UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRUDY CLARK, *et al.*, Plaintiffs, v. BETH ISRAEL DEACONESS MEDICAL CENTER, *et al.*, Defendants.	Case No. 1:22-cv-10068-DPW

MOTION FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN HOSPITAL ASSOCIATION, AND ASSOCIATION OF AMERICAN MEDICAL COLLEGES TO PARTICIPATE AS *AMICI CURIAE*

OF COUNSEL:

Paul Lettow
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Chad Golder
AMERICAN HOSPITAL ASSOCIATION
800 10th Street, NW
Two CityCenter, Suite 400
Washington, DC 20001

Frank Trinity
ASSOCIATION OF AMERICAN MEDICAL COLLEGES
655 K Street, NW, Suite 100
Washington, DC 20001

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Jordan Bock (BBO# 708171)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
jbock@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association, and Association of American Medical Colleges

The Chamber of Commerce of the United States of America ("Chamber"), the American Hospital Association ("AHA"), and the Association of American Medical Colleges ("AAMC") respectfully move for leave to file a brief as *amici curiae* in the above-captioned case in support of Defendants' motion to dismiss. The proposed *amicus* brief is attached as Exhibit A. Defendants have consented to the filing of this brief. Counsel for Plaintiffs informed counsel for *amici* that Plaintiffs do not consent to *amici*'s motion.

Amicus participation is appropriate where, as here, the *amicus* can assist the Court "in putting the immediate controversy in its larger context." *Gallo v. Essex Cnty. Sheriff's Dep't*, No. 10-10260-DPW, 2011 WL 1155385, at *6 n.7 (D. Mass. Mar. 24, 2011); *see also Seaboats, Inc. v. Alex C Corp.*, No. Civ.A. 01-12184-DPW, 2003 WL 203078, at *12 (D. Mass. Jan. 30, 2003) (inviting *amicus* participation on the "larger question" whether the Court's statutory interpretation reflected "the policy Congress intended to adopt"). While "no procedural rule provides for filing of amicus briefs in federal district court," this Court has recognized its "inherent authority and discretion" to allow amicus participation. *Boston Gas Co. v. Century Indem. Co.*, No. 02-12062-RWZ, 2006 WL 1738312, at *1 n.1 (D. Mass. June 21, 2006); *see also Auto. Club of N.Y., Inc. v. Port Authority of N.Y. and N.J.*, No. 11 Civ. 6746(RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (district courts "have broad discretion" to assess whether *amicus* participation will be "of aid to the court and offer insights not available from the parties"). Applying these principles, this Court has frequently permitted *amici* to participate in its proceedings, including over an opposition. *See, e.g.*, *Steinmetz v. Coyle & Caron, Inc.*, No. 15-cv-13594-DJC, 2016 WL 4074135, at *2 n.1 (D. Mass. July 29, 2016) (noting that the court, "[i]n reaching its decision," had "reviewed and considered not only the briefing filed by the parties, but also the amicus brief" submitted in the case); *Celentano v. Comm'r of Mass. Div. of Ins.*, No. 09-11112-DPW, 2010 WL 559121, at

*2 (D. Mass. Feb. 20, 2010) (inviting amicus participation on the question of ERISA preemption); *Boston Gas Co.*, 2006 WL 1738312, at *1 n.1 (granting motion for leave over opposition).

The proposed brief provides a unique perspective informed by *amici*'s extensive membership and experience in the business and healthcare fields. The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA. In fact, the Chamber's membership is unique because it includes representatives from all aspects of the private-sector retirement system, such as plan sponsors, asset managers, recordkeepers, consultants, and other service providers. The AHA is a national organization representing nearly 5,000 hospitals, healthcare systems, networks, and other providers of care. The AHA is a source of valuable information and data on healthcare issues and trends, and it has a deep understanding of its members' perspectives on a variety of issues, including employment concerns. Finally, the AAMC is a national nonprofit representing all 155 accredited U.S. medical schools and approximately 400 teaching hospitals and health systems, including Department of Veterans Affairs medical centers. Like the AHA, the AAMC has extensive experience with the issues its members face, in the employment realm and elsewhere.

Since ERISA was enacted, the Chamber in particular has played an active role in the law's development and administration. The Chamber regularly submits comment letters when the Department of Labor ("DOL") engages in notice-and-comment rulemaking,[1] provides information

[1] *See, e.g.*, Electronic Disclosure by Employee Benefit Plans (Nov. 22, 2019), https://bit.ly/3C8QKBp.

to the Pension Benefit Guaranty Corporation ("PBGC") to support PBGC in its efforts to protect retirement incomes,[2] submits comments to the Department of the Treasury on plan administration and qualification,[3] and provides testimony to DOL's standing ERISA Advisory Council.[4] The Chamber has also published literature proposing initiatives to encourage and bolster the employment-based retirement benefits system in the United States,[5] and is frequently quoted as a resource on retirement policy.[6]

Given its perspective and deep understanding of the issues involved in these cases, the Chamber regularly participates as *amicus curiae* in cases involving employee-benefit design or administration. *See, e.g.*, *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022) (standard for pleading fiduciary-breach claim involving challenges to defined-contribution plan line-ups and service-provider arrangements); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (standard for pleading fiduciary-breach claim involving employer stock); *Sweda v. Univ. of Pa.*, 923 F.3d 320 (3d Cir. 2019) (standard for pleading fiduciary-breach claim involving 401(k) plan fees and investment line-up);[7] *Meiners v. Wells Fargo Co.*, 898 F.3d 820 (8th Cir. 2018) (same). District courts in several recent cases have granted the Chamber leave to participate as an amicus

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[2] *See, e.g.*, Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Aug. 10, 2021), https://bit.ly/3pvgpPJ; Letter from U.S. Chamber of Commerce Regarding Partitions of Eligible Multiemployer Plans (Aug. 18, 2015), https://bit.ly/3IEuvpd.

