No. 23-11097

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF UTAH, *et al.,*

Plaintiffs-Appellants,

v.

JULIE A. SU, Acting Secretary, U.S. Department of Labor;
U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of Texas
No. 2:23-cv-016, Hon. Matthew J. Kacsmaryk

BRIEF FOR AMICI CURIAE ERISA LAW PROFESSORS
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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March 28, 2024

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

No. 23-11097, *State of Utah, et al. v. Su, et al.*

Pursuant to Fifth Circuit Rule 29.2, undersigned counsel states that, in addition to the interested persons identified in the briefs submitted by the parties and other amici, the following people have an interest in the outcome in this case. This representation is made so that the judges of this Court may evaluate possible disqualification or recusal.

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2. Professor Richard L. Kaplan
3. Professor Dana Muir
4. Professor Norman P. Stein
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STATEMENT OF INTEREST

Amici curiae are legal scholars who write and teach about pension, employee benefits, elder, and trust law. One of their primary areas of concern is the importance of fiduciary obligation in investment selection, an issue implicated in this litigation. Donald T. Bogan is an Emeritus Professor of Law at the University of Oklahoma College of Law. Richard L. Kaplan is the Guy Raymond Jones Chair in Law at the University of Illinois College of Law. Dana Muir is the Robert L. Dixon Collegiate Professor of Business and Arthur F. Thurnau Professor of Business Law at the Stephen M. Ross School of Business at the University of Michigan. Norman P. Stein is a Professor Emeritus at Drexel University's Thomas R. Kline School of Law. Lauren K. Valastro is a Visiting Assistant Professor of the Practice of Law at Sturm College of Law, University of Denver. Peter J. Wiedenbeck is the Joseph H. Zumbalen Professor of the Law of Property at the Washington University School of Law.

No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No other individual or organization contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Department of Labor's challenged rule is consistent with the Employee Retirement Income Security Act ("ERISA") and is a proper exercise of the Department's authority under that statute. *See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822 (Dec. 1, 2022) ("2022 Rule" or "the Rule"). The district court's judgment should therefore be affirmed.

The 2022 Rule is consistent with ERISA. It makes clear that ERISA's fiduciary obligations of prudence and loyalty apply to all investment decisions and that fiduciaries must always invest plan funds to maximize risk-adjusted returns. The 2022 Rule is neutral. It neither favors nor disfavors any particular factors and does not identify any factors that fiduciaries should or should not consider when making investment decisions to best serve a plan. As always, the burden remains on fiduciaries to consider all information they reasonably determine to be relevant to a risk-return analysis and to act on that information to maximize returns to the plan.

The 2022 Rule also fits comfortably alongside regulations and sub-regulatory guidance issued by the Department since the late 1970s. Like those rules and guidance documents, the 2022 Rule confirms that a fiduciary's primary mandate is to identify the investment course of action reasonably likely to maximize risk-adjusted returns for participants and beneficiaries. It also confirms that fiduciaries must exercise their informed judgment to appropriately consider factors relevant to risk and return including, when appropriate, environmental, social, and governance ("ESG") factors. Finally, the 2022 Rule confirms that, in the unlikely event that a fiduciary identifies two or more investments that equally serve the plan's financial interests, then the fiduciary may distinguish between them using factors not otherwise relevant to risk and return. The district court correctly recognized that the Rule's consistency with its antecedents provides further evidence that the Rule is well-founded.

The 2022 Rule is also a sensible exercise of the Department's authority because it eliminates confusion created by the 2020 Rule, *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72,846 (Nov. 13, 2020) ("2020 Rule"). Indeed, public comments specific to the 2020 Rule expressed concern that the rule and its preamble would discourage fiduciaries from considering some information relevant to risk and return or preclude them from incorporating ESG factors even when they were relevant. The 2022 Rule returns consistency and certainty to the management of benefit plans by clarifying that fiduciaries remain obligated to consider any factors they prudently determine are economically relevant.

Because the 2022 Rule is consistent with ERISA and neither arbitrary nor capricious, the district court's judgment should be affirmed.

ARGUMENT

I. The 2022 Rule is consistent with ERISA and with prior agency directives.

The 2022 Rule is a neutral one. It reaffirms the fiduciary's duty under ERISA to act solely in the interest of participants and beneficiaries and in a manner that, in the fiduciary's informed judgment, will yield the investment course of action most likely to maximize risk-adjusted returns. It neither prohibits nor promotes particular types of investments or the consideration of specific factors, and it confirms that a fiduciary's investment decisions must be based only on factors relevant to risk and return.[1] The 2022 Rule also confirms that if a fiduciary identifies two or more investments that equally serve the plan's financial interests—an unlikely event—then (and only then) may the fiduciary consider factors not relevant to risk and return to break the "tie." Thus, the 2022 Rule is consistent with both ERISA and prior agency directives.

