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* PHYLLIS C. BORZI, KAREN HANDORF AND ALI KHAWAR IN SUPPORT OF PETITIONERS

ELIZABETH HOPKINS
Counsel of Record
HOPKINS ERISA LAW
12123 Laurel Terrace Drive
Studio City, CA 91604
(301) 938-7516
hopkinserisalaw@outlook.com

JEFFREY LEWIS
KELLER ROHRBACK
180 Grand Avenue,
Suite 1380
Oakland, CA 94612
(510) 463-3900

ERIN M. RILEY
KELLER ROHRBACK
1201 Third Avenue,
Suite 3400
Seattle, WA 98101
(206) 623-1900

Counsel for Amici Curiae

391897

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

This case involves a pleading standard created and applied by the Ninth Circuit Court of Appeals, which led that court to affirm the dismissal for failure to state a claim of a lawsuit brought by participants against fiduciaries of a defined contribution retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq*. The Ninth Circuit's standard mandates that plan participants claiming fiduciary imprudence in selecting and maintaining plan investments due to underperformance of the selected funds must in all instances point in their complaint to a "meaningful benchmark" and plausibly allege that the challenged funds underperformed "a relevant comparator with similar risk-mitigation strategies and objectives." Pet. App. 14a.

Amici curiae are three former high-ranking officials at the United States Department of Labor with decades of combined experience writing regulations, setting policy, and bringing lawsuits on behalf of the government with respect to Title I of ERISA. All three are ERISA experts who remain active in the legal community and academia on issues

[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici and their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, amici notified counsel for the parties of their intent to file this brief.

pertaining to ERISA, including by speaking, teaching and writing on ERISA matters.

Phyllis C. Borzi was, from 2009 to 2017, the Assistant Secretary of Labor of the Employee Benefits Security Administration (EBSA), the branch of the United States Department of Labor that oversees millions of private-sector pension and welfare benefit plans. In that capacity, as EBSA's senior-most official, she had responsibility during her tenure for all of the agency's functions, including EBSA's regulatory, investigative and enforcement responsibilities. In addition, for more than 15 years prior to her EBSA service, Ms. Borzi counseled plan sponsors and fiduciaries of collectively bargained multiemployer benefit plans on ERISA issues, including their responsibilities as investment fiduciaries.

Karen Handorf served as the Deputy Associate Solicitor, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor from 2000 until 2007. In that role, she provided guidance and litigation support to EBSA in many of its functions. Prior to that time, she was counsel for appellate and special litigation. In that role, she supervised briefs setting forth the Department of Labor's view on many ERISA issues, including issues related to the responsibilities of investment fiduciaries for retirement plans.

Ali Khawar served as the Acting Assistant Secretary for EBSA from 2021 through late 2022. In that capacity, he oversaw all of EBSA's many functions with respect to ERISA. He was the Principal Deputy Assistant Secretary for EBSA from 2021 to

early 2025. In that capacity, he supervised all of the agency's regulatory work.

As former Department of Labor officials who worked for many years on enforcement and regulatory issues, including those related to the duties of ERISA investment fiduciaries, amici offer both expertise and a unique perspective on the fiduciary and pleading issues raised in this matter. Indeed, they not only have a keen interest in the proper resolution of these issues, they are also uniquely suited to address the likely impact of the Ninth Circuit's flawed pleading standard if adopted by this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As the statute spells out in its first section, and this Court has repeatedly recognized, ERISA is fundamentally a remedial statute concerned with protecting the interests of plan participants and beneficiaries in receiving the benefits they have been promised and earned. *See* 29 U.S.C. § 1001(a); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *Massachusetts v. Morash*, 490 U.S. 107, 112, 115 (1989); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014). Thus, "to help fulfill ERISA's broadly protective purposes, Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 & n.5 (1993) (citations omitted).

These fiduciary standards require that plan fiduciaries manage the money held in trust to support pensions and other employee benefits with undivided loyalty and scrupulous care. *See*, *e.g.*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985) (ERISA "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets"); *Tatum v RJR Pension Investment Committee,* 761 F. 3d 346, 355 (4th Cir. 2014) (consistent with its protective purpose "ERISA imposes high standards of fiduciary duty on those responsible for the administration of employee benefit plans and the investment and disposal of plan assets"); *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003) (describing ERISA's fiduciary duties as "the highest known to law"); *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (same). Indeed, ERISA imposes a stringent version of the trust-law's standard of care for fiduciaries, requiring that plan fiduciaries 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).

