23-35370

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TERRANCE JOHNSON, *et al*.,

Plaintiffs-Appellants,

v.

CARPENTERS OF WESTERN WASHINTON BOARD OF TRUSTEES, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Washington, No. 2:22-cv-01079-JCC, The Honorable Judge John C. Coughenour

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA AND SIGNATORY WALL AND CEILING CONTRACTORS ALLIANCE IN SUPPORT OF DEFENDANTS-APPELLEES' PETITIONS FOR PANEL REHEARING OR REHEARING EN BANC

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* Associated General Contractors of America, Inc., and Signatory Wall and Ceiling Contractors Alliance state that they are national construction associations, that they each have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

Date: September 22, 2024

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INTERESTS OF *AMICI CURIAE*

Associated General Contractors of America ("AGC") is a national construction association that works to ensure the continued success of the construction industry by advocating for federal, state, and local measures that support the industry and by connecting member firms with the resources and individuals they need to be successful businesses and corporate citizens. AGC comprises eighty-nine chartered chapter affiliates, including at least one chapter in every state plus the District of Columbia and Puerto Rico. Over 28,000 firms, including approximately 7,000 of America's leading general contractors, 9,000 specialty contractors, and 12,000 service providers and suppliers belong to AGC through its nationwide network of chapters.

Signatory Wall and Ceiling Contractors Alliance ("SWACCA") is a national, non-profit trade association that advances the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents approximately 400 wall and ceiling construction employers – including many of the largest in the industry – who perform framing, drywall, and interior systems work nationwide, primarily in the construction industry. SWACCA members employ many thousands of carpenters, drywall finishers, plasterers, and laborers throughout the United States.[1]

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[1] Pursuant to Local Rule 29-2(a), *Amici* affirm that all parties have consented to the filing with this brief. In accordance with Federal Rule of Appellate Procedure Rule 29, *Amici* further affirm no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amici*, their members, and their counsel made such a monetary contribution.

Amici and their chapters appoint trustees to serve as management representatives on Taft-Hartley multiemployer benefit trust funds in the construction industry. *Amici* member-employees, both currently employed and retired, frequently serve as management trustees for pension and retirement funds, and other funds with investment responsibilities. Presently, *Amici* and their chapters collectively have authority to appoint more than 1,000 trustees to over 600 ERISA-covered plans.

Amici and their membership also interact extensively with organized labor. Many members have direct interactions through organized labor's representation of the members' trade employees. Approximately forty (40) AGC chapters and 13 SWACCA regional affiliates serve as collective bargaining agents on their members' behalf, and negotiate collective bargaining agreements with up to 11 and four major crafts, respectively. Through this collective bargaining, *Amici* chapters and affiliates have sponsored the creation of, and maintain, multiemployer benefit trust funds nationwide. The negotiations they undertake necessarily address employer contributions to these Taft-Hartley multiemployer benefit trust funds for hours worked by employees, including defined benefit pension plans and defined contribution retirement plans of the type at issue in this case.

The questions presented in this case are of significant importance to *Amici*, their membership, and the individual trustees *Amici* and their chapters/affiliates appoint. Trustees do not work for their own benefit, but instead take on responsibilities outside their ordinary roles of employment and devote considerable time and effort, generally without compensation, to advance the interests of plan

participants and beneficiaries and to benefit the construction industry at large. In doing so, trustees assume fiduciary duties to plan participants, and are exposed to potential personal liability for violations of their fiduciary duties.

The pleading standard applicable to claims for breach of the fiduciary duty of prudence is a matter that affects the financial health of multiemployer trust funds, the individuals serving as fiduciaries, plan participants and beneficiaries receiving benefits, and the construction industry as a whole. It is critical that plans and their beneficiaries continue to enjoy the benefit of prudent investment decision-making, but also that plan trustees and fiduciaries can conform their decision-making processes to standards that are consistently enunciated, within their control to satisfy, and applied across all jurisdictions.

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act of 1974 ("ERISA") requires that multiemployer plan trustees undertake an objective and thorough analytical process when evaluating potential investments to fulfill their duty of prudence. Trustees cannot base investment decisions on the risk of loss and opportunity for gain alone. Instead, they must consider and balance diverse interests of plan participants and beneficiaries, including the plan's liquidity requirements, financial returns and goals, and the role a particular investment will play as part of a plan's overall portfolio.

