IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

RICHARD BRAUN and
FREDERICK LUEHRS III,

Plaintiffs,

Case No. 23-cv-234

v.

MARTIN J. WALSH, in his official
capacity as Secretary of Labor,

Defendant.

COMPLAINT

Plaintiffs allege their complaint against Defendant as follows:

INTRODUCTION

1. For Americans of all races, creeds, and political stripes, the American dream includes the prospect of a comfortable retirement. Recognizing this bedrock goal of American society, Congress enacted the Employment Retirement Income Security Act of 1974 (ERISA). This comprehensive federal law governs the operation of retirement plans and protects the hard-earned savings of millions of employees from mismanagement and abuse. The law also imposes important fiduciary duties on those who administer retirement plans. 29 U.S.C. § 1001(a) et seq.

2. According to the Department of Labor ("Department"), approximately 141 million workers and beneficiaries benefit from the protections afforded by

ERISA[1]. A majority of American workers, about 54 percent, earn retirement benefits on the job.[2]

3. Importantly, for the purposes of this lawsuit, Americans benefit from ERISA's explicit statutory command that retirement savings be invested "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). In other words, ERISA is grounded in the principle that those entrusted with the administration of retirement plans must aim to maximize the value of those accounts for the exclusive purpose of benefitting retirees, and not to promote collateral objectives.

4. ERISA protects retirement savings from mismanagement and abuse and imposes fiduciary duties on those who administer the plans, as described in further detail below. Plan participants are entitled to receive information about their plan, the plan's performance, and the effect of that performance on the benefits they receive.

5. One of the reasons ERISA has been popular with Americans across the board is that the law confers significant tax advantages on both employers and employees—so long as ERISA's standards are complied with. *See* 26 U.S.C. §§ 401 *et seq*. (setting forth qualifications for retirement plans).

[1] United States Department of Labor, "Fact Sheet: What is ERISA?," available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa (last visited August 1, 2022).
[2] *Id.*

6. Any alterations to the implementing of regulations by the Secretary of Labor ("Secretary") can thus have a substantial effect on the retirement savings of tens of millions of workers and beneficiaries all over the country who have assets invested in qualified ERISA plans.

7. The fundamental principle that retirement investments are made for the benefit of retirees is now under attack via the guise of an investing fad often referred to as "ESG," which by its nature focuses on environmental, social, and governance goals rather than maximizing investment returns. According to the Biden administration, ESG can also be referred to as "sustainable investing, socially responsible investing, and impact investing." Whatever euphemism one wishes to use—"people over profits," "standing for something more," etc.—the ESG investment trend contemplates a focus on policy objectives rather than financial returns. This ERISA forbids.

8. On December 1, 2022, the Secretary promulgated a new rule, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73822, 73884 (hereafter the "ESG Rule"), which both permits and encourages plan administrators to consider environmental, social, and governance (commonly referred to as "ESG") factors when making investments on behalf of plan beneficiaries.

9. The ESG Rule stems from a broader executive initiative, outlined in Executive Order 14030, which aims to fight climate change through rulemaking

across federal agencies, from the Securities and Exchange Commission to the Department of Education.

10. But Congress never granted President Biden the authority to override ERISA's text and its stated objective to protect retirees in favor of progressive policy dreams like social credit scores, reducing pay for CEOs, or instituting racial quotas for corporate boards.

11. The ESG Rule violates ERISA and exceeds the authority granted to the Secretary by statute. In addition, it unlawfully politicizes the retirement system and, in doing so, puts the retirement savings of millions of Americans at substantial risk in service of a policy choice not found in ERISA or otherwise enacted by Congress. For this reason, Plaintiffs are entitled to a declaration that the ESG Rule exceeds the authority conferred on the Secretary and the Department by Congress, and a preliminary and permanent injunction enjoining the ESG Rule.

PARTIES, JURISDICTION, AND VENUE

12. Plaintiff Richard Braun is the Operations Manager for SWAT Environmental, a soil, water, and air technologies company that provides radon mitigation and other services. Mr. Braun is a resident of Waukesha County and is a participant, as that term is defined in 29 U.S.C. § 1002(7), in a qualified defined contribution benefit plan offered by his employer.

13. Plaintiff Frederick Luehrs III is a Maintenance Supervisor at Petron Corporation, a supplier of engineered lubricants, in New Berlin, Wisconsin. Mr. Luehrs is a resident of Waukesha County and is a participant, as that term is defined

in 29 U.S.C. § 1002(7), in a qualified defined contribution benefit plan offered by his employer.

