

No. 25-498

IN THE

Supreme Court of the United States

WINSTON R. ANDERSON, CHRISTOPHER M. SULYMA,
on behalf of all those similarly situated,
Petitioners,

v.

INTEL CORPORATION INVESTMENT POLICY COMMIT-
TEE, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth
Circuit**

**BRIEF OF AMERICANS FOR FINANCIAL
REFORM AND CONSUMER FEDERATION OF
AMERICA AS AMICI CURIAE IN SUPPORT
OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amicus Curiae Americans for Financial Reform is a nonpartisan, nonprofit organization dedicated to creating a fairer and more sustainable financial system that contributes to shared prosperity for all families and communities.

Amicus Curiae Consumer Federation of America is an association of nonprofit organizations that advances consumers' interest through research, advocacy, and education.

Amici have long raised concerns about the risks of private financial markets that operate outside of many of the legal guardrails that protect investors in public stock exchanges, and about the erosion of critical protections for retirement savers under ERISA. *Amici* have a strong interest in preserving the ability of consumers, employees, and retirees to challenge unwise investments in private markets in order to safeguard their hard-earned benefits and, more generally, to avoid a future financial crisis.

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission.

SUMMARY OF ARGUMENT

For retirees, who collectively have more than \$10 trillion invested in pension funds, the stakes of this case are enormous. This case is about whether plaintiffs alleging a pension fund's underperformance under the Employee Retirement Income Security Act of 1974 (ERISA) must identify a "meaningful benchmark" to compare to the challenged investment in order to even have their case heard in court. But because of how investment opportunities have changed in recent decades, it may be impossible to find a "meaningful benchmark" with similar risks, objectives, and potential rewards, as the Ninth Circuit would require; or, if such a benchmark exists, it may be wholly misleading.

Institutional investors have increasingly invested employees' and retirees' benefits into so-called private funds, including private equity, venture capital, real estate, and hedge funds. These private funds have few of the investor protections that were created after the financial collapse of 1929. They are less transparent and less liquid than are investments in public stocks and bonds. Private equity investments in particular are also often poor tools to diversify investment portfolios, which was Respondents' stated reason for investing in private equity funds in this case, BIO 2, because such investments often rise and fall in tandem with public markets. Nonetheless, fund managers remain attracted to private markets in part because those markets' performance can be gamed to appear more profitable than they are.

Because of the secrecy around, complexities of valuation for, and variation of, private funds, it may be impossible for ERISA plan beneficiaries to identify a “meaningful benchmark” as the Ninth Circuit narrowly defines it, at the initial pleading stage. In fact, imposing such a requirement could encourage ERISA fiduciaries to seek out increasingly esoteric and inappropriate investments. Moreover, comparing only funds with similar “aims,” “risks,” and “potential rewards,” Pet. App. 14, could create the false impression that certain funds are doing well when in fact all similar funds are faring badly if the particular set of risks, aims, and potential rewards was a poor choice. The inverse may be true when funds are compared broadly to the range of investment options.

This Court has recognized that “[o]ne of Congress’ central purposes in enacting” ERISA “was to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated.” *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374 (1980) (internal quotation marks omitted). Adopting a rigid pleading requirement risks precisely such tragedies for consumers and retirees.

ARGUMENT

I. Private Funds Operate Without The Disclosure Requirements on Public Companies.

In 1929, prices on the New York Stock Exchange collapsed following a long period of speculation. Without meaningful federal oversight of these public markets, cartels of sophisticated investors conspired to artificially raise the price of stocks that they then sold;

companies hid crucial information about their own performance; and insiders regularly traded on information unknown to the public at large. These tactics created the market euphoria that in turn led to the market crash of 1929 and the Great Depression. Their revelation inspired the passage of our modern securities laws and the creation of the Securities and Exchange Commission. *See generally*, ANDREW ROSS SORKIN, 1929: INSIDE THE GREATEST CRASH IN WALL STREET HISTORY—AND HOW IT SHATTERED A NATION (2005); Tawfiq Abu-Raqabeh, *Securities & Exchange Commission: Past, Present, & Future*, 3 Int. J. of Bus. Rsch. and Mgmt. 1 (2025).

Because of these laws, public companies—those that solicit investments from the general public on exchanges like the New York Stock Exchange and the NASDAQ—must publish information about themselves on an ongoing basis. Securities Exchange Act of 1934 § 13(a), *codified at* 15 U.S.C. § 78m(a). They may not selectively disclose material information to favored investors. *Id.* at §10(b), *codified at* 15 U.S. Code § 78j. And company employees and directors may not buy or sell stocks based on secret, “inside” information. *Id.* The guiding principle of these reforms was disclosure: armed with full and fair information, legislators believed, investors would be able to make informed choices for themselves.

