No. 20-609

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an ERISA fiduciary entitled to dismissal on the pleadings of a plan participant's claim that the fiduciary imprudently maintained an undiversified, single-stock fund in a defined contribution plan where the plan does not restrict participants' ability to sell their shares of the undiversified fund and reinvest in other, diversified funds?

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INTRODUCTION

According to the petition, this case presents the Court with an opportunity to resolve a circuit split on the question whether ERISA simply requires that the fiduciary of a defined contribution plan offer a diversified "menu of investment options"—or whether the fiduciary must also diversify "each separate option on the menu." In other words, the purported question here is whether the fiduciary's duty to diversify applies at the plan or the fund level. "The Second and Fifth Circuits," Gannett argues, "require fiduciaries to provide a diversified menu, but do not require that each separate option on the menu be diversified." *See Schweitzer v. Inv. Comm. of Phillips 66 Sav. Plan*, 960 F.3d 190, 199 n.49 (5th Cir. 2020); *Young v. General Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009). But the Fourth Circuit, it claims, "expressly disagreed" with those decisions by applying the duty instead to "each available fund on a menu."

Even if the split that Gannett describes exists (and it does not), this case would not provide a vehicle for resolving it. The decision below held that the complaint adequately pleaded "that there was a failure to diversify at a plan level, not just at a fund level." App. 22a. The plaintiff here alleged that more than a quarter of the assets of the plan *as a whole* were invested in just two companies—Gannett's former affiliate, TEGNA, and Gannett itself—both of which are in the same industry and which "tend to rise and fall together." *Id.* Because the complaint, based on those allegations, "plausibly states a claim for a breach of the duty of diversification" at both the plan and fund levels, *id.* at 23a, the plaintiffs' allegations would survive on either side of Gannett's purported split. Real or not, that split is thus not implicated here.

But there is no split, and Gannett's claim to the contrary seriously misreads the decision below. Rather than rejecting the Second Circuit's unpublished decision in *Young*, the Fourth Circuit expressly "distinguish[ed]" it. App. 22a. *Young*, the court explained, only concerned ERISA's duty of *diversification* under section 1104(a)(1)(C). But there was no need to decide the scope of that duty here because the plaintiffs stated a claim under the separate duty of *prudence* contained in section 1104(a)(1)(B). That duty requires that all investment funds—not just the plan as a whole—be prudently diversified to protect participant assets. And far from creating a split with the Fifth Circuit, the Fourth Circuit *agreed* with *Schweitzer* on the issue Gannett identifies. Like the decision below, *Schweitzer* held that, "[u]nder ERISA, the prudence of investments or classes of investments offered by a plan must be judged *individually*." 960 F.3d at 199, n.49 (emphasis added). And under that test, *Schweitzer* concluded, the plaintiffs there had "plausibly alleged" a breach of the duty of prudence based on the fiduciaries' maintenance of an undiversified, single-stock fund. *Id.* at 198. That is just what the Fourth Circuit held here.

Gannett attempts to create the illusion of a split by repeatedly quoting out of context the Fourth Circuit's statement that it "disagree[d]" with *Schweitzer*. But that disagreement was about a different issue—one that the Fifth Circuit never decided and that Gannett's petition barely mentions—the role of participant choice and its application at the pleadings. The decision below, like *Schweitzer*, recognized that a plan participant's choice to invest in a single-stock fund may, under certain circumstances, defeat the participant's claim that the fund is imprudently diversified. But it then went one step further, examining the *stage* of the case at which

participant choice becomes a relevant consideration. Relying on ERISA's text, its implementing regulations, and the consensus of other circuits, the court concluded that participant choice is an affirmative defense turning on questions of fact that are inappropriate for resolution on a motion to dismiss. For that reason, it vacated the district court's dismissal on the pleadings, leaving Gannett free to assert its defense on remand.

Gannett does not ask this Court to grant certiorari to decide that issue—the only issue on which the Fourth Circuit "disagreed" with any other court. Nor is the issue worthy of this Court's review. Because the Fifth Circuit appears to have simply assumed that dismissal on the pleadings was proper, its decision hardly touches on, let alone conflicts with, the Fourth Circuit's contrary conclusion. And although *Schweitzer* missed the issue, earlier Fifth Circuit precedent holds—exactly like the decision below—that participant choice is an affirmative defense unfit for resolution on the pleadings. *See Kopp v. Klein*, 722 F.3d 327, 335 (5th Cir. 2013). Notwithstanding *Schweitzer*'s silence, that earlier precedent remains the law of the Fifth Circuit. Because every other circuit to have considered the question has held the same, there is no split, even on this issue, requiring this Court's intervention.

