No. 24-1030

In The Supreme Court of the United States

PARKER-HANNIFIN CORPORATION, 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 IN OPPOSITION

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QUESTION PRESENTED

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), plan fiduciaries are subject to a "Prudent man standard of care" which requires the fiduciary to "discharge his responsibility 'with the care, skill, prudence, and diligence' that a prudent person 'acting in a like capacity and familiar with such matters' would use" under the circumstances. *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting 29 U.S.C. § 1104(a)(1)). The statute does not mention investment performance as a test of prudence. The question presented is:

Whether a complaint must show that a plan investment underperformed a materially identical investment to plausibly allege that an ERISA fiduciary failed to use the requisite "care, skill, prudence, or diligence" under the circumstances and thus breached ERISA's duty of prudence.

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INTRODUCTION

The issue raised in the petition does not involve a conflict among the courts of appeals and was correctly decided by the Sixth Circuit. Petitioners simply disagree with the Sixth Circuit's context-specific and fact-bound application of the legal standard. The interlocutory posture of this case also makes it a poor vehicle for review. The petition does not warrant this Court's review.

Petitioners mischaracterize the decision below as having "held that 'a meaningful benchmark is not required to plead a facially plausible claim' . . . *that rested on investments' comparative performance*." Pet. 1–2 (quoting Pet. App. 19a) (emphasis added). But that portion of the opinion did not address investment performance comparisons. The opinion merely stated that a performance comparison is not *necessarily* required "to demonstrate imprudence," because ERISA's prudence standard focuses on a fiduciary's *conduct* and "decision-making process, not on whether any one investment performed well in hindsight," *id.*, 18a. Because the statutory text requires the exercise of "care, skill, prudence, and diligence" and says nothing about investment performance, 29 U.S.C. § 1104(a)(1)(B), the majority's statement that a performance comparison "is not required" if the complaint pleads *other* facts raising "an inference of insufficient process" is plainly correct as a matter of law. Pet. App. 18a. Even the dissent agreed that a performance comparison is not *always* required because imprudence can be shown "in other ways." Pet. App. 54a (Murphy, J., dissenting). Petitioners cite no case that has held otherwise.

There is also no conflict as to "the majority's alternative holding," Pet. 2—that respondents stated a plausible imprudence claim based on the totality of the allegations before the court. The complaint shows that petitioners failed to discharge their "continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). That other courts have dismissed fiduciary breach claims based on different facts merely reflects that such claims are "inevitably fact intensive." *See Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014). The fact-bound question of whether the particular facts alleged here raise a plausible inference of imprudence does not warrant this Court's review.

The interlocutory posture of this case makes it a poor vehicle for review. Petitioners only seek review of one of the two claims at issue, so the action will proceed regardless. Granting review would impose unwarranted delays in resolving the case, which is now in its fifth year. D. Ct. Doc. 1 (complaint filed Jan. 29, 2021).

Petitioners' policy arguments are unavailing. Allowing plan participants to enforce ERISA's fiduciary standards furthers the purposes of the Act. The decision below could not possibly threaten the availability of retirement plans, as petitioners suggest. In fact, similar litigation has caused improvements in the administration of defined contribution plans across the country, thus enhancing the retirement security of the tens of millions of American workers who participate in such plans.

For these reasons, discussed further below, the petition should be denied.

STATEMENT

I. Statutory background

Congress, aware of the importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985); 29 U.S.C. § 1001(b).

To protect workers' retirement security, ERISA imposes upon plan fiduciaries "strict standards of trustee conduct . . . derived from the common law of trusts." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014). Fiduciaries must act "solely in the interest of the participants" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]" 29 U.S.C. § 1104(a)(1)(B). ERISA requires plan fiduciaries "to monitor trust investments" on an ongoing basis "and remove imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). The duty of prudence also includes an obligation to incur only reasonable expenses. *See Hughes v. Nw. Univ.*, 595 U.S. 170, 176–77 (2022) (reversing dismissal of claims that fiduciaries incurred excessive fees and "neglect[ed] to provide cheaper and otherwise-identical alternative investments"); *see also Cunningham v. Cornell Univ.*, 145 S. Ct. 1020, 221 L. Ed. 591, 597–98 (2025) (holding that fiduciaries bear the burden of proving that service providers received "no more than reasonable compensation") (quoting 29 U.S.C. § 1108(b)(2)(A)).

A fiduciary who breaches its duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). ERISA empowers a plan participant to bring a civil action for breach of fiduciary duty, which is the same authority granted to fiduciaries and the Secretary of Labor. 29 U.S.C. § 1132(a)(2). The Secretary "depends in part on private litigation to ensure compliance with the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir.

2009). "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties[.]" *Id.* at 598.

