No. 20-

IN THE

Supreme Court of the United States

GANNETT CO., INC., THE GANNETT BENEFIT PLANS COMMITTEE, and JOHN DOES 1-10,
Petitioners,

v.

JEFFREY QUATRONE, on behalf of GANNETT CO., INC. 401(K) SAVINGS PLAN and all others similarly situated,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER A. EISWERTH
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

LAURIN H. MILLS
SAMEK | WERTHER | MILLS LLC
2000 Duke St., Ste. 300
Alexandria, VA 22314
(703) 547-4693

TACY F. FLINT*
ERIC S. MATTSON
SIDLEY AUSTIN LLP
One S. Dearborn St.
Chicago, IL 60603
(312) 853-7000
tflint@sidley.com

Counsel for Petitioners Gannett Co., Inc. and The Gannett Benefit Plans Committee

October 30, 2020 * Counsel of Record

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., imposes on fiduciaries of ERISA retirement plans a duty to act with prudence and to "diversify[] the investments of the plan so as to minimize the risk of large losses." *Id.* § 1104(a)(1)(B)-(C). The Second and Fifth Circuits have held that in a defined contribution plan—in which participants choose how to invest their assets from a menu of investment options—these duties require fiduciaries to provide a diversified menu, but do not require that each separate option on the menu be diversified. Thus, in the Second and Fifth Circuits, a fiduciary does not breach the duty of prudence or diversification merely by offering an undiversified single-stock fund as one item on the menu as long as the overall menu is adequately diversified.

The Fourth Circuit here disagreed. Holding that "each available fund on a menu must be prudently diversified," App. 19a, the court concluded that Plaintiff, Respondent Jeffrey Quatrone, stated a claim for breach of the duties of prudence and diversification solely by alleging that Defendants, Petitioners Gannett Co., Inc. and The Gannett Benefit Plans Committee, allowed participants to invest in an undiversified single-stock fund. The question presented is:

Whether a plaintiff adequately pleads breach of the duties of prudence and diversification solely by alleging that fiduciaries permitted participants in a defined contribution plan to choose, from an adequately diversified menu of investment options, to invest in an undiversified single-stock fund.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Defendants-Petitioners Gannett Co., Inc. and The Gannett Benefit Plans Committee, and Plaintiff-Respondent Jeffrey Quatrone. Additionally, Mr. Quatrone sought leave to file an amended complaint in which Christina Stegemann would be substituted for Mr. Quatrone as Plaintiff, but the motion to amend the complaint was denied. App. 51a.

RULE 29.6 STATEMENT

Gannett Co., Inc. is a publicly traded company. Black Rock, Inc. and The Vanguard Group, Inc. each hold 10 percent or more of Gannett's stock. The Gannett Benefit Plans Committee is not a corporation.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Quatrone v. Gannett Co., Inc., No. 18-cv-325 (Sept. 26, 2018), motion for leave to amend denied, Feb. 13, 2019.

United States Court of Appeals (4th Cir.):

Quatrone v. Gannett Co., Inc., No. 19-1212 (Aug. 11, 2020), petition for reh'g denied, Sept. 22, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Gannett Co., Inc. and The Gannett Benefit Plans Committee (collectively, "Defendants") respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 970 F.3d 465 and is reproduced at App. 1a-45a. The Fourth Circuit's order denying rehearing *en banc* is reproduced at App. 68a-69a. The district court's order granting the motion to dismiss is reproduced at App. 52a-67a. The district court's order denying leave to amend is reproduced at App. 46a-51a.

JURISDICTION

The Fourth Circuit issued its decision on August 11, 2020, and denied the petition for rehearing and rehearing *en banc* on September 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 1104(a)(1)(B) states:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Section 1104(a)(1)(C) 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."

Other relevant provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., are reproduced in the Appendix, see App. 70a-73a.

INTRODUCTION

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court acknowledged "the threat of costly duty-of-prudence lawsuits" facing ERISA plan fiduciaries following a drop in the stock price of an employer or other company in which plan assets were invested. 573 U.S. 409, 423 (2014). To separate "the plausible sheep from the meritless goats" and limit "meritless, economically burdensome lawsuits," the Court laid out a demanding pleading standard for duty-of-prudence claims, requiring plaintiffs to plead that "special circumstances" beyond publicly available information made investment in a particular stock imprudent. *Id.* at 424-26.

This case presents the next generation of duty-of-prudence claims. Here, Plaintiff did not contend that any investment option in the retirement plan was imprudent due to its price, but instead claimed that by allowing plan participants to invest in a single-stock fund—that is, by including a single-stock fund on a diversified menu of investment options—Defendants breached the diversification requirement of the duty of prudence, as well as ERISA's standalone diversification requirement. In allowing Plaintiff's claim to proceed, the Fourth Circuit candidly created a circuit split regarding the scope of ERISA's diversification requirement and, in permitting Plaintiff's claim for breach of the duty of prudence to proceed absent allegations of "special circumstances," ruled in conflict with this Court's decision in *Dudenhoeffer*. The petition should be granted to resolve these questions and ensure predictability and uniformity in the law governing ERISA retirement plans.

