No. 25-2061

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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LOCKHEED MARTIN CORPORATION,

*Defendant-Appellant*,

v.

BRUCE KONYA, SIMON SHIFF, STEPHEN SWARTZ, AND DIANA VASQUEZ, Individually and as Representatives of a Class of Participants and Beneficiaries on Behalf of the Lockheed Martin Corporation Salaried Employee Retirement Program and the Lockheed Martin Aerospace Hourly Pension Plan,

*Plaintiffs-Appellees*.

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On Appeal from the United States District Court
for the District of Maryland, Northern Division
Hon. Brendan A. Hurson, 8:24–cv–00750

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# BRIEF OF AMICI CURIAE ALI KHAWAR AND PHYLLIS BORZI IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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January 30, 2026

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

*Amici curiae* file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Fourth Circuit Local Rule 29(a). The parties have consented to the filing of this brief.

*Amici* are retirement security experts and former senior officials of the U.S. Department of Labor's Employee Benefits Security Administration. In those capacities, they were responsible for interpreting, administering, and enforcing the Employee Retirement Income Security Act of 1974, including ERISA's fiduciary standards applicable to defined-benefit pension plans.

*Amici* have a substantial interest in the proper interpretation and application of ERISA's fiduciary obligations. This case presents questions concerning Article III standing and the application of ERISA fiduciary principles to annuity-provider selection decisions in the context of pension risk transfers governed by Interpretive Bulletin 95-1.

*Amici* submit this brief to provide the Court with the perspective of former officials charged with ERISA enforcement. That perspective may assist the Court in evaluating arguments advanced in this appeal that

diverge from longstanding Department of Labor interpretations and enforcement approaches across multiple administrations.

No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *Amici* or their counsel made such a monetary contribution. *See* Fed. R. App. P. 29(4)(E).

## STATUTORY BACKGROUND

The Employee Retirement Income Security Act ("ERISA") was signed into law on Labor Day, 1974. However, in some ways, its history begins in 1963, when the Studebaker-Packard Corporation closed its automobile plant in South Bend, Indiana, leaving thousands of workers without their pensions. The fate of the Studebaker workers animated the American public and began a drive for reform that culminated in ERISA's passage. Senator Jacob Javits, considered the father of ERISA, highlighted repeated pension failures in order to make the public case for reform. *See* James Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (1st ed. 2005).

One of ERISA's "central purposes" is "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980). The Act contained numerous significant changes to prior law, including high standards of conduct expected of fiduciaries, a federal pension guarantee administered by the Pension Benefit Guaranty Corporation ("PBGC"), and significantly more enforcement authority for the U.S. Department of Labor. In short, as applicable here, ERISA enshrined a role for the federal government in overseeing the uniform management of pension promises across the country, as part of a Congressional goal to ensure that those promises were kept.

The remedial structure Congress created envisioned two key forces ensuring fiduciary accountability—a broad grant of civil enforcement authority to the Secretary of Labor and a private right of action. Both are essential parts of the remedial scheme. In describing the purpose of ERISA, the government has previously pointed out that, given limitations on its own resources, the "best means of protecting individual pension rights was to authorize beneficiaries to sue fiduciaries who

breach their duties." Br. for the United States as *Amicus Curiae* at 14, *Thole v. U.S. Bank, N.A.*, 590 U.S. 538 (2020). That means of protecting rights is even more important today than it was when the government made this statement in 2019. Government enforcement is currently experiencing a unique stress, as the subagency responsible for enforcement has had unprecedented attrition. *See* Restoring Trust: Enhancing Transparency and Oversight at EBSA: Hearing Before the Subcomm. on Health, Emp., Labor, & Pensions of the H. Comm. on Educ. & the Workforce, 119th Cong., at 3 (2025) (Statement of Ali Khawar), https://edworkforce.house.gov/uploadedfiles/khawar_testimony.pdf.

Additionally, as evidenced by the Secretary of Labor's *amicus* brief in this matter, an effort is underway to limit the scope of ERISA's private right of action. If successful, that effort would return workers and retirees to the pre-ERISA regime, where meaningful remedies were largely unavailable and fiduciary misconduct often went unredressed.

