No. 25-498

In the Supreme Court of the United States

WINSTON R. ANDERSON, ET AL.
PETITIONERS,

v.

INTEL CORPORATION INVESTMENT POLICY COMMITTEE,
ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners phrase the question presented as: Whether, for claims predicated on fund underperformance, pleading 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 when investing plan assets requires alleging a "meaningful benchmark."

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INTRODUCTION

The 2008 stock market crash caused many participants in equity-heavy retirement funds to lose nearly half their retirement assets. To guard against a recurrence, the fiduciaries for two Intel Corporation retirement plans (the "Plans") adopted a strategy of risk-mitigation rather than return-maximization. The fiduciaries ("Respondents") created customized, broadly diversified portfolios that included not only stocks and bonds but also holdings in hedge funds and private equity funds, which are common in large institutional investment products. Respondents recognized—and repeatedly disclosed—that their risk-mitigation strategy would deliver lower returns during a bull market than equity-heavy funds, and would carry the higher fees typically charged for actively-managed investments.

Petitioners sued several years later, claiming that Respondents violated their duty under ERISA to act prudently in managing the Plans. Their complaint charged imprudence based on the alleged "underperformance" of the funds in the Plans. But as the courts below recognized, "underperformance" is a relative measure. And Petitioners' pleadings compared the funds in the Plans only to equity-heavy retail funds and indices with different aims, different risks, and different objectives. Because no plausible inference of imprudence was available, the district court dismissed and the Ninth Circuit affirmed.

Petitioners contend that the Ninth Circuit thereby split with the Sixth Circuit[1] over whether allegations of investment imprudence predicated on fund underperformance require plaintiffs to plead a "meaningful benchmark" for comparison. Petitioners are incorrect. No circuit holds that such a claim of investment imprudence always requires pleading a meaningful benchmark. Rather, every circuit to consider the question recognizes that dismissal is appropriate where, as here, a plaintiff claiming "underperformance" supports that contention only by comparing apples to oranges. That includes the Sixth Circuit. In *Parker-Hannifin*, the plaintiff successfully stated a claim based on allegations far different from those made by Petitioners here. That does not mean there is any circuit split in how a plausible

[1] *Johnson v. Parker-Hannifin Corp.*, 122 F.4th 205 (6th Cir. 2024), *pet. for cert. filed*, No. 24-1030 (Mar. 28, 2025).

claim may be pleaded. At a minimum, further percolation is necessary so that the Sixth Circuit can clarify whether it intended *Parker-Hannifin* to be a sea change in its own law.

The Ninth Circuit's decision is also correct on the merits. This Court has repeatedly held that because "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," courts "must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). Requiring that apples be compared to apples helps courts implement that directive by avoiding the kind of hindsight-driven speculation that permeates Petitioners' complaint. The standard is also consistent with ERISA's text, which grounds the duty of prudence in "the conduct of an enterprise *of a like character and with like aims*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added).

In any event, this case would be an odd vehicle for addressing the question presented. Petitioners take issue with Respondents' decision to mitigate risk in the first place, unlike in more typical ERISA suits focused only on alleged imprudence in *implementing* a strategy. The atypical nature of the allegations would limit any guidance this Court could offer the lower courts.

For these and other reasons, the petition should be denied. There is similarly no reason to hold this petition pending the resolution of the petition in *Parker-Hannifin*. But if the Court grants review in *Parker-Hannifin*, it should grant review in this case as well to ensure that the full Court can address the question presented free of any recusal issues. *See* Entry dated June 30, 2025, Dkt. No. 24-1030 (noting Justice Alito's recusal from *Parker-Hannifin*).

STATEMENT

A. Statutory and Factual Background

1. Enacted in 1974, ERISA protects employee pensions and other benefits by providing insurance for vested pension rights, specifying certain plan characteristics, and setting forth general fiduciary duties. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 (1983). The statute "represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). This Court has explained that, in interpreting ERISA, courts should consider the "competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

For fiduciaries entrusted with the administration of employee benefit plans, ERISA imposes a "prudent man" standard of care. 29 U.S.C. § 1104(a)(1)(B). In line with the common law of trusts, this duty of prudence requires plan fiduciaries to exercise "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." *Id.*; *see also* 29 C.F.R. § 2550.404a-1(b)(1) (implementing regulations for fiduciaries' "investment duties"). Practically speaking, this duty requires plan administrators to select initial investment options with care, monitor those investments, and remove imprudent ones as needed. *Tibble v. Edison Int'l*, 575 U.S. 523, 529-30 (2015).

Regarding investment decisions in particular, ERISA "requires prudence, not prescience." *Debruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). Thus, an imprudence claim against a fiduciary turns on "a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight." *PBGC ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.* ("*St. Vincent*"), 712 F.3d 705, 716 (2d Cir. 2013) (citation omitted). In other words, what matters is the fiduciary's "conduct in arriving at an investment decision, not on its results." *Id.* at 717. Moreover, "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *Id.* This standard recognizes that "[a]t times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and 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.

2. This case arises from certain retirement plans that Intel Corporation offers its employees as a benefit of their employment—the Intel Retirement Contribution Plan and the Intel 401(k) Savings Plan ("the Plans"). App. 5a-6a. Among other investment options, these plans include two types of customized funds relevant here: a "multi-asset portfolio with a fixed allocation model" called the Global Diversified Fund ("GDF"), and several blended funds called Target Date Funds ("TDFs"). The TDFs "use a dynamic allocation model" whereby the relative allocation of assets "changes over time" based on a participant's estimated retirement date. App. 37a. An express objective of both the GDF and the TDFs (the "Intel Funds") is to "reduce investment risk by investing in assets whose returns are less correlated to equity

markets." App. 13a. In other words, the conservative Intel Funds were designed not to chase maximum returns, but rather to guard against downside risk.