II. Factual background

Parker-Hannifin Corporation maintains for its employees an individual-account defined contribution retirement plan (the Parker Retirement Savings Plan ("Plan")). Pet. App. 2a–3a; *see* 29 U.S.C. §§ 1002(2)(A), 1002(34). Participants' retirement benefits in a defined contribution plan "are limited to the value of their own individual investment accounts." *Tibble*, 575 U.S. at 525. "Each participant chooses how to invest her funds, subject to an important limitation: She may choose only from the menu of options selected by the plan administrators." *Hughes*, 595 U.S. at 173. Thus, the amount of money a participant will have saved for retirement "can turn on the plan fiduciaries' particular investment decisions." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 540 (2020).

Respondents are five of the 32,000 Parker-Hannifin employees and retirees who participate in the Plan. Pet. App. 2a. Petitioners are Parker-Hannifin Corporation and related boards and committees; each petitioner is allegedly a Plan fiduciary. Pet. App. 2a–(3)(a); 29 U.S.C. §§ 1102(a), 1002(21)(A). Petitioners are collectively responsible for the administration of the Plan, including determining what options are included in the Plan's investment lineup. Pet. App. 3a. With $4.3 billion in assets, the Plan is among the largest 0.03% of all defined contribution plans in the United States. Pet. App. 3a.

Respondents brought suit under 29 U.S.C. § 1132(a)(2) on January 29, 2021, and filed the Amended Complaint that is the subject of the petition on June 11, 2021. Pet. App. 8a. They allege that petitioners "breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble*, 575 U.S. at 530. Respondents' Amended Complaint asserts that petitioners breached this duty in two ways: (1) retaining the Northern Trust Focus Funds as Plan investment options despite limited and abysmal performance and high turnover (Count I, Am. Compl. ¶¶ 114–23 (D. Ct. Doc. 20)), and (2) providing higher-cost share classes of certain Plan investment options instead of lower-cost versions of the same funds available to the Plan as a $4 billion investor (Count II, Am. Compl. ¶¶ 124–28).[1] On behalf of the Plan and a proposed class of participants, Plaintiffs seek to recover the Plan's losses resulting from each breach and to obtain appropriate equitable relief. Am. Compl. ¶¶ 6, 122, 128; 29 U.S.C. §§ 1109(a), 1132(a)(2).

A. Northern Trust Focus Funds claim

Defined contribution plans frequently include "target-date" funds, which are "single diversified investment vehicle[s] . . . offered as a suite of funds typically identified by the participant's target retirement date." Am. Compl. ¶ 45 (D. Ct. Doc. 20). Target date funds typically "rebalance their portfolios to become more conservative as the participant gets closer to retirement." Am. Compl. ¶ 47. A target-date fund's rebalancing formula is known as its "glide path," and may be designed to either go "To" or

[1] Count III alleges that Parker-Hannifin Corporation, its Board of Directors, and the Board's Human Resources and Compensation Committee failed to prudently monitor other fiduciaries to prevent or remedy the breaches in Counts I and II. Am. Compl. ¶¶ 129–36. The parties agree that Count III survives to the extent Count I or II survives, Pet. App. 31a, and petitioners do not seek review of the Sixth Circuit's ruling reversing dismissal of Count II, Pet. at 7 n.1.

"Through" the target date. Am. Compl. ¶¶ 47, 49. A deviation from the glide path or other significant change in the target date fund's "underlying assets or asset allocations can have an extremely negative impact on" performance and participants' account balances. Am. Compl. ¶ 52.

From 2014 through 2019, petitioners provided the Northern Trust Focus Funds as the Plan's target-date option. Am. Compl. ¶¶ 83, 94. The Focus Funds were launched in 2009 and advertised as "back-tested," meaning a hypothetical performance history was created to project how the Funds *would have* performed had they previously existed. Am. Compl. ¶ 65. Back-tested data is purely hypothetical and unreliable because it is subject to manipulation to show inflated performance. Am. Compl. ¶ 65.

From their launch in 2009 until 2013, the Focus Funds underperformed the S&P target date fund benchmark, an "industry-accepted target date benchmark for 'Through' target date funds used by investment professionals." Am. Compl. ¶¶ 67–68. The Focus Funds also had exorbitant rates of turnover, a measure of how often a fund changes its investments. Pet. App. 5a. High turnover can show manager inexperience or an attempt to remedy underperformance by changing the fund's holdings. Am. Compl. ¶ 59. In 2013, the Focus Funds changed 5 of 10 component funds, "resulting in significant and material changes to the underlying assets and allocations of those assets." Am. Compl. ¶ 79. The Focus Funds' turnover reached 90%, multiples higher than the industry average of 23.5%, resulting in increased transaction costs for the Funds. Am. Compl. ¶¶ 80–81. Turnover greater than 30% "warrants close analysis by investment professionals as it can suggest that the manager is not following a disciplined investment strategy." Am. Compl. ¶ 81.

