No. 20-1255

IN THE

Supreme Court of the United States

JEFFREY SCHWEITZER, ET AL.,
Petitioners,

v.

INVESTMENT COMMITTEE OF THE PHILLIPS 66 SAVINGS PLAN, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the ERISA duty of diversification requires fiduciaries of a defined-contribution plan to diversify each investment option offered by the plan—as opposed to the plan's offerings overall—such that fiduciaries must force plan participants to divest their holdings in a former employer, single-stock fund following a corporate spin-off.

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BRIEF IN OPPOSITION

INTRODUCTION

Respondents agree with petitioners that there is no circuit split warranting this Court's attention. What is more, the Fifth Circuit correctly affirmed the dismissal of petitioners' ERISA claims. At a minimum, allowing additional circuits to weigh in on the question presented here would be advisable before this Court expends resources on plenary review. If, however, this Court grants certiorari in *Gannett Co.* v. *Quatrone*, No. 20-609, and is inclined not to deny certiorari here, respondents request that the Court grant review of both cases and consider them together. This case presents certain distinct factual allegations from *Gannett* that may facilitate the Court's

review of the relevant legal question, whereas granting *Gannett* and holding this case (as petitioners request in the alternative) may present the Court with an unduly limited context for its decision.

STATEMENT

I. BACKGROUND

A. Statutory background

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA promotes employees' interests by imposing fiduciary duties on "anyone * * * who exercises discretionary control or authority over the plan's management, administration, or assets." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993); see 29 U.S.C. § 1002(21)(A). These duties are derived from "the common law of trusts." *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). Two statutory duties are relevant here: the duty of diversification and the duty of prudence. See 29 U.S.C. § 1104(a)(1)(B)-(C).

The duty of diversification requires a fiduciary to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C).

The duty of prudence requires a fiduciary to "discharge his responsibility 'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting 29 U.S.C. § 1104(a)(1)(B)). For instance, plaintiffs alleging that an ERISA fiduciary should have forced plan participants to divest their holdings in employer stock must "'plausibly allege[]' that a prudent fiduciary in the same

position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Amgen Inc.* v. *Harris*, 577 U.S. 308, 311 (2016) (per curiam) (quoting *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 429-430 (2014)).

ERISA provides plan participants a cause of action for breach of the duties of diversification and prudence. 29 U.S.C. § 1109(a). "To state a claim under this section, a plaintiff must plausibly allege that a fiduciary breached one of these duties, causing a loss to the employee benefit plan." Pet. App. 6a.

The application of ERISA duties depends on the type of plan at issue. In a defined-benefit plan, participants do not make their own investment decisions, but instead "receive a fixed payment each month, and the payments do not fluctuate with the value of the plan." *Thole* v. *U. S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020); see also 29 U.S.C. § 1002(35). For such plans, a fiduciary's duty of diversification applies to its decision as to how to invest all plan assets. Pet. App. 8a.

In a defined-contribution plan, by contrast, "participants' retirement benefits are limited to the value of their own individual investment accounts." *Tibble*, 575 U.S. at 525. Participants direct the investment of assets associated with their individual accounts, and the value of those accounts "is determined by the market performance" of participants' selected investments. *Ibid*. In this context, fiduciaries "only select investment options; the participants then choose how to allocate their assets to the available options." Pet. App 8a.

Neither the duty of diversification nor the duty of prudence to the extent it requires diversification applies to employee stock ownership plans, which by design invest heavily in employer stock. See 29 U.S.C. § 1104(a)(2).

