*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added).

ERISA § 406 supplements those general fiduciary obligations by prohibiting

fiduciaries from engaging in virtually any transaction with an interested party—unless covered by an enumerated exemption. *Henry*, 445 F.3d at 618; *see, e.g.*, 29 U.S.C. § 1108. Because § 406's general prohibition sweeps so broadly that it "might impede a plan from entering into reasonable contracts for necessary services," the central focus in the litigation of an ERISA prohibited-transaction claim is whether the engagement falls within an available exemption. *See L.I. Head Start Child Dev. Servs., Inc. v. Frank*, 165 F. Supp. 2d 367, 370 (E.D.N.Y. 2001).[2]

The district court nonetheless concluded that the existence of a prohibited-transaction violation could be determined on a classwide basis because all of the plans in the class subscribed to the same basic TIAA loan program. Op. at 10-12. But even assuming that is factually accurate, *contra* Appellant's Br. 39, the operation of an ERISA exemption is the critical question under the statute—there's no wrongdoing if an exemption applies. The court's opinion thus ignores that liability in a prohibited-transaction suit ultimately centers on the *context* of the

[2] The Tenth Circuit recently construed ERISA's prohibited-transactions provision narrowly, holding that "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest under § 1106." *Ramos v. Banner Health*, 1 F. 4th 769, 787 (10th Cir. June 11, 2021). The court's logic applies equally to the exemptions that permit plans to procure services that benefit plan participants, like loan services: "ERISA cannot be used to put an end to run-of-the-mill service agreements, opening plan fiduciaries up to litigation merely because they engaged in an arm's length deal with a service provider." *Id.*

fiduciary's decision, which will vary across plans. The statutory two-step shifts the burden of proof to defendants while enabling plans to obtain the critical services that those exemptions make possible. *See, e.g.*, 29 U.S.C. § 1108(b)(2)(A) (allowing plans to enter into contracts for office space and legal and accounting services). But concluding that a transaction qualifies as "prohibited" under ERISA § 406 does not answer the ultimate question whether the transaction is *permissible*—a court must determine whether an exemption applies in order to find whether an ERISA violation occurred.

Multiple exemptions are of particular relevance here. Among them, plans are authorized to create participant loan programs so long as they comply with requirements spelled out in ERISA and its implementing regulations. *See* 29 U.S.C. § 1108(b)(1); 29 C.F.R. § 2550.408b-1. The implementation of such a program is a fiduciary action much like any other: "a program of participant loans, like other plan investments, must be prudently established and administered for the exclusive purpose of providing benefits to participants and beneficiaries of the plan." 29 C.F.R. § 2550.408b-1(a)(3)(i). Plans are also authorized to contract with service providers like TIAA so long as the compensation provided is "reasonable." 29 U.S.C. § 1108(b)(2); *see also* 29 U.S.C. § 1108(b)(17) (permitting transactions for which the plan receives or pays "adequate consideration").

ERISA requires fiduciary decisions about plan services to be individualized

when made, and the elements necessary to show a participant loan program is permissible—*e.g.*, that the loan provider's compensation is reasonable, that the loans accord with the plan document, and that the plan receives adequate compensation for the loan (29 U.S.C. § 1108(b)(1), (b)(8), (b)(17))—inherently depend on facts particular to the plan and the circumstances under which the loan services were procured. A plan's particular characteristics—for example, if the participants tend to take smaller loans—may make one style of loan program more cost effective on the whole than alternatives. And a plan with thousands of participants will exert more bargaining power than a small plan can. With loan services no less than other important plan services, determining whether the arrangement is permissible requires examining the terms the fiduciaries negotiated based on their plan's individual needs and the alternatives available to the plan in the marketplace at the time of the transaction. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7-10 (1st Cir. 2009).

The Secretary of Labor's regulations governing participant loan programs reinforce the individualized nature of these determinations. For instance, those regulations explain that assessing the adequacy of a loan's security is highly individualized: it "will be determined in light of the type and amount of security

which would be required in the case of an otherwise identical transaction in a normal commercial setting between unrelated parties on arm's-length terms." 29 C.F.R. § 2550.408b-1(f)(1). The Secretary's advisory opinions likewise emphasize the fact-bound nature of these questions. As early as 1979, the Secretary explained that for "the statutory exemption for the provision of services" it "was intended that a determination as to the reasonableness of the arrangement and the compensation package and the necessity for a particular service [would] depend[] on the facts and circumstances relevant to the needs of each plan at the time the services are initially provided." U.S. Dep't of Labor, Pension & Welfare Benefits Admin., Op. Letter (Aug. 3, 1979), 1979 WL 169910, at *2.[3] Just as a fiduciary could not make a judgment about the appropriate loan program for their plan without considering the "facts and circumstances relevant to the needs of [the] plan at the time of the services are initially provided," that judgment cannot be condemned without the same facts—and that level of factual inquiry is clearly impossible in a class that is intended to address the propriety of half a million loans spread across thousands of plans.