On February 1, 2014, petitioners removed the Fidelity Freedom Funds as the Plan's target-date option and replaced them with the Focus Funds, transferring approximately $800 million of Plan participants' retirement savings to the Focus Funds. Am. Compl. ¶¶ 82–83. Thereafter, the Focus Funds continued to "substantially underperform" the S&P target-date fund benchmark as well as similar target-date funds managed by Vanguard, T. Rowe Price, and TIAA-CREF, each of which had excellent long-term performance and used a "Through" strategy, like the Focus Funds. Am. Compl. ¶¶ 61–62, 70–78, 86–94. Despite that persistent underperformance and upheaval, the Focus Funds remained in the Plan until September 2019. Am. Compl. ¶¶ 94–95.

B. Share-class claim

Respondents further allege that certain of the Plan's investment options charged excessive fees. Many investment options offer a range of different share classes to investors. Am. Compl. ¶ 100. The only difference between the various share classes of a given fund is the fees charged; the different share classes are otherwise identical in all respects, investing in the same portfolio of securities managed by the same advisor. *Id.* With over $4 billion in assets throughout the class period, the Plan had the size and bargaining power to easily qualify for the lowest-cost share class of any Plan investment option. Am. Compl. ¶¶ 14, 99, 102–103. For the Focus Funds and three other Plan investment options, however, petitioners provided a higher-cost share class to participants instead of an identical lower-cost share class of the *same* funds. Am. Compl. ¶¶ 104–107. An experienced and prudent investor would have been aware of the available lower-cost shares, which can be ascertained from fund literature, and would have opted for the lower-cost options to avoid incurring unnecessary costs. Am. Compl. ¶ 101. By using the higher-cost share classes, petitioners caused the Plan to pay wholly unnecessary fees totaling millions of dollars. Am. Compl. ¶¶ 107–08.

III. Procedural background

A. The district court's dismissal

On December 4, 2023, the district court granted petitioners' renewed motion to dismiss the Amended Complaint for failure to state a claim. Pet. App. 69a–96a. The court rejected the Focus Funds claim on the ground that respondents had not alleged a "meaningful benchmark" against which to evaluate the Focus Funds. Pet. App. 80a–85a. The court also found that the lack of a meaningful benchmark comparison to show that the Focus Funds underperformed within ERISA's six-year repose period precluded consideration of other facts, such as limited performance history and high turnover, showing that petitioners' initial selection of the Focus Funds was imprudent, and that these facts did not show imprudence in any event. Pet. App. 87a–89a.

The district court also dismissed the share-class claim. Pet. App. 92a–95a.

B. The Sixth Circuit's reversal

The court of appeals reversed the dismissal of the Amended Complaint. Pet. App. 1a–32a.

1. The court first rejected petitioners' argument that it is "*always* necessary" "to point to a higher-performing fund to demonstrate imprudence." Pet. App. 18a. Because "prudence is a 'process-driven dut[y],'" the proper "focus is on each administrator's real-time decision-making process, not on whether

any one investment performed well in hindsight." *Id.* Thus, "if a poorly chosen fund happens to perform well" in hindsight, "the administrator would still have acted imprudently." *Id.* Accordingly, "[a] plaintiff sufficiently states a claim of imprudence if it pleads facts sufficient to give rise to an inference of insufficient process. A meaningful benchmark may sometimes be one part of an imprudence pleading, but it is not required." *Id.* (citations omitted).

2. Though performance comparisons are not always required to show imprudence, the court concluded that respondents "did in fact plead a meaningful benchmark in this case." Pet. App. 19a. As a passively managed target-date fund, the Focus Funds were "designed to meet industry-recognized benchmarks." *Id.* (quoting Am. Compl. ¶ 70). "Because tracking an industry-recognized index is the 'investment goal' of a passively managed target date fund such as the Focus Funds, a relevant market index is inherently a meaningful benchmark." Pet. App. 20a. The court concluded that respondents had plausibly alleged "that the S&P target date fund benchmark was the relevant 'industry-accepted target date benchmark[] for "Through" target date funds used by investment professionals'" at the time. Pet. App. 19a (quoting Am. Compl. ¶¶ 67–68, 70). The court proceeded to reject petitioners' fact-bound contentions, based on extrinsic evidence, that the S&P target-date index was not sufficiently "meaningful." Pet. App. 21a. "Where a complaint alleges that a fund, by its design, sets a benchmark for itself and repeatedly fails to meet that benchmark, it is perfectly appropriate to submit to a jury the prudence of the administrator's process in retaining the fund despite that failure." Pet. App. 22a.

In addition to plausibly alleging that the Focus Funds "systematically underperformed" a meaningful benchmark, respondents' alleged additional facts supporting reasonable inferences that petitioners had a flawed process for monitoring the Focus Funds. Pet. App. 23a–24a. Petitioners "retained the Focus Funds despite 'persistent' 'upheaval' of the Funds' assets and turnover rates many times higher than what is considered 'significant' and 'warrant[ing] close analysis.'" Pet. App. 25a. "Taking these allegations together," the court concluded that "[a] jury could plausibly find that a prudent decision-making process would have considered the Funds' turnover and underperformance and would have arrived at the conclusion that retaining the funds would not be in the Plan's best interests." Pet. App. 25a–26a. Thus, respondents pleaded facts sufficient to state a claim for breach of fiduciary duty in retaining the Focus Funds.