B. Factual background

In 2012, ConocoPhillips Corporation spun off Phillips 66 as an independent company. Pet. App. 2a. Twelve thousand ConocoPhillips employees became employees of Phillips 66. *Ibid.* Many of those employees held ConocoPhillips stock as part of two single-stock investment funds in their ConocoPhillips retirement plan. With the spin-off, those ConocoPhillips plan holdings, along with the single-stock ConocoPhillips funds, became part of the new Phillips 66 plan. *Ibid.*

Phillips 66, like ConocoPhillips, operates a defined-contribution plan. *Ibid.* Employees decide how much to contribute to their accounts and how to allocate their assets among numerous investment options selected by the plan's Investment Committee (respondents here). *Id.* at 3a. The Phillips 66 Investment Committee provided a wide array of investment options for participating employees, ranging from a single-stock fund containing Phillips 66 stock to index funds, actively managed funds, and target-date retirement funds. C.A. Rec. 319. Employees with legacy holdings in the ConocoPhillips stock funds were free to sell those assets or reinvest those assets in any other plan investment option at any time. Pet. App. 2a. But no one could make new investments in the ConocoPhillips single-stock funds. *Ibid.*

When ConocoPhillips spun off Phillips 66 in April 2012, ConocoPhillips's share price was about $55. *Id.* at 3a. Over the next two years, its share price increased more than 50%, reaching $86 by June 2014. *Ibid.* The price fluctuated over the following three years, touching a low of $40 in February 2016. *Ibid.*

Petitioners brought suit in 2017, alleging that respondents violated the ERISA duties of diversification and prudence by allowing the Phillips 66 plan participants to maintain their holdings in the ConocoPhillips

stock funds. According to petitioners, respondents should have forced Phillips 66 employees to divest their holdings in ConocoPhillips stock at an unspecified point in time. C.A. Rec. 12 (complaint).

II. PROCEEDINGS BELOW

The District Court for the Southern District of Texas dismissed petitioners' complaint for failure to state a claim, Pet. App. 17a-45a, and a unanimous panel of the Court of Appeals for the Fifth Circuit affirmed, *id.* at 1a-16a.

The court of appeals first rejected petitioners' duty-to-diversify claim under § 1104(a)(1)(C). That provision requires fiduciaries to "diversify[] the investments of *the plan* so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C) (emphasis added). The court explained that "[t]his duty looks to a pension plan as a whole, not to each investment option." Pet. App. 8a. To be sure, petitioners complained that the Phillips 66 plan held an excessive percentage of plan assets in the ConocoPhillips stock funds. But the court of appeals reasoned that "the duty to diversify under § 1104(a)(1)(C) imposes obligations on fiduciaries for defined benefit plans that are different from those for defined contribution plans." *Ibid.* Unlike fiduciaries of defined-benefit plans, fiduciaries for a defined-contribution plan "only select investment options; the participants then choose how to allocate their assets to the available options." *Ibid.* Fiduciaries like respondents "therefore need only provide investment options that enable participants to create diversified portfolios; they need not ensure that participants actually diversify their portfolios." *Ibid.* Because respondents indisputably discharged that statutory duty, petitioners' diversification claim failed as a matter of law. *Id.* at 9a.

The court of appeals next turned to petitioners' duty-of-prudence claim under § 1104(a)(1)(B). The first of the

"two wings of Plaintiffs' duty-of-prudence claim * * * * alleges the Fiduciaries should have known from publicly available information that the stock market underestimated the risk of holding ConocoPhillips stock." Pet. App. 10a. The court recognized that this Court's decision in *Dudenhoeffer* forecloses such a theory. There, this Court held that "where a stock is publicly traded, allegations that a fiduciary should have recognized from *publicly available information alone* that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Id.* at 10a-11a (quoting 573 U.S. at 426).

In the court of appeals' view, however, *Dudenhoeffer* does "not apply to the second wing of Plaintiffs' argument: that the ConocoPhillips Funds were imprudent because of the risk inherent in failing to diversify" those individual funds. *Id.* at 11a. Confronting that claim, the court of appeals observed that "ERISA contains no prohibition" on "single-stock funds." *Id.* at 12a. Indeed, "a per se rule against single-stock funds would also conflict with * * * ERISA's legislative history and implementing regulations, which clarify that single-stock investments can be a prudent investment option." *Ibid.* ERISA, moreover, "requires fiduciaries to provide" a regular statement advising participants of the "risk" of "holding more than 20 percent of a portfolio in the security of one entity," reflecting that offering single-stock investments is permissible. *Ibid.* (quoting 29 U.S.C. § 1025(a)(2)(B)).

