No. 12-3736

In the United States Court of Appeals for the Seventh Circuit

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ANTHONY ABBOTT, et al., Plaintiffs-Appellants,

v.

LOCKHEED MARTIN CORPORATION, et al., Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of Illinois
No. 06-0701-MJR, Hon. Michael J. Reagan, Presiding

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **12-3736**

Short Caption: **Abbott v. Lockheed Martin Corp.**

(1) The full name of every party or *amicus* that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
Chamber of Commerce of the United States of America, the ERISA Industry Committee, and the American Benefits Council

(2) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Winston & Strawn LLP

(3) If the party or *amicus* is a corporation:

i) Identify all its parent corporations, if any; and
None. The Chamber of Commerce of the United States of America, the ERISA Industry Committee, and the American Benefits Council have no parent corporations.

ii) List any publicly held company that owns 10% or more of the party's or *amicus's* stock:
None. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America, the ERISA Industry Committee, or the American Benefits Council.

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The American Benefits Council

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Winston & Strawn LLP

(3) If the party or *amicus* is a corporation:

i) Identify all its parent corporations, if any; and
None. The American Benefits Council has no parent corporations.

ii) List any publicly held company that owns 10% or more of the party's or *amicus's* stock:
None. No publicly held company has any ownership interest in the American Benefits Council.

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The ERISA Industry Committee

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Winston & Strawn LLP

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None. No publicly held company has any ownership interest in the ERISA Industry Committee.

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SUMMARY OF ARGUMENT AND INTEREST OF THE AMICI CURIAE[1]

The Court's decision in this case could have a significant practical impact on the administration, disclosures, and costs of plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*—and, hence, on the benefits and choices they offer to plan participants.

Plaintiffs assert claims of mismanagement in Lockheed Martin Corporation's Stable Value Fund (the "Lockheed Fund")—alleging, among other things, that the Lockheed Fund struck a different balance between various types of investments than the balance struck by other funds offered by other employers under the label "stable value fund." At summary judgment, the district court properly rejected this theory, observing that the duties of a plan administrator are necessarily defined by the disclosures of that particular plan and not by the operation of other plans bearing similar labels. Yet Plaintiffs now seek to resurrect this meritless theory indirectly, through the class certification process. They do so by tying their class definition to the performance of the Lockheed Fund in comparison to an industry index, which they claim reflects the expected performance of a prudently managed stable value fund.

This Court has already made clear that a fund's performance must be evaluated in relation to its own disclosures, not to the performance or profile of other funds that share similar labels. *See DeBruyne v. Equitable Life Assurance*

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No one other than the *amici*, their members, and their counsel made a contribution intended to fund the preparation or submission of this brief.

Soc'y, 920 F.2d 457 (7th Cir. 1990). Allowing a plaintiff to certify a class—even provisionally—on this rejected theory of liability would impose significant adverse consequences on the sponsors, administrators, and beneficiaries of ERISA plans.

As this Court is well aware, class certification carries heavy consequences for defendants, amplifying the risk of litigation and often forcing the settlement of meritless claims. Class certification in ERISA cases is no different. Those consequences inevitably impact both plan administrators and plan participants, driving costs up and limiting benefits and choices. Indeed, given the particular costs and risks of ERISA class actions, the consequences of certification in such contexts can be particularly severe.

Accordingly, to prevent such mischief in this and future cases, this case can and should be resolved on the basis of a simple legal principle, namely, that a plaintiff cannot use class certification to import a theory of ERISA liability that it could not pursue on the merits.

Amici and their members have a strong interest in these issues and submit this brief—with the consent of all parties—to offer the Court their perspective. All three organizations provide a voice for businesses that maintain, administer, and provide services to employee benefits programs governed by ERISA.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every economic sector, and from every region of the country.

The ERISA Industry Committee represents the nation's largest employers with ERISA-covered pension, health-care, disability, and other employee benefit plans. These employers provide benefits to millions of Americans.

