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# Brief for Amicus Curiae Professor Edward A. Zelinsky in Support of Appellants and Reversal

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No. 23-11097

IN THE

# United States Court of Appeals for the Fifth Circuit

STATE OF UTAH, ET AL.,

*Plaintiffs-Appellants*,

v.

JULIE A. SU, Acting Secretary, U.S. Department of Labor, and UNITED STATES DEPARTMENT OF LABOR

*Defendants-Appellees*.

On Appeal from the United States District Court for the Northern District of Texas, No. 2:23-CV-016 Hon. Matthew J. Kacsmaryk

**BRIEF FOR *AMICUS CURIAE* PROFESSOR EDWARD A. ZELINSKY IN SUPPORT OF APPELLANTS AND REVERSAL**

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January 24, 2024

*Amicus Curiae*

## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, *amicus curiae* states that, in addition to the interested persons identified in the parties' briefs, no person one other than *amicus curiae* Edward A. Zelinsky has an interest in this *amicus* brief.

/s/ Edward A. Zelinsky
Edward A. Zelinsky

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## INTEREST OF THE *AMICUS CURIAE*

*Amicus Curiae* Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law of the Benjamin N. Cardozo School of Law of Yeshiva University. Among his interests, Professor Zelinsky teaches and writes about trust law and the Employee Retirement Income Security Act of 1974 (ERISA). The Supreme Court and several federal Courts of Appeal, among other courts, have cited Professor Zelinsky's work.[1]

For almost three decades, Professor Zelinsky has written about the particular issue presented by this case, i.e., ERISA's duty of loyalty requires retirement plan trustees to invest plan assets for the "exclusive purpose of ... providing" retirement benefits to plan participants and their beneficiaries. This duty of loyalty forbids ERISA-regulated trustees from pursuing "collateral benefits" such as social objectives or the interests of nonparticipants.[2] Workers' retirement resources are

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[1] See, e.g., *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008); *Nolan v. Detroit Edison Co*., 991 F.3d 697, 701 (6th cir. 2021).

[2] Professor Zelinsky's most recent writing on this theme is Edward A. Zelinsky, *(Some) ESG Supporters Should Oppose the DOL's Tie-Breaking Rule*, Chapter 4 in David Pratt (ed.), NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION (2023), available at Lexis/Practice Area/Pensions & Benefit Law/All Pensions & Benefits Law Treatises, Guides & Jurisprudence/NYU Review of Employee Benefits and Executive Compensation/Volume 2023 (hereinafter, "Zelinsky, *Tie-Breaking*"). His first article on this subject is Edward A. Zelinsky, *ETI, Phone the Department of*

less secure when such resources may be used for political or ideological agendas, as worthy as those agendas may be. As a teacher and a scholar, Professor Zelinsky has an interest in the sound development of the law. He has no direct or indirect financial interest in the outcome of this case.

Professor Zelinsky also serves as an uncompensated member of the Connecticut Retirement Security Advisory Board. The conclusions expressed in this brief are Professor Zelinsky's. This brief has not been reviewed or sponsored by this Board.

Professor Zelinsky authored this brief in its entirety. No party, no party's counsel and no other person contributed money that was intended to fund preparing or submitting this brief.

All parties have consented to Professor Zelinsky filing this *amicus* brief.

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*Labor: Economically Targeted Investments, IB 94-1 and The Reincarnation of Industrial Policy*, 16 BERKELEY J. OF EMP. AND LAB. LAW 333 (1995) (hereinafter, "Zelinsky, *ETI*").

## STATEMENT OF THE ISSUE

This *amicus* brief addresses the following issue: Whether the Department of Labor's (DOL) administrative "tie-breaker" rule (29 CFR § 2550.404a-1(c)(2)) violates ERISA's duty of loyalty (ERISA § 404(a)(1)(A)) and ERISA's duty to diversify (ERISA § 404(a)(1)(C)).

