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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 WINSTON R. ANDERSON, ET AL.,)
4 Petitioners,)
5 v.) No. 25-498
6 INTEL CORPORATION INVESTMENT POLICY)
7 COMMITTEE, ET AL.,)
8 Respondents.)
9 - - - - -
10
11 Washington, D.C.
12 Tuesday, October 6, 2026
13
14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.
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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 25-498, Anderson
5 versus Intel Corporation Investment Policy
6 Committee.

7 Mr. Wessler.

8 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

9 ON BEHALF OF THE PETITIONERS

10 MR. WESSLER: Mr. Chief Justice, and
11 may it please the Court:

12 ERISA's duty of prudence is inherently
13 flexible. As a result, this Court has
14 consistently declined to inject judicially
15 crafted bright-line rules into a determination
16 of whether a complaint's allegations plausibly
17 allege imprudence. Categorical rules, as this
18 Court put it colorfully in Dudenhoeffer, do not
19 readily "divide the plausible sheep from the
20 meritless goats" because they are inconsistent
21 with the careful context-sensitive inquiry that
22 both ERISA and Rule 8 require.

23 The Ninth Circuit's "meaningful
24 benchmark requirement" is just such a rule.
25 Under it, a court first asks whether a

1 complaint's performance allegations on their
2 own can plausibly demonstrate imprudence by
3 identifying a virtually indistinguishable fund
4 that performed better. If the complaint fails
5 to identify that specific fund, the performance
6 allegations are discarded, and that is true
7 even if the complaint relies on benchmarks
8 selected by the fiduciaries themselves or
9 comparators identified by benchmarking experts.

10 In the Respondents' view, this rule is
11 consistent with the ordinary pleading framework
12 set forth in *Twombly* and *Iqbal*. But, under
13 that framework, courts must assess all
14 non-conclusory allegations together in
15 determining if a complaint plausibly states a
16 claim. The "meaningful benchmark requirement"
17 precludes that assessment.

18 And the Ninth Circuit's rule isn't
19 even necessary. Everyone agrees that, without
20 more, a complaint merely alleging that one fund
21 performed better than another won't survive a
22 motion to dismiss. The ordinary pleading
23 standards, however, are perfectly capable of
24 weeding out a truly meritorious -- meritless
25 claim like that.

1 Ultimately, because the meaningful
2 benchmark rule is both out of step with Twombly
3 and Iqbal and an unnecessary solution in search
4 of a problem, it should be rejected.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: So are you saying
7 that you can prove imprudence or demonstrate it
8 by comparing dissimilar funds?

9 MR. WESSLER: I mean, that is one way
10 that a complaint --

11 JUSTICE THOMAS: So how would you do
12 that?

13 MR. WESSLER: Sure. So it's
14 context-dependent, and there is no one specific
15 fund that a complaint needs to identify to make
16 performance allegations relevant to support a
17 claim of imprudence. It can run a very wide
18 spectrum of different ways that the complaint
19 could use performance allegations to contribute
20 to the overall plausibility of a complaint.

21 And the way it would do that is it
22 would identify a relevant way of comparing the
23 performance of one fund with other potential
24 comparators, and it would explain why that
25 performance was relevant to the theory of

1 breach alleged in a complaint.

2 But what the Ninth Circuit has done
3 here is it has attempted to predefine the kind
4 of comparison that will count when a court is
5 asking how the performance allegations
6 contribute to plausibility.

7 JUSTICE THOMAS: I think what the
8 Ninth Circuit is saying is you can't compare
9 apples and oranges if you have a fund, an
10 equity fund, that is designed to produce high
11 returns but riskier returns, and you can't
12 compare that to a fund that is to protect
13 against losses.

14 MR. WESSLER: We -- I agree that if
15 that was all the complaint was trying to do, to
16 premise a claim of imprudence on, that kind of
17 complaint would be -- would not survive a
18 motion to dismiss. But the Ninth Circuit, I
19 think, went beyond just a recognition that the
20 performance allegations need to contribute to
21 the theory of imprudence.

22 What it did was to say the only kind
23 of comparison that will count is one that
24 identifies a specific materially
25 indistinguishable fund that only differed in

1 performance. And by attempting to predefine
2 the kind of comparator that counts, it set the
3 bar in a way that would foreclose a complaint
4 from relying on a whole range of different
5 kinds of potential comparisons.