The Intel fiduciaries put this risk-reduction strategy in place following the 2008 stock market crash, when some equity-heavy funds lost nearly half their value. App. 6a-7a. Specifically, Respondents diversified the funds' holdings to include "non-traditional assets," including investments in hedge funds and private equity vehicles. *Id.*

Respondents expressly disclosed that their strategy would yield lower returns than an equity-heavy approach during a bull market, but would mitigate the risk of large losses during an equity market downturn like the 2008 stock market crash. App. 13a. Respondents also disclosed that, because this risk-mitigation strategy included allocations to assets like hedge funds and private equity, it would carry higher active management fees. 2-ER-229; 2-ER-249-50.

Intel's strategy performed as intended and as disclosed to employees, producing positive returns while cushioning participants against stock market volatility. From 2011 through 2018, the GDF in particular exceeded its modest target of a 5% real annual return, 2-ER-235, and it even "outperformed 80% of the largest funds in the Morningstar World Allocation Category" between 2008 and 2018. App. 62a. But as was expected, during the remarkable bull-market period running from 2011 through 2018, the Intel Funds did not keep pace with the returns of funds with much greater equity market exposure. 2-ER-229; 2-ER-250.

B. Procedural Background

1. Petitioners Christopher Sulyma and Winston Anderson are former Intel employees who participated in

the Plans and invested in the Intel Funds. App. 34a. In October 2015, Sulyma sued Respondents—fiduciaries for the Plans—in the United States District Court for the Northern District of California, challenging their management of the Plans and alleging breaches of ERISA's fiduciary duties. App. 40a. The district court granted summary judgment on all claims in favor of the fiduciaries, concluding that the claims were time-barred. App. 43a. Sulyma appealed, the Ninth Circuit reversed, and this Court affirmed. *Id.*

In August 2019, while *Sulyma* was on appeal, Anderson sued substantially the same defendants on substantially the same allegations and claims of imprudent investment. App. 43a-44a. Those claims were stayed until the resolution of the *Sulyma* appeal, after which the cases were consolidated in the district court, before a new district judge, in 2020.

On June 24, 2020, Petitioners filed their first consolidated class action complaint. *Id.* That complaint maintained as defendants 21 individuals (primarily current and former Intel employees and directors) who served as fiduciaries to the Plans since 2009. App. 34a-35a. As relevant here, Petitioners contended that Respondents acted imprudently both by initially allocating some of the Plans' assets to hedge funds and private equity funds and by failing to adjust that allocation during the bull market, as hedge funds and private equity funds were producing lower returns than those available from funds holding only more traditional assets like stocks and bonds. App. 9a.[2]

[2] Petitioners also alleged that Respondents breached their duty of loyalty under ERISA by steering Plan funds to investment managers with whom Intel's venture-capital arm had already invested, thereby

2. The district court dismissed the complaint for failure to state a claim. 1-ER-72. As relevant here, the court rejected the imprudence claim because Petitioners failed to allege facts sufficient for a plausible inference of imprudence based on a performance comparison of the Intel Funds to other funds, because they failed to show that those comparator funds were comparable to the Intel Funds. The district court granted leave to amend, and Petitioners filed an amended complaint in March 2021.

The district court dismissed the claims in Petitioners' amended complaint with prejudice. App. 34a.[3] As with the prior dismissal order, the court concluded that Petitioners had failed to plead a viable imprudence claim because they again neglected to plead any valid comparator against which to assess the Funds. App. 55a. Where a plaintiff alleges that "a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund," a plaintiff must provide "a sound basis for comparison—a meaningful benchmark," in order to satisfy the *Iqbal/Twombly* plausibility standard. App. 52a (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 833 (8th Cir. 2018)). The district court noted that Petitioners, by contrast, simply asserted that the comparators were "common benchmarks" and pleaded generic features that are common to all target-date funds, rather than

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purportedly reducing Intel's own investment risk. The district court dismissed that claim based on the absence of allegations of an actual conflict of interest or self-dealing. App. 68a-83a. The court of appeals affirmed, and Respondents do not seek review of that portion of the decision below in this Court.

[3] One individual (non-class) count for failure to provide documents upon request in violation of ERISA was later dismissed with prejudice by stipulation. App. 32a.

explaining why the putative comparators had "similar aims, risks, and potential rewards."[4] App. 52a, 57a.

The district court also rejected Petitioners' alternate theory that they need not compare the Intel Funds to any benchmarks with similar characteristics because the overall investment strategy was imprudent. App. 65a. The court noted that Petitioners did not "cite a single case to support their new theory that a risk mitigation strategy can be deemed imprudent under the law," explaining that ERISA fiduciaries are not required to adopt a riskier strategy simply because that strategy may increase returns. App. 66a-67a.

3. The Ninth Circuit affirmed. The panel held that Petitioners failed to state a claim for breach of ERISA's duty of prudence because they did not plausibly allege that the Intel Funds underperformed other funds with comparable aims. App. 5a, 13a. Noting that courts "evaluate prudence prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved," the panel explained that "it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results"—rather, a plaintiff must provide "some further factual enhancement" for an inference of imprudence to be plausible. App. 10a-11a. The court of appeals observed that the need for an apples-to-apples comparison "is implicit in ERISA's text." App. 12a. "By making the standard of care that of a hypothetical prudent person 'acting in a like capacity . . . in the conduct of an enterprise of a like character and with like aims,' the statute makes clear that the goals of the plan matter." App. 12a.