Gannett's backup argument—that the decision below conflicts with this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014)—is equally off base. In *Dudenhoeffer*, this Court imposed particularized pleading requirements when the plaintiffs allege that fiduciaries of an employee stock ownership plan (ESOP) owning publicly traded employer securities breached their duty of prudence by failing to "outperform[] the market." *Id.* at 427. Gannett pitches this case as a substitute for *Ret.*

Plans Comm. of IBM v. Jander, 140 S. Ct. 592 (2020), which this Court agreed to review to clarify *Dudenhoeffer*'s pleading standard but ultimately remanded without deciding the question.

As both the decision below and *Schweitzer* recognized, however, *Dudenhoeffer*'s pleading requirements do not apply in a case like this one, where the plan at issue is not an ESOP and the plaintiffs do not allege that the fiduciaries overpaid for stock. Instead, the plaintiffs here alleged that the non-employer stock fund was imprudent because it was undiversified. *Dudenhoeffer* could not possibly shed any light on this claim because ERISA exempts ESOP fiduciaries from any obligation to diversify.

Nor would it make any sense to extend *Dudenhoeffer* to this context. Given that completely undiversified investments are almost never prudent, there is no need to require plaintiffs to plead "special circumstances" casting doubt on a fiduciary's decision to invest all of a fund's assets in a single stock. Indeed, Congress mandated the opposite presumption, requiring plan fiduciaries to diversify "unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C).

If this Court seeks a substitute for *Jander*, it should first take a case that applies *Dudenhoeffer* to analogous claims in the ESOP context. *See, e.g.*, *Allen v. Wells Fargo & Co.*, 967 F.3d 767 (8th Cir. 2020) *filed petition for cert.* (Dec. 23, 2020) (No. 20-866). Gannett's petition does not ask this court to clarify *Dudenhoeffer*'s requirements, but to extend its holding to a new, unrelated context where its rationale makes no sense. To vastly expand *Dudenhoeffer*'s reach before explaining its meaning would exacerbate, not reduce, confusion. The Court should deny certiorari.

STATEMENT

A. Statutory background

Congress enacted ERISA 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). Congress's primary concern was "mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). The "inadequacy" of existing management standards, it found, was a threat to "the soundness and stability of plans." 29 U.S.C. § 1001(a). Congress thus imposed safeguards intended to "insure against the possibility that the employee's expectation of the benefit would be defeated through poor management." *Morash*, 490 U.S. at 115.

To that end, the law imposes "strict standards of trustee conduct … derived from the common law of trusts." *Dudenhoeffer*, 573 U.S. at 416. Those standards include "a number of detailed duties and responsibilities, which include the proper management, administration, and investment of plan assets." *Schweitzer*, 960 F.3d at 194. "Courts have often called these fiduciary duties the 'highest known to the law.'" App. 3a (quoting *Schweitzer*, 960 F.3d at 194).

This case involves two distinct but related duties under ERISA. *First*, the duty to diversify requires a plan 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). *Second*, the duty of prudence requires that fiduciaries act "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." *Id.* § 1104(a)(1)(B). Prudence requires fiduciaries to "determine that each investment is reasonably designed, as part of the portfolio, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain." *Schweitzer*, 960 F.3d at 196. (cleaned up)

Although the two statutory duties are separate, they significantly "overlap[]," because diversification is itself a key principle of prudent investing. *Id.* at 194–95. "In a 'diversified' portfolio, that is, one which contains a variety of investments, 'the risks of the various components of such a portfolio tend to cancel out; that is the meaning and objective of diversification.'" App. 17a (quoting *Summers v. State St. Bank & Tr. Co.*, 453 F.3d 404, 409 (7th Cir. 2006)). Thus, "trust law, ERISA case law, and the text of ERISA all understand diversification as an element of prudence*.*" *Id.* at 21a; *see* 29 U.S.C. § 1104(a)(2) (recognizing that "the prudence requirement" normally "requires diversification"); *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006) ("The duty to diversify is an essential element of the ordinary trustee's duty of prudence …"); *see also* Restatement (Third) of Trusts § 90 cmt. e(1). "After all, the point of the duty to diversify is not diversification for diversification's sake, but risk management." App. 19a–20a.

Finally, section 1104(a)(2) exempts investments in employer stock from "the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent it requires diversification) of paragraph (1)(B)." Congress would not have exempted employer stock from the prudence requirement "to the extent it requires diversification" unless diversification was an element of prudence.

Accordingly, ERISA creates two duties to diversify: the freestanding diversification duty under section 1104(a)(1)(C), and the diversification required for prudent investing under section 1104(a)(1)(B). Under the "somewhat circular" structure of those provisions, "each duty implicates the other." App. 13a n.7.

B. Factual background

In June 2015, the publicly traded media company TEGNA, Inc. spun off its publishing business into a new, independent company called Gannett Co., Inc.—the defendant in this case. *Id.* at 4a.[1] Before the spinoff, TEGNA had contributed to its employees' retirement accounts in the form of its own stock. *Id.* at 5a. The accounts of employees who transferred from TEGNA to the newly spun-off Gannett, for that reason, included significant investments in TEGNA stock. *Id.* at 6a.