6 JUSTICE THOMAS: So do you agree that
7 you can't compare apples and oranges?

8 MR. WESSLER: Yes, but I think the
9 question is, what is an apple and what is an
10 orange? And that question can't be answered by
11 defining at the outset what can count as a
12 relevant comparator.

13 And I can, if I can, just give you an
14 example. So the Ninth Circuit's rule, the
15 meaningful benchmark definition that it
16 adopted, requires that a specific comparator be
17 an actually existing fund that shares similar
18 aims, similar risks, similar potential rewards,
19 and similar asset allocations.

20 But imagine a complaint that
21 identifies a potentially imprudent fund and
22 says this fund is labeled as a growth fund, but
23 it is underperforming another fund that is
24 labeled as a stable value fund. Under the
25 Ninth Circuit's definition, that attempted

1 comparison would fail because the two funds do
2 not share similar aims. But the point of the
3 allegation is to demonstrate that the growth
4 fund is underperforming even a fund that isn't
5 attempting to maximize returns.

6 And I think what you can see is that
7 the Ninth Circuit's definition of this
8 "meaningful benchmark requirement," if you
9 trace it back, what you see is that it came
10 from a series of Eighth Circuit decisions, a
11 trio of Eighth Circuit decisions, in which the
12 Eighth Circuit had crafted this rule in which
13 it said, to state a claim, plaintiffs have to
14 identify a meaningful benchmark.

15 But, if you look at those cases,
16 what's going on there is very different from
17 the kind of case you have here. In those
18 cases, what -- what you had was plaintiffs
19 attempting to exclusively rely on performance
20 allegations to state a claim. There were no
21 non-performance allegations in the case. And
22 the Eighth Circuit said, if all you're going to
23 do is look just at performance allegations and
24 try to get through a motion to dismiss, you
25 better have a pretty tight connection between

1 the challenged fund and whatever fund you're
2 saying did better than that fund.

3 But, here, the complaint in this case
4 doesn't rely exclusively on performance
5 allegations. And I think that's really the
6 methodological problem of the Ninth Circuit's
7 approach that adopted this Eighth Circuit rule,
8 imported it over into a case in which
9 performance allegations are just a part of the
10 overall picture.

11 It -- it block-ported that rule,
12 though. And so what it said was not only do
13 you have to identify this actually existing
14 specific fund that must share the same
15 objectives, risks, and rewards, but also, if
16 the complaint doesn't identify that fund, the
17 performance allegations are out of the holistic
18 analysis because they, on their own, don't
19 demonstrate imprudence.

20 JUSTICE JACKSON: So can I ask you,
21 what does your complaint rely on? I'm just
22 trying to understand how the argument that you
23 just laid forward applies to your complaint.

24 MR. WESSLER: Sure.

25 JUSTICE JACKSON: So you say we don't

1 rely solely on performance allegations, so what
2 do you rely on?

3 MR. WESSLER: The complaint has
4 paragraphs of non-performance allegations that
5 detail why the fiduciaries' over-allocation of
6 these funds into hedge funds was both risky and
7 also unprecedented, inconsistent with the way
8 other fiduciaries managing similarly sized
9 plans were constructing their investment
10 options.

11 JUSTICE JACKSON: So do you need a
12 comparator to sustain those kinds of
13 allegations or don't you?

14 MR. WESSLER: No. They're -- no, you
15 don't --

16 JUSTICE JACKSON: You don't need one?

17 MR. WESSLER: -- you don't -- you
18 don't -- you --

19 JUSTICE KAGAN: Well, Mr. Wessler, I
20 guess I don't understand the relevance of those
21 allegations. I mean, if those allegations get
22 you over the Iqbal line themselves, all well
23 and good. If they don't, then you need
24 something in addition to them.

25 And I think, going back to Justice

1 Thomas's question, the thing that you need
2 in addition is like another apple.

3 Now I -- I understand it when you say
4 it can't -- it doesn't have to be, like,
5 precisely the same apple with precisely, you
6 know, the same color and texture and taste and
7 all of that. But it's got to be kind of an
8 apple.

9 And it seems to me that the Ninth
10 Circuit pretty much said exactly that. I mean,
11 you're -- you're -- you're suggesting a kind of
12 caricature of the Ninth Circuit opinion. But
13 the Ninth Circuit opinion doesn't say
14 absolutely everything, including the -- the
15 assets invested in, has to be the same.

16 It says, you know, in the end, it
17 can't be a good comparison unless you have a --
18 a -- a fund with the same general approach and
19 risk/reward profile.