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[4] Petitioners' proposed benchmarks were the S&P 500, Intel TDFs' Morningstar "peer group category," and four identified TDF fund families. App. 61a.

Turning to Petitioners' allegations, the court determined that Petitioners' putative comparators were not comparable to the Intel Funds because they had "different aims, different risks, and different potential rewards." App. 14a (citation omitted). The court applied the same reasoning to Petitioners' allegations regarding the Intel Funds' higher fees, explaining that "comparison to off the-shelf funds that did not seek to mitigate risk to the same degree as Intel's funds is not enough" to show that the Intel Funds' fees were so excessive as to suggest that the fiduciaries neglected to follow a prudent process of management. App. 15a.

Next, the court rejected Petitioners' fallback argument that they could not have pleaded a meaningful benchmark because there are "no meaningful comparators for the fiduciaries' decision," in that Intel's allocation to hedge funds and private equity "was unusual, if not unparalleled." App. 15a. The court noted that this argument "conflates the risk-mitigation objective of the Intel funds with the allocation decisions made to implement that objective." *Id.* And even if Petitioners were challenging the implementation of the Plans' risk-minimization strategy based on contended risks inherent to hedge funds and private equity funds, such a *per se* challenge would still fail, because "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." App. 16a (citing *St. Vincent*, 712 F.3d at 717).

Judge Berzon concurred in full in the majority opinion, writing separately to clarify that an imprudence claim does not require allegations of comparative performance or fees. A plaintiff can plead "facts that directly show that the fiduciary's methods, processes, or objectives were imprudent," or other circumstantial allegations that plausibly suggest imprudence. App. 25a, 31a. Judge Berzon noted that "[t]here are a myriad of circumstances that could violate the [prudent man] standard, so there is no fixed formula for the facts from which we might infer imprudence." App. 26a (citation omitted). The ultimate question, Judge Berzon emphasized, is "whether the facts alleged—comparative or not—lead to the plausible inference that the actual process used by the defendant fiduciary was flawed." App. 31a. Judge Berzon agreed that, in this case, Petitioners failed to plead facts that supported an imprudence claim either directly or inferentially. *Id.*

4. Petitioners declined to seek rehearing en banc, and no Ninth Circuit judge called for rehearing.

REASONS FOR DENYING THE PETITION

Petitioners (at 1-2) argue that the Ninth Circuit imposed an extra-statutory pleading test that contravenes this Court's precedent and risks stymieing meritorious imprudence claims against reckless fiduciaries. That assertion is inaccurate, and rests on an apparent misunderstanding of imprudence claims, the Ninth Circuit's opinion, and the decisions of the other circuits. The Ninth Circuit applied the typical Rule 12(b)(6) analysis to examine the factual allegations in Petitioners' complaint and confirmed that Petitioners failed to state a claim for breach of the duty of prudence. In unanimously affirming dismissal, the court did not impose any "categorical pleading rule" specific to ERISA duty of prudence claims. Nor did the court pick sides in any purported circuit split. Rather, it held only that the particular claims here yielded no plausible inference of imprudence because the complaint failed to explain why it was relevant that the return of the Intel Funds was lower than Petitioners' cherry-picked comparators with different goals and investing strategies than the Intel

Funds. In any event, Petitioners gloss over substantial vehicle issues that are almost as formidable as those impeding certiorari in *Parker-Hannifin*.

I. This Case Does Not Implicate Any Circuit Split

1. Petitioners suggest that the courts of appeals are divided 4-1 over whether ERISA claims premised on a fund's underperformance require comparison to a meaningful benchmark in order to state a claim. In fact, all courts of appeals that have addressed such claims agree on the basic framework, which the Ninth Circuit applied in the decision below.

Start with the Eighth Circuit. It has explained that a plaintiff alleging that "a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund . . . must provide a sound basis for comparison—a meaningful benchmark." *Meiners*, 898 F.3d at 822 (internal quotation marks omitted). In *Meiners*, the court affirmed dismissal for failure to state a claim because the complaint provided no explanation as to why the allegedly "comparable" fund that outperformed the fund at issue was in fact a comparable choice at the time the investment decision was made. Dismissal was appropriate because the imprudence claim "lack[ed] 'sufficient factual matter, accepted as true,' to demonstrate that the [selected funds] were an imprudent choice." *Id.* at 823 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Comparing apples and oranges is not a way to show that one is better or worse than the other." *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 (8th Cir. 2020) (rejecting claim where allegedly comparable options had "different aims, different risks, and different potential rewards that cater to different investors").

This is by no means an insurmountable hurdle to pleading a plausible claim. In *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), for example, the Eighth Circuit determined that the allegations were sufficient for an inference of an imprudent process where the complaint detailed how both the market index and lower-cost shares of the same fund with an identical strategy (*i.e.*, tracking the index) performed better than the options selected by the defendant fiduciaries. *Id.* at 595-96. Because the only difference between the available options was their varying costs, those allegations supported the inference that the underperforming funds were imprudently chosen "despite the ready availability of better options." *Id.* at 596. *Braden* dispenses with Petitioners' notion that requiring allegations that substantiate the basis for a comparison between funds or investments "immunizes fiduciaries from liability." Pet. 2. Rather, when it comes to pleading a meaningful benchmark, "there is no one-size-fits-all approach," as a claim's plausibility "depends on the 'totality of the specific allegations.'" *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 280-81 (8th Cir. 2022) (first citing *Meiners*, 898 F.3d at 822; and then citing *Braden*, 588 F.3d at 595-96).

