No. 20-609

IN THE

Supreme Court of the United States

GANNETT CO., INC., *ET AL.*,

Petitioners,

v.

JEFFREY QUATRONE,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The United States concludes that the petition should be denied because "the court of appeals' decision does not create any clear conflict with the decision of another federal court of appeals." U.S. Br. 10. This conclusion would come as a surprise to the Fourth Circuit, which candidly acknowledged that it was departing from the decision of the Fifth Circuit in *Schweitzer v. Investment Committee of Phillips 66 Savings Plan*, 960 F.3d 190 (5th Cir. 2020), *petition for cert. filed*, No. 20-1255 (U.S. Mar. 8, 2021), even though the two cases involved "near-identical facts and claims." App. 14a. The Fourth Circuit held that "each available fund on a menu must be prudently diversified," *id.* at 19a, and concluded that Plaintiff stated a claim for breach of fiduciary duty by alleging that the Gannett Plan included "a single-stock fund with inherent concentration risk," *id.* at 33a—even though the Plan offered a diversified menu of investment options from which participants could choose. The Fifth Circuit, by contrast, affirmed dismissal of the same claim.

This is an indisputable circuit split that warrants this Court's attention. The petition should be granted.

If the petition is not granted, it should be held for this Court's pending decision in *Hughes v. Northwestern University*, No. 19-1401 (U.S. cert. granted July 2, 2021). Like this case, *Hughes* addresses the scope of the ERISA duty of prudence with respect to individual investment options on a diversified menu in a defined contribution plan. How the Court interprets the duty of prudence in *Hughes* will likely impact the outcome of this case.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED.

A. The Circuits Are Split.

The fundamental premise of the United States' position is that the Fourth Circuit did not mean what it said. According to the United States, the Fourth Circuit's decision does not "meaningfully conflict with the Fifth Circuit's decision in *Schweitzer*," and Gannett's argument otherwise "misreads the court of appeals' holding here." U.S. Br. 20. But the Fourth Circuit evaluated the Fifth Circuit's decision, and declared that it "*disagree[d]* as to the effect of participant choice on a fiduciary's duties with respect to a defined contribution plan." App. 14a (emphasis added). Based on that disagreement, the Fourth Circuit reached the opposite conclusion from the Fifth Circuit, holding that Plaintiff stated a claim for breach of fiduciary duty where the Fifth Circuit had affirmed dismissal, even though, in the Fourth Circuit's words, the two cases involved "near-identical facts and claims." *Id.* If Gannett's conclusion that the decisions conflict is a "misreading" of the Fourth Circuit's decision, then black is white, up is down, and George Orwell is somewhere laughing at the irony of it all.

1. The Fourth Circuit's decision adopts a different legal framework from that applied in *Schweitzer*. The Fifth Circuit held in *Schweitzer* that ERISA's fiduciary duties do not "obligate[]" plan sponsors "to force Plan participants to divest from [frozen single-stock] [f]unds" following a spin-off simply because single-stock funds carry additional risk. 960 F.3d at 198. That is because, the Fifth Circuit explained, the plan fiduciaries "need only provide investment options that enable participants to create diversified portfolios," and plan participants who choose to invest in a single-stock

fund rather than other options "cannot enjoy their autonomy and now blame the Fiduciaries for declining to second guess that judgment." *Id.* at 196, 199.

By contrast, the decision below held that Plaintiff stated a plausible claim for breach of fiduciary duty based on "near-identical facts"—namely, Gannett's alleged failure to compel divestment from the frozen TEGNA Stock Fund. App. 14a. Departing from the Fifth Circuit, the Fourth Circuit held that "each available fund on a menu must be prudently diversified," and "[t]his holding applies regardless of whether the menu contains other funds, which individuals may or may not elect to combine with a single-stock fund to create a prudent portfolio." *Id.* at 19a (cleaned up; emphasis omitted).

Put simply: In the Fifth Circuit, a plaintiff does not state a claim for breach of the ERISA duty of prudence by alleging that plan sponsors permitted participants to retain investments in a single-stock fund, so long as the single-stock fund is part of a well-diversified menu of investment options. In the Fourth Circuit, a plaintiff making identical allegations can state a claim for breach of the ERISA duty of prudence—and this holding applies regardless of whether the overall menu is adequately diversified. This is, in the Fourth Circuit's apt description, a "disagree[ment]" between the circuits. App. 14a.

