

No. 11-1531

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**In The Supreme Court of the United States**

STEPHEN GRAY, ET AL.,  
*Petitioners,*

v.

CITIGROUP, INC., ET AL.,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Second  
Circuit**

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**BRIEF OF *AMICI CURIAE* AARP, NATIONAL  
EMPLOYMENT LAWYERS ASSOCIATION AND  
PENSION RIGHTS CENTER IN SUPPORT OF  
PETITIONERS**

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**INTERESTS OF *AMICI CURIAE***<sup>1</sup>

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interests of persons aged 50 and older. Nearly one-third of AARP's members are currently employed with many working for employers which provide pension and health plans covered by the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 *et seq.* Many other members are retired and receiving or have received retirement benefits from those employers.

One of AARP's primary objectives is to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits through educational and advocacy efforts. Participants in private, employer-sponsored employee benefit plans rely on ERISA to protect their rights under those plans. In particular, ERISA's protections, and plan participants' opportunities to enforce the statute's protections, are of vital concern to workers of all ages and to retirees, since the quality of workers' lives in retirement

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<sup>1</sup> Pursuant to Supreme Court Rule 37, counsel of record received timely 10-day notice of the intent to file this brief and, on behalf of the 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 the preparation or submission of this brief. No party other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

depends heavily on their eligibility for and the amount of their retirement and welfare benefits.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA members' clients and other employee benefit plan participants depend on the Employee Retirement Income Security Act ("ERISA") to protect their rights under private employer-sponsored employee benefit plans.

The Pension Rights Center is a Washington, D.C. nonprofit consumer organization, which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For 36 years, the Center has provided information and assistance to thousands of participants and beneficiaries and has represented

their interests before the federal administrative agencies and the courts.

AARP members, NELA members' clients and beneficiaries and other pension plan participants have a significant interest in ensuring that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Moreover, they also have an interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets. In defined contribution retirement plans in which fiduciaries include employer stock as a matching contribution, an investment option, or both, older workers are not only more likely to own employer stock than younger workers, but they are more likely to own more of it in higher percentages of the total value of their account balance. See Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2010* at 22 (Employee Benefits Research Inst., Issue Brief No. 366, 2011), available at [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_12-2011\\_No366\\_401\(k\)-Update.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_12-2011_No366_401(k)-Update.pdf). Without participants' ability to straightforwardly challenge their plan fiduciaries which improperly select and manage investments in employer stock in ERISA plans, one of the primary goals of ERISA will be undermined - protecting the assets of pension plans from misuse and mismanagement. See *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008); *Mass. Mut.*

*Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985).

Thus, resolution of the issues in this case will have a direct and vital bearing on plan participants' ability to police and protect their pension plans from mismanagement, to guard the integrity of the administration of employee benefit plans, and to ensure monies for retirement benefits which will foster their economic security. *Amici* respectfully submits this brief to facilitate a full consideration by the Court of the important issues presented by the petition for a writ of *certiorari*.

### **REASONS FOR GRANTING THE PETITION**

In addition to the substantial conflict between the circuit courts of appeals on the questions presented by the petitioners, a writ of *certiorari* is appropriate because the issues presented by petitioners affect a significant number of covered participants and a substantial amount of retirement plan assets. Moreover, because it is well-established that in participant-directed accounts, the investment options offered significantly affect how participants allocate their assets, the fiduciaries' decision to include employer stock as a matching contribution, an investment option, or both, serves as an endorsement and thus encourages participants to choose employer stock. Finally, numerous exemplars illustrate the potential for massive losses to the plans and individuals' account balances when plans invest in employer stock. By permitting

fiduciaries to wait until “the employer is in a ‘dire situation’. . . . to override plan terms” as the Second Circuit would do, Pet. App. 18a, it becomes too late to remedy the fiduciaries’ breach of duty and protect participants from the resultant devastating impact on their retirement security.