Other circuits agree with the commonsense conclusion that for a plausible inference of imprudence to arise from asserted underperformance, the comparison has to be to something comparable. Thus, in *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022), the Seventh Circuit—like the Eighth Circuit in *Davis*—examined allegations that the selection of certain actively managed funds was evidence of an imprudent process because other, passively managed funds charged lower fees. *Id.* at 581. But as discussed above, actively managed funds commonly have very different objectives than passive funds designed to track an index, making it unremarkable that the fees or returns differ. Because the plaintiff failed to plead "a 'sound basis for comparison'" between the active versus passive funds, dismissal was warranted. *Id.* at 582 (quoting *Meiners*, 898 F.3d at 822).

The same is true in the Tenth Circuit. In *Matney v. Barrick Gold of North America*, 80 F.4th 1136 (10th Cir. 2023), the plaintiffs challenged the fees charged by certain plan investments compared to alleged comparator investments. *Id.* at 1148. The court surveyed the case law in several other circuits before agreeing that "an inference of imprudence" grounded in comparisons requires the plaintiff to articulate why those comparators are "a 'meaningful benchmark.'" *Id.* (quoting *Meiners*, 898 F.3d at 822). And there, the complaint lacked "information about the goals or strategies of the various [alternatives] so as to establish their comparability." *Id.* at 1153.[5]

2. Arguing that there is a circuit split, the Petitioners here and in *Parker-Hannifin* suggest that the Sixth

[5] The Second Circuit appears to agree. In *Collins v. Northeast Grocery, Inc.*, 24-2339-cv, 2025 WL 2383710 (2d Cir. Aug. 18, 2025) (summary order), the court noted that a "fund's underperformance relative to comparator funds may support an inference of imprudence, but Plaintiffs [a]re required to allege 'meaningful' benchmarks against which to compare the criticized funds." *Id.* at *2 (emphasis and citations omitted). In that instance, while the plaintiffs named allegedly better-performing comparators in their complaint, they "did not allege any factual basis from which to infer that the purported comparators were appropriate." *Id.*; *see also Singh v. Deloitte LLP*, 123 F.4th 88, 96 (2d Cir. 2024) (affirming dismissal of duty of prudence claim based on allegedly high recordkeeping fees because of absence of details regarding services provided by proposed comparator plans that would make them "meaningful benchmark[s] for use in assessing the Plan's recordkeeping fees").

Circuit has departed from the approach taken by other circuits. But the case law does not bear that out.

In *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), the plaintiff brought an imprudence claim because the plan's actively managed funds cost more and performed worse than certain passively managed funds identified as comparators. *Id.* at 1164. Writing for the Sixth Circuit, Chief Judge Sutton affirmed dismissal, noting that "a showing of imprudence [does not] come down to simply pointing to a [different] fund with better performance." *Id.* at 1166. Rather, when making such a comparison, a plaintiff must offer an appropriate comparator and not one with, for example, "separate goals and separate risk profiles." *Id.* at 1166-67. The court cited the Eighth Circuit's rulings in *Meiners* and *Davis* and noted that its "reasoning also lines up with" those decisions. *Id.* at 1166.

Soon after, in *Forman v. TriHealth, Inc.*, 40 F.4th 443 (6th Cir. 2022), the court determined that the plaintiffs had failed to state a claim of imprudence based on excessive fees where they "never alleged that these fees were high *in relation to the services that the plan provided*." *Id.* at 449 (emphasis added). As relevant here, the Sixth Circuit reaffirmed its reasoning from *CommonSpirit* and explained that a plaintiff seeking to rely on comparative analysis "must do the work of showing that the comparator investment has sufficient parallels to prove a breach of fiduciary duty." *Id.* at 451.

Next up was *Parker-Hannifin*, which in no way altered Sixth Circuit law. There the court evaluated allegations that the fiduciary imprudently retained certain underperforming funds (*i.e.*, the "Focus Funds"), provided participants with needlessly higher-cost shares of those funds, and failed to monitor its agents in their fiduciary duties. 122 F.4th at 209-12. As relevant here, the plaintiff's imprudent-retention theory alleged that a prudent fiduciary would have jettisoned the Focus Funds given their high turnover rate (*i.e.*, how often the fund swapped in/out investments) and persistent subpar performance (*i.e.*, their market value). *Id.* at 213-16.

Examining whether the allegations, "taken together, sufficiently state a claim for imprudence under ERISA," the court first summarized its case law, including *CommonSpirit* and *Forman*, and noted that "a plaintiff is permitted to point to a higher-performing fund—in conjunction with additional context-specific evidence—to demonstrate imprudence." *Id.* at 216. On the specific allegations before it, the court determined that the plaintiff had successfully done so by pleading facts about an S&P target date fund that "share[d] the same goals, strategies, and risks as" the Focus Funds, both of which were "designed to replicate" passive indices. *Id.* at 217.[6] The S&P target date fund benchmark was "a meaningful comparison" in this instance because of the specific "investment goal" of the Focus Funds. *Id.* The court noted that in a similar context the Eighth Circuit decided that a market index served as a meaningful benchmark to the fund at issue in that case, and so the court "br[oke] no 'new ground'" here. *Id.* (citing *Braden*, 588 F.3d at 596). The court then decided that an imprudent process could also be inferred through the company's retention of the Focus Funds despite the "persistent upheaval of the Funds' assets and turnover rates many times higher than" normal. *Id.* at 219 (cleaned up). Summing up, the court explained that the "high historical turnover rates