## STATEMENT OF THE CASE

The Department of Labor (DOL) has amended its ERISA-related regulations to contain a "tie-breaker" rule which is effective when plan fiduciaries deem their investment choices to be equally compelling. Specifically, 29 CFR § 2550.404a-1(c)(2) now provides that

> [i]f a fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on *collateral benefits* other than investment returns.

29 CFR § 2550.404a-1(c)(2) (emphasis added).

In the decision being appealed, the District Court held that ERISA's statutory duty of loyalty is ambiguous and that consequently the DOL's tie-breaker rule is not "manifestly contrary" to ERISA. *Utah v. Walsh.*[3] The District Court also held that the administrative history of the tie-breaking rule justifies this rule.[4]

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[3] 2023 U.S. Dist. LEXIS 168696 at *8-*10 (discussing DOL's "tiebreaker test") and at *17 (tie-breaker rule is not "manifestly contrary to the statute"); 2023 WL 6205926 at *1-*2 (discussing DOL's "tiebreaker test) and at *5 (tie-breaker rule is not "manifestly contrary to the statute") (N.D. Tex., Amarillo Div.) (Kacsmaryk, J.).

[4] 2023 U.S. Dist. LEXIS 168696 at *14 (invoking DOL's "prior rulemakings"); 2023 WL 6205926 at *4 (same).

## SUMMARY OF ARGUMENT

DOL's tie-breaking rule violates ERISA's duty of loyalty under ERISA § 404(a)(1)(A). ERISA's duty of loyalty requires ERISA-regulated trustees to invest plan resources for the "exclusive purpose of . . . providing" economic benefits to plan participants and their beneficiaries, "solely in the interest of the participants and beneficiaries." The tie-breaking rule violates this stringent statutory duty of loyalty because it permits plan trustees investing plan resources to consider "collateral benefits," i.e., the welfare of third parties or social goals. But ERISA's plain text does not permit this result. The words ""solely" and "exclusive purpose" in § 404(a)(1)(A) do not mean "collateral benefits."

If an ERISA-regulated trustee genuinely confronts equally appropriate investment choices, ERISA § 404(a)(1)(C) tells the trustee what to do: The trustee must *diversify*, buying or offering some of each investment option. But instead of mandating such diversification, 29 CFR § 2550.404a-1(c)(2) authorizes the pursuit of collateral benefits, benefits which are extraneous to the retirement interests of plans and their participants.

The notion of tie-breaking is an anachronism, originally deployed to defend ERISA's duty of loyalty. Today, however, the very notion of tie-breaking (whatever its prior jurisprudential justifications) conflicts with the statutory duty of

loyalty to plans and their participants by introducing into the trustee's deliberations concern for nonparticipants or for social goals. The tie-breaking rule jeopardizes the security of workers' retirement assets. Using the euphemism of collateral benefits, the tie-breaking rule allows ideological (often highly political) considerations and the interests of nonparticipants to influence the investment decisions of ERISA-regulated fiduciaries. This Court should enforce ERISA's plain language and reverse the judgment below.

## ARGUMENT

### I. BY CONDONING THE PURSUIT OF COLLATERAL BENEFITS, DOL'S TIE-BREAKING RULE VIOLATES ERISA'S DUTY OF LOYALTY UNDER ERISA § 404(A)(1)(A).

ERISA imposes a duty of loyalty. Section 404(a)(1)(A) provides that fiduciaries investing the funds of ERISA-regulated arrangements must "discharge [their] duties" "*solely* in the interest of the participants and beneficiaries" "for the *exclusive purpose* of . . . providing benefits to participants and their beneficiaries."[5] This language is uncompromising. But DOL's tie-breaking rule authorizes trustees to pursue additional collateral benefits. That violates the fundamental duty of loyalty as embodied in the text of Section 404(a)(1)(A).

