

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

**BRIEF OF AMICI CURIAE AARP, AARP
FOUNDATION, PENSION RIGHTS CENTER
AND BETTER MARKETS, INC. IN SUPPORT
OF PETITIONERS**

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STATEMENTS OF INTEREST¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health and financial security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works for and with vulnerable people over 50 to end senior poverty and reduce financial hardship by building economic opportunity.

AARP and AARP Foundation seek to increase the financial security of older individuals' retirement, pension, and other employee benefit plans through participation as *amicus curiae* in federal and state courts. One of amici's main objectives is to ensure that plan participants receive all the benefits they are entitled to in retirement. To achieve this goal, amici work to ensure that fiduciaries manage and administer plans loyally and prudently in accordance with the requirements outlined in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*

AARP and AARP Foundation have previously filed *amicus* briefs seeking to ensure that courts apply

¹ Pursuant to Supreme Court Rule 37, we submit that no counsel for any party authored the brief in whole or in part. In addition, no person or entity, other than amici, their members, and their counsel, has made any monetary contribution to the preparation or submission of this brief.

appropriate pleading standards in suits brought by plan participants alleging breaches of fiduciary duties under ERISA. *See, e.g., Hughes v. Nw. Univ.*, 595 U.S. 170 (2022); *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025). Preserving plaintiffs' access to the courts is critical to ensuring that fiduciaries manage and administer plans loyally and prudently in accordance with the requirements of ERISA.

The Pension Rights Center is a national nonprofit, nonpartisan consumer organization founded in 1976 to protect and promote the retirement security of American workers, retirees, and their families. The Center works to expand our nation's retirement programs and make them fairer, more adequate and secure; to help individuals obtain retirement benefits they have been improperly denied; and to preserve pension protections conferred by Congress in ERISA, the landmark private pension law.

Better Markets, Inc. is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. Better Markets fights for reforms that stabilize our financial system; increase economic prosperity for all Americans; and protect investors from fraud, abuse, and conflicts of interest. Better Markets has fought long and hard to protect Americans' retirement savings through amicus briefs and comment letters to the Department of Labor (DOL) and the U.S. Securities and Exchange Commission (SEC), advocating for strong fiduciary standards to prevent

conflicted or imprudent financial advisers from siphoning away billions of dollars a year from Americans' retirement accounts. And in this Court, Better Markets has sought to protect retirement savers by supporting common sense pleading standards in plan participant suits seeking redress for violations of fiduciary duties under ERISA. *See Hughes*, 595 U.S. 170; *see generally Our Impact Through the Years*, Better Markets, <https://bettermarkets.org/timeline/> (last visited Apr. 24, 2026) (archiving all comment letters and briefs). The issues presented in this case similarly involve the ability of millions of Americans to protect their retirement savings through private actions under ERISA.

SUMMARY OF ARGUMENT

The Ninth Circuit in this case held that plaintiffs pleading 401(k) plan underperformance as part of an ERISA imprudence claim must recite a “meaningful benchmark.” Amici recognize that plaintiffs, when alleging underperformance, often will be required to cite some relevant comparison or benchmark to meet plausibility pleading standards. Here, however, the Ninth Circuit defines that requirement as having to plead a near-identical benchmark in circumstances where no plaintiff with a meritorious case could succeed. The court’s categorical rule not only violates settled pleading standards but also sets a precedent perversely giving special immunity to fiduciaries who make radical “outlier” investment choices for their 401(k) plans.

The Ninth Circuit’s unworkable approach is especially dangerous given workers’ inability to protect themselves from such imprudent investment choices. While a majority of workers today have 401(k) plans to help secure their retirement, these plans require those individuals to bear all the market risk even though nearly all lack the financial training to review the fiduciary’s menu of investment options. This problem is magnified when, as alleged here, the fiduciary also fails to disclose the material risks associated with the investments, sabotaging plan participants’ efforts at self-help. Even modest 401(k) investment shortfalls caused by fiduciary imprudence can have outsized impact on the financial security of retirees in today’s economy, when people are having to work longer to save more to cover basic living costs.

ARGUMENT

I. The Ninth Circuit’s Strained Definition of “Meaningful Benchmark” Leads to an Unworkable Pleading Rule for ERISA Imprudence Claims.