3. The court further concluded that Plaintiffs plausibly alleged that petitioners imprudently wasted participants' money by providing higher-cost shares of the Focus Funds and three Vanguard funds, "when reasonable effort would have unlocked" lower-cost but otherwise identical shares of the same investments. Pet. App. 28a–30a. Taken together, respondents' allegations that the Plan invested in higher-cost shares even though lower-cost shares were readily available to the Plan as a $4 billion investor with tremendous bargaining leverage in a highly competitive market raised a reasonable inference that petitioners imprudently failed to negotiate access to lower-fee share classes. *Id.*

4. Judge Murphy dissented. Pet. App. 33a–68a. He agreed with the majority that the relevant pleading standard "*does not require a meaningful benchmark* in all cases." Pet. App. 54a (emphasis added). While performance comparisons are one way to raise an inference of imprudence, ERISA plaintiffs can also show imprudence "in other ways." Pet. App. 54a. But he would have affirmed dismissal of the

Focus Funds claim on the ground that respondents' performance comparisons were not sufficiently "meaningful." Pet. App. 54a–55a. Judge Murphy advocated a heightened pleading standard that would require a plaintiff to allege all of the factual details needed to prevail at trial. Pet. App. 33a–34a, 39a–48a; *see also* Pet. App. 23a n.4 (describing dissent as "creating the mistaken impression that Johnson's complaint has failed to carry a huge evidentiary burden—one that is inapplicable to the matter currently before us.").

5. The Sixth Circuit denied rehearing. Pet. App. 97a–98a. No judge requested a vote on the suggestion for rehearing en banc. Pet. App. 98a.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the decision of any other court of appeals. Petitioners merely disagree with the Sixth Circuit's application of a rule of law, which is rarely a basis for certiorari. S. Ct. R. 10. That the judgment is interlocutory, and the petition only seeks review of one of respondents' claims, further supports denying the petition. The policy arguments pressed by petitioners also provide no basis for certiorari.

I. The decision below does not create a conflict with any other circuit decision.

Petitioners misstate the Sixth Circuit's holding, which does not conflict with any other circuit decision. What they describe as an "alternative holding" also does not create a circuit conflict and amounts to a mere disagreement with the Sixth Circuit's context-specific application of a legal standard to distinct facts.

A. Petitioners misstate the decision below and identify no circuit conflict.

Petitioners contend that the Sixth Circuit held that a "meaningful benchmark" is not required to state a "plausible ERISA claim *based on the relative underperformance of a plan investment*." Pet. 11–12, 16 (emphasis added). But that is not what the court ruled. Rather, it held that because "prudence is a 'process-driven dut[y],'" a performance comparison "is not required" *if* the complaint pleads other facts "sufficient to give rise to an inference of insufficient process." Pet. App. 18a. The majority relied on earlier circuit precedent which recognized that the extent to which a meaningful benchmark is needed or relevant necessarily depends on context. *Id.*; *Forman v. TriHealth, Inc.*, 40 F.4th 443, 451 (6th Cir. 2022) ("Different ERISA claims have different requirements, to be sure."); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022) (noting that "a fund's underperformance, as compared to a 'meaningful benchmark,' *may* offer a *building block* for a claim of imprudence"). While such a benchmark "'may be'" "'[i]mportant' in some circumstances," it is "less-so in others." Pet. App. 18a (quoting *Forman*, 40 F.4th at 451). The dissenting opinion agreed that imprudence could be shown "in other ways," such as through direct allegations of inadequate monitoring. Pet. App. 54a.

Because petitioners misstate the Sixth Circuit's decision, they fail to identify any court that has held otherwise. Like the Sixth Circuit, the extent to which other circuits have required a "meaningful benchmark" depends on the context.

The Eighth Circuit has required a meaningful benchmark for a claim alleging that a prudent fiduciary "would have selected a different fund based on the cost or performance of the selected fund."

Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018). "[B]ut there is no one-size-fits-all approach," and a claim's plausibility ultimately "depends on the 'totality of the specific allegations.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 280–81 (8th Cir. 2022) (citing *Meiners* and *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595–96 (8th Cir. 2009)). *Braden*, cited by *Meiners* and *Matousek* as requiring a meaningful benchmark (without using that phrase), found "the market index and other shares of the same fund" to be meaningful benchmarks on a motion to dismiss. *Meiners*, 898 F.3d at 822 (citing *Braden*, 588 F.3d at 595–96). *Braden* emphasized that the complaint must "be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." 588 F.3d at 594. The plausibility determination ultimately depends on the "totality of the specific allegations." *Id.* at 596 n.7.

Far from conflicting with the Sixth Circuit, the Seventh Circuit case cited by petitioners *relied* on "the Sixth Circuit's decision in *Smith*" to affirm dismissal of a claim alleging "excessive investment-management fees" due to plan fiduciaries' decision to offer actively managed funds instead of passive alternatives. *Albert v. Oshkosh Corp.*, 47 F.4th 570, 581–82 (7th Cir. 2022) (citing *Smith*, 37 F.4th at 1165). Nothing in the opinion suggests that an investment-performance benchmark is *always* required to state an imprudence claim.