The reforms had an enormous impact. Equitable access to full and fair disclosures as well as audited financial statements provide investors with the ability to measure the risks and rewards of investment decisions on a comparable basis. The rules for America’s public companies and exchanges have yielded

the deepest, most liquid and most sought-after capital markets in the world because their disclosure and transparency rules encourage market discipline and efficient price discovery.

Despite these successes, in recent decades, the finance industry has increasingly moved away from public markets. *See Statement of Securities and Exchange Commissioner Allison Herren Lee, Sec. and Exch. Comm'n* (Oct. 12, 2021), <https://www.sec.gov/newsroom/speeches-statements/lee-sec-speaks-2021-10-12> (“Perhaps the single most significant development in securities markets in the new millennium has been the explosive growth of private markets.”); *U.S. Private Market Fund Managers See Huge Growth in Assets Under Management*, Ocorian (Nov. 12, 2025), <https://www.ocorian.com/knowledge-hub/insights/us-private-market-fund-managers-see-huge-growth-assets-under-management-says> (estimating that private market funds in the United States have over \$7 trillion in assets under management).

Companies increasingly raise money in private unregistered transactions, rather than through public offerings. Meanwhile, “private funds,” such as private equity and venture capital firms, increasingly invest in, or lend to, these private companies. By definition, participants in private markets are required to disclose far less to their investors than must companies raising capital in the public markets. Investors in private markets do not benefit from the free access to information and audited financials available in public markets that support apples to apples comparisons among available investment opportunities.

II. Private Funds Are Varied.

Private funds are diverse, but they engage in four major strategies to collectively invest trillions of dollars of private savings.

First, “private equity” firms typically use a small amount of their own money, some investor money, and a great deal of borrowed money to buy up existing companies. They then aim to make financial or operational changes to these companies with the goal of selling them a few years later. In these acquisitions—referred to as “leveraged buyouts”—it is the purchased company, rather than the private equity fund, that is responsible for paying back the money borrowed for the acquisition. This encourages high-risk investment strategies, as firms benefit when their investments succeed, but lose comparatively little if they fail. EILEEN APPELBAUM AND ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 41-91 (2014). An estimated \$3 trillion is currently invested in private equity funds in the United States. Joyce Guevarra & Neel Hiteshbhai Bharucha, *US private equity AUM hits \$3.128 trillion in 2024*, S&P Global (Apr. 2, 2025), <https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/4/us-private-equity-aum-hits-3128-trillion-in-2024-88099590>.

Second, “venture capital” firms usually buy minority stakes in several startup companies, most commonly technology companies, with the hope that some of their investments will grow dramatically. See Bob Zider, *How Venture Capital Works*, Harv. Bus. Rev.

(Nov. 1998), <https://hbr.org/1998/11/how-venture-capital-works>. An estimated \$1.25 trillion is currently invested in venture capital funds in the United States. *NVCA Releases 2025 Yearbook*, National Venture Capital Associations (Mar. 27, 2025), https://nvca.org/press_releases/nvca-releases-2025-yearbook-showcasing-2024-vc-trends/.

Third, “private credit” firms are nonbank entities that extend loans to small and medium sized businesses. Jose Berrospide, *et al.*, *Bank Lending to Private Credit: Size, Characteristics, and Financial Stability Implications*, Bd. Of Governors of Fed. Rsrv. Sys. (May 23, 2025), <https://www.federalreserve.gov/econres/notes/feds-notes/bank-lending-to-private-credit-size-characteristics-and-financial-stability-implications-20250523.html>. These funds demand higher interest rates from their borrowers than those offered by banks, with fewer disclosures and often less rigorous due diligence. An estimated \$1.34 trillion is currently invested in private credit funds in the United States. *Id.*

Fourth, private funds invest in infrastructure and real estate, by buying existing assets or financing the construction of new ones. About \$1.4 trillion is currently invested in infrastructure and real estate funds in the United States. *U.S. Private Market Fund Managers See Huge Growth in Assets Under Management*, Ocorian (Nov. 12, 2025), <https://www.ocoorian.com/knowledge-hub/insights/us-private-market-fund-managers-see-huge-growth-assets-under-management-says>.

Other entities, like “hedge funds” and “family offices” use a variety of strategies, including investing in both public and private markets.

III. Weaker Standards for Private Funds Present Inherent Risks for People Saving for Retirement.

For participants in ERISA-covered plans, private funds may be poor fits for reducing risks or maximizing returns.

