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 *AMICUS CURIAE* THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF RESPONDENTS

KENT A. MASON
Counsel of Record
ADAM R. MCMAHON
ADDISON C. SPENCER
GRACE F. SULLIVAN
DAVIS & HARMAN LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230
kamason@davis-harman.com

Counsel for Amicus Curiae

July 9, 2026

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. An Overreliance on Past Performance Would Be Inconsistent with Basic ERISA Principles	5
II. Sole Reliance on Past Performance By a Fiduciary Would Harm Participants	5
III. An Overreliance on Past Performance Would Exacerbate the Harmful Impacts of the Litigation Crisis Facing the Private Retirement System	10
IV. Case Law Widely Supports the Conclusion That Past Underperformance Alone Cannot Support a Fiduciary Claim	14
A. Circuit Court Case Law	15
B. District Court Case Law	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page(s)

Beldock v. Microsoft Corp.,
No. C22-1062, 2023 WL 3058016
(W.D. Wash. Apr. 24, 2023) 19

Bracalente v. Cisco Systems, Inc.,
No. 5:22-cv-04417-EJD, 2023 WL
5184138 (N.D. Cal. Aug. 11, 2023) 18-19

Collins v. Northeast Grocery, Inc.,
No. 24-2339-cv, 2025 WL 2383710
(2d. Cir. Aug. 18, 2026) 16

Cunningham v. Cornell Univ.,
604 U.S. 693 (2025) 11-12

England v. DENSO Int'l Am., Inc.,
No. 22-11129, 2023 WL 4851878
(E.D. Mich. July 28, 2023) 17

Fumich v. Novo Nordisk Inc.,
No. 24-9158 (ZNQ) (JBD), 2025
WL 2399134 (D.N.J. Aug. 19, 2025) 18

In Re: Quest Diagnostics ERISA Litigation,
No. 24-2866, 2026 WL 1783204
(3d Cir. June 22, 2026) 16

Jenkins v. Yager,
444 F.3d 916 (7th Cir. 2006) 17

Jones v. Dish Network Corp.,
No. 22-cv-00167-CMA-STV, 2023 WL
2796943 (D. Colo. Jan. 31, 2023) 17

Lard v. Marmon Holdings, Inc.,
No. 22 cv 04332, 2025 WL 1383269
(N.D. Ill. May 13, 2025) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Patterson v. Morgan Stanley,
No. 16 Civ. 6568 (RJS), 2019 WL 4934834 (S.D.N.Y. Oct. 7, 2019) 19

Pizarro v. Home Depot, Inc.,
111 F.4th 1165 (11th Cir. 2024) 17

Smith v. CommonSpirit Health,
37 F.4th 1160 (6th Cir. 2022) 4, 15-17

Tullgren v. Hamilton,
No: 1:22-cv-00856-MSN-IDD, 2023 WL 2307615 (E.D. Va. Mar. 1, 2023) 17

White v. Chevron Corp.,
No. 16-cv-0793-PJH, 2016 WL 4502808 (N.D. Cal. Aug. 29, 2016) 18

White v. Chevron Corp.,
No. 16-cv-0793-PJH, 2017 WL 2352137 (N.D. Cal. May 31, 2017), *aff'd*, 752 Fed.Appx. 453 (9th Cir. 2018) 18

OTHER AUTHORITIES

2025 Underperformance & Excessive Fee Settlements: Participant Median Recovery of $68, Plaintiffs' Lawyers Average Fees of $1.59 Million, Davis & Harman LLP (Jan. 14, 2026), https://www.davis-harman.com/wp-content/uploads/2026/01/DH-Settlement-Survey-2025.pdf 13-14

Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 Ga. L. Rev. 289 (2012) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Berlinda Liu & Phillip Brzenk, S&P Dow Jones Indices, *Does Past Performance Matter?, The Persistence Scorecard* (Dec. 2019), https://www.spglobal.com/spdji/en/documents/spiva/persistence-scorecard-december-2019.pdf 7

Brian R. Wimmer et al., Vanguard, *Quantifying the impact of chasing fund performance* (Aug. 13, 2014), https://ritholtz.com/2014/08/vanguard-quantifying-the-impact-of-chasing-fund-performance/.. 6