14. Defendant Martin J. Walsh is the Secretary of Labor. The Secretary is authorized to promulgate regulations "as he finds necessary or appropriate to carry out the provisions of [ERISA]." However, that authority does not extend to contradicting the statutory text and requirements of ERISA, such as the requirement that a fiduciary discharge the fiduciary's duties "solely in the interest of the participants and beneficiaries" or altering the meaning of the term "prudent man standard of care" as defined by Congress. 29 U.S.C. § 1104(a). Mr. Walsh is sued in his official capacity for declaratory, injunctive, and equitable relief.

15. This Court has jurisdiction over this complaint under 28 U.S.C. §§ 1331 and 2201 and 5 U.S.C. § 706(2)(c), as the ESG Rule is in excess of statutory jurisdiction, authority, or limitations prescribed by Congress.

16. In addition, this Court has jurisdiction over the action because ERISA empowers any participant or beneficiary to bring a civil action "to enforce his rights under the terms of the plan" or to "enjoin any act or practice which violates any provision of this subchapter" and "to obtain [ ] appropriate equitable relief" for such violations. 29 U.S.C. § 1132(a)(1)(B), (3).

17. Congress also explicitly contemplated suits by a participant or beneficiary to restrain the Secretary from taking any action contrary to the provisions of ERISA or to compel the Secretary to take action required by ERISA. 29 U.S.C. § 1132(k).

18. Defendant is the Secretary of the Department of Labor, an agency of the United States that is responsible for enforcement of the rule upon which this action is based. The Department has an office within this District at 310 W. Wisconsin Avenue, Milwaukee, WI 53203. Venue is therefore proper here.

STATEMENT OF CLAIM

A. ERISA Protections and Consistent Application of Strict Standards of Fiduciary Duty.

19. Congress has provided that a fiduciary shall discharge its duties with respect to an ERISA plan "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1).

20. In defined contribution plans, like those in which Plaintiffs participate, the investment risk is on the participant. Because of this risk, it is particularly important that the interests of participants be protected by the proper enforcement of ERISA standards and rules.

21. The Department has long prohibited beneficiaries from sacrificing investment returns for participants and beneficiaries at the altar of collateral societal or policy goals.

22. For example, the Department issued an interpretive bulletin in 1994 noting that it had construed the requirement that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from "subordinating the interests of

participants and beneficiaries in their retirement income to unrelated objectives." 59 Fed. Reg. 32607.

23. In that particular bulletin, the Department observed that a fiduciary could permissibly select an economically targeted investment (ETI), defined as an investment that is selected for the economic benefits they create in addition to the investment return participants and beneficiaries receive. 59 Fed. Reg. 32606. In other words, the fact that a particular investment served other economic objectives *in addition to* providing a comparable risk and rate of return did not mean that the fiduciary had violated ERISA by selecting it.

24. But the Department was careful to point out that "fiduciaries who are willing to accept expected reduced returns or greater risks to secure collateral benefits are in violation of ERISA" and that "an investment will not be prudent if it would provide a plan with a lower expected rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return." *Id.* at 32607.

25. This focus on financial return has been consistent in federal rules and regulations over the nearly three decades between 1994 and the present day, regardless of what party controlled the White House during that time. *See id.*; *see also* 73 Fed. Reg. 61735 (Oct. 17, 2008) (clarifying that fiduciaries "may not select investments on the basis of any factor outside the economic interest of the plan except in very limited circumstances" and that the statute's "text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic

interest of the plan") and 80 Fed. Reg. 65137 (Oct. 26, 2015) ("The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.").

26. The last rule promulgated on the subject of the prudence and loyalty that fiduciaries owe to plan participants similarly emphasized the continued primacy of financial returns for retirees, not aspirational policy goals.[3]

27. Specifically, the Department stated that a fiduciary's evaluation of an investment "must be based only on pecuniary factors," other than in limited circumstances when a fiduciary "is unable to distinguish [among one or more investment choices] on the basis of pecuniary factors alone."[4] In other words, nonpecuniary factors could be used to break ties among otherwise substantially equivalent investments.

28. The 2020 Rule provides that a fiduciary may consider nonpecuniary factors (which could include ESG factors) if the investment choices are otherwise equivalent, so long as the fiduciary documents a) why pecuniary factors were not sufficient to select an investment course of action; b) how the selected investment compares to the alternative investments with regard to factors including diversification, liquidity, and projected return; and c) how the chosen non-pecuniary

[3] *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. at 72846, 72883 (Nov. 13, 2020) (hereafter the "2020 Rule").
[4] *Id.* at 72884.

factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.[5]

29. In other words, fiduciaries have been free to select investments that account for ESG factors, provided that the pecuniary factors underlying these investments and other investment options are equivalent and that fiduciaries document for the participants and beneficiaries the reasoning for their choices.

30. This requirement is consistent with longstanding Department guidance that fiduciaries document their reasons for deciding among investment choices.