The court of appeals therefore rejected petitioners' contention that "the Fiduciaries were obligated to force Plan participants to divest from the Funds." *Id.* at 13a. Moreover, respondents "ensured that they were not offering an imprudent investment option" "[b]y closing the ConocoPhillips Funds to new investments immediately after the spin-off." *Id.* at 15a.

As for the existing investments held in the ConocoPhillips Funds, respondents published the statutorily required warnings, expressly advising petitioners of the risk of maintaining concentrated holdings in "the common stock of a single company." *Id.* at 14a-15a (reproducing statements). Petitioners were free to sell or reinvest assets held in the ConocoPhillips Funds, but they chose a different option. "With a rising market, they chose to retain the ConocoPhillips Funds for over two years, balancing the risk of a want of portfolio diversity against the rising values of ConocoPhillips stock." *Id.* at 15a. ERISA allows petitioners to make that choice in a defined-contribution plan, and "[t]hey cannot enjoy their autonomy and now blame the Fiduciaries for declining to second guess that judgment." *Id.* at 16a. Thus, the court of appeals affirmed the dismissal of petitioners' claims. *Ibid.*

The full court denied rehearing en banc without recorded dissent. *Id.* at 50a.

REASONS FOR DENYING THE PETITION

This case involves similar issues to those presented in *Gannett Co.* v. *Quatrone*, No. 20-609 (CVSG'ed Apr. 19, 2021). In *Gannett*, the Fourth Circuit reversed the dismissal of ERISA claims based on fiduciaries' retention of a non-employer, single-stock fund after a corporate spin-off. *Stegemann* v. *Gannett Co*., 970 F.3d 465 (4th Cir. 2020). Petitioners here—represented by the same counsel as the *Gannett* respondents—are petitioners in name only. Consistent with their counsel's position in *Gannett*, petitioners urge the Court to *deny* certiorari because the decision below "does not create a circuit split [with *Gannett*] requiring this Court's review." Pet. 9. If, however, the Court grants review in *Gannett*, petitioners urge the Court to hold this case pending the decision in *Gannett. Ibid.*

Respondents agree that certiorari should be denied because no circuit split warrants the Court's review, as the Fourth Circuit rested its decision on factual allegations that are absent here. Regardless, any circuit disagreement is at most 1-1, and the Court would benefit from additional appellate courts addressing the question presented. The Fifth Circuit, moreover, correctly affirmed the dismissal of petitioners' claims because ERISA does not prohibit offering single-stock investment funds as part of a balanced menu of options, much less require the divestiture of such funds after a corporate spin-off.

If, however, the Court grants certiorari in *Gannett* and is inclined not to deny review here, respondents urge the Court to grant review in both cases. Considering the cases together will provide the Court with a more complete context for outlining the duties of fiduciaries with respect to single-stock funds held by ERISA plans.

I. RESPONDENTS AGREE WITH PETITIONERS THAT CERTIORARI SHOULD BE DENIED

A. No circuit split warrants plenary review

Although respondents do not endorse every aspect of petitioners' characterization of *Gannett* or the decision below, respondents agree with petitioners' conclusion that the two cases do not embody a circuit split meriting review here. See Pet. 7, 9.

1. Petitioners argued below that respondents violated the ERISA duty of diversification under § 1104(a)(1)(C) because the Phillips 66 plan held a large portion of its assets in ConocoPhillips stock. Pet. App. 8a-9a; see 29 U.S.C. § 1104(a)(1)(C) (requiring fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses"). The court of appeals correctly ruled that in the context of a defined-contribution

plan, the requirement to "diversify[] the investments of the plan" means the fiduciary must offer a "divers[e]" range of "investments" from which plan participants may choose. See Pet. App. 8a-9a. It does not mean that the fiduciary must forcibly reallocate participants' chosen investments to ensure that the plan's holdings remain balanced among the menu of options. *Ibid.*

Petitioners do not appear to press their § 1104(a)(1)(C) plan-diversification argument in their barebones petition. Instead, they contend that under the diversification component of the *prudence* duty, every *fund* the plan offers must itself be diversified. See Pet. i (charging that respondents "imprudently maintained an undiversified, single-stock fund").