The Ninth Circuit held that plaintiffs who plead 401(k) fund underperformance as part of an ERISA imprudence claim must articulate a “meaningful benchmark.” *Anderson v. Intel Corp. Inv. Pol’y Comm.*, 137 F.4th 1015, 1022 (9th Cir. 2025). In the court’s view, a “meaningful benchmark” is a nearly identical comparator sharing the same “aims, ... risks, and ... potential rewards” of the underlying investment. *Id.* at 1023. According to the court, this definition not only excludes the benchmarks identified by the defendant’s

own plan fiduciaries as appropriate comparators but also ignores the plaintiff's non-conclusory allegations that the investment decisions at issue were profoundly out of step with industry norms. *Id.* Accordingly, the Court should reject the Ninth Circuit's unworkable approach because it both violates settled pleading standards and sets a dangerous precedent immunizing fiduciaries who make radical "outlier" investment choices for their 401(k) plans.

A. The Ninth Circuit's Rigid Standard Is Not Supported by the Federal Rules of Civil Procedure or ERISA.

The Federal Rules of Civil Procedure are designed to be simple and direct, emphasizing notice-pleading over technical formalities. As such, Rule 8 requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When analyzing pleadings under Rule 8, the Supreme Court has long endorsed the plausibility standard. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Courts are generally required to accept as true a plaintiff's plausible allegations and need "not impose a probability requirement at the pleading stage." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). When alleging an ERISA imprudence

claim predicated on fund underperformance, plaintiffs often will be required to allege some relevant comparison or benchmark to meet the plausibility pleading standard. But nothing in the Federal Rules requires pleading the Ninth Circuit’s strict definition of a “meaningful benchmark” to defeat a motion to dismiss.

ERISA, too, does not require pleading the unbending “meaningful benchmark” standard mandated by the Ninth Circuit. Section 1104(a)(1)(B) directs fiduciaries to discharge their duties “with the care, skill, prudence, and diligence under the circumstances ... 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).² Notably, section 1104(a) does not reference a “meaningful benchmark” as a pleading requirement. *Id*; *See Anderson*, 137 F.4th at 1028 (Berzon, J., concurring). Similarly, DOL regulations do not list a “meaningful benchmark,” much less the Ninth Circuit’s strict interpretation of it, as an element of an ERISA imprudence claim.³ *See* 29 C.F.R. § 2550.404a-1 (fiduciaries shall evaluate “the risk of loss and the opportunity for gain” for the investment and

² Section 1104(a)(1)(C) requires fiduciaries to diversify investments. Section 1104(a)(1)(D) indicates that the duty of prudence trumps the instructions of plan documents.

³ Instead, an ERISA imprudence claim is focused on challenging a fiduciary’s real-time decision-making process in selecting, retaining, and monitoring investments. *See Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171, 182 (4th Cir. 2023); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022); Restatement (Third) of Trusts § 77 cmt. a (2007).

“*reasonably available alternatives with similar risks*”) (emphasis added).

Unlike other claims that require pleading with particularity,⁴ ERISA does not contain a heightened pleading standard for imprudence or other claims. Instead, the statute requires courts to engage in a “careful, context-sensitive scrutiny of a complaint’s allegations” under the plausibility standard set forth in *Iqbal* and *Twombly*. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). The Ninth Circuit’s restrictive definition of a “meaningful benchmark” is contrary to the express language of ERISA, its regulations, and this Court’s plausibility standard for pleadings. “Such a categorical rule is inconsistent with the context-specific inquiry that ERISA requires.” *Hughes*, 595 U.S. at 173.

B. The Ninth Circuit’s Approach Requires Plaintiffs to Plead Information Solely in Defendants’ Possession and Guts ERISA’s Protections When Plan Participants Need It Most.

Amici take no position on whether a fiduciary may prudently allocate a portion of 401(k) plan assets to private equity and hedge funds. However, amici submit that here, Anderson has alleged with more than sufficient detail that Intel’s fiduciaries—despite notice of the high risks—breached their duty of

⁴ See, e.g., Fed. R. Civ. P. 9(b) (particularity standard for fraud allegations); Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(2) (particularity standard for *scienter* allegations).

prudence to plan participants by allocating massive, unprecedented amounts of those investments in the 401(k) plan and then failing to reduce those allocations despite their alarming underperformance for over a decade.