ERISA's stringent duty of loyalty is derived from the common law of trusts.[6] ERISA's fiduciary duties are "the highest known to the law."[7] The duty of loyalty requires ERISA-regulated fiduciaries to invest plan funds or to construct investment menus "with an eye single to the interests of the participants and

[5] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

[6] *Tibble v. Edison International*, 575 U.S. 523, 528 (2015) ("We have often noted that an ERISA fiduciary's duty is derived from the common law of trusts.") (internal quotation marks deleted)*; Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, 960 F.3d 190, 194 (5th cir. 2020) (ERISA's fiduciary duties "are 'derived from the common law of trusts.'").

[7] *Schweitzer*, 960 F.3d at 194.

beneficiaries,"[8] "*solely* in the interest of the participants and beneficiaries."[9]

Instructive in this context is the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer.*[10] In *Dudenhoeffer*, fiduciaries had argued that ERISA's fiduciary duties permit plan fiduciaries to pursue the alleged advantages of employee stock ownership. The Court unanimously disagreed, holding that ERISA § 404 means what it says and requires ERISA-regulated fiduciaries to seek only pecuniary benefits for retirement and other employee welfare plan participants.

Writing for the unanimous *Dudenhoeffer* Court, Justice Breyer explained:

> Read in the context of ERISA as a whole, the term "benefits" in [ERISA Section 404] must be understood to refer to the sort of financial benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. Cf. [29 U.S.C.] §1002(2)(A) (defining "employee pension benefit plan" and "pension plan" to mean plans that provide employees with "retirement income" or other "deferral of income"). The term does not cover nonpecuniary benefits like those supposed to

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[8] *Perez v. Bruister*, 823 F.3d 250, 262 (5th cir. 2016). *See also* RESTATEMENT 3D OF TRUSTS, § 78, General Comment a (The "principle of undivided loyalty" to the beneficiary is "fundamental" to trust law.) ; Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds.), THE OXFORD HANDBOOK OF FIDUCIARY LAW 41 (2019) ("Trust law frames the duty of *loyalty* as a `sole' interest rule..."); Internal Revenue Code § 401(a), 26 U.S.C. § 401(a) (qualified plan and trust are "for the exclusive benefit" of employees and their beneficiaries).

[9] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

[10] 573 U.S. 409 (2014).

arise from employee ownership of employer stock.[11]

This strict, text-based understanding of ERISA § 404 leaves no room for plan trustees to pursue "collateral benefits" for third parties or for society as a whole since ERISA's fiduciary duties do not even permit trustees to seek "nonpecuniary benefits" for plan participants. As loyal fiduciaries, ERISA plan trustees must act for the "exclusive purpose of" financing retirement and other ERISA-regulated monetary benefits for participants and their beneficiaries. *"Exclusive purpose" means "exclusive purpose," not "collateral benefits."*

The tie-breaking rule "manifestly"[12] violates ERISA's statutory duty of loyalty. Pursuant to that administratively-created rule, a pension trustee who declares that two or more possible investments "equally serve" the participants' interests thereby frees herself to make her final decision by pursuing "collateral benefits" for nonparticipants or for society as a whole.[13] This is precisely what ERISA's duty of loyalty is designed to prevent. ERISA-regulated funds are to be invested "*solely* in the interest of the participants and beneficiaries."[14] Under the

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[11] *Id.* at 421 (parentheticals in original). The District Court quotes this language from *Dudenhoeffer* but fails to analyze or apply it. *Utah v. Walsh*, 2023 U.S. Dist. LEXIS 168696 at *13 (citing *Dudenhoeffer*); 2023 WL 6205926 at *3 (same).

[12] *Utah v. Walsh*, 2023 U.S. Dist. LEXIS 168696 at *17; 2023 WL 6205926 at *5.

[13] 29 CFR § 2550.404a-1(c)(2) .

[14] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

euphemism of collateral benefits, the tie-breaking rule jeopardizes the security of workers' retirement assets by allowing ideological (often highly political) considerations and the interests of nonparticipants to influence the investment decisions of ERISA-regulated fiduciaries.