The pleading standard applied to claims of breach of the duty of prudence – which has developed over the course of decades and has been consistently applied across jurisdictions – recognizes that trustees must often make difficult tradeoffs

among competing considerations and close judgment calls. Accordingly, to state a claim for breach of the duty of prudence, plaintiffs are required to allege specific facts to establish that **the process** undertaken by trustees was insufficient or otherwise deficient, or identify a meaningful benchmark where information about the fiduciaries' process is not known.

The Court of Appeals' opinion in this case implicitly accepts that a plaintiff may state a claim for breach of the duty of prudence by alleging that an investment was imprudent *per se*. A lower pleading bar would, if adopted, directly conflict with ERISA's mandate for portfolio diversification and run contrary to longstanding regulations and guidance from the Department of Labor regarding how ERISA fiduciaries may fulfill their duty of prudence. A standard that allows lawsuits to challenge a plan's investments without meaningful comparisons or evidence of flawed decision-making would open the floodgates to meritless litigation against plans and trustees. It will cause trustees to be trained and advised to adopt a more risk averse approach to plan asset investment. It will constrain trustees' ability to address plan funding issues over time. It will result in reduced investment returns, negatively affecting participant and beneficiaries' interests. And it would discourage members of the construction industry from acting as trustees, which would threaten plans' ability to maintain institutional knowledge and provide steady management.

For these reasons, *Amici Curiae* respectfully submit that the Court should grant Petitioners' request for rehearing or rehearing *en banc*.

ARGUMENT

I. The Historic Process-Focused Pleading Standard Properly Aligns with ERISA's Duty of Prudence and Conforms with Decades of Guidance from the Department of Labor

Section 404 of ERISA requires fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries[,]" and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1).

In recent rulemaking, the Department of Labor ("DOL") affirmed that Section 404 specifically "require[s] fiduciaries to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan." *Financial Factors in Selecting Plan Investments*, 85 Fed.Reg. 72846-01 (2020). The DOL emphasized that "[t]he Department's longstanding and consistent position, reiterated in multiple forms of sub-regulatory guidance, is that **when making decisions on investments and investment courses of action**, plan fiduciaries must be focused solely on the plan's financial returns, and the interests of plan participants and beneficiaries in their benefits must be paramount." *Id.*, *e*mphasis added.

To implement section 404 of ERISA, DOL long ago issued regulations that define the actions a fiduciary should take to satisfy their duty to act prudently when making investment decisions:

> (b) Investment duties.
> (1) With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary:
> (i) Has given 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 to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
> (ii) Has acted accordingly.
> (2) For purposes of paragraph (b)(1) of this section, "appropriate consideration" shall include, but is not necessarily limited to,
> (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and
> (ii) Consideration of the following factors as they relate to such portion of the portfolio:
> (A) The composition of the portfolio with regard to diversification;
> (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> (C) The projected return of the portfolio relative to the funding objectives of the plan.

29 C.F.R. § 2550.404a–1; see also, *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013). In issuing this regulation, the DOL stated, "the regulation is in the nature of a 'safe harbor' provision; it is the opinion of the Department that fiduciaries who comply with the provisions will have satisfied the requirements of the 'prudence' rule, but no opinion is expressed in the regulation of the status of activities undertaken or performed that do not so comply." 44 Fed. Reg. 37222 (1979). By its nature, this safe harbor focuses on trustees' actions and decision-making, not on ultimate investment performance.

Trustees' ability to conform their decision-making processes to objective standards and the availability of a safe harbor provision is of utmost importance. ERISA holds a trustee liable for a breach of fiduciary duty for resulting losses to the plan. *Friend v. Sanwa Bank*, 35 F.3d 466, 469 (9th Cir.1994). "Section 1109(a) provides that a fiduciary who breaches his duties 'shall be personally liable to make good to such plan any losses to the plan resulting from each such breach....'" *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217-18 (4th Cir. 2011). In the absence of objective standards, trustees can be exposed to personal liability for investment decisions that, with the benefit of 20-20 hindsight, fall short of expectations. While many trustees are protected to some extent by fiduciary insurance, the potential remains that investment losses exceed policy limits, particularly given the size of investments that pension and retirement trusts frequently make, thus exposing trustees to actual personal liability.

