No. 24-1030

In the Supreme Court of the United States

PARKER-HANNIFIN CORP., ET AL.,

Petitioners,

v.

MICHAEL D. JOHNSON, ET AL.,

Respondents.

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

BRIEF OF ENCORE FIDUCIARY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Encore Fiduciary (f/k/a Euclid Fiduciary) is a fiduciary insurance underwriting company serving many of the nation's largest single employer, multiemployer, and government employee benefit plans. Fiduciary insurance policies provide defense and indemnity rights for plan-related legal claims. Because Encore reviews thousands of plan filings and plan materials each year for underwriting purposes, it has developed a deep understanding of industry trends and fiduciary best practices.

In addition to underwriting, Encore provides thought leadership through channels like whitepapers, benchmarking studies, and the Fid Guru Blog (https:/encorefiduciary.com/blog). Encore has chronicled dozens of examples in which plaintiffs' firms have manufactured excessive fee and imprudent investment lawsuits against plan sponsors that followed best fiduciary practices. Its commentary on these trends is cited frequently in the press and in court submissions.

Encore underwriters are skilled at vetting plans with prudent fiduciary practices—separating the sheep from the goats, as federal courts are supposed to do at the motion to dismiss stage. As an underwriter for many of the nation's largest plans and close observer of hundreds of fiduciary imprudence lawsuits filed in recent years, Encore has a strong interest in ensuring that courts have the tools to screen out

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than Encore or its counsel made a monetary contribution to fund the brief's preparation or submission. Counsel for all parties were given timely notice of the intent to file this brief.

abusive lawsuits early in the litigation process. It submits this brief to urge the Court to clarify the pleading standard for investment imprudence cases consistent with this objective.

SUMMARY OF ARGUMENT

When it comes to long-term investing, past performance is not a guarantee of future results. Neither is the Employee Retirement Income Security Act. For many years, however, lower courts have misconstrued ERISA by treating bare comparisons about past performance of plan investments as plausible grounds to infer that plan fiduciaries breached their duty of prudence. Persistent uncertainty over how to evaluate these allegations has opened the door to speculative class-action lawsuits and unfair and unpredictable liability.

Some of the most problematic examples of unfair ERISA litigation—like this case—involve target date funds. Target date funds provide plan participants with a one-stop investment strategy, offering a unique mix of stocks, bonds and other investments assets suitable for many retirement portfolios. This mix, which defines the risk and reward profile of the fund, becomes more conservative over time as the fund approaches expected retirement age. Because of their "set-it-and-forget-it" nature, target date funds have become very popular among plan sponsors. But they also present attractive targets for plaintiffs' firms looking to leverage the costs of litigation.

Nearly all target date fund cases follow a common playbook: find a plan with a large target date fund investment; find other target date funds that performed better over a recent period; and allege that, based on that performance differential, a prudent fiduciary would have removed the target date fund in the plan for "underperformance." The flaw in this pleading strategy is obvious. There is considerable variation in target date funds; accordingly, some naturally have higher returns than others in any given period. Thus, alleging that Fund X performed worse than Fund Y over a particular period does *not* imply that Fund X is an imprudent choice. Without much more, it simply indicates that Fund X followed a different investment strategy.

When a court infers at the pleading stage that it is plausible that the defendant breached a fiduciary duty just because the complaint identifies some other investment strategies that in hindsight did "better," fiduciaries are presumed guilty and forced to exonerate themselves through years of litigation. That *de facto* performance standard is inconsistent with the discretion and flexibility ERISA gives fiduciaries. Yet lower courts remain hopelessly confused about this standard and need authoritative guidance—as do the plan sponsors who must defend these lawsuits. The Court should grant certiorari to clarify the pleading standard for this important category of ERISA fiduciary duty claims.

ARGUMENT

I. Plaintiffs are undermining the purpose of ERISA's prudence standard by filing meritless cases.

Congress enacted ERISA in 1974 to establish "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). As this Court has recognized, one of the statute's principal aims was creating "predictable" liabilities and "uniform standards" of conduct. *Rush*

Prudential HMO, Inc. v. *Moran*, 536 U.S. 355, 379 (2002). Congress did not want compliance to be so onerous that "administrative costs" or "litigation expenses" would discourage employers from offering benefit plans. *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010). ERISA thus imposes a prudence standard that requires plan fiduciaries to act as a prudent person would act under the circumstances. 29 U.S.C. § 1104(a)(1)(B). But this is meant to be general framework for decision-making, not a liability trap.