[3] *See also, e.g.*, U.S. Dep't of Labor, Pension & Welfare Benefits Admin., Op. Letter (Sept. 8, 1981), 1981 WL 314495, at *1 (fiduciaries considering a particular financial arrangement must "consider the appropriateness of the arrangement in view of the plan's needs"); U.S. Dep't of Labor, Office of Pension & Welfare Benefit Programs, Op. No. 95-17A (June 29, 1995), 1995 WL 406911, at *7 ("Whether a particular loan program satisfies the provisions of Section 408(b)(1) raises questions that are inherently factual in nature.").

The district court dismissed the individualized application of § 408 exemptions as mere "affirmative defenses" of little consequence given the "number of questions that can be resolved with common proof." Op. 23. But unlike one-off affirmative defenses that may affect only a handful of class members, the context-dependent availability of an exemption for each plan will be outcome-determinative for *every plan* in the class. If the exemption is satisfied, there is no ERISA violation. Given the "nature and significance" of the exemption questions, *In re Petrobras Sec. Litig.*, 862 F.3d 250, 271 (2d Cir. 2017), the class is insufficiently "cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

It is easy to imagine the problems that the district court's approach will create. For instance, the fundamental contention of the complaint is that plans paid TIAA excessive compensation for loans like plaintiff's. *See* Op. 12. But as the district court itself acknowledged, the amount of actual compensation TIAA received varied across plans; in "many cases," TIAA actually credited borrowers *more* than it earned in interest payments. Op. 10. Obviously, for loans where TIAA received *negative* compensation, TIAA's compensation cannot be considered unreasonable as a matter of law. The district court dismissed this as a negligible issue of damages, Op. 10-11, but it goes directly to whether each subject transaction was in fact permitted by ERISA. There is no ERISA violation at all if

the loan program was exempt and the service provider's compensation was reasonable. The applicability of the exemptions is "central to the validity of each one of the claims" in the class, but it cannot be proved through common evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

A second problem is that the reasonableness of TIAA's compensation cannot be adjudicated without considering other plan-specific evidence. The district court suggested (without citing any legal authority) that the program's reasonableness could be assessed on "an Excel spreadsheet" simply by comparing the cost of each loan against the interest the participant would have paid in a non-collateralized program. Op. 12. If the cost was higher under TIAA's program, the district court seemingly reasoned, the compensation must have been unreasonable. But this assumes that every plan in the class had access to the same alternative loan programs, offering identical and uniform rates of interest, and that no other factors except cost would be reasonable for a fiduciary to consider. It also assumes (contrary to the record, *see* Appellant's Br. 8-9, 27-28, 32-37) that a collateralized program will always be less beneficial to a plan and its participants than alternatives, and that plan fiduciaries could not reasonably decide *ex ante* to make such loans available. The district court's methodology provides no avenue for grappling with plan-specific nuances that are likely to arise, including the information and market options available to each plan at the time it selected TIAA,

how market forces affected TIAA's compensation over time, and variations among one plan's members regarding the level of interest paid. The district court's decision provides no explanation for how this spreadsheet-based analysis would work—but clearly it would not. Fiduciary duties cannot be reduced to a simple mathematical calculation; to assess the reasonableness of each fiduciary decision, the court would have to examine the full circumstances surrounding it.

Plan fiduciaries may consider an array of factors in determining whether a particular service arrangement is suitable for their plans. Looking at TIAA's collateralized-loan program as an example, a plan might already offer a non-collateralized loan program to participants, so the fiduciaries might want to provide an alternative loan option that would be more affordable for certain participants. Or they might know, based on the plan's particular characteristics, that participants would be more likely to benefit from a collateralized loan program over a non-collateralized one. Or there may be other factors, like a service provider's record of customer service or professional reputation, that would cause a fiduciary to conclude the services are reasonably priced. The point is that none of this information can be captured by simply comparing the rate of interest ultimately paid for a particular loan against what speculatively would have been paid under some other program. The district court's opinion does not explain how one could feasibly analyze the reasonableness of TIAA's compensation for all 460,000 loans

in the class "in one stroke" as Rule 23 requires. *Wal-Mart*, 564 U.S. at 350.

