No. 20-609

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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March 23, 2021

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REPLY BRIEF FOR THE PETITIONERS

This case presents a straightforward question: Does a plaintiff state a claim for breach of the ERISA duties of prudence and diversification merely by alleging that fiduciaries permitted participants in a defined contribution plan to choose, from a diverse menu of options, to invest in a single-stock, non-employer fund? The Fifth Circuit answered that question in the negative. See *Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, 960 F.3d 190, 197-200 (5th Cir. 2020), *petition for cert. filed*, No. 20-1255 (U.S. Mar. 8, 2021).[1] The majority below, in a case with "near-identical facts and claims," answered it in the affirmative. App. 14a.

Plaintiff nevertheless takes the remarkable position that "there is no split," and "the Fourth Circuit *agreed* with *Schweitzer*." Opp. 2. This is incorrect. And it is premised on a flat mischaracterization of *Schweitzer*. While Plaintiff asserts that "*Schweitzer* concluded[] [that] the plaintiffs there had 'plausibly alleged' a breach of the duty of prudence," *id.*, *Schweitzer* concluded precisely the opposite: the defendant fiduciaries were *not* "obligated" under ERISA "to force Plan participants to divest" from the single-stock fund at issue. 960 F.3d at 198. Indeed, it is only because *Schweitzer* concluded that the plaintiffs had *not* plausibly alleged a breach of the duty of prudence that the court affirmed the dismissal of the complaint.

The simple fact is, Plaintiff's counsel filed two materially identical complaints; the Fifth Circuit af-

[1] The *Schweitzer* plaintiffs have requested that the petition be held for this case.

firmed dismissal, and the Fourth Circuit reversed dismissal. Moreover, the Fourth Circuit explicitly noted its disagreement with *Schweitzer*, App. 14a, and subsequently took the extraordinary step of staying its mandate pending this petition. The split is undeniable, and the Fourth Circuit's stay order demonstrates that court's recognition that the split goes to a "substantial question." See Fed. R. App. P. 41(d)(1).

The petition further showed that the panel's decision conflicts with *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). Plaintiff alleges that permitting participants in Gannett's defined contribution plan to maintain their investments in the single-stock TEGNA fund was imprudent based on publicly available information showing the volatility of TEGNA stock. "[B]ecause Quatrone has pleaded no special circumstances, his allegation that the TEGNA stock's volatility made the inclusion of the TEGNA Stock Fund an imprudent investment simply fails to state a claim in light of *Dudenhoeffer*." App. 44a (Niemeyer, J., dissenting).

Finally, the Fourth Circuit's departure from the other courts of appeals will have a dramatic impact on fiduciaries' willingness to offer participants the option to invest in single-stock or single-sector funds. Plaintiff says this outcome is not "undesirable," Opp. 25, but cannot refute its significance. This Court should grant the petition to resolve the split among the lower courts on this critical question.

ARGUMENT

I. THE COURTS OF APPEALS ARE SPLIT.

The panel knowingly and concededly split from *Schweitzer*, and its decision departs from those of other courts as well. Pet. 16-23. Plaintiff attempts to mask this clear divide by injecting confusion on several points.

1. Plaintiff fails to appreciate that the Gannett plan is a *defined contribution plan*. As the petition explains, in a defined contribution plan, it is *participants*—not plan fiduciaries—who determine how assets associated with their individual accounts will be invested. Pet. 7-8. Thus, the overall concentration of investments in particular funds in a defined contribution plan is determined by participants' choices—not by plan fiduciaries. See *Schweitzer*, 960 F.3d at 198-99. Ignoring this, Plaintiff repeatedly and incorrectly attributes the investment choices at issue here to Gannett. Opp. 7 (describing "Gannett's extensive investment in both single-stock funds"); *id.* at 11 ("Gannett invested the plan's assets in a lopsided manner"); *id.* at 23 (discussing "Gannett's decision to go all-in on a floundering media company"). Contrary to these misstatements, Gannett did not choose to invest the plan's assets in TEGNA or any other stock—participants did.