## ARGUMENT

### **I. THE NUMBER OF PARTICIPANTS IN EMPLOYER-SPONSORED DEFINED CONTRIBUTION PLANS OFFERING EMPLOYER STOCK AND THE MAGNITUDE OF PLAN ASSETS HELD IN EMPLOYER STOCK ARE SIGNIFICANT.**

As the Court noted in *LaRue v. DeWolff, Boberg & Associates, Inc.*, defined contribution plans, including 401(k) plans like the plan here have become – aside from Social Security – the primary vehicle for providing retirement income in America. 552 U.S. 248, 255 & n. 5 (2008). There are millions of participants in plans offering employer stock accounting for billions of dollars held as plan assets.

#### **A. The Offering Of Employer Stock Is Directly Correlated To The Size Of The Company.**

In practice, whether employer stock is offered – as a matching contribution, an investment option or both – is directly correlated to the size of the

company.<sup>2</sup> This is not surprising given that few small plans offer employer stock as an investment option. In 2010, fewer than 1 percent of participants in plans of 100 participants or fewer were offered employer stock as an investment option, while 60 percent of participants in plans with more than 5000 participants were offered employer stock as an investment option. VanDerhei et al., *supra*, at 17, 20. See also Gary V. Engelhardt, *The Pension Protection Act of 2006 and Diversification of Employer Stock in Defined Contribution Plans* at 5 (Ctr. for Ret. Research, CRR WP 2011-20, Nov. 2011), available at <http://crr.bc.edu/working-papers/the-pension-protection-act-of-2006-and-diversification-of-employer-stock-in-defined-contribution-plans/> (discussing how a review of IRS Form 5500 filings from 2003 to 2009 found although there were not a substantial number of defined contribution plans using employer stock, the plans that did were large and covered many participants).

Not surprisingly, statistics for Fortune 100 corporations were consistent with these findings. “Eighty-six percent (79 of 92 companies) of all plans

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<sup>2</sup> With individual information on more than 23 million participants from more than 64,000 plans holding more than \$1.4 trillion in assets, the EBRI/ICI Participant-Directed Retirement Plan Data Collection Project is the largest, most representative repository of information about individual 401(k) plan participant accounts. Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2010 in 2010* at 17, 20 (Employee Benefits Research Inst., Issue Brief No. 366, 2011), available at [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_12-2011\\_No366\\_401\(k\)-Update.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_12-2011_No366_401(k)-Update.pdf).

sponsored by publicly traded companies included some employer stock in their asset allocation.” Erika Kummernuss & Brendan McFarland, Towers Watson, *The Defined Contribution Plans of Fortune 100 Companies in 2009* at 4 (2011), available at <http://www.towerswatson.com/assets/pdf/3754/The-Defined-Contribution-Plans-of-Fortune-100-Companies-in-2009.pdf>.

**B. Because Large Employers Are More Likely To Offer Employer Stock As An Investment Option, Substantial Numbers Of Participants Are Exposed To The Risks Of Holding Employer Stock.**

Because the plans that offer employer stock have a large number of participants, a significant number of individuals’ retirement security is potentially affected by their exposure to employer stock. Engelhardt, *supra*, at 5. Even in 2009, three years after the enactment of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, more than one quarter of all plan participants were still in plans with employer stock -- almost 14 million participants. Engelhardt, *supra*, at 6, 17.

The statistics in the EBRI/ICI Participant-Directed Retirement Plan Database for employer stock are consistent with the Form 5500 findings.<sup>3</sup> Thirty-nine percent of 401(k) participants were in

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<sup>3</sup> We would expect that the EBRI/ICI database would indicate higher percentages because fewer small plans are represented in the database.



plans that offered employer stock as an investment option. VanDerhei et al., *supra*, at 31.

**C. The Aggregate Amount Of Plan Assets Invested In Employer Stock Equals \$166 Billion With Almost Half Of Participants In Those Plans Offering Employer Stock Holding Such Stock.**

In 2009, the aggregate dollar amount of employer stock in retirement plans was approximately \$166 billion. Engelhardt, *supra*, at 6. Although in early 2000 the value of employer stock was higher, a large portion of the reduction in its value was caused by a decline in the number of plans with employer stock (including those companies which filed for bankruptcy) as well as the market-wide decline in share prices due to the financial crisis and Great Recession of 2008. *Id.* Thus, as the stock market recovers, the value of employer stock, in the aggregate, may reasonably be expected to increase.