2. Evaluating whether a *nonfiduciary* is liable for participating in a prohibited transaction only multiplies the plan-specific evidence needed to resolve a multi-plan lawsuit. In addition to showing "that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction," the plaintiff must prove that the *nonfiduciary* "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000). The "critical element" of this type of claim is evidence that the nonfiduciary "knew that the primary violator's conduct violated a fiduciary duty." *Leber v. Citigroup, Inc.*, 2010 WL 935442, at *14 (S.D.N.Y. Mar. 16, 2010). That further determination will depend on the circumstances surrounding the service provider's engagement by each of its client plans.

Because nonfiduciary prohibited-transaction claims implicate multiple layers of plan-level individualized determinations, they are not amenable to multi-plan damages class actions like this one. Particularly troubling here is that the class includes not just a few plans, but "over 8,000 plans" with an untold number of fiduciaries. *See* Op. 8. A challenge to the decisions of independent plan fiduciaries with respect to thousands of different employee benefit plans does not

turn on "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and any common questions that exist certainly don't "predominate" over individualized ones, Fed. R. Civ. P. 23(b)(3). *Wal-Mart*, 564 U.S. at 350-52 (2011) (explaining that the common question must be "the crux of the inquiry" to ensure that the class proceeding will "generate common *answers* apt to drive the resolution of the litigation" (quotation omitted)). In a multi-plan prohibited-transaction suit against a nonfiduciary, the central questions determining liability are particularized and inherently factual, not common. Making a singular judgment about them across thousands of plans would be both unprecedented and contrary to law.

II. The Class Device Is Unsuited to Evaluating the Fiduciary Decisions of Non-Party Plans

A multi-plan class proceeding against a service provider cannot be used to evaluate the decisions of individual fiduciaries that approved the terms of the service provider's engagement, not least because those independent fiduciaries have no opportunity to participate. Plaintiff's proposal to effectively adjudicate the reasonableness of the decisions of thousands of individual fiduciaries through a proceeding that excludes them violates due process as well as Rule 23(b)(3)'s requirement that class resolution be superior to other adjudication methods. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615.

If plaintiff succeeds in making TIAA liable for participating in prohibited

transactions caused by thousands of independent plan fiduciaries, the affected plans' service arrangements with TIAA will be disrupted and the plans' fiduciaries may themselves face claims about the "unreasonable" arrangements they approved. *See* 29 U.S.C. § 1109. But the court will not hear from those non-party fiduciaries in this proceeding, and it will not see the grounds that led each to conclude that their arrangement with TIAA was appropriate. Exposing non-parties to liability with no process whatsoever contravenes the most "elementary and fundamental requirement" of due process: notice apprising "interested parties of the pendency of the action and afford[ing] them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). In an action like this, the court would have to recognize that those fiduciaries are entitled to participate in a lawsuit that seeks to dismantle their plans' agreements, Fed. R. Civ. P. 24(a), and yet doing so would overwhelm the very functioning of the multi-plan class proceeding. Claims like plaintiff's can and should be adjudicated through individual plan lawsuits involving all necessary parties and proof.

Indeed, exactly such a lawsuit involving plaintiff's own plan was already adjudicated, in the fiduciaries' favor. *See Davis v. Wash. Univ. in St. Louis*, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018), *aff'd in part, rev'd in part and remanded*,

960 F.3d 478 (8th Cir. 2020).[4] In that case, the district court examined whether the plan fiduciaries' decision to participate in TIAA's loan program violated ERISA's prohibited-transaction rules by falling outside the exemption for participant loan programs. It concluded that the fiduciaries' decision to participate in the program was "prudent and lawful." *Id.* at *5. The court explained that requiring assets to be transferred to a traditional annuity to collateralize the loan—the central feature of TIAA's program that plaintiff challenges here—was a reasonable mechanism to ensure that the loan is adequately secured as explicitly required by 29 U.S.C. § 1108(b)(1)(E). *Id.*