20 MR. WESSLER: Sure. So a couple of
21 responses to that.

22 I -- I -- I -- I don't think that, in
23 my view, is an accurate reading of what the
24 Ninth Circuit did, and here's why.

25 The Ninth Circuit ruled out all of the

1 proposed comparators in this complaint, okay?

2 It said none of them are "truly comparable"
3 under its definition of what can count.

4 And what we know is that the complaint
5 identified a range of different kinds of
6 comparators, including, Justice Kagan, the
7 fiduciary's own selected benchmarks, okay?

8 It went into detail about why the
9 fiduciaries identified other funds and said --
10 and told participants: You can look at these
11 funds and evaluate the performance of our fund
12 against those funds.

13 Those were ruled out of the -- of --
14 on front -- in the Ninth Circuit based on this
15 meaningful benchmark standard.

16 We also know that the standard the
17 Ninth Circuit adopted, the definition, allowed
18 it to rule out comparators identified by
19 experts in the benchmarking process.

20 The plaintiffs in this case went out
21 at the pleading stage, retained experts who
22 were investment professionals involved in
23 benchmarking to look at the fiduciary's funds,
24 and asked them: Can you identify relevant
25 comparators for these funds given the features,

1 what they are, what their objectives are, the
2 asset allocation, everything?

3 And the experts did that. Those are
4 in the complaint. And they were ruled out
5 under the Ninth Circuit's definition.

6 CHIEF JUSTICE ROBERTS: Well, that's
7 just -- it seems to me that's just an objection
8 to the application of the rule in your
9 particular case. It -- it doesn't represent
10 a -- a basis for throwing out the basic -- the
11 fundamental approach.

12 MR. WESSLER: I -- I -- I think it's
13 more than that because, under this definition,
14 this meaningful benchmark definition, not only
15 is the court -- the Ninth Circuit attempting to
16 predefine what can count for relevance in the
17 plausibility analysis, but it's isolating a
18 category of allegation, just the performance
19 allegations. It's asking: Do those
20 performance allegations identify a specific
21 fund that is materially indistinguishable?

22 If not, those performance allegations
23 are out of the case before you reach the
24 holistic analysis. And I think that that's a
25 function of this meaningful benchmark rule that

1 was initially created in the Eighth Circuit,
2 where all you had were performance allegations.

3 And I think, in some ways, it might be
4 understandable that if that's -- that's all the
5 complaint has, just an attempt to state a claim
6 based exclusively on performance allegations,
7 then, if the performance allegations are
8 incapable of permitting a plausible inference
9 of imprudence, you're out.

10 JUSTICE ALITO: Well --

11 JUSTICE KAVANAUGH: Why --

12 JUSTICE ALITO: -- are you saying that
13 you can -- you can state a claim by comparing
14 apples and oranges but supplement that with the
15 suggestion that the strategy was flawed?

16 The question presented concerns
17 underperformance. But there's a lot in your
18 brief about denigrating the strategy, featuring
19 such a heavy reliance on private equity and
20 hedge funds.

21 MR. WESSLER: Right. So let me be
22 clear about this. The complaint does not
23 challenge, as -- as a category, the ability
24 that fiduciaries have to invest in hedge funds
25 or private equity. What the complaint

1 challenges as the basis for its imprudence
2 claim is the -- is the strategy that -- that
3 the Intel fiduciaries adopted in which they
4 overallocated these target-date funds and a
5 global diversified fund to this kind of asset
6 class.

7 JUSTICE ALITO: Well, that does sound
8 like strategy and not about -- not
9 underperformance.

10 MR. WESSLER: I agree with you that
11 the theory is strategy. The performance
12 allegations --

13 JUSTICE KAVANAUGH: Why is --

14 JUSTICE GORSUCH: How is that in
15 the case? The QP that you presented us with --

16 MR. WESSLER: Yeah.

17 JUSTICE GORSUCH: -- is whether, for
18 claims predicated on fund underperformance, a
19 meaningful benchmark is required.

20 MR. WESSLER: Right. And --

21 JUSTICE GORSUCH: And the Ninth
22 Circuit also said that Anderson insists that he
23 is not challenging -- that he's challenging the
24 implementation of the strategy as opposed to --
25 as opposed to the strategy itself.