Petitioners cite a Tenth Circuit case addressing a claim that fiduciaries "acted imprudently by offering higher cost funds and charging higher fees than comparatively cheaper options in the marketplace." *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1146 (10th Cir. 2023). The court required a "meaningful benchmark" for a specific type of claim: one seeking "to raise an inference of imprudence through price disparity." *Id.* at 1148. The court emphasized that determining what is a sufficiently meaningful comparison "will depend on context because 'the content of the duty of prudence' is necessarily 'context specific.'" *Id.* (quoting *Hughes*, 575 U.S. at 177). The court did not suggest that a performance comparison is *always* required to plausibly allege imprudence, regardless of context.

Petitioners also cite cases involving claims of excessive recordkeeping fees. Pet. at 14–15 (citing *Singh v. Deloitte LLP*, 123 F.4th 88, 94–96 (2d Cir. 2024); *Matney*, 80 F.4th at 1157; *Matousek*, 51 F.4th at 279–80; *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135, 1138–39 (8th Cir. 2024)). Because the focus of such a claim is price alone, as opposed to a contention that the service is unnecessary or substandard (as here), a sound basis for comparison is needed to meaningfully assess whether the plan plausibly overpaid for the service. *Matney*, 80 F.4th at 1148–49. Again, what qualifies as a "meaningful" comparison in a given case "will depend on context." *Id.* at 1148.

In short, petitioners cite no case holding that an investment-performance benchmark is a *required* element of an imprudence claim in all cases, and thus identify no conflict with the Sixth Circuit's holding that "[a] meaningful benchmark may sometimes be one part of an imprudence pleading, but it is not required." Pet. App. 18a.

B. Petitioners merely disagree with the Sixth Circuit's fact-specific application of the meaningful-benchmark standard.

Although they attempt to portray a split of authority, petitioners merely disagree with the Sixth Circuit's fact-bound determination that respondents did, in fact, plead a "meaningful" benchmark. Pet.

App. 19a. Petitioners assert that "[u]nder Eighth and Tenth Circuit standards, the S&P target date fund benchmark is not a meaningful benchmark for respondents' claims." Pet. at 19. The cases cited by petitioners reached different outcomes not because they adopted different legal standards, but because they addressed different facts and investments. This simply confirms the Tenth Circuit's observation that what qualifies as "meaningful" in a particular case will necessarily "depend on context." *Matney*, 80 F.4th at 1148.

Applying Rule 8's plausibility standard is "a context-specific task" that necessarily depends on the specific factual allegations before the court. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). That principle applies doubly to ERISA imprudence claims: "Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." *Hughes*, 595 U.S. at 177.

The Sixth Circuit concluded that respondents pleaded at least one meaningful benchmark because the Focus Funds were "designed to meet industry-recognized benchmarks," and respondents plausibly alleged "that the S&P target date fund benchmark was the relevant 'industry-accepted target date benchmark[] for "Through" target date funds used by investment professionals'" at the time. Pet. App. 19a, 23a ("the complaint alleges that the Focus Funds were 'designed to meet industry-recognized benchmarks,'" and that "'[t]he S&P target date fund benchmark is one such benchmark'") (citations omitted).[2] In the

[2] Given its finding that the S&P benchmark is a meaningful comparator, the Sixth Circuit did not address whether the three additional benchmarks cited in the complaint also met that standard. Pet. App. 23a–24a n.5.

context of a passively managed target date fund, the goal of which is to track an industry-recognized index, "a relevant market index is inherently a meaningful benchmark." Pet. App. 20a. The court thoroughly considered and rejected petitioners' fact-based arguments challenging the S&P target-date index. Pet. App. 21a.

Petitioners (at 16) first assert that the Sixth Circuit's application of the meaningful benchmark standard conflicts with the Tenth Circuit's decision in *Matney*, which described a comparison as meaningful if "the alternative investment options have similar investment strategies, similar investment objectives, or similar risk profiles to the plan's funds." *Matney*, 80 F.4th at 1148. Because the Focus Funds were designed to track industry-recognized benchmarks, the Focus Funds by definition "share the same goals, strategies, and risks as the indices they are designed to replicate." Pet. App. 18a. Thus, the S&P index is a meaningful benchmark under the Tenth Circuit's standard.

Petitioners also mistakenly claim that the Eighth Circuit would have rejected the S&P index. Pet. at 16–17. In fact, the majority relied on the Eighth Circuit's decision in *Braden*. Pet. App. 20a. In *Braden*, the market indices provided a meaningful comparison because 'tracking the market index was the stated investment goal of the fund the plaintiffs challenged.'" Pet. App. 20a (quoting *Matousek,* 51 F.4th at 281, in turn citing *Braden*, 588 F.3d at 595–96). Here, the Focus Funds were similarly designed to meet industry-recognized benchmarks, making the S&P index a meaningful benchmark. Pet. App. 20a–21a. Accordingly, there is no conflict with the Eighth Circuit.