To see the practical pitfalls of the tie-breaking rule, consider a pension plan with two sincere trustees, one of whom is pro-choice, the other pro-life. When two investment choices are deemed to "equally serve" the participants' financial interests, 29 CFR § 2550.404a-1(c)(2) allows these trustees to break the tie by considering collateral benefits. But whose collateral benefits are to be pursued, pro-choice collateral benefits or pro-life collateral benefits? The upshot is that the investment of plan resources or the construction of participants' investment menus becomes a political battlefield as exclusive concern for the economic welfare of plans and their participants gives way to the (often highly political) pursuit of collateral benefits.

When these two trustees invest their own personal funds, they can pursue whatever agendas they individually favor. But ERISA's duty of loyalty recognizes that, when these trustees invest plan funds, they invest "other peoples' money."[15] These ERISA-regulated fiduciaries are thus held to "the highest [standards] known

[15] The famous phrase was coined by Louis Brandeis before he was appointed to the U.S. Supreme Court. Louis Brandeis, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

to the law,"[16] namely, to "exclusive[ly]" and "solely" pursue participants' economic retirement interests.[17]

Or consider a pension plan with two environmentally-conscious trustees, one of whom favors nuclear power to reduce carbon emissions and one of whom opposes nuclear power because of skepticism about nuclear technology. If these trustees confront two equally good investment decisions, whose collateral benefits are to be pursued, the collateral benefits of nuclear power or the collateral benefits of a nonnuclear world? Yet another contemporary controversy swirls around defense contractors.[18] Are investments in such stocks to be eschewed in the name of ESG or should equities in defense contractors be embraced under the banner of collateral benefits because military supplies help Ukraine and Israel defend themselves?

In these and similar cases, the tie-breaking rule incents trustees to declare ties so that they can implement their sincere beliefs using other people's pension money, pursuing collateral benefits instead of focusing upon the "exclusive

[16] *Schweitzer*, 960 F.3d at 194.

[17] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

[18] Hannah Miao, *Wars Spur Socially Minded Investors To Diversify*, WALL ST. J. (Dec. 4, 2023) B1.

purpose of...providing"[19] economic benefits for plans and their participants. This tendency to find ties may be unconscious. An insight of contemporary behavioral economics is that fully rational decisionmakers (like these trustees) are often unconsciously "nudged" by the way in which choices are framed.[20] Telling trustees that ties among investment choices frees them to pursue collateral benefits with the funds entrusted to them may nudge some (perhaps many) trustees to find such ties.

The common law's traditional duty of loyalty, as codified in ERISA § 404(a)(1)(A), countervails any unconscious tendency to deploy retirement resources for political or ideological purposes—anybody's political or ideological purposes. In contrast, the tie-breaking rule invites plan fiduciaries, deliberately or unconsciously, to declare ties so that they can invest plan resources to pursue political or ideological agendas under the rubric of collateral benefits.

This is manifestly contrary to the terms and purposes of the statute. There is no ambiguity in ERISA § 404(a)(1)(A). *"Exclusive purpose" means "exclusive purpose," not "collateral benefits." "Solely" means "solely," not "collateral benefits."* By condoning the pursuit of "collateral benefits," 29 CFR § 2550.404a-1(c)(2) ignores ERISA's stringent duty of loyalty to the economic interests of plans

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[19] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

[20] Zelinsky, *Tie-Breaking*, *supra*, note 2, § 4.03 at n. 22 and accompanying text; Richard H. Thaler and Cass R. Sunstein, NUDGE: THE FINAL EDITION (2021) 38-40 ("frames can be powerful nudges, and must be selected with care and caution.")

and their participants.

## II. IF AN ERISA-REGULATED TRUSTEE GENUINELY CONFRONTS EQUALLY APPROPRIATE INVESTMENT CHOICES, ERISA § 404(A)(1)(C) REQUIRES THE TRUSTEE TO DIVERSIFY BY BUYING OR OFFERING SOME OF EACH.