[3] *See, e.g.*, Permanent Relief for Remote Witnessing Procedures (Sept. 29, 2021), https://bit.ly/3Mkrqgj.

[4] *See, e.g.*, Statement of the U.S. Chamber of Commerce Regarding Gaps in Retirement Savings Based on Race, Ethnicity, and Gender (Aug. 27, 2021), https://bit.ly/3sJWPkR.

[5] *See* U.S. Chamber of Commerce, *Private Retirement Benefits in the 21st Century: A Path Forward* (2016), https://bit.ly/3hOPBWt.

[6] *See, e.g.*, Austin R. Ramsey, *Who Wins, Who Loses With Auto Retirement Savings Plan Proposal*, Bloomberg Law (Sept. 23, 2021), https://bit.ly/3vxZ8JA; Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://bit.ly/3MecArL.

[7] In *Sweda*, the Chamber's motion for leave to file an *amicus* brief was granted over the plaintiffs' opposition.

at the motion-to-dismiss stage. As one court explained, "the proposed amicus brief could provide the Court wi[th] a broader view of the impact of the issues raised in the case"—"an appropriate basis to allow amicus participation." *Baumeister v. Exelon Corp.*, No. 21-6505-JRB (N.D. Ill. Mar. 11, 2022), ECF. No. 44 (denying plaintiffs' motion for reconsideration of the order granting the Chamber's motion for leave to file); *see also Singh v. Deloitte*, No. 21-8458-JGK (S.D.N.Y. Apr. 14, 2022), ECF No. 41 (granting the Chamber's motion for leave to file over the plaintiffs' opposition); *Barcenas v. Rush Univ. Med. Ctr.*, No. 22-366-GSF (N.D. Ill. Apr. 4, 2022), ECF No. 38 (same).[8]

The AHA and AAMC likewise frequently participate as *amici* in cases affecting their members' interests, including in the employment realm. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104 (2021); *Universal Health Servs., Inc. v. United States*, 579 U.S. 176 (2016); *Martin v. Petersen Health Operations*, No. 21-2959 (7th Cir. Jan. 31, 2022); *Caesars Ent. Corp. v. Int'l Union of Painters & Allied Trades*, Case 28-CA-060841 (NLRB Oct. 4, 2018).

Because of *amici*'s unique membership, which includes nearly all of those in the private-sector retirement community and a diverse set of hospitals and healthcare employers, their collective knowledge about the management of retirement plans and the issues facing healthcare employers extends beyond any single defendant or group of defendants named in a particular case. *Amici* thus seek to provide a broader perspective on the key threshold issue of when circumstantial allegations of a violation of ERISA are plausible in the context of hospital plan-management decisionmaking—where a plan's participant base is uniquely diverse and fiduciary decisions must

[8] As these decisions reflect, *amicus* briefs are routinely accepted at the motion-to-dismiss stage, including from the Chamber itself. *See, e.g.*, *New York v. U.S. Dep't of Labor*, No. 18-1747-JDB (D.D.C. Nov. 9, 2018) (minute order); *United States v. DaVita Inc.*, No. 21-229-RBJ (D. Colo. Oct. 20, 2021), ECF No. 65; *United States v. Walgreen Co.*, No. 21-32-JPJ (W.D. Va. Sept. 9, 2021), ECF No. 22.

take the diverse universe of participants into account when curating an investment line-up and selecting and retaining service providers. And as the Supreme Court has instructed, that context is key—courts are supposed to undertake a "careful, context-sensitive scrutiny of [the] complaint's allegations," *Fifth Third Bancorp*, 573 U.S. at 425, just as they are supposed to consider "context" in evaluating plausibility in all civil cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Hughes*, 142 S. Ct. at 742 (explaining that the pleading standard articulated in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to ERISA cases).

The proposed brief will therefore "contribute in clear and distinct ways" to the Court's analysis. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (granting the Chamber's motion for leave to file); *see also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (an *amicus* brief may assist the court "by explain[ing] the impact a potential holding might have on an industry or other group") (quotation marks omitted). "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs.*, 293 F.3d at 132; *see also Gallo*, 2011 WL 1155385, at *6 n.7 (noting that, "[w]hile the motion was ably presented by" defendant's counsel, "the very thoughtful *amicus* submissions were quite helpful in putting the immediate controversy in its larger context"). And here, *amici*'s perspective and expertise will serve several functions courts have identified as useful: They "explain[] the broader regulatory or commercial context" in which this case arises; "suppl[y] empirical data" informing the issue on appeal; and "provid[e] practical perspectives on the consequences of particular outcomes." *Prairie Rivers Network*, 976 F.3d at 763.