In any event, no circuit split is alleged over whether the diversification duty of § 1104(a)(1)(C) requires a defined-contribution fiduciary to ensure that participants do not become concentrated in a particular option among a diverse array of funds. Below, petitioners cited only district-court cases from the defined-*benefit* context where a fiduciary was unremarkably held liable for its *own* investment choices that were overly concentrated in a single holding. See Pet. App. 8a & n.26 (distinguishing defined-benefit cases).

2. While tension exists between the legal approaches of the Fourth and Fifth circuits as to the diversification component of the prudence duty under § 1104(a)(1)(B), divergent factual allegations cast doubt on whether this case would have been decided differently in the Fourth Circuit. The Fourth Circuit in *Gannett* relied heavily on several factual allegations—none of which are present here—to hold that plaintiffs plausibly pleaded ERISA breaches. These distinctions may well have made the difference in the Fourth Circuit's disposition of the case. The Court should await a case where any legal variations

between the circuits more clearly caused differing outcomes.

The *Gannett* plaintiffs alleged that at the time of the spin-off, an "Employee Matters Agreement" expressly required the liquidation of the former-employer, single-stock fund. *Gannett*, 970 F.3d at 470-471. According to plaintiffs, "between the time of the spin-off and the decision to liquidate the TEGNA Stock Fund," the fiduciaries "repeatedly received risk warnings related to holding large quantities of TEGNA stock" that advised eliminating the fund. *Id.* at 471. The fiduciaries allegedly ignored those internal and external warnings until finally deciding to liquidate two years after the spin-off. *Ibid.* In addition, the fiduciaries "allegedly accepted qualitatively less thorough reports from its investment consultant on the TEGNA stock fund, as compared to the reports provided by the same consultant on the other funds on the Plan's menu." *Ibid.* Plaintiffs pleaded that "[d]uring the Committee's period of inaction, TEGNA stock prices fell" precipitously for two years, causing tens of millions of dollars in alleged losses. *Id.* at 472. Finally, the *Gannett* plaintiffs asserted that fiduciaries "should have made the liquidation decision and informed participants of [a plan to] liquidat[e] by [six months after the spin-off], and the liquidation should have been completed six months later." *Ibid.*

Petitioners made no such allegations in this case:

- No agreement allegedly required that the ConocoPhillips stock funds be liquidated.
- Respondents did not allegedly receive warnings from auditors or others advising that the ConocoPhillips stock fund should be liquidated. Cf. Pet. App. 3a (alleging only "publicly available information" "indicating ConocoPhillips was a risky investment").

- Respondents did not allegedly accept lower-quality reports from their consultants on the ConocoPhillips stock funds as compared to other plan funds.
- ConocoPhillips' stock price did not plummet in the two years after the spin-off. Instead, it *rose* more than 50% during that period, Pet. App. 3a, meaning that plan participants would have *lost* tens of millions of dollars if respondents forcibly divested ConocoPhillips stock shortly after the spin-off.
- Unsurprisingly, then, petitioners never alleged a specific time that prudence required respondents to liquidate the ConocoPhillips stock fund. See C.A. Rec. 12 (complaint).
- Respondents did not divest the single-stock fund after years of warnings. The ConocoPhillips Fund remains a part of the plan today.

The detailed factual allegations in *Gannett* were at least arguably outcome-determinative in the Fourth Circuit's analysis. That court disavowed creating a per se rule against single-stock funds; it allowed the case to proceed "*because of the allegations*, not because of a per se rule." *Gannett*, 970 F.3d at 477 n.9 (emphasis added). And when the Fourth Circuit summarized the "allegations sufficient to state a claim for a breach of the duty of prudence," it reiterated that "two years elapsed where Defendants did not address the TEGNA stock fund, even though" they were "on notice that the TEGNA stock fund was problematic because of the Employee Matters Agreement that called for liquidation" and they "received risk warnings from auditors." *Id.* at 476. By contrast, the Fifth Circuit recognized that ruling for petitioners would require creating a per se duty to divest single-stock funds—precisely what the Fourth Circuit said it

was not adopting. See Pet. App. 10a ("Plaintiffs allege that single-stock funds are inherently imprudent.").