In participant-directed accounts, the investment options offered significantly affect how participants allocate their assets. VanDerhei et al., *supra*, at 17, 20. Thus, the percentage of plan assets invested in employer stock, in the aggregate, increases with plan size. *Id.* at 20.

Significantly, the amount of employer stock as a percentage of the total of a participant's plan holdings for those in plans offering employer stock

steadily increases in every age cohort for participants from a low of 12.4 percent for participants in their 20's to a high of 20.3 percent for participants in their 50's; there is a slight reduction to 19.2 percent for participants in their 60's. *Id.* at 22.

Almost half of the 39 percent of 401(k) participants in plans offering employer stock as an investment option held some employer stock. Of those participants, 36 percent allocated more than 10 percent of their account balances to employer stock and 11 percent allocated more than 50 percent. *Id.* at 31.

Again, statistics for Fortune 100 corporations were consistent with these findings. In 2009, of defined contribution plans sponsored by Fortune 100 companies that held employer stock, 22.1 percent of plan assets were held in employer stock. Kummernuss & McFarland, *supra*, at 5. During that year, 66 percent of plans had more than 10 percent of assets in employer stock. *Id.* at 5.

Remarkably, even after the debacles concerning employer stock in the early 2000's – most notably Enron and WorldCom – some plans and participants still hold substantial amounts of employer stock. Behavioral economics explains some of the reasons participants may still select employer stock if fiduciaries offer it in a plan.

**II. BEHAVIORAL ECONOMICS CONFIRMS THAT ERISA'S DUTIES OF PRUDENCE AND LOYALTY ARE EVEN MORE IMPORTANT IN THE CONTEXT OF EMPLOYER STOCK, WHERE THE FIDUCIARIES ARE OTHERWISE RELIEVED OF THEIR DUTY TO DIVERSIFY.**

Underlying the shift to participant-directed defined contribution plans are two implicit assumptions about individuals' behavior. The first assumption is that individuals are well informed, rational economic agents acting solely to maximize their self-interest. The second assumption is that individuals can appropriately interpret, evaluate, and act on information regarding the numerous investment options offered by their retirement plans. However, these assumptions do not align with reality. Instead, research consistently suggests that a significant number of individuals do not understand the need for and methods of planning for retirement. Olivia Mitchell & Steve Utkus, *Lessons from Behavioral Finance for Retirement Plan Design* 1-2, 31 (Pension Research Council of the Wharton Sch. of the Univ. of Penn., PRC WP 2003-6, 2003) [hereinafter Mitchell & Utkus, *Lessons from Behavioral Finance*], available at <http://fic.wharton.upenn.edu/fic/papers/03/0334.pdf>. For example, data collected as part of the National Financial Capability Study indicated that only 50 percent of respondents recognized that, according to generally accepted principles of investment, buying a single company's stock does not provide a safer return than

a stock mutual fund. Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States* 2, 4 (Nat'l Bureau of Econ. Research, NBER Working Paper No. 17108, 2011), *available at* <http://www.nber.org/papers/w17108>. Even if they do understand the issues, efforts at formulating and implementing a rational plan frequently fail. Mitchell & Utkus, *Lessons from Behavioral Finance*, *supra*, at 1-2, 31.