Petitioners contend that "the majority's reliance on *Braden* is misplaced" because the complaint did not allege that "the Focus Funds were designed to match the S&P target date fund benchmark in particular." Pet. at 17–18. But petitioners' cases do not hold that the *only* benchmark that can be considered meaningful at the pleadings stage is one that the fund was specifically designed to track. A benchmark is meaningful if it "would allow a jury to assess appropriately the Funds' performance and the prudence of the process that led to their retention," and the S&P benchmark does so. Pet. App. 22a–23a.

Petitioners assert a conflict with another Eighth Circuit case that found an industry benchmark to be an inadequate comparator in that case. Pet. at 17–18; Pet. App. 56a (Murphy, J. dissenting). The funds there were actively managed. *See Matousek*, 51 F.4th at 281 (discussing, *inter alia*, "Dodge & Cox International Stock" fund); Dodge & Cox, *Int'l Stock Fund* ("The Fund offers investors a highly selective, actively managed core international equity fund").[3] As the majority explained, while a market index may not be a valid comparator for an active fund, when index funds like the Focus Funds have the "investment goal" of meeting industry-recognized benchmarks, "a relevant market index is inherently a meaningful benchmark." Pet. App. 19a–20a & n.3.

Petitioners also assert a conflict with *Meiners*, which affirmed dismissal of a claim that certain target date funds were imprudent. Pet. at 16; *Meiners*, 898 F.3d at 823 & n.2. But there, the plaintiff "only pled that one Vanguard fund, which he alleges is comparable, performed better." *Meiners*, 898 F.3d at 823. Thus, the plaintiff did not identify a relevant market index, as here and in *Braden*, and did not allege that the Vanguard option was among the

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[3] https://www.dodgeandcox.com/individual-investor/us/en/investing/our-funds/international-stock-fund.html.

benchmarks that the challenged option was designed to meet, in contrast to this case. Pet. App. 23a ("the complaint alleges that the Focus Funds were 'designed to meet industry-recognized benchmarks,' that '[t]he S&P target date fund benchmark is one such benchmark,' and that the Funds systematically underperformed that benchmark.") (complaint citations omitted). Thus, the different outcome is merely a function of different facts.

A footnote in the petition also cites several unpublished district court cases. Pet. at 19 n.3. These cases did not address the Northern Trust Focus Funds and thus involved different facts. *See, e.g.*, *Luckett v. Wintrust Fin. Corp.*, No. 22-3968, 2024 U.S. Dist. LEXIS 144685, at *3 (N.D. Ill. Aug. 14, 2024) ("BlackRock LifePath Index" funds). Numerous district court cases specifically addressing similar claims regarding the Northern Trust Focus Funds have denied motions to dismiss. *Binder v. PPL Corp.*, No. 22-133, 2024 U.S. Dist. LEXIS 43927, at *9–11 (E.D. Pa. Mar. 12, 2024); *Conlon v. N. Trust Co.*, No. 21-2940, ECF No. 51 at 11–15 (N.D. Ill. Aug. 5, 2022); *Cutrone v. Allstate Corp.*, No. 20-6463, 2021 U.S. Dist. LEXIS 185430, at *23–24 (N.D. Ill. Sep. 28, 2021); *Brown-Davis v. Walgreen Co.*, No. 19-5392, 2020 WL 8921399, at *1–3, 2020 U.S. Dist. LEXIS 252317, at *10–14 (N.D. Ill. Mar. 16, 2020); *see also Ford v. Takeda Pharms. U.S.A., Inc.*, No. 21-10090, ECF #49 (D. Mass. June 4, 2021) (granting leave to amend Focus Funds claim over defendant's futility objection). This simply confirms that fiduciary breach claims "are inevitably fact intensive." *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014).

II. The Sixth Circuit's decision is correct.

The Sixth Circuit correctly ruled both that (1) "[a] meaningful benchmark may sometimes be one part of an imprudence pleading, but it is not required," and (2) respondents do "in fact plead a meaningful benchmark in this case." Pet. App. 18a–19a.

1. The Sixth Circuit's conclusion that it is not "*always* necessary" "to point to a higher-performing fund to demonstrate imprudence" is correct as a matter of law. Pet. App. 18a. ERISA's prudence standard does not refer to investment performance or benchmarks. The only statutory benchmark is that of "a prudent man acting in a like capacity and familiar with such matters." 29 U.S.C. § 1104(a)(1)(B). An ERISA fiduciary must discharge his duties "with the care, skill, prudence, and diligence" that such a person would use "under the circumstances then prevailing." *Id.* This is a test of conduct, not investment results: "the prudent person standard is not concerned with results; rather it is a test of how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917–18 (8th Cir. 1994). The resulting performance of an investment—whether good or bad—is irrelevant to the question of whether the fiduciary's conduct met the prudent person standard. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) ("First and foremost, whether a fiduciary's actions are prudent cannot be measured in hindsight, whether this hindsight would accrue to the fiduciary's detriment or benefit.").