As a consequence, Gannett's 401(k) plan wound up with most of its investments in a single-stock fund exclusively holding stock in TEGNA—now a separate company. *Id.* at 6a. Indeed, although Gannett froze new investments in the fund, more than 80% of the plan's stock holdings were, at the end of 2015, in TEGNA stock. *Id.* at 7a. That concentration "was doubly problematic because the Plan also had another single-stock fund devoted to [Gannett] stock." *Id.* at 9a. Because "the performances of the TEGNA stock and the [Gannett] stock were correlated," Gannett's extensive investment in both single-stock funds "exacerbate[ed] the concentration issues." *Id.* at 9a.

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[1] TEGNA was itself previously known as Gannett Co., Inc. App. 4a. To avoid confusion, this brief consistently refers to it as TEGNA. Defendants Gannett Co., Inc. and the Gannett Benefit Plans Committee are jointly referred to as Gannett.

Gannett justified its lopsided holdings to plan participants as a consequence of "the historical relationship between [Gannett] and TEGNA." *Id.* at 7a. It pledged, however, that "all outstanding investments" in the TEGNA single-stock fund "shall be liquidated and reinvested in other investment funds … on such dates and in accordance with such procedures as are determined by" the plan's administrator. *Id.* at 7a. Despite that promise, Gannett continued to maintain the fund in a "frozen holding pattern" for two years, even as TEGNA's stock plunged in value by more than 30%. *Id.* at 8a, 78a.

During that time, Gannett ignored repeated "risk warnings related to holding large quantities of TEGNA stock" and reports from its auditors that the plan's TEGNA and Gannett holdings "expose[d] [it] to concentration risk." *Id.* at 8a. Although Gannett reviewed other investments in that period, it "accepted qualitatively less thorough reports from its investment consultant" on the TEGNA stock fund, and neither considered nor took any steps toward liquidating the fund during that time. *Id.* at 9a.

Not until June 2017 did Gannett finally decide to liquidate the plan over a twelve-month period. *Id.* at 8a. But even when the plaintiff filed his amended complaint in August 2018—more than three years after the spinoff—the fund "had still not been fully liquidated." *Id.* at 8a. By that time, the fund had lost more than 45% of its value. *Id.* at 113a.

C. Procedural background

Plaintiff Jeffrey Quatrone filed suit against Gannett on behalf of the plan. *Id.* at 18. The complaint alleged that the TEGNA stock fund was "imprudent because it was a single-stock fund with high concentration risk," and that Gannett had repeatedly failed to respond to warnings

about that risk. *Id.* at 10a, 16a. According to the complaint, "the problem with the TEGNA Stock Fund was that, as a single-stock fund, it was inherently unduly risky because it put all the eggs in one basket, thus violating the diversification principle of sound investment." *Id.* at 9a. By taking no action to divest the fund for more than two years, it claimed, Gannett breached its fiduciary duties of prudence and diversification, costing the plan between $43 million and $57 million. *Id.*

The district court dismissed the complaint under Rule 12(b)(6) for failure to state a claim. *Id.* at 2a. The court concluded that the plaintiff had not alleged a breach of ERISA's duty to diversify, because that duty "requires diversity among the full set of funds offered in the menu of plan offerings but does not compel every individual fund in a plan to be diversified." *Id.* at 11a. In the alternative, the court held that the plaintiff's claims were barred by this Court's requirement in *Dudenhoeffer* that plaintiffs plead "special circumstances" related to alleged failures of ESOP fiduciaries to prudently value public stock. *Id.*

On appeal, the Fourth Circuit reversed. The court first held that it need not resolve the scope of the duty to diversify because the complaint adequately alleged that Gannett breached the related duty of prudence. *Id.* at 19a-20a. ERISA's duty of prudence, it held, requires "each available fund" in a plan, rather than just the plan as a whole, to be prudently diversified. *Id.* (citing *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423–24 (4th Cir. 2007)). And Gannett breached that duty, it concluded, by maintaining, despite warnings, an imprudently undiversified investment in its TEGNA stock fund for several years, costing plan participants millions of dollars. *Id.* at 22a–23a. In the alternative, however, the court concluded the complaint also alleged a breach of the duty

to diversify by alleging that the plan as a whole was excessively concentrated in the single-stock TEGNA fund—a problem exacerbated by the plan's simultaneous heavy investment in Gannett stocks. *Id.*

As to *Dudenhoeffer*, the court held that the decision did not require the plaintiff to plead "special circumstances" to state a claim that the TEGNA single-stock fund was imprudent based on its lack of diversification—an issue going to the fund's "composition" rather than, as in *Dudenhoeffer*, its "performance." *Id.* at 32a. Accordingly, the court vacated the district court's decision and remanded for further proceedings. *Id.*

REASONS FOR DENYING THE WRIT

I. There is no circuit split warranting review.

Gannett's primary argument for certiorari (at 2) is that "the Fourth Circuit candidly created a circuit split regarding the scope of ERISA's diversification requirement." According to Gannett, the Second Circuit in *Young* and the Fifth Circuit in *Schweitzer* held that fiduciaries need only provide participants with "a diversified menu" of investment options, while the Fourth Circuit's decision here instead required diversification of "each available fund on a menu." Pet. 19–20. This Court should grant review, it argues (at 16), to resolve the resulting "split as to whether ERISA requires diversification of each individual investment option or diversification of the entire plan menu."