Although the common law of trusts is the "starting point" with respect to the duties of ERISA fiduciaries, "trust law does not tell the entire story" because "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("Congress 'expect[ed] that the courts will interpret th[e] prudent man rule (and

the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans'") (citations omitted). Accordingly, to meet ERISA's prudence standard, the "'fiduciary's process must bear the marks of loyalty, skill, and diligence expected of an expert in the field.'" *Mator v. Wesco Distribution, Inc.*, 102 F.4th 172, 183 (3d Cir. 2024) (quoting *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 333 (3d Cir. 2019)).

The importance of these rules of prudent management to plan participants and their families, and to the economy as a whole, can hardly be overstated given the enormous sums of money held by pension plans to secure the retirements of over 100 million Americans. *See* Congressional Research Service (CRS), *U.S. Retirement Assets: Data in Brief* (April 1, 2026) (stating that the Federal Reserve's *Financial Accounts of the United States* reported that $10.6 trillion was held in private defined contribution plans and $3.2 trillion in defined benefit plans at the end of 2024); CRS, *A Visual Depiction of the Shift From Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector* (March 25, 2026) (reporting 96.4 million active defined contribution plan participants and 11.1 million active defined benefit plan participants as of 2023 based on Department of Labor data).

But like most legal requirements, ERISA's fiduciary standards are not self-enforcing. They depend in large measure on the ability of plan participants and their beneficiaries to bring suit when they have been injured by plan mismanagement, as they are expressly empowered to do under the statute. 29 U.S.C. §§ 1132(a)(2), 1132(a)(3). In designing

ERISA's remedial provision in this way, Congress sought to remove "procedural obstacles" that had previously hampered effective enforcement of pension protections, S. Rep. No. 127, 93d Cong., 2d Sess. 47 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4838, 487, by providing plan participants and beneficiaries "ready access to the Federal courts." 29 U.S.C. § 1001(b).

The Ninth Circuit's "meaningful benchmark" standard stands in the way of these remedial goals and is in error for at least three related reasons.

First, this court-created special pleading standard is out of line with this Court's rejection of another "special" court-created rule in *Dudenhoeffer*, and its admonition that determining whether plaintiffs have stated a plausible claim must be accomplished "through careful, context-sensitive scrutiny of a complaint's allegations." 573 U.S. at 425. As Judge Berzon correctly stated in her concurring opinion in the Ninth Circuit, "*any* set of allegations which, taken as true and viewed in the plaintiff's favor, plausibly support an inference that a fiduciary acted imprudently is sufficient at the pleading stage." Pet. App. 31a. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires the same. Rather than apply this kind of flexible and context-specific analysis, the Ninth Circuit adopted an inflexible requirement that elevates comparison to a similar investment with similar aims, whether or not that investment would be a prudent one, over all other factors that might indicate, directly or inferentially, that plan fiduciaries exercised poor judgment with respect to the investment at issue.

Second, as articulated by the Ninth Circuit, the "meaningful benchmark" standard misconstrues the fiduciary prudence standard, particularly what prudence means in the context of an investment fiduciary. ERISA, by its terms requires, all fiduciaries to act with the "care, skill, prudence and diligence" that a prudent person, educated about the matter, would use, 29 U.S.C. § 1104(a)(1)(B), underscoring the seriousness and comprehensiveness of what is required of plan fiduciaries. The standard is universally understood to be a stringent, objective one that is not satisfied by good intentions on the part of the fiduciary or by unthinking or uneducated reliance on the advice of others. Thus, prudence or lack of prudence is normally proven through expert testimony that aims to establish whether a prudent fiduciary, knowledgeable about such investments, would choose or maintain the challenged investments for the pension plan under the circumstances. Furthermore, although an investment's history and outcomes do not tell the whole story, these factors are hardly irrelevant, particularly when considering an assertion that the fiduciary failed to properly monitor and remove a plan investment that had become imprudent, even if that investment was permissible at the outset. Nor can ERISA's duty of care reasonably be understood as imposing a bare check-the-box procedural requirement that is unconcerned with the judgment exercised and the soundness of the decision reached by the fiduciary at the end of the process.