In the investment context, in particular, the duty of prudence is satisfied as long as the fiduciary gives "appropriate consideration to those facts and circumstances . . . relevant to the particular investment or investment course of action involved." 29 C.F.R. § 2550.404a-1(b)(1). Relevant considerations include a determination that an investment is "reasonably designed, as part of the [plan's] menu, to further the purposes of the plan," taking into consideration "the risk of loss and the opportunity for gain (or other return) associated with the investment" as compared to "reasonably available alternatives with similar risks." *Id.* § 2550.404a-1(b)(2). Because there can be many "reasonably designed" plans, there is no single prudent investment. As this Court has recognized, fiduciaries have substantial discretion to choose from a range of investments and service providers that may be appropriate for their plans. *Hughes* v. *Northwestern Univ.*, 595 U.S. 170, 177 (2022).

The flexibility of the prudence standard is also evident from the common law of trusts, which this Court has used to give content to the duty in the ERISA context. *E.g.*, *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528–29 (2015); *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

Under trust law, trustees should consider many factors in investing trust assets, including "general economic conditions, the possible effect of inflation or deflation, the role that each investment or course of action plays within the overall trust portfolio," and more. Uniform Prudent Investor Act § 2(c), cmt, 7B U.L.A. 21 (1995). Like ERISA fiduciaries, common law trustees have substantial leeway to make investment decisions.[2] Moreover, trustees are not insurers: "Not every investment or management decision will turn out in the light of hindsight to have been successful," let alone optimal (in the sense of having the very highest return over a particular period). *Id*. § 8, cmt.

Over the past 15 years, the plaintiffs' bar has turned ERISA's flexible framework on its head with a flood of lawyer-driven class actions. Hundreds of cases have been filed against plan sponsors using formulaic allegations, turning the duty of prudence from a shield—intended to protect beneficiaries against fiduciaries taking undue risks with a trust corpus—into a sword—used to force fiduciaries to pay inflated damages for failing to conform to an investment menu selected in hindsight.

There is a formulaic playbook for pleading such claims. Plaintiffs identify short-term performance data for some of the plan's investment options and compare that data to a few lower-cost and/or best-performing investments in broadly similar categories. It is rare that any of the challenged investments suffered

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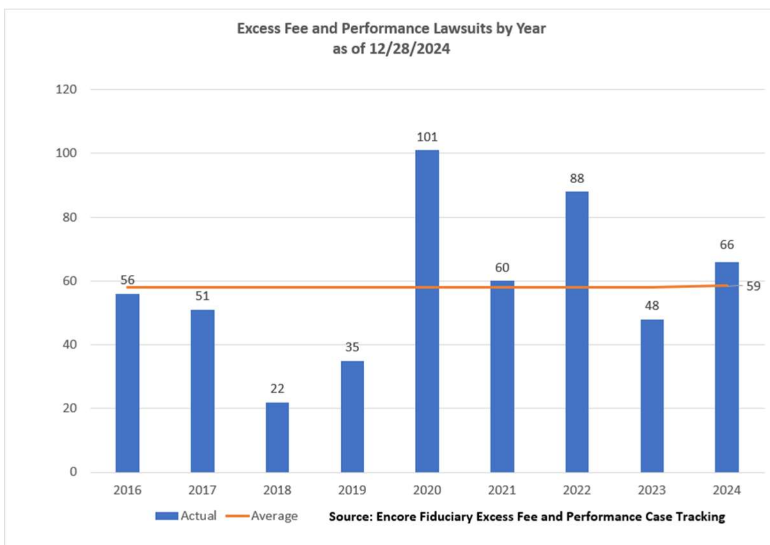
[2] *See, e.g.*, Restatement (Third) of Trusts § 90, cmt. f (2007) ("Varied approaches to the prudent investment of trust funds are . . . permitted by the law."); Restatement (Second) of Trusts § 227, cmt. e (1959) ("It is impossible to lay down a hard-and-fast rule as to what is a prudent investment.").

actual losses during the period in question. Nevertheless, because other investments may have done better, plaintiffs ask the court to infer that the fiduciaries either failed to consider or disregarded supposed warning signs regarding the plan's investments. From there, discovery costs and inflated damages—using alternatives also chosen in hindsight to maximize the supposed "loss" to the plan—quickly mount.

Each year, a small group of plaintiffs' firms files waves of such cases against sponsors and fiduciaries of large plans based on these and related theories (such as "excessive" fees or imprudent share classes). Since 2016, over half of plans with $1+ billion in assets have been targeted by at least one such lawsuit. The following chart prepared by Encore illustrates the 500+ excessive fee and investment performance cases filed since 2016 – 59 per year on average:



Although the data reflects an ebb and flow as firms process a backlog of suits, new lawsuits hit dockets every month.[3] There are different ways to parse the data, but an analysis conducted by Encore shows that plans with $500 million or more in assets have close to a 10% chance of being sued each year, which is higher than the probability that a publicly traded company will draw a securities lawsuit, which typically requires a decline in stock price.

