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IN THE
Supreme Court of the United States

JERRY N. JONES, MARY F. JONES,
AND ARLINE WINERMAN,

Petitioners,

v.

HARRIS ASSOCIATES L.P.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF LAW AND FINANCE *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are law and finance professors and scholars, whose fields of academic inquiry include securities regulation, business organization, investment company law, and economics, a former Commissioner of the Securities and Exchange Commission ("SEC"), and a former general counsel of the SEC. *Amici* submit this brief to respond to Petitioners' brief and the *amici* briefs submitted in support thereof. In particular, *Amici* address misperceptions regarding competition in the mutual fund industry today and review current facts about the industry that demonstrate that competition for investors is an important force that constrains mutual fund advisory fees.

The *Amici*, listed alphabetically, are:[2]

William J. Baumol, Academic Director, Berkley Center for Entrepreneurial Studies, and Professor of Economics, New York University Stern School of Business.

Michael H. Bradley, Professor of Law, Duke University School of Law, and F.M. Kirby Professor of

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. The Petitioners have filed a blanket waiver and the Respondent's consent is being lodged herewith.

[2] *Amici* participate solely as individuals and not on behalf of the institutions or entities with which they are affiliated.

Investment Banking, Duke University Fuqua School of Business.

William J. Carney, Charles Howard Candler Professor, Emory Law School.

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Robert C. Clark, Harvard University Distinguished Service Professor and Austin Wakeman Scott Professor of Law, Harvard Law School.

John C. Coates IV, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School.[3]

Allen Ferrell, Greenfield Professor of Securities Law, Harvard Law School.

Joseph A. Grundfest, William A. Franke Professor of Law and Business, Stanford Law School, and Co-Director of the Arthur and Toni Rembe Rock Center on Corporate Governance, also a former Commissioner of the SEC.

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[3] Professor Coates and R. Glenn Hubbard (Dean and the Russell L. Carson Professor of Finance and Economics, Columbia University Graduate School of Business, and Professor of Economics, Columbia University) co-authored the article *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. CORP. L. 151 (2007) ("Coates and Hubbard"). Both the Seventh Circuit panel opinion, and the dissent from denial of rehearing *en banc*, cited the article. *See* Pet. App. 12a (panel opinion) and Pet. App. 36a (dissent).

Steven N. Kaplan, Neubauer Family Professor of Entrepreneurship and Finance, University of Chicago Booth School of Business.

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Simon M. Lorne, Vice Chairman and Chief Legal Officer of Millennium Management LLC (a hedge fund) and Co-Director of Stanford Law School's Director's College, also former SEC General Counsel.

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Kenneth E. Scott, Ralph M. Parsons Professor of Law and Business, Emeritus, Stanford Law School.

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Roman L. Weil, V. Duane Rath Professor Emeritus of Accounting, University of Chicago Booth School of Business, and Board Member, MainStay Group of Funds.

This brief reflects the consensus view of *Amici*, each of whom believes that the decision below should be affirmed and, in so doing, this Court should adopt a standard that permits proper consideration of evidence of competition as a constraint on advisory fees under Section 36(b) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C. §80a-36(b).

SUMMARY OF ARGUMENT

Allegations that a mutual fund adviser charged a fund excessive fees are properly assessed in the context of the economic forces that affect these fees. Competition for mutual fund investors generally constrains advisory fees. The assertion that mutual fund boards rarely dismiss an adviser does not mean that fees are immune from fee competition. Rather,

the structure of mutual funds allows investors to react easily to fee disparities by investing elsewhere. Undisputed evidence shows that, as a general matter, consumer mobility in the mutual fund market exceeds that in many other markets, where significant transaction costs and other impediments restrain consumers from easily switching among different producers or products. Investor mobility, combined with other indisputable mutual fund industry characteristics, such as lack of concentration, a multitude of investor choices, low barriers to entry, common and continuous actual new entry, numerous distribution models, frequent and widespread advisory fee reductions, and, most importantly, strong and consistent correlations between lower advisory fees and higher returns, higher returns and investor flows, and lower fees and higher market share, results in robust fee competition.[4]

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[4] Petitioners disagree with this fundamental thesis and seek to buttress their disagreement with an attack on the objectivity of the Coates and Hubbard article cited by the court below. *See* Pet. Br. at 49; *see also supra* n.3. To be clear, the attack says nothing about the evidence on which the article relies—indeed, that evidence is consistent with a wealth of other scholarly analysis cited in this brief.

The claim that the article should be disregarded as "funded in part by the mutual-fund industry and co-authored by an expert witness in §36(b) cases" under *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 n.17 (2008) ("declin[ing] to rely on" research "funded in part by" party to the case), is equally without merit. Pet. Br. at 49 and n.48. No party to this case contributed to the funding of the Coates and Hubbard article and Professor Coates, a professor at Harvard Law School, received no compensation in connection with the preparation of the article or this brief. Professor Hubbard, the Dean of Columbia Business

In evaluating whether, under Section 36(b) of the ICA, an advisory fee is so excessive as to be deemed a breach of "fiduciary duty with respect to the receipt of compensation for services," courts should consider, first, what are the fees charged by advisers of similar funds, and, second, does competition among similarly situated funds affect the advisory fees? Fees charged by competing advisors to similar funds will generally be more probative of advisory fees' fairness than other measures. It may be that in some contexts, evidence of competition will be absent or weak, but in many cases, it will be clear and strong. To interpret the ICA so as to ban evidence of competition between fund advisers—or to place lesser weight on such competition—would blind courts to an important set of facts relevant to the Section 36(b) analysis.

Gartenberg v. Merrill Lynch Asset Mgmt., Inc. appropriately recognized that courts should consider "all pertinent facts" when evaluating mutual fund advisory fees under Section 36(b). 694 F.2d 923, 929

School and a highly regarded academic, has, it is true, qualified and testified as an expert witness in Section 36(b) litigation. Such expert testimony, however, is not a reason to disregard the views set forth in either an academic article or in an *amicus* brief. Indeed, if it were, certain studies and articles relied on in the Brief of *Amici Curiae* Law Professors in Support of Petitioners would have to be disregarded as their authors have qualified as expert witnesses in Section 36(b) litigation. In fact, three such authors—Mercer E. Bullard (*see* Law Professors Am. Br. at 23), Lyman Johnson (*see* Law Professors Am. Br. at 3, 4), and Tamar Frankel (*see* Law Professors Am. Br. at 6, 23)—were proffered as experts *in this case*. *See, e.g.*, Def. Harris Associates L.P.'s Mot. to Exclude the Expert Testimony of Mercer Bullard, Tamar Frankel, Lyman Johnson and James Lamb.

