No. 18-2707-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALAN SACERDOTE et al.,
Plaintiffs-Appellants,

v.

NEW YORK UNIVERSITY,
Defendant-Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 1:16-cv-06284

MOTION OF AMERICAN COUNCIL ON EDUCATION AND OTHER HIGHER EDUCATION ASSOCIATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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The American Council on Education, the Association of American Universities, the Association of Community College Trustees, the Association of Governing Boards of Universities and Colleges, the College and University Professional Association for Human Resources, the Consortium of Universities of the Washington Metropolitan Area, the Council of Independent Colleges, the National Association of Independent Colleges and Universities, and the University Risk Management and Insurance Association (collectively, "Movants") hereby move this Court for leave to file the accompanying brief as *amici curiae* in support of defendants-appellees. Pursuant to Fed. R. App. P. 29(a), Movants solicited the consent of the parties. Defendant-appellee consents to the brief; plaintiffs-appellants reserved the right to object.

The **American Council on Education** (ACE) is the major coordinating body for American higher education. Its approximately 1,800 institutional and association members reflect the extraordinary breadth and contributions of degree-granting institutions in the United States. Believing that a strong higher education system is the cornerstone of a democratic society, ACE participates as *amicus curiae* on occasions where a case presents issues of substantial importance to higher education in the United States.

The **Association of American Universities (AAU)** is a nonprofit organization, founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 63 public and private research universities in the United States and two in Canada.

The **Association of Community College Trustees (ACCT)** is a non-profit educational organization of governing boards, representing more than 6,500 elected and appointed trustees who govern over 1,200 community, technical, and junior colleges in the United States and beyond.

The **Association of Governing Boards of Universities and Colleges (AGB)** is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 31,000 human resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions, and over 500 two-year and specialized institutions.

The **Consortium of Universities of the Washington Metropolitan Area (CUWMA)** is a nonprofit organization founded in 1965 to advance joint educational opportunities for students; collaborate on critical issues and shape policy in higher education; collaborate with regional governments, businesses, and organizations to ensure an educated workforce and citizenry; and increase the postsecondary attendance rates of students in the Washington, DC region. CUWMA currently has 17 members across all sectors of nonprofit higher education.

The **Council of Independent Colleges (CIC)** represents 684 private, nonprofit liberal arts colleges and universities and 83 state councils and other higher education organizations.

The **National Association of Independent Colleges and Universities (NAICU)** serves as the unified national voice of private, nonprofit higher education in the United States. It has more than 1,000 members nationwide.

University Risk Management and Insurance Association (URMIA) promotes the advancement and application of effective risk management principles and practices in institutions of higher education.

Under the terms of Rule 29, leave to file an amicus brief should be granted if the proposed amici meet the requirements of "(a) an adequate interest, (b) desirability, and (c) relevance." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). With respect to these requirements, "a broad reading is prudent" and "it is preferable to err on the side of granting leave." *Id.* at 132-33. Amicus briefs are routinely permitted because amici may provide "important assistance to the court"—for example, by collecting relevant "'background or fact[s],'" providing "'expertise not possessed by any party,'" explaining "'the impact a potential holding might have'" on a particular group, or arguing "'points deemed too far-reaching'" by a party. *Id.* at 132 (quoting Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 (1999)).

Here, the standards of Rule 29(a) are readily satisfied. Movants are organizations committed to representing the interests of higher education. Their views are desirable because they lend historical and present-day context to the issues disputed by the parties and can meaningfully discuss the impacts of the holdings that the parties request. And the attached brief is plainly relevant, as it bears directly on the parties' dispute.

For these reasons, the motion for leave to file the accompanying brief as *amici curiae* should be granted.

Dated: April 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for movants, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 27 and 32, that the motion is proportionally spaced, has a typeface of 14 points or more, and contains 775 words.

The motion has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook font. I have relied upon the word-count feature of this word-processing system in preparing this certificate. The electronic version has been scanned by Microsoft System Center Endpoint Protection engine version 1.1.14700.5, with antivirus version 1.265.485.0, which did not detect a virus.