A. The 2022 Rule is consistent with ERISA.

ERISA sets clear boundaries for plan fiduciaries. It establishes that employee retirement accounts are held in trust, 29 U.S.C. § 1103(a), and that plan fiduciaries must act based on duties to plan participants and beneficiaries, *id.* § 1104(a).

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[1] Amici agree with the Department that the plaintiffs do not appear to challenge this portion of the Rule on appeal. *See* Brief for Appellees at 22, 29, 51; *see also Tharling v. City of Port Lavaca*, 329 F.3d 422, 430 (5th Cir. 2003) (confirming that arguments not developed in the opening brief are waived).

Specifically, fiduciaries must act "solely in the interest of" and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." *Id.* § 1104(a)(1)(A). Fiduciaries must also act "with . . . care, skill, prudence, and diligence under the circumstances." *Id.* § 1104(a)(1)(B). Together, those duties—commonly called the "duty of loyalty" and the "duty of prudence"—require fiduciaries to invest plan assets to maximize benefits to plan participants and beneficiaries. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 415-16 (2014); *see also* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. Rev. 459, 476 (2015) (describing the requirements ERISA imposes on plan fiduciaries).

Supreme Court precedent reinforces ERISA's clear structural requirements. In 2014, the Court held that ERISA's reference to "benefits" must be read to "refer to the sort of *financial* benefits . . . that trustees who manage investments typically seek to secure for the trust's beneficiaries." *Dudenhoeffer*, 573 U.S. at 421 (emphasis in original). The obligation to maximize financial benefits, the Court explained, is based in ERISA's duty of prudence and does not change "depending upon the specific nonpecuniary goal set out" in an ERISA plan. *Id.* at 420. In the end, fiduciaries must seek to identify the investment course of action that, in their judgment, will maximize risk-adjusted returns. *Id.* at 420–21.

Within those defined bounds, however, ERISA leaves fiduciaries space to exercise their informed judgment. The statute does not require fiduciaries to consider any specific factors or information, nor does it dissuade them from considering factors they reasonably deem relevant to a risk-return analysis. If the fiduciary decides that a particular factor implicates financial risk and return, then the fiduciary may consider it.

That sort of judgment implicates the fiduciary's knowledge and expertise and can be a complicated one to make. Indeed, as the Court recognized in *Hughes v. Northwestern University*, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." 595 U.S. 170 (2022). Thus, "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.*; *see also Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) (recognizing the bounded flexibility ERISA affords fiduciaries). In short, to effectuate ERISA's mandate to maximize risk-adjusted returns for participants and beneficiaries, the fiduciary must retain enough flexibility to make sound investment choices.

The discretionary judgment ERISA affords plan fiduciaries reflects background principles of fiduciary law. As in any fiduciary relationship, the plan fiduciary's decision-making space is bounded, but the fiduciary retains discretion to make informed judgments within that space. *See* D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 Ohio St. L.J. 609, 612 (2014). At the same time, fiduciaries are selected because they have knowledge and expertise and must be given room to apply that knowledge and expertise for the benefit of participants and beneficiaries. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. Rev. 1039, 1040–41 (2011); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & Econ. 425, 426 (1993) (recognizing that fiduciaries are chosen for their specialized "knowledge and expertise").

The 2022 Rule is consistent with both ERISA and with the longstanding fiduciary principles on which ERISA builds. The duty to maximize risk-adjusted returns has always been the core of ERISA's fiduciary obligation and remains so under the 2022 Rule. The Rule confirms that "a fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis." 29 C.F.R. § 2550.404a-1(b)(4). The Rule also confirms that the fiduciary "may not subordinate" the participants' and beneficiaries' interests "to other objectives," or otherwise "sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to" maximizing plan benefits. *Id.* § 2550.404a-1(c)(1). In this regard, the 2022 Rule confirms what ERISA has long mandated: fiduciaries must always seek to maximize risk-adjusted returns, and they have discretion to identify the factors that are relevant under the facts and circumstances.