(2d Cir. 1982). However, in *dicta* the *Gartenberg* court expressed skepticism regarding the existence of competition among funds and its impact on advisory fees. That court focused primarily on competition for a fund's advisory contract and noted funds rarely "fire" their advisers. In fact, courts should focus at the investor level. Investors, the economic evidence demonstrates, are fee sensitive. Advisers are aware of investor preferences and competition for investors constrains fees.

Therefore, this Court should clarify that the *dicta* in *Gartenberg* concerning the lack of competitive forces affecting advisory fees in the mutual fund industry are outdated and not binding. In particular, this Court should specify that courts should be permitted to consider two sets of facts relating to competition and advisory fees under Section 36(b): (1) evidence of competition for investors by funds similar to the type of fund at issue; and (2) evidence of the extent to which such competition constrains the fees charged by the adviser and approved by the fund's directors, and whether that competition is likely to produce fees similar to those generated by arm's-length bargaining.

ARGUMENT

I. EVALUTION OF ADVISORY FEES REQUIRES CONSIDERATION OF ALL PERTINENT FACTS

Section 15(c) of the ICA imposes on the independent directors of a mutual fund the duty "to request and evaluate" all "such information as may reasonably be necessary to evaluate" an advisory

contract. 15 U.S.C. 80a-15(c). Subsequent judicial review, occasioned by a suit under Section 36(b), similarly requires the Court to consider whether the directors' approval of the contract reflects a permissible business judgment under current market conditions; the directors' determination "shall be given such consideration by the court as is deemed appropriate under all the circumstances." Section 36(b)(2).

For the past twenty-five years, independent directors, in the first instance, and courts reviewing decisions of independent directors thereafter, have, overwhelmingly, evaluated advisory fees under the standard set forth by the Second Circuit in *Gartenberg*. The *Gartenberg* court held that to violate Section 36(b), "the Adviser-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been a product of arm's length bargaining." 694 F.2d at 928. "To make this determination", the court stressed, "*all* pertinent facts must be weighed," including "the price charged by other similar advisers to funds managed by them," the "adviser-manager's cost in providing the service, the nature and quality of the service, the extent to which the adviser-manager realizes economies of scale as the fund grows larger, and the volume of orders which must be processed by the manager." *Id.* at 929, 930 (emphasis added). The court relied on the legislative history of Section 36(b) which "makes clear that Congress 'intended that the court look at all the facts in connection with the determination and receipt of such compensation.' . . ." *Id.* at 930 (quoting S. REP. NO. 91-184, at 15 (1969)).

Although specifically requiring consideration of "all pertinent factors," and agreeing that rates charged

by other advisers to similar funds were "a factor to be taken into account," *Gartenberg* criticized the lower court ruling that competitive fees were "the *principal* factor to be considered in evaluating a fee's fairness." *Id.* at 929 (emphasis added). The court offered two reasons: first, mutual funds have an "unseverable relationship" with their advisers that "tends to weaken the weight to be given to rates charged by advisers of other similar funds" and, second, "[t]he fund customer's shares of the advisory fee is usually too small a factor to lead him to invest in one fund rather than in another or to monitor adviser-manager's fees." *Id.*

In support of these points, the *Gartenberg* court relied on a report issued by the SEC in 1966 and quoted the report's conclusion that "'[c]ost reductions in the form of lower advisory fees . . . do not figure significantly in the battle for investor favor.'" *Id.* (quoting H.R. REP. NO. 89-2337, at 126 (1966) ("1966 SEC Report")).[5] *Gartenberg* further quoted from the

[5] The 1966 SEC Report adopted conclusions from a study of the mutual fund industry conducted for the SEC by the Wharton School of Finance and Commerce in 1962. *See* 1966 SEC Report at 12. The Wharton report concluded that even though mutual fund assets grew in the 1950s, fees remained constant, meaning that (alleged) economies of scale were not being passed on to investors. *See A Study of Mutual Funds*, H.R. REP. NO. 87-2274, at 28-29 (1962) (the "Wharton Report"). According to that study, competition had "not been substantially operative in fixing the advisory fee rates paid by mutual funds" (*id.* at 494) because of the failure to pass on savings from economies of scale, and because advisers did not compete for retail mutual fund contracts (*see id.* at 493-94). A few years following the 1966 SEC Report, the Senate issued a report which largely

1966 SEC Report as follows: "negotiations between the unaffiliated [fund] directors and fund advisers over advisory fees would lack an essential element of arm's length bargaining—the freedom to terminate the negotiations and to bargain with other parties for the same services." *Id.* at 929 n.2 (citing 1966 SEC Report at 131). On this basis, *Gartenberg* stated that "fund[s] cannot move easily from one adviser-manager to another," because "'investment advisers seldom, if ever, compete with each other for advisory contracts with mutual funds.'" *Id.* at 929 (quoting 1966 SEC Report at 126).

These *dicta* have resulted in some courts (and possibly some independent directors) minimizing evidence of competition in the mutual fund industry or downplaying the effect of competition on fees in cases challenging advisory fees as excessive under Section 36(b). For example, in *Schuyt v. Rowe Price Prime Reserve Fund, Inc.,* the court gave "little weight" to expert testimony regarding "competition in the market for advisory services" because it was "directly contradicted by the views of the Second Circuit in *Gartenberg*." 663 F. Supp. 962, 974 (S.D.N.Y. 1987). In *Krinsk v. Fund Asset Mgmt., Inc.*, the court considered comparable fees, but did so saying that "such comparisons have limited value due to the lack of competition among advisers for fund business." 715 F. Supp. 472, 497 (S.D.N.Y. 1988) (citing *Gartenberg*, 694 F.2d at 929).

For the reasons set forth below, however, the economic evidence relating to the industry today demonstrates that the observations in the 1966 SEC

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tracked the conclusions in the Wharton Report and in the 1966 SEC Report. *See* S. REP. NO. 91-184, at 5-6.