It is thus far from clear that this case would have been decided differently under the Fourth Circuit's approach. Indeed, the Fourth Circuit openly conceded that "merely freezing the fund may be prudent in some cases." *Gannett*, 970 F.3d at 479. Meanwhile, the opinion below held that freezing (but not liquidating) the ConocoPhillips funds was prudent, particularly where it allowed petitioners the option to ride "a rising market" for over two years. Pet. App. 15a. Due to the starkly divergent allegations in *Gannett*, the Fourth Circuit's holding that plaintiffs there plausibly pleaded imprudence does not create a circuit split with the decision below. See *Bunting* v. *Mellen*, 541 U.S. 1019, 1021-1022 (2004) (Stevens, J., respecting the denial of certiorari) ("Given the unique features" of the decision below, "we do not know how the Fourth Circuit would resolve a case" on the facts presented in other circuits, "or, indeed, how the Sixth or Seventh Circuits would analyze the [different facts] at issue in this [Fourth Circuit] case.").

3. In any event, whatever degree of disagreement exists between the Fourth and Fifth circuits, the Court would benefit from further appellate consideration of the question presented. Only two courts of appeals have addressed that question in published opinions. Time will tell whether any circuit adopts the per se rule requiring divestiture of single-stock funds that petitioners advocate. And allowing additional courts of appeals to evaluate similar claims may lessen or heighten the need for certiorari. Immediate review is unnecessary, while "further percolation" could "assist" this Court's future decisionmaking. *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring in denial of certiorari). Accord *Calvert* v. *Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., re-

specting the denial of certiorari) (noting that "complex" legal question "would benefit from further percolation in the lower courts prior to this Court granting review").

B. The judgment below is correct

Certiorari should also be denied because the judgment below is correct.

1. Plaintiffs claim "that the duty of prudence requires each individual fund in a plan to be diversified." Pet. App. 10a. That argument is contradicted by the statutory provision that defines the duty of diversification. The diversification requirement operates exclusively at the plan level. 29 U.S.C. § 1104(a)(1)(C) (requiring fiduciaries to "diversify[] the investments of *the plan* so as to minimize the risk of large losses") (emphasis added). Thus, suits challenging individual investment options as insufficiently diversified under § 1104(a)(1)(C) fail to state a claim. See *Young* v. *Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31 (2d Cir. 2009) (per curiam panel including Sotomayor, J.) (rejecting duty-to-diversify claim under § 1104(a)(1)(C) based on alleged non-diversification of individual, single-equity funds within a defined-contribution plan); *Yates* v. *Nichols*, 286 F. Supp. 3d 854, 864 (N.D. Ohio 2017) (quoted at Pet. App. 8a-9a) (rejecting prudence and diversification claims challenging failure to force divestiture of former-employer stock fund after spin-off).

2. With the most natural avenue for a failure-to-diversify theory foreclosed, petitioners seek to recast their claim under the § 1104(a)(1)(B) duty of prudence, which includes an "overlap[ping]" duty to diversify. Pet. 3; see 29 U.S.C. 1104(a)(2) (exempting employer stock from the "prudence requirement * * * to the extent that it requires diversification"). But petitioners cannot explain why the diversification duty that operates at "the plan" level under § 1104(a)(1)(C) would somehow com-

pletely transform its character and require *fund*-level diversification when it is incorporated into § 1104(a)(1)(B)'s prudence mandate. The more straightforward reading of the statute dictates that the diversification duty always applies at the plan level wherever it is found. Because ERISA does not require diversification of each investment option, plaintiffs necessarily fail to state a claim when they allege that it was improper for fiduciaries to have offered a single-stock fund as part of a diversified menu of funds.