At the pleading stage, “it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior,” in part because plan participants “generally lack the inside information necessary to make out their claims in detail unless and until discovery commences.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, 598 (8th Cir. 2009). The detailed allegations of imprudence in Anderson’s amended complaint easily meet the pleading standard. Notably, Anderson alleges that: (1) Intel massively increased the allocation of plan assets (23-50%) in hedge funds, private equity, and other alternative investments in the 2009-11 period despite numerous public warnings from 2006 onward about the risks of such heavy allocations; (2) an analysis of 50 target date funds in 401(k) plans during this same time period indicated allocations of about 0-3%, but not more than 7%, in private equity and hedge funds; (3) Intel’s funds subsequently underperformed relevant benchmarks by hundreds of millions of dollars; (4) Intel’s fiduciaries failed to monitor and adjust the foregoing allocations over numerous years; (5) Intel’s funds imposed fees 100-400% higher than those charged in comparable target date and diversified funds; (6) Intel’s fiduciaries had a conflict of interest when they chose private equity funds investing in companies in which Intel’s venture capital arm had also invested; and (7) Intel’s disclosures

regarding the plans' investments in private equity and hedge funds contained material misrepresentations. *See* JA150-52, 184-200, 211-18. Anderson further identified multiple comparators, informed by expert opinion, as relevant benchmarks with similar characteristics to Intel's funds and included the very same funds against which Intel's fiduciaries compared their plans. *See* JA82-89, 94-99.

Requiring more particularized evidence than what Anderson produced at the pleading stage—before discovery—would demand that plaintiffs meet an unattainable standard: they would need to plead information contained in the fiduciary committee meeting minutes such as the processes and methods that fiduciaries used to arrive at the challenged investment decisions. However, this information is typically “kept secret” from participants and not included in annual plan disclosures. *Braden*, 588 F.3d at 602. “It would be perverse to require plaintiffs bringing ... [such claims] to plead facts that remain in the sole control of the parties who stand accused of wrongdoing.” *Id.* This Court has held that “it would make little sense to put the onus on plaintiffs to plead ... facts one would expect to be in the fiduciary's possession.” *Cunningham*, 604 U.S. at 705. The same reasoning applies here.

The “meaningful benchmark” pleading requirement imposed by the Ninth Circuit requires plaintiffs relying on circumstantial evidence to point to a near identical comparator fund that performed better. But this precondition has the paradoxical effect of protecting the most extreme and novel investments

for which there is no comparator. For instance, if fiduciaries invested 25% of plan assets in lottery tickets, there would be no comparator fund for participants to bring an ERISA imprudence claim. Here, the Ninth Circuit faulted Anderson for not identifying a near identical benchmark sharing the same “aims, ... risks, and ... potential rewards” of Intel’s plans even though no other target date or diversified fund had allocated such massive portions of plan assets in hedge funds and private equity. *Anderson*, 137 F.4th at 1023. By rejecting the Ninth Circuit’s categorical pleading rule, this Court will remain faithful to ERISA’s remedial purpose “to protect the interests of participants and beneficiaries,” especially when fiduciaries invest in ways that are so imprudent and far out-of-step with industry norms that no identical benchmark exists. *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) (quoting 29 U.S.C. § 1002(b)) (cleaned up).

II. The Ninth Circuit’s Unfair and Unrealistic Pleading Rule for ERISA Imprudence Claims Threatens the Financial Security of Older Adults.

A. Workers Bear All the Financial Risk of Fiduciaries’ Choice of Complex Investment Options and Lack the Training and Expertise to Independently Evaluate Them.

For decades, traditional defined benefit (DB) pension plans dominated the retirement landscape. Under these plans, workers are promised a guaranteed monthly income for life if they meet certain vesting requirements. Plan administrators make all the investment decisions, and the employer owes workers fixed benefits regardless of market downturns. As an added financial security measure, the Pension Benefit Guaranty Corporation insures benefits for all ERISA-covered DB plans.