Specifically, the proposed *amicus* brief provides context regarding the recent surge in ERISA litigation, describes similarities among these cases that help to shed light on Plaintiffs'

allegations here, discusses the particular concerns facing hospitals and healthcare employers in light of their unique employee populations and the ongoing pandemic, and provides context for how to evaluate these types of allegations in light of the pleading standard set forth by the Supreme Court in *Twombly* and *Iqbal*. In particular, the brief marshals examples from many of the dozens of recently filed cases to contextualize the issues presented in this litigation. These cases largely touch on issues that are relevant but adjacent to the issues presented here, and therefore in many instances have not have been cited or discussed by the parties. Given the extensive collective experience of *amici*'s members in both retirement-plan management and ERISA litigation, they offer a distinct vantage point that they believe will be of value to the Court as it considers Plaintiffs' complaint and whether it surpasses the plausibility threshold.

Finally, the proposed *amicus* brief is being filed well before Plaintiffs' opposition is due and therefore will not delay resolution of this motion. *See Andersen v. Leavitt*, No. 03-cv-6115 (DRH)(ARL), 2007 WL 2343672, at *2 (E.D.N.Y. Aug. 13, 2007) (considering timeliness as one factor relevant to amicus participation).

For these reasons, *amici* respectfully request that the Court grant them leave to participate as *amici curiae* and accept the proposed *amicus* brief, which accompanies this motion.

Dated: May 20, 2022

Respectfully submitted,

/s/ *Jaime A. Santos*

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Jordan Bock (BBO# 708171)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
jbock@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association, and Association of American Medical Colleges

OF COUNSEL:

Paul Lettow
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Chad Golder
AMERICAN HOSPITAL ASSOCIATION
800 10th Street, NW
Two CityCenter, Suite 400
Washington, DC 20001

Frank Trinity
ASSOCIATION OF AMERICAN MEDICAL COLLEGES
655 K Street, NW
Suite 100
Washington, DC 20001

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I, Jaime A. Santos, counsel for *amici* the Chamber of Commerce of the United States of America, the American Hospital Association, and the Association of American Medical Colleges in the above-captioned action, hereby certifies that counsel for *amici* conferred with counsel for Plaintiffs and counsel for Defendants, both on May 18, 2022. Defendants consent to the requested relief. Counsel for Plaintiffs informed counsel for *amici* that Plaintiffs do not consent.

Dated: May 20, 2022

/s/ Jaime A. Santos

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association and Association of American Medical Colleges

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Massachusetts by using the court's CM/ECF system on May 20, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: May 20, 2022

/s/ Jaime A. Santos

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association and Association of American Medical Colleges

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRUDY CLARK, *et al.*, Plaintiffs, v. BETH ISRAEL DEACONESS MEDICAL CENTER, *et al.*, Defendants.	Case No. 1:22-cv-10068-DPW

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN HOSPITAL ASSOCIATION, AND ASSOCIATION OF AMERICAN MEDICAL COLLEGES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

OF COUNSEL:

Paul Lettow
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Chad Golder
AMERICAN HOSPITAL ASSOCIATION
800 10th Street, NW
Two CityCenter, Suite 400
Washington, DC 20001

Frank Trinity
ASSOCIATION OF AMERICAN MEDICAL COLLEGES
655 K Street, NW
Suite 100
Washington, DC 20001

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Jordan Bock (BBO# 708171)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
jbock@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association, and Association of American Medical Colleges

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country, including hospitals and healthcare-related entities.

The American Hospital Association is a national organization that represents nearly 5,000 hospitals, healthcare systems, networks, and other providers of care. Its members are committed to improving the health of the communities that they serve and to helping ensure that care is available to and affordable for all Americans.

The Association of American Medical Colleges is a nonprofit association dedicated to improving the health of people everywhere through medical education, health care, medical research, and community collaborations. Its members comprise all 155 accredited U.S. and 16 accredited Canadian medical schools; approximately 400 teaching hospitals and health systems, including Department of Veterans Affairs medical centers; and more than 70 academic societies.

These organizations are a valuable source of information and data on healthcare and retirement-plan-management issues and trends, and each promotes the interests and concerns of its members by participating as *amicus curiae* to address issues and cases with important and far-ranging consequences for their members. *Amici* submit this brief to provide context on retirement-plan management, particularly in the healthcare context, and how this case is situated in the broader litigation landscape.[1]

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The last 15 years have seen a surge of retirement plan litigation.[2] What began as a steady increase has exploded in the past two years, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year.[3] The last 16 months have only seen more of the same—and, recently, hospitals have been a particularly popular target. This year alone, complaints have been filed against Boston Children's Hospital, Dartmouth-Hitchcock Medical Center, Mass General Brigham, Munson Healthcare, NorthShore University Health System, Rush University Medical Center, Yale New Haven Hospital, and, of course, Defendants here.

Using the benefit of hindsight, these cookie-cutter lawsuits challenge the decisions that retirement plan fiduciaries made about the investment options available to plan participants or the arrangements the fiduciaries negotiated with the plan's service provider. The complaints typically point to alternative investment or service options (among tens of thousands of investment options offered in the investment marketplace and the dozens of service providers with a wide variety of service offerings and price points) and allege that plan fiduciaries *must have* had a flawed decisionmaking process, and therefore violated ERISA's fiduciary duties, because they did not choose one of those alternatives. While these types of allegations are insufficient against any employer, their deficiencies are particularly apparent with respect to hospitals, who face even more "difficult tradeoffs" than many other industries. *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022).