Report, even if true when made, do not accurately characterize the industry today. Today, the robust competitiveness of the mutual fund industry constrains the amount of advisory fees that a fund adviser can charge.

> Adviser fees are based on fund assets, which in turn depend on competition among funds for investors. Any attempt by an adviser to use either excess fees or fund assets to subsidize the marketing of shares (and increase assets and fees) at the expense of performance is self-limiting and can only work over the short term. As a result of the relationship between fees and returns, competition among funds for investors necessarily affects advisers when they propose their fees, and affects the bargaining process between advisers and fund directors. Both advisers and fund directors are constrained by the effects of competition for fund investors.

Coates and Hubbard at 212. Although Petitioners and others purport to challenge these facts, none disputes the evidence summarized below demonstrating competition in the fund industry. Instead, they make conclusory statements or point to other, unrelated evidence that, on inspection, is consistent with competition constraining mutual fund advisory fees. Accordingly, the statutory scheme, and the evidence about competition in the mutual fund industry discussed below, demonstrate that consideration of competitive fees is relevant to the evaluation performed by independent directors, in the first instance, and by a court, in the event of a fee challenge.

II. COMPETITION FOR INVESTORS IS AN IMPORTANT FORCE THAT CONSTRAINS MUTUAL FUND ADVISORY FEES

Critics' skepticism about competition in the mutual fund industry dates back to the 1960s view that market forces fail to constrain advisory fees in part because the structure of mutual funds is such that fund boards rarely "fire" advisers or put advisory contracts out for bid.[6] However, as discussed below, investors can discipline a fund's adviser both by investing new cash flows in other funds or by redeeming their shares and re-investing elsewhere. This investor mobility, combined with other characteristics of the mutual fund industry—a lack of concentration, a multitude of investor choices, low barriers to entry and common and continuous actual entry, numerous distribution models, advisory fee reductions and declining historical advisory fee and expense trends, a correlation between lower advisory fees and higher returns, and investor sensitivity to fee changes—results in robust competition that constrains the amount of fees charged by an adviser.

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[6] *See* Pet. Br. at 26 ("Congress found that 'the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy,' because 'a mutual fund cannot, as a practical matter[,] sever its relationship with the adviser.'") (citations omitted); Law Professors Am. Br. at 5 ("The structure of mutual funds is notoriously 'incestuous,' with 'each fund a captive' to the investment advisor who forms, incubates, and rules it.") (citations omitted).

A. *Mutual Fund Industry Criticisms: Stuck in the 1960s*

The 1960s view reflected in the Wharton Report, and in the 1966 SEC Report cited in *Gartenberg*, is based on perceived conflicts of interest between investment advisers and mutual funds and their boards. Central to this alleged conflict is that mutual fund boards of directors rarely "fire" advisers. *See, e.g.*, AARP Am. Br. at 15 ("[I]ndividual investors in mutual funds lack collective bargaining power to lower investment fees because mutual fund directors are captives of their investment advisors."); NASCAT Am. Br. at 7 ("firing rights" as to the funds adviser "are virtually never exercised") (citing John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. CORP. L. 609, 617 (2001)).

These criticisms wrongly focus on the adviser rather than the investor and ignore both important structural features of mutual funds and the evolution of the mutual fund industry since the 1960s. It is the mobility of the customer that constrains fees. In terms of structure, investors have contractual rights (supplemented by SEC regulations) to "fire" advisers, redeeming their shares and investing their assets elsewhere. This constraint follows from a defining feature of "open end" mutual funds: investors have the ability to redeem their shares on a daily basis at current net asset value. *See* Victoria E. Schonfeld & Thomas M.J. Kerwin, *Organization of a Mutual Fund*, 49 BUS. LAW. 107, 112 (1993). This feature directly enables competition among advisers.

Moreover, mutual fund advisers—compensated, virtually without exception, based on a percentage of

assets under management ("AUM")—have a strong economic incentive to retain existing and attract new investors. Positive fund returns directly increase AUM, and indirectly increase AUM by drawing in new investors. Returns are measured after deducting fees, so fees have a direct impact on an adviser's reported returns. Because shareholders enjoy mobility, competition prevails as advisers seek high returns (net of fees) to attract investors. Thus, whatever the fund's board's ability to "fire" advisers, shareholders can and readily do "fire" advisers by moving to another fund.

Further, the mutual fund industry has changed significantly since the mid-1960s. Over the past forty years, the industry has grown markedly: in June 1966, 379 mutual funds held assets of $38.2 billion,[7] while at the end of 2008, over 8000 mutual funds held assets of $9.6 trillion.[8] Over the same period, there has been a marked trend towards not charging a "front end," or initial, fee at the time an investor buys shares in a fund: in June 1966, load funds accounted for nearly 95% of mutual fund assets;[9] as of 2006, no-load funds accounted for a majority of mutual fund assets.[10] In addition, the mutual fund distribution process is more open and promotes easier movement between funds and fund complexes than was true in the 1960s. *See infra* at 25-26.

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[7] 1966 SEC Report at 44.

[8] INV. CO. INST., 2009 INV. CO. FACT BOOK: A REVIEW OF TRENDS AND ACTIVITY IN THE INV. CO. INDUS. at 110 (49th ed. 2009) ("ICI Fact Book").

[9] 1966 SEC Report at 52.

[10] Coates and Hubbard at 157 and n.23.

Despite these significant changes to the mutual fund industry, Petitioners and their *amici* rely on an outdated assessment of competition and urge an interpretation of Section 36(b) based on that outdated understanding.[11] Such reliance and the proposed interpretation should be rejected because, as discussed below, the undisputed evidence demonstrates that competition for investors is an important force that constrains advisory fees.

B. *Investors Have a Ready Ability to Exit Funds and Do Exit Funds When They Disapprove of the Amount of Advisory Fees*

Consistent with the above theoretical analysis, direct evidence of investors switching mutual funds illustrates that investors are not locked into their funds or advisers. Indeed, significant amounts of switching occurs annually by fund investors. For example, during market downturns average annual rates of shareholder redemptions in equity funds (as a percentage of average net assets) have ranged from approximately 35% (2008), to 23% (2005), to 41% (2002), to 73% (1987). *See* ICI Fact Book at 137.