It is also well-established that in participant-directed accounts, the number and character of investment options offered significantly affect how participants allocate their assets. *Id.* at 31; Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2010* at 17, 20 (Employee Benefits Research Inst., Issue Brief No. 366, 2011), *available at* [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_12-2011\\_No366\\_401\(k\)-Update.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_12-2011_No366_401(k)-Update.pdf). Participants' portfolio mixes are influenced not only by their own preferences and behavior, but also by their employer's plan design decisions. Not surprisingly, participants hold more equity when the investment menu includes more equity options. Thus, employers play a significant role in the case of employer stock because they select the menu of available investment options, including whether or not to offer employer stock. By merely offering employer stock as an option, employees tend to allocate a significant amount to that investment option. Olivia S. Mitchell & Stephen P. Utkus, *Company Stock and Retirement Plan Diversification* 12 (Pension Research Council of the Wharton Sch. of

the Univ. of Penn., PRC WP 2002-4, 2002) [hereinafter Mitchell & Utkus, *Plan Diversification*], available at [https://institutional.vanguard.com/iam/pdf/CRR\\_company\\_stock.pdf](https://institutional.vanguard.com/iam/pdf/CRR_company_stock.pdf) (citing to study showing plan holdings of 22 percent in employer stock where offered as an investment option). However, like the Citigroup plan, when employers provide matching contributions in company stock, employees tend to allocate even more of their accounts to employer stock. *Id.* (citing to study showing plan holdings increase to 53 percent where company matches in employer stock). These studies posit that employers tend to be viewed as implicitly endorsing employer stock as an investment and encouraging employees to invest their own funds. Shlomo Benartzi, Richard Thaler, Steve Utkus & Cass Sunstein, *The Law and Economics of Employer Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 47 (2007); Jeffrey Brown, Nellie Liang & Scott Weisbenner, *401(k) Matching Contributions in Employer Stock: Costs and Benefits for Firms and Workers*, 90 J. Pub. Econ. 1315, 1318, 1324 (2006).

Moreover, employees significantly underestimate the risks of their employer's own stock and are unduly influenced by past stock performance. Mitchell & Utkus, *Lessons from Behavioral Finance*, *supra*, at 35-36; Lusardi & Mitchell, *supra*, at 2, 4 (finding that participants err in assessing risk of their employer stock, rating employer stock as less risky than a diversified equity mutual fund or portfolio); Mitchell & Utkus, *Plan Diversification*, *supra*, at 23 (correlating participant allocation to employer stock and past investment performance).

Given ERISA's statutory exemption of employer stock plans from the generally applicable rule requiring diversification, these multiple behavioral economics studies underscore ERISA's statutory requirements for fiduciaries to be held to their duties of loyalty and prudence.

**III. THE RETIREMENT SECURITY OF WORKERS CAN BE DESTROYED WHEN FIDUCIARIES DO NOT PRUDENTLY SELECT AND MONITOR EMPLOYER STOCK AS AN INVESTMENT OPTION IN THOSE RETIREMENT PLANS FOR WHICH THEY ARE RESPONSIBLE.**

For most workers and retirees, their employer-sponsored retirement plans are one of their most significant financial assets. For most of them, aside from Social Security, defined contribution plans are the primary vehicle for providing retirement income. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 & n. 5 (2008).

For those workers and retirees who hold employer stock in their retirement plans, a significant loss in the value of employer stock can have dire consequences for them. Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815, 829-30 (2002).

**A. By The Time A Company Is In Bankruptcy Or In A Dire Financial Situation, The Amount Of Money That Can Be Recovered For Breaches Of Fiduciary Duty For The Plan Is A Small Fraction Of The Losses.**

The stories are legion, and they may be found in newspaper headlines -- Enron, WorldCom, Bear Stearns, and Lehman Brothers. The losses to these companies' plans have been staggering. As an example, one needs to look no further than the Enron bankruptcy in December 2001. At the end of 2000, 62 percent of Enron employees' 401(k) assets were invested in the company's stock. Between January 2001 and January 2002, the value of Enron stock fell from over \$80 to less than \$0.70 per share, so that Enron's 401(k) plan lost approximately \$1.3 billion in aggregate value. Patrick J. Purcell, Cong. Research Serv., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans* 1 (2002), available at <http://fpc.state.gov/documents/organization/9102.pdf>. As a result, many participants lost between 70 and 90 percent of their retirement savings, decimating their retirement accounts at the same time they lost their jobs. See Stabile, *supra*, at 824; see also David Millon, *Worker Ownership Through 401(k) Retirement Plans: Enron's Cautionary Tale*, 76 St. John's L. Rev. 835, 841 (2002) ("As Enron's share price fell from a high of nearly ninety dollars to around twenty-five cents, its 401(k) plan -- in which 15,000 employees participated -- lost 1.3 billion dollars."). Although