Defendant Gannett Co., Inc. offers its employees a defined contribution 401(k) savings plan, which permits employees to allocate their investments among a menu of investment options. After Gannett's spinoff from TEGNA, Inc., one of these options was a fund of TEGNA stock in which participants were previously invested. While participants were free to divest from this fund at any point and were not permitted to invest more money in it after the spinoff, the Committee did not begin winding down the fund until two years after the spinoff. Plaintiff alleges that Defendants breached their duties of prudence and diversification by not closing the fund earlier because a non-employer single-stock fund is not appropriately diversified to limit investment risk.

Over the dissent of Judge Niemeyer, the Fourth Circuit reversed the district court's dismissal of these claims under Federal Rule of Civil Procedure 12(b)(6). The panel majority held that the diversification requirement of the duty of prudence requires not only diversification of investment options in the plan, but also of each individual option. In doing so, the Fourth Circuit expressly disagreed with the Fifth Circuit's decision in *Schweitzer v. Investment Committee of the Phillips 66 Savings Plan*, 960 F.3d 190, 195 (5th Cir. 2020), which held that the duty requires only diversification of the overall menu of investment options in a defined contribution plan. Indeed, as the panel majority acknowledged, this case and *Schweitzer* address "near-identical facts and claims"—yet reach opposite conclusions. App. 14a. The petition should be granted to resolve this split.

Additionally, even though Plaintiff alleged that the single-stock TEGNA fund was an imprudent investment based on publicly available information, the Fourth Circuit concluded that *Dudenhoeffer* did not apply. That holding conflicts with this Court's precedent. In *Dudenhoeffer*, this Court held that, absent "special circumstances," a fiduciary may "rely on the security's market price as an unbiased assessment of the security's value in light of all public information." 573 U.S. at 426 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 273 (2014)). Plaintiff did not plead special circumstances here; as a result, the Fourth Circuit's decision to allow Plaintiff's claim for breach of the duty of prudence to proceed conflicts with the decision of this Court.

Both of these issues are exceptionally important to the efficient operation of defined contribution plans under ERISA. If the Fourth Circuit's decision is left standing, plan fiduciaries will be forced to choose between closing their non-employer single-stock funds or risking significant litigation costs. In fact, if fiduciaries face a duty of diversification that applies at the fund level, they may be compelled to close single-sector funds and brokerage windows, further limiting the options available to plan participants. This looming uncertainty benefits neither plan participants nor fiduciaries.

STATEMENT OF THE CASE

A. Legal 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). These benefit plans include retirement plans.

One way ERISA promotes employees' interests is 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), and two, in particular, are relevant here: the duty of prudence and the duty of diversification, see 29 U.S.C. § 1104(a)(1)(B)-(C).

Prudence. The ERISA 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*, 135 S. Ct. 1823, 1828 (2015) (quoting 29 U.S.C. § 1104(a)(1)(B)). In recent years, after the Private Securities Litigation Reform Act limited avenues for securities fraud lawsuits following stock price drops, there has been a significant increase in stock-drop lawsuits claiming that ERISA retirement plan fiduciaries invested plan assets imprudently. These cases have often arisen in connection with employee stock ownership plans ("ESOPs"), which have substantial holdings in the stock of a single company—the employer. In the wake of this movement, this Court has repeatedly been called to weigh in on what is required to state a claim for breach of the duty of prudence in a stock-drop case.

In *Dudenhoeffer*, this Court rejected the notion that ESOP fiduciaries were entitled to any "presumption of prudence" because the statute "makes no reference" to any such presumption. 573 U.S. at 418-19. The Court instead clarified that "the same standard of prudence applies to all ERISA fiduciaries," *id.*, but that Rule 12(b)(6) allows courts to perform the "important task" of "divid[ing] the plausible sheep from the meritless goats," *id.* at 425. In particular, the Court explained that a plaintiff may not rely on generalized allegations that a fiduciary should have predicted a stock price drop: "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 426 (cleaned up).

Since *Dudenhoeffer*, confusion has persisted as to the pleading requirements for a duty-of-prudence claim in the stock-drop context. In 2016, the Court reversed a decision of the Ninth Circuit allowing a duty-of-prudence claim to proceed because that court had insufficiently scrutinized "whether the complaint in its current form 'has plausibly alleged' 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*, 136 S. Ct. 758, 759-60 (2016) (per curiam) (quoting *Dudenhoeffer*, 574 U.S. at 429-30). And last Term, the Court granted review in *Retirement Plans Committee of IBM v. Jander* to address "what it takes to plausibly allege an alternative action 'that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it,'" but the case was remanded without resolving the question to allow the Second Circuit to consider new arguments. 140 S. Ct. 592, 594-95 (2020) (per curiam) (quoting *Dudenhoeffer*, 573 U.S. at 428). In separate concurring opinions, Justices Kagan and Gorsuch indicated lingering disagreement as to how *Dudenhoeffer* would apply. See *id.* at 597 (Gorsuch, J., concurring) ("I do not read *Dudenhoeffer* so broadly" as Justice Kagan).

Diversification. 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 diversification is both an independent requirement and an element of the duty of prudence (because ensuring diversification is prudent). See 29 U.S.C. § 1104(a)(2).[1]

How the duty of diversification applies depends on whether the plan is a "defined benefit" plan or a "defined contribution" plan. 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). In this context, the duty of diversification governs the plan fiduciaries' decisions as to how to invest the entire spectrum of plan assets.