[6] Because the court determined that the S&P target date fund was a meaningful benchmark, it declined to determine whether three additional benchmarks pleaded in the complaint were also valid comparators. *Id.* at 219 n.5.

and persistent underperformance relative to the Funds' stated objectives suggest[]" an imprudent process. *Id.*

In contending that there is a circuit split, the *Parker-Hannifin* petitioner seizes on that panel's throat-clearing statement that "a meaningful benchmark is not required to plead a facially plausible claim of imprudence." Pet. for Cert. at 1, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (Mar. 26, 2025). But that is not a departure from the standard applied in other courts. As explained above, *supra* pp. 11-12, ERISA plaintiffs can plausibly plead imprudence in various other ways, including through *direct* allegations of an imprudent process, as well as through *indirect* allegations that do not rely on performance comparisons. Indeed, the crux of Judge Berzon's concurrence in the decision below is that "comparisons are not the only form of indirect allegation that could support" an imprudence claim. App. 26a. So a "meaningful benchmark may sometimes be one part of an imprudence pleading, but it is not required." *Parker-Hannifin*, 122 F.4th at 216. While the *Parker-Hannifin* petitioner may disagree with the Sixth Circuit's *application* of the principle at issue to the facts of the case, at no point did the court reject a plaintiff's obligation, when trying to root an inference of imprudence in an investment fund's "underperformance," to plead facts showing why the comparison is a valid one.

Nor does Judge Murphy's dissent illuminate any circuit split. Judge Murphy stated that "*[i]f* [his colleagues] mean to suggest that plaintiffs need not identify such a benchmark when relying on an investment's *relative underperformance*, they depart from our law and create a circuit split." *Id.* at 232 (Murphy, J., dissenting) (first emphasis added). As noted, however, that is not what the Sixth Circuit held. Moreover, Judge Murphy noted his "agree[ment] that" the pleading standard "does not require a meaningful benchmark in all cases," as allegations substantiating the basis for a comparison between funds are necessary only where a "complaint tries to make out a case of imprudence based on the . . . superior returns" of "an alternative investment." *Id.*

The disagreement between the *Parker-Hannifin* majority and dissent thus concerns not whether the plaintiff sought an inference of imprudence based on the Focus Funds' relative underperformance (he did so), or whether he needed to plead a valid comparator grounded in context-specific evidence to substantiate the alleged underperformance (he did need to do so), but the fact-bound question of whether he *had done so*—*i.e.*, whether "the S&P target-date benchmark qualifies as a 'meaningful' one" based on the details (or lack thereof) pleaded in the complaint about that benchmark. *Id.* This fact-specific disagreement over *application* of the meaningful-benchmark standard creates no circuit split.

3. Had the Sixth Circuit's decision amounted to any sea change in the pleading standard, the ripples would be apparent in the lower courts. There are none. For example, in *England v. DENSO International American Inc.*, 136 F.4th 632 (6th Cir. 2025), in examining an imprudence claim based on a plan's allegedly excessive fees for recordkeeping services compared to comparable plans, the court cited *Parker-Hannifin* as an example of cases *endorsing* a "meaningful benchmark" standard. *Id.* at 636-37.[7] At a minimum, these subsequent decisions—

[7] Similarly, in *Fulton v. FCA US LLC*, No. 24-cv-13159, 2025 WL 2800003 (E.D. Mich. Sep. 30, 2025), the district court cited *Parker-Hannifin* for the rule that while comparison to a fund with better performance may "offer a building block for a claim of imprudence, the comparison alone is insufficient to demonstrate a breach of

which characterize *Parker-Hannifin* as falling in line behind prior Sixth Circuit precedent—suggest that this Court should not grant certiorari on this issue until any meaningful differences develop in the way courts in the various circuits actually apply the pleading standard.

4. Finally, even if there were a split among the circuits on the pleading standard, it would not be implicated here because Petitioners' claims would fail even in the Sixth Circuit. As explained, *Parker-Hannifin* held that the S&P target date benchmark was a "meaningful" comparator to the Focus Funds because the Focus Funds were passively managed target date funds that were "designed to meet industry-recognized" benchmarks such as the S&P target date fund. 122 F.4th at 217. Critical to the court's analysis was the fact that the complaint "pleaded that the Focus Funds were 'attempting to mimic' the S&P target date fund" in particular, thereby "making it a meaningful benchmark." *Id.*

Here, by contrast, Petitioners have sued over the alleged underperformance and fees of the bespoke, *actively managed* GDF and TDFs with different goals than traditional equity-driven benchmarks such as those Petitioners identified. *See* App. 13a. The Sixth Circuit would recognize the incongruence and swiftly reject Petitioners' putative comparators as insufficient for a meaningful comparison. *See Parker-Hannifin*, 122 F.4th at 217 (accepting the petitioner's proposed comparators

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fiduciary duty" without "additional context-specific evidence" that demonstrates that the comparator is suitable. *Id.* at *6 (internal quotation marks omitted). Far from rejecting the need for a meaningful benchmark, the district court looked for, analyzed, and scrutinized several benchmarks pleaded by the plaintiffs before declaring them sufficiently similar to the funds at issue to justify an inference of imprudence. *Id.* at *6-8.

only because, as "industry-recognized benchmarks" that the Focus Funds were "designed to replicate," they "[b]y definition . . . share[d] the same goals, strategies, and risks as the" Focus Funds); *CommonSpirit*, 37 F.4th at 1167 ("Just as comparison can be the thief of happiness in life, so it can be the thief of accuracy when it comes to two funds with separate goals and separate risk profiles.").