1 MR. WESSLER: Yes. So a couple --

2 JUSTICE GORSUCH: So is that --

3 MR. WESSLER: -- a couple --

4 JUSTICE GORSUCH: -- that's the case
5 as it comes to us.

6 MR. WESSLER: -- a couple responses to
7 that. The Ninth Circuit's rule -- and I don't
8 think there is any disagreement about this --
9 is a rule that applies not just to claims that
10 rely exclusively on underperformance but rely
11 on allega- -- on allegations --

12 JUSTICE GORSUCH: Okay. Okay. If
13 that -- what that may -- whatever that may be.

14 MR. WESSLER: Yeah.

15 JUSTICE GORSUCH: Let's suppose we're
16 going to answer the question presented.

17 MR. WESSLER: I -- but I -- yeah.

18 JUSTICE GORSUCH: Let me just -- let
19 me just finish, counsel.

20 MR. WESSLER: Sorry.

21 JUSTICE GORSUCH: You'll get all the
22 time you want, I promise.

23 But let's say we answer the question
24 presented and whether -- whether claims for
25 underperformance require a meaningful

1 benchmark.

2 Do you have any objection to saying
3 that's true?

4 MR. WESSLER: Yes, we have an
5 objection to that, and here's why, because,
6 as the Ninth Circuit defined what counts as a
7 meaningful benchmark, it screens out all manner
8 of potentially relevant ways that a complaint
9 could perform the comparison.

10 JUSTICE GORSUCH: Okay. But do you
11 agree with the general principle that when
12 we're limited to underperformance claims, a
13 benchmark of some kind, a meaningful benchmark
14 of some kind, is required, apples, not oranges?

15 MR. WESSLER: I think that for -- for
16 performance allegations to be relevant, they --
17 they -- there is inherent comparison that needs
18 to occur. I think the -- the -- the problem
19 here is the way in which the Ninth Circuit
20 attempted to define, before a court ever
21 considers the allegations, what can count for
22 purposes of that comparison.

23 JUSTICE BARRETT: But don't you have
24 to do that to decide if an apple is an apple?
25 Don't you have to say, well, it has to be

1 round, you know, it has to come from a certain
2 kind of tree?

3 I mean, it seems to me that, really,
4 you are agreeing that a meaningful benchmark
5 standard is appropriate. You're fighting a
6 little bit about what is meaningful, right?
7 But there has to be some criteria.

8 MR. WESSLER: So, yes, but I think
9 what matters is -- is the way in which the
10 complaint connects the dots between the
11 challenged fund and the proposed comparator.

12 So just, for instance, the Ninth
13 Circuit would -- would screen -- the Ninth
14 Circuit's rule would screen out attempts to
15 provide a comparison point of fiduciary's own
16 selected benchmarks if those benchmarks don't
17 meet the specific criteria that the Ninth
18 Circuit said qualify.

19 And I think that's, again, a function
20 of -- of view that the way that the court could
21 assess the allegations is to -- in the
22 complaint is to isolate the performance
23 allegations separate and apart from the rest of
24 the allegations in the complaint and ask, based
25 just on those performance allegations, does the

1 complaint demonstrate -- have a --

2 JUSTICE BARRETT: So you're shifting.
3 You're putting more weight on your
4 non-performance allegations?

5 MR. WESSLER: Our view is that they
6 have to be taken together under a holistic
7 analysis. And I think, if I can, if you can
8 give me maybe 30 seconds to walk through why I
9 think that matters in a case like this.

10 The theory of imprudence here is one
11 in which the fiduciaries told participants that
12 the reason they were adding more of these funds
13 into hedge funds was an attempt to mitigate
14 risk. That was the stated objective of this
15 strategy, okay?

16 And the complaint lays out, outside of
17 the performance allegations, why that strategy
18 couldn't be accomplished through this
19 overallocation into hedge funds.

20 It explains, hedge funds, contrary to
21 what the fiduciaries said, hedge funds are, in
22 fact, correlated to the market. They are often
23 volatile. They don't provide the kind of risk
24 mitigation that the fiduciaries are saying is
25 their objective.

1 And the performance allegations in
2 this case corroborate those non-performance
3 allegations. They show specifically that the
4 performance of these funds underperformed other
5 points of comparison in exactly the ways --

6 JUSTICE KAVANAUGH: Why -- why does
7 performance matter in the sense that half of
8 all the funds are going to underperform or be
9 lower than the median? It seems to me that
10 what your complaint's really about is either
11 the strategy of going low risk or the means to
12 fulfill that strategy, namely, hedge funds.

13 What you just said suggests it's the
14 latter, the means to fulfill that strategy or
15 achieve that strategy. I don't know why
16 underperformance has anything to do with that.