None of these important considerations are factored into the "meaningful benchmark" standard, and indeed all were ignored or discounted by the

Ninth Circuit in this case. The plaintiffs plausibly alleged that the investments at issue were ill-designed to serve the plan's purported risk-mitigation goals, unduly expensive, and unsuitable for securing retirement income, *e.g.*, JA79-82, 112-114, 280-85, particularly in light of the high concentration in private equity, hedge funds, and other alternative investments. JA57-59 (alleging allocations in such investment as high as 38% in one fund and 23% in the other). Thus, the plaintiffs alleged that the plan's investment strategies "deviated greatly from prevailing professional investment standards." JA9-10. These plausible allegations, if assumed true, as required on a motion to dismiss, support an inference that a prudent fiduciary, knowledgeable about such investments, would not have pursued the plan's investment strategy.

This should have been enough, without more, to withstand a motion to dismiss, but the Ninth Circuit imposed a pleading requirement that the plaintiffs specifically compare the performance of the plan's investments to a meaningful benchmark, notwithstanding the absence of any such requirement in ERISA's text or in the Federal Rules of Civil Procedure. Having imposed this extra-statutory requirement, the Ninth Circuit then compounded the error by disregarding the benchmarks specifically identified in the plaintiffs' complaint and supported by the plaintiffs' experts. Benchmarking hedge funds and other private investments is a very complex undertaking given the paucity of good indices for these kinds of "alternative" investments, hardly the kind of issue that lends itself to resolution on the pleadings. But instead of drawing all plausible

inferences in favor of the plaintiffs, the Ninth Circuit simply resolved all the financial issues in favor of the defendants, without taking any testimony, expert or otherwise, on appropriate benchmarks for this plan.

Third, the "meaningful benchmark" standard cannot be squared with ERISA's expressly stated goal of providing "ready access to the Federal courts" because it sets an impossible to meet pleading standard for many imprudent investment decisions. At the heart of the plaintiffs' allegations was the assertion that the investment strategies pursued and the decisions made by the defendants were imprudent and misaligned with the plan's risk-mitigation goals.

The Ninth Circuit, however, required that the plaintiffs rely upon benchmarks that reflected strategies and approaches similar to those adopted by the plaintiffs, rather than benchmarks that reflected the prudent approach urged by the plaintiffs. In effect, the Ninth Circuit required the plaintiffs to restrict their comparisons to benchmarks that, in the court's view, better mirrored the very strategies that the plaintiffs alleged were imprudent. This is particularly problematic in the most egregious circumstances, as the plaintiffs argue is the case here, where the investments are so out of line with what prudent fiduciaries would choose that there is no comparator that would meet the Ninth Circuit's standard.

ARGUMENT

I. The "Meaningful Benchmark" Standard Improperly Creates a "Special" Pleading Rule That Prevents "Careful, Context-Sensitive Scrutiny" of Imprudent Investment Claims.

The Ninth Circuit's "meaningful benchmark" standard cannot be squared with this Court's repeated rejection of special rules of pleading and prudence in ERISA cases, or the Court's holdings with respect to the notice pleading standard of Rule 8(a)(2).

In *Dudenhoeffer*, this Court addressed whether fiduciaries to an employee stock ownership plan ("ESOP") are entitled to a presumption that they have acted prudently by buying and continuing to hold stock in the sponsoring company, as the Sixth Circuit and several others had held. 573 U.S. at 414. Rejecting this court-created approach to prudence, the Court held that ERISA "does not create a special presumption favoring ESOP fiduciaries" because, subject to an exception from ERISA's diversification requirement for ESOPs not applicable here, "the same standard of prudence applies to all ERISA fiduciaries." *Id.* at 418-19. The Court was not moved by the argument "that the threat of costly duty-of-prudence lawsuits will deter companies from offering [retirement] to their employees," *id.* at 423. The Court was unconvinced "that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite 'balancing.'" *Id.* at 425. Instead, because the "proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence

claim, no matter how meritorious, unless the employer is in very bad economic circumstances," it would "not readily divide the plausible sheep from the meritless goats." *Id.* "That important task, this Court held, "can be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.*

The same is true of the "meaningful benchmark" standard at issue here. ERISA itself does not, either expressly or implicitly, contain such a standard applicable to determining prudence based on an investment's underperformance. Instead, ERISA contains a single standard of prudence that allows a plaintiff to state a claim through "*any* set of allegations" sufficient "to plausibly support an inference that a fiduciary" did not act with the "care, skill, prudence and diligence" that a prudent person, educated about the matter, would use in making the investment decisions at issue, 29 U.S.C. § 1104(a)(1)(B). Pet. App. 31a (Berzon, J., concurring).