Dated: April 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

Dated: April 6, 2020

Respectfully submitted,
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 21-3, the undersigned counsel certifies that none of the *amici* is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of nine organizations that represent the interests of institutions of higher education.[1]

The **American Council on Education (ACE)** is the major coordinating body for American higher education. Its approximately 1,800 institutional and association members reflect the extraordinary breadth and contributions of degree-granting institutions in the United States. Believing that a strong higher education system is the cornerstone of a democratic society, ACE participates as *amicus curiae* on occasions where a case presents issues of substantial importance to higher education in the United States.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici*, *amici*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief. In the district court, Mayer Brown LLP appeared on behalf of the Trustees of Columbia University in the City of New York to intervene to seek the unsealing of certain documents. Columbia is not a party to this appeal. This brief is accompanied by a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3).

of research universities to society. Its members include 63 public and private research universities in the United States and two in Canada.

The **Association of Community College Trustees (ACCT)** is a non-profit educational organization of governing boards, representing more than 6,500 elected and appointed trustees who govern over 1,200 community, technical, and junior colleges in the United States and beyond.

The **Association of Governing Boards of Universities and Colleges (AGB)** is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 31,000 human resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions, and over 500 two-year and specialized institutions.

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University Risk Management and Insurance Association (URMIA) promotes the advancement and application of effective risk management principles and practices in institutions of higher education.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 100 years, American institutions of higher education have been committed to fostering retirement security for the professionals who dedicate their careers to educating our next generation. The retirement system for higher education has always looked different than the system for industrial and corporate America. Whereas the pension system that predominated in America's for-profit sector incentivized a lifelong relationship between employers and their workers, colleges and universities implemented a system of annuities that achieved a similar guarantee of lifelong income without hampering the movement of personnel that is essential to academic life. When large companies introduced 401(k) plans more than a half-century later to supplement weakened pensions—and ultimately to supplant them—institutions of higher education had no reason to abandon the system that has, for generations, sustained academics after their teaching days have ended. So even as mutual funds have been added to collegiate retirement plans, annuities remain at their core.

ERISA does not require a one-size-fits-all approach to retirement. Rather, fiduciaries are obligated to act with the 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). Heeding this standard, the district court conducted a trial in which it evaluated whether New York University (NYU) acted prudently in light of the particular constraints it faced. Naturally, the court considered evidence of how other fiduciaries under those same constraints have acted, and discounted evidence about fiduciaries overseeing plans bearing no resemblance to NYU's. *See Sacerdote v. NYU*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

Plaintiffs contend that by crediting the similarities between NYU and fiduciaries administering similar plans, the district court was endorsing a "'loosened' standard of conduct" and permitting an industry to set its own standards. Pls.' Br. 70 (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014)). But the district court did no such thing. It simply applied ERISA's standard of conduct—one that by its terms depends on the context in which decisions are made. That NYU's decisions were consistent with those of the thousands of professionals who administer similar retirement plans was correctly treated as strong evidence for NYU.

The district court's approach to the evidence was not only acceptable, but under this Court's deferential standard for evaluating fiduciary conduct, essential. When courts are asked to evaluate the appropriateness of fiduciary conduct, the decisions of the fiduciary's peers provide an objective benchmark. Plaintiffs' contrary approach would permit the most relevant evidence to be discarded, which could result in penalizing fiduciaries for heeding prudent industry norms—which is exactly what ERISA asks fiduciaries to do.

ARGUMENT

"[T]he 403(b) plan marketplace is unique" and "significant[ly] differen[t] from 401(k) plans."[2] That phenomenon is a result, no doubt, of the circumstances that led to the university retirement system at the turn of the 20th Century—the history of which bears no resemblance to the rise of 401(k) plans in the 1980s and 1990s.

A. The Development of 403(b) Plans Differed from the Development of 401(k) Plans.

1. By most accounts, the collegiate retirement system owes its start to Andrew Carnegie. Carnegie "became concerned about the cause of the teacher when he was made a trustee of Cornell University in 1890."[3] "In 1905, concerned about the poverty that seemed the common fate of retired teachers, he gave the then colossal sum of $10 million to fund the pensions of teachers at thirty universities."[4] As he explained in his letter of gift, he hoped "to remove a source of deep and constant anxiety to the poorest paid and yet one of the highest of all professions."[5]

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[2] U.S. Dep't of Labor, Advisory Council on Emp. Welfare & Pension Benefit Plans, *Current Challenges and Best Practices for ERISA Compliance for 403(b) Plan Sponsors* 5, 9 (2011), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/current-challenges-and-best-practices-for-erisa-compliance-for-403b-plan-sponsors.pdf.