There are two fundamental drivers of this model: an inconsistent pleading standard and high and asymmetric discovery costs. As this case reflects, motions to dismiss are frequently rolls of the dice. Even prevailing on a motion to dismiss can cost a defendant upwards of $2 million. If a plaintiff beats a motion to dismiss, defense costs skyrocket. The "prospect of discovery in a suit claiming breach of fiduciary duty is ominous," exposing fiduciaries to "probing and costly inquiries and document requests about its methods and knowledge." *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013). In addition to wading through document discovery and depositions, defendants must hire experts, who cost several millions of dollars. In Encore's experience, defense costs through summary judgment can run $5 million to $8 million. Taking a case to trial can cost $10 million or more.

[3] *See, e.g.*, D. Aronowitz & K. Jozwiak, PlanAdviser, *401(k) Excessive Fee Litigation Spiked to 'Near Record Place' in '24* (Jan. 13, 2025), https://tinyurl.com/97xspj2e/ ("The frequency of . . . excessive fee class action litigation surged by 35% in 2024"); Chubb, *Excessive Litigation Over Excessive Plan Fees in 2023* (Apr. 2023), http://tiny.cc/8wck001 ("The pace of filings . . . remains elevated with no end in sight.").

II. Target date funds have become a particular focus of litigation abuse.

The case below, like many recent investment challenges under ERISA, involves an investment product called a "target date fund" (TDF). Target date funds invest in a variety of underlying assets classes, like US stocks, foreign stocks, bonds, and cash, using a formula that automatically rebalances to become more conservative as a "target date" approaches. TDFs thus provide a convenient one-stop shop for participants who want a diversified investment to save for retirement but do not want to actively manage their asset allocation as markets or circumstances change. They are also useful for fiduciaries to make sure that plan participants can access a diversified, low-cost, high-quality investment option calibrated to fit a typical participant's retirement needs.

Since their introduction in the early 1990s, TDFs have become popular in employer-sponsored retirement plans. But target date funds have also proved to be a particularly attractive target for ERISA class action plaintiffs. Because of their many advantages, TDFs are frequently offered as the default investment option in a retirement plan—in ERISA lingo, the "qualified default investment alternative." As a result, TDFs usually have the highest aggregate share of a plan's assets. For plaintiffs, a larger aggregate investment means higher purported damages and, ultimately, more settlement pressure.

There have been scores of cases filed against plan sponsors based on target date funds in recent years. As with other investment challenges, plaintiffs allege that the target date funds in the plan underperformed cherry-picked alternative funds, almost invariably among the best-performing TDFs in the market. Then, plaintiffs ask the court to infer that a prudent fiduciary would have removed the TDFs in favor of another option given the funds' performance history.

One focal point of TDF litigation has been Fidelity target date funds, which are among the largest target date funds by total assets invested. Fidelity offers two versions of those funds, one (the "Freedom Funds") which includes an active management component, and another (the "Freedom Index Funds") which eschews active management in favor of a passive strategy. In *Smith* v. *CommonSpirit Health*, the Sixth Circuit explained that the active Freedom Funds were popular among market participants, highly rated by third parties, and showed no "serious signs" of distress. 37 F.4th 1160, 1168 (4th Cir. 2022). But plaintiffs have continued to target the funds.

In *Daggett* v. *Waters Corporation*, for example, a plaintiff who participated in a plan that used the Fidelity Freedom Funds claimed that "other target date funds . . . in the same investment style and same investment category could act as meaningful benchmarks to the underperforming Fidelity Freedom 2025 Active Fund" for the prior three- and five-year periods and provided a table showing how the returns of the Freedom Funds compared to the 2025 vintages of other target date funds. *Daggett*, No 1:23-cv-11527, Dkt. 19 (Am. Compl.) ¶ 177. Three of the table's top five performers over this period—the T. Rowe Price Retirement, TIAA-CREF Lifecycle, and Vanguard Target Retirement funds—are also offered as comparators in this complaint (and many others).

The *Daggett* plaintiffs went even further and alleged that the defendants were imprudent for failing to replace the Fidelity Freedom funds with the American Funds TDF—the best performing target date fund on the list. *Daggett*, Dkt. 19 ¶ 172. These cherry-picked comparisons are plainly inapt, but they did the job. The district court denied the motion to dismiss, finding that "the alternatives proposed by Daggett" "are sufficient . . . at this juncture" and that "disputes over the appropriateness of these benchmarks are inappropriate at the motion to dismiss stage." *Daggett* v. *Waters Corp.*, 731 F. Supp. 3d 121, 141 (D. Mass. 2024). The case settled shortly thereafter.

As the pleading approach in *Daggett* exemplifies, almost any target date fund can be made to appear to "underperform" when juxtaposed against a particular period's top performers. The implication of such a comparison, however, is that it is imprudent to offer funds that do not have the best performance record over a recent period. Indeed, looking at the list of top performers in *Daggett*, that is exactly the rule that plaintiffs have tried to impose through litigation.