The Sixth Circuit recognized as much in *Parker-Hannifin Corp. v. Johnson*, 122 F.4th 205 (6th Cir. 2024), where the court held that such a benchmark is not always required when plaintiffs allege that fiduciaries acted imprudently in investing plan assets in an underperforming fund. *Id.* at 216. Thus, the Sixth Circuit correctly recognized that plaintiffs may state an imprudence claim by pleading any set of "facts to give rise to an inference" that the fiduciaries' "real-time decision-making process" was insufficient, *id.*, or, more broadly, that would support an inference that the fiduciaries did not act as a prudent person would under the circumstances. Moreover, as with the presumption of prudence that this Court rejected in

Dudenhoeffer, the "meaningful benchmark" standard, as applied by the Ninth Circuit, is ill-suited to the task of sorting meritless from meritorious claims because it makes it impossible for plaintiffs to establish imprudence where, as the plaintiffs assert is the case here, the chosen investments are so imprudent and unusual that there are no real-world comparators, and it is inappropriate to compare them with hypothetical benchmarks that reflect "similar" investment strategies.

"The open-endedness of the inquiry into whether a fiduciary acted with care makes sense because," as the Fifth Circuit has correctly noted, "the nature of a fiduciary's responsibility is itself open-ended." *Perez v. Bruister*, 823 F.3d 250, 264 (5th Cir. 2016). *See also Sweda*, 923 F.3d at 331 ("employ[ing] a holistic approach" to evaluate ERISA complaint); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (noting that ERISA's "remedial scheme * * * counsel[s] careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief"). The Ninth Circuit's inflexible pleading rule cannot be squared with this open-ended, holistic approach.

For much the same reason, as applied by the Ninth Circuit, the standard is hard to square with the "simplified notice pleading standard" of Rule 8(a)(2) of the Federal Rules of Civil Procedure, which "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) (citations omitted) (rejecting a special pleading rule requiring

plaintiffs in all employment discrimination suits to plead the elements of a prima facie case of discrimination). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting with approval *Swierkiewicz*'s emphasis of the "liberal pleading requirements" embodied in the Federal rules; internal quotation marks and citation omitted)).

In fact, in accepting Respondents' contention that the challenged investments were chosen to mitigate risk, and in rejecting Petitioners' arguments that they could not sensibly have been chosen for that reason because they were too concentrated in risky and costly investments, the lower court appears to have turned on its head the rule that, in deciding a motion to dismiss, courts must assume "that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). *See also id.* at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable"). Without any presentation of evidence, the court effectively resolved expert issues on proper risk-mitigation strategy, rejected allegations that the defendants' investment strategy, as implemented by the defendants was inconsistent with the plan's purported risk-mitigation goals, ignored or discounted the allegations that the defendants' strategy was an outlier that was inconsistent with the conduct of knowledgeable investment managers, and rejected the benchmarks offered by the plaintiffs and supported by their experts.

As this Court has done with regularity in ERISA cases in particular, it should continue to resist the call

to apply anything other than the ordinary rules of civil procedure here. *See*, *e.g.*, *Cunnigham v. Cornell Univ.*, 604 U.S. 693, 601-02 (2024) (applying ordinary rule that plaintiffs need not plead or prove elements of an affirmative defense). So too, the Court should continue to reject categorical rules of fiduciary conduct and instead require courts to assess prudence in a flexible manner based on the facts and circumstances presented. *See Hughes v. Nw. Univ.*, 595 U.S. 170, 173 (2022) (rejecting the Seventh Circuit's categorical rule that, because lower cost investments were available to participants in a defined contribution plans, plaintiffs' allegations of imprudence with regard to higher cost investment options failed as a matter of law); 29 C.F.R. § 2550.404a-1(b)(1) (a fiduciary's investment decisions are prudent if the fiduciary "[h]as given appropriate consideration to those facts and circumstances that * * * are relevant to the particular investment * * * involved * * * and [h]as acted accordingly").

The "meaningful benchmark" rule should be rejected because it is a categorical rule of pleading that is inconsistent with the approach taken by this Court in cases such as *Dudenhoeffer*, *Hughes* and *Cunningham*, and with notice pleading under Rule 8(a).