## SUMMARY OF ARGUMENT

This appeal asks whether participants in a defined-benefit pension plan that underwent a pension risk transfer have Article III standing to challenge fiduciaries' selection of an annuity provider when the

complaint plausibly alleges that fiduciaries imprudently and disloyally chose a materially riskier insurer to benefit the plan sponsor, thereby increasing the risk of nonpayment of promised benefits.

ERISA permits pension risk transfers, but it does not exempt them from fiduciary scrutiny. While the decision to undertake a pension risk transfer is settlor in nature, the selection of an annuity provider is a fiduciary act governed by ERISA's duties of prudence and loyalty. Participants therefore suffer a cognizable injury when fiduciaries allegedly expose their earned benefits to materially greater risk through an imprudent or disloyal selection process.

Plaintiffs' Complaint plausibly alleges a concrete and particularized injury: a non-speculative, materially increased risk of nonpayment that is fairly traceable to the challenged fiduciary decision and redressable through ERISA's remedial provisions, including equitable relief. Allegations that fiduciaries selected a materially riskier insurer despite the availability of safer alternatives, and did so to advance the interests of the plan sponsor rather than plan participants, are sufficient at the pleading stage.

The Secretary of Labor urges a contrary rule that would, as a practical matter, foreclose judicial review of annuity-provider selections unless and until nonpayment of benefits becomes virtually inevitable. That approach misconstrues both the nature of the injury alleged and ERISA's remedial design, which included a private right of action to redress harms, without a virtually insurmountable burden of proof, to ensure that there was ready access to federal courts. *See* 29 U.S.C. § 1001(b). ERISA does not require participants to wait for financial collapse before seeking relief for fiduciary misconduct that has already increased the risk to their benefits.

It is also inconsistent with ERISA's prudence standard, where, building on the common law of trusts, Congress "expect[ed] that the courts will interpret this prudent man rule (and other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H.R. Conf. Rep. No. 93-1280, at 302 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083.

Adopting the Secretary's position would undermine Congress's intent in enacting ERISA's fiduciary standards and remedial scheme by

insulating fiduciary conduct from review precisely when judicial oversight is most needed. The order below should therefore be affirmed.

## ARGUMENT

### I. Plaintiffs have standing to challenge a fiduciary's implementation of an annuity provider selection.

The Secretary of Labor's amicus brief mischaracterizes Plaintiffs' Complaint as premised on the abstract possibility that an insurer might fail at some indeterminate point in the future. Plaintiffs instead allege that fiduciaries increased the risk to their earned benefits through the selection of a particular annuity provider—an injury sufficient to establish Article III standing.

#### A. *Plaintiffs allege a concrete injury arising from the fiduciary's selection of a materially riskier annuity provider.*

Article III requires an injury that is concrete and particularized and actual or imminent. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs allege that the fiduciaries increased the risk of nonpayment by selecting this particular insurance carrier over better alternatives available on the market in order to lower the expenses for the plan sponsor, in violation of its duty of prudence and loyalty. *See* 29 U.S.C. § 1104. That injury arises at the moment fiduciaries commit the

plan's benefit liabilities to the chosen insurer, at which point participants' protection hinges on that insurer's ability to perform for decades.

Additionally, in contrast to the Secretary's derision of PBGC's guaranty program, the loss of PBGC coverage is a concrete harm that goes directly to the risk of individuals not receiving their promised benefits. The experience of policyholders following the 1991 failure of Executive Life Insurance Company ("ELIC") underscores that risk. Policyholders were treated differently depending on where they lived; whether they had purchased a policy from ELIC, based in California, or its subsidiary, Executive Life of New York; and the type of policy purchased. *See* Daniel A. Hartley, *Insurance on Insurers: How State Insurance Guaranty Funds Protect Policyholders*, Econ. Persp., No. 3 at 8 (May 21, 2024), https://doi.org/10.21033/ep-2024-3. Some policyholders "faced years of uncertainty" and, in some cases, received "only a fraction of the payments promised from their policies." *Id.* By contrast, PBGC strives to ensure continuity of benefit payments and continues paying benefits at estimated levels until it completes its calculations and issues formal determinations of benefit payments.