Chasing performance is a dead end, BMO Ret. Servs. (2012), https://www.bmo.com/mybmoretirement/pdf/resource-library/09-325-023_BHBMI431_Chasing_performance_7-11.pdf 6

6 Contrarian Investment Ideas, Morningstar (Feb. 13, 2024), https://www.morningstar.com/business/insights/blog/contrarian-investment-ideas#buying-the-unloved-strategy 8-9

Courtney Zinter, *The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants*, Am. Benefits Council (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358........ 11

TABLE OF AUTHORITIES—Continued

Page(s)

ERISA Fiduciary Litigation in 2025: Plaintiff Law Firms Continue the Frenetic Pace, With Broader Allegations Against Both Retirement Plans and Health Plans, Encore Fiduciary (Feb. 9, 2026), https://encorefiduciary.com/erisa-fiduciary-litigation-in-2025-plaintiff-law-firms-continuefrenetic-pace/.......... 11, 12, 13-14

Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 Yale L.J. 1476 (2015) . 6

Jyoti Madhusoodanan, *Does A Mutual Fund's Past Performance Predict Its Future?*, Yale Insights (July 7, 2020), https://insights.som.yale.edu/insights/does-mutual-fund-s-past-performance-predict-its-future 8

Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2017-02-08/chasing-performance-is-a-quick-way-to-disaster 6

Ninth Circuit Affirms Win for Alternative Asset Strategy in the Intel Case*, but Broad Challenges Remain*, Encore Fiduciary (Aug. 11, 2025), https://encorefiduciary.com/ninth-circuit-affirms-win-for-alternative-asset-strategy-in-the-intel-case/ 6

TABLE OF AUTHORITIES—Continued

Page(s)

Robb Arnott et al., *The Folly of Hiring Winners and Firing Losers*, Rsch. Affiliates (Sept. 2017), https://www.cannonfinancial.com/uploads/main/The_Folly_of_Hiring_Winners_and_Firing_Losers 1725.pdf 3-4, 7

Ronald T. Wilcox, *Bargain Hunting or Star Gazing? Investors' Preferences for Stock Mutual Funds*, 76 J. Bus. Univ. Chic. 645 (2003) 8

Thomas R. Kmak, *Protect Yourself at All Times – Emphasize Quality, Service and Value Before Fees*, Nat'l Inst. of Pension Adm'rs (April 11, 2016), https://www.nipa.org/blogpost/982039/244084/Protect-Yourself-at-All-Times--Emphasize-Quality-Service-and-Value-Before-Fees 13

Tony Thorn, *Contrarian Fund Picks for 2024*, Morningstar (Dec. 28, 2023), https://www.morningstar.com/funds/contrarian-picks-2024 9

INTEREST OF THE *AMICUS CURIAE*[1]

The American Benefits Council (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Collectively, the Council's more than 400 members either directly sponsor or provide services to retirement plans and health and welfare plans covering virtually all Americans who participate in employer-sponsored programs. The Council frequently participates as *amicus curiae* in cases, such as the case before this Court, that have the potential for far-reaching effects on employee benefit plan design or administration. The Council has a strong interest in this case because its members are often targeted as defendants in ERISA class actions. Moreover, the Council is particularly concerned about the wave of lawsuits involving claims predicated on fund underperformance.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is: "Whether, for claims predicated on fund underperformance, pleading that an ERISA fiduciary failed to use the requisite 'care, skill, prudence, or diligence' under the circumstances and thus breached ERISA's duty of prudence when investing plan assets requires alleging a 'meaningful benchmark.'" The Council strongly supports the position of Respondents that any such

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

claim must include a comparison to a meaningful benchmark.

Assuming that a fiduciary claim predicated on past underperformance should ever be allowed to advance, it would appear beyond question that past performance must be evaluated in the context of other funds with similar aims, risks, and rewards. In the absence of *any* benchmark, it is meaningless to say that a fund "underperformed." Such an allegation necessarily begs the question of underperformed relative to *what*? Unless plaintiffs can identify a *meaningful* benchmark with similar aims, risks, and rewards, reviewing courts cannot reasonably infer anything about the performance of the challenged fund, much less the prudence of a fiduciary's selection process. This is because any comparisons between a challenged fund and a benchmark with different aims, risks, and rewards would necessarily be attributable to the differences in the different strategies and not the prudence of the underlying selection. But we defer to the parties for an in-depth discussion of those core issues.