Diversification. Private markets are not necessarily effective tools to diversify a portfolio invested primarily in the stock market. This was Respondents’ purported reason for investing heavily in the private markets. BIO 2. But private equity and venture capital are ultimately investments in the equity of companies, just like equity investments in the public markets. Unsurprisingly therefore, investments in private equity tend to rise or fall alongside the stock market, precisely the outcome one would seek to avoid when trying to diversify one’s portfolio. *See* Nicolas Rabener, *Private Equity: Fooling Some of the People All of the Time?*, CFA Institute Research & Policy Center (Jan. 20, 2020), <https://rpc.cfainstitute.org/blogs/enterprising-investor/2020/private-equity-fooling-some-of-the-people-all-of-the-time> (demonstrating that private equity returns correlate with public market returns).

Transparency. Private funds are opaque by design. As noted above, private companies and funds are in many ways exempt from the post-1929 crash reforms of the public markets that have ensured that the public has access to material information.

Unsurprisingly, this sort of secrecy can lead to problems for both small and large investors. Absent important disclosures, investors have frequently been duped by criminals in the private markets. *See, e.g.*, Indictment, *United States v. Pennetta*, No. 25-cr-577 (S.D.N.Y. 2025) (alleging private equity fund manager induced investors to his fund with promises of access to private markets then spent their money on personal expenses); Indictment, *United States v. Lucas*, No. 25-cr-81 (S.D.N.Y. 2025) (alleging private equity fund manager deceived investors to divert investments for personal expenses).

Even short of criminal fraud, the private equity industry’s preferred metric for measuring performance—“internal rate of return”—is notoriously gameable, potentially misleading investors. “[A]n emerging body of academic research” has found that internal rates of return are “artificially inflated” because accounting loopholes allow private equity funds to manipulate their internal rate of return “without increasing the actual amount of money that investors take home.” Amy Whyte, *The Faulty Metric at the Center of Private Equity’s Value Proposition*, Institutional Investor (Sept. 11, 2019), <https://www.institutionalinvestor.com/article/2bswknnt9xjdx29r7k00/portfolio/the-faulty-metric-at-the-center-of-private-equitys-value-proposition>; *see also* Jonathan Weil, *How One Big Private-Equity Fund Makes Its Numbers Incomprehensible*, Wall St. J. (Aug. 13, 2025), <https://www.wsj.com/finance/investing/how-one-big-private-equity-fund-makes-its-numbers-incomprehensible-5268657e> (describing another accounting trick where funds buy “stakes in other private-equity funds at big discounts on the secondary market and

then mark[] them up immediately to their official net asset values,” resulting “in gains of 1,000% or more in a single day”). Absent more robust disclosure requirements, it is hard to know how well private equity funds—which make up the largest part of the private funds industry—are actually doing.

Liquidity. In public markets, stocks and bonds can be sold freely and readily by investors at publicly reported prices. This is particularly valuable for funds covered by ERISA, where retirees must often make regular withdrawals by selling their securities into the market. By contrast, private markets are highly illiquid. Most private equity funds, for instance, require investors to invest for a decade before they can withdraw their money. Moreover, almost all private equity funds fail to return their money to investors within even this ten-year timeframe. Sebastien Canderle, *Private Markets: Why Retail Investors Should Stay Away*, CFA Institute Research & Policy Center (Nov. 13, 2025), <https://rpc.cfainstitute.org/blogs/enterprising-investor/2025/private-markets-why-retail-investors-should-stay-away>. In venture capital, the restrictions on exiting an investment are even longer: one study found that just seven percent of funds liquidate within a decade, and that the median fund takes over 14 years to do so. Diane Mulcahy, *The New Reality of the 14-Year Venture Capital Fund*, Institutional Investor (Feb. 19, 2015), <https://www.institutionalinvestor.com/article/2bsv31916hb46dpp501ds/portfolio/the-new-reality-of-the-14-year-venture-capital-fund>.

Funds advertise themselves as allowing investors to easily redeem their investment. But in fact, they