Gannett is wrong, both because resolution of the split would not affect the outcome of this case and because the split does not exist. Although Gannett relies heavily on the Fourth Circuit's statement that it "disagree[d]" with the Fifth Circuit's decision in *Schweitzer*, that disagreement relates to a separate timing issue that the Fifth Circuit

appears to have overlooked. Gannett does not ask this Court to take up the Fifth Circuit's mistake, which contradicts prior circuit case law but does not itself create a circuit split.

A. Even assuming that the split Gannett asks this Court to resolve is real, this case would not provide a vehicle for resolving it. Gannett appears to assume that it could prevail under the test it attributes to the Second and Fifth Circuits because, regardless of whether its funds are diversified, it offers an adequately "diversified menu of investment options" at the plan level. Pet. 2. But that assumption is wrong. As the decision below explained, the plaintiff here alleged "that there was a failure to diversify at a *plan* level, not just at a fund level." App. 22–23a (emphasis added).

According to the complaint, Gannett invested the plan's assets in a lopsided manner that heavily favored the stocks of just two companies. At the end of 2015, more than 80% of the plan's stock holdings were invested in the stock of TEGNA—Gannett's former affiliate. *Id.* at 111a. And, on top of that, the plan also invested a significant share of its assets in Gannett stock. *Id.* at 111a–12a. Because "Gannett and TEGNA are in the same sector and tend to rise and fall together, the interplay between the two single-stock funds caused the Plan overall to have a diversification problem." *Id.* at 22a. The plaintiff alleged that these investments "caused the Plan to be undiversified" as a whole, posing "an imprudent and unnecessary undiversified risk for the workers and retirees who depend on the Plan for their retirement savings." *Id.* at 111a. Based on those allegations, the Fourth Circuit concluded, the complaint "plausibly state[d] a claim for a breach of the duty of diversification under § 1104(a)(1)(C)" at the plan level. *Id.* at 23a.

Although Gannett ignores this aspect of the decision below, the Fourth Circuit's holding means that resolution of the split Gannett identifies would have no impact on the outcome of this case. The plaintiff's claim, the court held, would "pass[] muster even under [the Second Circuit's decision in] *Young*"—the decision Gannett asks this Court to adopt. *Id.* at 22a. Even if this Court were inclined to decide the question presented, it should at least wait for a case in which the answer to that question actually matters.

B. In any event, the decision below did not create a circuit split, much less "expressly" create one, on the issue Gannett identifies. Gannett's claim to the contrary depends on muddling the distinction drawn by the cases between the duty of diversification under section 1104(a)(1)(C) and the duty of prudence under section 1104(a)(1)(B). The Fourth Circuit, however, carefully distinguished the two fiduciary duties and, as to each, either distinguished or agreed with the Second and Fifth Circuit decisions that Gannett claims it expressly rejected.

Duty to diversify. Gannett is correct that both the Second and Fifth Circuits hold that section 1104(a)(1)(C)'s duty to diversify applies at the plan, rather than the fund, level. As the decision below recognized, the Second Circuit in *Young* "addressed the § 1104(a)(1)(C) duty of diversification … and held that the duty 'contemplates a failure to diversify claim when a plan is undiversified as a whole.'" *Id.* at 21a–22a (quoting *Young*, 325 F. App'x at 33). And the Fifth Circuit in *Schweitzer* held the same, relying on *Young* to conclude that the duty to diversify "looks to a pension plan as a whole, not to each investment option." 960 F.3d at 195.

But the Fourth Circuit found no need to weigh in on that question here. First, it held the plaintiff here had pleaded a claim of lack of diversification at the plan level.

Second, "even assuming the Second Circuit was correct that § 1104(a)(1)(C) does not extend down to the fund level," it wrote, "we may distinguish that case as not addressing § 1104(a)(1)(B)'s requirement of prudence." App. 22a. And that separate duty, the court concluded, requires each fund to be prudently diversified regardless of section 1104(a)(1)(C)'s scope. *Id.* at 19a ("[D]iversification is a component of prudence.").