Hospitals have especially broad employee populations that encompass varying income

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[2] *See, e.g.*, George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, Center for Retirement Research at Boston College (May 2018), https://bit.ly/3fUxDR1 (documenting the rise in 401(k) complaints from 2010 to 2017).

[3] *See Understanding the Rapid Rise in Excessive Fee Claims* 2, AIG, https://bit.ly/3k43kt8; *see also* Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), https://bit.ly/3fDgjQ5.

levels and degrees of financial flexibility. That diverse employment base requires concomitantly diverse investment options. After all, a highly compensated surgeon may look for different investment opportunities than a hospital orderly with less flexibility to take financial risks. A medical resident with a long career ahead of her may seek different investment strategies than a nurse at the end of his career. And a seasoned hospital executive may have different investment priorities than a newly hired cafeteria worker. And, of course, participants in such a diverse employee population may have vastly different levels of financial literacy, irrespective of their age or income level. As a result, it is particularly important for hospitals to offer a broad array of investments, and to provide employees with the necessary services and educational resources to best utilize these options. While these complaints are one-size-fits-all, hospital employees certainly are not.

If these types of conclusory and speculative complaints are sustained, hospital employees will be the ones who suffer. Hospitals have seen their resources taxed during the COVID-19 pandemic, and many—especially smaller, rural hospitals—operate on razor-thin margins with little capacity to absorb increased litigation costs, and particularly the daunting prospect of expensive, asymmetrical, class-action discovery that is commonly sought by plaintiffs in these types of cases. As a result, these suits exert pressure on hospital fiduciaries and plan sponsors to limit investments to a narrow range of options at the expense of providing a variety of choices with a range of fees, fee structures, risk levels, and potential performance upsides, as ERISA expressly encourages, and as is particularly important for employers with a diverse employee population. These lawsuits also operate on a cost-above-all mantra—despite the Department of Labor's ("DOL") admonition that fees should be only "one of several factors" in fiduciary

decisionmaking.[4] And given many plaintiffs' single-minded emphasis on cost, these lawsuits pressure fiduciaries to forgo popular services like financial-wellness education and enhanced customer-service options—services that are particularly important for plans that cover employees with a range of backgrounds and financial literacy levels.

Against this backdrop, it is critical that courts do not shy away from the "context-specific inquiry" ERISA requires. *Hughes*, 142 S. Ct. at 740; *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). As the Supreme Court recently made explicit, ERISA cases are subject to the pleading standard articulated in *Twombly* and *Iqbal*. *See Hughes*, 142 S. Ct. at 742. When, as here, a plaintiff does not present direct allegations of wrongdoing and relies on circumstantial allegations that are "just as much in line with" plan fiduciaries' having acted through a prudent fiduciary process, dismissal is required. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007). This Court should apply these principles here and dismiss Plaintiffs' complaint.

ARGUMENT

I. ERISA encourages the creation of benefit plans by affording flexibility and discretion to plan sponsors and fiduciaries.

When Congress enacted ERISA, it "did not *require* employers to establish benefit plans." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010) (emphasis added). Rather, it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *Id.* at 516-17. Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress also knew that plan sponsors and fiduciaries must make a range of decisions, often during periods of considerable market uncertainty (as during the pandemic). These decisions

[4] DOL, *A Look at 401(k) Plan Fees* 1 (Sept. 2019), https://bit.ly/3fP8vuH ("*401(k) Plan Fees*").

require plan sponsors and fiduciaries to accommodate "competing considerations," including present and future participants' varying objectives, administrative efficiency, and the need to "protect[] the financial soundness" of plan assets. H.R. Rep. No. 96-869(I), at 67 (1980). As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries "greater flexibility, in the making of investment decisions…, than might have been provided under pre-ERISA common and statutory law in many jurisdictions." DOL, Op. No. 81-12A, 1981 WL 17733, at *1 (Jan. 15, 1981). Congress viewed this flexibility as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations." S. Rep. No. 92-634, at 16 (1972).

Given the breadth of fiduciary decisions made in the face of market uncertainty and the need for flexibility, Congress chose the "prudent man" standard to define the scope of the duties that these fiduciaries owe to plans and their participants. 29 U.S.C. § 1104(a). Neither Congress nor DOL provides a list of required or forbidden investment options, investment strategies, service providers, or compensation structures. And when Congress considered requiring plans to offer at least one index fund, the proposal failed. *See* H.R. 3185, 110th Cong. (2007). DOL expressed "concern[]" that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *401(k) Fee Disclosure: Helping Workers Save For Ret., Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions*, 110th Cong. 15 (2008) (statement of Assistant Secretary of Labor).

The flexibility Congress provided means that fiduciaries have a wide range of reasonable options for almost any decision they make. There are thousands of reasonable investment options

with different investment styles and risk levels—nearly 10,000 mutual funds alone,[5] several thousand of which are offered in plans—and nearly innumerable ways to put together a plan that enables employees to save for retirement. Thus, while ERISA plaintiffs often try to challenge fiduciaries' decisions to offer specific investment options by pointing to less expensive or better-performing alternatives and then suggesting that the fiduciaries *must have* had an inadequate decisionmaking process—just as Plaintiffs in this case assert—that is not how the prudence standard operates. Rather, courts must account for the "range of reasonable judgments a fiduciary may make" when evaluating the plausibility of ERISA claims. *Hughes*, 142 S. Ct. at 742.