In our role as *amicus curiae*, the Council would like to highlight a point that is directly related to that narrow question presented to the Court. ***For the reasons discussed below, we strongly urge the Court to attribute very little weight, if any, to a fund's past performance in evaluating whether a fiduciary acted prudently in selecting the fund.*** Even if a plaintiff alleges that a chosen investment underperformed a "meaningful benchmark," that underperformance alone cannot, by itself, support an inference of a fiduciary breach. The Council believes this directly-related issue is even more important than the meaningful benchmark issue, and could be addressed by the Court's decision in this case.

In other words, if a plaintiff wants to make a claim based on past performance, it should go without saying that there must be a comparison to a meaningful benchmark. But the most critical issue in all "underperformance" cases is the following: very little weight should be given to past performance. Otherwise, ERISA plan participants will suffer greatly by a legal regime that: (1) effectively forces fiduciaries to buy the "hot" funds, thus buying high and selling low, which is imprudent and a violation of their fiduciary duties, and (2) leads to baseless lawsuits challenging all investment funds not in the top 50% (or just not in the top 10% or 1%), thus exacerbating a litigation crisis threatening the private retirement plan system.

The Council's views are supported by extensive data and financial literature regarding how past performance has virtually no probative value regarding future performance, and can even in some cases foreshadow the opposite result in the future due to market overreactions one way or the other. For example, a 2017 study of 3,331 mutual funds from 1990 to 2016 found that past performance can steer investors in exactly the wrong direction:

> Institutional investors often sell funds (or fire managers) once they have underperformed the market over the last two to three years, typically replacing them with funds or managers that recently outperformed. This seemingly sensible strategy, intended to identify skilled managers, is often bad for future returns. . . ***[T]he newly expensive holdings typically set the stage for poor future performance***. . . . Underperforming strategies are often newly cheap and might

> well be better candidates for new assets, not for termination. . . . [For example,] ***the usual practice of firing recent losers and hiring recent winners achieves the exact opposite of what is intended.***

Robb Arnott et al., *The Folly of Hiring Winners and Firing Losers*, Rsch. Affiliates (Sept. 2017), https://www.cannonfinancial.com/uploads/main/The_Folly_of_Hiring_Winners_and_Firing_Losers1725.pdf (emphasis added).

In addition, extensive case law clarifies that mere underperformance is insufficient as a basis for even surviving a motion to dismiss. As powerfully explained by one circuit court:

> Merely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty. Precipitously selling a well-constructed portfolio in response to disappointing short-term losses, as it happens, is one of the surest ways to frustrate the long-term growth of a retirement plan. . . . Any other rule would mean that every actively managed fund with below-average results over the most recent five-year period would create a plausible ERISA violation.

Smith v. CommonSpirit Health, 37 F.4th 1160, 1166 (6th Cir. 2022).

In the Council's view, plaintiffs need to be required to allege facts that show a fiduciary failure, not simply that a fund was not in the top 50% or 10% or 1% of all

similar funds for some past period, which means virtually nothing.

ARGUMENT

I. An Overreliance on Past Performance Would Be Inconsistent with Basic ERISA Principles.

ERISA's duty of prudence is a test of process, not results. So, in strictly applying the law, plaintiffs should not be able to advance a prudence claim unless they can identify a specific flaw, or evidence allowing a court to plausibly infer a flaw in a fiduciary's investment selection process. In evaluating this test of process, past performance comparisons alone should not permit courts to infer a breach.

That is, if a fund's underperformance is inappropriately regarded as circumstantial evidence of a fiduciary breach, plan fiduciaries will be exposed to lawsuits challenging the selection or retention of any fund that that was not in the top 50% (or just not in the top 10% or 1%), regardless of the prudence of such investment. In effect, this would improperly transform ERISA's process-based duty of prudence into a judicially created rule compelling ERISA fiduciaries to buy high and sell low, and thereby hurt the participants that ERISA was meant to protect.