Where plaintiffs plausibly allege that fiduciaries have already increased the risk of benefit nonpayment through a challenged fiduciary act, the injury is sufficiently imminent to support Article III standing. Requiring near-certain default to plead injury would deny relief until after the risk materializes—precisely the point at which meaningful redress is least feasible.

ERISA's remedial structure confirms this. Congress authorized private actions not only to recover losses, but also to obtain equitable relief to remedy and address fiduciary misconduct *before* catastrophic loss. *See* 29 U.S.C. § 1132(a)(2)–(3).

### B. *The alleged injury is fairly traceable to the challenged fiduciary conduct and redressable under ERISA.*

The alleged injury is fairly traceable to the fiduciary conduct challenged here: the selection of the annuity provider to assume responsibility for plan benefits. The Secretary correctly notes that the decision to pursue a pension risk transfer is a settlor decision. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). But that distinction supports jurisdiction rather than defeats it: Plaintiffs do not challenge the abstract decision itself. They challenge the fiduciary's

implementation of that decision—specifically, the allegedly imprudent and disloyal selection of a particular provider.

Redressability is likewise satisfied. ERISA authorizes plan-wide and equitable relief for fiduciary breaches, including remedies that can mitigate ongoing risk and restore appropriate fiduciary governance. *See* 29 U.S.C. § 1132(a)(2)–(3).

## II. ERISA fiduciary duty principles do not support dismissal at the pleading stage.

On the face of the statutory text, ERISA's fiduciary standard is not satisfied by adherence to a rote process checklist. Although pension risk transfers are permissible under ERISA, permissibility does not equate to prudence. While the decision to engage in a pension risk transfer is settlor in nature, its implementation is governed by ERISA's fiduciary obligations.

ERISA requires fiduciaries to engage in a prudent process, and prudence is an expert standard. The comparison is not to a prudent layperson, but to a "prudent fiduciary with experience dealing with a similar enterprise." *Marshall v. Snyder*, 1 E.B.C. 1878, 1886 (E.D.N.Y. 1979) (citing *Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978)). In other words, a prudent expert. As the Fifth Circuit has explained, "a pure

heart and an empty head are not enough." *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983). Courts therefore must assess whether fiduciaries engaged in a reasoned decision-making process under the circumstances then prevailing. *See Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000).

When a complaint alleges the selection of a materially riskier provider despite the availability of safer alternatives—and pleads specific indicia suggesting inadequate investigation of relevant factors, misweighing of those factors, or disloyal motives—those allegations plausibly support an inference of fiduciary breach sufficient to proceed beyond dismissal.

### A. *Understanding the process is central to an ERISA prudence inquiry, and allegations of a materially riskier selection can plausibly imply an imprudent process.*

The Secretary correctly observes that an ERISA prudence inquiry focuses on the process surrounding the decision rather than only judging the results in hindsight. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007). But at the pleading stage, plaintiffs rarely have access to internal deliberations, consultant advice, committee minutes, or other documents bearing on how a pension risk transfer was implemented.

Courts therefore permit circumstantial pleading—allegations concerning the selection itself, available market alternatives, and identified red flags may support a plausible inference that fiduciaries failed to conduct a reasoned investigation or misapplied relevant considerations.

Additionally, since the propriety of the process used to select the annuity provider is key to assessing whether any fiduciary breach occurred, delaying that analysis until potentially years in the future—when a potential failure is close to realized—is incompatible with principles of judicial efficiency, fiduciary accountability, and ERISA's purposes.

Moreover, process-based review does not require courts to ignore substance. A purported "process" that is not reasonably designed to identify and select a safe provider, or that is compromised by conflicts or predetermined outcomes, is not prudent under ERISA's standards. 29 U.S.C. § 1104(a)(1)(A)–(B). Having a pure heart and an empty head are not enough to meet an expert standard of conduct. *Donovan*, 716 F.2d at 1467. Whether the fiduciaries in this instance met the standards ERISA imposes on them requires additional information, which can only be obtained through (perhaps limited) discovery.