[3] WILLIAM C. GREENOUGH, COLLEGE RETIREMENT AND INSURANCE PLANS 8 (1948).

[4] IRVING S. SCHLOSS & DEBORAH V. ABILDSOE, UNDERSTANDING TIAA-CREF 19 (2001).

[5] GREENOUGH, *supra* note 3, at 9.

In 1906, Congress chartered the Carnegie Foundation for the Advancement of Teaching, and endowed it with the mission "[t]o provide retiring pensions, without regard to race, sex, creed, or color, for the teachers of universities, colleges and technical schools in the United States, the Dominion of Canada, and Newfoundland."[6]

Despite Carnegie's initial contribution (and subsequent contributions made directly by Carnegie and by the Carnegie Corporation of New York), it was clear almost immediately that Carnegie's money alone would not be enough to achieve his goal of making retiring allowances "a part * * * of our American system of education, so that the teacher may feel that the retiring allowance to which he is entitled is one of the compensations which go with small pay and modest living."[7] In 1918, then, the Carnegie Foundation founded the Teachers Insurance and Annuity Association, which is now known as TIAA.[8] From its founding, TIAA has assured retirement security for university faculty by providing annuities.

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[6] Act to Incorporate the Carnegie Foundation for the Advancement of Teaching, ch. 636, 34 Stat. 59 (Mar. 10, 1906).

[7] Henry S. Pritchett, *Mr. Carnegie's Gift to the Teachers*, 83 OUTLOOK 120, 121 (May 19, 1906).

[8] *See* TIAA, *Our History*, https://www.tiaa.org/public/why-tiaa/who-we-are.

Indeed, "[t]he TIAA annuity contract incorporates fundamental provisions specially designed for college retirement plans" with an eye toward "advanc[ing] the cause of education as a whole."[9]

An annuity is a type of insurance policy. "Under a classic fixed annuity, the purchaser pays a sum certain and, in exchange, the issuer makes periodic payments throughout, but not beyond, the life of the purchaser." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins.*, 513 U.S. 251, 262 (1995). Just as life insurance insures against the risk of death, annuities insure against the risk of outliving one's assets. "Economists and experts on insurance agree that annuities can play a key role in providing stable retirement income that lasts for the lifetime of retired workers and their spouses."[10] Studies show that retirees with savings that generate a periodic annuity are better able to enjoy retirement, because they do not face the anxiety entailed in managing a dwindling pool of assets.[11] As a result, the U.S. Government Accountability Office in

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[9] GREENOUGH, *supra* note 3, at 14, 17.

[10] Barry P. Bosworth et al., *Do Retired Americans Annuitize Too Little?: Trends in the Share of Annuitized Income* 1, (Ctr. for Retirement Research at Boston College, Working Paper 2015-9 (2015)), http://crr.bc.edu/wp-content/uploads/2015/06/wp_2015-9.pdf.

[11] *See, e.g.*, Jonathan Gardner & Nathan Schneeberger, *'Lucky Few' Retirees: Financially Comfortable but Health Costs Loom Large¸* TOWERS WATSON INSIDER (Nov. 2014) ("Retirees with a greater share of income from an employer pension or annuity were less concerned about financial risks and more confident of their financial futures than similar retirees

2016 issued a report "recommend[ing]" that the Secretary of Labor "help encourage plan sponsors to offer lifetime income options" as part of their retirement plans.[12]

For university employees, annuities replicate the guaranteed income of a pension without requiring the loyalty to a single employer that traditional defined benefit plans have been designed to promote.[13] Collegiate annuities were designed to facilitate the "free interchange of professors"[14] between institutions—and, as a result, the free movement of ideas. So they were designed to allocate individual rights to participants (not to institutions) and to be readily portable.[15] These features make the

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whose income came from more variable sources, such as defined contribution accounts.").

[12] GAO, GAO-16-433, 401(k) Plans: DOL Could Take Steps to Improve Retirement Income Options for Plan Participants 55 (2016), https://www.gao.gov/assets/680/678924.pdf.