Likewise, the 2022 Rule does not favor, much less demand, the consideration of ESG factors or dedicated ESG investments. To be sure, the Rule identifies several factors that may bear on risk and return, including "the economic effects of climate change and other environmental, social, or governance factors," but it confirms that they may be considered only if the fiduciary deems them a "risk-return factor." *Id.* § 2550.404a-1(b)(4). Even then, the Rule warns, the "weight given to any factor by a fiduciary should appropriately reflect a reasonable assessment of its impact on risk-return." *Id*. The text of the 2022 Rule reflects the Department's "inten[t] to make it clear that climate change and other ESG factors may be relevant in a risk-return analysis . . . and do not need to be treated differently than other relevant investment factors, without causing a perception that the Department favors such factors in any or all cases." 87 Fed. Reg. at 73,830–31.

Finally, the 2022 Rule confirms that fiduciaries may consider collateral benefits—that is, benefits not relevant to risk and return—only after determining that the investments under review "equally serve the financial interests of the plan over the appropriate time horizon." 29 C.F.R. § 2550.404a-1(c)(2). At this stage in evaluating potential investments, fiduciaries have already fulfilled their statutory duties to select investments to maximize risk-adjusted returns. Only once investments have been prudently determined to equally serve the plan's financial interests may a fiduciary exercise reasoned judgment based on factors beyond those relevant to the risk and return analysis. *See* Brief for Appellees at 30–31 ("The tiebreaker standard comes into play only where an investment choice cannot be resolved merely by applying that statutory duty.").

Thus, the 2022 Rule, consistent with ERISA and Supreme Court precedent, does not expand fiduciaries' discretion outside of existing statutory limits. Instead, it reinforces the Supreme Court's warning in *Dudenhoeffer* that ERISA plan fiduciaries cannot compromise investment returns for purposes unrelated to providing financial benefits under the plan and its recognition in *Hughes* that fiduciaries exercising their discretion have space to make informed judgments.

B. The 2022 Rule is consistent with prior agency directives.

In the more than 40 years since ERISA was passed, the Department has periodically provided formal and informal guidance to fiduciaries regarding the application of the duties of prudence and loyalty and how fiduciaries are to decide between investments that are otherwise equivalent in terms of risk and return. Those directives confirm two points. First, they confirm that whether a particular factor is relevant to risk and return is for fiduciaries to decide, and that fiduciaries may, consistent with their fiduciary obligations, consider ESG-type factors in some instances. Second, they confirm that fiduciaries may consider factors not relevant to maximizing financial benefits only when necessary to break a tie.

1. The Department has long recognized that fiduciaries acting in accord with their duties may have reason to consider ESG-type factors.

For decades, the Department has provided formal and informal guidance on investment decisions and the exercise of shareholder rights. These documents consistently stated that fiduciaries must act prudently and in the best financial interests of plan participants and beneficiaries. They also recognized that it is up to fiduciaries to decide which factors are relevant to risk and return. And they confirmed that, in some instances, fiduciaries acting in accord with their duties may deem ESG-type factors relevant.

The first regulation the Department promulgated on ERISA's fiduciary obligations as applied to the investment of plan assets confirmed that fiduciaries must exercise their responsibilities with prudence and care, but it did not direct fiduciaries to consider or ignore any particular factors when selecting investments. *Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule*, 44 Fed. Reg. 37,221, 37,225 (June 26, 1979). Instead, the 1979 rule merely directed fiduciaries to "give[] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant" and to "act[] accordingly." *Id.*

The Department elaborated on the fiduciary's obligation in subsequent guidance, which was consistently neutral about which factors might be used in investment decisions. The Department also recognized that in some instances it may be permissible—and perhaps even necessary—to consider ESG-type factors. A 1994 Interpretive Bulletin, for example, confirmed that fiduciaries are required to "act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries." *Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974*, 59 Fed. Reg. 32,606, 32,607 (June 23, 1994). It also recognized that the standards applicable to "economically targeted investments"—investments selected for the benefits they create in addition to their investment returns—"are no different than the standards applicable to plan investments generally." *Id.* It warned, though, that fiduciaries may not "subordinat[e] the interests of participants and beneficiaries . . . to unrelated objectives." *Id.*

A 2015 Interpretive Bulletin took a similar approach. That bulletin confirmed that "if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment." *Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments*, 80 Fed. Reg. 65,135, 65,136

(Oct. 26, 2015). The guidance also recognized that a fiduciary is not only allowed to consider the "direct relationship" between ESG issues and the economic value of the plan's investment, but that, in some instances, ESG factors may in fact be "proper components of the fiduciary's primary analysis of the economic merits of competing investment choices." 80 Fed. Reg. at 65,136. This document also confirmed, however, that the plan's economic interests must remain the fiduciary's primary focus. *Id.* at 65,135 ("The Department has consistently stated . . . that the focus of plan fiduciaries on the plan's financial returns and risk to beneficiaries must be paramount.").