II. The "Meaningful Benchmark" Standard Misconstrues and Weakens ERISA's Prudence Standard.

The "meaningful benchmark" standard should also be rejected for a related reason: it is fundamentally at odds with ERISA's fiduciary duty of prudence and threatens to significantly undermine

that standard, particularly with respect to fiduciaries that choose and manage plan investments.

Under ERISA, a plan fiduciary must administer the plan "solely in the interest of the participants and beneficiaries and * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] 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). Thus, the statute "requires the fiduciary of a pension plan to act prudently in managing the plan's assets," *Dudenhoeffer*, 573 U.S. at 411-12, by "impos[ing] a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Russell*, 473 U.S. at 143 n.10. This duty of prudence is "derived from the common law of trusts," *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), as adapted to "'the special nature and purpose of employee benefit plans.'" *Varity Corp.*, 516 U.S. at 497 (quoting H.R. Conf. Rep. No. 93–1280, pp. 295, 302 (1974), 3 Leg. Hist. 4562, 4569).

In previously promulgating regulations describing the fiduciary duties of those tasked with selecting and maintaining plan investments, the Department of Labor has correctly stressed that prudence requires such fiduciaries to act in accordance with an appropriate consideration of the relevant facts. Thus, under the regulation, an investment fiduciary has acted prudently if that fiduciary has:

> given appropriate consideration to those facts and circumstances that, given the scope of such

> fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio or menu with respect to which the fiduciary has investment duties; and * * * acted accordingly.

29 C.F.R. § 2550.404a–1(b)(1).

"Appropriate consideration" includes, but is not limited to "[a] determination by the fiduciary that the particular investment * * * is reasonably designed * * * to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain * * * compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks." *Id*. (b)(2)(i). It also includes consideration of the portfolio's diversification, liquidity, and projected return relative to the plan's funding objectives. *Id*. (b)(2)(ii).

Prudence is thus a facts-and-circumstances test that "is measured according to the objective 'prudent person' standard developed in the common law of trusts." *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (citing *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983)) (additional citations omitted). The fiduciary's "lack of familiarity with investments is no excuse: under an objective standard, trustees are to be judged 'according to the standards of others acting in a like capacity and familiar with such matters.'" *Katsaros*, 744 F.2d at 279 (quoting *Marshall v. Glass/Metal Association*, 507 F. Supp.

378, 384 (D. Haw. 1980)). Thus, a fiduciary must act with the "'loyalty, skill, and diligence expected of an expert in the field.'" *Mator v. Wesco Distribution, Inc.*, 102 F.4th 172, 183 (3d Cir. 2024) (quoting *Sweda*, 923 F.3d at 329). Nor are good intentions good enough. *Sweda*, 923 F.3d at 329 ("It is not enough to avoid misconduct, kickback schemes, and bad-faith dealings. The law expects more than good intentions."); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("a pure heart and an empty head are not enough"); *DeFelice v. U.S. Airways, Inc.*, 497 F.3d. 410, 418 (4th Cir. 2007) (same, quoting *Donovan*).

In applying its one-size-fits-all "meaningful benchmark" standard to all cases where participants allege imprudence based on cost or underperformance of plan investments (at least where they do not have direct proof of a flawed process), the Ninth Circuit misunderstood the facts-and-circumstances nature of a prudence analysis under ERISA. *See* 29 C.F.R. § 2550.404a-1(b)(1)(i) (fiduciaries must give "appropriate consideration to those facts and circumstances that" they "know[] or should know are relevant to the particular investment or investment course of action involved"). Likely for this very reason, the court ignored many important factors relevant to determining whether the defendants acted imprudently with respect to the decisions to include and maintain the challenged investments.

The appellate court's missteps began with the apparent notion that the prudence standard is an entirely procedural standard that is divorced from the actual merits of the investment decision. Pet. App. 10a-11a. But ERISA's duty of care cannot reasonably

be understood as imposing a bare procedural requirement that is unconcerned with the judgment exercised and the decision reached by the fiduciary at the end of the process. To the contrary, in determining whether a fiduciary has acted prudently, courts must focus both "on the merits of [a] transaction," as well as "on the thoroughness of the investigation into the merits of [that] transaction." *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). *Accord DeFelice*, 497 F.3d. at 418 (quoting *Howard*). Likewise, the Department of Labor's fiduciary regulation provides that, to meet the statutory prudence standard, a fiduciary must not only have employed a prudent process in making investment decisions but must have "acted accordingly." 29 C.F.R. § 2550.404a–1(b)(1).