31. The documentation requirement provides protection for plan participants and beneficiaries and ensures that fiduciaries will only consider these non-economic factors when doing so will not put the economic returns of participants and beneficiaries at risk at the expensive of collateral objectives.

32. Courts have also emphasized the strict requirements imposed upon fiduciaries to act solely for the benefit of plan participants and beneficiaries.

B. The Biden Administration Suspends an Otherwise Valid Rule to Pursue its Political Ends.

33. Upon taking office in early 2021, President Joe Biden and the Department announced that the Department would not enforce the 2020 Rule, despite that rule having gone through the complete rulemaking and public comment process.[6]

---

[5] *Id.*

[6] https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310

34. Upon information and belief, the Biden administration took this action at the behest of a number of organizations whose goal has been to encourage the use of ESG investing.

35. Proponents of ESG investing have made significant contributions to Democratic Party politicians and causes since the Biden administration took office. For example, between January 2021 (when the Biden administration took office and announced its intention to promulgate its own, pro-ESG rule) and the November 2022 midterms, BlackRock Capital alone contributed $647,000 to left-leaning political campaigns.[7]

36. During the same period, some states pulled their pension investments from BlackRock, citing the company's alleged push to emphasize ESG factors over investment returns for their employees.[8]

37. As further described below, a rule that endorses or provides cover for selecting investments based on factors other than financial returns necessarily disadvantages individual employees and participants. These individual workers may be provided with the illusion of investment choices by plan administrators, but at bottom whether the participant is interested in the social causes ESG promotes or not is wholly irrelevant. Because Congress conferred special privileges, including tax advantages, on retirement funds *to encourage retirement savings* (and thereby relieve or at least lessen the public burden of supporting workers after they retire), it is

---

[7] https://www.bloomberg.com/news/articles/2022-11-04/blackrock-spends-record-amount-on-us-political-campaigns-amid-esg-fallout?leadSource=uverify%20wall

[8] https://www.reuters.com/business/sustainable-business/missouri-pulls-500-mln-blackrock-over-asset-managers-esg-push-2022-10-18/

inappropriate for the Department of Labor to encourage the use of these funds for other, collateral objectives instead.

38. Additionally, because the ESG Rule relieves plan fiduciaries of any duty to meaningfully document the non-monetary reasons for their decisions, plan participants and beneficiaries will have no way to hold a fiduciary who chooses to subvert plan returns for ideological or political ends to account.

39. The ESG Rule, initially proposed in October 2021 to supersede the 2020 Rule and finalized on December 1, 2022, will fundamentally alter the focus on investment returns for plan participants and beneficiaries, instead injecting consideration of ESG factors—but without requiring that fiduciaries quantify the benefits of any such factors, or even document the reasoning behind their consideration.

40. If enforced, participants will lose fundamental protections afforded under the statute, prior regulations, and case law, including but not limited to assurances that their financial interests—and not someone else's preferred social or political agenda—come first, and the protection provided by transparency in decisionmaking.

41. As further described below, the ESG Rule is not a typical example of policy reversals commonly initiated when the executive branch flips from Republican to Democratic control or vice versa. Rather, the ESG Rule would upend the standard of prudence and loyalty that underpins the structure and purpose of ERISA, which is to secure benefits for retirees by requiring fiduciaries to invest funds for the "sole"

benefit of plan participants and beneficiaries, in an effort to promote the current administration's progressive policy aims through rulemaking without congressional action.

42. One cannot argue that the duty of prudence and loyalty as defined in federal law extends to a generalized fiduciary duty "for the planet" or "for a more just world." Congress's command that funds be invested for the highest possible economic return has been consistent and clear for nearly fifty years: for employers and employees to receive the favorable tax treatment that encouraged the creation of qualified retirement plans, the assets of the plan must be invested *solely* for the benefit of the plan participants or their beneficiaries, or to defray costs of administering the plan. Consideration of collateral policy objectives, noble though they may otherwise be, is not permitted.

C. Environmental, Social, and Governance (ESG) Investing Generally

43. In recent years, some investors have chosen to buy stock or otherwise invest in companies whose policies or public statements align with their own political and social policy preferences.

44. Commonly referred to as "socially responsible investing" by its promoters, these investors select where to spend their money based upon considerations outside of the rate of financial return. The most common non-economic factors these investors consider are policies or positions surrounding the issues of environmental protection, board governance, social justice policies, and diversity, equity, and inclusion initiatives. Collectively, these factors are commonly referred to as "ESG" (environmental, social, and governance) factors.

45. With some limited exceptions, the forces driving ESG investing have historically been associated with left-leaning political causes.

46. Plaintiffs do not dispute that an individual directing his or her own investments in the stock market or making purchase decisions generally has the freedom to choose on what basis they will spend their own money, whatever their personal beliefs and policy preferences may be.