Today, defined contribution (DC) plans—most often employer-sponsored 401(k)s—are the treasured means for workers to invest in their economic future. Workers choose from a menu of investment options; employers often match investments up to a fixed amount set by the Internal Revenue Service (IRS); and retired workers can either retain their 401(k) investments as-is or complete “roll overs” to other plans of their own choosing. Some workers who are financially educated may even welcome the chance to have greater agency in choosing investments tuned to

their specific financial circumstances.⁵ However, a key downside is that, now, workers bear all the market risk of their choices. This societal shift in retirement security is of breathtaking proportion. In 1975, private sector DB plans had a total of 27.2 million active participants, and private sector DC plans—like 401(k)s—had 11.2 million active participants. By 2023, private sector DB plans had only 11.1 million active participants, and private sector DC plans had 96.4 million active participants.⁶

To be sure, ERISA requires 401(k) plan administrators—as fiduciaries—to choose investment options wisely and to monitor their success over time. *See, e.g., Hughes*, 595 U.S. at 175-76 (all 401(k) investment options must be prudent); *Tibble v. Edison Int’l*, 575 U.S. 523, 530 (2015) (duty to monitor 401(k) investment options and remove imprudent ones). However, the imposition of inappropriate, harsh pleading standards, as here, impedes plan participants’ access to the courts to enforce those precepts, reducing their real-world impact.

Nor can workers, realistically, detect imprudent investment decisions. Most Americans lack the financial training to do so. For example, 59% of adults express confidence they could create a monthly

⁵ Natalya Shnitser, *Retirement Plan Reforms in the Absence of a Retirement Policy*, in *THE CAMBRIDGE HANDBOOK OF INVESTOR PROTECTION* 120-21 (Arthur B. Laby, 2d ed. 2022).

⁶ Elizabeth A. Myers & John J. Topleski, *A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector* (Mar. 25, 2026), <https://www.congress.gov/crs-product/IF12007>.

financial budget, but only 27% have confidence they could create an investment plan.⁷ One chief problem is lay persons' lack of education in understanding investment risk, such as asset diversification. Only 48% of adults understand that buying a mutual fund with multiple stocks poses less risk than buying a single company's stock.⁸ AARP reports that older adults also struggle with ill-composed financial disclosures of investment fees. In one study, 71% of respondents inaccurately believed that their 401(k) plans charged no fees.⁹

Studies further show that many 401(k) plan participants have no choice but to defer to fiduciaries' judgment due to lack of time. For example, a principal problem for workers is the "opportunity cost of financial management" when time "could otherwise be used for job-related human capital accumulation."¹⁰

⁷ Khadijah Edwards, *Roughly Half of Americans are Knowledgeable About Personal Finances*, Pew Rsch. Ctr. (Dec. 9, 2024), <https://www.pewresearch.org/short-reads/2024/12/09/roughly-half-of-americans-are-knowledgeable-about-personal-finances/>.

⁸ Robert Clark, et al., *Financial Knowledge and 401(k) Investment Performance: A Case Study* (June 22, 2015), <https://gflec.org/wp-content/uploads/2015/12/Financial-Knowledge-and-401k-Investment-Performance-A-Case-Study.pdf>.

⁹ Lona Choi-Allum, *401(k) Participants' Awareness and Understanding of Fees*, AARP Rsch. (Mar. 1, 2011), <https://www.aarp.org/pri/topics/work-finances-retirement/financial-security-retirement/401k-fees-awareness-understanding/>.

¹⁰ Hugh Hoikwang Kim, et al., *Time is Money: Rational Life Cycle Inertia and the Delegation of Investment Management*, HHS Pub. Access (Aug. 1, 2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5363991/pdf/nihms779516.pdf>.

Given that many Americans are still working into their late sixties and seventies and having to monitor their investment choices, this principle applies to older adults as well as younger workers just starting their careers.

Finally, the sheer complexity of today's investments stands in the way. Target Date Funds (TDFs) are a case in point. Their *concept* is easily understood: If, for example, you are 30 years old today and want to retire in 2050, you can pick a TDF 2050 plan. The TDF plan's initial asset allocation may be 80% stock / 20% bonds, and it adjusts each year to become more conservative until it's, say, 20% stock / 80% bonds upon retirement. The concept may be simple, but fiduciaries' choice of specific investments within the TDF plan is not. As the SEC has observed, "[e]ven target date funds with the same target date often have very different investments and different performance returns ... the mix of investments all along the glide path may be more conservative or more risky than other funds ... [and] target date funds with the same target date charge different fees."¹¹ Asking workers—often lacking expertise in understanding complex investments—to independently assess the risks and rewards of TDF plans that also contain massive allocations of hedge funds and private equity is unfair, unrealistic, and clearly a bridge too far for typical 401(k) investors.

¹¹ *Target Date Funds – Investor Bulletin*, U.S. Sec. & Exch. Comm'n (Mar. 25, 2025), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/target-date-funds-investor-bulletin>.