more than 20,000 former Enron employees sued and received what is still the biggest settlement to date – \$250 million, it represented only a fraction of those people's \$1.3 billion in losses. *See Workers' Lawsuits Rap Execs for 401(k) Losses: The Hot Claim Lately in Class Acts? Breach of Fiduciary Duty*, Crain's N.Y. Bus. (Feb. 3, 2011, 11:32 AM), <http://www.crainsnewyork.com/article/20110213/SUB/110219949#ixzz20hG3gMBE>.

Similarly, at the end of 2000, WorldCom's 401(k) plan held 32 percent or \$642.3 million of employer stock. In mid-2002, the amount of employer stock in WorldCom's 401(k) plan was valued at less than \$18.7 million. Yuki Noguchi, *Workers' 401(k)s Lost \$1.1 Billion*, Wash. Post, July 10, 2002, at E-1. In two years WorldCom's stock dropped from \$56 to 14 cents per share. The total loss to WorldCom's 401(k) plan was estimated to be \$800 million. The recovery from various sources to WorldCom participants was approximately recovered \$48.435 million. David E. Rovella, *MCI, WorldCom's Ebbers Settle 401K Suit for \$51 Mln (Update2)* Bloomberg, July 6, 2004, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aY1dYMjFOeic&refer=home>; *Worldcom ERISA Litigation*, Keller Rohrbach LLP, <http://www.erisafraud.com/Default.aspx?tabid=1090> (last visited July 23, 2012). Likewise, in six months, with \$700 million invested in employer stock in its retirement plan, Tyco's stock dropped from \$58 to \$11 per share. Bob Sanders, *Tyco Employee Class Action Nets \$72.5m Settlement*, New Hampshire Business Review (Jan. 10, 2011), <http://www.nhbr.com/businessnews/statenews/46160>



8-257/story.html (detailing \$72.5 million settlement resulting in average of \$1,000 per participant); Dan Christensen, *WorldCom, Tyco Sued Over 401(k) Losses*, Miami Daily Business Review (July 24, 2002), <http://nasd-law.com/2002/07/24/worldcom-tyco-sued-over-401k-losses/>.

A few years later, the 401(k) plan of Countrywide Financial Corp. held \$349.9 million in Countrywide stock representing 38 percent of the plan's total assets. *Countrywide is Sued by Workers Over 401(k) Losses*, Los Angeles Times (Sept. 13, 2007), <http://articles.latimes.com/2007/sep/13/business/fi-country13>. The participants recovered \$55 million. Rebecca Moore, *BoA Settles with Countrywide Plan Participants for \$55M*, Plan Sponsor (Aug. 11, 2009), <http://www.plansponsor.com/NewsStory.aspx?Id=6442451711>. Although Bear Stearns' employees shared a \$10 million settlement for losses in their retirement accounts, that settlement is equal to only 10 to 28 percent of their total losses, given that Bear Stearns' stock price fell to \$4.30 per share from a previous 15-month high of approximately \$160. Bob Van Voris, *Ex-Bear Stearns Employees to Get \$10 Million in Settlement*, Bloomberg (Mar. 21, 2012), <http://www.bloomberg.com/news/2012-03-21/ex-bear-stearns-employees-to-get-10-million-in-settlement.html>; Rebecca Moore, *J.P. Morgan Agrees to Settle Bear Stearns Stock Drop Suit*, Plan Adviser (Mar. 22, 2012), [http://www.plansponsor.com/JP\\_Morgan\\_Agrees\\_to\\_Settle\\_Bear\\_Stearns\\_Stock\\_Drop\\_Suit.aspx](http://www.plansponsor.com/JP_Morgan_Agrees_to_Settle_Bear_Stearns_Stock_Drop_Suit.aspx); Russell Goldman, *Bear Stearns Calls in Grief Counselors*, ABC News (Mar. 19, 2008),

<http://abcnews.go.com/Business/story?id=4476286&page=1#.UAMLiZHhfpw>.