47. Plaintiffs bring this lawsuit because the new federal rule proposed by the Department gives unprecedented license to ERISA plan fiduciaries to make such decisions with the money that has been set aside and put under the direction of fiduciaries for the specified purpose of saving for the participants' retirement.

D. ESG Investing Historically Results in Lower Returns and Higher Costs for Plan Participants and Beneficiaries.

48. Studies have shown that ESG investing is not as profitable as investing in standardized portfolios, such as investing in an index like the Standard & Poor's (S&P) 500 or the Nasdaq.

49. For example, a 2019 study shows that over a ten-year period, a portfolio of ESG funds would have a net return that is 43.9% lower than if those same funds had been invested in the S&P 500 index fund.[9]

50. Another study demonstrated that a company's ESG indicators were inversely correlated with their expected rate of financial return.[10]

---

[9] Wayne Winegarden, "Environmental, Social, and Governance (ESG) Investing: An Evaluation of the Evidence," Pacific Research Institute (2019).

[10] Rocco Ciciretti, Ambrogio Dalo, Lammertjan Dam, "The Contributions of Betas versus Characteristics to the ESG Premium" (2019).

51. A number of other studies have reached no conclusion concerning the impact of ESG investing on portfolios.

52. Additionally, there is evidence that passive investing in ESG-directed investments results in higher fees compared to standard passive funds.[11]

53. When fees are too high, they can eat away at the tax benefits of investing in an ERISA plan, particularly for younger employees.[12]

54. Courts the country over have universally recognized that failure to minimize fees for investors violates a fiduciary's duty of prudence under ERISA.

E. The October 2021 Proposed Rule

55. On October 14, 2021, the Department issued a proposed rule entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." The proposed rule was published in the Federal Register and a comment period was held open until December 13, 2021. *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57272 (Oct. 14, 2021) (hereafter the "Proposed Rule").

56. The text of the Proposed Rule initially acknowledged the history of the strict rules governing the conduct of fiduciaries, dating back to ERISA's passage

---

[11] See, *e.g.,* 85 Fed. Reg. 72848 n.16 (citing Principles for Responsible Investment, *How Can a Passive Investor Be a Responsible Investor?* (Aug. 2019), *www.unpri.org/download?ac=6729,* at 15 (ESG passive investing strategies likely result in higher fees compared to standard passive funds)); and Wayne Winegarden, *ESG Investing: An Evaluation of the Evidence,* Pacific Research Institute (May 2019), *www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf,* at 11–12 (finding average expense ratio of 69 basis points for ESG funds compared to 9 basis points for broad-based S&P 500 index fund).

[12] https://www.cnbc.com/2019/07/22/how-much-the-average-american-typically-pays-in-401k-fees.html

nearly fifty years ago. It also stated repeatedly throughout the rule summary that fiduciaries may not subvert financial returns to collateral objectives such as policy preferences–but then stated in the text of the proposed rule itself that proper consideration "*may often require* an evaluation of the economic effects of climate change and other ESG factors." *Id.* at 57276 (emphasis addd).

57. Among the ESG factors the Proposed Rule suggested be considered are "exposure to the real and potential economic effects of climate change," social issues and governance factors including "board composition," and workforce practices "including the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention." *Id.* at 57277.

58. The Proposed Rule's summary also suggested scenarios in which collateral factors such as an investment "better align[ing] with the corporate ethos of the plan sponsor or that it improves the esprit de corps of the workforce" might "prompt[] the selection of the investment" where two investments are otherwise equivalent in the (undocumented) judgment of the fiduciary. *Id.* at 57280.

59. Not surprisingly, the Proposed Rule did not include any statistical evidence demonstrating that consideration of any of the ESG factors listed above actually result in a better economic return, whether now or in the future, for plan participants and beneficiaries.

60. The Proposed Rule similarly "includes clear text to indicate that ESG considerations, including climate-related financial risk, are, in appropriate cases, risk-return factors that fiduciaries *should take into account* when selecting and

monitoring plan investments and investment courses of action." *Id.* at 57278 (emphasis added). In short, the Proposed Rule effectively mandated consideration of these factors, while at the same time claiming not to subvert these amorphous policy interests to financial returns.

61. As noted above, the 2020 Rule that the Biden administration suspended required fiduciaries to document the non-pecuniary reasons why a particular investment was selected where the fiduciary is selecting among more than one investment that the fiduciary has deemed comparable where noneconomic factors are taken into account.

62. Under the Proposed Rule, this documentation requirement was completely eliminated. The ESG Rule's drafters maintain that the reason for this change is to eliminate the so-called "prejudice" they believe the 2020 Rule created against ESG investments. The Department now takes the position that ESG factors are "no different than other [ ] 'material' risk-return factors." *Id.* at 57277.