Consequently, the court of appeals correctly rejected petitioners' contention that "single-stock funds are inherently imprudent." Pet. App. 12a. For one thing, "a per se rule against single-stock funds would * * * conflict with * * * ERISA's legislative history and implementing regulations, which clarify that single-stock investments can be a prudent investment option." *Ibid.*

ERISA's regulations implementing the prudence duty further confirm that fiduciaries need not consider the diversification of individual investments in isolation. Rather, in undertaking a "particular investment or investment course of action" the fiduciary must consider the "composition of *the portfolio* with regard to diversification." 29 C.F.R. § 2550.404a-1(b)(2)(i)-(ii)(a) (emphasis added). The statutory design, reinforced by the governing regulations, reflect that the prudence duty does not require each fund to be diversified.

3. Petitioners' view also contradicts the nature of defined-contribution plans. A defined-contribution plan "gives participants the control by design, and it gives employees the responsibility and freedom to choose how to invest their funds." Pet. App. 13a (quoting *White* v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 994 (7th Cir. 2013), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409. The role of fiduciaries is to "offer a diversified

menu of investment options," not to scrutinize whether each fund is itself diversified. *Yates*, 286 F. Supp. 3d at 864.

In a defined-contribution plan, participants are free to assemble a non-diverse portfolio through their voluntary choices. Employees are empowered to "balanc[e] the risk of a want of portfolio diversity" against the possibility of higher returns if they so desire. Pet. App. 15a. That is why ERISA requires that participants be advised of the hazards of concentrating their holdings in single-stock funds. 29 U.S.C. § 1025(a)(2)(B); Pet. App. 14a-15a (quoting Phillips 66's extensive warnings about the "risk" of excessive concentration in "funds that hold the common stock of a single company"). These warnings would be unnecessary if fiduciaries had a statutory duty to avoid offering funds that invest in single stocks.

Requiring diversification of each fund would dramatically limit the participant autonomy that is the *raison d'etre* of the defined-contribution model. See *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011) ("An ERISA defined contribution plan is designed to offer participants meaningful choices about how to invest their retirement savings."). Besides single-stock funds, petitioners' position would rule out many ubiquitous investment options that would be deemed undiversified if considered in isolation. To take just a few examples: A large-cap stock fund (which contains no bonds), a bond fund (which contains no stocks), a real-estate investment trust, a gold fund, or an energy-sector fund all would be off-limits under petitioners' view. Each of these investments could play a valuable role within a diverse portfolio, but petitioners would deem them all per se imprudent under their fund-level diversification theory.

4. Petitioners' approach goes beyond barring fiduciaries from including a focused investment option in the

first instance. Their position demands that fiduciaries *forcibly divest* participants' holdings in former-employer, single-stock funds that a new company inherits following a corporate spin-off. No matter that participants have willingly invested in the former-employer stock fund for years and may wish to maintain those holdings even as they work for a new employer. Petitioners would require fiduciaries to close the former-employer stock fund and coerce participants to sell or reinvest their holdings elsewhere, doing even greater violence to the purpose of defined-contribution plans.

In the real world, petitioners' position puts fiduciaries between the proverbial rock and a hard place. On the one hand, if a fiduciary heeds petitioners' per se rule and sells off the former-employer stock holdings, it risks a duty-of-prudence lawsuit if, as here, the stock rises sharply after the spin-off. See *Tatum* v. *RJR Pension Inv. Comm.*, 761 F.3d 346, 351-355 (4th Cir. 2014) (fifteen-year-long duty-of-prudence suit against fiduciaries who *did* divest former-employer, single-stock fund after a spin-off). But fiduciaries who respect participants' desires and maintain the single-stock fund risk a mirror-image suit under petitioners' theory—even if they freeze new investments.