In addition, in *Parker-Hannifin* the Sixth Circuit bolstered its conclusion that an inference of imprudence was plausible by noting that the "allegations of high turnover rate and underperformance, *taken together*," were sufficient. 122 F.4th at 216 (emphasis added). That Parker-Hannifin "retained the Focus Funds despite 'persistent' 'upheaval' of the Funds' assets and turnover rates many times higher than" normal provided yet more reason to infer imprudence. *Id.* at 219 (citation omitted). Petitioners here, however, rely on no such additional factual enhancements. Facing materially weaker circumstantial allegations of imprudence, the Sixth Circuit would similarly affirm dismissal of the claims.

II. The Ninth Circuit's Decision Is Correct

Review is also unwarranted because the Ninth Circuit correctly held that Petitioners failed to state a violation of the duty of prudence.

1. ERISA requires plan trustees to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Because there are "a myriad of circumstances that could violate the prudence standard," there are a myriad of ways plaintiffs can plead factual allegations sufficient for a plausible inference of a breach of the duty of prudence. App. 11a (cleaned up).

Those include facts that, if proven, would establish *directly* that a fiduciary used unsound methods in choosing or retaining investments and thus acted imprudently. For example, plaintiffs could plead that fiduciaries selected funds at random or based on tarot card readings, or—for a more mundane example—entirely failed to monitor funds for an extended period despite repeated warnings, *see Stegemann v. Gannett Co.*, 970 F.3d 465, 476 (4th Cir. 2020).

Alternatively, plaintiffs can plead facts that, if proven, would establish imprudence *indirectly*. In contrast to the hypothetical allegations above directly regarding the process for selecting or monitoring investments, plaintiffs can plead circumstantial factual allegations about the *results* of that process from which one can "reasonably infer from what is alleged that the [fiduciaries'] process was flawed." App. 11a (cleaned up). For example, perhaps no facts are available directly regarding the fiduciaries' investment-selection process, but that process yielded a strategy that funneled assets entirely into lottery ticket purchases. *See* App. 26a-27a (Berzon, J., concurring). That might plausibly suggest that the fiduciaries were imprudent. More commonly, plaintiffs point to an allocation of assets into an investment with relatively high fees or relatively low returns, seeking an inference that the fiduciaries selected or retained that investment imprudently.

The critical question in that common scenario, though, is "relative to what?" If a plaintiff relies "on a theory that 'a prudent fiduciary in like circumstances would have selected a different fund based on the cost or performance of the selected fund,' that plaintiff 'must provide a sound basis for comparison.'" App. 52a (quoting *Meiners*, 898 F.3d at 822). Absent a suitable comparator, there could be no plausible inference of an imprudent process, because there has been no allegation that the fees or results were anything other than normal when measured against comparable investments. In such circumstances, the "key to nudging an inference of imprudence from possible to plausible is providing a sound basis for comparison—a meaningful benchmark—not just alleging that costs are too high, or returns are too low." App. 12a (cleaned up).

This requirement is not an atextual "categorical pleading rule," as Petitioners contend. Pet. 1. Rather, it is a shorthand for describing the analysis inherent in enforcing the pleading standards of Rule 8(a) and Rule 12(b)(6) when a plaintiff wishes to recover for a breach of the duty of prudence because an investment allegedly "underperformed" or "cost too much." This comparative exercise channels the common-sense notion that when a plaintiff asks for an inference of imprudence simply based on the relative performance or cost of a particular investment fund, the plaintiff must plead both the existence of a comparator fund and allegations establishing *why* it is an appropriate comparator. In this respect, the requirement of a meaningful benchmark mirrors other common-sense pleading standards enforced when a plaintiff seeks an inference of liability. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (explaining that neither the "naked assertion of conspiracy" nor "parallel conduct" establish a plausible inference of conspiracy absent "some further factual enhancement").

Pleading a meaningful benchmark is what allows a plaintiff to plausibly allege that a prudent fiduciary "acting *in a like capacity* . . . in the conduct of an enterprise *of a like character* and *with like aims*" would have acted differently than the defendants. App. 12a (emphasis in original) (quoting 29 U.S.C. § 1104(a)(1)(B)).

Otherwise, the contention that a prudent fiduciary would have acted differently is conclusory and thus insufficient to plausibly state a claim.

Evaluating whether a claim relying on indirect allegations of imprudence properly pleaded any suitable comparator by no means absolves courts of assessing imprudence claims on a case-by-case basis. This analysis is fully consistent with the "careful, context-sensitive scrutiny" required to assess ERISA claims at the Rule 12 stage and "divide the plausible sheep from the meritless goats." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

2. Applying that standard, the Ninth Circuit correctly held that Petitioners did not plausibly allege that Respondents acted imprudently. Forgoing any direct allegations of imprudence, the amended complaint sought an inference of imprudence in Respondents' allocation of assets to hedge funds and private equity holdings because of the Intel Funds' allegedly higher resulting fees and relative resulting underperformance. But those allegations fell short of stating a plausible imprudence claim.