In the Lehman Brothers debacle, not only did more than 13,000 employees, half the company's workforce, lose their jobs immediately following the events that toppled the company, but they also lost \$228.7 million that was invested in Lehman Bros. Stock Fund in their 401(k) plan (or 10.6 percent of plan assets) as the Fund became worthless after Lehman's bankruptcy. See Linda Sandler, *Lehman Retirement Plan Sues Fuld over Repo 105*, Bloomberg Businessweek (Dec. 7, 2010), <http://www.bloomberg.com/news/2010-06-04/ex-lehman-chief-fuld-seeks-to-toss-repo-105-lawsuit.html>; Bloomberg, *Lehman 401(k) Participants Sue Top Exec, Pensions & Investments* (Dec. 8, 2010), <http://www.pionline.com/article/20101208/DAILYREG/101209904>. Unlike other situations, there has been no recovery of these losses.

As these examples show, even if a lawsuit is brought to attempt to remedy the fiduciaries' breach of their duties, there may be no or a minimal recovery.

#### **B. Individuals' Lives Have Been Shattered By Significant Losses In 401(K) Plans Due To The Collapse In The Price Of Employer Stock.**

When substantial losses occur after a plan's failure to determine whether investment options are prudent and a participant is near or at retirement,

the long-term effect wreaks havoc, financially and emotionally, on individuals and their families, since retirement typically occurs at an age when employees do not have time to make up their losses. Numerous individuals, especially those over the age of 45, have been forced to postpone their retirements, return to work, frequently at lower pay, or have made other necessary adjustments in their lifestyles, including being left without the financial means to help their children and grandchildren. See AARP, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older* at i-iii (2008), available at [http://assets.aarp.org/rgcenter/econ/retirement\\_survey\\_08.pdf](http://assets.aarp.org/rgcenter/econ/retirement_survey_08.pdf); Stephanie Armour, *Enron Woes Reverberate Through Lives*, USA Today (Jan. 27, 2006), [http://www.usatoday.com/money/industries/energy/2006-01-25-enron-employees-usat\\_x.htm](http://www.usatoday.com/money/industries/energy/2006-01-25-enron-employees-usat_x.htm); Rick Bragg, *Enron's Collapse: Workers; Workers Feel Pain of Layoffs And Added Sting of Betrayal*, N.Y. Times (Jan. 20, 2002), <http://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting-betrayal.html?pagewanted=all&src=pm>; Danny Hakim, *Former Workers at Lucent See Nest Eggs Vanish, Too*, N.Y. Times (Aug. 29, 2001), <http://www.nytimes.com/2001/08/29/business/former-workers-at-lucent-see-nest-eggs-vanish-too.html?pagewanted=all&src=pm> (detailing losses of 90 percent of account balances due to Lucent bankruptcy).

For some individuals the impact of losing their retirement savings and their jobs at the same time was even more devastating. Armour, *supra*; Bragg, *supra*. Some individuals lost their homes; others sold their cars and other personal goods to keep

afloat, using soup kitchens to eat. Individuals and their families also experienced health issues due to the losses in their retirement accounts. Armour, *supra*; Bragg, *supra*. Bears Stearns brought in grief counselors to help workers deal with the fact that their retirement savings were totally decimated. Of course, the individuals who lost the most are those who will have the hardest time getting back on their feet. *See* Goldman, *supra*.

These examples demonstrate that fiduciaries should not be permitted to wait until a company is in bankruptcy or in a dire financial situation to exercise their duties of prudence and loyalty as the Second Circuit would permit. Pet. App. 18a. By so doing, participants are left with no protection of their retirement assets – totally undermining the reason for ERISA’s enactment. ERISA § 2(b), 29 U.S.C. § 1001(b).

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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