Undergirding the United States' assertion of "no meaningful conflict" is its argument that the Fourth Circuit did not mean what it said when it wrote that "each available fund on a menu must be prudently diversified." U.S. Br. 14 (quoting App. 19a). On their face, these words mean that each fund included on the menu of a defined contribution plan must be diversified. And, as the Fourth Circuit acknowledged, "single-stock funds are, by definition, not diversified." App.

16a. It therefore follows that no plan menu including a single-stock fund will comply with the Fourth Circuit's admonition that *each* fund on the plan must be prudently diversified. Indeed, the Fourth Circuit confirmed that is exactly what it meant, repeating that because the TEGNA Stock Fund "was a single-stock fund with inherent concentration risk, it is plausible that the fund was, in fact, imprudent." *Id.* at 33a. Further, that is what Plaintiff argued to the Fourth Circuit, see *id.* at 43a (Niemeyer, J., dissenting), and how the dissent understood the majority's holding, see *id.*

The United States acknowledges that "[i]f the court had actually interpreted ERISA to categorically prohibit single-stock or non-diverse funds from being included in a defined-contribution plan, then that would have been error," and in conflict with *Schweitzer*. U.S. Br. 14. But the government asserts that is not what the court meant when it said that "each available fund" must be diversified. The government points repeatedly to footnote 9, which it says "disclaimed creating any 'per se rule against single-stock, non-employer funds.'" *Id.* at 15 (quoting App. 20a n.9); *id.* at 20, 21.

Footnote 9 cannot hold the weight the government puts on it. There, the panel majority noted the dissent's "object[ion] that our opinion creates a per se rule against single-stock, non-employer funds," and declared the objection "premature"—not unfounded. App. 20a n.9. The court then attempted to explain: "The requirement that a fiduciary prudently diversify a fund means that the fiduciary must undertake an appropriate investigation and implement whatever risk management steps, e.g., diversification, that the investigation reveals to be prudent." *Id.* The court notably did not suggest any "risk management steps" that could satisfy the requirement that a single-stock fund be prudently diversified. Nor did the court identify what "investigation" could lead a reasonable fiduciary to conclude that a single-stock fund is prudently diversified. Nor could it have: Because "single-stock funds are, by definition, not diversified," *id.* at 16a, no investigation or "risk management steps" can make them diversified. Footnote 9 does not "disclaim" a per se rule, but instead confirms the plain import of the opinion's main text: that "no non-employer, single-stock investment option offered under an ERISA plan could ever satisfy the duty of prudence" as understood by the Fourth Circuit. *id.* at 43a (Niemeyer, J., dissenting).

2. Equally wide of the mark is the United States' contention that "the Fourth Circuit's conclusion was based on facts that were not alleged in *Schweitzer*." U.S. Br. 22. Again, the Fourth Circuit said the opposite—explaining that the cases involve "near-identical facts and claims." App. 14a.

The government highlights that Gannett was allegedly advised that "the Plan's TEGNA holdings were over-concentrated and unduly risky," and that the risk was allegedly "magnified" because the Plan also offered the New Gannett ESOP, "another single-stock fund in the same sector, which magnified the risk of both funds." U.S. Br. 12. However, this is no different from *Schweitzer*. Plaintiff in this case alleges that Plan participants directed 26 percent of the Plan's total assets to be invested in TEGNA and New Gannett stock collectively. App. 112a. In *Schweitzer*, more than 30 percent of the plan's total assets were invested in the legacy employer stock fund. See 960 F.3d at 193. Even if TEGNA and New Gannett were indistinguishable for diversification purposes, the overall concentration of investment in non-diversified funds is not a distinguishing allegation between this case and *Schweitzer*.

The government also points to the existence of an Employee Matters Agreement, which the government says "requir[ed] liquidation of the TEGNA fund." U.S. Br. 21. But this is simply error. As the Fourth Circuit made explicit, the Employee Matters Agreement "was not itself a governing plan document." App. 7a. That document thus did not "require" anything of the plan fiduciaries. See 29 U.S.C. § 1104(a)(1)(D) (fiduciaries must act "in accordance with the documents and instruments *governing the plan*") (emphasis added).