The Department reiterated these points again in a Field Assistance Bulletin published in 2018. Field Assistance Bulletin 2018-01 (Apr. 23, 2018), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01.pdf. There, the Department confirmed that an "ERISA fiduciary must always put first the economic interests of the plan" and should consider factors that the fiduciary decides "have a material effect on the return and risk of an investment." *Id.* The 2018 Bulletin also confirmed that the 2015 Bulletin "merely recognized that there could be instances when otherwise collateral ESG issues present material business risk or opportunities" that a "qualified investment professional[] would treat as economic considerations." *Id.*

The 2020 Rule also was consistent with prior agency practice in some relevant respects. That rule directed fiduciaries to base their "evaluation of an investment or investment course of action . . . only on pecuniary factors," 85 Fed. Reg. at 72,884, and its preamble recognized that ESG factors may in some situations be "appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors," *id.* at 72,857. The record reflects minimal substantive differences between the 2020 Rule and prior directives with respect to the obligation of fiduciaries to maximize risk-adjusted returns. Max M. Schanzenbach & Robert H. Sitkoff, *ESG Investing After DOL Rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*," Harv. L. Sch. F. on Corp. Governance (Feb. 2, 2023), https://corpgov.law.harvard.edu/2023/02/02/esg-investing-after-the-dol-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights; *see Utah v. Walsh*, No. 2:23-CV-016-Z, 2023 WL 6205926, at *4 (N.D. Tex. Sept. 21, 2023) ("The 2022 Rule changes little in substance from the 2020 Rule and other rulemakings."). As explained below in Part II, however, the Department appropriately replaced the 2020 Rule to eliminate confusion within the regulated community created by statements in the rule and its preamble that appeared to "put a thumb on the scale against the consideration of ESG factors," even when they were "financially material." 87 Fed. Reg. at 73,826; *see id.* at 73,853–55; *see also* Brief for Appellees at 10–12 (discussing elements of 2020 Rule).

The 2022 Rule is consistent with the core of prior Department guidance, both in substance and in effect. The 2022 Rule once again confirms that "[a] fiduciary may not subordinate the interests of the participants and beneficiaries . . . under the plan to other objectives." 29 C.F.R. § 2550.404a-1(c)(1); *see also* 87 Fed. Reg. at 73,834 (explaining the Rule's consistency with the boundaries recognized in *Dudenhoeffer*). Like the prior agency directives, the 2022 Rule also confirms that fiduciaries remain obligated to exercise reasoned and considered judgment through prudent investment decisions based on factors they consider relevant to risk and return. 29 C.F.R. § 2550.404a-1(b)(1) (directing fiduciaries to give "appropriate consideration to those facts and circumstances that" they deem economically relevant and to "act[] accordingly"). And finally, although the 2022 Rule acknowledges that ESG factors and other information may be economically relevant, it also reiterates that those factors may be considered during investment selection only if the fiduciary reasonably finds that they "are relevant to a risk and return analysis." *Id.* § 2550.404a-1(b)(4); *see* 87 Fed. Reg. at 73,830 (preamble to 2022 Rule, confirming that "[i]n no way did the Department consider" the reference to ESG "to be an expression of a novel concept"). Thus, the 2022 Rule is consistent with prior agency practice.

2. The Department has long authorized fiduciaries to consider collateral factors when distinguishing between investments that equally serve a plan's financial interests.

A consistent view throughout the Department's prior directives is that a fiduciary may consider factors not relevant to risk and return only when the fiduciary identifies two or more investment courses of action that, in their judgment, will equally serve the plan's financial interests. The 2022 Rule and its sub-regulatory antecedents indicate that these scenarios are rare and confirm that fiduciaries may consider factors with no direct bearing on risk and return only to break a tie.

The Department has formally recognized the propriety of considering these types of collateral factors since at least 1994. *See* 87 Fed. Reg. at 73,836 (recognizing same).[2] In the 1994 Interpretive Bulletin referenced above, the Department confirmed that plan fiduciaries "may consider collateral benefits in choosing between investments that have comparable risks and rates of return." 59 Fed. Reg. at 32,606. In conjunction with supporting the use of collateral benefits in limited circumstances, the Department reminded fiduciaries that they must not subordinate the plan's financial interests to other objectives. *Id.* at 32,607.