II. Sole Reliance on Past Performance By a Fiduciary Would Harm Participants.

A ruling from this Court that authorizes reviewing courts to infer a fiduciary breach based solely on past underperformance, or otherwise places undue weight on past performance, would distort fiduciary decisions by strongly incentivizing fiduciaries to focus exclusively on past performance. As noted, that would

mean systematically buying high and selling low, which would harm participants.[2]

Past performance is an unreliable predictor of future results, and, by itself, past performance has very little probative value in distinguishing prudent decisions from imprudent decisions. There is hard data and extensive financial literature supporting this position. For example, a 2017 study of 3,331 mutual funds from 1990 to 2016 found that past performance can steer

---

[2] *See Ninth Circuit Affirms Win for Alternative Asset Strategy in the Intel* Case*, but Broad Challenges Remain*, Encore Fiduciary (Aug. 11, 2025), https://encorefiduciary.com/ninth-circuit-affirms-win-for-alternative-asset-strategy-in-the-intel-case/ (noting that ERISA plans "buying high and selling low . . . is a formula for failure"); *Chasing performance is a dead end*, BMO Ret. Servs. (2012), https://www.bmo.com/mybmoretirement/pdf/resource-library/09-325-023_BHBMI431_Chasing_performance_7-11.pdf (noting that "performance chasing – choosing investments based only on their recent results . . . [and] buy[ing] when prices are near their peak and sell[ing] when they are at or near the bottom" is "directly contrary to a basic principle of successful investing: buy low and sell high"); Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 Yale L.J. 1476, 1518 (2015) ("Extensive research has shown that return-chasing behavior in mutual fund investing [in the context of 401(k) plan menus] is unlikely to be a successful investment strategy."); Brian R. Wimmer et al., Vanguard, *Quantifying the impact of chasing fund performance* 2 (Aug. 13, 2014), https://ritholtz.com/2014/08/vanguard-quantifying-the-impact-of-chasing-fund-performance/ (considering a decade of financial data and finding that a "buy-and-hold [investment strategy] was superior to a performance-chasing strategy across the board"); Kate Stalter, *Chasing Performance Is a Quick Way to Disaster*, U.S. News (Feb. 8, 2017), https://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/articles/2017-02-08/chasing-performance-is-a-quick-way-to-disaster ("[J]umping into investments that recently posted strong gains [] is generally doomed to some kind of failure.").

investors in exactly the wrong direction by leading them to buy high and sell low:

> Institutional investors often sell funds (or fire managers) once they have underperformed the market over the last two to three years, typically replacing them with funds or managers that recently outperformed. This seemingly sensible strategy, intended to identify skilled managers, is often bad for future returns. . . ***[T]he newly expensive holdings typically set the stage for poor future performance***. . . . Underperforming strategies are often newly cheap and might well be better candidates for new assets, not for termination. . . . [For example,] ***the usual practice of firing recent losers and hiring recent winners achieves the exact opposite of what is intended.***

Robb Arnott et al., *The Folly of Hiring Winners and Firing Losers* (Sept. 2017) (emphasis added).

Similarly, a study by S&P Dow Jones Indices presents powerful data on this issue. *See* Berlinda Liu & Phillip Brzenk, S&P Dow Jones Indices, *Does Past Performance Matter?, The Persistence Scorecard* (Dec. 2019), https://www.spglobal.com/spdji/en/documents/spiva/persistence-scorecard-december-2019.pdf. The study reviewed the performance of funds over two non-overlapping five-year periods. Overall, among all domestic funds, only 32% of the top quartile funds for the first five-year period remained there in the second five-year period, while 20% moved to the bottom quartile and 8% merged or liquidated.

That past performance is an unreliable predictor of future results is also well-supported by widely

accepted investment theory and literature. In 2020, for example, a finance professor at Yale School of Management conducted a study that concluded that from 1994 to 2018, "a fund's performance [wa]s completely unpredictive of its returns in the future." Jyoti Madhusoodanan, *Does A Mutual Fund's Past Performance Predict Its Future?*, Yale Insights (July 7, 2020), https://insights.som.yale.edu/insights/does-mutual-fund-s-past-performance-predict-its-future. As another example, in 2012, two professors from The Wake Forest University School of Law published an article stating that a "fund's past performance might be the most important factor to investors choosing among equity mutual funds. Fund investors chase high past returns. Yet studies of actively managed equity funds have found little evidence that strong past returns predict strong future returns." Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 Ga. L. Rev. 289 (2012). And as yet another example, a 2003 article published by a University of Virginia professor and former Securities & Exchange Commission Economist in the *Journal of Business* stated that, "within the finance literature there is weak and controversial evidence that past performance has much, if any, predictive ability for future returns." Ronald T. Wilcox, *Bargain Hunting or Star Gazing? Investors' Preferences for Stock Mutual Funds*, 76 J. Bus. Univ. Chic. 645 (2003).