In addition to the duty of loyalty, ERISA imposes a duty to diversify upon plan fiduciaries. ERISA § 404(a)(1)(C) requires plan trustees to "diversify . . . the investments of the plan so as to minimize the risk of large losses."[21] The duty of diversification commands an ERISA-regulated fiduciary who genuinely confronts equally appropriate investment choices to diversify by buying or offering some of each.

If a pension fiduciary investing defined benefit plan funds confronts two stocks which would both equally serve the plan's needs, she should not pursue collateral benefits to break the tie. Instead, she should diversify pursuant to § 404(a)(1)(C) by purchasing some of each of the two stocks. Similarly, if a 401(k) trustee identifies two equally appropriate funds for the plan's menu of participant investment choices, she should not choose the fund corresponding to her personal ideological preferences about collateral benefits. Instead, § 404(a)(1)(C) tells her to diversify and put both, equally compelling funds on the menu for participants' investment choices.

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[21] ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). See *Whitley v. BP, P.L.C.*, 838 F.3d 523, 526 (5th cir. 2016) (ERISA imposes "on those who manage the plan strict statutory duties, including loyalty, prudence, and diversification.").

The District Court states that "ERISA does not contemplate the possibility of a 'tie' between two financially equivalent investment options."[22] To the contrary: It is when two or more investment options are equally attractive for the plan that diversification is compelling. When there is a tie among choices, the statutory duty of diversification commands the ERISA-regulated trustee to buy some of each or to offer each choice to the participants' making their own investment decisions.

In the lead up to 29 CFR § 2550.404a-1(c)(2), commentators (including *amicus curiae*)[23] highlighted diversification (rather than the pursuit of collateral benefits) as the proper response when two or more investments are equally appropriate for a plan. In response to these comments, the DOL spurned the statutory mandate of diversification in an unpersuasive manner. In the rulemaking, DOL declared in conclusory fashion that diversifying sometimes "entails additional costs (such as transactional or monitoring costs) that offset the benefits of investing in two (or more) investments rather than one."[24]

For three reasons, this is an unconvincing rejection of the statutory requirement of diversification when two or more investments are equally good.

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[22] *Utah v. Walsh*, 2023 U.S. Dist. LEXIS 168696 at *14; 2023 WL 6205926 at *4.

[23] Zelinsky, *Tie-Breaking*, *supra* note 2, § 4.04 at n. 25.

[24] DOL, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,* 87 FR 73822, 73836 (Dec. 1, 2022) (parentheticals in original).

*First*, there is no evidence that the alleged costs of diversification are significant. The DOL cites no such evidence. In fact, the Restatement of Trusts finds the costs of diversification to be negligible:

> Broader diversification...is usually to be preferred in trust investing. Broadened diversification may lead to additional transactions costs, at least initially, but the constraining effect of these costs can be generally dealt with quite effectively through pooled investing...Hence, thorough diversification is practical for nearly all trustees.[25]

*Second*, DOL's own rationale applies only if diversification "entails additional costs."[26] But 29 CFR § 2550.404a-1(c)(2) permits the pursuit of collateral benefits in all tie-breaking contexts, even when diversification is costless. DOL's own reasoning would limit the use of collateral benefits as a tie-breaker to those situations where diversification "entails additional costs"—which is not what 29 CFR § 2550.404a-1(c)(2) says.

*Three*, there are many cost-free alternatives to the DOL tie-breaking rule, e.g., flipping a coin, any random choice mechanism downloaded from the internet.[27] Besides being costless, flipping a coin or a downloaded random choice program does not introduce into the trustee's decision-making process extraneous

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[25] Restatement 3d of Trusts, §90, Comment g.

[26] DOL, *supra*, note 24.