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[2] This position likely dates back even earlier. *See* 59 Fed. Reg. at 32,607 & nn.5-7 (explaining that "the Department has stated that a plan fiduciary may consider collateral benefits in choosing between investments that have comparable risks and rates of return," and referencing letters it sent to plan fiduciaries in the 1980s).

The Department confirmed this position in subsequent directives. The Department's 2008 Interpretive Bulletin also allowed for the consideration of "a factor other than the economic interest of the plan" but confirmed that the fiduciary could do so only if the fiduciary has "concluded that the alternative options are truly equal." *Interpretive Bulletin Relating to Investing in Economically Targeted Investments*, 73 Fed. Reg. 61,734, 61,735 (Oct. 17, 2008). It also recognized that this sort of occurrence would be a "limited circumstance[]" and that a fiduciary's consideration of factors not relevant to risk and return "should be rare." *Id.* at 61,734. The Department's 2015 Interpretive Bulletin similarly confirmed that the Department had "consistently recognized that fiduciaries may consider such collateral goals as tie-breakers when choosing between investment alternatives that are otherwise equal with respect to return and risk." 80 Fed. Reg. at 65,136. Finally, even the 2020 Rule confirmed that fiduciaries may consider factors not relevant to maximizing financial benefits in tiebreaker scenarios. 85 Fed. Reg. at 72,860–63, 72,844.

In the end, the 2022 Rule preserves the substantive core of at least three decades of agency guidance. It grants fiduciaries leeway to consider collateral factors only when the fiduciaries have determined that "competing investments . . . equally serve the financial interests of the plan." 29 C.F.R. § 2550.404a-1(c)(2). It fully protects the economic interests of the plan participants and beneficiaries as it forbids fiduciaries from "accept[ing] reduced returns or greater risk to secure such additional benefits." *Id*. And, like prior statements, the preamble to the 2022 Rule recognizes that ERISA's prudence requirements limit the likelihood of tiebreaker scenarios. *See* 87 Fed. Reg. at 73,836, 73,871. Only in the unlikely event that the investments equally serve a plan's financial interests would the fiduciary be allowed to consider collateral factors (which may or may not include ESG factors) under the 2022 Rule. *Id*. at 73,827.

Thus, the tiebreaker element of the 2022 Rule fits comfortably alongside its antecedents. As the district court correctly recognized, "the reasonableness of [the Department's] interpretation is supported by its prior rulemakings." *Utah*, 2023 WL 6205926, at *4; *see* Brief of the Institute for Policy Integrity at 10–12, 22–24. The consistency of the Department's positions on these points over time suggests that they are the reasonable product of careful consideration. *See Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 11 (2011) (reasoning that the length of time an agency position had been held reflected "careful consideration"). !

II. The 2022 Rule addresses confusion created by the 2020 Rule that chilled the exercise of fiduciaries' informed judgment.

The 2020 Rule's core principle, that fiduciaries must invest to maximize risk-adjusted returns, mirrored its regulatory antecedents. *See* Part I.B. Yet, some of the 2020 Rule's provisions caused fiduciaries to doubt their authority to exercise their informed judgment. *See* Brief for Appellees at 13–14, 44, 47. This caused a chilling effect that altered the way ERISA fiduciaries discharged their duties to plan participants and beneficiaries. The 2022 Rule reconfirms that fiduciaries should continue to exercise their knowledge and expertise within the boundaries set by ERISA and in accord with longstanding agency guidance.

The regulated community and other stakeholders expressed concern about the 2020 Rule early in its development. In comments responding to the proposed 2020 Rule, fiduciaries stressed that the rule would cause uncertainty about the legality of investments that considered ESG factors. 85 Fed. Reg. at 72,855–56. As they saw it, the proposed 2020 Rule required a heightened level of scrutiny for investments that factored in ESG, indicating to fiduciaries that these investments were discouraged or even impermissible. *Id.*

Those sorts of early concerns persisted after the 2020 Rule was finalized. *See* Brief for Appellees at 13–14. Regulated entities observed that the 2020 Rule created "barriers—both overt and subtle—that inhibit[ed] ERISA fiduciaries from analyzing investments fully." North American Securities Administrators Association, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 1 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0704/attachment_1.pdf. Industry representatives also warned that the 2020 Rule erected "actual or perceived legal barriers to prudent [ESG] investing." Council of Institutional Investors, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 2 (Dec. 2, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0275/attachment_3.pdf.