In the end, it makes little difference whether the Fourth Circuit's decision effects a per se prohibition on single-stock funds, or whether some additional allegations are required to state a claim for breach of the duty of prudence where a fiduciary includes a single-stock fund on the menu of investment options. See U.S. Br. 14. If a plan participant with buyer's remorse can draft a complaint that survives dismissal merely by alleging "excessive concentration" in a single-stock fund, then rational plan fiduciaries will stop offering those options. That will be a costly loss for the many participants who wish to invest in single-stock funds, which can return greater-than-average results.

3. More telling than the government's reading is how lower courts are navigating the Fourth and Fifth Circuit's conflicting decisions. In *Snider v. Administrative Committee*, No. CIV-20-977-D, 2021 WL 4711691 (W.D. Okla. Oct. 8, 2021), for example, the court evaluated another complaint advancing "near-identical facts and claims" to those at issue here and in *Schweitzer*, App. 14a. See *Snider*, 2021 WL 4711691, at *2. The *Snider* court recognized that the Fourth and Fifth Circuit decisions "have created a split of authority on some issues, and the Supreme Court is currently considering whether to resolve the uncertainty." *Id.* at *5; see also *id.* at *6 (describing how "the opinions

diverged" and "the Fourth Circuit rejected the Fifth Circuit's reasoning"). Faced with the split of authority—and with the Tenth Circuit not yet having weighed in—the *Snider* court found itself compelled to pick a side. It elected to follow the Fourth Circuit, see *id.* at *6–7, while the next district court to face this recurring question may well choose otherwise. This Court should resolve the uncertainty by granting review here.

B. The Decision Below Is Inconsistent With *Dudenhoeffer*.

Dudenhoeffer establishes that, absent special circumstances, a fiduciary "is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it that is available to him." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 427 (2014) (cleaned up). That means that Gannett was not imprudent to assume that the TEGNA stock price accurately reflected that stock's value—including its risk and volatility—and thus allowed Plan participants to continue investing in an investment option that was appropriately priced to reflect its value in their overall investment portfolios. See Pet. 24–26.

The government says *Dudenhoeffer* "does not apply" because Plaintiff's claim is "based on the TEGNA fund's undiversified *composition*, as opposed to its performance." U.S. Br. 16 (cleaned up). This can mean one of two things. Either the panel concluded that a 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 unique characteristics, was imprudent because it was too risky or volatile. If it is the former, then the panel concluded that single-stock funds are per se imprudent—a position that the government concedes is error. See *id.* at 14. If the latter, then there is no distinction between Plaintiff's claim and the one rejected in *Dudenhoeffer*. Either way, the Fourth Circuit erred.

II. IF THE PETITION IS NOT GRANTED, IT SHOULD BE HELD FOR *HUGHES*.

Finally, if the petition is not granted, it should be held for this Court's pending decision in *Hughes*. After the Court called for the views of the Solicitor General in this case, the Court granted a writ of certiorari to the Seventh Circuit in *Hughes v. Northwestern University*, No. 19-1401 (U.S. cert. granted July 2, 2021). The *Hughes* petitioners are participants in Northwestern's retirement plans, both of which are defined contribution plans organized under 26 U.S.C. § 403(b).[1] Petitioners contend that respondents, fiduciaries of the Northwestern plans, breached the ERISA duty of prudence by including on the plans' menu of investment options higher-cost retail class mutual funds, when it could have replaced those offerings with lower-cost institutional class mutual funds. *E.g.*, Joint Appendix at 83–84, 100–16, 122–23, *Hughes*, No. 19-1401 (filed Sept. 3, 2021).