The American Benefits Council is an organization of large U.S. employers that provide employee benefits to active and retired workers. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

In carrying out their respective missions, these three organizations all speak frequently for their members on important issues before Congress, the Executive Branch, and the courts, lending expertise and providing information from the perspective of plan sponsors and administrators. All three have filed *amicus* briefs in cases that bear directly on the issues at the heart of this case. *See, e.g.*, *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008). Each organization limits its participation as *amicus curiae* to cases with potentially far-reaching effects and where the organization can offer a perspective not presented by the other litigants. This case meets those criteria.

ARGUMENT

I. A plaintiff should not be able to use class certification proceedings to import a theory of liability that it could not pursue on the merits.

This Court has consistently instructed that class certification must be approached with care and discretion. Following this Court's guidance, the district court here appropriately precluded Plaintiffs from certifying a class based on a flawed and already-rejected theory of liability. Plaintiffs and their *amicus* now seek

to have the Court retreat from its settled requirements for class certification. Specifically, Plaintiffs argue that they ***must*** resurrect the already-rejected theory of liability in order to define a class of plan participants who were actually affected by the alleged mismanagement, consistent with this Court's holding in *Spano v. The Boeing Co.*, 633 F.3d 574 (7th Cir. 2011). That is simply incorrect. A class representative should not be allowed to bootstrap itself into a certifiable class action by defining the class based on a substantive allegation that is not cognizable under the governing law. For the reasons set out in the brief of Defendants-Appellees, Plaintiffs' reasoning is wrong as a matter of law. And as discussed below, given the high stakes in ERISA class actions, Plaintiffs' position is wrong as a matter of policy and judicial administration as well.

A. Class certification is an important step with important practical consequences.

It is no secret—certainly not to this Court—that certifying a class dramatically amplifies the risk and scope of a lawsuit. Indeed, certification increases a defendant's potential liability and litigation costs to such a degree that often the only "economically prudent" choice is "to settle and abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). If the merits of a claim are debatable, a defendant sued by individual claimants will win some cases and lose others. But in the class action context, all the individual claims are bundled together, and litigation becomes a high risk, all-or-nothing proposition. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Consequently, class certification can put tremendous pressure on defendants to settle, regardless

of the merits of the underlying claims. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."). The result is an "exorbitant inflation of penalties." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting); *see also* FED. R. CIV. P. 23 advisory committee's note ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.); Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

For this reason, the class certification decision is often the most important decision in the lawsuit—and effectively "the last word on the subject." *Spano*, 633 F.3d at 583 ("[A]n order certifying a class usually is the last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certificate as provisional).") (quoting *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). That is precisely why Rule 23(f)'s process for interlocutory appeal was adopted. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) ("Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f)."). Further, the practical consequences of certification make it all the more important for the district court to make all the factual and legal inquiries necessary under Rule 23 before certifying a

class. *See Szabo*, 249 F.3d 675; *see also*, *e.g.*, *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) (requiring a district court to rule on an expert's qualifications prior to class certification where the "expert's report or testimony is critical to class certification").

At the same time, while class actions drive up penalties for defendants, they may actually drive down the recovery for individual plaintiffs and, in some circumstances, provide an inefficient remedy even for meritorious claims. *See* Jonathan R. Macey & Geoffrey P. Miller*, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 23–24 (1991) (noting that class actions may cause plaintiffs' attorneys to bill excessive hours, delay litigation, and "earn windfall profits, at the expense of class members"). These problems result from the fact that the interests of counsel may diverge from the interests of class members as the litigation progresses. *Id.* Although class members and their counsel may have similar interests initially (particularly prior to class certification), once the case reaches the settlement stage, the incentives of class counsel shift and there is a danger that counsel will "settle claims for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *see also Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("[T]he representative and counsel may be tempted to sell out the class for benefits

to themselves."). The result is that class members may receive little or no actual benefit from a class action settlement, while counsel reaps a handsome fee.