Indeed, each time the Supreme Court has addressed the standard for sufficiently alleging a claim under ERISA, it has emphasized the importance of flexibility and discretion. Given the diversity among ERISA plans and participants, and the wide discretion fiduciaries have when making decisions on behalf of thousands of employees with widely varying investment styles and risk tolerances, the Court has explained that applying Rule 8(a) to ERISA claims requires a close evaluation of "'the circumstances … prevailing' at the time the fiduciary acts" and a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. "[C]ategorical rules" have no place in this analysis—as the Court has recognized, "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 142 S. Ct. at 742.

II. ERISA's focus on flexibility and discretion is particularly important for hospital plan sponsors and fiduciaries, who serve a uniquely diverse set of employees.

Nowhere is this need for flexibility more apparent than with respect to hospital employers.

[5] Investment Company Institute, *Investment Company Fact Book* 40 (61st ed. 2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

All plan sponsors and fiduciaries must consider employees across age ranges with divergent risk tolerances, but hospitals and health-care systems have a uniquely variable employee population. A single hospital employs healthcare executives, doctors, nurses, lawyers, social workers, interpreters, billing professionals, technicians, janitorial staff, and food service professionals.[6] These employees have different backgrounds, incomes, financial sophistical levels, degrees of financial flexibility, and retirement needs. Hospitals must account for these many differences when choosing which investment options to offer from among the thousands available in the market (how many, which types, at what risk/reward levels, and at what fee levels); which services to offer; who should provide those services; and how to compensate service providers. Across these areas, it is critical that hospital plan sponsors and fiduciaries have the flexibility Congress envisioned to craft a plan that will serve *all* of their employees. *Hughes*, 142 S. Ct. at 742.

Plaintiffs fail to grapple with this fundamental tenet of ERISA, instead entirely ignoring the "difficult tradeoffs" hospitals must make. *Hughes*, 142 S. Ct. at 742. Plaintiffs' allegations boil down to an assertion that hospital plan fiduciaries could have selected some lower-cost or better-performing option. But there will always be a plan with lower expenses and a plan with higher ones, just as there will always be a fund that performs better and many that perform worse. There is no one prudent fund, service provider, or fee level that renders everything else imprudent. Instead, there is a wide range of reasonable options, and Congress vested fiduciaries with flexibility and discretion to choose from among those options based on their informed assessment of the needs of their plan and its unique participant base. *See supra*, pp. 4-6. That fiduciaries, in

[6] Edward S. Salsberg and Robert Martiniano, *Health Care Jobs Projected To Continue To Grow Far Faster Than Jobs In The General Economy*, Health Affairs Blog (May 9, 2018), *available at* https://bit.ly/3vksydz (noting the millions of workers in health settings who are "not in health occupations, such as administrators, food service workers, accountants, and housekeepers").

hindsight, did not select what may have turned out to be the lowest-cost or best-performing option does not plausibly suggest that cherry-picked comparators were in fact "better" overall, much less that fiduciaries' decisionmaking *process* was imprudent. That is particularly true given the considerations hospitals face with respect to participant services and fund selection.

A. Plaintiffs' excessive-fee allegations fail to consider the level of services hospital plan sponsors and fiduciaries provide.

ERISA plaintiffs' recordkeeping allegations typically do not consider anything but cost—notwithstanding ERISA's direction to fiduciaries to do precisely the opposite. *See White v. Chevron Corp.*, 2016 WL 4502808, at *10 (N.D. Cal. Aug. 29, 2016). Indeed, DOL has repeatedly said that fees are "just one of several factors fiduciaries need to consider in deciding on service providers," DOL, *Meeting Your Fiduciary Responsibilities* 6 (2021), https://bit.ly/3kh7LB3, and that "plan fiduciaries are not always required to pick the least costly provider," DOL, *Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan* 1, https://bit.ly/3KgsUpA; *cf. Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)."). As DOL has explained, services "may be provided through a variety of arrangements,"[7] and neither recordkeepers nor recordkeeping services are interchangeable widgets. To the contrary, recordkeeping services are highly customizable depending on, for example, the needs of each plan, its participant population, the capabilities and resources of the plan's administrator, and the sponsor's human-resources department. *See* Daniel Aronowitz, *Exposing Excessive Fee Litigation Against America's Defined Contribution Plans* 6, Euclid Specialty (Dec. 2020), https://bit.ly/3hNXJaW ("*Excessive Fee*

[7] *401(k) Plan Fees* 3.