Accordingly, over the past 45 years, courts have developed and consistently applied a prospective, process-based approach to analyze claims alleging a breach of the duty of prudence. As discussed in Petitioners' briefs, this Court and Courts of Appeals throughout the country have long held that when determining whether a sufficient claim for breach of the duty of prudence has been alleged, the question is "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983). The process undertaken by trustees to evaluate and structure an investment is the relevant inquiry, not the ultimate investment performance.

Ultimately, so long as trustees have employed an appropriate process, the outcome or return on the investment is (and should be) irrelevant for purposes of stating a claim for breach of the duty of prudence. Plan fiduciaries are not charged with accurately predicting the future, nor are they guarantors of investment returns.

The pleading standard Petitioners advocate – developed and applied for decades and consistent with DOL guidance – requires a plaintiff to allege facts to establish a deficiency in the investment evaluation and decision-making process, or identify a meaningful benchmark when information about the fiduciaries' process is not known. This standard adequately protects plan beneficiaries' interest in prudent investment decision-making, while allowing trustees the latitude and discretion they require to make investment decisions that benefit current and future beneficiaries without exposing trustees to undue liability. As discussed herein, lessening the applicable pleading standard, or allowing beneficiaries to state a claim premised on an allegation that a particular investment was imprudent *per se,* will threaten plans and trustees with meritless litigation, is antithetical to ERISA's diversification mandate, will distort trustee decision-making by compelling trustees to be overly risk averse, and will disincentivize participation of trustees for plans in the construction industry.

II. Endorsing a More Lenient Pleading Standard Damages the Financial Health of Plans, Harms Participants and Beneficiaries, and Chills Trustee Participation

A. A *Per Se* Rule of Prudence Exposes Plans and Trustees to Meritless Claims and Litigation

A threshold pleading standard that relies on investment performance and departs from the historical focus on the process of trustee decision-making opens the doors to meritless litigation against pension plans and trustees. Without needing to allege specific facts evidencing imprudence, plaintiffs could file suit any time they are dissatisfied with investment performance. Even when trustees follow a sound decision-making process, investment performance varies, so that claims for breaches of fiduciary duties could be made where trustees have acted prudently, or even within the DOL's safe harbor. Legal costs for plans would necessarily increase, diverting resources away from benefits.

Moreover, investment performance can vary widely during the life of an investment. Markets of all types fluctuate. An investment may take an unexpected short term loss, but rebound dramatically over a longer time horizon. A short-term failure may be a long term success. If plans and trustees are exposed to litigation based on investment outcomes, the lower pleading bar will invite plaintiffs and their counsel (with their own financial incentives) to capitalize on fluctuations in investment performance. ERISA fund investment litigation will increase and be more on par with consumer and security class action litigation.

The historic pleading standard recognizes that employee benefit plans would be unnecessarily harmed by undue litigation without a threshold, gate-keeping

pleading standard that is not subject to whims of investment performance, but on actual fiduciary conduct. The Court should not depart from that standard.

B. A *Per Se* Rule of Prudence is Antithetical to ERISA's Diversification Mandate

Trustees are charged with prudently investing plan assets to safeguard and grow the benefits participants have earned and are entitled to receive now and far into the future. A pleading standard that focuses on trustees employing a prudent process allows trustees to evaluate multiple considerations when making such investments. In contrast, a *per se* standard focused on outcomes will limit trustee discretion and drive lowest-risk decision-making to the detriment of plans and their beneficiaries.

At the outset, it is important to note that examining the merits of a particular investment and evaluating that investment decision within the context of a fund's overall portfolio, liquidity requirements, and long-term funding goals, requires financial knowledge and expertise. Courts have accordingly long encouraged fiduciaries to employ the services of professional investment consultants (like Petitioner Callan), actuaries, and counsel in their investment decision-making process. *In re Unisys Sav. Plan Litigation*, 74 F.3d 420, 435 (3d Cir. 1996) ("While we would encourage fiduciaries to retain the services of consultants when they need outside assistance to make prudent investments and do not expect fiduciaries to duplicate their advisers' investigative efforts, we believe that ERISA's duty to investigate requires fiduciaries to review the data a consultant gathers, to assess its significance and to supplement it where necessary.")