Congress has recognized these risks and their implications for businesses, consumers, and the economy generally. Indeed, such concerns led Congress to impose new limits on class actions by passing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"). In the process, Congress noted that the risks of exorbitant class action settlements are reflected in the price of the defendant's products or services. *See* S. REP. 109-14 at 14 (2005) ("defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices"); *id.* at 30 ("such abuses hurt consumers by resulting in higher prices"). And as the value and frequency of class action settlements increase, so too will prices. That is precisely why Congress passed CAFA: to "benefit society by encouraging innovation and lowering consumer prices." Pub. L. No. 109-2, § 2(b)(3).

B. ERISA class actions present these concerns in spades.

Like many other class action lawsuits, ERISA class actions produce high settlement values and low potential payouts to individual claimants—only more so. A recent study of employment class actions found that ERISA class actions produce the ***largest*** gross settlements of any category of employment class actions, but the ***lowest*** average and median individual recoveries. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class & Collective Action Employment Settlements: A Preliminary Assessment*, *in* EMPLOYMENT CLASS & COLLECTIVE ACTIONS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 56TH ANNUAL CONFERENCE ON LABOR 128–129 (David Sherwyn ed., 2009). Because ERISA class actions can be

extremely expensive to litigate, defendants may feel an enhanced pressure to agree to unreasonably large settlements, often resulting in substantial attorneys' fees for plaintiffs' counsel. *See* Fiduciary Counselors Inc., *ERISA Class Action Settlements & Attorney Fees* (2010), *at* http://www/erisasettlements.com/press/ERISA-Chart.pdf (compiling data on ERISA class action settlement values and attorneys' fees). Indeed, in 2009–10, the last years for which data were compiled, settlements ranged from $300,000 to $89.75 million—with seven settlements exceeding $45 million. *Id.*

These substantial settlements are problematic not only for employers but also for plan participants, who face the prospect of reduced employer contributions and greater plan expenses. As this Court aptly observed in *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006), "[l]itigation cannot compel an employer to make plans more attractive. . . . It is possible, though, for litigation about pension plans to make everyone worse off." *Id.* at 642.

The problems of ERISA class certification are particularly pronounced when dealing with defined contribution plans like the Lockheed plan at issue here. *See Spano*, 633 F.3d at 582. Because these plans allow participants to make individual investment decisions, there is an increased risk of conflict among plan beneficiaries within the same class, as a fund management decision that is disadvantageous for some class members may prove profitable for others. *Id.* at 591. To allay these concerns, the Court in *Spano* held that in classes relating to defined contribution plans, the certified class must include only those participants who were actually harmed. *Id.*

This makes practical sense. The way a court defines the class will greatly influence a defendant's ultimate liability—as well as the pressure to settle. *Spano*, 633 F.3d at 583–84 (definition of the class and issuance of the certification order are "vital step[s]" in the class action process because "the scope of the litigation and the ultimate *res judicata* effect of the final judgment will depend on the class definition"). Even ***provisional*** certification can force a defendant to settle a non-meritorious claim, simply to avoid the cost of litigation and the uncertainty of trial. To minimize these consequences—and the concomitant increases in costs for plans and their participants—courts in ERISA cases must be particularly vigilant about enforcing the limits of Rule 23 and setting out a precise, proper, and well-tailored class definition.

C. At a minimum, a class definition cannot be based on criteria that bear no connection to the claims that will proceed on the merits.

Because of such concerns, among others, this Court has long recognized that a class definition cannot be based on criteria or metrics unrelated to the claims that will proceed on the merits. For example, in *Adashunas v. Negley*, 626 F.2d 600 (7th Cir. 1980), this Court affirmed an order denying certification of a plaintiff class consisting of all learning-disabled children in Indiana. *Id.* at 605. The Court rejected the class definition as overbroad because it failed to tie the proposed class members to an "injury ***warranting some relief.***" *Id.* at 604 (emphasis added). In so holding, the Court noted that a class based on "abstract, conjectural, or hypothetical" injury fails to state an actual case or controversy under Article III of the Constitution. *Id.* at 604. In the context of *Spano*—which requires a class

definition to distinguish between plan participants who were harmed by the alleged conduct and those who were not—this means that the proposed criteria of harm must be connected to the claims of injury and liability that will actually proceed on the merits. A class that includes individuals who have no claim for relief is necessarily overbroad and impermissible. *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("[I]f the [class] definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad.")