Elsewhere, Plaintiff appears to conflate *funds* with *plans*. Plaintiff states: "Even if investing in a particular stock is prudent, … that would not support the conclusion that investing *all* of a fund's assets in that stock is also prudent." Opp. 22; see also *id.* at 23 (hypothesizing about a fiduciary that "chose to invest the entirety of a fund's assets in online retailer Pets.com"). But in the defined contribution context, a "fund" is no more than an option on the menu from which participants can select. Investing all of the assets of a "fund" in a single stock means giving participants the option to invest in a single-stock fund. What share of the *plan's* assets are invested in the stock depends on how many participants choose to invest in the single-stock *fund*, and in what measure.

If, as Plaintiff asserts, it is imprudent to invest "all of a fund's assets" in a single stock, then that means that plan fiduciaries may not include single-stock funds on the menu of options of their defined contribution plans—full stop. That is precisely the legal issue on which the Fourth and Fifth Circuits diverged: the court below held that Plaintiff adequately pleaded that Gannett breached the duty of prudence by permitting participants to maintain their investments in a single-stock fund (because the fund was not diversified), while the Fifth Circuit in *Schweitzer* held that the defendant fiduciaries did not breach that same duty by allowing the same investment.

2. Plaintiff's argument that this clear split does not exist rests on a misreading of *Schweitzer*. According to Plaintiff, "the Fifth Circuit concluded that the plaintiffs had 'plausibly alleged' a breach of the duty of prudence based on the fiduciaries' maintenance of an undiversified, single-stock fund—precisely the same conclusion, in other words, as the one reached by the Fourth Circuit." Opp. 14 (quoting *Schweitzer*, 960 F.3d at 198). That was not the Fifth Circuit's conclusion.

The sentence immediately following the one quoted by Plaintiff reads: "But it does not follow that the Fiduciaries were obligated to force Plan participants to divest from the [single-stock] Funds." 960 F.3d at 198. The Fifth Circuit recognized that "ERISA contains no prohibition on individual account plans' offering single-stock funds," and that in defined contribution plans, participants "were free to sell off their investments at any time and reinvest in other funds." *Id.* at 197-99. Thus, because it was participants who "chose to retain the [single-stock] Funds," allegations that the "resulting concentration" in those funds was imprudent did not state a claim for breach of fiduciary duty. *Id.*[2]

The Fourth Circuit unequivocally reached the opposite conclusion. According to the panel, "diversification is a component of prudence," and "each available fund on a menu must be prudently diversified." App. 19a. And because the TEGNA fund "was a single-stock fund with inherent concentration risk," the panel concluded that "it is plausible that the fund was, in fact, imprudent." App. 33a. These two decisions are in direct conflict.

Plaintiff contends that the panel's ruling that "each available fund on a menu must be prudently diversified," App. 19a, does not effect a *per se* ban on single-stock funds. Opp. 14-15. Plaintiff cites footnote 9 of the panel opinion, which hinted at, but ultimately "d[id] not address," the possibility that a defendant fiduciary could avoid liability by "undertak[ing] a thorough investigation" before offering a single-stock fund. App. 20a n.9. It is unclear what investigation into a single-stock fund, which is by definition not diversified, could satisfy the panel's requirement that each fund must be diversified. That is likely why, as Judge Niemeyer noted in dissent, Plaintiff's counsel "acknowledged that his position would essentially create such a *per se* rule." App. 43a.

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[2] Plaintiff's reading of *Schweitzer* here is a complete reversal from his acknowledgement below that the Fifth Circuit "found that the fiduciaries' failure to divest did *not* violate ERISA's fiduciary duties of prudence and diversification." Notice of Supplemental Authority, *Quatrone v. Gannett Co.*, No. 19-1212 (4th Cir. May 22, 2020), ECF No. 39-1 (emphasis added).

Finally, Plaintiff's attempts to explain away the split from *Young v. General Motors Investment Management Corp.*, 325 F. App'x 31 (2d Cir. 2009), are similarly misguided. Plaintiff contends that *Young* concerns only the duty to diversify under 29 U.S.C. § 1104(a)(1)(C) and that because the panel decided the case below under the diversification component of the duty of prudence under § 1104(a)(1)(B), these cases are ships passing in the night. Opp. 12-14. But whichever subsection is cited, the cases impose conflicting duties on fiduciaries of defined contribution plans: In the Second Circuit, fiduciaries may offer single-stock funds if the overall menu is diversified, and in the Fourth Circuit they may not.