Litigation") (recognizing that "[e]ven plans that have an identical number of participants and the same total plan assets may have very different service models"). Moreover, myriad services are available at different fee levels, among them core operational services, participant communication, participant education, brokerage windows, loan processing, and compliance services.[8]

In making these decisions, plan fiduciaries must heed DOL's common-sense observation "that cheaper is not necessarily better," and fees should be considered as only "one of several factors" when one makes a decision. *401(k) Plan Fees* 1. A retirement plan "may offer a host of additional services," including everything from educational seminars and investment advice to retirement planning software. *Id.*, at 3. Not surprisingly, "generally the more services provided, the higher the fees." *Id.* As a result, and given the wide range of services, providers, and fee arrangements, it is implausible to suggest everything in excess of a single fee level is imprudent. Applying these principles, a string of recent decisions have rejected recordkeeping allegations premised solely on cost where the plaintiffs failed to account for the differences in services. *See, e.g.*, *Matney v. Barrick Gold of N. Am.*, 2022 WL 1186532, at *13 (D. Utah Apr. 21, 2022) (dismissing recordkeeping allegations "based on generalizations, assumptions, and unsuitable comparisons"); *Cunningham v. USI Ins. Servs., LLC*, 2022 WL 889164, at *4 (S.D.N.Y. Mar. 25, 2022) (rejecting allegations where "none of the[] ten purportedly 'comparable' plans offer[ed] participants the pension consulting or valuation services [defendants] offer[ed] to Plan participants"); *Perkins v. United Surgical Partners Int'l, Inc.*, 2022 WL 824839, at *6 (N.D. Tex. Mar. 18, 2022) (plaintiffs must provide "sufficient factual allegations about the Plan's offered services and fee structures for the Court to infer more than a possibility of misconduct"); *Smith v.*

[8] *See, e.g.*, Sarah Holden et al., *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020* 4, ICI Research Perspective (June 2021), https://bit.ly/3vnbCU3 ("Holden").

CommonSpirit Health, 2021 WL 4097052, at *12 (E.D. Ky. Sept. 8, 2021) (dismissing recordkeeping claim where the plaintiff "failed to allege facts showing that the recordkeeping fees exceeded those of comparable plans or were excessive in relation to the service provided").

Hospitals in particular have recognized the importance of robust educational and communication services, allowing all of their employees to plan effectively for retirement regardless of whether they can independently hire a personal financial advisor. Indeed, it could be short-sighted for hospital plan fiduciaries to submit to Plaintiffs' race to the bottom, choosing to offer fewer services just to pay a rock-bottom fee. While employees might save a nominal amount on yearly fees, they would lose access to services—such as educational resources and one-on-one meetings with an account advisor—that could dramatically impact their retirement savings over the course of their career. It is hardly a breach of fiduciary duty for hospital plan sponsors' and fiduciaries to offer "[p]articipant-focused services" that "help employees fully realize the benefits of their 401(k) plans." Holden, *supra* n.8, at 5.

Plaintiffs ignore these principles. Their Complaint contains *no* specific allegations about the services provided to plan participants, nor do they compare those services to the services provided by their purported comparator plans. Compl. ¶¶ 64, 67-69, 81-82. Plaintiffs in fact acknowledge that they have failed to include these allegations, instead asserting—with no support—that it is "plainly untrue" that the cost of recordkeeping services depends upon service level. Compl. ¶ 36. That is entirely conclusory, supported by no authority or plausible factual allegations, and contrary to DOL guidance. While Plaintiffs baldly assert that it is "both false and frivolous," to suggest "that recordkeeping expenses depend upon the service level provided to a plan," *id.*, DOL and a series of courts have expressly recognized the opposite. *See supra*, pp. 8-10. More broadly, Plaintiffs' bright-line approach runs directly counter to the Supreme Court's

directive to courts to undertake a "careful, context-sensitive scrutiny of a complaint's allegations." *Fifth Third*, 573 U.S. at 425. This Court should reject Plaintiffs' efforts to subvert ERISA's demand for nuanced, case-specific analysis and to tie the hands of hospital plan sponsors and fiduciaries that are working to ensure their employees have the resources necessary to maximize their retirement savings.

B. Hospitals' decision to offer actively managed funds is not evidence of imprudence.

Plaintiffs' improper reliance on categorical rules extends to their allegations regarding the funds Defendants select. Plaintiffs here, like plaintiffs in many of these suits, allege imprudence based on Defendants' decision to make available the actively managed Fidelity Freedom Funds—alongside various passively managed funds—rather than Fidelity Freedom Index Funds. *See* Compl. ¶¶ 64, 67-69, 81-82. The notion that a wildly popular and high-performing target-date suite can be *per se* or even presumptively imprudent simply because it employs an active management strategy is wrong as a matter of law. "Many courts have concluded that choosing actively managed funds" instead of passive index funds "is not a breach of fiduciary duty." *Kurtz v. Vail Corp.*, 511 F. Supp. 3d 1185, 1200 (D. Colo. 2021) (citing cases); *see also Matney*, 2022 WL 1186532, at *9 (rejecting allegations that a plan's inclusion of actively managed funds with higher expense demonstrated imprudence). That is particularly true where, as here, the plan *also* includes a selection of passively managed funds. *Kurtz*, 511 F. Supp. 3d at 1200 (noting that the plan "had a mix of actively and passively managed funds" and "thus included several alternatives to the higher-cost actively managed options").[9]

[9] Plaintiffs also allege that Defendants should have selected one of a handful of allegedly "better performing" alternative target-date funds. Compl. ¶ 63. But the Complaint includes *no* allegations about the fees charged by these funds, and instead merely alleges that the Fidelity Freedom Funds