In a similar vein, the court of appeals mistakenly discounted the performance history of the challenged investments, stressing that because courts must "evaluate prudence prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved, it is not enough for a plaintiff simply to allege that the fiduciaries could have obtained better results—whether higher returns, lower risks, or reduced costs—by choosing different investments." Pet. App. 10a. However, an historical review of an investment's poor performance relative to costs is likely to be relevant to a prudent analysis, whatever the process employed. This is particularly the case when considering an assertion that the fiduciary failed to properly monitor and remove a plan investment that had become imprudent, even if it was permissible at the outset. *See Hughes*, 595 U.S. at 176 ("If the

fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."); *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015) ("A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones.").

The Ninth Circuit likewise missed the mark in rejecting the plaintiffs' comparisons to more "equity-heavy funds" with lower fees, including "published indices like the S&P 500 and Morningstar categories of peer group funds," Pet. App. 14a, and in holding that the plaintiffs were required to plead underperformance relevant to funds with "comparable aims" and "the same asset allocation," such as the fiduciaries' hypothetical "customized benchmarks." *Id.* 13a. Indeed, based on nothing but the complaint, which attached expert reports explaining that the challenged funds significantly underperformed relative to a number of meaningful comparators, including ones that the defendants referenced in their disclosures to plan participants, the court went so far as to conclude that the plaintiffs' "putative comparators were not truly comparable because they had 'different aims, different risks, and different potential rewards,'" *id.* 14a (citation omitted). *See also Parker-Hannifan Corp*, 122 F.4th at 218 (Murphy, J., dissenting) (asserting that a count alleging imprudence in investing fails unless it "includes enough details about the [comparators] to suggest that they are interchangeable in all material respects but their returns"). This is both inconsistent with normal pleading standards and is wholly unsupported by the text and aims of ERISA.

The court reasoned that its requirement that the complaint allege a "relevant comparator with similar objectives" is "implicit" in the language of ERISA's prudence provision, which refers to a "prudent person 'acting *in a like capacity* * * * in the conduct of an enterprise *of a like character* and *with like aims*.'" Pet. App. 12a. However, in the context of this case, the statutory reference to "an enterprise of a like character with like aims" is most naturally read as simply referring to the standards applied by professional asset managers with the expertise necessary to promote the standard retirement plan goals to "(1) to maximize retirement savings for participants while (2) avoiding excessive risk." *Dudenhoeffer*, 573 U.S. at 420. Thus, "[t]aken in context, § 1104(a)(1)(B)'s reference to 'an enterprise of a like character and with like aims' means an enterprise with * * * the 'exclusive purpose' to be pursued by all ERISA fiduciaries: 'providing benefits to participants and their beneficiaries' while 'defraying reasonable expenses of administering the plan.'" *Ibid.* (quoting 29 U.S.C. §§ 1104(a)(1)(A)(i), (ii)). Nothing about this provision requires a plaintiff alleging an imprudent investment decision to point to a comparator with the same risk profile, strategies, and aims, much less that they adopt such a comparator when the crux of the plaintiffs' case is that the investment strategy is flawed in its design.[2]

[2] Moreover, contrary to the Ninth Circuit's understanding, the Department of Labor regulations do not "provide that the duty of prudence is satisfied if the fiduciary has made a determination that a chosen investment "is reasonably designed, as part of the

Indeed, finding a relevant comparator for investments in alternative assets is often no easy task, both because there are no well-defined alternative indices, and because the underlying assets for the indices that do exist are not always readily available and so may not be easy to duplicate. *See Fiduciary Duties in Selecting Designated Investment Alternations*, 91 Fed. Reg. 16088, 16117 (proposed Mar. 31, 2026) (in regulatory impact analysis to recent proposal, the Department of Labor notes that "when using an alternative index, the underlying assets within the index are often not easily investable, meaning that an asset manager would not be able to easily invest in the same underlying assets and could not replicate the index"). "In addition, * * * private equity and hedge fund data is reported voluntarily to indices," resulting in "indices [that] are more likely to reflect better performers, who have an incentive to report." *Id.* at 11618 (also noting that "failed funds are removed from indices, creating an inherent survivorship bias that over-weights better performing funds"). For these reasons, and because "private market investments * * * do not have a market price," *ibid.*, assets of this type are considered hard to value. In

portfolio * * * , to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain * * * *compared to* the opportunity for gain * * * associated with *reasonably available alternatives with similar risks*." Pet. App. 12a-13a (quoting 29 C.F.R. § 2550.404a-1(b)(2)(i)) (emphasis added by Ninth Circuit). Rather, the regulations list this comparison as among the non-exclusive factors that must be given "appropriate consideration" by a fiduciary, who must then weigh that factor to "reflect a reasonable assessment of its impact on risk-return." *Id.* § 2550.404a-1(b)(4).