Further evidence of the unreliability of past performance is the contrarian theory of investing – *i.e.*, buying what is currently out of favor.[3] Many market

[3] "Contrarian investing is the practice of buying assets that are out of favor with the expectation that they will rebound. Investors tend to buy what's done well recently and sell what

experts may use an investment strategy based on investments that have recently performed poorly. When implementing this strategy, recent under-performance is exactly why a fund may be selected through a prudent process – it may be undervalued due to market overreaction. Morningstar published a striking study showing that over a 30-year period from 1994 to 2023, funds with the most outflows (depressing prices) significantly outperformed funds with the most inflows (increasing prices) and the Global Large-Stock Blend Average.[4] And it wasn't close: the annual returns over the period were 10.96%, 5.57%, and 7.44%, respectively. *See* Tony Thorn, *Contrarian Fund Picks for 2024*, Morningstar (Dec. 28, 2023), https://www.morningstar.com/funds/contrarian-picks-2024.

There is not a simple formula that a plan fiduciary should use to select or monitor plan investment options. On the contrary, plan fiduciaries should be able to review, in a non-formulaic manner, a fund's

---

hasn't. This behavioral bias can cause a feedback loop. Strong inflows drive up stock prices, attracting more return-chasing investors and bidding up prices further. Contrarian investing bucks market trends in the hope of holding the right investments when market sentiment shifts. The approach may work if other investors overreact to past performance or if riskier assets are priced to compensate investors. Note that contrarian investing can be risky." *6 Contrarian Investment Ideas*, Morningstar (Feb. 13, 2024), https://www.morningstar.com/business/insights/blog/contrarian-investment-ideas#buying-the-unloved-strategy.

[4] "For 30 years, Morningstar's Buy the Unloved report has put contrarian investing ideas to the test. The initial approach recommended investing equal amounts in the three equity categories with the most outflows from the previous calendar year, holding them for three years, and then repeating the process. In recent years, the analyst team revised their strategy to include more investment categories." *Id.*

objectives and strategy and how they fit with the plan's objectives, strategy, and time horizon, without being compelled to chase hot funds in a manner that adversely affects participants.

III. An Overreliance on Past Performance Would Exacerbate the Harmful Impacts of the Litigation Crisis Facing the Private Retirement System.

A ruling from this Court that authorizes reviewing courts to infer a fiduciary breach based solely on past underperformance, or otherwise places undue weight on past performance, would create a new tidal wave of cases and thus exacerbate the harmful impacts that the ongoing litigation crisis is having on the private retirement system. This would happen by making virtually all plans vulnerable to litigation because almost every plan will at some point have funds not in the top 50% or top 10% or top 1%, unless they constantly chase the hot funds, which would be harmful to participants.

For those employers who voluntarily choose to offer a plan to their employees, the litigation crisis is deterring improvements that would otherwise benefit their workers saving for retirement. ***Because fiduciaries are being forced to make decisions based on defense against litigation, it is the participants who suffer the consequences through less assistance and fewer options, as powerfully demonstrated by an informal survey conducted by the Council:***

- Almost 89% of defined contribution plan sponsors report that the risk of litigation is either a very significant or a somewhat significant factor

affecting their decisions to enhance services or provide different investment options.

- Almost 25% of plan sponsors have decided against providing more assistance to participants due to the litigation risk.
- Over 43% of plan sponsors have decided against offering lifetime income options due to the litigation risk related to selecting such options.
- Almost 29% of plan sponsors have decided against offering services or investment options simply because other similar plans were not doing so, which would make the additional services or options vulnerable to litigation.

Courtney Zinter, *The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants*, Am. Benefits Council (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358.