Davis illustrates how these types of cases should be adjudicated: by individually evaluating the arrangement struck by each plan. Nonfiduciaries often lack the evidence that would establish the reasonableness of the arrangement each fiduciary negotiated for their particular plan. The rationale for placing the burden of proof on fiduciaries to prove the propriety of an otherwise prohibited transaction is that "the fiduciary has a virtual monopoly of information concerning the transaction in question," and therefore "is in the best position to demonstrate the absence of self-dealing." *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987). That rationale does not extend to service providers like TIAA, who

[4] The plaintiff in *Davis* did not appeal the district court's dismissal of the claim related to the participant loan program; the Eighth Circuit's decision discusses only other, unrelated ERISA claims.

lack direct knowledge about the competitive offerings any given fiduciary considered in selecting them and must rely on the market to establish the reasonableness of their terms. The order below necessarily contemplates that this action will proceed without that evidence at all.

This evidentiary gap highlights the impropriety of permitting a participant in one plan to challenge the fiduciary process of other, unrelated plans. Plaintiff has no factual basis to question the sufficiency of context-driven decisions made by other plans' fiduciaries in selecting their participant loan programs—yet her action, if successful, would have the effect of disrupting fiduciary choices with which those third-party plans and their participants may be entirely satisfied. With the precedent set by this certified class action, fiduciaries' carefully negotiated service arrangements will be subject to challenge by individuals who are wholly unrelated to their plans, disturbing service provider arrangements that the fiduciaries have determined best serve the interests of their participants. Unitary classwide adjudication of these claims would frustrate, not advance, ERISA's goals.

It should go without saying that plaintiff, lacking any connection to the unrelated plans, cannot articulate any Article III injury affecting her "in a personal and individual way" that is fairly traceable to those plans' independent service arrangements. *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 118 (2d Cir. 2002) (quotation omitted); *see La Mar v. H & B Novelty & Loan*

Co., 489 F.2d 461, 462 (9th Cir. 1973) (a class representative "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands [s]he suffered no injury"). But she also lacks a cause of action under ERISA to press claims on behalf of unrelated plans. *See* 29 U.S.C. § 1132(a)(2) (limiting cause of action to Secretary of Labor, plan fiduciaries, participants, and beneficiaries); *see Acosta v. Pac. Enters.*, 950 F.2d 611, 617 (9th Cir. 1991), *as amended on reh'g* (Jan. 23, 1992); *Chemung Canal Tr. Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 14 (2d Cir. 1991). A participant in one plan cannot derivatively represent another plan any more than a shareholder in one company can represent the interests of an unrelated corporation in which she does not own shares. *See* Debra A. DeMott, Shareholder Derivative Actions: Law & Practice § 2:2 (2020). And such a participant certainly cannot adequately represent the interests of those other plans' participants and beneficiaries. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quotation omitted)).

The district court's certification of an opt-out class under Rule 23(b)(3) does not resolve these concerns, and the court's order does not clarify how the notice required by Rule 23(c)(2)(B) would operate. If the opt-out decision is given to plan fiduciaries, they will face an untenable dilemma: preserve their plan service

arrangements (and incidentally favor their own interests) by opting out, or cede their plans' fates to this litigation, with no ability to influence how it affects those arrangements. If the notice goes to individual plan participants, the fiduciaries will be powerless to exclude their plans from this litigation, and participants' opt-out decisions may conflict. Should a single one of a plan's participants remain in the action, the propriety of the plan's fiduciary decisions would be determined for the entire plan because participants bring claims on behalf of their plan and fiduciaries generally must treat all participants in a uniform manner. *See Coan v. Kaufman*, 457 F.3d 250, 259-61 (2d Cir. 2006).

This litigation threatens to upend thousands of fiduciary-negotiated service-provider arrangements and replace them with the generic approach favored by a single individual with no legal connection to those plans. Plaintiff is not equipped to question the considered judgment of thousands of unrelated plans' fiduciaries who initially selected, and continuously monitor the prudence of, their plans' arrangements and investments. Nor is TIAA best positioned to defend those decisions. This Court should not permit the class device to undermine the goals and fundamental structure of ERISA.

CONCLUSION

Amici curiae respectfully urge this Court to reverse the district court's order certifying the class.

Dated: July 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 29.1(c) because the brief contains 4,947 words, excluding the items listed in Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font (14-point for footnotes).

Date: July 20, 2021 *<u>/s/ Meaghan VerGow</u>*

Meaghan VerGow