Gannett complains (at 22) that the decision below failed to "articulate[] any coherent reason why" the scope of the duties would be different. But that's the point: The Fourth Circuit declined to consider whether the (a)(1)(C) duty to diversify applied at the fund level, holding the plaintiff pleaded a breach of that section at the plan level and separately analyzing fund-level diversification under (a)(1)(B)'s prudence and diversification requirements. The Second and Fifth Circuits, however, did find the reason that Gannett seeks in the language of ERISA itself. As those courts noted, section 1104(a)(1)(C) requires diversification of "investments *of the plan* so as to minimize the risk of large losses." *See Young*, 325 F. App'x at 33 (emphasis added); *see also Schweitzer*, 960 F.3d at 195. Section 1104(a)(1)(B), in contrast, includes no such qualifier and instead imposes a general duty of prudence—including prudent diversification—in *all* investment decisions. Based on that language, Gannett itself argued below that, while the duty of diversification "involves the mix of funds available" in a plan, the duty of prudence requires "analysis of each fund individually." App. 21a.

Regardless, the important point for purposes of this petition is that the Fourth Circuit never decided the scope of the duty to diversify. As the court expressly recognized,

its decision therefore cannot conflict with other circuits on that issue. *Id.* at 22a.

Duty of prudence. On section 1104(a)(1)(B)'s duty of prudence, the Fourth Circuit's decision does not conflict with *Young* and *Schweitzer*. The Second Circuit in *Young* did not reach the duty of prudence. And the Fifth Circuit in *Schweitzer*, which did decide the issue, reached the same conclusion as the Fourth Circuit on the scope of that duty.

Like the decision below, *Schweitzer* relied on the Fourth Circuit's decision in *DiFelice* in "rejecting the view that 'any single-stock fund … would be prudent if offered alongside other, diversified Funds.'" 960 F.3d at 199 n.49 (quoting *DiFelice*, 497 F.3d at 423–24). Instead, it noted, "the prudence of investments or classes of investments offered by a plan must be judged *individually*." *Id.* (emphasis added) (quoting *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 305 (5th Cir. 2007)). Applying that test, the Fifth Circuit concluded that the plaintiffs had "plausibly alleged" a breach of the duty of prudence based on the fiduciaries' maintenance of an undiversified, single-stock fund, *id.* at 198—precisely the same conclusion, in other words, as the one reached by the Fourth Circuit.

Gannett nevertheless argues that the decision below conflicts with *Schweitzer*'s holding that the duty of prudence does not "prohibit[] ... individual account plans' offering single-stock funds." Pet. 17 (quoting *Schweitzer*, 960 F.3d at 197). Unlike the decision below, it argues, the Fifth Circuit rejected a "per se rule against single-stock funds." *Id.* But the Fourth Circuit did not adopt a "per se rule" either. As the court explained, its conclusion that the plaintiff stated a claim for breach of the duty of prudence was "not because of a per se rule" but "because of the

allegations" in the complaint "that there was a single-stock fund with a relatively high degree of risk and a failure to consider the surrounding facts and circumstances." App. 20a n.9. Gannett's claim of a conflict on this point is particularly far-fetched given that *Schweitzer* based its rejection of a per se rule on the Fourth Circuit's decision in *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014)—the same case on which the decision below also relied.

* * *

Bottom line: There is no "circuit split regarding the scope of ERISA's diversification requirement," as Gannett claims. Pet. 2. The only point at which the decision below overlaps with the decisions Gannett cites is on the Fifth Circuit's application of the duty of prudence. And on that point, the two courts reached the same conclusion.

C. The remainder of Gannett's argument on its claimed circuit split amounts to repeated out-of-context quotations of the Fourth Circuit's statement that it "disagree[d]" with the outcome in *Schweitzer*. Unfortunately for Gannett, however, that disagreement is not about the scope of ERISA's diversification duties—the only issue that Gannett asks this Court to review. Rather, the Fourth Circuit "disagree[d]" with the Fifth Circuit's resolution of the case based on a separate issue that *Schweitzer* did not decide or even acknowledge: "the appropriate way to account for participant choice." App. 29a.

The courts were in alignment on the principle involved, even on this issue. Both agreed that "the ability of a participant to calibrate their retirement investing based on their individual situation is one of the virtues of the defined contribution plan structure." *Id.*; *see Schweitzer*, 960 F.3d at 198. And both agreed that "fiduciaries should

not be liable for participant autonomy." App. 29a; *see Schweitzer*, 960 F.3d at 199 (holding that participants cannot "blame the Fiduciaries for declining to second guess [their] judgment"). For the Fifth Circuit, however, that was the end of the matter. After observing that participants were "free to sell off their investments at any time and reinvest in other funds," it simply affirmed the district court's dismissal for failure to state a claim. *Id.* The Fourth Circuit, in contrast, did not stop there. Instead, the court went on to consider the additional question of "whether a defendant may invoke that autonomy in a motion to dismiss." *Id.*

It was only at this final step that the Fourth Circuit "disagree[d]" with *Schweitzer*. "[A]s for participant choice," the court observed, "ERISA accounts for that choice with the situational safe harbor of § 404(c)." *Id.* at 34a. The safe harbor provides that fiduciaries are not liable for losses resulting from a participant's "exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). The "fact that plan participants exercise[] control over plan assets," however, "does not automatically trigger the section 404(c) safe harbor." *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 599 (6th Cir. 2012). As the decision below explained, Department of Labor regulations include more than "twenty-five requirements that a fiduciary must meet before invoking the … safe harbor." App. 30a (citing 29 C.F.R. § 2550.404c-1(a)(1)). To help ensure that a participant's control is meaningful, those regulations prescribe in detail "the kinds of plans that are 'ERISA section 404(c) plans,' the circumstances in which a participant or beneficiary is considered to have exercised independent control over the assets in his account as contemplated by section 404(c), and the consequences of a participant's or beneficiary's exercise of control." 29 C.F.R. § 2550.404c-1(a)(1).