[13] *See, e.g.*, Teresa Hassara, *The 403(b) Lifetime Income Lesson for 401(k) Plans*, Pensions & Investments (Nov. 30, 2015), http://www.pionline.com/article/20151130/PRINT/311309998/the-403b-lifetime-income-lesson-for-401k-plans; David Pratt, *To (b) or Not to (b): Is That the Question? Twenty-First Century Schizoid Plans Under Section 403(b) of the Internal Revenue Code*, 73 ALB. L. REV. 139, 172 (2009).

[14] GREENOUGH, *supra* note 3, at 9.

[15] *See, e.g.*, Advisory Council, *supra* note 2, at 5-6 ("[M]any 403(b) plans have consisted solely of participant-owned annuity contracts and/or custodial accounts. Under these contracts and/or accounts, the plan participants possessed many (and sometimes all) of the contractual rights associated with these accounts and contracts, and the plan participants interacted directly with the service providers for the plan."); GREENOUGH, *supra* note 3, at 15 ("All rights in the [TIAA] contract are vested in the staff member or his beneficiary. If he changes jobs, he takes the contract

"TIAA-CREF Traditional Annuity a popular investing option." *Divane v. Nw. Univ.*, -- F.3d --, 2020 WL 1444966, at *3 (7th Cir. Mar. 5, 2020) (quotation marks omitted); *accord id.* at *6 (describing the product as an "attractive offering[]" with "favorable terms" "because it promise[s] a contractually specified minimum interest rate").

The launch of the collegiate retirement system of annuities predates, by decades, enactment of Section 403(b) of the Internal Revenue Code. In 1942, Congress bestowed tax-preferred status to contributions by charitable organizations toward their employees' annuities.[16] And in 1958, Congress enacted Section 403(b), which defined the amounts that could be contributed to so-called tax-sheltered annuities.[17] In 1974, Congress permitted 403(b) plans to offer investments other than annuities, thus allowing 403(b) plans to include custodial accounts containing mutual funds in addition to annuities.[18]

Notwithstanding this statutory change, the prominence of annuities remains a defining characteristic of 403(b) plans.[19] This phenomenon has a variety of root causes. *First*, university employees are familiar

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with him, including the rights established by all premiums paid up to that time.").

[16] Revenue Act of 1942, ch. 619, § 162, 56 Stat. 798, 862.

[17] Technical Amendments Act of 1958, Pub. L. No. 85-866, § 23, 72 Stat. 1606, 1620-21 (codified at 26 U.S.C. § 403(b)).

[18] ERISA, Pub. L. No. 93-406, § 1022(e), 88 Stat. 829, 940 (1974) (codified as amended at 26 U.S.C. § 403(b)(7)).

[19] *See* Advisory Council, *supra* note 2, at 17, 20.

with and trust annuities as a key to maintaining a stable retirement income, having viewed the successful retirements of their predecessors. *Second*, annuities in university retirement plans are typically issued as bilateral contracts between the annuity provider and the plan participant. Under those contracts, the plan sponsor lacks the authority to take money out of the existing annuities. *Third*, annuity providers typically penalize or restrict withdrawals in exchange for offering the most favorable rates. So plan participants are naturally reluctant to transition away from annuities. *See, e.g.*, *Divane*, 2020 WL 1444966, at *2 (observing that the TIAA Traditional Annuity has a "a 2.5% surrender charge if a participant withdraws the investment in a lump sum sooner than 120 days after the termination of her employment"). *Fourth*, participants have limited other investment options, because the Internal Revenue Code limits 403(b) plan investments (unlike 401(k) plan investments) to annuities and registered mutual funds.[20]

Organizations representing 403(b) plan participants have themselves celebrated the value of annuities to the system of academic retirement. This is exemplified by the Statement of Principles on Academic Retirement and Insurance Plans, which is prepared and periodically revised by a joint committee of the American Association of University Pro-

[20] *See* I.R.C. § 403(b).

fessors and the Association of American Colleges (now known as the Association of American Colleges and Universities).[21] The Statement encourages member-institutions to "provide for a plan of retirement annuities" that will generate, for a typical individual retiring at a normal age, "two-thirds of the yearly disposable salary (after taxes and other mandatory deductions) during the last few years of full-time employment."[22]

2. The origin story for 401(k) plans differs markedly from the history of 403(b) plans. 401(k) plans were designed to supplement pensions. Indeed, Congress did not even authorize 401(k) plans until 1978.[23] "[W]hen ERISA was enacted" in 1974, "the defined benefit plan was the norm of American pension practice." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (alteration and quotation marks omitted). Unlike 403(b) plans, defined benefit plans were designed to "*reduce* [employee] portability" by "reward[ing] employees who spen[t] their entire career with a single employer through longer vesting requirements and back-loaded pension wealth accrual."[24]

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[21] *See* AAUP, *Statement of Principles on Academic Retirement and Insurance Plans,* https://www.aaup.org/file/retirement-and-insurance-plans.pdf.