B. Fiduciaries' Failure to Disclose the Material Risks of Investment Options Sabotages Plan Participants' Efforts at Self-Help.

ERISA requires fiduciaries to provide full and accurate information to plan participants who usually lack the training needed to choose among complex investment options offered in 401(k) plans. *See Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995), *as amended* (Nov. 15, 1995) (“A fiduciary has an obligation to convey complete and accurate information material to the beneficiary’s circumstance, even when a beneficiary has not specifically asked for the information.”); *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (9th Cir. 2000) (en banc) (fiduciary violates duty of loyalty “to plan participants by failing to disclose material information”); *Washington v. Bert Bell/Pete Rozell NFL Retirement Plan*, 504 F.3d 818, 823 (9th Cir. 2007) (citing *Peralta v. Hisp. Bus., Inc.*, 419 F.3d 1064, 1070 (9th Cir. 2005) (cleaned up) (fiduciaries must “deal fairly and communicate to the beneficiary all material facts the trustee knows or should know in connection with the transaction”). When fiduciaries keep plan participants in the dark about their investment choices by failing to disclose material risks, participants are in no position to challenge imprudent investments and engage in self-help. This is especially unfair in circumstances where fiduciaries offer complex and high-risk investment options.

Here, Anderson’s amended complaint alleges that Intel—years before the launch of the higher

allocations of private equity and hedge funds in 2011—had ample notice of the inherent risks of their investments from government and financial industry reports. With respect to hedge funds, for example, these reports referenced issues of their inadequate performance; liberal use of leverage magnifying losses; low liquidity; difficulty of valuation due to low transparency; and high fees. *See* JA167-84 (warnings of poor performance and high risks).¹² In fact, Intel’s own hedge fund portfolio had not met expectations as a buffer in the 2008 financial crisis, losing 17% in 2008, versus a 5.2% gain in the Barclay’s U.S. Aggregate Bond index. *See* JA166-67. Intel, starting in 2011, nevertheless doubled down on such investments, for example increasing TDF’s hedge fund allocations from about \$50 million to \$680 million (an increase of 1,300%). It also increased the private equity allocation in the Global Diversified Fund from about \$83 million to \$810 million (an increase of 968%).

Anderson’s amended complaint further alleges—in no less than 50 paragraphs—that Intel, in multiple ways, then failed to warn plan participants of

¹² *See also Rolling in it: Why Investors Should Kick up a Fuss About Hedge-Fund Fees*, *The Economist* (Nov. 16, 2006), <https://www.economist.com/finance-and-economics/2006/11/16/rolling-in-it>; Gary Bruebaker, et al., *Principles and Best Practice for Hedge Fund Investors*, U.S. Commodity Futures Trading Comm’n, 14 (Jan. 15, 2009), https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/principlespractice_s.pdf; U.S. Gov’t Accountability Off., GAO-08-692, *Guidance Needed to Better Inform Plans of the Challenges and Risks of Investing in Hedge Funds* (Aug. 2008), <https://www.gao.gov/assets/gao-08-692.pdf>.

the material risks of these high allocations of hedge funds and private equity. *See* JA150-52, 184-200, 211-18. Sometimes, as in its Summary Plan Descriptions, Intel mentioned the inclusion of hedge funds and private equity in its 401(k) plans without indicating the risks.¹³ Other times, it conceded that high allocations of hedge funds could “serve as a drag when markets are experiencing rapid run-ups,” but touted their supposed protection against stock downturns without warning of the greater risks versus bonds.¹⁴

Notably, facts (and risks) are “material” and require disclosure when “a reasonable man would attach importance (to the fact misrepresented) in determining his choice of action in the transaction in question.” *United States v. Smith*, 155 F.3d 1051, 1065 (9th Cir. 1998) (citing *Marx v. Comput. Sci. Corp.*, 507 F.2d 485, 489 (9th Cir. 1974)). There should be no debate on the materiality of the facts in question in this case. Yet the Ninth Circuit blithely dismissed the entirety of Anderson’s non-conclusory allegations, not bothering to discuss the specifics and implying that investment risks are immaterial if the investment plays a diversification role in a larger portfolio, citing DOL’s regulations and Fourth Circuit precedent.¹⁵

¹³ *See, e.g.*, JA336 (2013 Summary Plan Description describing TDFs and stating nothing more about risk than: “Each fund offers a broadly diversified mix of domestic and international stocks and bonds, and includes investments not typically available to individual investors, such as hedge funds and commodities. They are professionally managed, continually monitored, and automatically rebalanced for you.”)