"Because the § 404(c) affirmative defense is custom-tailored to the issue of participant choice in a defined contribution plan," the Fourth Circuit "conclude[d] that the fiduciary of a defined contribution plan should not have the benefit of safe harbor on account of participant choice without proving the § 404(c) defense first." App. 30a. And because the safe harbor is an affirmative defense requiring resolution of factual issues, the defense cannot be resolved at the pleading stage. *See id.* "In other words, as-yet-unproven participant choice does not abrogate a fiduciary's duties such that a plaintiff fails to state a claim." *Id.*

In so holding, the court joined the consensus of every court of appeals to have addressed the issue. *See Pfeil*, 671 F.3d at 598; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238 (10th Cir. 2002); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 (3d Cir. 1996). That consensus includes the Fifth Circuit itself, which held in *Kopp v. Klein*—a published decision predating *Schweitzer*—that "the safe harbor provision is an affirmative defense that is not appropriate for consideration at the motion to dismiss stage," at least where "the plaintiffs did not raise it in the complaint." 722 F.3d 327, 335 (5th Cir. 2013).

Gannett does not ask this Court to grant certiorari to resolve the proper timing of a defense based on participant choice—the only issue on which the decision below and *Schweitzer* diverged. Indeed, Gannett barely addresses the issue, limiting its discussion to three paragraphs in its petition and describing the Fourth Circuit's decision on the safe harbor as a "further" holding that "does not soften" the split over which it seeks review. Pet 20–21. And, in any event, the Fifth Circuit's apparent mistake does not create a circuit split necessitating this

Court's review. The panel in *Schweitzer* did not adopt any holding on the safe-harbor issue that conflicts with the decision below. It did not cite section 1104(c) or its implementing regulations. Nor did it identify or attempt to distinguish the court of appeals decisions—including its own—that have applied the safe harbor to foreclose a defense of participant choice at the pleadings stage. Instead, the court appears to have simply missed the issue.

That *Schweitzer* overlooked an important issue suggests that it was wrongly decided under ERISA and the Fifth Circuit's own precedent. It does not, however, create a circuit split. When, as here, an issue is "assumed … without explanation" by a Fifth Circuit panel—even an issue crucial to a case's outcome—that "silence is best viewed as a failure to address or decide the issue." *Wilkerson v. Whitley*, 28 F.3d 498, 506 n.12 (5th Cir. 1994). Thus, "[w]hen an issue is not argued or is ignored," the decision on that issue "is not precedent to be followed in a subsequent case in which the issue arises." *Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

Even more significantly for this case, the panel's silence here postdates the Fifth Circuit's precedential decision in *Kopp v. Klein*, 722 F.3d 327 (5th Cir. 2013), which adopted precisely the same rule as the Fourth Circuit below. When panel decisions in the Fifth Circuit conflict, the earlier decision controls. *See Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 n.2 (5th Cir.1992). And when the later panel "makes no mention of the earlier case," the later opinion is simply "a nullity." *Grabowski v. Jackson Cty. Pub. Defenders Off.*, 47 F.3d 1386, 1400 n.4 (5th Cir. 1995) (Smith, J., concurring and dissenting). That is the case here: *Schweitzer*'s failure to address,

distinguish, or even acknowledge its conflicting precedent leaves *Kopp* undisturbed as the law of the circuit.

Even if *Schweitzer* could be read to create a split, that split would be, at most, a shallow and unconsidered one. *Schweitzer* is less than a year old. Because the decision gave no reasons for its departure from circuit precedent and the consensus of other circuits, there is every reason to believe that, when called on to reconsider the question, the Fifth Circuit will return to the fold. If it chooses instead to endorse the outcome in *Schweitzer*, this Court will have the opportunity to address the split at that time with the benefit of a reasoned decision. But for now, the prudent course is for this Court to allow the Fifth Circuit the opportunity to reconcile its own precedent before jumping into the fray.