17 MR. WESSLER: Well, I mean, there --
18 there are two --

19 JUSTICE KAVANAUGH: Was that a
20 reasonable, prudent strategy to use hedge funds
21 to achieve a goal of low risk or not?

22 MR. WESSLER: Right. So --

23 JUSTICE KAVANAUGH: I'll just ask that
24 question.

25 MR. WESSLER: -- not -- not in the way

1 that the fiduciaries did it. And I think
2 that's really the -- the thrust of this
3 complaint, is that no one -- if -- if risk
4 mitigation was your goal, the complaint
5 alleges, there were other, better-performing
6 ways to accomplish that goal. And the
7 complaint identified -- you asked, I think,
8 this --

9 JUSTICE KAVANAUGH: Well, the
10 question, I think, that ERISA asks is whether
11 it was an unreasonable means to achieve that
12 goal, namely, use of hedge funds. And you --
13 that's -- you can just have argument on that
14 question.

15 MR. WESSLER: Sure. Sure. And that
16 question gets at, I think, a slightly --

17 JUSTICE KAVANAUGH: And the answer, I
18 guess, is -- is no, is what the Ninth Circuit
19 concludes.

20 MR. WESSLER: Well, the Ninth Circuit
21 ultimately carved up this complaint in a way
22 that allowed it to isolate just the performance
23 allegations and ask, based only on those
24 allegations, do those allegations demonstrate
25 imprudence?

1 And I think part of the problem here
2 is that the performance allegations help
3 reinforce or corroborate the
4 non-performance-related allegations about the
5 nature of this strategy.

6 JUSTICE JACKSON: But I guess I don't
7 see that. And I'm sort of piggy-backing on
8 Justice Kavanaugh's question. I don't see that
9 in the Ninth Circuit's opinion. I mean, they
10 do have a -- a -- they mention
11 underperformance, but they focus on your
12 argument and they say, for example, "The
13 argument appears to rest on the proposition
14 that the fiduciaries' allocation strategy was
15 imprudent because hedge funds and private
16 equity funds are inherently so risky that no
17 prudent investor with the same aims would have
18 invested in them."

19 That doesn't bring to mind anything
20 about underperformance. They seem to be
21 focusing on the very part of the complaint that
22 you say they should be focusing on.

23 MR. WESSLER: So let me -- can I point
24 you to where I think --

25 JUSTICE JACKSON: Yes.

1 MR. WESSLER: -- you can -- you can
2 look in the complaint. So, if you go to 14a of
3 the Petition Appendix, what you'll see there is
4 that the court says, "To the extent a plaintiff
5 asks a court to infer imprudence based on
6 performance, even in part, must" -- "the
7 plaintiff must compare the performance to funds
8 or investments that are meaningfully similar."
9 That's at 14a.

10 And then, at 15a, the next page, the
11 court is saying, to accomplish that, to
12 actually permit a plaintiff to rely on
13 performance allegations, those allegations must
14 by themselves demonstrate imprudence.

15 So what's going on in the Ninth
16 Circuit's decision -- and, again, this --
17 this -- this goes back to the way that the
18 Eighth Circuit's rule evolved -- is that a
19 court first isolates the performance
20 allegations and asks: Is there -- does the
21 complaint identify a specific materially
22 indistinguishable fund that differs only in
23 performance? That's the standard. And if not,
24 then the performance allegations on their own
25 will fail to demonstrate imprudence and so

1 they're out of the case.

2 And then we might ask: Well, okay,
3 putting the performance allegations to one
4 side, do the rest of the allegations state a
5 claim? And what we submit is that that kind of
6 attempt to isolate a category of allegation and
7 ask do those allegations just on their own
8 permit an inference of imprudence is -- is --

9 JUSTICE JACKSON: What do you make of
10 the part of the Ninth Circuit's opinion where
11 it says it is possible that a plaintiff could
12 make out an imprudence claim by alleging that a
13 plan invested much more in a particularly risky
14 class of assets than did other comparable
15 plans, even if investing in that asset class is
16 not per se imprudent in smaller amounts?

17 They do seem to entertain this idea of
18 asset allocation and -- and say, contrary to
19 what you just said, that you could make out an
20 imprudence claim on that basis.

21 MR. WESSLER: I -- I think that's
22 correct, but they have done that by discarding
23 at the outset the performance -- one category
24 of allegation in this complaint.