[27] *See, e.g.,* Picker Wheel at https://pickerwheel.com; Random Choice Generator at https://randomchoicegenerator.com; Random Choice at https://jklp.org/html/choose.html.

considerations like the pursuit of "collateral benefits," benefits which will typically reflect the trustee's (deliberate or unconscious) ideological preferences. A trustee who knows that an investment tie will be broken by a random choice process rather than her subjective selection of collateral benefits will be less likely to declare the existence of such a tie.

In short, just as the DOL's tie-breaking rule ignores § 404(a)(1)(A)'s duty of loyalty ("exclusive purpose," "solely"), the tie-breaking rule ignores § 404(a)(1)(C) ("diversify... the investments of the plan"). Confronted with two investments which "equally serve the financial interests of the plan,"[28] ERISA commands the trustee to diversify by buying or offering some of each, not to intrude the search for "collateral benefits" into the fiduciary's investment decision-making process.

## III. THE NOTION OF TIE-BREAKING IS AN ANACHRONISM, ORIGINALLY DEPLOYED TO DEFEND ERISA'S DUTY OF LOYALTY.

The District Court relied heavily on the history of the tie-breaking rule.[29] But a careful evaluation of that history leads to a different conclusion: The notion of tie-breaking is an anachronism, best understood as originally deployed to defend

[28] 29 CFR § 2550.404a-1(c)(2).

[29] *Utah v. Walsh*, 2023 U.S. Dist. LEXIS 168696 at *8 ("For nearly three decades...") and *14 ("prior rulemakings"); 2023 WL 6205926 at *1 ("For nearly three decades...") and *4 ("prior rulemakings").

ERISA's duty of loyalty against the early onslaught against that statutory rule. Having served its tactical purpose, it is now time to jettison the notion of tie-breaking as inconsistent with ERISA's statutory duties of loyalty and diversification.

Before ESG advocates sought to dilute ERISA's fiduciary protections by the search for collateral benefits, the effort to divert retirement funds to political and ideological agendas traveled under different monikers. In one incarnation, this effort was known as "social investing."[30] In a later variant, the campaign to divert workers' retirement resources to extraneous purposes traveled under the banner of "economically targeted investing (ETI)."[31]

The concept of tie-breaking was introduced into ERISA discourse to defend the fiduciary duties established in § 404 from these diversionary efforts.[32] Tie-breaking (as we now call it) was originated as a way to minimize the claims of social investing and ETI advocates: Only if investments were "economically competitive" could trustees pursue the social investing or ETI agendas.[33] In its

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[30] John H. Langbein, David A. Pratt, Susan J. Stabile and Andrew W. Stumpf, PENSION AND EMPLOYEE BENEFIT LAW (6th ed. 2015) 583 (discussing "social investing).

[31] Zelinsky, *ETI*, *supra*, note 2.

[32] *Id.* at 346-347.

[33] Langbein, et al., *supra*, note 30.

time, this was a tactically sound way to defend ERISA's fiduciary duties from the then-powerful forces seeking to dilute those duties.

Today, however, the notion of tie-breaking (whatever its prior tactical justifications) unacceptably dilutes the statutory duty of loyalty to plans and their participants by introducing into the trustee's deliberations concern for nonparticipants or for social goals. Under the euphemistic rubric of collateral benefits, the tie-breaking rule jeopardizes the security of workers' retirement assets by allowing ideological (often highly political) considerations and the interests of nonparticipants to influence the investment decisions of ERISA-regulated fiduciaries. Tie-breaking has served its historic purpose and should now be recognized for what it is, namely, the introduction of extraneous considerations into the investment decisions of ERISA-regulated trustees who are bound by the statutory duty of loyalty to plans and their participants.

## CONCLUSION

For all of the foregoing reasons, the opinion of the District Court should be reversed.

Respectfully submitted,

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January 24, 2024

## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,609 words.

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/s/ Edward A. Zelinsky
EDWARD A. ZELINSKY

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on January 24, 2024. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Edward A. Zelinsky
EDWARD A. ZELINSKY