light of the complexities in benchmarking these kinds of assets, and the limitations in the available indices, the Ninth Circuit's resolution of these fact-dependent financial issues seems particularly inappropriate on the pleadings.

Second, the court effectively ignored the statute's express comparison between the actions of a prudent person familiar with such matters and the actions of the plan's fiduciaries. In this case, the plaintiffs expressly alleged that the actions taken by the plan fiduciaries were inconsistent with the plan's risk-mitigation goal and with the conduct of knowledgeable investment professionals responsible for the prudent management of other people's money. JA9-10, 183-84, 201-03, 206-09. Thus, the plaintiffs' allegations directly tracked the statutory standard.

In requiring a comparison to another investment with a similar risk-profile and aims, the court accepted the fiduciaries' assertion that its heavy investments in private equity and hedge funds were designed to "'provide greater downside protection in faltering markets,'" Pet. App. 13a, without any analysis into whether the plan's investments were at all likely to deliver on this. In fact, the complaint alleged that the investments were not well designed and did not in fact deliver such protection, JA92-93, 98-99, 176-77, 277-78, and that a prudent fiduciary would not have chosen or maintained these investments "at the proportions that the fiduciaries selected" given, among other things, the "contemporaneous reports of poor hedge-fund returns, the exorbitant expenses of hedge funds and private equity, and [their] well-recognized risks." Pet. App 16a (internal quotation marks omitted).

The court, however, rejected the plaintiffs' assertions as an impermissible *per se* challenge to private equity and hedge funds, while simultaneously accepting the fiduciaries' assertion that it intended these funds to mitigate risk. What the truth of the matter is—whether these funds were well-designed to mitigate risk in a downturn—cannot be determined without the development and weighing of evidence, likely including expert testimony of the type that the plaintiffs' previewed in their complaint. But assuming, as one must at the pleading stage, the plaintiffs' factual contention that the investments were not well designed to mitigate risk, and that a prudent fiduciary would not have undertaken or maintained these investments given all the marks against them, it is impossible to understand what is accomplished by requiring comparisons to investments pursuing similar strategies, as opposed to investments that would better serve the plan's risk-mitigation goals.

III. If Allowed to Stand, the Ninth Circuit's Rule Erects an Obstacle to the "Ready Access to the Federal Courts" That Congress Viewed as Essential to Protect Plan Participants From Fiduciary Breaches.

"Congress enacted ERISA to 'protect * * * the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (quoting 29 U.S.C. § 1001(b)). *See also Lexmark Int'l, Inc. v.*

Static Control Components, Inc., 572 U.S. 118, 131 (2014) ("Identifying the interests protected by" a statute "requires no guesswork" when there is a "detailed statement of the statute's purposes.").

"Broad enforcement provisions effectuate this policy." *Authier v. Ginsberg*, 757 F.2d 796, 801 (6th Cir. 1985). Among other forms of relief, ERISA Section 409(a) makes fiduciaries who breach any of their obligations under ERISA personally liable for plan losses, 29 U.S.C. § 1109(a). Section 502(a)(2), in turn, expressly allows plan participants and beneficiaries, as well as the Secretary of Labor and fiduciaries, to sue for "appropriate relief" under Section 409(a), *id.* § 1132(a)(2), whereas Section 502(a)(3) allows participants, beneficiaries and fiduciaries to sue for injunctive and "other appropriate equitable relief." *Id.* § 1132(a)(3). These provisions make clear that Congress viewed private litigation by plan participants and beneficiaries as an essential way to ensure that they can protect their rights under pension plans. *See*, *e.g.*, S. Rep. No. 93-127, at 35 (1973) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No 93-533, at 17 (1973) (describing House version in identical terms).