25 At its core, I think the problem with

1 the Ninth Circuit's approach is -- is -- is
2 just a pleading one. It's an attempt to
3 side-step the requirement that this Court has
4 consistently emphasized applies to ERISA claims
5 no less than any other in which a court must
6 take all of the allegations together and ask
7 holistically whether they together are able to
8 state a claim.

9 JUSTICE JACKSON: Can I just ask --

10 JUSTICE ALITO: Well, "holistic" is
11 kind of a magic word, but I -- I don't
12 understand how your arguments about your --
13 your argument about strategy and your argument
14 about underperformance fit together. Whether a
15 particular strategy is reasonable or not cannot
16 be judged based on how that strategy performed
17 in one particular instance. It may be -- it --
18 it might -- they -- they're just two different
19 things.

20 If you want to analyze whether it's a
21 good strategy to try to -- to convert a fourth
22 down from the one-yard line, you would have to
23 look at a large number of instances where
24 that's done. The fact that it didn't work in a
25 particular case doesn't really show you

1 anything, nor does the fact that it worked in a
2 particular case show you anything.

3 But you seem to be trying to -- you
4 know, you say "holistic" and you want to throw
5 these two seemingly unrelated things together.

6 MR. WESSLER: Let --

7 JUSTICE ALITO: Maybe I'm not --

8 MR. WESSLER: Yeah. Let me --

9 JUSTICE ALITO: -- I don't understand
10 what you're arguing.

11 MR. WESSLER: Let me try to -- let
12 me -- let me just try to be specific about how
13 it worked in this complaint.

14 So what this complaint did, outside of
15 the performance allegations, is that it
16 explained why the particular strategy that
17 these fiduciaries adopted to achieve the risk
18 mitigation goal was inappropriate for that risk
19 mitigation goal.

20 It included paragraph after paragraph
21 of allegation explaining why hedge funds are
22 incapable, at least in the allocations that
23 these fiduciaries used, of decoupling
24 themselves sufficiently from equity markets in
25 a way that would have provided downside market

1 protection and how these hedge funds, again, at
2 this allocation level would not have been able
3 to prevent the kind of volatility that the
4 fiduciaries were concerned with.

5 And then, in the performance
6 allegations, it included specific examples of
7 the kinds of hedge fund investments that the
8 fiduciaries employed that matched up with those
9 volatile approaches --

10 JUSTICE GORSUCH: Let me --

11 MR. WESSLER: -- that were --

12 JUSTICE GORSUCH: -- let me come at
13 it --

14 MR. WESSLER: -- alleged outside.

15 JUSTICE GORSUCH: -- let me come at
16 the same question a different way. I don't
17 doubt one could have a -- an argument about the
18 strategy being a good or -- or bad one to try
19 to mitigate risk rather than seek more growth
20 or to rely on hedge funds as opposed to other
21 investments tools.

22 But that's not the question you asked
23 us to address in your cert petition. Your cert
24 petition asks us to address, when we're dealing
25 with performance -- underperformance

1 allegations, do apples need to be apples? Does
2 there need to be many -- a meaningful
3 benchmark? That's the question you asked us to
4 address. And the argument I'm hearing today
5 seems to be saying, yeah, that's true, answer
6 the QP yes, but our complaint has a whole lot
7 more.

8 And I -- I guess I'm just wondering,
9 you know, are you shifting ground on us here?

10 MR. WESSLER: Yeah, I mean, I -- I
11 don't think we're shifting ground. I think
12 that the question we asked you to decide is
13 whether the Ninth Circuit's rule --

14 JUSTICE GORSUCH: Well, no. No,
15 that's not the question you asked us to decide.
16 I've got the question.

17 MR. WESSLER: Yeah, I understand. The
18 actual question.

19 JUSTICE GORSUCH: You wrote it. You
20 know it.

21 MR. WESSLER: Yes.

22 JUSTICE GORSUCH: It's -- it's
23 whether -- whether, for claims predicated on
24 fund underperformance, a meaningful benchmark
25 is required.

1 MR. WESSLER: Right.

2 JUSTICE GORSUCH: I'm paraphrasing,
3 but that's --

4 MR. WESSLER: Yes.

5 JUSTICE GORSUCH: -- that is what
6 you --

7 MR. WESSLER: Yes, and -- and I -- our
8 claim here is predicated on underperformance in
9 the sense that we need those allegations to get
10 us over the plausibility line. They are part
11 of the claim, but they're not the only part of
12 the claim.