II. The circumstances here do not implicate this Court's decision in *Dudenhoeffer*.

A. Gannett's alternative argument is that, "in permitting Plaintiff's claim for breach of the duty of prudence to proceed absent allegations of 'special circumstances,'" the Fourth Circuit "ruled in conflict with this Court's decision in *Dudenhoeffer*." That is simply wrong. As both the decision below and the Fifth Circuit in *Schweitzer* recognized, *Dudenhoeffer* does "not address the prudence of holding a single-stock fund." *Schweitzer*, 960 F.3d at 197; *see* App. 32a. Nor could it, given that the duty of prudence does not even require diversification of an ESOP like the one at issue in *Dudenhoeffer*. 573 U.S. at 417. Indeed, *Dudenhoeffer* recognized that ERISA's special exemption from diversification requirements for ESOPs was necessary precisely because single-employer stock funds "are *not* prudently diversified." *Id.* at 416.

The pleading standards that *Dudenhoeffer* requires turn on "considerations" bearing on the plausibility of the

specific claims there—that ESOP fiduciaries had breached their duty of prudence by overvaluing a publicly traded stock. 573 U.S. at 426. The Court did not adopt those considerations as one-size-fits-all rules for ESOP claims, much less for ERISA claims in general. Rather, it emphasized that whether a complaint states a plausible claim for breach of the duty of prudence "will necessarily be context specific," turning "on 'the circumstances . . . prevailing' at the time the fiduciary acts." *Id.* at 425 (quoting 29 U.S.C. § 1104(a)(1)(B)). *Dudenhoeffer* therefore requires "careful, context-sensitive scrutiny of a complaint's allegations." *Id.*

Gannett, in contrast, asks for a broad-brush application of *Dudenhoeffer* to circumstances far beyond those that rendered its holding relevant. Unlike *Dudenhoeffer*, this is not an ESOP case, so the defendants are not at risk of the unique conflicts that arise when ESOP fiduciaries are alleged to have access to inside information that a stock is overpriced. *See Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 674 (7th Cir. 2016). And Gannett acknowledges that the plaintiff here does "not contend that any investment option in the retirement plan was imprudent due to its price." Pet. 2. Unlike the overpayment claim in *Dudenhoeffer*, a claim that a fiduciary was "imprudent because of the risk inherent in failing to diversify. . . does not turn on publicly available information or whether Fiduciaries can beat the market." *Schweitzer*, 960 F.3d at 197. Such a claim thus does not require fiduciaries to "read[] tea leaves to predict the *performance* of a stock—what *Dudenhoeffer* forecloses as a basis for liability." App. 32a.

For the same reasons, this case is no replacement vehicle for *Jander*, 140 S. Ct. 592 (2020). This Court granted review in *Jander* to address "lingering

disagreement as to how *Dudenhoeffer* would apply" to duty-of-prudence claims in the ESOP context. Pet. 7. Gannett, in contrast, asks the Court to apply *Dudenhoeffer*'s pleading standards to unrelated, non-ESOP claims. To substantially broaden *Dudenhoeffer*'s scope before the Court has had the chance to clarify its meaning would complicate, rather than clarify, the law.

B. Gannett fails to identify even a single appellate decision extending *Dudenhoeffer* to a case like this one, much less a circuit split on the issue. It argues only (at 25) that the Eighth Circuit in *Usenko v. MEMC LLC*, 926 F.3d 468 (8th Cir. 2019), applied *Dudenhoeffer* to "facts similar to those presented here." But the claim in *Usenko* was that fiduciaries had failed to "outperform[] the market"—a claim for which the similarity to *Dudenhoeffer* was "undeniable." 926 F.3d. at 473. *Usenko* expressly declined to address the duty to diversify and thus sheds no light on *Dudenhoeffer*'s relevance to such claims. *Id.* at 475 n.5.

Nor would it make sense to extend *Dudenhoeffer* to this context. This Court in *Dudenhoeffer* required plaintiffs claiming that a fiduciary overpaid for public stock to allege "special circumstances" because, where a stock is publicly traded and the fiduciary's decision is based on public information, it usually "is not imprudent" for a fiduciary "to assume that a major stock market … provides the best estimate of the value." 573 U.S. at 427.

But the exact opposite is true in a duty-to-diversify case: Outside the ESOP context, it is almost always *imprudent* for a fiduciary to invest 100% of a fund's assets in a single stock. *See id.* (noting that single-stock funds are not prudently diversified); *DiFelice*, 497 F.3d at 424 (observing that single-stock funds "would seem generally imprudent for ERISA purposes"); *Schweitzer*, 960 F.3d at

198 (noting that "courts have expressed concern about the prudence of single-stock funds" because they "may encourage investors to put too many eggs in one basket"); *see also* App. 16a. It would thus be nonsensical to require plaintiffs alleging a failure to diversify to address the considerations this Court identified in *Dudenhoeffer*. If anything, the failure to diversify, in the absence of special circumstances, is presumptively *imprudent*. Indeed, Congress mandated essentially that presumption in ERISA, requiring plan fiduciaries to diversify "unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C).