F. Comments and the Final ESG Rule Published December 1, 2022

63. After the Proposed Rule was issued in October of 2021, the Department held a public comment period on the proposed rule changes. That period closed on December 13, 2021.

64. Over the course of the public comment period, the Proposed Rule received over 22,000 comments.

65. The Department noted that a number of comments expressed concern that the proposed rule would mandate consideration of ESG factors or subvert

consideration of financial returns to those factors, resulting in a loss to investors. 87 Fed. Reg. 73834.

66. The Department also acknowledged that the language in the Proposed Rule that prudence "may often require" consideration of ESG factors could be seen as putting a thumb on the scale in favor of these factors. *Id.* at 73854.

67. The Department also received comments both in support of keeping the existing documentation requirement for the use of non-pecuniary factors and in support of eliminating this requirement for fiduciaries. *Id.* at 73839-41.

G. Final ESG Rule

68. On December 1, 2022, the Department promulgated the final ESG Rule. 87 Fed. Reg. 73884 (Dec. 1, 2022).

69. The ESG Rule as promulgated removed the proposed language suggesting that prudent investment choices "may often require" the consideration of climate change, corporate governance, diversity policies, and other noneconomic factors from the text of the rule itself. *Id.*

70. But the spirit of the proposed rule—to favor investments based on these non-pecuniary factors—remains.

71. Although the list of enumerated factors described above was removed from the text of the rule itself, the lengthy rule summary makes clear that these factors may, or even should, still be considered by fiduciaries when making investment decisions.

72. The administration's stated aim of the ESG Rule is to eliminate "prejudice" and the "chilling effect" that it perceived in the 2020 Rule. 87 Fed. Reg. 73859, 73825.

73. The ESG Rule and its summary employs two primary vehicles to achieve these objectives: 1) language authorizing and encouraging consideration of ESG factors; and 2) elimination of documentation requirements for "tiebreaker" inquiries. *Id.* at 73885.

74. The ESG Rule, as promulgated, provides in pertinent part, "A fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis, using appropriate investment horizons consistent with the plan's investment objectives . . . Risk and return factors may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action." *Id.* at 73885.

75. The regulation then reiterates the longstanding principle that a fiduciary "may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives" or take on additional risk "to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan." *Id.*

76. While this language, combined with the removal of the word "required," may appear to solve the problems associated with the Proposed Rule at first glance,

the remainder of the regulation, along with the lengthy summary, makes clear that these ESG investments are favored under the new regulation despite a lack of evidence that they provide increased returns for investors.

77. One aspect of the ESG Rule that makes this favoritism evident is the administration's decision to permit the use of ESG factors when the plan participant has made no election at all, such as when a new employee does not select a fund and the employee's funds are automatically directed into what is known as a qualified default investment alternative, or QDIA.

78. The 2020 Rule implicitly recognized that employees whose funds are invested in a plan's QDIA merit additional protections. While an active, day trading investor in the stock market may elect to sacrifice some profitability in favor of a trendy tech startup or a company that directs a certain portion of profits to the investor's favorite charitable cause, an investor who is invested in a QDIA has, by definition, made no such choice.

79. There are a number of reasons why an employee may end up with his or her funds in a QDIA, including that the person lacks the sophistication or know-how to make particular investment choices or simply lacks the time or resources to monitor the plan's investments.

80. The 2020 Rule prohibited the use of ESG factors in selecting a QDIA, noting that they "warrant special treatment" because QDIAs "exist for participants and beneficiaries who do not actively direct their investments, and by operation tend

to sweep in many participants and beneficiaries with less investment experience and sophistication than more active investors." 85 Fed. Reg. 72865, 72866.

81. The 2020 Rule also noted that the "overriding concern relevant here has always been providing a secure retirement for America's workers and retirees, and it is inappropriate for participants to be defaulted into a retirement savings fund that may have other objectives absent their affirmative decision." *Id.* at 72866.

82. Of course, any worker who desired to invest in an ESG-focused fund would be able to make that election, subject to the requirements in the 2020 Rule. The 2020 Rule merely implemented "a heightened prophylactic approach for QDIAs." *Id.* at 72865.

83. The ESG Rule eliminates these protections for QDIA participants wholesale.

84. Additionally, the ESG Rule incorporates a new standard not grounded in statute, prior regulation, or case law to guide whether the use of collateral factors in investment decisions is permissible.

85. The ESG Rule provides that a fiduciary may select an investment or investment course of action "based on collateral benefits other than investment returns" if he or she "prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon." 87 Fed. Reg. 73885.

86. There are at least two problematic aspects to this portion of the rule. First, there is nothing to indicate what constitutes the "appropriate time horizon" or

how such a horizon is determined. Second, the fiduciaries decide for themselves what the appropriate time horizon is, and there is no check on that decision in the form of a documentation requirement.