In a defined contribution plan, by contrast, "participants' retirement benefits are limited to the value of their own individual investment accounts." *Tibble*, 135 S. Ct. at 1826. Participants direct the investment of assets associated with their individual accounts, and the value of those accounts "is determined by the

[1] Neither the independent duty of diversification nor the diversification element of the duty of prudence applies to ESOPs, which by design invest heavily in employer stock. *See* 29 U.S.C. § 1104(a)(2).

market performance" of participants' selected investments. *Id.* In this context, fiduciaries "only select investment options; the participants then choose how to allocate their assets to the available options. These fiduciaries therefore need only provide investment options that enable participants to create diversified portfolios." *Schweitzer*, 960 F.3d at 196. ERISA further directs plan administrators to provide in each benefit statement to participants "an explanation … of the importance … of a well-balanced and diversified investment portfolio." 29 U.S.C. § 1025(a)(2)(B)(ii)(II). But the duty of diversification does not require fiduciaries of a defined contribution plan to "ensure that participants actually diversify their portfolios." *Schweitzer*, 960 F.3d at 196.

ERISA provides plan participants a cause of action for breach of both the duties of prudence and diversification. 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." *Schweitzer*, 960 F.3d at 195. A fiduciary held liable for breach of the duty of prudence or diversification "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach," and "shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a).

B. Factual Background

1. At its start early in the last century, Gannett Co., Inc. was a newspaper chain. It later acquired television stations and digital media, making it one of the largest mass media companies in the country.

In June 2015, the company "spun off" its publishing businesses into a separate publicly traded company also named Gannett Co., Inc. The company that retained the television and digital businesses changed its name to TEGNA, Inc. Today, Gannett continues to operate newspapers in cities and small towns across the country, papers such as *USA Today*, *The Arizona Republic*, and *The Des Moines Register*.

2. Before the spinoff, Gannett offered a 401(k) savings plan to its employees. This defined contribution plan provided a tax-advantaged way for employees to save money for retirement. App. 4a. The plan contained a menu of investment options. Employees and the company contributed to the plan, and then the employees determined how to invest their money from a menu of options. App. 4a-6a. One available option was a fund consisting solely of the company's own stock, and the company's contributions to employees' accounts were in the form of employer stock. App. 6a.

When the company split in two, its 401(k) plan was split as well. In their new plan, Gannett employees continued to hold the assets they had acquired before the spinoff. These assets included any investments in company stock, which due to the spinoff now comprised two separate funds: one holding stock in Gannett and the other holding stock in TEGNA.[2] Employees were permitted to keep their TEGNA stock in light of "the historical relationship" between TEGNA and Gannett. App. 7a. However, the Gannett Plan "froze" this single-stock fund, meaning that neither the company nor employees could invest additional assets in it. *Id.* Employees could choose to keep their existing holdings or move those investments into other funds within the plan. *Id.*

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[2] Employees remaining with TEGNA were transferred to a new TEGNA 401(k) plan. App. 6a.

At the time of the spinoff, midway through 2015, "the Plan held $269 million invested in TEGNA common stock, representing more than 21.7% of the Plan's total assets." App. 118a ¶ 32. By the end of that year, the Plan held $178 million in TEGNA stock (15.8% of the Plan's assets), and at the end of 2016, the Plan's holdings of TEGNA stock were down to $115 million (10.7% of the Plan's assets). App. 82a ¶ 32; App. 86a-87a ¶¶ 43, 45. This decline was the result of, one, employees' decisions to shift their investments into other funds and, two, drops in TEGNA's stock price.

The Gannett Benefit Plans Committee monitored the Plan throughout this time period. See App. 51a. A few months after the spinoff, the Committee hired an investment consultant. The Committee and the consultant discussed the TEGNA single-stock fund, but given that employees could transfer their investments and the Committee's belief that those invested in TEGNA "knew the company well," App. 127 ¶ 57, the Committee declined to force the sale of TEGNA stock—though it still provided the mandatory advisements warning of the risks of overconcentration of investments, see App. 95a ¶ 76. In the Spring of 2017, after hiring another consultant, the Committee revisited the single-stock fund and decided to sunset the fund in one year. App. 9a. If employees did not shift their investments from the TEGNA single-stock fund by July 2018, the fund would be closed and the investments moved elsewhere. The Committee provided notice of this change to employees on July 31, 2017. *Id*.

3. Plaintiff Jeffrey Quatrone participated in the Gannett Plan after the spinoff and ultimately sold his remaining TEGNA stock sometime before July 1, 2016. On March 22, 2018, he filed his complaint, al-

leging that Gannett and the Committee breached their fiduciary duties of prudence and diversification under ERISA by not forcing the divestment of the TEGNA single-stock fund more quickly.[3] Specifically, Plaintiff alleged that Defendants allowed too much investment in TEGNA stock, a supposedly volatile stock on which investment banks were "bearish," and then failed to decrease these holdings quickly enough after the spinoff, making the plan too heavily invested in one company and one industry. See App. 75a-76a ¶¶ 2, 4, 6; App. 99a ¶ 95. Mr. Quatrone purports to bring these claims on behalf of the Plan and similarly situated individuals who remained invested in the TEGNA single-stock fund after the spinoff.

C. Prior Proceedings

1. On April 16, 2018, Gannett and the Committee moved to dismiss the complaint for failure to state a claim. The district court granted that motion on September 26, 2018.