Because nothing in ERISA's text requires a showing of poor investment performance to establish a fiduciary's imprudence, the Sixth Circuit's conclusion that an ERISA plaintiff "is not required" to plead a meaningful performance benchmark if the complaint otherwise plausibly shows that the defendant failed to use the requisite care, skill, prudence, or diligence, is correct as a matter of law. Pet. App. 18a.

Petitioners contend that requiring a meaningful benchmark is "[t]he only way to heed" this Court's instruction, Pet. at 20, that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise," *Hughes*, 595 U.S. at 177. Not so. While a performance comparison may be one way to show that a fiduciary's investment decision was unreasonable, it is not "the only way." As even the dissent acknowledged, a plaintiff could make out an imprudence claim by alleging "that the administrators did not review their portfolio for years," Pet. App. 54a, i.e., failed to properly apply their "experience and expertise," *Hughes*, 595 U.S. at 177. While the resulting performance relative to a comparator may be relevant to show the "losses to the plan resulting from" the breach, 29 U.S.C. § 1109(a), such a comparison is not required to show that the defendant "*acted* imprudently" in the first instance, Pet. App. 18a (emphasis added).

While the Sixth Circuit correctly held that a performance comparison is not always required "to plead a facially plausible claim of imprudence," Pet. App. 19a, as a practical matter, plan participants often must rely on such comparisons to "*indirectly* show" imprudent fiduciary conduct, because "ERISA plaintiffs generally lack the inside information" to "describe directly" how the fiduciary's process was flawed. *Braden*, 588 F.3d at 595, 598 (emphasis added). Such details "tend systemically to be in the sole possession of defendants" before discovery. *Id.* at 598. Nevertheless, while underperformance relative to a meaningful benchmark may be one way to indirectly show misconduct, ERISA's text cannot be read to *require* such a comparison if the alleged facts otherwise plausibly demonstrate imprudent conduct, as the Sixth Circuit correctly held. Pet. App. 18a.

2. The Sixth Circuit also correctly held that an industry-recognized benchmark like the S&P target date fund benchmark is a sufficiently meaningful benchmark for funds that are "designed to meet industry-recognized benchmarks." Pet. App. 20a–21a. "[T]here is no one-size-fits-all approach" to determining what qualifies as "a meaningful benchmark" in a particular case. *Matousek*, 51 F.4th at 280–81. Assessing whether a specific benchmark is sufficiently "meaningful" is an inherently fact-intensive question that will necessarily "depend on context." *Matney*, 80 F.4th at 1148.

Petitioners advocate a one-size-fits-all approach, that a benchmark cannot be considered "meaningful" unless it is materially identical to the challenged option, *i.e.*, shares the same strategy, objectives, and risk profile. Pet. at 16–17. As the dissent put it, any performance comparison is "meaningless" unless the challenged option and benchmark are "interchangeable in all material respects but their returns." Pet. App. 51a. But if two investments are materially identical in *all* respects, their returns will necessarily be identical as well. Investments would only differ in their returns if they materially differed in their holdings, but such a deviation would render the comparator "meaningless" in petitioners' subjective view, making it impossible to ever show a loss or to even state a claim.

Petitioners' one-size-fits-all definition of what constitutes a "meaningful" benchmark is inconsistent with a context-specific pleading standard. Because fiduciary prudence depends on the totality of the prevailing circumstances, the plausibility inquiry in an ERISA imprudence case "will necessarily be context specific." *Hughes*, 595 U.S. at 177 (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U. S. 409, 425 (2014)). While a showing of substantial similarity to a benchmark may sometimes be appropriate, in other cases such an approach may conflict with the plaintiff's liability theory. For instance, a plaintiff may allege that an investment option was outside the "range of reasonable judgments" due to some substantive defect that a prudent fiduciary would have avoided. *Hughes*, 595 U.S. at 177. It makes little sense to evaluate an allegedly imprudent investment by comparing it to a materially identical (and hence also imprudent) investment. It is far more logical, and consistent with ERISA's text and the law of trusts, to compare the imprudent investment to a *prudent* alternative, *i.e.*, an investment that plausibly would have been used *but for* the breach. 29 U.S.C. § 1109(a) (losses "resulting from" the breach); *Brotherston v. Putnam Investments, LLC*, 907 F.3d 17, 31–34 (1st Cir. 2018); *Tussey v. ABB, Inc.*, 850 F.3d 951, 960 (8th Cir. 2017); *Donovan v. Bierwirth*, 754 F.2d 1049, 1055–56 (2d Cir. 1985).