The district court dismissed the complaint, and the Seventh Circuit affirmed. As the lower courts reasoned, plan participants who found retail class mutual fund shares to have an excessive expense ratio could simply invest in the other available investment options. *Divane v. Nw. Univ.*, 953 F.3d 980, 983, 985 (7th Cir. 2020). "[T]he plaintiffs might have a different case

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[1] Section 403(b) plans are retirement plans sponsored by educational institutions and other not-for-profit organizations. Like 401(k) plans offered by for-profit entities, 403(b) plans are defined-contribution plans. *See* U.S. Dep't of Labor, *Types of Retirement Plans*, https://www.dol.gov/general/topic/retirement/typesofplans (last visited Nov. 22, 2021).

if they alleged that fiduciaries failed to make the low-cost index funds preferred by plaintiffs available to them." *Id.* at 986 (cleaned up). But in fact, "plaintiffs alleged that those types of low-cost index funds *were and are* available to them" on the plans' menu of investment options. *Id.* (cleaned up). "Plaintiffs simply object that numerous additional funds"—that is, higher-cost retail class mutual funds—"were offered as well." *Id.* at 991. The court concluded that the mere offering of retail class funds on a diverse menu of funds was insufficient to state a claim: The allegations that "the types of funds plaintiffs wanted (low-cost index funds) *were and are* available to them eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu." *Id.* (cleaned up).

In short, the Seventh Circuit rejected the *Hughes* petitioners' "paternalistic" reading of ERISA. *Id.* at 989 (quoting *Loomis v. Exelon Corp.*, 658 F.3d 667, 673–74 (7th Cir. 2011)). As the court explained, "[plaintiffs] want the judiciary to make non-preferred investments impossible." *Id.* (cleaned up). But the plans "cannot be faulted" under ERISA for offering participants "a menu that includes" a variety of investment options and leaving the "choice to the people who have the most interest in the outcome." *Id.*

In this Court, respondents in *Hughes* directly ask the Court to adopt this reasoning:

> [Petitioners'] claim erroneously overlooks petitioners' own choice among the diverse menu of investment options assembled and invites second-guessing of literally every investment in a plan …. In rare cases, a single investment option may be so rotten that it would call into question the prudence of the fiduciary as a general matter. But here, the investments at issue are widely held and generally sound …. As the Seventh Circuit has

> concluded, where, as here, the fiduciary has assembled a sufficient range of options so that the participants have control over the risk of loss, ERISA does not permit a plaintiff to overlook the choices that he or she made.

Brief for Respondents at 25, *Hughes*, No. 19-1401 (filed Oct. 21, 2021). *See generally id.* at 18–26.

If the Court accepts the position adopted by the Seventh Circuit and advanced by respondents in *Hughes*, its decision will almost certainly require reversal of the Fourth Circuit's decision here. Both here and in *Hughes*, the claim is that defendant plan fiduciaries breached the ERISA duty of prudence by including on a diverse menu of investment options both options that meet plaintiffs' approval and "non-preferred" options. In *Hughes*, the plan menu offered both retail class and lower-cost funds; here, the menu included both diversified investment funds and the single-stock TEGNA fund, *see* Plan Document at 95–96 (attached as Exhibit A to Defendants' Memorandum in Support of Motion to Dismiss, *Quatrone v. Gannett Co.*, No. 1:18-cv-00325-AJT-JFA (E.D. Va. Apr. 16, 2018), ECF No. 22-1). Like the petitioners in *Hughes*, Plaintiff here asks the judiciary to make the "non-preferred investment option" unavailable—and seeks monetary relief for his choice to invest in that non-preferred option rather than the diversified funds that were and are available to him.

The Fourth Circuit accepted Plaintiff's argument that Gannett breached its fiduciary duty by temporarily including the single-stock TEGNA fund on the diverse menu of investment options it made available—adopting Plaintiff's desired rule that "each available fund on a menu must be prudently diversified." Pet. App. 19a. In doing so, the Fourth Circuit applied the same "paternalistic" understanding of ERISA that the

Seventh Circuit rejected in *Hughes*. And—in a further echo of *Hughes*—the Fourth Circuit's decision is already "causing plan administrators/fiduciaries to adopt bright-line rules that exclude many classes of investments from defined contribution plan investment lineups, to the potential detriment of both plans and plan participants." Brief of Investment Company Institute as Amicus Curiae in Support of Respondents at 3, *Hughes*, No. 19-1401 (filed Oct. 28, 2021). If the petition is not granted, it should be held to allow evaluation of the impact of *Hughes* on this case.

CONCLUSION

The petition should be granted. If the petition is not granted, it should be held for the Court's decision in *Hughes*.

Respectfully submitted,

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