Several investing organizations likewise commented in unison that the 2020 Rule made fiduciaries "hesitant to engage" in certain investments because of "regulatory uncertainty." ClearBridge Investments, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 1 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0793/attachment_1.pdf; Pacific Community Ventures, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 1 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0707/attachment_1.pdf; Impact Capital Managers, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 1 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0740/attachment_1.pdf.

Still other commenters found the 2020 Rule to be "unduly prescriptive" and expressed concern that it "interfere[d] with ERISA's well-accepted, principles-based approach with regard to investment evaluation in a way that may skew plan fiduciaries' judgement and impair their ability to satisfy their responsibilities."

Coalition of Collective Investment Trusts, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 2 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0766/attachment_1.pdf. Thus, despite the 2020 Rule's facially comparable adherence to the core principle that fiduciaries may consider any appropriate factors when maximizing risk-adjusted returns, *see supra* Part I.B.1, fiduciaries and investment professionals nevertheless understood the 2020 Rule to caution against, or in some situations even prohibit, the prudent consideration of ESG factors, even when the statute, case law, and decades of regulatory history demanded otherwise.

The 2022 Rule resolves industry concerns and uncertainty by confirming that longstanding principles imposed by ERISA, interpreted by the Supreme Court, and reiterated in agency directives still hold. *See* 87 Fed. Reg. at 73,883 (expressing the Department's belief that "uncertainty with respect to the [2020 Rule] may . . . hamper fiduciaries as they attempt to discharge their responsibilities prudently and solely in the interests of plan participants and beneficiaries"). As explained in Part I, the 2022 Rule confirms that ERISA requires fiduciaries to consider factors, including ESG-related factors, that they reasonably determine are relevant to risk and return. 29 C.F.R. § 2550.404a-1(b)(4). The 2022 Rule is neutral. It does not single out ESG factors for favorable or unfavorable treatment; it merely provides certainty that fiduciaries may consider those factors when appropriate, just as they may consider any other factors relevant to maximizing risk-adjusted returns. *Id.* And, although the Rule mentions ESG factors, it does so only to eliminate confusion surrounding the 2020 Rule. 87 Fed. Reg. 73,826–27 (explaining that the Rule seeks to eliminate the "chilling effect" of the 2020 Rule); *id.* at 73,854 ("Rather than placing a thumb on the scale, the final rule removes the current regulation's thumb against ESG strategies.").

Comments on the 2022 Rule reflect the regulated community's understanding that the Rule serves as a neutral course correction. For example, the National Coordinating Committee for Multiemployer Plans commented that the proposed 2022 Rule "takes a balanced and uniform approach to plan investment decisions that neither manifests a bias against certain types of investment considerations based on how they are labeled nor incorporates grossly inaccurate presumptions against an entire class of investment-related decisions." National Coordinating Committee for Multiemployer Plans, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 2 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0716/attachment_1.pdf.

ERISA is clear in its directive to fiduciaries. How fiduciaries determine the investment strategy that best maximizes risk-adjusted returns is a complex, particularized process, unique to the investment needs of each plan. Because managing this complexity is core to fiduciaries' duties to plan participants and beneficiaries, ERISA requires fiduciaries to use their informed judgment, constrained by the obligation to maximize risk-adjusted financial benefits. *Dudenhoeffer*, 573 U.S. at 420–21. The 2022 Rule does not endorse ESG; instead, it was promulgated and has correctly been interpreted by the regulated community to clarify and correct the chilling effect of the 2020 Rule. 87 Fed. Reg. at 73,854. As one commenter correctly put it, the Rule "benefit[s] plan participants and beneficiaries by ensuring that ERISA fiduciaries continue to place paramount importance on a plan's financial performance." The Vanguard Group, Comment Letter on Proposed Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 1 (Dec. 13, 2021), https://downloads.regulations.gov/EBSA-2021-0013-0753/attachment_1.pdf.

CONCLUSION

For all these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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March 28, 2024

[3] The Clinic would like to acknowledge the contributions of Harvard Law School students Sarah Hart, Kayla Hollingsworth, Layla Rao, and Grace Summers.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation of Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29. The brief contains 4,806 words, excluding the portions exempted by 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 style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word Version 2203 and 14-point Times New Roman font.

Dated: March 28, 2024

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