13 JUSTICE SOTOMAYOR: So tell me how you
14 define "meaningful." I think that's what we're
15 coming down to. You're saying, I provided you
16 with comparators. But you haven't answered
17 Justice Barrett's question, which is what kind
18 of apple is it?

19 MR. WESSLER: Yep.

20 JUSTICE SOTOMAYOR: So how do you
21 define what kind of apples should be compared?

22 MR. WESSLER: Yep. I think it's
23 entirely context-dependent. What does the
24 complaint do to connect the dots between the
25 challenged fund and the proposed comparison?

1 But I -- and it could take --

2 JUSTICE SOTOMAYOR: But I have a
3 problem, which is we know that the -- the
4 stated aim of this investment was to minimize
5 long-term risk, correct?

6 MR. WESSLER: Yes.

7 JUSTICE SOTOMAYOR: All right. That's
8 not the aim of equity funds. So, when I look
9 at an equity fund, they want to make short-term
10 profit, not long-term risk management. So
11 where in the complaint -- and that's what I
12 thought the Ninth Circuit was saying that it
13 couldn't find -- do you say other funds --

14 MR. WESSLER: Yep.

15 JUSTICE SOTOMAYOR: -- these are
16 them --

17 MR. WESSLER: Yep.

18 JUSTICE SOTOMAYOR: -- who want to
19 control for long-term risk management --

20 MR. WESSLER: Yep.

21 JUSTICE SOTOMAYOR: -- don't invest in
22 hedge funds, they invest in something else,
23 they do something else and why?

24 MR. WESSLER: Yep.

25 JUSTICE SOTOMAYOR: I don't see that.

1 MR. WESSLER: Sure. So I'll point you
2 specifically to a couple of examples. If you
3 go to JA 248, as one example, you will see that
4 the complaint attempts to provide a comparison
5 for the Global Diversified Fund to a 60/40
6 equity/bond fund. And the -- and the complaint
7 says, if you're trying to do risk mitigation,
8 an effective and common way to do that is to
9 invest in 40 percent bonds.

10 So that's one example of a comparison
11 that the complaint provided that attempted to
12 compare a fund with similar objectives, like
13 risk mitigation, to the approach that the
14 fiduciaries adopted.

15 Now that was screened out under the
16 Ninth Circuit's definition because it didn't
17 include a similar asset allocation. It didn't
18 have the kind of hedge fund allocation that
19 the -- that the -- that the fiduciary funds
20 had.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, anything?

24 Justice Alito?

25 Anything further, Justice Sotomayor?

1 Justice Kavanaugh?

2 Justice Gorsuch?

3 JUSTICE KAVANAUGH: Yeah. Just to
4 follow up on Judge Murphy's dissent in the
5 Sixth Circuit, who raises the question about
6 why performance -- underperformance would ever
7 be relevant.

8 You've used the phrase "performance
9 allegations" a number of times. I just want
10 to be clear. You're not suggesting that
11 underperformance alone is a violation, correct?

12 MR. WESSLER: No. But --

13 JUSTICE KAVANAUGH: And -- and why
14 does underperformance become relevant then?

15 MR. WESSLER: Sure. It can become
16 relevant if it corroborates a theory of
17 imprudence that the complaint attempts to
18 allege by showing --

19 JUSTICE KAVANAUGH: You could have a
20 terrible strategy that -- that is imprudent and
21 nonetheless works, or you could have --

22 MR. WESSLER: For -- for sure.

23 JUSTICE KAVANAUGH: -- a really good
24 strategy that ends up losing because of the way
25 the market turned.

1 MR. WESSLER: For sure. And to get
2 back, Justice Kavanaugh, to a point you made
3 earlier, ultimately, the statute focuses on
4 fiduciary decision-making, a process. How did
5 the fiduciaries engage in a decision-making
6 process that led them to adopt a particular
7 strategy?

8 JUSTICE KAVANAUGH: Right. And this
9 whole case -- I mean, the question presented
10 we're going to decide, but I think, actually,
11 this case, your complaint's really about:
12 Is it reasonable to have hedge funds in a
13 risk-mitigation strategy?

14 MR. WESSLER: And -- and one thing
15 that plaintiffs don't have access to is direct
16 information about the fiduciaries'
17 decision-making process. So, instead, in most
18 of these cases --

19 JUSTICE KAVANAUGH: But I think you
20 would have to make a threshold argument that
21 using hedge funds to try to mitigate risk was
22 sufficiently unreasonable to get past the
23 motion-to-dismiss stage.