Plaintiffs, for example, have sued based on a plan's inclusion of the American Century target date funds, which fall in the middle of the performance data in the *Daggett* chart. *See, e.g.*, *Rubke* v. *ServiceNow, Inc.*, 2024 WL 4540756 (N.D. Cal. Oct. 21, 2024); *Phillips* v. *Cobham Advanced Elec. Sols.,* 2024 WL 3228097 (N.D. Cal. June 28, 2024). Plaintiffs have also targeted plans using the JPMorgan SmartRetirement funds, which fall just below the Fidelity Freedom funds on the *Daggett* chart. *E.g.*, *Macias* v. *Sisters of Leavenworth Health Sys.*, 2024 WL 1555061 (D. Colo. Apr. 10, 2024); *Rosenkranz* v. *Altru Health Sys.*, 2021 WL 5868960 (D.N.D. Dec. 10, 2021). Plaintiffs in these cases do not have any actual proof of the process fiduciaries followed to select and monitor investments.

They are relying on performance and asking the court to infer a poor process as a result.

Perhaps most notably, one plaintiffs' firm sued nearly a dozen plans for offering the BlackRock LifePath target date funds. These were the first target date funds offered widely in the market. At the time, they were offered by roughly 20% of Fortune 100 companies. As here, the basis for these claims were cookie-cutter allegations that the LifePath funds had "underperformed," on a short-term basis as of 2016, the target date funds offered by T. Rowe Price and Vanguard and the S&P 500 target date index. As observers noted, however, plan sponsors could pick from roughly 55 other TDF series in 2016 besides the BlackRock TDFs. Most did not perform as well as the LifePath funds over the same period. *See* M. Pacholok, Morningstar, *New 401(k) Lawsuits Go To Far* (Sept. 7, 2022), https://www.morningstar.com/funds/new-401k-lawsuits-go-too-far. True, the BlackRock funds were not the top performers, but the differences in performance were driven the underlying allocations. *Id.* "Limiting the peer group to only a select few, including two that had the best track records as of the end of 2021, sets an unrealistically high bar for sponsors choosing investment options for their plans." *Id.*

Plaintiffs have used a similar cherry-picking strategy to attack many other target date funds from reputable providers. *E.g.*, *Baird* v. *Steel Dynamics, Inc.*, 2024 WL 3983741 (N.D. Ind. Aug. 29, 2024) (PIMCO); *Fitzpatrick* v. *Ne. Methodist Health Sys., Inc.*, 2023 WL 5105362 (D. Neb. Aug. 9, 2023) (Wells Fargo); *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018) (same). For example, the same firm sued two different sponsors for early adoption of the flexPATH target date funds that had a higher hedge against inflation than other target date funds and thus performed less well when, in hindsight, inflation remained low in the second half of the 2010s. The sponsors of both plans prevailed, but only after extremely expensive discovery and full-blown trials. *Mills* v. *Molina Healthcare, Inc.*, 2024 WL 1216711 (C.D. Cal. Sept. 17, 2024); *Lauderdale* v. *NFP Retirement, Inc.*, 2024 WL 751005 (C.D. Cal. Feb. 23, 2024).

Firms have also used the same strategies to attack "custom" target date funds built by investment providers to fit a particular plan.[4] In one case, for instance, the plaintiff claimed that a custom target date fund offered in the Exelon plan was imprudent by comparing it to six top-performing funds, including American and T. Rowe Price. *Baumeister* v. *Exelon Corp.*, 2023 WL 6388064, at *4 (N.D. Ill. Sept. 29, 2023). Ironically, another fund series the plaintiffs alleged should have been considered were the BlackRock TDFs alleged to be imprudent in other litigation. *Id*.

Something has gone wrong when plan sponsors are being sued *en masse* for not picking the investments that happened to record the best performance over a brief three- or five-year period. ERISA "requires a prudent process, but it does not guarantee good results." *Pizarro* v. *Home Depot, Inc.*, 111 F.4th 1165, 1171 (11th Cir. 2024). Rather, prudence "focus[es] on a fiduciary's conduct in arriving at an investment decision." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996); *see also DeBruyne* v. *Equitable Life*

[4] In 2013 guidance, the Department of Labor specifically advises fiduciaries to consider custom target date funds because they may be a "better fit" for a plan and plan participants. U.S. Dep't of Labor, Employee Benefits Security Admin., *Target Date Retirement Funds—Tips for ERISA Plan Fiduciaries* at 3 (Feb. 2013).

Assurance Soc'y of the United States, 920 F.2d 457, 465 (7th Cir. 1990) ("[T]he ultimate outcome of an investment is not proof of imprudence."). A fiduciary's decisions are not deficient just because another investment might have yielded a few extra percentage points over an arbitrary period. *See Meiners*, 898 F.3d at 823 ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the Wells Fargo TDFs were an imprudent choice at the outset.").