Applying *Dudenhoeffer*, the district court rejected Plaintiff's claim that Defendants breached their duty of prudence by allowing participants to invest in TEGNA when "publicly available information (e.g.[,] TEGNA's poor stock performance) should have informed the fiduciaries that investment into a single stock was an unnecessary risk." App. 58a. The district court reiterated this Court's holding that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing [a publicly traded] stock are implausible as a general rule, at least in the ab-

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[3] The Committee has not contested Plaintiff's claim that it is a fiduciary under ERISA. However, Gannett disputes that it qualifies as a fiduciary. *See* App. 4a n.1, 58a n.2.

sence of special circumstances." App. 60a (quoting *Dudenhoeffer*, 573 U.S. at 426). The court found that Mr. Quatrone had not alleged "any 'special circumstances' sufficient to support the contention that the market price was not an unbiased assessment of the security's value." App. 64a.

The district court also rejected Plaintiff's duty-to-diversify claim. The court recognized that "Plaintiff's claim is not that the Plan failed to offer investment options sufficient to allow participants to diversify their investments but rather that the Defendants were required to force the participants to diversify their investments." App. 65a-66a. The court rejected this theory, holding that § 1104(a)(1)(C)'s duty to diversify requires only that a fiduciary provide a diverse menu of options and does not impose an obligation to ensure each participant has diversified their investments. App. 66a.

Shortly thereafter, Plaintiff moved to amend the complaint to (1) swap Ms. Christina Stegemann for Mr. Quatrone as the class representative and (2) "conform the allegations to the facts learned through discovery." App. 48a. In these new allegations, Plaintiff changed his theory of when Defendants should have divested from the TEGNA single-stock fund: instead of claiming that Defendants should have closed the fund shortly after the spinoff, the amended complaint contends the fund should have been closed roughly a year after the spinoff, compare App. 76a-77a ¶ 6 with App. 125a-126a ¶ 52. The district court denied this motion because the allegations did not cure the original complaint's deficiencies. App. 51a.

2. In a divided opinion, the Fourth Circuit reversed dismissal of the complaint. Relying on a prior Fourth Circuit decision, the panel majority first explained

that "the duty of prudence's included duty of diversification" requires that "*each available fund* on a menu [of investment options] must be prudently diversified." App. 19a-20a (emphasis added) (citing *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423-24 (4th Cir. 2007)). The court concluded that Plaintiff stated a viable claim for breach of this duty by alleging that Defendants had permitted Plaintiff and other participants to retain their investments in the TEGNA single-stock fund after the spinoff, which (as a single-stock fund) was not diversified. App. 22a-23a.[4]

The panel reached this conclusion even though participants in a defined contribution plan, like the Gannett Plan, have complete freedom to move their investments into different funds. App. 26a-27a. It was undisputed that the Plan offered a diverse menu of options, and that Plaintiff could have avoided excessive concentration in the TEGNA Stock Fund—and in fact could have avoided investing in that fund at all. The panel openly acknowledged that its ruling created a square split with the Fifth Circuit, which had ruled in favor of the fiduciaries in "a case with near-identical facts and claims." App. 14a; see App. 26a-28a. The Fifth Circuit had reasoned that "where a fund is frozen, participants may divest if they choose to, and the plan distributes statutorily mandated warnings that portfolios are better if diversified, a plaintiff cannot state a claim that alleges a fi-

[4] The majority also held that Plaintiff stated a claim for breach of the duty of diversification by alleging that the Gannett Plan was excessively concentrated in media sector funds, as a result of participants' retained investments in the TEGNA Stock Fund in combination with investments in the Gannett ESOP fund. App. 22a-23a.

duciary should have forced divestment." App. 26a-27a (citing *Schweitzer*, 960 F.3d at 199). But, contrary to the Fifth Circuit, the panel majority concluded that *each fund* must be diversified if fiduciaries are to satisfy the duties of prudence and diversification. App. 27a. To the extent that participants' ability to choose from a diverse menu of options enters the analysis, the majority said, it comes not when a court reviews the sufficiency of the complaint, but instead when it addresses an affirmative defense, presumably at summary judgment or at trial. App. 29a-30a (citing 29 U.S.C. § 1104(c)(1)(A)(ii)).

Further, the panel concluded that *Dudenhoeffer* does not require Plaintiff to plead "special circumstances" to state a claim that the TEGNA single-stock fund was imprudent based on its "composition" as opposed to its "performance." App. 32a (emphasis omitted). The panel accepted the "efficient market hypothesis," App. 31a n.13, but nevertheless permitted Plaintiff's claim, based on publicly available information, that TEGNA stock was volatile—and, thus, an imprudent investment—to survive.

3. Judge Niemeyer dissented. First, he explained that the duty of diversification "is imposed with respect to '*the plan*,' not with respect to *each investment* offered by the plan." App. 40a (quoting 29 U.S.C. § 1104(a)(1)(C)). Like the Fifth Circuit, he noted that in defined contribution plans, as opposed to defined benefit plans, participants choose whether to invest in a particular fund, which means "the cause of any overconcentration in TEGNA stock was individual Plan participants' decisions to retain their assets in the TEGNA Stock Fund"—not a failure by Defendants to diversify the plan. App. 41a.

Second, while Judge Niemeyer recognized that a plaintiff could potentially state a claim if the TEGNA single-stock fund was an imprudent option, he determined that Plaintiff's effort to state such a claim here was foreclosed by *Dudenhoeffer*. App. 41a-42a. Because Plaintiff failed to plead "special circumstances," "his allegation that the TEGNA stock's volatility made the inclusion of the TEGNA Stock Fund an imprudent investment vehicle simply fails to state a claim in light of *Dudenhoeffer*." App. 44a.