With the aid of professionals, trustees invest plan assets to maximize returns within the framework of considerations reflected in the DOL's safe harbor. Among other things, trustees must take into account the liquidity and low-volatility returns needed to meet payment obligations to current and near-term beneficiaries. At the same time, trustees incorporate investments that may involve higher risk to generate returns that meet or exceed internal investment performance targets and inflation, to ensure that plans remain sufficiently funded to provide future vested benefits and increases.

For pension and retirement plans, the diversity of interests among beneficiaries demands diversification of risk across the portfolio. Pension plan trustees manage and invest plan assets on behalf of current beneficiaries (*i.e.*, retirees) as well as future beneficiaries at all stages of their careers – from junior employees who may retire 40 or more years in the future, to late-career employees whose retirements are imminent. Trustees must take into account these competing interests. Current and soon-to-be retirees may best be served by maintaining high levels of liquidity and making conservative investments with more stable, but lower, returns. Meanwhile, younger contributing participants may be better served by maintaining less liquidity and instituting a more aggressive investment approach with higher yields to support future benefit increases. Trustees owe fiduciary duties to both of these groups simultaneously while advancing the interest of all.

Moreover, trustees for plans with unfunded liabilities must also take into consideration how they can maintain current benefits while taking prudent steps to

increase the plan's funding levels. Ultimately, plans are funded through contributions and investment returns. Limits on one source places higher demands on the other, with neither source being unlimited. If additional benefit contributions are necessary due to reduced investment returns, plan beneficiaries and their collective bargaining representatives must make difficult decisions. Allocating more monies from collectively bargained wage packages to shore up a pension fund leaves less monies that can be allocated elsewhere. This can result in a reduction or stagnation of other benefits (e.g., health and welfare or vacation pay) or require employees to forego increases in their hourly wages.

The Supreme Court recognized that ERISA fiduciaries make "difficult tradeoffs" in making investment decisions. *Hughes v. Northwestern Univ.,* 595 U.S. 170, 177 (2022). These can include balancing current liquidity requirements with long term funding objectives, the diverse interests of participants and beneficiaries, and evaluating individual investment and portfolio level risks in light of those considerations. For these reasons, ERISA expressly contemplates and requires that fiduciaries maintain a diversified portfolio of investments. 29 U.S.C. § 1104(a)(1)(C).

Diversification means more than mere diversification of asset types (treasuries, securities, real estate, etc.). The type of diversification required under 29 C.F.R. § 2550.404a–1 is diversification of risk levels and exposure across a portfolio. Conservative investments support liquidity to pay current benefits and satisfy short-term funding requirements, while investments having higher returns, and often higher risks, advance long term funding goals.

A pleading standard that allows an investment to be deemed imprudent *per se* due to its risk profile would be antithetical to ERISA's demand for investment portfolio risk diversification. It would constrain trustees' ability to fully consider the range of plan participant and beneficiaries' interests, which they are bound to serve. The prospective, process-focused standard of prudence that has emerged over decades strikes a careful balance between preserving beneficiaries' right to state claims when trustees fail to fulfill their fiduciary obligations, while recognizing that fiduciaries face a daunting task, and that the prudence of investment decisions is not always reflected by their outcomes.

C. A *Per Se* Rule of Prudence Will Drive Overly Conservative Decision-Making by Fiduciaries at the Expense of Plan Financial Health

If the Court endorses a rule that allows an investment decision to be deemed imprudent *per se* due to the investment's risk, trustees' decision-making will be profoundly impacted.

As discussed, a *per se* pleading standard can be expected to result in more claims against plans. Plan trustees will take into account the likelihood of increased claims when considering an investment. They will consider the potential impact on plan resources needed to defend claims. Investment professionals will advise that lower risk (and lower return) investments will be less likely to result in claims. Trustees will make investment decisions in light of these concerns.

In addition, trustees themselves are cognizant of the potential for personal liability. If an investment decision can be deemed to be imprudent merely because

of the risk the investment entails, notwithstanding the thoroughness or sufficiency of their evaluation of the investment decision, trustees can be expected to immediately adopt a more risk averse approach.