[22] *Id.* at 252.

[23] Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763.

[24] Gopi Goda et al., *Retirement Plan Type and Employee Mobility: The Role of Selection and Incentive Effects* 1 (NBER Working Paper No. 18902 (2013)) (emphasis added).

Given their role as supplements to pensions, early 401(k) plans were not built around annuities. Although the market for for-profit retirement plans has changed dramatically in the past forty years—such that "defined benefit plans are now largely limited to the public sector, very large employers, and multi-employer plans of large national unions such as the Teamsters"[25]—401(k) plans have largely retained their original structures.

Furthermore, only 6 percent of 401(k) plans offer annuities as investment options.[26] And because annuities bring administrative and contractual complexities, there are "substantial differences" between 403(b) and 401(k) plans.[27]

B. Compliance with ERISA's Fiduciary Duties Must Be Assessed in Light of the Differences Between 403(b) and 401(k) Plans.

Plaintiffs are not shy about their intent to punish a university for not transforming a 403(b) plan into what is functionally a 401(k) plan.

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[25] Pratt, *supra* note 13, at 144.

[26] *Compare* Plan Sponsor Council of Am., 2017 403(b) Plan Survey tbl.58, *Sacerdote v. NYU*, No. 1:16-cv-06284-AT (S.D.N.Y. Jan. 10, 2018), Doc. 134-5, *with* Deloitte, Defined Contribution Benchmarking Study 20 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-defined-contributions-benchmarking-survey-report.pdf.

[27] Advisory Council, *supra* note 2, at 20*; see also id.* at 10-13 (table cataloguing many differences between the plan types).

See, e.g., Pls.' Br. 14 ("[T]here is no material difference in pricing or services between 403(b) plans and 401(k) plans."); *id.* at 70 (suggesting that the plan types are different only "for *tax* purposes"); A38 (complaint) (alleging that universities were obligated to respond to regulations that, in their view, "ma[d]e 403(b) plans more like 401(k) plans").

But the argument is meritless. "ERISA protects plan participants' reasonable expectations *in the context of the market that exists*." *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 2016 WL 7494320, at *17 (D. Conn. Dec. 30, 2016) (emphasis added). After all, ERISA determines a fiduciary's obligation to exercise care prudently and with diligence "under the circumstances *then prevailing*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added). ERISA thus offers no relief to plaintiffs who "seek to transform the market itself." *Rosen*, 2016 WL 7494320, at *17.

This insight is critical to the instant appeal. As we have explained, 403(b) and 401(k) plans have different histories, promote different objectives, and serve different constituencies. Their fiduciaries therefore work under markedly different constraints. Because ERISA requires a fiduciary to act as would a reasonable individual in *similar* circumstances, it does not require (and often does not permit) a court to judge 403(b) fiduciaries by how 401(k) fiduciaries have acted. Rather, ERISA measures 403(b) fiduciaries—like all fiduciaries—against the conduct of their peers who have prudently addressed similar issues.

The trial made it abundantly clear that the investment preferences of the plans' beneficiaries was central to its fiduciaries' decisionmaking. As we have documented, educators have historically flocked to TIAA annuities. In response to this desire, NYU has long affiliated with TIAA. That affiliation fully explains many of the decisions challenged in this case.

Most importantly, NYU had to account for the fact that its relationship with TIAA was immutable. Its members held TIAA annuities that were subject to bilateral contracts to which NYU was not a party. *Sacerdote v. NYU*, 328 F. Supp. 3d 273, 289, 300-01 (S.D.N.Y. 2018). Thus, TIAA does not permit plan sponsors to remove money from those annuities—only participants can elect to reinvest their annuity accounts. (And even then, certain annuity contracts are illiquid as to participants.) *Id.* at 299-300, 303-04. Moreover, because TIAA's annuity products are particularly complex, TIAA does not permit other vendors to provide recordkeeping services; only TIAA provides those services. *Id.* at 302-03.