Although the tactic of picking a handful of better-performing alternatives is most pronounced in pleading investment claims, plaintiffs use similarly flawed strategies used to ground other claims of imprudence. A common strategy in excessive fee cases, for instance, is to include a table in the complaint that purports to show that a plan paid more for administrative services than "a potentially random assortment of nine other plans from around the country." *Albert* v. *Oshkosh Corp.*, 47 F.4th 570, 579 (7th Cir. 2022). Comparing amounts supposedly paid by a plan to those allegedly paid by a few other random plans does not give meaningful perspective on whether fiduciaries followed a prudent process to monitor administrative expenses. It is just another hindsight performance standard.

III. Many lower courts are applying a *de facto* performance pleading standard.

Perhaps stymied by the flood of cases, lower courts have struggled to articulate pleading standards to separate the wheat from the chaff in the ERISA context. There is little rhyme or reason why some courts dismiss investment claims while others allow claims to proceed to discovery.

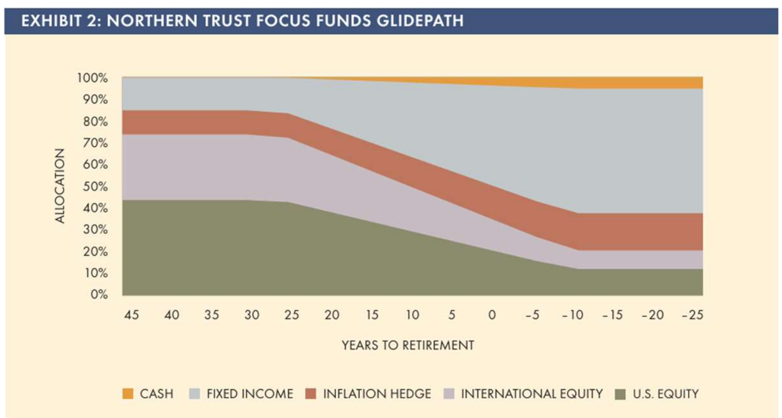
A. The first fundamental confusion among lower courts is whether there should be a meaningful benchmark requirement for performance allegations at all. The court below, breaking with the Seventh, Eighth, and Tenth Circuits, thought not. *See* Pet. App 54a. Lower courts in other circuits are hopelessly confused. *E.g.*, *Binder* v. *PPL Corp.*, 2024 WL 1096819, at *4 (E.D. Pa. Mar. 12, 2024) ("Defendants' argument that the Vanguard, TIAA, and T. Rowe Price target date funds are not apt comparators is misplaced at the pleadings stage."); *Laliberte* v. *Quanta Servs., Inc.*, 2023 WL 12047212, at *2 (S.D. Tex. Sept. 29, 2023) ("The Fifth Circuit has not adopted the Sixth Circuit's holding in *Smith* nor the Eighth Circuit's holding in *Meiners* requiring a meaningful benchmark.").

In Encore's view, a meaningful benchmark requirement is not just necessary to rein in abusive litigation. It is inherent in assessing investment performance in the first place. To be valuable as a basis for assessing performance, a benchmark must reflect the aims and objectives of a particular fund. Despite what plaintiffs ask courts to believe, investments in the same general category are not the same. That different investments perform differently over the same period is proof of that basic truth.

One important way target date funds differ is the ratio of investments they hold. A TDF's rebalancing formula, called the fund's "glidepath," is one of the main features of the investment. The glidepath reflects the fact that an asset mix that may be appropriate for an investor at age 30 is unlikely to be appropriate for an investor at age 65. Younger investors, in the accumulation phase of their investing careers, are likely to be invested for several market cycles and have comparatively more human capital and risk tolerance. Older investors approaching retirement may be more interested in preserving their nest egg or avoiding large swings in value.

Beyond the specific mix of investments, there are different glidepath philosophies. A "to" glidepath stops lowering stock exposure at the target retirement date. A "through" glidepath continues to a lower stock exposure for ten to fifteen years after the retirement date. A "to" glidepath, for example, may have a 35% allocation to stocks at retirement age, whereas a "through" glidepath may have a 50% allocation to stocks. In short, there is material variation among TDF glidepaths—that is one of several dimensions on which target date fund providers compete.

Glidepath details are publicly available. Here, for example, is that of the Northern Trust Focus Funds:[5]



This notably reflects a material allocation to fixed income and an inflation hedge early in the lifecycle.