The impact of a *per* se pleading standard in favor of highly conservative decision-making can be expected to become institutionalized in the ERISA plan community. Trustees rely on the input, advice, and counsel of investment and legal professionals when making investment decisions. Trustees also routinely participate in formal education and training to understand their roles and responsibilities as fiduciaries.[2] Under a rule that equates prudence with risk, the investment and legal professionals that train and advise plan trustees would necessarily advocate for more conservative investment strategies and caution against investments that involve anything other than generic market risk to avoid risk of claims. The rational (and defensible) course of action would be to pursue conservative investments that generally provide modest returns with low volatility (*e.g.*, municipal bonds, treasury bonds, and the like), broad exposure to the market (index funds), or broad exposure to particular market segments (exchange traded funds).[3]

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[2] For example, many trustees for multiemployer trusts in the construction industry take courses through the International Foundation of Employee Benefit Plans, a well-established provider of training for both new and experienced multiemployer plan trustees.

[3] Of course, innovation will also be stifled. Investment vehicles that provide new opportunities or structures, or in new markets, but lack established track records will carry inherently greater risk and be far less likely to be selected. This can prevent trustees from making investments that may prove a valuable component of an overall diversified portfolio.

And as more and more plans and their fiduciaries adopt highly conservative investment strategies, such trend will set the future bar for what is deemed "prudent." Trustees would, in effect, become guarantors for investments that deviate from these strategies, and would be taught and advised to avoid them. Reasonable trustees and fund advisors would be highly reticent to place their plans at higher risk of claims or put their own financial future (or their professional liability insurance policies) on the line to advocate for an investment with a higher return but greater risk.

Paradoxically, trustees will find themselves in a Catch-22. While conservative investments will become the norm, more and more plans and trustees could be exposed to claims that they were too conservative and did not diversify properly by investing in higher return and risk investments.[4]

A shift from a flexible, process-oriented standard of prudence to one in which particular investment decisions can be deemed imprudent *per se* will negatively impact funds' long term funding goals and initiatives. If higher-risk investments that offer higher returns are no longer advisable or available to plan trustees, plans and beneficiaries will be unable to realize the same rates of return on invested plan assets they might otherwise achieve. Trustees will be constrained in their ability to generate investment returns over time and, in turn, be less able to

[4] As recently as September 18, 2024, the District Court for the Northern District of California granted a Motion to Dismiss fiduciary breach claims, properly applying the traditional, process-based pleading standard with respect to a complaint alleging that plan investments were too conservative. *Rubke, et al. v. Servicenow, Inc., et al.*, 24-cv-01050, Order at 11-21 (N.D. Cal. Sept. 18, 2024).

increase benefit payments. Younger plan participants whose retirements are decades in the future will be denied the benefit of compounded returns that can be generated by incorporating investments of varying risks to achieve higher present-day returns. They will be more directly affected if increased contribution rates are required to maintain or increase current benefit levels, leaving less monies available in take-home wages. Moreover, if benefit levels are merely maintained over time and not increased, the real value of the benefits paid to beneficiaries in the future will be less than the benefits paid today.

D. A *Per Se* Rule of Prudence Discourages Trustee Participation

The Court's decision in this case also discourages individuals from agreeing to serve or continuing to serve as trustees. While trustees may be reimbursed for expenses incurred to fulfill their obligations, they are typically not compensated for their time or efforts. For the most part, individuals do not agree to act as fiduciaries for personal gain, they act in service to their fellow employees and their industry. A pleading standard that increases the likelihood a plan trustee will face a claim for breach of fiduciary duties in their personal capacity would have a chilling effect on individuals' willingness to serve as fiduciaries, or to continue their current appointments.

Moroever, continuity among the membership of a board is important to maintain institutional knowledge. By providing mentorship and training to new trustees, the continuing participation of experienced trustees improves plan stability and governance, which accrues to the benefit of all plan participants and beneficiaries. An increased risk of fiduciary liability from a *per* se pleading

standard will negatively impact plans' ability to recruit and retain qualified trustees and to maintain and pass down institutional knowledge.

CONCLUSION

For the reasons stated above, *Amici Curiae* respectfully submit that the Court should grant Petitioners' request for rehearing or rehearing *en banc*.

Dated: September 22, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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