Finally, Judge Niemeyer warned of the consequences of the panel's holding. Permitting a claim to proceed on these allegations "necessarily leads to the conclusion that no non-employer, single-stock investment option offered under an ERISA plan could ever satisfy the duty of prudence." App. 43a. Thus, if the Fourth Circuit's decision stands, fiduciaries of a defined contribution plan may not permit participants to invest in any non-employer, single-stock fund without risking liability under ERISA.

4. Defendants petitioned for rehearing and rehearing *en banc*. On September 22, 2020, the Fourth Circuit denied the petition. Six judges voted to deny the petition, three judges voted to grant the petition, and six judges recused. App. 69a.

On September 28, 2020, Defendants moved to stay the mandate pending this petition for certiorari, arguing that a stay was appropriate because the panel, by its own admission, created a split with the Fifth Circuit, and because the decision conflicts with *Dudenhoeffer*. The court granted the motion on October 16, 2020.

REASONS FOR GRANTING THE PETITION

The Court's review is appropriate here for at least three reasons. *First*, the Fourth Circuit's decision has created a square conflict with the Second and Fifth

Circuits on whether fiduciaries face a duty to diversify each investment option in a defined contribution plan, or whether the duty of diversification is limited to the overall menu of investment options in the plan. See Sup. Ct. R. 10(a). *Second*, the Fourth Circuit contradicted *Dudenhoeffer* when it held that, without pleading special circumstances, Plaintiff stated a valid claim by alleging that public information about TEGNA's volatility rendered the single-stock fund imprudent. See Sup. Ct. R. 10(c). *Third*, this case presents issues of exceptional importance to the operation of defined contribution plans under ERISA. See *id.* The petition should be granted.

I. THE COURTS OF APPEALS ARE SPLIT AS TO WHETHER ERISA REQUIRES DIVERSIFICATION OF EACH INDIVIDUAL INVESTMENT OPTION OR DIVERSIFICATION OF THE OVERALL PLAN MENU.

This case presents an acknowledged conflict between the federal courts of appeals concerning the duties of prudence and diversification under § 1104(a)(1). The Second and Fifth Circuits have held that, under ERISA, a plan fiduciary has a duty to ensure adequate diversification of *the menu* of investment options in a defined contribution plan—but not to ensure that each individual option is diversified. See *Schweitzer*, 960 F.3d at 195; *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009). However, in "a case with near-identical facts and claims" as *Schweitzer*, the Fourth Circuit held that the duties of prudence and diversification required both, rejecting the Fifth Circuit's holding outright and attempting to distinguish *Young*. App. 14a, 21a-22a, 29a. The decision below acknowledged that it created this conflict, and this case warrants the Court's review.

1. Outside the Fourth Circuit, the federal courts uniformly hold that a plaintiff does not state a claim for breach of fiduciary duty solely by alleging that a defined contribution plan includes a single-stock investment option on a diverse menu of options.

In *Schweitzer*, the Fifth Circuit rejected a materially identical claim to the one allowed by the Fourth Circuit here. That case presented the same basic facts as this case: following Phillips 66's separation from ConocoPhillips, the Phillips 66 defined contribution plan offered participants the choice of keeping their holdings in ConocoPhillips single-stock funds or transferring their investments into other funds. 960 F.3d at 193. Just like Defendants here, the plan managers did not permit new investments in the ConocoPhillips funds, but plaintiffs alleged that the plan fiduciaries violated their duty of diversification by not immediately forcing the sale of ConocoPhillips stock after the spinoff. *Id.*

The Fifth Circuit rejected this claim. First, agreeing with the Second Circuit's decision in *Young*, *Schweitzer* held that § 1104(a)(1)(C)'s duty of diversification, on its face, applies only to the menu of investment options in a defined contribution plan—not to each individual fund on its own. *Id.* at 195 ("This duty looks to a pension plan as a whole, not to each investment option."); see *id.* at 195 & n.25 (citing *Young*). Second, the court held that the duty of diversification contained in the duty of prudence does not "prohibit[] … individual account plans' offering single-stock funds." *Id.* at 197. In fact, as the court noted, such a "per se rule against single-stock funds would … conflict with the fact-specific focus of the duty of prudence, as well as with ERISA's legislative history and implementing regulations, which clarify that single-stock investments can be a prudent investment option." *Id.* at 198 (footnote omitted). Further, the court explained that, even accepting that single-stock funds can be risky, "it does not follow that the Fiduciaries were obligated to force Plan participants to divest from the Funds" because defined contribution plans provide "employees the responsibility and freedom to choose how to invest their funds" and "ERISA does not require fiduciaries … to act as personal investment advisers to plan participants"—particularly when the plan provides notice that diversification lessens risk. *Id.* at 198-99. Because the Phillips 66 fund was diversified at the plan level—and because the plaintiff did not allege special circumstances that would support a "prudence" challenge to the decision to permit participants to retain their investments in the ConocoPhillips single-stock funds—the claim failed. *Id.* at 199-200.