For hospitals in particular, it is readily apparent why plan fiduciaries would deem it beneficial to include both actively and passively managed funds. Plan fiduciaries are tasked with a "whole-portfolio, investment strategy that properly balances risk and reward, as well as short-term and long-term performance." *Kurtz*, 511 F. Supp. 3d at 1198 (citation omitted). "That mandate will naturally involve selecting funds with a range of return and expense profiles," *id.*—particularly for employers with a diverse population of employees with different retirement timelines, investment strategies, and risk tolerances. For example, some hospital employees, such as those with lower long-term earning potential, may prefer passively managed index funds that typically have lower fees and more predictably track market indices like the S&P 500. By contrast, employees with greater financial flexibility—*e.g.*, hospital physicians—might prefer the potential to beat the market through active management, while still others might prefer tailored investment management offered by managed-account products, and others may prefer a combination of both active and passive investment. In selecting a plan line-up, hospitals must account for employees in all of these groups. Try as Plaintiffs might, ERISA simply "does not require plan fiduciaries to offer a particular mix of investment options, whether that be, for example, favoring institutional over retail share classes, preferring CITs to mutual funds, or choosing passively-managed over actively-managed investments." *Matney*, 2022 WL 1186532, at *10.

Indeed, recent complaints bear this out, as one complaint's supposedly imprudent choice is often another complaint's prudent exemplar. While Plaintiffs here focus on Defendants'

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underperformed these alternative target-date funds based on returns from December 2015—almost *seven years ago* (and prior to the start of the class period). Compl. ¶¶ 80-82. That is plainly insufficient to make out a claim for breach of the duty of prudence. Indeed, plaintiffs in a different case—represented by the same counsel as Plaintiffs here—alleged the exact opposite: that the defendants should have selected the Fidelity Freedom Funds offered by Defendants here *instead of* the alternative target-date funds included in this complaint. *See infra*, p. 13.

decision to offer both actively and passively managed funds, plaintiffs in other cases have alleged a breach of fiduciary duty based on a plan's decision to include passively managed target-date funds *rather than* actively managed ones—the exact opposite of the allegations here. *See* Compl. ¶¶ 79-83, *Ravarino v. Voya Fin., Inc.*, No. 21-1658 (D. Conn. Dec. 14, 202), ECF No. 1. This same phenomenon plays out with respect to fund performance. The plaintiffs in *Wehner v. Genentech, Inc.*—represented by the *same* attorneys who represent Plaintiffs here—alleged that defendants should have offered Fidelity Freedom Funds *instead of* the alternative target-date funds Plaintiffs identify here as a supposedly better-performing alternative. *See* Am. Compl. ¶¶ 6, 146 n.16, 154, *Wehner v. Genentech, Inc.*, No. 20-6894 (N.D. Cal. Mar. 1, 2021), ECF No. 46; *see also supra* p. 11-12 n.9 (further discussing Plaintiffs' unsupported performance allegations). Likewise, General Electric was sued in 2017 for including the GE RSP U.S. Equity Fund, among others, in its 401(k) plan. *See* Compl. ¶ 1, *Haskins v. Gen. Elec. Co.*, No. 17-1960 (S.D. Cal. Sept. 26, 2017), ECF No. 1. But a different case held up *that exact fund* as a "superior performing alternative[]." Compl. ¶ 122, *Harding v. Southcoast Hosps. Grp.*, No. 20-12216 (D. Mass. Dec. 14, 2020), ECF No. 1. And it plays out again with respect to recordkeeping fees. Last year Henry Ford was hit with an ERISA class action alleging that plan fiduciaries breached their duty of prudence by negotiating "excessive" recordkeeping fees. *See* Compl. ¶¶ 157-167, *Hundley v. Henry Ford Health Sys.*, No. 21-11023 (E.D. Mich.) (May 5, 2021), ECF No. 1. But another complaint holds up *that exact plan* as an example of "prudent and loyal" fiduciary decisionmaking with respect to recordkeeping fees. *See* Compl. ¶ 45, *Carrigan v. Xerox Corp.*, No. 21-1085 (D. Conn. Aug. 11, 2021), ECF No. 1.

As these complaints demonstrate, ERISA fiduciaries making discretionary decisions are at risk of being sued seemingly no matter what decisions they make. Plaintiffs sue fiduciaries for

failing to divest from risky or dropping stock,[10] or for failing to *hold onto* such stock because high risk can produce high reward.[11] Some plaintiffs allege that it is imprudent for a plan to offer more than one investment option in the same style,[12] while others complain that including *only one option* in each investment style is imprudent.[13] In many cases, plaintiffs allege that fiduciaries were imprudent because they should have offered Vanguard mutual funds,[14] but others complain that defendants were imprudent *because they offered* Vanguard mutual funds.[15] Some plaintiffs allege that plans offered imprudently risky investments,[16] while others allege that fiduciaries were *imprudently cautious* in their investment approach.[17] And in some instances, fiduciaries have simultaneously defended against "diametrically opposed" theories of liability, giving new meaning to the phrase "cursed-if-you-do, cursed-if-you-don't."[18] This dynamic has made it incredibly difficult for fiduciaries to do their job—and it has made it nearly *impossible* for fiduciaries to avoid

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[10] *See, e.g.*, *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008).

[11] *E.g.*, *Thompson v. Avondale Indus., Inc.*, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (plaintiff alleged that fiduciaries "prematurely" divested ESOP stock).

[12] *See, e.g.*, *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019).

[13] *See, e.g.*, Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-12123 (D. Mass.) (Jan. 12, 2018), ECF No. 35.

[14] *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016).

[15] *See, e.g.*, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-0793 (N.D. Cal.) (Sept. 30, 2016), ECF No. 41.