87. The Department's justification for going this route is that the 2020 Rule allegedly caused "confusion" by use of the term "non-pecuniary factors."

88. The term "non-pecuniary factors" in the 2020 Rule is based upon language from a unanimous United States Supreme Court opinion, *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

89. In that decision, the Court held that the term "benefits" in Section 1104(a)(1)(A)(i) and (ii) "must be understood to refer to the sort of *financial* benefits (such as retirement income)," and that the term "does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock." 573 U.S. at 420-21.

90. Far from being "confusing," the obvious meaning as laid out by a unanimous Court is that "non-pecuniary" refers simply to factors that are not financial in nature.

91. ESG factors fall into this category. Unlike stock prices, profits and losses, inventory, the CPI index, or other time-tested methods of quantifying the potential for gain or loss, there is currently no accepted method to gauge the potential profitability of a corporation's green initiative or the financial benefits to be gained from a diversity, equity, and inclusion program.

92. Instead, the Department has elected to craft its own standard, not grounded in the text of the statute, any prior regulation, or case law—the use of an "appropriate time horizon" to determine the prudence of a given investment.

93. In contrast to the 2020 Rule and its reliance on *Dudenhoeffer* and financial metrics, the ESG Rule's use of the term "appropriate time horizon" is not defined anywhere in case law or even in the rule itself.

94. While reasonable minds may differ on what an appropriate time horizon is for a particular plan investment, one thing is clear: under the ESG Rule, the fiduciary gets to decide what that time horizon is.

95. Under the language of the ESG Rule, the fiduciary has the power to determine that two investments "equally serve" the participants' objectives—without the need to document that decision and while relying on unquantifiable factors such as an employer's diversity program or corporate governance policies—and to then make investment decisions based on factors "other than investment returns."

96. Under the 2020 Rule, fiduciaries were free to use collateral factors to break a tie between two investments.

97. However, when fiduciaries made such decisions, they were called upon to "show their work"—to document the reasons why they could prudently conclude the two investments were the same before selecting an investment based on noneconomic factors.

98. The ESG Rule completely eliminates this documentation requirement.

99. There are only two plausible reasons why the Department would eliminate a documentation requirement. One would be to eliminate any realistic chance of a participant proving a breach of the duty of prudence and loyalty if a fiduciary subverts the participants' economic return to collateral considerations. A fiduciary that has not documented the reasons for his or her choice at the time that choice is made can simply look back and with hindsight claim that he or she reasonably believed a company's sustainability initiative or diversity initiative would generate a certain financial return over an appropriate time horizon—a term used but not defined in the rule—whereas contemporaneously documenting the reasons for that belief may not bear that out.

100. The commentary to the ESG Rule bears this reasoning out, citing the concern that participants might sue as a reason not to require documentation of the fiduciary's rationale. *Id.* at 73840.

101. The second reason to eliminate the documentation requirement is less nefarious: as has been noted, it is difficult, if not impossible, to quantify the economic impact of the ESG factors the ESG Rule, whether in the short or the long term.

102. The Department itself acknowledges this problem, noting that "the literature overall has varied findings" concerning whether ESG investing provides a positive or a negative net return. One study cited in the summary of the ESG Rule found that ESG funds have a rate nearly 44% lower than investing in an S&P 500 index fund.[13] Because the study cited was published long before the recent spike in

[13] 86 Fed. Reg. at 57290-91.

oil and gas prices, this study and those similar to it do not even take into account current market conditions caused by the Russia-Ukraine conflict and other factors.

103. Unlike economic factors such as supply chain pressures, wage increases or other manufacturing costs, there is no reliable method through which to calculate the economic impact on share price of a company's decision to aggressively recruit more board members of color or its vow to cut back its carbon footprint by 50% in the next ten years (or the impact of, say, either meeting these goals early or abandoning them altogether three or five years after making them after ESG investments flow in).

104. And while fiduciaries are never expected to predict with absolute certainty the future performance of a given investment, it is equally certain that a fiduciary does not discharge his or her duty if the fiduciary is purely guessing at the financial impact a particular policy or initiative will have on economic returns.

105. Absent a reliable method of quantifying the financial risks and rewards of ESG factors such as those outlined in the ESG Rule, fiduciaries are simply choosing investments based on the policies they think (or hope) will result in a return. Absent an accepted approach to incorporating these factors into a company's share price, the fiduciary is doing nothing more than selecting the as-yet unproven policy objective he or she likes best when ESG factors are considered.

106. But nothing in the text or structure of ERISA, nor in the law interpreting it over the past five decades, either permits or actively encourages fiduciaries to subvert financial returns of retirees or their beneficiaries in an attempt

to reverse engineer that outcome through investments that, viewed through the lens of the information currently available, would fail to meet the prudent investor standard.