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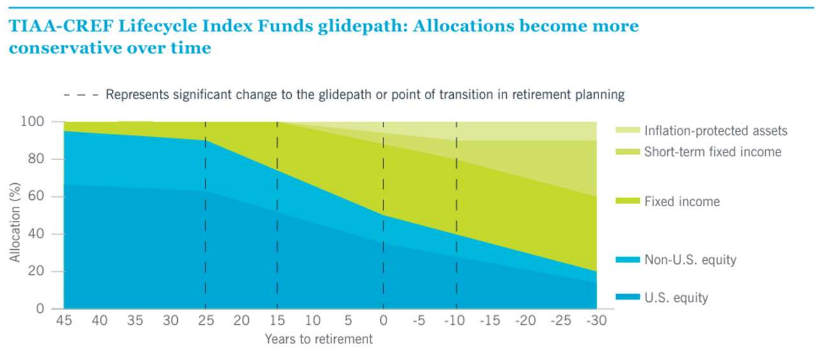
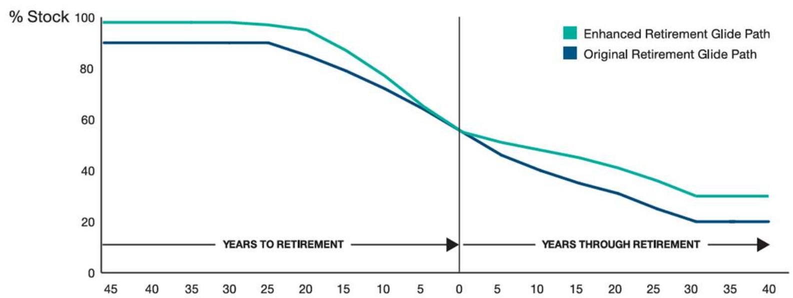
[5] Northern Trust, *Making Target Retirement Date Funds Work – 2012 Edition*, http://tiny.cc/cqck001.

Here, by contrast, are the glidepaths of the comparator funds in the complaint. First, TIAA-CREF Lifecycle, which has a smaller allocation to conservative investments at the start of the lifecycle[6]:



Next, the allocations for T. Rowe Price, which unlike Northern Trust allocated 90% of investments to equities at the start of the lifecycle:



The glidepath for this TDF was modified in 2020 to start at nearly 100% equities, making historical performance comparisons even less informative.[7]

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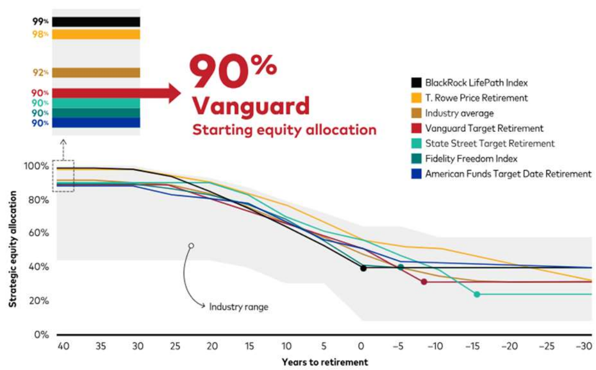
[6] Nuveen: A TIAA Company, *At-A-Glance: TIAA-CREF Lifecycle Index Funds*, http://tiny.cc/eqck001.

[7] T. Rowe Price, *T. Rowe Price Target Date Strategies: Retirement Glide Path Enhancement,* http://tiny.cc/sqck001.

And finally, the Vanguard glidepath[8], which illustrates not only a 90% starting equity allocation (again higher than Northern Trust), but also the wide "industry range" of equity allocations offered by products from different providers across a lifecycle:

Figure 1. Glide-path comparisons among TDF providers



The fundamental point is that despite all being examples of target date funds, Northern Trust TDFs and other TDFs are *different*, as is readily apparent from public information, not to mention information disclosed to prospective investors and plan participants. *See Smith*, 37 F.4th at 1168 (observing that prospectus data is "central to [an imprudence] claim, publicly available, and judicially noticeable").

These differences matter. Fixed income investments are expected to offer less return, and less risk, than equities. Inflation hedges are expected to underperform when inflation is low. Indeed, it is precisely because these assets are not correlated with assets

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[8] Vanguard, *TDF Glide-Path Essentials: Setting the Right Starting Point*, http://tiny.cc/yqck001.

like equities that they can be a valuable part of a diversified, long-term portfolio. At the same time, including safer assets early in the glidepath means that the funds may not do as well in a bull market. Because fiduciaries do not have a crystal ball, it is not imprudent for a fiduciary to pick a fund with an inflation hedge just because inflation happens to have been low or turns out to be low in the future. How to balance these and many other trade-offs for a particular plan is a matter of judgment: the prudence standard does not forbid fiduciaries from choosing to offer participants a slightly more conservative investment.