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[11] *See, e.g.*, Pet. Br. at 5 (Investment advisers "'seldom, if ever, compete with each other for advisory contracts with mutual funds'") (quoting 1966 SEC Report at 126); Law Professors Am. Br. at 6 ("[T]he forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.") (citing S. REP. NO. 91-184, at 5); *Id.* at 25 ("[T]he unique operational structure of mutual funds prevents sophisticated investors from creating a competitive pressure in mutual funds."); United States Am. Br. at 26 (whether advisory fees are subject to "competitive pressure" remains "the subject of lively debate.").

Where do these redeeming investors put their money? The data show that equity funds with below-median operating expense ratios have an overwhelming, and increasing, collective market share—83% in 1995 to 87% in 2005. *See* Brian Reid, *Competition In The Mutual Fund Business*, RESEARCH COMMENTARY (Inv. Co. Inst., Washington, D.C.), Jan. 2006, at 5, *available at* http://conference.ici.org/pdf/rc_competition.pdf. This evidence demonstrates that switching costs are not an impediment to investors moving from one adviser to another: investors have a ready ability to exit funds and do exit when they disapprove of the amount of advisory fees.

Moreover, competition would still be a powerful force to constrain advisory fees even if switching costs did materially affect the ability of investors to exit (which they do not). New investments by investors in funds (*i.e.*, dollars not affected by alleged adverse consequences of switching from one fund to another) continue to grow exponentially. To illustrate, if every mutual fund dollar in 1980 had been locked into its 1980 fund and these funds had not otherwise attracted new investors, by 2004, the market share of the 1980 funds would have shrunk from 100% to less than 5% of the overall fund industry. *See* Coates and Hubbard at 200. Competition to attract these new dollars is another significant force upon advisers and complexes to maintain competitive fee levels.

Empirically, there is also a strong inverse relationship between fees and a fund's growth in asset size. *See id*. at 183. That is, "holding other factors constant, investors shift substantial amounts of assets out of high-fee funds and into low-fee funds." *Id*. at 180. One reason is that high fees reduce returns—and returns are the key factor in attracting new investors.

Looking at the period from 1998 through 2004, a 10% increase in fund fees, holding all else equal, decreases a fund's total assets by 23% to 28% and a complex's assets by 15% to 19%. *Id.* at 183. Other studies have similarly concluded. *See, e.g.,* Andrew Zhang, *Mutual Fund Expense Ratios in Market Equilibrium* at 24 (July 20, 2007) (unpublished working paper, *available at* http://ssrn.com/abstract=1010544) ("the mutual fund industry is expense ratio competitive in the growth and index fund sectors," which supports the conclusion that the "U.S. fund industry provides a near textbook example of a competitive market structure"); WILLIAM J. BAUMOL ET AL., THE ECONOMICS OF MUTUAL FUND MARKETS: COMPETITION VERSUS REGULATION 161, 164 (Karl Bruner & Paul W. MacAvoy eds., Kluwer Academic Publishers (1990)) (demonstrating that "a one percent rise in the relative fee charged by a fund adviser will lead to a more than proportionate loss in that fund's market share" and concluding that "it is a mistake to base regulatory and judicial decisions on the premise that [money market funds] are not effectively constrained by market forces in their selection of fees").

These findings ought not be surprising because mutual fund investors seek returns, a motive that causes them to flock to funds with the highest recent returns. Funds necessarily compete on fees when they compete on returns as returns are correlated with lower advisory fees. An adviser, therefore, cannot simply raise fees with impunity because these studies show investors are fee sensitive. Unless it provides a commensurate increase in value (whether by increasing performance or services provided), investors will punish an adviser's unwarranted fee increase by moving their dollars to a competitor that provides better value.

This evidence directly refutes claims by Petitioners and their *amici* that mutual fund investors "do not exit despite high fees" both because of restrictions on exit and because investors "have demonstrated little behavioral capacity to invest rationally." Law Professors Am. Br. at 22, 23. The evidence, described above, demonstrates that investors do exit when they disapprove of the amount of advisory fees.

Petitioners' *amici* also claim that mutual fund investors face transaction costs—such as redemption fees or new sales charges—that lock investors into their funds and advisers, undermining mobility that theoretically exists with redeemable shares. *Id.* at 22 ("If, as the evidence demonstrates, investors do not exit despite high fees . . . then advisors can make a great deal of money"). Yet the trend in the mutual fund industry has, overwhelmingly, been towards minimizing these transaction fees (other than as a penalty to prevent over-frequent market-timing redemptions). For example, from 2002 through 2007, over 72% of net new investments in long-term funds were made in no-load (no sales charge fee) funds (with the reminder divided between load funds and variable annuities). *See* ICI Fact Book at 26. Moreover, with regard to all types of switching costs, as with other goods and industries, even a small portion of price-sensitive investors can force the entire industry to price their products competitively. Advisers receive higher fees for each dollar of AUM in a share class, regardless of whether the dollar comes from a price-sensitive or price-insensitive investor. Therefore, even if the above constraints make exit prohibitively costly for *some*

investors, the marginal investor's ability to exit free from transaction costs keeps fees low for *all* investors.[12]

One perceived switching cost—taxes—is not likely to significantly undermine competition among mutual funds, for two reasons. *See, e.g.*, Pet. Br. at 42 ("If an individual has owned a particular fund for a sufficient length of time, selling her shares likely would trigger adverse tax consequences"). First, nearly half of all mutual fund assets in 2008 were held in tax-deferred accounts or tax-exempt funds and roughly 70% of all fund-investing households in 2008 owned a portion of their assets through tax-exempt vehicles (such as 401(k)s or IRAs). *See* ICI Fact Book at 23, 84. That these customers can exit free of tax costs holds down fees for those who would incur tax costs to leave.

Second, new investment flows—which, as noted above, represent a large share of all assets invested in mutual funds—do not trigger taxes. An adviser that attempted to keep fees high on the assumption that taxes would constrain investors from moving their investments elsewhere would soon find itself with a diminishing market share because new investments face no such constraints.