The consequences of permitting an overly broad class definition are clear. Like any class certification order, a certification of an overbroad class imposes pressures so great that the defendant may well be compelled to settle—incurring significant costs to extinguish what are, by definition, nonmeritorious claims. Indeed, as this Court has emphasized, the costs associated with class actions are "magnified unfairly" where a class is defined so broadly as to include individuals who could not bring claims on the merits. *Messner v. Northshore Univ. Hosp. Sys.*, 669 F.3d 802, 825 (7th Cir. 2012). Such a class necessarily poses a risk of intra-class conflicts and would require additional proceedings to tease out which class members have a legitimate claim and which do not—precisely the sort of problems that this Court's class certification jurisprudence seeks to avoid. *Cf. Spano*, 633 F.3d at 591 (holding that courts must be particularly careful when dealing with class definition in defined-contribution cases because of the risks of intra-class conflict); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (stating

that in the class-certification process, "[a] district judge may not duck hard questions by observing that each side has some support); *Szabo,* 249 F.3d at 676 (requiring the district judge to make all findings of fact necessary under Rule 23 ***before*** certifying a class).

In an ERISA case, such costs will inevitably be reflected in the operation of the plan and the benefits to plan participants. This is precisely the sort of situation where, as this Court has observed, "[i]t is possible . . . for litigation about pension plans to make everyone worse off." *Cooper*, 457 F.3d at 642.

II. Whether on the merits or for purposes of class certification, a fund's performance must be evaluated based on its own disclosures, not on whether it performed consistently with other funds with similar labels.

Both the proposed class definition and the opening brief on appeal make clear that Plaintiffs here are attempting to define a class based on the Lockheed Fund's alleged divergence from the performance of a ***typical*** "stable value fund"—rather than on any imprudence in the Fund's operations as set forth in its own disclosures. This is an attempt to circumvent the settled law of this Circuit, and it will have bad practical consequences for plan administrators and participants alike.

A. Certification of a class based on the performance of other supposedly "similar" funds will pose practical problems for plan administrators.

One of ERISA's most fundamental features is its focus on clear disclosure to participants. ERISA requires that all plans be in writing, requires that they specify the basis on which payments are made, and imposes disclosure and reporting duties on plan administrators. 29 U.S.C. §§ 1022, 1102(a), 1102(b)(4); *see also Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112 (2d. Cir. 2003). The required

descriptions and disclosures "advance[] the Congressional purpose of protecting beneficiaries of ERISA plans by insuring that employees are fully and accurately appraised of their rights under the plan." *Id.*

Many ERISA-governed plans provide participants with the right to direct investment of their accounts based on the design, particular investment choices, and disclosures provided by the plan administrator. The disclosures provide clear parameters for the plan administrators' conduct, allowing "employers to 'establish a uniform administrative scheme." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). ERISA provides participants a remedy when the administrator runs afoul of those disclosures. *See* ERISA § 502(c), 29 U.S.C. § 1132(c).

If Plaintiffs' view were to prevail, however, a plan administrator could be subjected to substantial cost and litigation risk based on something completely different: a standard of performance defined entirely by reference to the performance, decisions, and disclosures of plan sponsors and fiduciaries of ***other***, unrelated plans, rather than the terms and disclosures of the plan involved. Plan administrators then would be compelled to identify and monitor other, supposedly "similar" funds, or at least to anticipate arguments based on their divergence from some hypothetical norm. A plan administrator who failed to do so would risk the possibility of its fund's operating differently from that norm and may face litigation if the fund underperforms. This would only add complexity, confusion, and risk to plan administration, and it would ultimately discourage employers from offering diverse ERISA plans. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting

that with ERISA, Congress tried to avoid creating "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place").