In light of the differences between funds, comparing the trailing three-year performance of a fund with a more conservative glidepath to that of funds with more aggressive glidepaths does not call a fiduciary's process for selecting either fund into question. Performance is not plausible evidence of imprudence. The comparison simply reflects the fact that, in hindsight, equities did well and inflation was low during that particular period. Had inflation been higher, or had equity markets taken a turn, the performance figures would have reversed. As a different panel of the Sixth Circuit recognized, "[m]erely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry." *Smith*, 37 F.4th at 1168.

It is wrong for the same reasons to infer red flags based on the S&P target date fund index. The S&P index is a benchmark intended to track *all* target date funds—including many whose glidepaths have a more aggressive equity allocation than the Northern Trust funds. ERISA plaintiffs have even admitted in other complaints the S&P Target Date Indices are a "composite of the disparate strategies and styles present in the broad universe of investable alternative TDFs." *E.g.*, *Hall* v. *Capital One Fin. Corp.*, 2023 WL 2333304, at *2 (E.D. Va. Mar. 1, 2023). Comparing the Northern Trust funds to the S&P target date index in the mid-2010s thus shows only that, during this period, a more conservative strategy had lower returns than the average target date fund strategy reflected in the index. But nothing in the Northern Trust Focus Funds prospectus states that Northern Trust was promising to mimic or replicate the S&P target-date index. Nor is such an average strategy required.

B. Besides confusion over whether and when a complaint must plead a sound basis for comparison, there is an even more basic misunderstanding about the role historical performance plays in evaluating an investment. One of the first lessons any long-term investor learns is that past performance is not a guarantee of future results. This maxim is so fundamental that the SEC has warned investment companies that sales literature might be misleading if it implies otherwise. 17 C.F.R. § 230.156(b)(2).

As courts have recognized, therefore, prudent investors can and often do stick with funds even through periods of lower performance. *E.g.*, *Jenkins* v. *Yager*, 444. F.3d 916, 926 (7th Cir. 2006); *Patterson* v. *Morgan Stanley*, 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019) ("[T]he duty of prudence does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year's top performers. If that were the case, Plan sponsors would be duty-bound to merely follow the industry rankings for the past year's results, even though past performance is no guarantee of future success."). Chasing the last year's top performers, or jettisoning a long-term investment just because it underperformed over a three- or five-year period, is not a sound investment strategy. It is the definition of imprudence.

The Department of Labor, the government agency charged with administering ERISA, agrees that fiduciaries must consider much more than just historical performance. As the Department has advised, "there are considerable differences among TDFs offered by different providers, even among TDFs with the same target date." *Tips for ERISA Plan Fiduciaries*, *supra* n.4, at 1. TDFs "may have different investment strategies, glide paths, and investment-related fees," and fiduciaries must also consider "how well the TDF's characteristics align with eligible employees' ages and likely retirement dates" and "the possible significance of other characteristics of the participant population," such as salary levels, turnover, contribution rates, and underlying asset classes or investments. *Id.* at 2– 3. Because the glidepath can "significantly affect the way a TDF performs," the Department advises that "it is important that fiduciaries understand these differences when selecting a TDF as an investment option for their plan." *Id.* at 3.

A January 2011 GAO study similarly emphasizes that "[b]ecause TDFs are designed to be long-term investments, short-term gains or losses *need to be put in the proper context*; that is that these investments are expected to fluctuate in value over time." U.S. Gov't Accountability Office, *Defined Contribution Plans: Key Information On Target Date Funds as Default Investments Should Be Provided To Plan Sponsors and Participants* 22–23 (Jan. 2011) (emphasis added). For example, "higher-equity TDFs" may "result in higher average returns relative to a more conservative, lower-equity TDF," but can also "increase[] the chance for an infrequent poor outcome because of the risk these investments carry." *Id.* at 25–26.

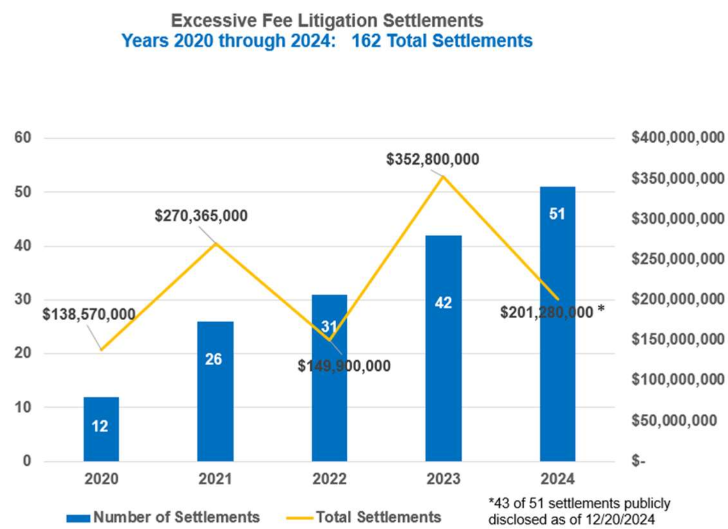
Simply put, past performance is just the starting point for evaluating an investment—not, as plaintiffs would have it, a talismanic indicator that the process has gone awry. A pleading standard that treats the supposed "failure" to replace a fund after a short period of underperformance as evidence of malpractice sends a perverse signal. Courts should not penalize fiduciaries who follow a long-term, disciplined strategy.