Gannett nevertheless argues that the "claims here are similar" to those in *Dudenhoeffer* because the plaintiff "allege[s], based on publicly available information, that [Gannett] 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.'" Pet. 24. But the availability of public information about a stock's volatility, at most, suggests that the volatility should be reflected in a lower stock price, and, as a consequence, that buying the stock at that price would be prudent. *See Dudenhoeffer*, 573 U.S. at 427. In some circumstances, investing "in a risky security as part of a diversified portfolio" can be "an appropriate means to increase return while minimizing risk." *DiFelice*, 497 F.3d at 423. Even if investing in a particular stock is prudent, however, that would not support the conclusion that investing *all* of a fund's assets in that stock is also prudent. Even if a stock's price accurately takes into account an investment's individual risks, it does not take into account the investor's failure to buy that stock as part of a diversified portfolio. *See Schweitzer*, 960 F.3d at 197 n. 36 ("[S]tock prices in efficient markets do not reflect risks that an investor could eliminate through diversification.").

Consider, for example, a fiduciary who, in the year 2000, chose to invest the entirety of a fund's assets in online retailer Pets.com. Under Gannett's proposed application of *Dudenhoeffer*, that fiduciary could not be said to have acted imprudently—even after losing everything in the company's almost immediate bankruptcy—because the stock's market price of $14 per share at the time of purchase would have accounted for the investment's significant risks. But, even without the benefit of hindsight, no rational fiduciary—much less a prudent one—would have bet *all* of a fund's assets on a single startup. Gannett's decision to go all-in on a floundering media company is no more rational.

Limiting failure-to-diversify claims in such cases to "special circumstances" would let fiduciaries off the hook for gambling away the assets of beneficiaries with unnecessarily concentrated investments. That would defeat ERISA's core purpose of preventing the "possibility that the employee's expectation of the benefit would be defeated through poor management." *Morash*, 490 U.S. at 115. That is reason enough to reject Gannett's call to apply *Dudenhoeffer* here.

III. Gannett's "exceptionally important" policy concerns are unrealistic and exaggerated.

Gannett's policy arguments are difficult to credit. It argues (at 22) that this case raises "exceptionally important" issues because the decision below "erodes the freedom of participants … to choose how best to invest their savings—including in undiversified, single-stock funds." That is nonsense. The decision below does not prohibit plan participants from continuing to participate in single-stock funds and other imprudent investments if they choose. It just requires—in line with every other circuit to have considered the issue—that fiduciaries raise

participant choice as an affirmative defense rather than as a basis for dismissing a plaintiff's complaint out-of-hand. App. 29a–30a.

Gannett nevertheless predicts (at 4) that the Fourth Circuit's decision will limit investment options because "plan fiduciaries will be forced to choose between closing their non-employer single-stock funds or risking significant litigation costs." Relying on *Dudenhoeffer*, it argues that "the motion to dismiss for failure to state a claim" is an "important mechanism for weeding out meritless claims" and avoiding "the threat of costly duty-of-prudence lawsuits." Pet. 20 (quoting *Dudenhoeffer*, 573 U.S. at 423, 425). As already explained, however, failure-to-diversify claims do not pose the sorts of special problems that would justify invoking the considerations this Court articulated in *Dudenhoeffer.* The bare desire of fiduciaries to avoid litigation costs is no reason to exempt them from the normal rules of civil procedure.

Gannett's argument (at 21) that pursuing participant choice as an affirmative defense involves too many "intricate requirements" is even less sympathetic. Those requirements are set by Department of Labor regulations implementing ERISA, the validity of which Gannett does not challenge. *See* 29 C.F.R. § 2550.404c-1. If it believes the rules are too stringent, Gannett is free to bring its complaint to Congress or to the agency. But it cannot have the regulations set aside by a court just to save it the cost of compliance.

Gannett's fear that the risk of marginal litigation costs will drastically reduce investment options is especially hard to swallow given that the courts of appeals—including the Fifth Circuit—uniformly treated participant choice as an affirmative defense for decades before *Schweitzer* was decided last year. *See, e.g.*, *Kopp*, 722 F.3d

at 335; *Unisys*, 74 F.3d at 446. But even if Gannett were correct that the Fourth Circuit's decision could drive fiduciaries to curtail single-stock funds, that result is not necessarily an undesirable one. "[P]lacing retirement funds in *any* single-stock fund carries significant risk." *DiFelice*, 497 F.3d at 424. That is why Congress requires ERISA fiduciaries to diversify "unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C). Indeed, as even Gannett itself recognized, "participant choice" was no reason to retain an imprudently undiversified option—after all, it pledged at the time of the spin-off to liquidate and reinvest "all outstanding investments" in the TEGNA single-stock fund. App. 7a–8a.

The rule that Gannett asks this Court to adopt, however, would virtually eliminate fiduciaries' incentive to avoid those risks. If imprudent decisions were excused just because participants could have independently chosen their own, more diversified investments, "[a]ny participant-driven 401(k) plan . . . would be prudent." *DiFelice*, 497 F.3d at 424. That would be a "perverse" result. *Id.*

CONCLUSION

This Court should deny Gannett's petition for a writ of certiorari.

Respectfully submitted,

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