Indeed, as Defendants' brief explains, this Court has soundly rejected any approach that imposes ERISA liability by evaluating a fund's performance solely by reference to the performance of other, supposedly "similar" funds. *See DeBruyne*, 920 F.2d at 465 ("[T]he ultimate outcome of an investment is not proof of imprudence."). In *DeBruyne*, the Court rejected an attempt to challenge the management of an investment fund by comparing it to other funds with similar names. *Id.* As this Court noted, assertions about the performance of other plans "say little about the wisdom" of a particular plan's investments—"only that it may not have followed the crowd." *Id.* That principle is dispositive here.

B. Certification of a class based on the performance of other supposedly "similar" funds will pose practical problems for plan participants while driving up plan costs.

Aside from its impact on plan administrators, Plaintiffs' approach to certification would also disserve plan participants, who rely on a diversity of investment options to build successful portfolios. Each investor has individual preferences and risk tendencies and so will prefer different investment options. Some investors even prefer to spread their money out over a number of different investments with different profiles.

A diversity of investment options allows a plan participant to allocate his or her account in a manner that suits his or her investment preference and risk tolerance. *Cf. Hecker v. Deere*, 556 F.3d 575, 586 (2009) (in responding to plaintiff's

claim that Deere's plans had excessive fees, the Court held: "In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants."); Marisa Rogoway, *Proposed Reforms to the Regulation of 401(k) Plans in the Wake of the Enron Disaster*, 6 J. SMALL & EMERGING BUS. L. 423, 429–30 (2002) ("One of the most serious issues illuminated by the Enron disaster is the importance of maintaining a diversified selection of investments in a 401(k) plan."). To achieve their goals, plan participants can review disclosures and decide what kinds of funds to invest in, based on their particular priorities and investment needs. With respect to the Lockheed Fund, for example, participants may have made their selections for a variety of reasons. In fact, some may have chosen the Fund precisely ***because of*** the asset allocation that the plan administrators disclosed—and that Plaintiffs now contend may have been imprudent.

Plan participants rely on plan fiduciaries to offer this mix of investment options. But if a fund's divergence from the practices or results of ***other*** funds can subject plan fiduciaries to liability or increased costs—whether at the liability stage, or as a result of class certification—plan sponsors will likely curtail the number and variety of options available, with an increasing and counterproductive tendency toward plan homogenization. *See Varity*, 516 U.S. at 497 (observing that through ERISA, Congress sought to avoid an employee benefits system where the costs of litigation or administration discouraged plan creation). The result would be that plan participants will have fewer investments to choose from in building their

portfolios. That outcome will also ultimately undermine ERISA's command that fiduciaries should fulfill their duties by taking into account the individual circumstance of the plan and its participants. *See* 29 U.S.C. 1104(a)(1)(B).

Moreover, Plaintiffs' proposed approach to class certification would drive up litigation costs, harming plan participants in the process. Expanding remedies, even for non-meritorious claims, always comes at a cost. As the Supreme Court recognized in *Twombly*: "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). And as discussed above, these financial burdens and the corresponding pressure to settle are even more pronounced in the class action context.

An increase in litigation costs and risk—even from a "provisional" class certification—will inevitably disserve plan participants. Increased cost means reduced employer contributions and greater plan expenses. And again, if the costs of maintaining plans become overly burdensome, employers may be forced to reduce their sponsorship for retirement plans entirely or to cut back on the variety of options they offer. *See*, *e.g.*, *Varity*, 516 U.S. at 497 (noting that with ERISA, Congress tried to avoid creating "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"); *Cooper*, 457 F.3d at 642 (result of litigation was that "IBM eliminated the cash-balance option for new workers and confined them to pure defined-contribution plans"). Thus, the same concerns that led Congress to

pass CAFA to remedy the effects of class action abuses on the economy as a whole—concerns about increased costs and reduced innovation—counsel strongly against Plaintiffs' approach.