The Court has previously acknowledged concerns about meritless ERISA litigation, and a ruling from the Court placing undue emphasis on past performance would make the aforementioned problems worse. *See Cunningham v. Cornell Univ.*, 604 U.S. 693, 708 (2025) (making note of "serious concerns" about "meritless [ERISA] litigation").

According to detailed data from Encore Fiduciary, more than 600 excessive fee and imprudent investment lawsuits have been filed against ERISA defined contribution plans over the last ten years, not counting employee stock ownership plans (ESOPs). *ERISA Fiduciary Litigation in 2025: Plaintiff Law Firms Continue the Frenetic Pace, With Broader Allegations Against Both Retirement Plans and Health Plans*,

Encore Fiduciary (Feb. 9, 2026), https://encorefiduciary.com/erisa-fiduciary-litigation-in-2025-plaintiff-law-firms-continuefrenetic-pace/. In 2026, there has been an explosion of underperformance cases, with well over 50 having already been filed this year.

This explosion in litigation is completely unrelated to retirement plan performance.[5] The objective for plaintiffs' attorneys is simply to survive the motion to dismiss and settle, as Justice Alito recognized in his concurrence in *Cunningham v. Cornell University*.[6] Why is the motion to dismiss so important? Because if the defendants lose the motion to dismiss, the plaintiffs' lawyers (not the participants) have generally won. If a lawsuit survives a motion to dismiss, litigating the case through discovery and summary judgment can cost the plan sponsor many millions of dollars. This puts enormous pressure on the plan sponsor to settle for millions of dollars to avoid the greater cost and burden of continuing to litigate the case.

That gets back to the point of who benefits from the lawsuits, and the answer is easy: the plaintiffs'

---

[5] The merits of a lawsuit are apparently not relevant. As Encore Fiduciary stated, "[p]lan fees have declined over the prior ten years, so it should correspondingly follow that the number of excessive fee lawsuits would also decline. Instead, the opposite has happened – plaintiff firms have filed more excessive fee lawsuits during the same time period during which plan fees have declined." *ERISA Fiduciary Litigation in 2025*, Encore Fiduciary (Feb. 9, 2026).

[6] *Cornell Univ.*, 604 U.S. at 710 (Alito, J., concurring) ("[I]n modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery. Defendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued.").

lawyers, not the participants. For example, from the period of 2009 to 2016, attorneys representing plaintiffs in breach of fiduciary duty lawsuits are estimated to have collected roughly $204 million for themselves, while only securing an average per participant award of $116. *See* Thomas R. Kmak, *Protect Yourself at All Times – Emphasize Quality, Service and Value Before Fees*, Nat'l Inst. of Pension Adm'rs (April 11, 2016), https://www.nipa.org/blogpost/982039/244084/Protect-Yourself-at-All-Times--Emphasize-Quality-Service-and-Value-Before-Fees. The problem has only gotten worse since then. In 2025, the median of the average per-participant award in fee and underperformance cases was just $67.79, compared to average plaintiffs' attorneys' fees of $1.59 million. *See 2025 Underperformance & Excessive Fee Settlements: Participant Median Recovery of $68, Plaintiffs' Lawyers Average Fees of $1.59 Million*, Davis & Harman LLP (Jan. 14, 2026), https://www.davis-harman.com/wp-content/uploads/2026/01/DH-Settlement-Survey-2025.pdf.

Encore Fiduciary echoes this point:

> Our internal data indicates that in the last five years, there have been over 200 settlements of excessive fee and imprudent investment lawsuits totaling more than $1.3 [billion]. Plaintiff law firms typically get 33% of these settlements, which calculates to almost $450 [million] during this time period. Based on our calculations and combined with analysis from the Davis & Harman law

> firm,[7] it appears that individual plan participants each obtain only $55-70 on average from these same settlements.

ERISA Fiduciary Litigation in 2025, Encore Fiduciary (Feb. 9, 2026).

In this context, if the Court were to ascribe material weight to the past performance of any fund in evaluating the prudence of the fiduciary's selection, the result would be very clear – a plague of new underperformance cases, based on a clear roadmap provided to plaintiffs' lawyers. It is a mathematical redundancy to say that half the funds offered by plans will not be in the top 50% of such funds. And 90% will not be in the top 10%. And 99% will not be in the top 1%. So, any holding by the Court that ascribes weight to past performance will result in a bonanza for the plaintiffs' lawyers, at the expense of the entire private retirement system.