Petitioners' *amici* also highlight search costs—the cost to an investor of finding a superior fund and adviser—as a restriction on investor mobility. *See* Law Professors Am. Br. at 22. These critics, however, fail to acknowledge the wide array of tools and

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[12] *See* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1405-06 (1983) ("A market can be in competitive equilibrium even though the ratio of comparison shoppers to all consumers is much less than one").

comparative information—available on home computers—that the market provides investors, including free sources such as Morningstar and the comparison tools offered by various mutual fund supermarkets, such as Fidelity and Charles Schwab.[13] *See* ICI Fact Book at 81-82 (in 2008, 91% of U.S. households owning mutual funds had internet access and 82% of such households used the internet for financial purposes).

Critics also claim that investors face impediments to exit if they lack access to alternative mutual funds. As evidence, they point to the alleged lack of choice available within some 401(k) plans. *See, e.g.*, Pet. Br. at 42 ("401(k) plans and similar investment vehicles often have a limited menu of investment choices that restrict the investor's options to high-priced funds."); *see also* Law Professors Am. Br. at 22 (one reason "investors do not exit despite high fees" results from "limited options in their 401(k) plans"). Yet 401(k) plans generally offer a wide and growing range of options to investors. *See* Jeffrey R. Brown & Scott J. Weisbenner, *401(k) Investment Options, Portfolio Choice and Retirement Wealth* at 4 (Dec. 2005) (working paper, *available at* http://www.nber.org/programs/ag/rrc/books&papers.html and follow link to "NB05-03") (finding that from 1993 through 2002, "the median number of funds offered as investment options

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[13] *See* Charles Schwab—"Mutual Funds", http://www.schwab.com (select "Investment Products" tab and follow link to "Mutual Funds") (last visited Sept. 2, 2009); Fidelity Investments—"Mutual Funds at Fidelity", http://www.fidelity.com (select "Investment Products" tab and follow link to "Mutual Funds") (last visited Sept. 2, 2009); Morningstar—"Funds", http://www.morningstar.com (select "Funds" tab) (last visited Sept. 2, 2009).

by 401(k) plans in our sample rose from 5 to 13").[14] Moreover, plan administrators (who have a fiduciary duty to the plan participants) select the funds for inclusion in each plan from among an even broader selection of available funds. In addition, the funds are offered as a part of a complex bundle of services that can include recordkeeping and advisory services, the prices for which are often negotiated by sophisticated retirement plan committees that often retain professional consultants to advise them in the negotiation of these arrangements. Finally, employers can respond to non-competitive fees and change plan providers, administrators, and options. Thus, again, competition plays a role.

Another alleged impediment to competition is alleged investor ignorance and irrationality in choosing funds due to cognitive biases.[15] Petitioners' *amici* also argue that investors are "unaware" of the fees their

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[14] In addition, 401(k) plans that offer self-directed brokerage windows offer investors an even broader range of options.

[15] *See, e.g.*, Pet. Br. at 43 ("most mutual-fund investors do not rationally process fee information"); Law Professors Am. Br. at 23 (Investors "have demonstrated little behavioral capacity to invest rationally"); *but see* Zoran Ivković & Scott J. Weisbenner, *"Old" Money Matters: The Sensitivity of Mutual Fund Redemption Decisions to Past Performance* at 4 (May 2006) (unpublished working paper, *available at* http://ssrn.com/abstract=903792) (determining that "psychological motivations . . . play much less of a role in the domain of individuals' mutual fund investments than they do in the domain of investment into individual stocks").

adviser charges.[16] Rational investors, however, need only gather information about fees when they deem it useful. For example, many investors rely on third-party fiduciaries (*e.g.*, employers or financial advisers) to provide information or even make choices on their behalf. Indeed, among investors owning mutual fund shares outside of retirement plans at work, 77% own fund shares through professional financial advisers. ICI Fact Book at 68. Additionally, as noted above (*see supra* at 18), only a subset of fund investors need to be price-aware and price-sensitive for advisers to have an incentive to set fees at the competitive level. Furthermore, differences in fees may reflect different levels of value investors place on fund services, rather than irrationality.

C. *The Mutual Fund Industry Offers a Multitude of Choices to Investors, Barriers to Entry Are Low, and New Entry Is Common*

To capitalize on their ability to redeem their shares, investors need feasible alternatives: to "fire" an adviser is an empty threat unless the investment can relatively easily be put to better use. The mutual fund industry presents a wide range of fund choices, low barriers to entry, and common and continuous actual

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[16] *See* John C. Bogle Am. Br. at 30 ("[F]unds do not generally compete on the basis of costs, and investors accordingly are generally unaware of how much they are paying in costs or the enormous effects that such costs can have on performance over long periods of time."); *see also* Litan et al. Am. Br. at 8 ("The vast majority of investors cannot accurately assess the quality of the mutual funds in which they invest."); *id.* at 13 ("[T]he vast majority of mutual fund investors lack essential information necessary for them to make informed decisions.").

new entry. Consequently, large shifts in market share occur.

More than 8000 mutual funds affiliated with hundreds of fund complexes (*i.e.*, funds with a common adviser) compete for investors' dollars.[17] ICI Fact Book at 12, 66. These mutual funds present a wide array of investment choices with varied risk tolerance, different services and liquidity, and diverse sectors and geographies. This wealth of options, coupled with investor mobility, means that funds and advisers can keep their investors and attract new ones only by delivering consistent value. Choice drives competition. To illustrate, over the last twenty-five years the number of equity mutual funds and complexes has increased, while the concentration of investments in those funds has declined over that same period, a clear indication that no fund or complex has a dominant market share. *See* Coates and Hubbard at 165 (Table 1).[18]

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[17] *See* Sunil Wahal & Albert (Yan) Wang, *Competition Among Mutual Funds* at 23-24 (Nov. 2008) (unpublished working paper, *available at* http://ssrn.com/abstract =1130822) (concluding that established funds that face competition from new fund entrants are "more likely to use fee waivers, use larger fee waivers and experience lower flows").

[18] The Vanguard Group's growth to one of the largest fund complexes in the U.S.—based in large part on price competition—is not consistent with the outdated 1960s view that there is no effective advisory fee competition in the mutual fund industry. *See* Coates and Hubbard at 167. Notably, the Managing Director of the Vanguard Group has acknowledged that price competition exists in the industry and Vanguard's Founder has attributed Vanguard's success to its minimized costs. *See Improving*

In addition, exchange-traded funds (ETFs), open-end mutual funds traded on an exchange, offer a rival vehicle to investors for investing in diversified stock portfolios. These ETFs exert competitive pressure on mutual funds and their fees. ETFs invest in groups of stocks designed to replicate the performance of market indices or particular sectors. Although ETFs do not issue redeemable shares to retail investors, they provide comparable liquidity because their owner can sell ETF units on the secondary market or back to the ETFs in exchange for the asset's underlying securities. They thus generally compete directly with indexed mutual funds. *See id.* at 164 n.57. ETFs have grown rapidly in recent years, from total net assets of approximately $16 billion in 1998 to $531 billion at the end of 2008. *See* ICI Fact Book at 40, 41.