107. Unless the Secretary is immediately restrained from implementing the ESG Rule, Plaintiffs and millions of American participants and beneficiaries like them face a substantial likelihood that their retirement contributions will be invested in a manner inconsistent with the statutory requirement that contributions be invested solely in their interest.

108. The same issues that arise with regard to Plaintiffs' ERISA plans arise under any ERISA plan, regardless of where and by whom it is administered. A nationwide injunction prohibiting implementation of the ESG Rule is therefore both appropriate and necessary.

CAUSES OF ACTION

CLAIM I: VIOLATION OF ADMINISTRATIVE PROCEDURE ACT 5 U.S.C. § 706

109. Plaintiffs reallege and incorporate by reference the allegations set forth above as if fully set forth herein.

110. The Constitution structures the federal government so that Congress makes law and the Executive Branch enforces it. The Executive Branch may not unilaterally declare, through presidential proclamation, rulemaking, or otherwise, policy that is either in direct contradiction to the duly enacted law of the land or in excess of the authority that Congress has delegated to a particular agency.

111. When Congress enacted ERISA in 1974, it required that all qualified benefit plans under that statute invest their returns "solely in the interest of the participants and beneficiaries."

112. Furthermore, Congress required fiduciaries to abide by a strict duty of prudence and loyalty to plan participants and beneficiaries. Courts interpreting that language have consistently mandated that the duties to plan participants and beneficiaries under ERISA are the "highest known [under] the law."[14]

113. The Departments of Labor and Treasury administer aspects of ERISA. This administration includes Congress's provision of valuable tax deductions to employers and employees to encourage saving for retirement. If the plan does not meet the requirements in ERISA, the employer and the employee are not entitled to the tax benefits available.

114. Congress has not passed any law defining the duty of prudence and loyalty to require, or even permit, consideration of ESG factors.

115. As set out in the summary to both the Proposed Rule and the final ESG Rule, it is far from established that investing in ESG alternatives will meet ERISA's twin objectives of providing financial benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

[14] *See*, *e.g.*, *Schweitzer v. Investment Cmte. Of Phillips 66 Savings Plan*, 960 F.3d 190, 194 (5th Cir. 2020); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 426 (6th Cir. 2002); *Tatum v. RJR Pension Inv. Cmte.*, 761 F.3d 346, 356 (4th Cir. 2014).

116. Congress has not passed any law purporting to overrule the fifty years of case law emphasizing that fiduciaries must seek to maximize the economic returns for participants and beneficiaries of ERISA plans in favor of ESG factors.

117. Congress has not delegated the power to make environmental policy or to mandate corporate transparency or diversity initiatives, to the Department of Labor.

118. The Administrative Procedure Act (APA) provides courts with the power to "hold unlawful and set aside agency action" that is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority or limitations; or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A), (C), (E).

119. The ESG Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law because its terms are in conflict with the statutory text and structure of ERISA, as well as with decades of case law interpreting that statute.

120. The ESG Rule is promulgated in excess of statutory jurisdiction because the Department does not have the authority to make environmental policy or to advance the policy objectives sought by ESG proponents more generally. It thus also violates the constitutional separation of powers.

121. The ESG Rule is unsupported by substantial evidence because it is unsupported by any evidence reliably demonstrating that fiduciaries that consider ESG factors are acting in the sole interest of participants and beneficiaries, or that

companies that consider ESG factors such as climate change and diversity programs drive higher financial returns.

122. For these reasons, the ESG Rule violates the Administrative Procedure Act and Plaintiffs are entitled to a declaratory judgment to that effect, as well as a court order enjoining the ESG Rule.

CLAIM II: VIOLATION OF 29 U.S.C. §§ 1132(a)(1)(B), (k) ENFORCING RIGHTS UNDER THE PLAN AND RESTRAINING THE SECRETARY FROM TAKING ACTION CONTRARY TO THE PROVISIONS OF ERISA

123. Plaintiffs reallege and reincorporate the allegations above as if restated herein.

124. In order to qualify as a benefit plan under ERISA, and to receive favorable tax treatment, it must be impossible for any part of the plan to be used for purposes other than the exclusive benefit of employees or beneficiaries. 26 U.S.C. § 401(a)(2).

125. For the reasons alleged above, the ESG Rule encourages plan fiduciaries to make investment choices based on noneconomic factors that may not be in the sole interest of either participants or beneficiaries, contrary to ERISA.

126. Congress's decision to afford these investments preferred tax treatment for both employer and employee, as a means of incentivizing retirement savings, underscores the importance that Congress placed on these funds being set aside for that specific purpose. For this reason, even if an individual participant wholeheartedly supports ESG policy objectives, that policy preference is irrelevant if those objectives do not correlate with financial return.