The Second Circuit in *Young* likewise rejected a breach of fiduciary duty claim based on allegations that fiduciaries offered "undiversified single-equity funds that [defendants] 'knew or should have known [were] ... too risky and volatile.'" 325 F. App'x at 32 (omission and second alteration in original). The panel (including then-Judge Sotomayor) explained that ERISA "requires a fiduciary to 'diversif[y] the investments of *the plan*" and that plaintiffs' "narrow focus on a few individual funds, rather than the plan as [a] whole, is insufficient to state a claim for lack of diversification" under 29 U.S.C. § 1104(a)(1)(C). 325 F. App'x at 33 (first alteration in original) (emphasis added). Bare allegations that individual funds were undiversified—like the claims allowed by the Fourth Circuit here—were insufficient. See *id.*

The district courts that have addressed this issue have similarly concluded that the duty of diversification focuses on the menu of options and does not prohibit offering non-employer single-stock funds in defined contribution plans. See, *e.g.*, *Harmon v. FMC Corp.*, No. 16-6073, 2018 WL 1366621, at *5 (E.D. Pa. Mar. 16, 2018) ("'The language of § 1104(a)(1)(C) contemplates a failure to diversify claim only when a plan is undiversified as a whole, not when 'individual funds within the plan are undiversified'") (brackets omitted) (quoting *Young*, 325 F. App'x at 33); *Yates v. Nichols*, 286 F. Supp. 3d 854, 864 (N.D. Ohio 2017) ("[E]valuating the plan as a whole makes good sense when the plan at issue is, like the Marathon Petroleum plan, a defined-contribution plan where each participant has his or her own account"), *appeal dismissed*, No. 18-3075, 2018 WL 1888998 (6th Cir. Apr. 17, 2018). According to each of these courts, therefore, a plaintiff does not avoid dismissal under Rule 12(b)(6) merely by alleging that fiduciaries of a defined contribution plan included a single-stock, non-employer fund on a diverse menu of investment options.

2. The decision below unsettled this uniform approach. As explained above, pp. 13-14, *supra*, the Fourth Circuit recognized that this case and the Fifth Circuit's decision in *Schweitzer* concern "near-identical facts and claims," App. 14a, but the panel expressly "disagree[d] with that court," App. 29a. The panel here concluded that providing an adequately diversified menu of options for participants to choose from is insufficient to satisfy the diversification component of the duty of prudence; instead, "each available fund on a menu must be prudently diversified." App. 19a. Here, Plaintiff's claim that the TEGNA Stock Fund was "inherently unduly risky because it put all the eggs in one basket," App. 9a, was sufficient to state a claim for breach of the diversification requirement of the duty of prudence—

notwithstanding Plaintiff's concession that Defendants provided a diversified menu of options to choose from.

Having expanded the duty to diversify beyond the bounds previously recognized by the federal courts, the panel further held that plaintiffs could state a claim based on a fiduciary's failure to close a frozen non-employer single-stock fund in a defined contribution plan. App. 26a-27a. The panel expressly rejected the Fifth Circuit's reasoning that the duty of prudence does not require such an action where participants in defined contribution plans could choose, at any point, to move their investments from the single-stock fund, and were appropriately informed of the risks of concentrated investments. App. 28a-30a. Rather, the Fourth Circuit concluded that participant choice was relevant only to the affirmative defense recognized in § 1104(c), not the scope of the duty itself. App. 29a-30a.

The sharp break between the Fourth and Fifth Circuits is not softened by the panel's suggestion that Defendants might avoid liability through an affirmative defense under § 1104(c). See App. 29a-30a; 29 U.S.C. § 1104(c)(1)(A)(ii) (providing that a fiduciary is not liable for "any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control"). There is a profound difference between imposing pleading requirements on plaintiffs, as *Schweitzer* did, and imposing the burden of proving an affirmative defense on Defendants, as the panel here did. *Dudenhoeffer* acknowledged "the threat of costly duty-of-prudence lawsuits" and emphasized that "the motion to dismiss for failure to state a claim" represents an "important mechanism for weeding out meritless claims." 573 U.S. at 423, 425.

The Fourth Circuit's approach—which does not "weed[] out meritless claims," but instead forces Defendants to remain embroiled in litigation until an affirmative defense can be proved and adjudicated—provides no comparable relief from "meritless, economically burdensome lawsuits." *Id.* at 424. And more fundamentally, fiduciaries pursuing an affirmative defense under § 1104(c) must show significantly more than that plan participants had an adequately diversified menu of options from which to select: the defense is available only if fiduciaries satisfy over twenty-five "intricate requirements of 29 C.F.R. § 2550.404c-1." App. 30a. In short, the divide between the decision below and *Schweitzer* is no mere pleading technicality, but a fundamental disagreement as to the breadth of fiduciary duties imposed by ERISA.

3. The Fourth Circuit's departure from the uniform rule was wrong for two main reasons. First, requiring diversification of individual funds is contrary to ERISA's text. Section 1104(a)(1)(C), by its own terms, requires fiduciaries to "diversify[] the investments *of the plan*." 29 U.S.C. § 1104(a)(1)(C) (emphasis added). As Judge Niemeyer explained, "[t]his duty is imposed with respect to '*the plan*,' not with respect to *each investment* offered by the plan." App. 40a; see *Schweitzer*, 960 F.3d at 195; *Young*, 325 F. App'x at 33.