Low barriers to entry into the mutual fund industry also contribute to competitive advisory fees. The costs are relatively low, both in time and money, for a fund complex to add an additional fund or for a new adviser to enter the market.[19] Funds and

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Price Competition for Mutual Funds and Bonds: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce, 105th Cong. 69-75 (1998) (statement of F. William McNabb III, Managing Dir., Vanguard Group); *Mutual Fund Industry Practices and Their Effect on Individual Investors: Hearing Before the Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. 74 (2003) (statement of John C. Bogle, Founder, Vanguard Group) ("Bogle Statement").

[19] *See generally Improving Price Competition for Mutual Funds and Bonds: Hearing Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. (1998) (statement of Matthew P. Fink, President,

complexes entering the mutual fund industry since 1990 have secured billions of dollars in new investments. Indeed, the top equity mutual fund complexes in 2004 that did not exist in 1994 were larger than approximately 70% of existing complexes; and the top new fund entrants in that same time period were larger than 95% of existing funds. *See* Coates and Hubbard at 167-68. In addition, an analysis of the distribution of mutual funds by complex size evidences competitiveness—complexes in various sizes from 6 to 100 funds increased the number of funds offered from 1985 to 2004. *Id.* at 168-69.

Competition in mutual fund distribution also aids investors. Currently, investors can purchase shares through numerous channels, including: (1) direct sales, (2) retirement plans, (3) full-service financial firms, (4) fund supermarkets and discount brokers, and (5) annuity plans offered by insurance companies. Moreover, mutual funds offer multiple share classes, which present a range of price choices to investors targeted, in part, to the potential length of their investments. *See, e.g.*, ICI Fact Book at 27 (discussing share classes).

One market innovation noted above—fund supermarkets—has especially added to investors'

Inv. Co. Inst.); 3 TAMAR FRANKEL & ANN TAYLOR SCHWING, THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS § 21.04[A] (2d ed. 2009) (acknowledging that only $100,000 in capital is required by SEC regulations to start a fund); Laurin Blumenthal Kleiman & Carla G. Teodoro, *Forming, Organizing and Operating a Mutual Fund: Legal and Practical Considerations*, *in* THE ABCS OF MUTUAL FUNDS 11, 57–58 (Practicing Law Institute 2006) (stating that a fund can be created within three months).

convenience. *See generally* Martine Costello, *One-Stop Fund Shopping*, CNNMoney, Mar. 6, 2000, http://money.cnn.com/2000/03/06/mutualfunds/q_funds_supermarket. Run by brokerage firms, fund supermarkets provide investors the ability to select from a large number of mutual funds and fund families and transfer assets between such fund families with relative ease, often within one brokerage account. With multiple fund families available from a single source, investors can more easily compare funds' fees, operating costs, and historical fund performance and ratings. Rather than filing paperwork with, keeping track of, and interacting with multiple fund complexes, supermarkets provide investors with a mechanism to manage their investments at a one-stop shop. This permits, in effect, investors to form their own "complexes" of funds, selecting funds from various mutual fund families.[20]

As a result of the competitive nature of the mutual fund industry, advisers' market shares significantly fluctuate. As the Table below shows, some complexes' market shares rose dramatically (*e.g.*, Vanguard's market share almost doubled from 6.36% in 1985 to 12.63% in 2004) while others lost much of their market

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[20] One example of the popularity of supermarkets is reflected in the asset growth of Charles Schwab's Marketplace fund supermarket: from $31 billion in 1994 to $333.9 billion at the end of 2008. CHARLES SCHWAB & CO., 1999 ANNUAL REPORT (1999) at 35, *available at* http://www.aboutschwab.com/annualreport99/financialreview/gis.pdf; CHARLES SCHWAB & CO., 2008 ANNUAL REPORT (2008) at 9, *available at* http://www.aboutschwab.com/media/pdf/2008annual_report_fullprint.pdf.

share (*e.g.*, American Express's share dropped from 3.72% to 1.07% over the same time period).[21]

Shares Of Equity Assets Under Management Of Top 25 Mutual Fund Complexes, 1985-2004			
Complex	**1985**	**1995**	**2004**
AIM Investments	1.17%	3.50%	1.56%
AllianceBernstein	1.35%	*0.72%*	0.93%
American Century	2.11%	2.43%	1.65%
American Express	3.72%	2.10%	1.07%
American Funds	7.76%	9.48%	14.09%
Citigroup Ast Mgmt	1.97%	1.42%	1.05%
Columbia Mgmt Adv	*0.99%*	1.28%	0.93%
DFA	--	*0.30%*	0.89%
Davis-Selected Adv	*0.25%*	*0.25%*	0.87%
Delaware	1.03%	*0.39%*	*0.27%*
Dodge & Cox	*0.05%*	*0.24%*	1.62%
Dreyfus	3.23%	0.96%	0.94%
Eaton Vance	1.33%	*0.19%*	*0.61%*

[21] The data in this Table come from Table 7 in Coates and Hubbard (at 179) (noting "[s]hares of equity assets under management are measured as of year-end. Complexes with italicized values for a given year are not in the top 25 in that year.") (citing Strategic Insight (Simfund) (The Strategic Insight Simfund is a current and comprehensive historical database of over 32,000 U.S.-based open and closed mutual funds, fund-of-funds and exchange-traded funds (ETFs). Simfund contains thousands of data fields and fund details, including assets, cash flows, volatility, portfolio statistics, sales loads, detailed expenses, advisory fee breakpoints, service providers and official performance data, rankings and ratings from all major third party sources. *See* Strategic Insight—"Simfund: Mutual Fund Database", http://www.sionline.com/aboutsi/about_simmf.asp (last visited Sept. 2, 2009)).