¹⁴ *See, e.g.*, JA651 (Target Date 2045 Fund Fact Sheet).

¹⁵ *See Anderson*, 137 F.4th at 1024 (“[t]he Department of Labor’s regulations contemplate that fiduciaries ... [should

Neither supports that premise.¹⁶ And in any event, *Tibble* and *Hughes* make clear that every investment option in a 401(k) menu must not violate ERISA’s prudence standard.¹⁷ Anderson, therefore, justifiably alleges that Intel should have alerted plan participants of the material risks to them. Had Intel done so, at least some participants could have engaged in self-help, discussing with family, friends, or a financial advisor whether there were other better options for investing their hard-earned savings (*e.g.*, an Individual Retirement Account with a straight-forward TDF).

Older adults, retired or attempting to do so, ultimately pay the price when fiduciaries make imprudent investment decisions and fail to disclose the material risks to plan participants. Private

follow] the principles of modern portfolio theory, which recognizes that riskiness of a particular investment ... can be managed through diversification of investment assets”) (citing 29 C.F.R. § 2550.404a-1 and *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4th Cir. 2007)).

¹⁶ DOL’s regulations merely state that fiduciaries should consider “the role the investment or investment course of action plays in that portion of the plan’s investment portfolio or menu” 29 C.F.R. § 2550.404a-1(b)(i)-(ii). And the Fourth Circuit in *DiFelice* further opined “the [district] court may have overstated the appropriate relevance of modern portfolio theory Under ERISA, the prudence of investments or classes of investments offered by a plan must be judged individually.... [Immunizing the risky fund] would be perverse in light of [DOL’s] direction that selection of prudent plan *options* falls within the fiduciary duties of a plan administrator.” 497 F.3d at 423-24 (emphasis in original) (cleaned up).

¹⁷ *Hughes*, 595 U.S. at 175; *Tibble*, 575 U.S. at 530.

enforcement of ERISA’s fiduciary duties, under proper pleading standards, is essential to both fairly compensate the wronged individuals in that circumstance and to deter future violations that threaten the financial security of other retirees in their twilight years.

C. Even Modest Losses Caused by Fiduciary Imprudence Can Have Outsized Impact on the Financial Security of Retirees in Today’s Economy.

An overly stringent pleading standard for ERISA imprudence claims—like that required by the Ninth Circuit—inhibits plan participants’ ability to seek redress through a private right of action, “one of the essential tools for accomplishing the stated purposes of ERISA.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987), *superseded by statute on other grounds as explained in Hunger v Ameritech*, 779 F. Supp. 419, 421 (N.D. Ill. 1991); 29 U.S.C. § 1001(b) (ERISA provides “appropriate remedies, sanctions, and ready access to the Federal courts”). This enforcement mechanism is crucial, now more than ever, as a retirement crisis looms and older workers rely so heavily on income from their 401(k) plans for their economic survival.

The sheer number of older adults who now depend or will depend on their retirement savings demonstrates the utmost importance of fiduciary prudence needed to safeguard their investments. Among working adults (ages 15 to 64), the “most

common type of retirement accounts in 2020 were 401(k)-style accounts.”¹⁸ “Eighty-five percent of Baby Boomer workers [62-80 years old] are saving for retirement in a 401(k) or similar plan.”¹⁹ Overall, “[d]efined contribution plans hold more than \$4.4 trillion of workers’ retirement savings.”²⁰ Since 401(k)s are the hallmark of many workers’ retirement plans, “welfare in retirement—and even the ability to retire—hinges on the performance of the mutual funds in their retirement portfolios.”²¹

The outsized impact of even modest shortfalls in 401(k) income caused by imprudent investments is compounded by the retirement crisis in this country. Financial advisors warn that “retirees need to replace 70 percent to 80 percent of their working income.”²² However, of retirement-age individuals, “[m]ore than half—52.5 percent—have less than \$250,000 in retirement assets.”²³ These assets are simply

¹⁸ Maria G. Hoffman, et al., *New Data Reveal Inequality in Retirement Account Ownership*, U.S. Census Bureau (Aug. 31, 2022), <https://www.census.gov/library/stories/2022/08/who-has-retirement-accounts.html>.