And that is only the beginning of the fiduciary's troubles, for under petitioners' view, the fiduciary must somehow decide the optimal time to divest the former-employer stock fund. In hindsight, a rapid divestiture may have helped the employees in *Gannett* but would have deprived Phillips 66's employees of two years of stock-price gains. Compare Pet. App. 3a with *Gannett*, 970 F.3d at 471-472. Little wonder then that petitioners studiously avoided pleading *when* it would have been prudent for respondents to forcibly sell off the ConocoPhillips stock funds. By complaining that fiduciaries should have acted on publicly available information to di-

vest a widely traded stock, petitioners directly contravene *Dudenhoeffer*'s central holding that fiduciaries need not outsmart an efficient securities market in deciding when to sell equity holdings. See 573 U.S. at 427.

ERISA does not foist any of these dilemmas on plan managers precisely because it does not prohibit single-stock investment options in the first place. Because the diversification obligation operates only at the plan level, a fiduciary fulfills its ERISA duties when it offers a single-stock fund as part of a plan that offers diversified choices. The judgment below appropriately respects the structure of defined-contribution plans, appreciates the unique conundrum faced by fiduciaries after a corporate spin-off, and honors the plain text and intent of ERISA.

5. Petitioners contend that merely alleging the existence of a single-stock fund is enough to defeat a motion to dismiss, consigning fiduciaries to litigating an affirmative defense under 29 U.S.C. § 1104(c) at summary judgment or trial. See Pet. 8. But that assertion overlooks the vital screening function this Court assigned to the motion to dismiss in *Dudenhoeffer*. In *Dudenhoeffer*, this Court acknowledged "the threat of costly duty-of-prudence lawsuits" facing fiduciaries following a drop in the stock price of an employer or other company in which plan assets were invested. 573 U.S. at 423. To separate "the plausible sheep from the meritless goats," the Court directed that district judges must employ "careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Id.* at 425. ERISA does not require that each fund within a plan be diversified and thus permits focused investment options as part of a diversified menu of funds. Consequently, ERISA certainly does not impose a per se rule requiring divestiture of single-stock funds after a spin-off. Thus, petitioners' bare pleading that respondents acted imprudently because they maintained the former-employer,

single-stock fund simply does not state a violation of the ERISA duty of diversification or prudence. Petitioners' theory exemplifies the type of legally deficient claim that is "weed[ed] out" at the motion-to-dismiss stage. *Ibid.*

II. THIS CASE SHOULD NOT BE HELD IF *GANNETT* IS GRANTED

While petitioners' counsel urge the Court to deny their own petition for the same reasons they oppose certiorari in *Gannett*, they request in the alternative that the Court hold this petition if the Court grants review in *Gannett.* Pet. 9.

The motivation for this strategy is evident. If the Court grants certiorari in *Gannett*, petitioners' counsel prefers that the Court address the question presented solely against the backdrop of the factual allegations made in *Gannett*, while this case—which lacks such allegations—lingers on the sidelines. As noted, the *Gannett* plaintiffs proffered factual allegations that, in the Fourth Circuit's view, demonstrated the imprudence of the fiduciaries in maintaining the former-employer, single-stock fund. See pp. 9-12, *supra*. Here, by contrast, petitioners made no similar allegations and instead endorse a per se rule requiring divestiture of single-stock funds. Pet. App. 10a, 12a ("Plaintiffs claim that holding a single-stock fund is imprudent per se" and that "the duty of prudence requires each individual fund in a plan to be diversified."). The threadbare allegations in this case highlight the extreme nature of petitioners' position.

That is precisely why this Court should not accede to petitioners' alternative request. Rather, if the Court grants certiorari in *Gannett* and is inclined not to deny review in this case, the Court should grant review of both cases and consider them together. Granting both cases will afford the Court a fuller context for deciding the question presented. That course will enable the Court to

squarely confront whether petitioners' per se position is correct and thus provide clearer guidance on whether fiduciaries may maintain single-stock funds as part of a fully diversified menu of options.

CONCLUSION

The petition for writ of certiorari should be denied. But if the Court grants certiorari in *Gannett* and is inclined not to deny certiorari here, respondents request that the Court grant both cases and consider them together.

Respectfully submitted.

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