Evergreen Investmt	1.87%	0.97%	*0.65%*
Fidelity	10.42%	18.56%	14.05%
Franklin Templeton	4.85%	4.20%	3.74%
Grantham Mayo	*0.02%*	0.79%	0.76%
Ivy Invst Mgmt	1.95%	0.86%	*0.47%*
JPMorgan Funds	*0.04%*	*0.75%*	0.85%
Janus	*0.36%*	1.74%	1.66%
Lord Abbett	2.41%	*0.46%*	0.88%
MFS	2.81%	1.14%	1.46%
Merrill Lynch	2.28%	3.15%	1.11%
Morgan Stanley Adv	1.25%	2.09%	*0.70%*
OppenheimerFunds	2.41%	1.35%	1.77%
Phoenix Investment	*0.84%*	0.83%	*0.15%*
Pioneer	3.41%	0.99%	*0.46%*
Prudential Finl	*0.85%*	1.15%	*0.56%*
Putnam	4.27%	3.43%	2.13%
Scudder	2.49%	2.11%	0.93%
Seligman	1.13%	*0.47%*	*0.17%*
T Rowe Price	3.17%	2.54%	2.72%
Van Kampen	3.36%	*0.73%*	1.23%
Vanguard	6.36%	7.70%	12.63%
Wells Fargo Bank	*0.45%*	0.96%	*0.73%*

As Coates and Hubbard note, these "changes in market share are a direct reflection of competition, with more successful funds growing at the expense of rivals." Coates and Hubbard at 178.

D. *Advisers Compete on the Basis of Advisory Fees*

Petitioners' *amici* tout a study, performed by the U.S. General Accounting Office in 2000, that concluded that "competition in the mutual fund industry may not be strongly influencing fee levels" because advisers generally do not compete "on the basis of the fees they

charge."[22] Yet the GAO Report found that "fund advisers generally compete on the basis of performance." GAO Report at 7. Performance, typically measured by percentage annual return on investment, necessarily reflects fees (returns equal share appreciation less fees).

Moreover, the GAO Report's conclusions contradict each other for two reasons. First, shareholders invest their funds to reap the highest return on their investments, a calculation that factors in, among other things, performance, services provided, and convenience. A rational shareholder would not focus on fees independent of a fund's performance. Second, many studies show a strong positive association between a fund's returns and the size of the fund. Because fees are factored into returns, the logic of the GAO Report that mutual funds compete on returns but not on fees is flawed. Competing on returns necessarily involves competing on fees.

As a result of fee competition, mutual funds with relatively low fees experience large in-flows of assets. For example, one study of the relation between total fund expenses (including advisory fees, sales charges

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[22] General Accounting Office, *Mutual Fund Fees: Additional Disclosure Could Encourage Price Competition* at 7 (June 2000), *available at* http://www.gao.gov/archive/2000/gg00126.pdf ("GAO Report") (cited in Law Professors Am. Br. at 20 n.21); *see also* AARP Am. Br. at 14 ("[E]vidence suggests that mutual fund 'managers do not compete on costs.'") (citing John C. Bogle, Lecture, *A New Order of Things: Bringing Mutuality to the "Mutual" Fund*, 43 WAKE FOREST L. REV. 1089, 1113-14 (2008)); *id.* at 15 ("[F]ees are higher than they would be if investment advisers were forced to compete on the basis of price.").

charged at the time of purchase, and marketing and distribution fees) and fund complex market shares from 1979 to 1998 (for open-end fund complexes) found a strong inverse relation between expenses and market share: the lower the expenses, the higher the complex's market share. Ajay Khorana & Henri Servaes, *Conflicts of Interest and Competition in the Mutual Fund Industry* at 20 (July 2004) (unpublished working paper, *available at* http://ssrn.com/abstract=240596). The study's authors concluded that "[p]rice competition is an effective way of obtaining market share." *Id.* These results persisted even after the authors adjusted for the fact that larger funds may charge lower fees due to economies of scale. *Id.*

Another study found that funds with lower expense ratios experienced the greatest asset growth. Vikram Nanda et al., *Family Values and the Star Phenomenon: Strategies of Mutual Fund Families*, 17 REV. FIN. STUD. 667, 680 (2004). That study suggests that a 10% decline in expenses increases new fund flow by 2.5%. *Id.*

Price reductions also highlight the competitive forces at work in the mutual fund industry. Advisers use one type of price reduction, fee waivers (temporary reductions that are not directly reflected in advisory contract amendments), to improve results for funds that would otherwise have relatively poor performance. In this way, an adviser can compensate for lower share appreciation by charging lower fees and thus improving overall returns to investors. The Table below shows that from 1998 through 2004, over 40% of equity share classes waived fees each year.[23]

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[23] The data in this Table come from Table 5 in Coates and Hubbard (at 174) (noting, *inter alia* that "[a] share class

Fee Waivers For Equity Mutual Fund Share Classes, 1998-2004		
Year	Number of Share Classes	Percentage of Share Classes With Fee Waivers
1998	1,995	42.0%
1999	2,325	46.9%
2000	2,699	41.7%
2001	3,543	45.7%
2002	4,168	49.2%
2003	4,341	48.4%
2004	4,139	48.0%

If the 1960s view of the absence of competition for advisory fees were true, such fee waivers would not occur.

With regard to one type of mutual fund, money market funds, evidence of competition in the form of price reductions is even more stark. Money market funds, which compete largely on returns due to their relatively standardized objectives, offer substantial fee reductions and waivers. In fact, a 2001 study found that 55% of retail money market fund managers waived almost two-thirds of their contracted-for fees. Susan E.K. Christoffersen, *Why Do Money Fund Managers Voluntarily Waive Their Fees?*, 56 J. FIN. 1117, 1121 (2001). This is because "[d]ifferences in

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is determined to have waived fees if the average gross expense ratio inclusive of reimbursements and waivers, weighted by assets in each share class, exceeds the actual average expense ratio paid by shareholders") (citing Strategic Insight (Simfund)).

money market fund net returns are determined almost entirely by differences in expenses borne by shareholders, with the lowest-fee money market funds having the highest net returns." Coates and Hubbard at 173 (citing Bogle Statement at 75).