Indeed, Congress itself has recognized the importance of balancing "the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 42 (1987). The legislative history of ERISA demonstrates this point:

> It is axiomatic to anyone who has worked for a time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

H.R. CONF. REP. NO. 93-1280 (1974), *reprinted in* 3 LEGIS. HIST. OF ERISA at 4763 (1976) (statement of Rep. Ullman, Member, House. Comm. On Ways and Means).

This case amply demonstrates the perverse consequences of allowing class certification based on a comparison of a fund's performance with the average performance of funds offered by other plans. Under *DeBruyne* and the district court's summary judgment ruling, ***no one*** is entitled to recover based on the claim that the Lockheed Fund failed to match the asset balance or performance of the "typical" stable value fund. *DeBruyne*, 920 F.2d at 465 (affirming dismissal of breach of fiduciary duty claim because "assertions of what a 'typical' balanced fund portfolio manager might have done in 1987 say little about the wisdom of Equitable's investments"). Thus, a class of participants whose earnings did not

match the typical fund's performance would inevitably be overbroad, encompassing participants who cannot possibly state a claim for relief. Further, an order certifying such a class—even "provisionally"—would inevitably increase the pressure on the Defendants to reach a settlement. Although a settlement in this case might or might not confer a short-term benefit on Lockheed Fund participants, it will surely disserve the interests of plan beneficiaries generally—all the while turning a handsome profit for Plaintiffs' counsel, who has brought a series of suits asserting similar theories against a variety of corporations and administrators.[2]

Finally, allowing Plaintiffs to certify a class based on the performance of other, supposedly similar funds—and thereby to resurrect a theory of liability already rejected on the merits—would do little to ensure compliance with the plan administrator's duties under the plan disclosures. To the contrary, it would ***penalize*** Defendants for their fidelity to the plan, as the difference in performance could merely reflect that the Lockheed Fund—and the participants who chose it—"may not have followed the crowd." *DeBruyne*, 920 F.2d at 465. And again, the increased costs associated with such class certification will inevitably find their way to the plan participants whom ERISA litigation is designed to protect. Neither ERISA itself nor the requirements of Rule 23 justify such a perverse result.

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[2] *See, e.g.*, *George v. Kraft Foods Global, Inc.*, No. 1:08-cv-03799 (N.D. Ill. filed Jul. 7, 2008); *Tussey v. ABB, Inc.*, No. 2:06-cv-04305 (W.D. Mo. filed Dec. 29, 2006); *Spano v. The Boeing Co.*, No. 3:06-cv-00743 (S.D. Ill., filed Sept. 25, 2006); *Kanawi v. Bechtel Corp.*, No. 3:06-cv-05566 (N.D. Cal. filed Sept. 11, 2006); *Loomis v. Exelon Corp.*, 1:06-cv-04900 (N.D. Ill. filed Sept. 11, 2006); *Martin v. Caterpillar, Inc.*, No. 2:06-cv-04208 (S.D. Ill. filed Sept. 11, 2006); *Taylor v. United Tech. Corp.*, No. 2:06-cv-02129 (W.D. Tenn. filed Feb. 24, 2006).

CONCLUSION

Far from providing a more effective method of regulation, Plaintiffs' approach to liability and class certification will leave both plan providers and plan participants worse off. *Amici* urge this Court to affirm the district court's class certification decision and to issue a decision reaffirming *DeBruyne* and the other important requirements this Court and Congress have placed on class action litigation, both generally and in the ERISA context.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

I, Linda T. Coberly, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 4,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared in a 12-point, proportionally spaced typeface, Century, with footnotes in 11-point type.

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CERTIFICATE OF SERVICE

I, Linda T. Coberly, certify that on February 20, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel:

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