¹⁹ *4 Generations Are Persevering Against Headwinds and Uncertainties to Prepare for Retirement*, Transamerica Ctr. for Ret. Studies (June 2025), <https://www.transamericainstitute.org/research/publications/details/four-generations-persevering-against-headwinds-uncertainties-prepare-for-retirement>.

²⁰ Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and “Dominated Funds” in 401(k) Plans*, 124 Yale L.J. 1476, 1479 (Mar. 2015).

²¹ *Id.*

²² Andy Markowitz, *Are the Last Boomers Ready for Retirement?*, AARP (Apr. 19, 2024), <https://www.aarp.org/money/retirement/peak-boomer-readiness/>.

²³ *Id.*

insufficient to maintain financial security. “[W]ell over half of them will find it challenging to meet their needs through their retirements, let alone maintain their current standard of living.”²⁴ Further, the Elder Index demonstrates that “[o]ver 19 million (45%) older adult households do not have the income needed to cover basic living costs And 80%, or about 34 million households, are unable to weather a major shock such as widowhood, serious illness, or the need for long-term care.”²⁵

And for those individuals nearing retirement age, the concerns appear to intensify. According to AARP, 69% of adults ages 50-64 are worried about having enough money to be financially secure in retirement.²⁶ Unfortunately, as the data demonstrates, these worries are well-founded. One reason for incoming retirees’ precarious financial position is that while they must save more than prior generations, they have had less time and opportunity to do so. Research shows that “the average 65-year-old can expect to live another two decades.”²⁷ Although

²⁴ *Id.*

²⁵ *Addressing the Nation’s Retirement Crisis: The 80%*, Nat’l Council on Aging (Oct. 7, 2025), <https://www.ncoa.org/article/addressing-the-nations-retirement-crisis-the-80-percent-financially-struggling/>.

²⁶ Kathi Brown, *AARP Financial Security Trends Survey, January 2025 Annotated Questionnaire*, AARP, 12 (Jan. 2025), <https://www.aarp.org/content/dam/aarp/research/topics/work-finances-retirement/financial-security-retirement/financial-security-trends-january-2025-annotated-questionnaire.doi.10.26419-2fres.00525.049.pdf>.

²⁷ *Baby Boomer Retirement Income Expectations and Opportunities*, Am. Equity (Aug. 13, 2018), <https://www.>

they must account for a longer life expectancy, they have had less time to save for retirement. Many incoming retirees “were already mid-career when 401(k) plans were introduced.”²⁸ With less time to save but more money required to sustain themselves, financial security for these older adults is more difficult to accomplish.

Insufficient retirement assets force older adults to continue working past retirement age or go back to work. Financial experts warn that older adults “need to consider alternative models of retirement, such as working beyond retirement age, changing one’s standard of living in retirement, strategies for deploying retirement savings, or some combination.”²⁹ Older adults recognize this and “four in 10 ... will likely work part time in retirement, either by choice or necessity.”³⁰ Remarkably, the majority of baby boomers remain in the workforce.³¹ “In 2018, 29% of Boomers ages 65 to 72 were working or looking for work, outpacing the labor market engagement of the Silent Generation (21%) and the Greatest Generation (19%) when they were the same age.”³²

[american-equity.com/insights/baby-boomer-retirement-income-expectations-and-opportunities](https://www.american-equity.com/insights/baby-boomer-retirement-income-expectations-and-opportunities).

²⁸ *4 Generations*, *supra* note 19.

²⁹ *Boomers Face Tougher Retirement Than Their Parents Did*, AARP (Oct. 24, 2018), <https://www.aarp.org/money/retirement/boomers-struggle-home-values/>.

³⁰ *Baby Boomer Retirement*, *supra* note 27.

³¹ Richard Fry, *Baby Boomers are Staying in the Labor Force at Rates not Seen in Generations for People Their Age*, Pew Rsch. Ctr. (July 24, 2019), <https://www.pewresearch.org/short-reads/2019/07/24/baby-boomers-us-labor-force/>.