Rather than reconcile its ruling with the statute's plain language, the panel majority suggested that there is a material difference between "the § 1104(a)(1)(C) duty of diversification and the § 1104(a)(1)(B) duty of prudence to the extent it requires diversification." App. 21a-22a (emphasis omitted). Although the panel acknowledged the holding of the Second Circuit in *Young* that the duty of diversification under § 1104(a)(1)(C) must be analyzed at the plan level, it purported to "distinguish that case as not addressing § 1104(a)(1)(B)'s requirement of prudence." *Id.* But neither the panel nor Plaintiff has articulated any coherent reason why this prudence-based duty to diversify applies to individual investment options when the statute's explicit diversification duty does not. Indeed, such a requirement would render § 1104(a)(1)(C)—and its express reference to diversification of "investments of *the plan*"—superfluous. See *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019) ("[W]e 'generally presume[e] that statutes do not contain surplusage.'") (second alteration in original) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006)).

Second, the panel's decision erodes the freedom of participants in defined contribution plans to choose how best to invest their savings—including in undiversified, single-stock funds. This result contravenes the aims of ERISA and drastically shrinks the distinction between defined contribution plans, where participants can customize their investment portfolio, and defined benefit plans, where the plan manager controls all aspects of investment. Compare 29 U.S.C. § 1002(34), with *id.* § 1002(35).

4. Regardless of the merits, this acknowledged split in the courts of appeals is stark. *Schweitzer* and this case present the same fact pattern. Indeed, plaintiffs in both cases are represented by the same counsel. Yet—fully aware of the split—the panel majority allowed Plaintiff's suit to proceed, even after the Fifth Circuit had "weeded out" an identical claim.

There is little likelihood that the Fourth Circuit will reverse course without this Court's intervention. The panel majority indicated that its decision was compelled by *DiFelice*, where the Fourth Circuit earlier "observed that [single-stock funds] 'would seem generally imprudent for ERISA purposes.'" App. 16a (quoting *DiFelice*, 497 F.3d at 424). The decision here thus represents firmly established law in that circuit. Moreover, the *en banc* court declined to review the panel's ruling, notwithstanding Judge Niemeyer's dissent and the panel majority's acknowledgment of a circuit split. This Court's intervention is necessary to ensure a uniform national rule.

II. THE FOURTH CIRCUIT'S DECISION IS INCONSISTENT WITH *DUDENHOEFFER.*

In *Dudenhoeffer*, this Court explained how pleading standards apply in cases alleging breach of the duty of prudence. 573 U.S. at 425-26. The decision below disregards those standards.

1. When this Court addressed the pleading standards for duty-of-prudence claims in *Dudenhoeffer*, it recognized 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 426. Put another way, this Court held that the only way to plead a claim for breach of the duty of prudence based on public information is by alleging "special circumstance[s] rendering reliance on the market price imprudent." *Id.* at 427. The Court further explained that a "special circumstance" is one that "affect[s] the reliability of the market price as an unbiased assessment of the security's value in light of all public information." *Id.* (quoting *Halliburton Co.*, 573 U.S. at 273).

The plaintiff in *Dudenhoeffer* premised his challenge to a single-stock fund on publicly available information that the company engaged in risky lending practices, that the defendants "were aware of the risks of such investments," and that "such risks made [the company's] stock an imprudent investment." *Id.* The Court determined that—absent allegations of "special circumstances"—relying on the market price was not imprudent. *Id.*

2. Plaintiff's claims here are similar in that they allege, based on publicly available information, that Defendants should have known that investment in the single-stock TEGNA fund was imprudent because the company's stock was "45.5% more volatile than the stock market." App. 92a ¶ 62. And like the *Dudenhoeffer* plaintiff, Plaintiff here failed to allege special circumstances that "would make reliance on the market's valuation imprudent." *Yates*, 286 F. Supp. 3d at 859-60 (quoting *Dudenhoeffer*, 573 U.S. at 427).

The Fourth Circuit nevertheless concluded that *Dudenhoeffer* was inapplicable to Plaintiff's claims for breach of the duty of prudence. The panel distinguished between a claim based on "reading tea leaves to predict the *performance* of a stock," which it recognized *Dudenhoeffer* foreclosed, and a claim "based on the fund's *composition*." App. 32a. The court acknowledged that "a fund's composition might be informed by publicly available information about the stocks that it contains and therefore that a plaintiff's allegations might reference such publicly available information," but concluded that "those references do not shift an imprudent non-diversification claim into the ambit of *Dudenhoeffer*." App. 32a-33a.

3. This ruling is inconsistent with *Dudenhoeffer*'s reasoning. *Dudenhoeffer* emphasized the need to "weed[] out" meritless claims at the motion to dismiss stage when plaintiffs allege only that publicly available information showed that a stock was too risky and there are no special circumstances that would pre-

vent the market from adequately pricing this risk. 573 U.S. at 425-27. Here, Plaintiff has not alleged any special circumstances that satisfy *Dudenhoeffer*'s standard. As Judge Niemeyer stated in dissent, "because [Plaintiff] has pleaded no special circumstances, his allegation that the TEGNA stock's volatility made the inclusion of the TEGNA Stock Fund an imprudent investment simply fails to state a claim in light of *Dudenhoeffer*." App. 44a. Indeed, the Eighth Circuit affirmed dismissal of a duty-of-prudence claim on facts similar to those presented here, where plaintiffs alleged that fiduciaries of a defined contribution plan acted imprudently by permitting participants to retain existing investments in the stock of a former affiliate after a spin-off. *Usenko v. MEMC LLC*, 926 F.3d 468, 471-72 (8th Cir.), *cert. denied*, 140 S. Ct. 607 (2019). The Eighth Circuit held that allegations about the former affiliate's declining stock price and liquidity problems were insufficient to establish that defendants "could not rely on the market's valuation" of that stock, and thus failed to state a claim under *Dudenhoeffer*. *Id.* at 473-74. The Fourth Circuit should have held the same here.