127. And even if an individual investor's policy preferences were relevant, no such argument can be applied to those participants who are invested in the QDIA for a particular plan, because these participants rely entirely on the fiduciary to make prudent investment decisions and have made no affirmative elections of their own.

128. QDIA participants have, by definition, not asked for an ESG alternative, but the ESG Rule permits plan fiduciaries to funnel those participants' funds into such alternatives anyway.

129. Participants and beneficiaries have the right to investments selected on the basis of the expected rate of return, not on unquantifiable metrics such as board transparency measures or climate-change initiatives.

130. Furthermore, in the event a fiduciary concludes that two or more investments are substantially equivalent based on financial measures, fiduciaries should document the reasons for their selection if ESG factors are used to ensure participants' right to a remedy for breach of the duty of prudence and loyalty that underpins ERISA's text and structure.

131. By eliminating the requirement that fiduciaries document the reasons for their choices when nonpecuniary factors are relied upon in investment decisions, the ESG Rule undermines the statutory command that fiduciaries act solely in the interest of participants and beneficiaries.

132. The ESG Rule therefore breaches the participants' and beneficiaries' most fundamental rights under ERISA and the Secretary should be restrained from implementing it.

133. Federal law authorizes an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to file suit to "restrain the Secretary from taking any action contrary to the provisions of this chapter." 29 U.S.C. § 1132(k).

134. The ESG Rule is contrary to the text and purpose of ERISA in that it encourages fiduciaries to subordinate financial returns for participants and beneficiaries to collateral objectives that cannot be quantified.

135. Because the ESG Rule encourages consideration of noneconomic factors and policy objectives rather than the maximization of financial returns required of fiduciaries under ERISA, the Secretary should be restrained from implementing it.

136. Because the ESG Rule authorizes fiduciaries to make choices based on noneconomic factors that are not solely in the interests of participants and beneficiaries, the Secretary should be restrained from implementing it.

137. Additionally, because the ESG Rule eliminates all recordkeeping (and thus all practical accountability) specifically for ESG considerations, it is contrary to ERISA and the Secretary should be restrained from implementing it.

138. Because the ESG Rule eliminates accountability for potentially irresponsible investment choices based on noneconomic factors, the Secretary should be restrained from implementing it.

RELIEF REQUESTED

Plaintiffs respectfully request that this Court:

A. Immediately enter a temporary restraining order prohibiting the Secretary from implementing the ESG Rule, pending the resolution of this litigation;

B. Enter a declaratory judgment that the ESG Rule exceeds the statutory authority conferred on the Secretary and the Department by Congress, and thus violates the Administrative Procedure Act;

C. Enter an order permanently enjoining the Secretary from implementing the ESG Rule;

D. Award Plaintiffs their reasonable attorneys' fees and costs, as authorized by 29 U.S.C. § 1132(g)(1); and

E. Grant Plaintiffs such other and further relief as the court deems appropriate.

Dated this 21st day of February, 2023.

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

s/ *Katherine D. Spitz*

Richard M. Esenberg (WI Bar No. 1005622)
Katherine D. Spitz (WI Bar No. 1066375)
Lucas T. Vebber (WI Bar No. 1067543)
Daniel P. Lennington (WI Bar No. 1088694)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Kate@will-law.org
Lucas@will-law.org
Dan@will-law.og

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

Richard Braun and Frederick Luehrs III *Plaintiff(s)* v. Martin J. Walsh, in his official capacity as Secretary of Labor *Defendant(s)*	)	Civil Action No. 23-cv-234

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Martin J. Walsh
U.S. Secretary of Labor
S-2521
200 Constitution Avenue, N.W.
Washington, D.C. 20210

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Katherine D. Spitz
Wisconsin Institute for Law & Liberty, Inc.
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: ______________________

____
Signature of Clerk or Deputy Clerk

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Richard Braun and Frederick Luehrs III

(b) County of Residence of First Listed Plaintiff Waukesha County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Wisconsin Institute for Law & Liberty, Inc., 330 E. Kilbourn Ave., Suite 725, Milwaukee, WI 53202, 414-727-9455

DEFENDANTS

Martin J. Walsh, in his official capacity as Secretary of Labor

County of Residence of First Listed Defendant ______
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)* *(For Diversity Cases Only)*

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
29 U.S.C. 1132(k)

Brief description of cause:
Challenge to Department of Labor rule governing prudent investments in ERISA.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE ______ DOCKET NUMBER ______

DATE: Feb 21, 2023

SIGNATURE OF ATTORNEY OF RECORD: s/ Katherine D. Spitz

FOR OFFICE USE ONLY

RECEIPT # ______ AMOUNT ______ APPLYING IFP ______ JUDGE ______ MAG. JUDGE ______