³² *Id.*

However, many older adults will be *unable* to work and will depend on prudent returns from their 401(k) plans to survive. Disabilities and health complications are more likely to affect older adults and inhibit employment. “By ages 65-74, about one in four adults has a disability (25 percent for men and 23 percent for women). After 75, the pervasiveness jumps sharply, affecting nearly half of both men (45 percent) and women (46 percent).”³³ While the prevalence of disability continues to grow with age, only 6.8 percent of *all* individuals with disabilities find employment.³⁴ Since the IRS does not penalize adults for withdrawing early from 401(k) plans when they have a permanent disability, this source of income becomes a lifeline for those older adults who are unable to work.³⁵

Another reason that imprudent investments in 401(k) plans looms larger for older adults is the expanding uncertainty of Social Security. Many incoming retirees will rely on Social Security in addition to their other retirement assets.³⁶ While

³³ *Point of View on Disability in the Workplace*, EBRI (May 8, 2025), https://www.ebri.org/docs/default-source/point-of-view/pov_5-deidisability-8may25.pdf?sfvrsn=d3d4042f_1.

³⁴ *Id.*

³⁵ *Retirement Topics – Disability*, IRS (Feb. 26, 2026), <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-disability#:~:text=A%20plan%20participant%20may%20receive,still%20be%20reported%20as%20income>.

³⁶ Robert Shapiro & Luke Stuttgen, *The Peak Boomers Impact Study*, 1 (Apr. 2024), <https://www.limraconsumer.com/wp-content/uploads/2024/04/Peak-Boomers-Econ-Impact-Study->

Congress may act to prevent its collapse, Social Security’s combined trust fund reserves are projected to be depleted around 2034.³⁷ Thus, retirees may see broad cuts of approximately 20% starting around this time.³⁸ Given that “62 percent of baby boomers think Social Security will provide more than half of their income during retirement,” any substantial cuts will obviously increase their dependence on robust 401(k) returns.³⁹

Imprudent shortfalls in 401(k) income are a double disaster for low-income workers. It’s no secret that among older adults, there “is a growing wealth divide between the bottom 80% and the top 20%.”⁴⁰ A 2023 study demonstrates that “vulnerable households are projected to fall short of their income replacement target by an annual average of \$7,050 by 2040.”⁴¹ Further, older adults with low income who have already begun drawing from their 401(k) plans depend

EXEC-SUMM-ALI-RII-Shapiro-Stuttgen-EMBARGOED-Apr-18-2024-041624.pdf.

³⁷ *The Social Security Challenge*, Am. Acad. of Actuaries, <https://actuary.org/socialsecurity/> (last visited Apr. 24, 2026).

³⁸ Shapiro & Stuttgen, *supra* note 36.

³⁹ *Baby Boomer Retirement*, *supra* note 27.

⁴⁰ Jane Tavares, et al., *Low-Income Older Adults Die 9 Years Earlier Than Those With Greatest Wealth*, Nat’l Council on Aging, 7 (2025), https://assets.ncoa.org/ffacfe7d-10b6-0083-2632-604077fd4eca/df44501b-7c8e-43ac-8e12-2373288f71d4/2025_80_Percent_Report.pdf.

⁴¹ John Scott, *Millions of Americans Are Falling Behind on Their Retirement Goals*, Pew Charitable Trs. (Oct. 24, 2024), <https://www.pew.org/en/about/news-room/opinion/2024/10/24/millions-of-americans-are-falling-behind-on-their-retirement-goals>.

on those funds for 47% of their annual income.⁴² With these low-income households substantially depending on their 401(k)s, it is vital that fiduciaries act prudently.

Finally, even small increases in fees, or unmitigated plan underperformance, can have an outsized impact on older adults' 401(k) retirement funds. As DOL explained:

Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of \$25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to \$227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only \$163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.⁴³

In sum, allowing fiduciaries to curtail their statutory responsibilities at a time when older adults are barreling towards a retirement crisis is the

⁴² *2022 Survey of Consumer Finances*, Bd. of Governors of the Federal Reserve Bd. (2023), <https://www.federalreserve.gov/econres/scfindex.htm>.

⁴³ *A Look at 401(k) Plan Fees*, U.S. Dep't of Lab., <https://www.dol.gov/node/63354> (last visited Apr. 24, 2026).

antithesis of what Congress intended when enacting ERISA. Thus, this Court should reject the Ninth Circuit's unworkable and impractical pleading rule for alleging ERISA imprudence claims.

CONCLUSION

For the foregoing reasons, amici respectfully request the Court to vacate the Ninth Circuit's judgment and remand the case for further proceedings.

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