IV. Case Law Widely Supports the Conclusion That Past Underperformance Alone Cannot Support a Fiduciary Claim.

Many courts that have considered underperformance claims have routinely – and soundly – rejected arguments from plaintiffs that past underperformance alone can sustain a claim that a fiduciary breached its duties under ERISA. Below, we present a sampling of cases that have considered claims that rely solely on past performance in order to highlight the courts' strong reasoning as to why past underperformance is insufficient to support a fiduciary breach claim. As the

---

[7] *See 2025 Underperformance & Excessive Fee Settlements: Participant Median Recovery of $68, Plaintiffs' Lawyers Average Fees of $1.59 Million* (Jan. 14, 2026).

courts cited below explain, ERISA requires the plaintiff to plead some *additional* indication that the fiduciary acted imprudently in selecting and retaining an allegedly underperforming investment.

A. Circuit Court Case Law

In affirming a district court's dismissal of an underperformance claim, the Sixth Circuit in *Smith v. CommonSpirit Health* held that the plaintiffs had not alleged any facts from which could be plausibly inferred that the defendant sponsor of a 401(k) plan breached its fiduciary duties by selecting and maintaining a suite of actively managed mutual funds that allegedly underperformed. The court highlighted the fundamental problem with complaints that rely solely on past underperformance to support an inference that the plan fiduciary acted imprudently:

> Merely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision—largely a process-based inquiry—that breaches a fiduciary duty. Precipitously selling a well-constructed portfolio in response to disappointing short-term losses, as it happens, is one of the surest ways to frustrate the long-term growth of a retirement plan. . . . Any other rule would mean that every actively managed fund with below-average results over the most recent five-year period would create a plausible ERISA violation. Unless and until it becomes feasible to have all actively managed funds perform above average, that would lead to the disappearance of this option in ERISA plans.

Smith v. CommonSpirit Health, 37 F.4th 1160, 1166 (6th Cir. 2022).

Similarly, just last month, the Third Circuit – citing to *Smith* – also rejected the idea that underperformance alone can support a claim of a fiduciary breach:

> One cannot just "point[] to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years" to show that fund was an unreasonable investment. . . . [T]here may be sound reasons to hold on to the fund during a period of weaker returns. . . . Requiring fiduciaries to cut every below-average fund would create chaos.

In Re: Quest Diagnostics ERISA Litigation, No. 24-2866, 2026 WL 1783204, at *4 (3d Cir. June 22, 2026) (internal citations omitted).

The Second Circuit echoed the Sixth Circuit's reasoning in *Collins v. Northeast Grocery, Inc.*, where the Second Circuit held that a district court had properly rejected an underperformance claim. According to the Second Circuit, the fact that a particular fund "lost value does not, standing alone, make its selection or retention imprudent." Citing to *Smith*'s language quoted above, the Second Circuit concluded that it could not infer from six years of performance data that the defendants' decision to select or retain the challenged fund was imprudent. *See Collins v. Northeast Grocery, Inc.*, No. 24-2339-cv, 2025 WL 2383710, at *3 (2d. Cir. Aug. 18, 2026). The Eleventh Circuit also cited to *Smith* in rejecting claims that the defendant plan sponsor should have dropped

four funds from its 401(k) plan.[8] The court concluded that a "few here-and-there years of below-median returns . . . are not a meaningful way to evaluate a plan's success as a long-term investment vehicle." *Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1179-80 (11th Cir. 2024).

The Seventh Circuit has also concluded that past underperformance alone is insufficient to sustain a claim, noting in *Jenkins v. Yager* that, while it was true that the challenged funds lost money in the three prior years,

> that alone is not evidence that [the defendant] violated his fiduciary duty. We have stated that investment losses are not proof that an investor violated his duty of care. . . . [The defendant], in keeping the [challenged] mutual funds, did not violate his standard of care. Nothing in the record suggests that it was not reasonable and prudent to select conservative funds with long-term growth potential and to stay with those mutual funds even during years of lower performance.