IV. This Court's guidance is needed to ensure a consistent standard for weeding out meritless claims.

The lower courts' failure to strike the right balance in fiduciary breach cases has been hugely disruptive and wasteful. As long as the pleading standard is unclear, plaintiffs' firms will have little to lose by filing cookie-cutter claims and swinging for the fences. For example, most courts dismissed the BlackRock claims after finding that there was no valid basis for comparing the BlackRock funds to the other target date funds, much less inferring that modest alleged performance differences warranted an inference that plan fiduciaries were imprudent for continuing to offer a tried-and-tested product from a reputable provider. *E.g.*, *Luckett* v. *Wintrust Financial Corp.*, 2024 WL 3823175 (N.D. Ill. Aug. 14, 2024); *Anderson* v. *Advance Publications, Inc.*, 2023 WL 3976411 (S.D.N.Y. June 13, 2023). But other courts, ostensibly applying the same legal standard, allowed the claims to proceed. *See Kistler* v. *Stanley Black & Decker, Inc.*, 2024 WL 3292543 (D. Conn. July 3, 2024); *Trauernicht* v.

Genworth Financial, *Inc.*, 2023 WL 5961651 (E.D. Va. Sept. 13, 2023).

Experience teaches that "careful case management" is ineffective at screening out groundless claims in discovery. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007). That is because, due to the litigation dynamics described above, ERISA fiduciary duty cases put enormous settlement pressure on defendants. As recently recognized, "in modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery." *Cunningham* v. *Cornell Univ.*, 145 S. Ct. 1020, 1033 (2025) (Alito, J., concurring).



Encore's tracking shows that there have been well over $1 billion in settlements since 2020, most for little more than the cost of defense. Faced with mounting defense costs, years of litigation, and unpredictable liability, excessive fee and investment cases often result in settlements even though the plan fiduciaries followed a prudent process.

Besides the direct costs, ERISA imposes personal liability on fiduciaries, 29 U.S.C. § 1109(a), so runaway litigation makes it hard to convince qualified individuals to serve. Without a way to screen out meritless cases at the pleading stage, moreover, fiduciary underwriters' underwriting models do not work. Insurers have already raised premiums because of the surge in cases under Section 1104. Ed Antonucci, CRC GROUP, *Surge in Excessive Fee Litigation is Impacting Fiduciary Liability Insurance (*Mar. 2021), https://tinyurl.com/bdme8359. In addition, insurers raised retentions from $1 million to as high as $15 million for many policies. Encore (formerly Euclid) provided competition for large plans and moderated the effect of the premium and retention increases in the market that developed from skyrocketing lawsuits in 2019 to 2022. But if insurers cannot collect enough premium to match the cost of defending meritless cases, that will eventually put quality employee benefit plans at risk.[9]

Ultimately, however, the biggest problem with an inconsistent pleading standard is the message that it sends to fiduciaries: that the safest course is to choose the most aggressive investment strategies, because fiduciaries will be punished if they choose anything other than the most popular, high-performing investments. *See* Fid Guru Blog, *Has ERISA Class Action Litigation Made a Positive Difference for Plan*

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[9] Similar dynamics played out in the employee stock ownership plan (ESOP) market. Before excessive fee litigation exploded, the plaintiffs' bar brought a wave of cases targeting ESOPs and alleging improper valuations and breaches of fiduciary duty. Many leading fiduciary carriers have stopped insuring these plans after realizing that leveraged ESOPs have a high probability of litigation and cannot be insured profitably at normal premiums.

Participants? (Oct. 31, 2023), https://tinyurl.com/3dnwdbue. ERISA leaves the judgment of how much risk is appropriate for a target date fund or other investment option to fiduciaries, not plaintiffs' lawyers. Courts should give "due regard" to those determinations. *Hughes*, 595 U.S. at 177.

Hundreds of fiduciary breach cases have been filed against plan sponsors since this Court stressed the need for "careful, context-sensitive scrutiny" of breach of fiduciary duty complaints to weed out meritless claims. *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014). Scores more have been filed since the Court stressed the deference due to fiduciaries in *Hughes*. Too many lower courts are not heeding these principles and are letting meritless lawsuits go forward to discovery. It is time to clarify that measuring an investment's short-term performance record against hand-picked top performers or a broad industry-wide average is not plausible proof of fiduciary imprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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