[16] *E.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013).

[17] *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (addressing claim that fiduciaries maintained an overly safe portfolio); Compl. ¶2, *Barchock v. CVS Health Corp.*, No. 16-61, (D.R.I.) (Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries imprudently invested portions of the plan's stable value fund in conservative money market funds and cash management accounts).

[18] *E.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

being sued, no matter how careful their process and no matter how reasonable their decisions.

III. The surge of litigation will harm participants in hospital-sponsored retirement plans.

As shown by the recent wave of suits, hospitals are a prime target for Plaintiffs' cost-above-all litigation campaign, which threatens to have a significant detrimental impact on hospitals and hospital employees alike. Hospitals, like all fiduciaries, must make careful decisions based on an array of factors. But these lawsuits push them to reflexively focus on just one factor: the lowest-cost option. A hospital investment committee observing recent litigation trends may, for example, feel pressured by the threat of litigation to offer only the "lowest-cost fund." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. Not only is that not always "the most prudent" option, *id.*, it often runs directly counter to the interests of hospital employees who may specifically want to invest in actively managed funds. *See supra*, pp. 12-13. Likewise, these suits may affect the recordkeeping services hospitals select, pushing them toward lower-cost options despite the importance of educational and communication services, especially for employees with lower levels of financial literacy, *see supra*, pp. 7-8. The pressure created by these suits undermines the very values—innovation, diversification, and employee choice—that Congress was careful to incorporate in ERISA.

Moreover, given the "enormous strain" COVID-19 has placed on hospitals and health-care systems, many hospitals may believe they have no choice but to bow to this pressure and modify their plans in an effort to avoid suit. *Massive Growth in Expenses and Rising Inflation Fuel Continued Financial Challenges for America's Hospitals and Health Systems*, AHA (Apr. 2022), https://bit.ly/3KqITBv ("over 33% of hospitals are operating on negative margins"); *see also Financial Effects of COVID-19: Hospital Outlook for the Remainder of 2021* 3, 7, Kaufman Hall (Sept. 2021), https://bit.ly/3k8v3t2 (estimating a $54 billion loss for hospitals nationwide over the course of 2021, even accounting for federal relief funds). That is particularly true because once a

hospital is sued, they face the "ominous" and "asymmetric" discovery costs involved in these lawsuits, which "elevate[] the possibility that a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence." *PBGC*, 712 F.3d at 719 (internal quotations omitted). While large hospitals may have some capacity to absorb litigation costs, many smaller and rural hospitals, which frequently operate on razor-thin margins, do not. *See* Dhruv Khullar et al., *COVID-19 and the Financial Health of U.S. Hospitals*, 323 JAMA 2127-2128 (May 4, 2020), https://bit.ly/3K91xxF ("in recent years … many smaller and rural hospitals have experienced major financial challenges," putting them at particular risk of closure from the pandemic).

Compounding these problems, the litigation surge has upended the insurance industry for retirement plans. Judy Greenwald, *Litigation Leads to Hardening Fiduciary Liability Market*, Business Insurance (Apr. 30, 2021), https://bit.ly/3ytoRBX. The risks of litigation have pushed fiduciary insurers "to raise insurance premiums, increase policyholder deductibles, and restrict exposure with reduced insurance limits." *Excessive Fee Litigation* 4; *see also* Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg (discussing the "sea change" in the market for fiduciary insurance); Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, Pensions & Investments (Sept. 20, 2021), https://bit.ly/39W996Y. Plans are now at risk of not being able to "find[] adequate and affordable fiduciary coverage because of the excessive fee litigation." *Excessive Fee Litigation* 4; *see also* Jon Chambers, *ERISA Litigation in Defined Contribution Plans* 1, SageView Advisory Grp. (Mar. 2021), https://bit.ly/2SHZuME (fiduciary insurers may "increasingly move to reduce coverage limits, materially increase retention, or perhaps even cancel coverage"). If hospitals need to absorb

the cost of higher insurance premiums and higher deductibles, many hospitals will inevitably have to offer less generous plans, reducing their employer contributions, declining to cover administrative fees and costs when they otherwise would voluntarily elect to do so, and decreasing the services available to employees. That is the opposite of what Congress had in mind, and barebones plans will do nothing to help hospitals recruit employees during these challenging times.

CONCLUSION

For the foregoing reasons, the context-specific inquiry prescribed in *Hughes* and *Fifth Third* requires this Court to consider the uniquely diverse population that hospitals serve. Applying the appropriate pleading standard, this case should be dismissed.

Dated: May 20, 2022

Respectfully submitted,

/s/ *Jaime A. Santos*

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Jordan Bock (BBO# 708171)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
jbock@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association and Association of American Medical Colleges

OF COUNSEL:

Paul Lettow
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Chad Golder
AMERICAN HOSPITAL ASSOCIATION
800 10th Street, NW
Two CityCenter, Suite 400
Washington, DC 20001

Frank Trinity
ASSOCIATION OF AMERICAN MEDICAL COLLEGES
655 K Street, NW
Suite 100
Washington, DC 20001

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Massachusetts by using the court's CM/ECF system on May 20, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system.

Dated: May 20, 2022

/s/ Jaime A. Santos

Jaime A. Santos (BBO# 689946)
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
jsantos@goodwinlaw.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, American Hospital Association and Association of American Medical Colleges