Because Petitioners needed to suggest that "a hypothetical prudent person acting in a like capacity . . . in the conduct of an enterprise of a like character and with like aims" would have chosen differently, they needed to plead the existence of one or more benchmark funds for comparison and explain why those comparators were a "sound basis for comparison." App. 12a (quoting 29 U.S.C. § 1104(a)(1)(B)); *accord Matney*, 80 F.4th at 1147; *Meiners*, 898 F.3d at 822. Here, that meant identifying benchmarks that shared the Plans' "clearly disclosed . . . risk-mitigation objective" yet produced better returns. App. 13a. Petitioners failed to do so. Petitioners did not even compare the Funds to their own customized benchmarks, disclosed to plan participants and beneficiaries as representative performance targets. *Id.* at 13a-14a. Instead, Petitioners sought to compare the Funds only to passively managed "equity-heavy retail funds," including "published indices like the S&P 500 and Morningstar categories of peer-group funds." *Id.* at 14a, 55a-56a.

None of the comparators pleaded in the complaint were meaningful benchmarks because passive indices and equity-heavy retail funds plainly have '"different aims, different risks, and different potential rewards"' than the expressly disclosed risk-mitigation objective of the Intel Funds. *Id.* (quoting *Davis*, 960 F.3d at 485). As a result, differences in performance between the proposed comparators and the Funds permit no plausible inference that imprudent selection of specific investment was to blame. Differing returns stemming from the different high-level strategies is just as plausible. "Comparing apples and oranges is not a way to show that one is better or worse than the other." *Davis*, 960 F.3d at 485 (rejecting comparison of actively managed funds and passively managed index funds).

This same reasoning also justified affirming dismissal of the allegations that the Plans incurred unnecessary fees compared to those passive, equity-heavy comparators. Similar to the poor-investment-performance allegations, Petitioners needed to plead the existence of investment options that provided substantially the same product yet incurred less in fees. They did not. Petitioners' comparison to "off-the-shelf funds that did not seek to mitigate risk to the same degree as Intel's funds" was not enough to support an inference that the Funds' fees were imprudently excessive. App. 15a. The prices for off-the-rack suits do not permit any inference about whether a custom-tailored garment is appropriately priced for what is offered. With no plausible inference of imprudence, the complaint failed to state a violation of the duty of prudence.

2. The panel also correctly rejected Petitioners' novel argument that they did not need to plead a meaningful benchmark because there were "*no* meaningful comparators for the fiduciaries' decision because Intel's approach was unusual, if not unparalleled." *Id.* (emphasis in original). Taken at face value, Petitioners' real gripe appears to be that Respondents chose a strategy that was too conservative, not that they imprudently executed a permissible strategy. But as the Ninth Circuit noted, Petitioners' apparent preference for a different strategy is not the basis for an imprudence claim. Indeed, "courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk." *Id.*; s*ee Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1181 (11th Cir. 2024); *Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 10 (1st Cir. 2018); *Barchock v. CVS Health Corp.*, 886 F.3d 43, 49-50 (1st Cir. 2018). The statutory text supports these decisions, as "a [hypothetical] prudent man acting in a like capacity" would undertake his fiduciary duty "with like aims" in mind. 29 U.S.C. § 1104(a)(1)(B).

Even crediting Petitioners' insistence that they did, in fact, seek to challenge Respondents' *implementation* of a clearly disclosed risk-mitigation strategy, *see* App. 16a, there is no support for the apparent contention that no prudent fiduciary with comparable aims would have invested in hedge funds and private equity funds. As the Ninth Circuit noted, ERISA actually *requires* that fiduciaries "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C); *see also* 29 C.F.R. § 2550.404a-1(b)(1)(i)-(ii) (implementing regulations recognizing that risk can be managed through diversification).[8] And "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole." *St. Vincent*, 712 F.3d at 717.

The notion that the alternative investments in the Intel Funds were too *risky* runs completely counter to the charge that the Plans' conservative strategy cost Petitioners' favorable returns. But even putting that aside, the complaint came nowhere close to marshalling the allegations necessary to mount a plausible challenge to the Plans' relative allocation of capital. At bottom, Petitioners "had access to detailed information about the Intel funds—including the identities of the hedge funds and private equity funds in which they invested"—yet made "only general arguments about the riskiness and costliness of hedge funds and private equity funds without providing factual allegations sufficient to support the claim that the investments that were actually made were ill-suited to the Intel funds." App. 20a. The Ninth Circuit was correct to affirm dismissal.

III. This Case Does Not Warrant the Court's Review

1. Even were this Court inclined to consider the question presented, the peculiar facts here—atypical for an ERISA claim—make this case an imperfect vehicle to squarely address the pleading standards for an ERISA imprudence claim. Rather than challenging Respondents' imprudent implementation of an investment strategy, Petitioners in essence challenge Intel's investment strategy itself. App. 15a. The Ninth Circuit understood the same when it noted that Petitioners "conflate[ed] the

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[8] Consistent with this diversification directive, by 2010, 92% of large defined benefit plans invested in private equity, and 60% invested in hedge funds, with allocations as high as 30% for private equity and 33% for hedge funds. *See* 3-ER-430, 434.

risk-mitigation objective of the Intel Funds with the allocation decisions made to implement that objective." App. 15a.

When Congress enacted ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators"—*i.e.*, "ERISA was designed to prevent these abuses in the future." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). By codifying a fiduciary's duty of prudence as one imposing a "continuing duty to monitor trust investments and remove imprudent ones," Congress sought to ensure that fiduciaries were not asleep at the wheel when managing participants' savings. *Tibble*, 575 U.S. at 529. ERISA was not, however, intended to dictate how fiduciaries should develop their strategy, nor mandate that they seek maximum returns (which, of course, comes with higher risk). *See Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320-21 (2016).