To expand on the dissent's analogy, suppose a fiduciary seeking safe, conservative investments fails to adequately investigate and thereby unwittingly invests in a fund primarily holding stock of "a 'speculative' start-up" that subsequently goes bankrupt. Pet. App. 44a. The beneficiaries would have no direct knowledge of the fiduciary's failure to investigate and would have to rely on indirect inferences of imprudence. To raise such an inference under petitioners' inflexible "apples-to-apples" pleading rule, the beneficiaries would have to allege that the unduly risky fund underperformed other identically risky funds at the time to state a claim. That makes little sense—the supposedly "meaningful" benchmark represents the *opposite* of the liability theory, *i.e.*, that a prudent investigation would have led to a *low-risk* investment. Conversely, the fact that an imprudently risky investment performed comparably or even better than other imprudent choices of the same type should not render a claim of imprudence implausible, if the alleged facts otherwise raise a plausible inference "that a prudent fiduciary would have acted differently" by avoiding the option. *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022). The Sixth Circuit's conclusion that an industry-recognized benchmark establishes a meaningful comparison for funds designed to meet such benchmarks was a proper context-specific application of the meaningful benchmark rule.

3. Because ERISA's fiduciary duties are "derived from the common law of trusts," "courts often must look to the law of trusts" to determine "the contours of an ERISA fiduciary's duty." *Tibble*, 575 U.S. at 528–29. Petitioners contend that a market index like the S&P target-date benchmark is inherently inappropriate because it "reflects a composite or average of performance" and is not an investable fund. Pet. at 18a–19a. Petitioners' argument is inconsistent with trust law, which "specifically identifies as an appropriate comparator for loss calculation purposes 'return rates of one or more . . . suitable index mutual funds or market indexes.'" *Brotherston*, 907 F.3d at 31 (quoting RESTATEMENT (THIRD) OF TRUSTS, § 100 cmt. b(1)).

III. This case would be a poor vehicle for considering the questions petitioners seek to present.

The Sixth Circuit reversed the dismissal of respondents' complaint and remanded for further proceedings. Pet. App. 32a. For cases in an interlocutory posture like this one, this Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., statement respecting the denial of certiorari); *Bhd. of Locomotive Fireman & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."). While this Court has the authority to review cases in an interlocutory posture under 28 U.S.C. § 1254, it has declined to exercise that discretion "unless necessary to prevent extraordinary inconvenience and embarrassment." *American Constr. Co. v. Jacksonville, Tampa & Key West R.R. Co.*, 148 U.S. 372, 384 (1983). "[I]n the absence of some such unusual factor," such as if the lower court's decision would have "immediate consequences for the petitioner," the Court "generally rules in a denial of certiorari." Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* § 4.18 (11th ed. 2019). No such extraordinary circumstance exists here.

In addition, petitioners explicitly declined to seek review of respondents' "share-class claim." Pet. at 7 n.1. The share-class claim will thus proceed in any event. Because that claim includes the Northern Trust Focus Funds which are the subject of the "meaningful benchmark" issue, discovery will proceed as to petitioners' monitoring of those funds regardless of the outcome of the petition.

Petitioners also raise several policy arguments, contending that a heightened meaningful benchmark standard is needed because it is supposedly too "easy" to state a plausible imprudence claim and that "litigation expenses" will deter companies from sponsoring retirement plans. Pet. at 23. These policy arguments do not support review and should be directed to Congress.

"A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). Enforcing ERISA's long-standing statutory duties cannot possibly pose any significant risk to the availability of retirement plans. Petitioners offer no evidence that any employer has terminated its retirement plan in the face of ERISA fiduciary breach litigation such as this. Instead of harming retirement plans, participant-led ERISA fiduciary breach litigation has reduced by nearly 50% the expenses of retirement plan investments. George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are The Causes And Consequences?*, Center For Retirement Research (May 2018) at 2 (fig. 1), 5 (fig. 5);[4] Lauren K. Valastro, *How Misapplying Twombly Erodes Retirement Funds* 4 (July 26, 2024).[5] It has produced enhanced fiduciary awareness, reduction of fees, and enhanced employee retirement accounts. Anne Tergeson, *401(k) Fees, Already Low, Are Heading Lower*, WALL ST. J. (May 15, 2016).[6] Courts have attributed nearly $2.8 billion "in annual savings for American workers and retirees" to excessive-fee litigation and DOL's fee-disclosure regulations. *Cates v. Trustees of Columbia Univ.*, No. 16-6524, 2021 WL 4847890, at *6 (S.D.N.Y. Oct. 18, 2021).

Although ERISA strikes a balance between protecting promised benefits and encouraging employers to create benefit plans, Pet. at 24, among ERISA's explicit protective purposes is to provide for "ready access to the Federal courts." 29 U.S.C. § 1001(b). In that regard, the Secretary of Labor

[4] https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.

[5] https://ssrn.com/abstract=4928476.

[6] https://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601.

"depends in part on private litigation to ensure compliance with the statute." *Braden*, 588 F.3d at 597 n.8. A pleading standard that would require participants "to carry a huge evidentiary burden" to state a plausible claim, Pet. App. 23 n.4, as petitioners advocate, would undermine that express statutory purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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