This background is essential to explaining NYU's recordkeeping decisions. TIAA not only had monopoly power over recordkeeping services for its *own* products, but also could unilaterally dictate NYU's recordkeeping decisions more generally: NYU could consolidate only with TIAA, and only once TIAA had the technology to keep adequate records for non-TIAA funds. SA44, 49-50; ASA35; *cf. Divane*, 2020 WL 1444966, at *7 (upholding the dismissal of a similar allegation against Northwestern University, because "[i]f Northwestern removed TIAA [as a] record-keeper, participants would have lost access to the Traditional Annuity").

But under the terms of its charter, TIAA's services are available only to "nonprofit colleges, universities, institutions engaged primarily in education or research, governments and their agencies and instrumentalities, and other nonprofit institutions."[28] Fiduciaries to 401(k) plans sponsored by for-profit companies cannot avail themselves of TIAA's product offering.

Thus, on the issues that were central to this case—what fees NYU could have attained for recordkeeping services, the timing of NYU's recordkeeping consolidation, and the appropriateness of offering two TIAA annuities on NYU's plan investment lineup—it would have been impossible to glean meaningful information about reasonable fiduciary conduct by evaluating 401(k) plans that faced none of the same constraints.[29] But Plaintiffs straightforwardly ask the Court to disregard

[28] Restated Charter of Teachers Insurance and Annuity Association of America art. 8, § 1 (as amended 2016), https://www.tiaa.org/public/pdf/tiaa_charter.pdf.

[29] Importantly, Plaintiffs do not challenge NYU's original decision to affiliate with TIAA. Nor could they—TIAA is popular among educators and has long been the industry standard, and in any case, the limitations period for challenging that decision expired decades ago. Thus, the only issue before the district court was whether NYU acted reasonably in continuing its affiliation with TIAA.

the overwhelming evidence that NYU's interactions with TIAA were ordinary, in favor of evidence that other fiduciaries made different decisions when faced with different problems under different conditions.

Plaintiffs' position lacks any credible support.

1. Plaintiffs rely first on a personal injury case about an allegedly faulty airport baggage carousel. In *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d Cir. 1997), this Court considered whether *Daubert* should be interpreted to require the exclusion of experts who had not designed baggage carousels. The Court held that exclusion was not required because individuals who had not designed baggage carousels might still be able to detect flaws in baggage carousel design (in part because such defects could never be litigated if only individuals who had worked for the airline industry were permitted to testify).

Plaintiffs interpret *Stagl* to mean that courts should not consult industry standards of reasonableness, but *Stagl* says no such thing. This Court did not require the jury to accept the plaintiffs' expert; it merely authorized the jury to hear from the plaintiffs' expert. If, as here, the plaintiffs' expert offered only inapt experience and apples-to-oranges comparisons, then the jury surely would have discounted the testimony. Likewise, here, the court rejected the testimony of Plaintiffs' expert witnesses because they could offer neither experience nor analysis that might answer questions that so obviously turned on the characteristics of the TIAA products at issue. *See Sacerdote*, 328 F. Supp. 3d at 282 & nn.19-20, 305-06 & n.76, 311 & n.110, 312 & n.112.[30] Indeed, the court *did* consider Plaintiffs' experts testimony to some extent—and found that the testimony *undermined* Plaintiffs' case. *See, e.g.*, *id.* at 302 n.63, 304 & n.71, 305, 316. Plaintiffs' problem was not that the court categorically disregarded their experts; it was that their experts' evidence just did not help them. Judge Forrest's methodical criticism of Plaintiffs' experts demonstrates conclusively that the court was asking the right questions.

2. Plaintiffs also insist that the district court "effectively created a different prudence standard for TIAA's 403(b) clients" when she credited the comparisons between NYU and other TIAA 403(b) plan clients. Pls.' Br. 70 They say that by doing so, the court was subjecting NYU's fiduciaries to a "'loosened' standard of conduct." *Id.* (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014)). But Plaintiffs are again misconstruing what the court found. The court did not decide that evidence about TIAA's clients set the standard by which NYU should be judged; it found that, within the record assembled by the parties, NYU's

[30] Implicit in Plaintiffs' argument is the suggestion that universities move in lockstep, and that unaffiliated experts must be credited in order to provide a check on the university community. That premise is categorically false. Not all universities use TIAA annuities, and some universities that started with TIAA annuities opted to freeze their TIAA accounts to start fresh with new lineups. It is particularly telling that, given the diversity of approaches adopted by large universities, none followed what Plaintiffs insist was the only reasonable course.

evidence was more probative than Plaintiffs' of whether NYU satisfied ERISA's normal fiduciary standard.