frequently prohibit withdrawals when markets are stressed. For instance, recently in the private credit markets, several large funds—Ares, Apollo, and BlackRock—temporarily refused to allow investors to withdraw their own money. Arasu Kannagi Basil & Isla Binnie, *Ares Caps Withdrawals At Private Credit Fund After Redemption Requests Surge*, Reuters (Mar. 24, 2026), <https://www.reuters.com/business/ares-private-credit-fund-limits-investor-withdrawals-after-requests-surge-2026-03-24/>; Hugh Son, *Apollo Gives Investors Only 45% Of Requested Withdrawals From \$15 Billion Private Credit Fund*, CNBC (Mar. 23, 2026), <https://www.cnbc.com/2026/03/23/apollo-private-credit-fund-gives-investors-only-45percent-of-requested-withdrawals.html>; Silla Brush & Brian Chappatta, *BlackRock \$26 Billion Private Credit Fund Limits Withdrawals*, Bloomberg (Mar. 6, 2026), <https://www.bloomberg.com/news/articles/2026-03-06/blackrock-s-26-billion-private-credit-fund-limits-withdrawals>. As Harvard Law Professor Jared Ellias put it, “The great fear is that private credit is going to turn out to have financed a lot of the losers, and then those private credit funds are going to be left with huge losses.” Maria Aspan, *It’s Called ‘Private Credit’ — And It Could Lead To Big Trouble On Wall Street*, NPR (Mar. 19, 2026), <https://www.npr.org/2026/03/19/nx-s1-5747128/private-credit-equity-jamie-dimon-wall-street>. That appears to be what is happening, and firms are now limiting withdrawals to prevent their own collapse.

Performance. The typical promise of private funds is that they compensate for the increased risk of their opacity and illiquidity by delivering higher returns

than would potential investments in the public markets. But this is often not the case. Between 2009 and 2019, investors in the S&P 500 made, on average, 15.5 percent per year; investors in private equity made, on average, 15.3 percent per year (this seemingly small difference on a \$1 million investment would cost an investor over \$72,000). Sebastien Canderle, *Myths of Private Equity Performance*, CFA Institute Research & Policy Center (Jan. 13, 2021), <https://rpc.cfainstitute.org/blogs/enterprising-investor/2021/myths-of-private-equity-performance-part-iv>. Between 2022 and September 30, 2025, investors in the S&P 500 made 11.6 percent per year, while investors in private equity firms earned just 5.8 percent after fees. Maureen Farrell, *Once Wall Street's High Flyer, Private Equity Loses Its Luster*, N.Y. Times (Dec. 23, 2025), <https://www.nytimes.com/2025/12/23/business/private-equity-stock-market.html>.

Other parts of the private markets are struggling too. Venture capital, typically focused on the technology industry, underperformed the NASDAQ 100 and S&P 500 InfoTech Index over a ten-year period. *Alternative Investments Reality Check*, Atlas Capital Advisors, <https://atlasca.com/alternative-investments-reality-check-part-2-venture-capital-investing-good-ideas-disappointing-returns/> (last visited Mar. 31, 2026). An index of real estate investment funds earned just a 1.62 percent annualized return over ten years, while the S&P 500 delivered an 11.88 percent annualized return. *S&P U.S. Equity All REIT Index*, S&P Global, <https://www.spglobal.com/spdji/en/indices/equity/sp-us-equity-all-reit-index/> (last visited Mar. 31, 2026); *S&P 500*, S&P Global, <https://www.spglobal.com/spdji/en/indices/equity/sp>

500/ (last visited Mar. 31, 2026). An index of private credit funds fell 6.6 percent in 2025, while the S&P 500 rose 18.1 percent. Olivia Fishlow, *Publicly Traded Private-Credit Funds Set for Worst Year Since 2020*, Bloomberg (Dec. 29, 2025), <https://www.bloomberg.com/news/articles/2025-12-29/publicly-traded-private-credit-funds-set-for-worst-year-since-2020>.

As a result of their performance problems, increasing numbers of large institutional investors are looking to reduce exposures to the private funds market, and private funds are pushing for increased access to the savings of individual retirees in 401Ks as sources of capital. Antoine Gara & Alexandra Heal, *Big Investors Look to Sell Out of Private Equity After Market Rout*, Fin. Times (Apr. 6, 2025), <https://www.ft.com/content/b7c5aea6-c429-4917-bf35-a4f1b3159f85?syn-25a6b1a6=1> (describing large investor flight from the private equity industry); Maureen Farrell & Lauren Hirsch, *Yale Is Rushing to Sell Billions in Private Equity Investments*, N.Y. Times (June 10, 2025), <https://www.nytimes.com/2025/06/10/business/yale-endowment-private-equity-trump.html> (same). As one former private equity executive observed, “I would joke with friends that when I see them going after 401(k)s, we’ll know it’s over. . . . And they’re going after 401(k)s.” Bethany McLean, *Why Private Equity Needs You More Than You Need Them*, Wash. Post (Sept. 18, 2025), <https://www.washingtonpost.com/business/2025/09/18/why-private-equity-needs-you-more-than-you-need-them/>.