Thus, in more typical ERISA imprudence claims, the plaintiffs sue fiduciaries for imprudently fulfilling their duties to keep costs low while selecting favorable investments and removing unfavorable ones. *E.g.*, *Matousek*, 51 F.4th at 278. The claims typically concern careless management or implementation. Here, however, Petitioners try to shoehorn their dissatisfaction with the Intel Funds' conservative strategy into an imprudence claim by comparing the Intel Funds to equity-heavy retail funds that pursued a fundamentally different objective of maximizing returns. App. 14a. Indeed, when Petitioners argue that there were no comparators because Intel's approach "was unusual, if not unparalleled," they inadvertently acknowledge that Intel's approach was fundamentally different than an equity-heavy, return-maximation approach. App. 15a. As the Ninth Circuit observed, "the complaint suggests that the fiduciaries' choices had their intended effects," with hedge funds underperforming the global stock market in "up" months but overperforming in "down" months. *Id.* Petitioners may prefer, *post facto*, to have been invested more heavily in stocks during a lengthy bull market, but that hindsight-driven preference does not entitle them to an imprudence claim under ERISA. *See Pizarro*, 111 F.4th at 1180 (explaining that a "snapshot [of a fund's subpar performance] does not mean it is objectively imprudent to adopt a more conservative strategy—the tables turn when the market is down"). And the well-settled principle that an ERISA fiduciary cannot violate the duty of prudence by seeking to minimize risk does not warrant further review. *See, e.g.*, *Ellis*, 883 F.3d at 10 (rejecting argument "that a plan fiduciary's choice of benchmark . . . can be imprudent by virtue of being too conservative").

2. As explained above, this is also a paradigmatic case where further percolation is warranted. Despite the prevalence of ERISA suits, only a handful of circuits have yet weighed in on when a plaintiff must plead a meaningful benchmark to support her imprudence claims. The case supposedly creating the (phantom) split—*Parker-Hannifin*—is barely a year old, and no subsequent circuit courts have analyzed the decision and addressed whether or not a split does, in fact, exist. (Indeed, despite publication six months later, and references to the case in multiple Rule 28(j) letters, the Ninth Circuit declined to discuss or even cite *Parker-Hannifin*.) There is good reason to expect that any tension in the circuits will dissipate in due course. Similarly, there has not yet been substantial activity in the district courts on the meaningful-benchmark issue in recent months. Before taking up this issue, this Court should wait to see if any meaningful differences actually

arise in the way that courts are applying the pleading standard for indirect allegations of imprudence.

IV. Were the Court Inclined To Address the Question Presented, It Should Grant this Petition in Addition to *Parker-Hannifin*

For the reasons explained above, there is no compelling reason to grant review in either this case or *Parker-Hannifin*. Both decisions apply well-established law, break no new legal ground, and reach the right result. At most, the petitioners in each case ask for factbound error correction of decisions that are not erroneous. But if the Court decides to review the question of whether ERISA plaintiffs must plead a meaningful benchmark to state an imprudent-investment claim based on underperformance, this case presents a more suitable vehicle to address the issue than *Parker-Hannifin*.

1. To begin, *Parker-Hannifin*'s interlocutory posture renders that case a suboptimal vehicle as a general matter. In *Parker-Hannifin*, the Sixth Circuit reversed the dismissal of the respondents' complaint and remanded for further proceedings. 122 F.4th at 207. Although this Court can review cases in an interlocutory posture, *see* 28 U.S.C. § 1254, it "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993); *see* Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* § 4.18 (11th ed. 2019) (explaining that in the absence of an "unusual factor," the Court "generally" denies certiorari). The Ninth Circuit's decision in this case, on the other hand, has terminated the litigation.

2. In addition, resolving the question presented in *Parker-Hannifin* would not alone determine the outcome

of that case. The plaintiffs there pleaded three claims, only one of which—a claim that the fiduciaries imprudently retained underperforming funds—implicated the possible need for a meaningful benchmark. *See Parker-Hannifin*, 122 F.4th at 213-20. The Sixth Circuit also reversed dismissal of an imprudence claim based on allegations that the fiduciaries selected fund share classes that had higher fees than other share classes within the same funds. *Id.* at 220-22. That claim automatically provided a meaningful comparison—without any need to point to a separate fund as a benchmark—because the share classes were *within the same fund* and thus necessarily were pursuing the same objectives. In other words, a valid comparator was not required to demonstrate that the share-class allegations were comparing apples to apples. *Compare id.* at 220-22 (no mention of benchmarks in relevant portion of majority opinion), *with id.* at 235-39 (Murphy, J., dissenting) (same for relevant portion of dissenting opinion). The petitioners in *Parker-Hannifin* "do not seek review of the Sixth Circuit's ruling on [the] share-class claim." Pet for. Cert. at 7 n.1, *Parker-Hannifin Corp. v. Johnson* (No. 24-1030). Therefore, both that claim and a derivative failure-to-monitor claim will proceed to discovery regardless of whether the Court grants or denies certiorari in that case.

3. An independent deficiency with the petition in *Parker-Hannifin* stems from Justice Alito's apparent recusal in that case. *See* Entry dated June 30, 2025, Dkt. No. 24-1030. By reducing the Court to an even eight members, recusal of a Justice poses significant risks to the Court's ability to resolve the issues at hand. *See Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 915 (2004) ("The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by

the case."). The Court can sidestep the recusal issue by choosing to grant review in this case in addition to *Parker-Hannifin*. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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