Moreover, the panel majority's effort to distinguish between claims based on a stock's performance and its composition disintegrates under its own weight. Either the panel concluded that a non-employer single-stock fund, regardless of its characteristics, is inherently imprudent for defined contribution plans, or it concluded that the TEGNA single-stock fund, based on its characteristics, was imprudent because it was too risky or too volatile. If it is the former, the ruling departed from the uniform position on the duty of diversification even further than discussed above, see pp. 16-21, *supra*, running afoul of ERISA. If it is the latter, then there is little distinction between Plaintiff's claim here and the one at issue in *Dudenhoeffer*. Fundamentally, both assert that an investment was imprudent due to the stock's publicly known risks, which an efficient market would capture in the stock price. *Dudenhoeffer* requires Plaintiff to plead special circumstances that would suggest that "both fiduciaries and plan participants could [not] 'rely on the security's market price as an unbiased assessment of the security's value in light of all public information.'" App. 44a (Niemeyer, J., dissenting) (quoting *Dudenhoeffer*, 573 U.S. at 426). Plaintiff has not done so, and the Fourth Circuit's decision to let this claim nevertheless proceed contradicts the reasoning of this Court's unanimous decision in *Dudenhoeffer*.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO THE EFFICIENT OPERATION OF ERISA DEFINED CONTRIBUTION PLANS.

Certiorari is also warranted because the question presented is exceptionally important.

1. If left unreviewed, the Fourth Circuit's expansion of the duty of diversification will have wide-ranging impacts on the administration and management of defined contribution plans.

At a minimum, this decision calls into question whether or in what circumstances a defined contribution plan may offer non-employer single-stock investment options. As Judge Niemeyer observed, the panel never explained "how plan fiduciaries could ever prudently offer a single-stock, non-employer fund." App. 43a. Prudent plan fiduciaries may accordingly close any single-stock funds to avoid significant litigation risk. Indeed, this risk has already been realized for defined contribution plans across the country that have been sued as a result of allowing participants to retain investments in legacy or affiliated company stock funds, as the Gannett Plan did. See, *e.g.*, *Schweitzer*, 960 F.3d 190; *Yates*, 286 F. Supp. 3d 854; *Usenko*, 926 F.3d 468; *Reidt v. Frontier Commc's. Corp.*, No. 3:18-cv-01538 (D. Conn. filed Sept. 11, 2018). More such claims are sure to follow the Fourth Circuit's decision.

But the impact of the Fourth Circuit's opinion is not limited to employer spin-off cases like this one. Imprudent funds under the Fourth Circuit's rationale would include not only those comprised of legacy or affiliated company stock in which employees are already invested, but also funds containing the stock of one landmark American company or another, such as Coca-Cola, Apple, or Facebook.

A fund-level duty of diversification equally calls into question whether plan fiduciaries can prudently offer other forms of non-diversified funds. This could include funds with particular investment strategies. See, *e.g.*, *Muri v. Nat'l Indem. Co.*, No. 8:17-CV-178, 2019 WL 2513695, at *1 (D. Neb. June 18, 2019) (claim alleging that fiduciaries breached the duty of prudence by including on the menu of a defined contribution plan "a non-diversified, long-term growth, mutual fund" that "invests in 'common stocks it believes are undervalued'"), *appeal dismissed*, No. 19-2408 (8th Cir. July 18, 2019). Or sector funds—those made up of stocks from companies in the same industry—which pose risks, as all investments do, but also offer opportunities for significant returns. See, *e.g.*, *Vanguard Sector & Specialty Funds*, Vanguard, https://investor.vanguard.com/mutual-funds/sector-specialty (last visited October 28, 2020). The same is true for brokerage windows, which are a mainstay for many 401(k) plans and allow plan participants to invest in select individual stocks of their own choosing.

The Fourth Circuit's decision calls all of these types of funds into question. To avoid the risk of litigation, plan fiduciaries may simply close such funds, leaving participants with fewer good choices.

Congress enacted ERISA "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516-17 (2010) (alterations in original) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). In furtherance of that goal, ERISA seeks to "assur[e] a predictable set of liabilities, under uniform standards of primary conduct." *Id.* at 517 (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). The Fourth Circuit's decision upsets these goals. The Court should grant review to clarify fiduciaries' obligations and ERISA's requirements.

2. This case presents an ideal vehicle to address these recurring issues. As mentioned above, this case and *Schweitzer* present the same fact pattern and reach opposite conclusions as to whether the duty of diversification applies at the fund level. The parties fully developed the arguments below, and the Fourth Circuit directly addressed the issue and *Schweitzer*'s contrary reasoning. There is no obstacle that would prevent the Court from addressing the questions presented.

CONCLUSION

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

Respectfully submitted,

CHRISTOPHER A. EISWERTH
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

LAURIN H. MILLS
SAMEK | WERTHER | MILLS LLC
2000 Duke St., Ste. 300
Alexandria, VA 22314
(703) 547-4693

TACY F. FLINT*
ERIC S. MATTSON
SIDLEY AUSTIN LLP
One S. Dearborn St.
Chicago, IL 60603
(312) 853-7000
tflint@sidley.com

Counsel for Petitioners Gannett Co., Inc. and The Gannett Benefit Plans Committee

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* Counsel of Record