IV. Private ERISA Actions Are Necessary to Ensure That Plan Fiduciaries Meet Their Duty of Prudence.

As private funds often pose the serious problems described above, managers of pension funds should themselves exercise extra caution in investing in them. However, at least in the short term, fund managers can themselves benefit from the opacity that makes private markets risky, making ERISA suits by plan participants a critical check on poor investment decisions.

Pension fund managers are sometimes paid in part based on the performance of their investments. *See* Girard Miller, *Where Pension Incentive Pay Makes Sense — and Doesn't*, *Governing* Jan. 30, 2024), <https://www.governing.com/finance/where-pension-incentive-pay-makes-sense-and-doesnt>. The price of a public investment is always known, so a fund manager can always be judged in real time about the wisdom of their investment in the public market. This is not the case with private markets. Because investments in the private market are not publicly traded, their value is never certain until the assets are finally sold.

This means that for the entire lifespan of a private fund—which, as described above, is often a decade or longer—private fund managers can, in part, estimate their own performance and potentially be compensated accordingly. Often they do so by referencing the performance of comparable publicly traded assets, choosing those that create a favorable comparison. *See* Christopher Carrano, *The Alternative Truth of*

Private Equity and What That Means for Asset Allocation, Institutional Investor (Apr. 3, 2024).

Private funds do in fact appear to play with their own reported returns. Research shows that private equity firms mark up their own funds' performance relative to comparable publicly traded companies. *See, e.g.*, Tim Jenkinson *et al.*, *How Fair are the Valuations of Private Equity Funds?*, Working Paper (Mar. 7, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229547 (finding that private equity firms inflate their self-reported performance when raising money for future funds, and that such reported performance has little correlation to ultimate returns); Matthew C. Klein, *Private Equity's Mark-To-Make-Believe Problem*, *Fin. Times* (Apr. 6, 2016) <https://www.ft.com/content/8ea234df-460c-343a-a8cd-a097465ad9e7> (noting that while public energy companies were harmed by rising oil prices, private equity investments in the industry suspiciously were not). Private funds' evaluations of their own performance are thus not necessarily reliable, and pension fund managers, when compensated on performance, have reasons to invest in them, regardless of how well they ultimately do.

V. An Atextual, Rigid Pleading Requirement Makes Private Actions Under ERISA Harder, Particularly Actions Concerning Private Funds.

Because pension fund managers have an incentive, whether wise or not, to continue to invest in private funds, pension plan participants themselves must police whether the fiduciaries charged with

managing their investments are, in fact, acting in their best interests. Providing mechanisms to safeguard employee benefit plans is, ultimately, the purpose of the ERISA statute. Pub. L. No. 93-406, 88 Stat. 832, *as amended and codified at* 29 U.S.C. § 1001 (establishing “standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and . . . providing for appropriate remedies, sanctions, and ready access to the Federal courts.”).

Benchmarks may ultimately be relevant to evaluating the strength of investment decisions, but requiring such benchmarks as the Ninth Circuit narrowly defines them before discovery begins may make such lawsuits functionally impossible, especially where, as in this case, fund managers make novel and risky investment choices. Private funds do not disclose their investment strategies to the public. As such, it may be particularly difficult for pensioners to identify comparable funds with similar “aims,” “risks,” and “potential rewards,” as the Ninth Circuit demanded. Pet. App. 14. And given the diversity of private funds—some of which may use debt, short-selling, derivatives, or other complicated strategies—no meaningful benchmark may even exist. Incentivizing plan fiduciaries to assemble risky, untested portfolios would be antithetical to the goals of the ERISA system.

Efforts to solve the challenge of benchmarking private funds fall short. Some companies offer “indices” meant to estimate private funds’ performance. But those indices are not benchmarks in any meaningful sense because they are based on private funds’ self-reported, unaudited performance data, which may be unreliable for all the reasons discussed above.

Moreover, even when plan beneficiaries can identify “comparable” funds with similar “aims,” “risks,” and “potential rewards,” Pet. App. 14, a comparison between them may be inapt. Two ERISA-covered pension funds may share the same aims, risks, and rewards by investing heavily in private funds. But given the structural risks described above, the initial decision to invest in private funds to such an extent may itself be a mistake. By defining a “meaningful benchmark” so narrowly, the Ninth Circuit’s standard can create a false impression that certain investment strategies are appropriate when they are not.

CONCLUSION

ERISA’s fiduciary standard is a powerful protection for retirement savers. Pensioners must be able to police fund managers’ unwise investments, especially in opaque and illiquid private funds, in order to meet the goals of ERISA and safeguard working Americans’ financial security. Imposing a rigid and atextual “meaningful benchmark” requirement would significantly undermine those objectives precisely when flexibility is most important. *Amici* therefore respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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