Jenkins v. Yager, 444 F.3d 916, 925-26 (7th Cir. 2006).

---

[8] A number of district courts have also relied on the key language in *Smith* when dismissing underperformance claims. *See, e.g.*, *Lard v. Marmon Holdings, Inc.*, No. 22 cv 04332, 2025 WL 1383269, at *3 (N.D. Ill. May 13, 2025); *England v. DENSO Int'l Am., Inc.*, No. 22-11129, 2023 WL 4851878, at *9 (E.D. Mich. July 28, 2023); *Tullgren v. Hamilton*, No: 1:22-cv-00856-MSN-IDD, 2023 WL 2307615, at *5-6 (E.D. Va. Mar. 1, 2023); *Jones v. Dish Network Corp.*, No. 22-cv-00167-CMA-STV, 2023 WL 2796943, at *15 (D. Colo. Jan. 31, 2023).

Similarly, the Ninth Circuit affirmed a lower court's dismissal of an underperformance claim in *White v. Chevron Corporation*, where the district court twice dismissed the plaintiffs' complaint on the grounds that poor performance alone is not sufficient to create a reasonable inference that the defendant failed to adequately investigate the allegedly underperforming fund. On appeal, the Ninth Circuit concluded:

> [T]he facts alleged . . . were insufficient to support a plausible inference of [fiduciary breaches]. Rather, as to each count, the allegations showed only that [the defendant plan sponsor] could have chosen different vehicles for investment that performed better during the relevant period. . . . None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred.

See White v. Chevron Corp., No. 16-cv-0793-PJH, 2016 WL 4502808 (N.D. Cal. Aug. 29, 2016); No. 16-cv-0793-PJH, 2017 WL 2352137 (N.D. Cal. May 31, 2017), *aff'd*, 752 Fed.Appx. 453, 455 (9th Cir. 2018).

B. District Court Case Law

At the district court level, many courts from across various jurisdictions have time and again rejected fiduciary breach claims based on past performance. *See, e.g.*, *Fumich v. Novo Nordisk Inc.*, No. 24-9158 (ZNQ) (JBD), 2025 WL 2399134, at *5 (D.N.J. Aug. 19, 2025) ("Allegations of underperformance, without more, do not suffice. . . . [T]here are no factual allegations to establish that the [defendant] made an imprudent choice to select [the challenged funds]. . . . Hindsight cannot be used to plead a breach of the duty of prudence."); *Bracalente v. Cisco Systems, Inc.*, No. 5:22-cv-04417-EJD, 2023 WL 5184138, at *3 (N.D. Cal.

Aug. 11, 2023) ("Although duty of prudence breaches may be based on circumstantial evidence and are evaluated on a case-by-case basis, federal courts have nonetheless widely and consistently rejected attempts to impose ERISA liability where the claims are based solely on a fund's underperformance."); *Beldock v. Microsoft Corp.*, No. C22-1062, 2023 WL 3058016, at *3 (W.D. Wash. Apr. 24, 2023) ("Plaintiffs' allegations, which again are based solely on the [target date funds'] alleged poor performance during a brief timeframe, are insufficient, without more, to raise Plaintiffs' claim above the level of speculation and into plausibility."); *Patterson v. Morgan Stanley*, No. 16 Civ. 6568 (RJS), 2019 WL 4934834, at *11 (S.D.N.Y. Oct. 7, 2019) (noting that the fiduciary duty of prudence "does not compel ERISA fiduciaries to reflexively jettison investment options in favor of the prior year's top performers. If that were the case, Plan sponsors would be duty-bound to merely follow the industry rankings for the past year's results, even though past performance is no guarantee of future success.").

CONCLUSION

For the foregoing reasons, the Council as *amicus curiae* respectfully requests the Court to affirm the Ninth Circuit's judgment and, in its ruling, to attribute very little, if any, weight to a fund's past performance in evaluating whether a fiduciary acted prudently in selecting the fund.

Respectfully Submitted,

KENT A. MASON
Counsel of Record
ADAM R. MCMAHON
ADDISON C. SPENCER
GRACE F. SULLIVAN
DAVIS & HARMAN LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230
kamason@davis-harman.com

Counsel for Amicus Curiae

July 9, 2026