### B. *IB 95-1 requires fiduciaries to seek the safest available annuity under the circumstances, and Plaintiffs plausibly allege the selection fell outside the range of reasonable fiduciary judgment.*

Interpretive Bulletin 95-1 ("IB 95-1") sets forth the Department of Labor's views regarding factors a prudent fiduciary should consider when selecting an annuity provider. *See* 29 C.F.R. § 2509.95-1(c)(1)–(6). Although IB 95-1 does not have the same force of law as a notice and comment regulation, it does encapsulate the appropriate framework of how fiduciaries can satisfy their statutory prudence obligations when selecting an annuity provider.[1] It makes clear that the cheapest—or the most expensive—annuity provider is not necessarily best. Rather, IB 95-1 contemplates a prudence inquiry of multiple safety-related factors with the intention that fiduciaries, at a minimum, will apply those factors to their plan's particular circumstances.

[1] Notably, the Department has previously acknowledged in a report to Congress that IB 95-1's treatment of issues surrounding private equity ownership of insurance companies needed "further consideration" and that these issues "may expose annuitants to excessive risk." *See* Rep. to Cong. on IB 95-1, at 27 (June 2024), https://dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf.

Here, however, the record does not indicate whether the fiduciaries of this plan examined all relevant factors, how those factors were weighed, and what additional considerations may have influenced the selection. The Secretary emphasizes that more than one provider may qualify as the "safest available." However, that does not defeat a complaint plausibly alleging that the chosen provider was materially riskier than multiple available alternatives and therefore fell outside the range of reasonable fiduciary judgment in the first place.

Accordingly, the question at this stage is not whether courts may second-guess close calls, but whether Plaintiffs plausibly allege fiduciaries failed to act with the required prudence and loyalty in selecting a provider. 29 U.S.C. § 1104(a)(1)(A)–(B). At the pleading stage, and without even limited discovery, that question cannot be resolved as a matter of law.

## III. The Court should be cautious about adopting a sweeping "no standing absent near-certain default" rule based on policy predictions.

ERISA's focus is on the protection of benefits, not the convenience of plan sponsors. The Secretary argues that permitting suits like this will deter employers from offering defined-benefit plans and will destabilize

the pension system. This position does not consider countervailing policy considerations.

For example, the impact of delinking employment relationships on the effectiveness of employee benefits as a recruitment and retention tool for employers, or the impact of lower accountability standards on employees' willingness and interest in these benefits, and their ultimate retirement security. It also does not acknowledge that denying standing for this selection may leave the plaintiffs with statutory rights that have no remedy.

Moreover, although policy considerations can inform the Court's analysis, they cannot override Article III and ERISA's fiduciary accountability framework. ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987)).

That balance is not served by a rule that denies any judicial forum for alleged fiduciary misconduct in annuity-provider selection unless plaintiffs can plead something close to inevitable nonpayment. Such a

rule would reduce deterrence of imprudent or disloyal selection practices and could undermine confidence in plan administration—particularly in transactions that shift the payment obligation to an insurer for decades.

## CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to affirm the district court's denial of Defendant-Appellant's motion to dismiss for lack of standing and allow Plaintiffs' fiduciary-duty claims concerning annuity-provider selection to proceed under the ordinary pleading and merits standards applicable to ERISA fiduciary conduct.

Dated: January 30, 2026

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume and word-count limits of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,757 words.

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: January 30, 2026 Andrew D. Freeman

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 30, 2026, a true copy of the foregoing *Amicus Curiae* Brief of Ali Khawar and Phyllis Borzi In Support of Plaintiffs-Appellees and Affirmance was filed using the Court's CM/ECF system, which will send a notice of docketing activity to all parties who are registered through CM/ECF.

Dated: January 30, 2026 Andrew D. Freeman