Consider, for example, Plaintiffs' truism that "[j]ust as excessive fees significantly reduce the value of a defined contribution account in a 401(k) plan, the same is true in a 403(b) plan." Pls.' Br. 71 (quotation marks omitted). A reader of this sentence could be forgiven for thinking that the court had said that NYU was free to pay excessive fees as long as other 403(b) plans did, too. But, of course, the court said no such thing. It considered other TIAA plans simply as evidence of what *was* an excessive fee for a plan that had 75% of its assets in TIAA annuities—a question unanswerable through philosophical meditation, and a question for which plans *lacking* TIAA annuities can shed no light. *See Sacerdote*, 328 F. Supp. 3d at 294 & n.45.

In the end, then, Plaintiffs just misunderstand why the court looked to other 403(b) plans as evidence. Another of their arguments overtly betrays their confusion. Plaintiffs complain that, by using reference groups like "TIAA's largest two hundred clients," the court incorrectly "evaluated the prudence of NYU's methods by comparing it to other fiduciaries who had made the same allegedly imprudent decisions." Pls.' Br. 68-69 (quotation marks omitted). But that is facially wrong: Plaintiffs did *not* allege that NYU's continued use of TIAA was itself imprudent—nor could they have, because as discussed, that decision was not entirely up to NYU. Plaintiffs' argument, at best, must be that NYU acted imprudently *given* its affiliation with TIAA. And evidence of other plans with that same affiliation is the most probative information in assessing that argument.

In any event, Plaintiffs' suggestion that the court was "loosen[ing]" NYU's standard of conduct cannot be reconciled with the court's meticulously reasoned opinion. By its statutory text, ERISA subjects fiduciaries to liability only if other fiduciaries "familiar with such matters" would have acted differently "in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). That statutory text requires a contextual evaluation, and that is exactly what the court provided.

3. Despite their eagerness to criticize the district court's result, Plaintiffs offer no workable alternative to her mode of analysis. They suggest that fiduciaries should be held to account if their plans fail to attain "reasonable expenses" or fail to remove "imprudent investments." Pls.' Br. 71. But the definitions of "reasonable" and "prudent" will necessarily evade hard-and-fast standards. When courts evaluate fiduciary decisionmaking, they need to be able to rely on objective metrics of reasonableness. Otherwise, they may fall prey to hindsight bias—and this they must not do. *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) ("evaluating [a fiduciary's decision] from the perspective of the 'time of the investment decision' rather than from 'the vantage point of hindsight'"). The actions of other fiduciaries who confronted the same questions provide a valuable source of objective comparison.

And Plaintiffs fail to offer any objective alternative. Instead, they ask for a standard in which courts can decree fees and investments to have been unreasonable after the fact, without any grounding in the market forces that actually dictate real-time decisionmaking. But fiduciaries—who subject themselves to personal liability when they agree to serve on 401(k) and 403(b) oversight committees—need to be able to rely on objective metrics when decisions are being made. So Plaintiffs' approach is not only incoherent as a matter of statutory interpretation; it would advance an incoherent policy that benefits nobody except the cottage industry that has developed to litigate cases like these.

Here, after a trial that yielded a one-sided record showing that NYU had made reasonable decisions about recordkeeping and investment selections that were matched by the vast majority of fiduciaries confronting similar decisions, the court issued a thoughtful opinion explaining why NYU's conduct satisfied ERISA's fiduciary duties. Plaintiffs' baseless broadside on university retirement plans offers no sound reason to disturb the trial court's findings.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for *amici curiae*, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,682 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook font. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate. The text of the electronic brief is identical to the text of the paper copies, and the electronic brief has been scanned by Microsoft System Center Endpoint Protection engine version 1.1.14700.5, with antivirus version 1.265.485.0, which did not detect a virus.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

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