3. Even when Plaintiff begrudgingly acknowledges the split between this case and *Schweitzer*, he attempts to minimize it by suggesting that the dispute is merely over "the proper timing of a defense based on participant choice." Opp. 17. That argument both ignores the fundamental distinction between a *prima facie* claim and an affirmative defense and rewrites *Schweitzer*.

The Fifth Circuit focused on the scope of the duty of prudence in the context of a defined contribution plan. 960 F.3d at 197-99. The court concluded that the duty did not require the plan sponsor to close the single-stock fund because participants "were free to sell off their investments at any time and reinvest in other funds," and having "enjoy[ed] their autonomy" to do so, the participants could not "blame the Fiduciaries for declining to second guess that judgment." *Id.* at 199. The Fourth Circuit took an entirely different view of the same duty, determining that allowing participants to forgo a single-stock fund in favor of other options on a diversified menu is not enough. App. 29a-30a. Instead, the panel held that "the appropriate way to account for participant choice" is through the affirmative defense provided by 29 U.S.C. § 1104(c). App. 29a.

These holdings stand in conflict. In the Fifth Circuit, ERISA fiduciaries have the benefit of an "important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim." *Dudenhoeffer*, 573 U.S. at 425. But in the Fourth Circuit, ERISA fiduciaries must engage in discovery until the facts necessary to support their affirmative defense can be marshaled at summary judgment or trial. Even if such fiduciaries may ultimately prevail,[3] this Court should not permit the duties imposed on ERISA fiduciaries to turn on the happenstance of geography.

Plaintiff further suggests that, even if the circuits are divided, this Court should deny the petition because *Schweitzer* "overlooked [the] important issue" of the affirmative defense and failed to follow its own circuit precedent. Opp. 18-19. This argument also fails. *Schweitzer* does not conflict with *Kopp v. Klein*, 722 F.3d 327 (5th Cir. 2013), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409, *and vacated*, 573 U.S. 956 (2014) (mem.). *Kopp* said defendants could not rely on the § 1104(c) safe harbor at the motion-to-dismiss stage, but went on to uphold dismissal for failing to state a breach of fiduciary duty. *Id.* at 335. It did not address whether offering a single-stock

[3] This is far from certain, as proving an affirmative defense under § 1104(c) requires more than showing that plan participants could select from a diversified menu of options. *See* 29 C.F.R. § 2550.404c-1 (imposing a series of requirements, only one of which is that the plan must provide "a broad range of investment alternatives," and further imposing requirements on what qualifies as a "broad range of investment alternatives").

fund in a diversified menu of options violated the duty of prudence, nor did it hold participant choice is irrelevant to all other considerations. Indeed, the *Schweitzer* plaintiffs sought en banc rehearing on the ground that the decision conflicted with a later opinion in *Kopp*, Petition for Rehearing En Banc, *Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, No. 18-20379 (5th Cir. June 5, 2020), and the Fifth Circuit denied review without requesting a response, Order Denying Petition for Rehearing En Banc, *Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, No. 18-20379 (5th Cir. Oct. 8, 2020). Regardless, *Schweitzer* is not alone in its understanding of the scope of the duty of prudence. See, *e.g.*, *Yates v. Nichols*, 286 F. Supp. 3d 854, 864 (N.D. Ohio 2017).

4. Plaintiff also claims that this case is a poor vehicle to resolve the circuit split on the scope of ERISA's fiduciary duties because Plaintiff's allegations "would survive on either side of Gannett's purported split." Opp. 1. This argument is based on Plaintiff's consistent misunderstanding or misstatement of how defined contribution plans work.

Plaintiff contends that there was a failure to diversify at the plan level because "[a]t the end of 2015, more than 80% of the plan's stock holdings were invested in the stock of TEGNA,"[4] "the plan also invested a significant share of its assets in Gannett stock," and "these investments 'caused the Plan to be undiversified' as a whole." Opp. 11 (quoting App. 111a). What Plaintiff does not acknowledge is that Gannett does not decide where or in which fund an employee chooses to invest. The participants in a defined con-

[4] The TEGNA fund actually accounted for about 20% of the plan's assets. App. 8a.

tribution fund make those choices, and "any resulting concentration" in a particular fund is due to participants' choices. *Schweitzer*, 960 F.3d at 198. It is thus inaccurate to suggest that investments by Gannett caused the plan to be undiversified.