As the Department of Labor continues to recognize, there are significant challenges to finding appropriate comparators for private market investments of the type in which the challenged funds in this case were heavily invested. *See* 91 Fed. Reg. at 16117-18 (describing "*Challenges to Comparing Alternative Asset Performance*"). The Ninth Circuit,

nevertheless, was unmoved by the plaintiffs' argument that "that there are 'no meaningful comparators for the fiduciaries' decision' because [the fiduciaries'] approach 'was unusual, if not unparalleled.'" Pet. App. 15a. The court considered it sufficient that the fiduciaries invoked and disclosed a "risk-mitigation strategy" as the justification for including its bespoke investment funds in the plans, suggesting that, once invoked, such a strategy could not be challenged, even if the plaintiffs alleged that the defendants' investment strategy was inconsistent with its risk-mitigation goals. *Ibid*. (stating that "courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk") (citations omitted). Moreover, ignoring this Court's holding in *Hughes*, 595 U.S. at 742, that imprudent investment choices by fiduciaries are not insulated by the availability of other prudent options, the Ninth Circuit suggested that courts may not assess the prudence of individual investments. Pet. App. 16a (stating that "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole") (citation and internal quotation mark omitted). *See also id*. 17a (invoking "principles of modern portfolio theory").

In a different context, the Fourth Circuit correctly rejected a special prudence standard under which "ERISA's protections would be effectively unenforceable any time a fiduciary invokes the talisman of 'diversification,'" thus placing "numerous investment decisions beyond the reach of ERISA's fiduciary liability provision." *Tatum*, 761 F.3d at 370 (concluding that fiduciaries acted imprudently in too

quickly liquidating employer stock funds after a corporate merger and spin-off). Here, the Ninth Circuit found that it sufficed for the fiduciaries to assert, at the outset of a case, that they acted in pursuit of risk-mitigation, even though the plaintiffs alleged, based on expert opinions and other evidence, that the strategy that the fiduciaries adopted was, in fact, poorly designed to mitigate risk. Thus, under the Ninth Circuit's "meaningful benchmark" standard, so long as the plaintiffs cannot point to another investment fund with the same poorly designed strategy that did better, their complaint will be dismissed. As in *Tatum*, this is a result that "Congress certainly did not intend" as it will "neither deter a fiduciary's imprudent decision-making, nor provide a make-whole remedy for injured beneficiaries." *Ibid.*

Defendants attempt to justify the Ninth Circuit's standard by pointing to this Court's acknowledgement 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." Brief in Opposition, p. 5 (quoting *Hughes*, 595 U.S. at 177). But any suggestion that fiduciary discretion supports a loosening of the prudence standard or deferential review of such decisions by a court should be rejected.

Although discretion is normally a hallmark of fiduciary activity, this does not mean that a fiduciary exercising such discretion in choosing plan investments is entitled to deference when assessing the prudence of that fiduciary's actions. "Discretion is bounded by the prudent man standard," and thus

"does not mean * * * that the legal standard of prudence is without substantive content or that there are no principles by which the fiduciary's conduct may be guided and judged." *Sweda*, 923 F.3d at 333. "Rather a fiduciary's conduct at all times 'must be reasonably supported in concept and must be implemented with proper care, skill, and caution.'" *Ibid*. (quoting Restatement (Third) of Trusts § 90 (2007), cmt. f.). Thus, "[f]iduciary discretion must be exercised within the statutory parameters of prudence and loyalty," *Sweda*, 923 F.3d at 323, which "impose a fiduciary standard that is considered 'the highest known to the law.'" *Sweda*, 923 F.3d at 323 (citing DOL Advisory Op. 2006-08A, 2006 WL 2990326, at *3) (additional citations omitted).

It is certainly true that in many instances a fiduciary considering plan investments will have more than one prudent choice, just as the fiduciary is likely to have a number of bad ones. If the fiduciary makes a poor choice because of a failure of process, a failure of judgment, or both, Congress plainly intended that affected plan participants be able to recover losses or obtain other appropriate relief. The Ninth Circuit's rule erects a barrier to such suits, even if the investment is recklessly imprudent and causes large losses, so long as there is no sufficiently similar investment that the participants can point to that did better. This is inconsistent with ERISA's text and purposes and with ordinary pleading standards. This Court should therefore reject the Ninth Circuit's rule.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit and remand the case for further consideration.

Respectfully submitted,

Elizabeth Hopkins
Counsel of Record
HOPKINS ERISA LAW
12123 Laurel Terrace Drive
Studio City, CA 9104
301-938-7516
hopkinserisalaw@outlook.com

Counsel for Amici Curiae