Critics also characterize trends in fees and expense ratios in the mutual fund industry as proof of advisers taking excessive fees. *See, e.g.*, Bogle Statement at 72. They further allege that because fees have allegedly risen since the 1950s, advisers have been reaping the benefits of economies of scale at the expense of investors. This claim is flawed. First, studies of trends in average expense ratios do not consistently report increasing fees.[24] Second, the SEC concluded that the primary cause of increasing average expense ratios was that firms shifted from sales charges, which are not included in expense ratios, to marketing and distribution fees (*i.e.*, Rule 12b-1 fees), which are part of expense ratios and have been rising over time. *See* Coates and Hubbard at 176. Drawing conclusions about price competition in mutual funds based on trends in expense ratios will mislead unless one accounts for, among other things, the type and timing of sales charges, changes over time in the composition of funds, and changes in distribution channels. *Id.*

Still, critics say, if the mutual fund industry is truly competitive, why do supposed features of non-competitive markets persist? One example of alleged non-competitive behavior Petitioners and their *amici* posit is that advisory fees among similar funds are

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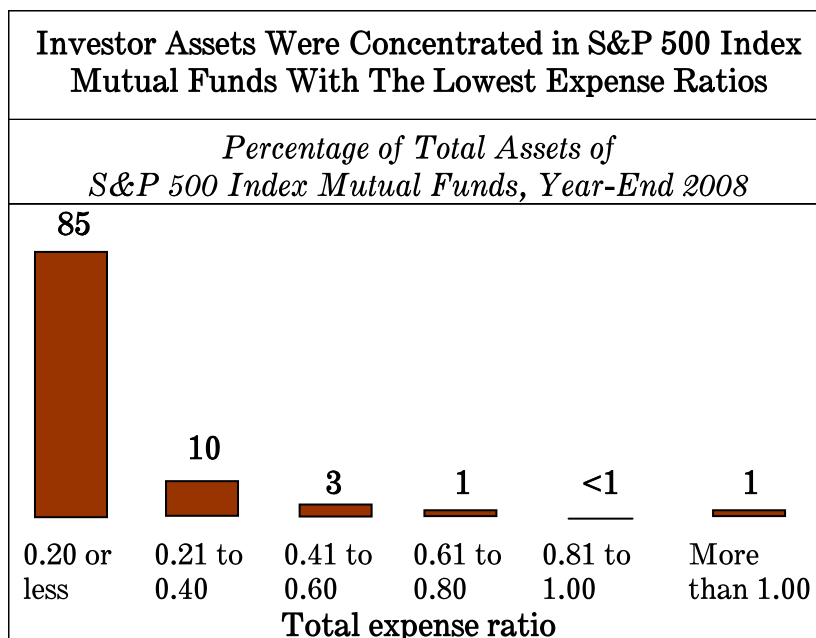
[24] *See* Coates and Hubbard at 175 and Table 6 (finding that the studies report conflicting results, depending on the time period analyzed (results are mixed within long and short time periods), how expense ratios are measured, and the sample of funds analyzed.

widely dispersed. Critics are especially concerned with alleged price dispersions among passive funds, such as S&P index funds, which invest in essentially identical portfolios. *See, e.g.*, John C. Bogle Am. Br. at 28 n. 10 ("[P]erhaps the most striking results [of the Freeman & Brown study] were provided by the S&P index funds, which in fact require very little investment advice.").

Two fallacies belie concerns about price dispersion. First, mutual fund advisers offer different business models and services to investors. Some choose to compete for investors by offering extensive services, incurring higher costs and charging correspondingly higher prices, while others choose to compete with fewer services, lower overhead and lower prices. *See* Coates and Hubbard at 167. In addition, some funds have requirements that explain lower fees, such as minimum investment requirements or constraints on liquidity. *See id.* at 196. Therefore, seller differentiation helps explain price dispersion (even among passive funds). The important determinant for investors, like customers of most other goods and services, is value—not simply price.

Second, because investors generally hold more than one fund, focusing on price comparisons between individual funds will not take into account benefits of investing within one fund family. *See, e.g.*, ICI Fact Book at 73 (the median number of funds held by an investor is four). Many investors favor the convenience of investing with one firm instead of in many funds among several firms; therefore, they focus on the bundled price of all their funds rather than the fees associated with a single fund. As a result, complexes compete by offering the best overall value, but need not necessarily offer the best value for each fund.

As reflected in the Figure below, at the end of 2008, 95% of investments in the S&P 500 index sector were concentrated in funds with the lowest expense ratios (less than forty basis points).[25]



Note: Percentages do not add to 100% due to rounding.
Sources: Investment Company Institute and Lipper.

Those invested in other S&P 500 index funds with higher expense ratios, however, are not being cheated by their advisers. Instead, they likely enjoy many benefits—no search costs to find a new firm and fund, the convenience of having their investments

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[25] The data in this Figure come from Figure 5.6 of the ICI Fact Book (at 66) (citing Investment Company Institute and Lipper); *see also* Coates and Hubbard at 195 Figure 3 (in 1990 and 2004, more than 90% of investments in the S&P 500 index sector were concentrated in funds with the lowest expense ratios, below 0.5%).

centralized in one complex, knowledge of the firm's operations, the ability to inexpensively alter asset allocations by shifting investments from fund to fund—to investing in an S&P 500 index fund that may have marginally higher fees. *See* Coates and Hubbard at 197. This is not inconsistent with competition among complexes based on price: "price dispersion reflects search costs for some investors, as well as different levels of service, particularly at the complex level, and different liquidity and trading costs. Buyer choice is the hallmark of competitive markets." *Id.*

CONCLUSION

As set forth above, contrary to outdated criticisms, numerous facts demonstrate that competition for investors is an important force in the mutual fund industry that constrains advisory fees. In articulating the legal standard applicable to an assessment of whether mutual fund advisory fees are excessive under Section 36(b) of the ICA, this Court should specify that two sets of facts relating to competition and advisory fees should be considered: (1) evidence of competition for investors by funds similar to the type of fund at issue; and (2) evidence of the extent to which such competition constrains the fees charged by the adviser and approved by the fund's directors, and whether that competition is likely to produce fees similar to those generated by arm's-length bargaining. This important information should inform the decisions of independent directors, evaluating advisory fees in the first instance, and of courts in the event of a fee challenge.

For the foregoing reasons and the reasons in the brief of Respondent, *Amici* respectfully urge this Court to affirm the judgment of the Seventh Circuit.

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