Plaintiff relies on one paragraph in the panel opinion as support for his claim that resolving the circuit split "would have no impact on the outcome of this case." Opp. 12 (citing App. 22a). In that paragraph, the panel concluded that Plaintiff had plausibly stated "a claim for a breach of the duty of diversification under § 1104(a)(1)(C)" because the Plan's menu of options included two single-stock funds in the same industry. App. 23a; see App. 22a ("[T]he interplay between the two single-stock funds caused the Plan overall to have a diversification problem."). The court said nothing of the other options on the Plan's overall menu, which Plaintiff has never challenged as inadequately diversified. And in an accompanying footnote, the panel made clear that its ruling regarding the duty of diversification flowed directly from its understanding that (contrary to *Schweitzer*) a participant can state a claim for breach of fiduciary duty based on the concentration of a plan's holdings—even though, again, concentration in a defined contribution plan results from participants', not fiduciaries', choices. App. 23a n.10 (noting that fiduciaries could have avoided overconcentration by exercising their "power to divest"). Far from providing an independent basis for its decision, the panel's statements about the duty of diversification were more of the same—and equally in conflict with the Fifth Circuit's ruling in *Schweitzer*.

II. THE DECISION BELOW CONFLICTS WITH *DUDENHOEFFER*.

The decision below also conflicts with *Dudenhoeffer*. Pet. 23-26. Plaintiff offers no valid response.

First, Plaintiff claims that *Dudenhoeffer* is limited to cases involving employee stock ownership plans ("ESOPs"). Opp. 19-20. That is not how the lower courts have interpreted *Dudenhoeffer*. See, *e.g.*, *Usenko v. MEMC LLC*, 926 F.3d 468, 473-75 (8th Cir. 2019); *Wilson v. Fidelity Mgmt. Tr. Co.*, 755 F. App'x 697, 698 (9th Cir. 2019). If the Court meant to limit *Dudenhoeffer* as Plaintiff suggests, clarification is urgently needed.

Second, Plaintiff claims it "would [not] make sense to extend *Dudenhoeffer* to this context" because "it is almost always *imprudent* for a fiduciary to invest 100% of a fund's assets in a single stock." Opp. 21-22. But this is just another way of saying that it violates the duty of prudence to offer a single-stock fund (which by definition invests in a single stock).

Outside of advocating for a *per se* rule against single-stock funds, the reason Plaintiff claims that permitting continued investment in the TEGNA stock fund was imprudent was because of that stock's volatility. App. 92a ¶ 62. Volatility, as Plaintiff acknowledges, is reflected in a stock's market price. Opp. 22. *Dudenhoeffer* holds that "a fiduciary usually '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.'" 573 U.S. at 427. Plaintiff's claim—that Gannett should have forced participants to divest their TEGNA stock due to its volatility—is foreclosed by *Dudenhoeffer*'s holding that a fiduciary is not imprudent to assume that the stock's value (including its volatility) is reflected in its market price.

III. THE PETITION PRESENTS IMPORTANT ISSUES.

The question presented is exceptionally important because the Fourth Circuit's decision creates great confusion over when—if ever—plan fiduciaries may include a single-stock, non-employer fund on the menu of options offered to participants in a defined contribution plan. See Pet. 26-28; App. 43a (Niemeyer, J., dissenting) (expressing concern that the panel left unresolved "how plan fiduciaries could ever prudently offer a single-stock, non-employer fund"). Plaintiff now asserts that "[t]he decision below does not prohibit plan participants from continuing to participate in single-stock funds and other imprudent investments if they choose," Opp. 23, but this is nonsense. If a complaint against plan fiduciaries can survive dismissal whenever a participant has buyer's remorse over an investment in a single-stock fund, then rational plan fiduciaries will stop offering those options. This effect will follow even though many participants wish to invest in single-stock funds, which can return greater-than-average results.

At bottom, Plaintiff suggests that this outcome is "[]desirable." Opp. 25. But as Gannett explained, requiring fund-level diversification eliminates options for plan participants—not only single-stock, non-employer funds, but also potentially sector funds, brokerage windows, and other types of funds as well. Pet. 27. That policy judgment should be made by Congress.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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