24 MR. WESSLER: Yeah, correct. And --
25 and I think the way that this complaint --

1 JUSTICE KAVANAUGH: I'm not sure
2 how performance has anything to do with that,
3 but --

4 MR. WESSLER: Sure. So the way that
5 this complaint tries to do that is it attempts
6 to demonstrate -- and, again, the allegations
7 in the complaint are entitled to -- to be taken
8 as true -- that the hedge funds, by their
9 nature, are in -- are inappropriate kinds of
10 investments to achieve that -- that kind of
11 risk-mitigation goal.

12 And then the performance allegations
13 demonstrate --

14 JUSTICE KAVANAUGH: One -- one of the
15 responses to that would be that they were very
16 common.

17 MR. WESSLER: Sorry?

18 JUSTICE KAVANAUGH: They were commonly
19 used, correct, hedge funds, by -- by many
20 funds?

21 MR. WESSLER: Hedge funds are --
22 are --

23 JUSTICE KAVANAUGH: Were commonly used
24 by funds seeking to mitigate risk?

25 MR. WESSLER: Yes, but not in the

1 allocations that the Intel fiduciaries used
2 here. In fact, there is no other example of a
3 fund in a similarly sized plan that was
4 anywhere close to the allocation percentages
5 that the fiduciaries used here, which, if I
6 can, just points up one additional problem with
7 the Ninth Circuit's test because in requiring a
8 comparison to be materially indistinguishable
9 means that you would need to identify another
10 fund that was at the same asset allocation
11 levels as the Intel fiduciaries' fund, and the
12 absence of any such fund would mean that the
13 performance allegations are out of the case.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 Justice Jackson?

18 JUSTICE JACKSON: Can I just go back
19 to my initial question to you, which is, if
20 we're focusing on the asset allocation strategy
21 part of your complaint, which I take it is the
22 thrust of your imprudence claim, is it your
23 view that you don't need a meaningful
24 comparator in order to establish or to support
25 that claim or those allegations?

1 MR. WESSLER: Our view is that if you
2 are attempting to rely on performance
3 allegations as part of that claim, that
4 inherently requires some point of comparison.

5 JUSTICE JACKSON: If you are
6 attempting to bring in the performance
7 allegations, okay, which you admit that you did
8 in this case --

9 MR. WESSLER: Yes.

10 JUSTICE JACKSON: -- you have some
11 performance allegations --

12 MR. WESSLER: Yes.

13 JUSTICE JACKSON: -- could you make
14 out the claim without the performance
15 allegations?

16 MR. WESSLER: I -- I could -- I could
17 imagine a case where you could -- you wouldn't
18 need to rely on performance allegations.

19 JUSTICE JACKSON: And if you didn't do
20 so, would you need a comparator to establish
21 that non-performance --

22 MR. WESSLER: No, I don't -- I don't
23 think so.

24 JUSTICE JACKSON: How -- wouldn't you
25 have to show or wouldn't -- wouldn't --

1 MR. WESSLER: Imagine --

2 JUSTICE JACKSON: Yes, please.

3 MR. WESSLER: -- if I can give you a
4 hypothetical.

5 JUSTICE JACKSON: Please.

6 MR. WESSLER: Imagine a situation
7 in which the fiduciaries' funds included
8 50 percent lottery tickets --

9 JUSTICE JACKSON: Mm-hmm.

10 MR. WESSLER: -- as a -- as a -- as --
11 as -- as implementing a particular strategic
12 objective.

13 I don't -- in that context, I don't
14 think you would need a comparator to -- to
15 potentially permit a plausible inference of
16 imprudence because, on its face, that strategy
17 would be --

18 JUSTICE JACKSON: Right. But, in the
19 world that we have --

20 MR. WESSLER: Yep.

21 JUSTICE JACKSON: -- we're talking
22 about hedge funds and private equity. Justice
23 Kavanaugh says that was pretty common.

24 Wouldn't, in order to make a plausible
25 claim with these facts, you have to demonstrate

1 that there were other funds that did not
2 have -- you know, that had the same aims, risks
3 and reward strategy but did not have that same
4 basket of assets, that did not --

5 MR. WESSLER: Oh, yes. And -- and --

6 JUSTICE JACKSON: So isn't that a
7 comparator?

8 MR. WESSLER: I mean, it is a
9 comparator. The Ninth Circuit does not apply
10 this rule to allegations that are outside of
11 the performance category in a complaint.

12 JUSTICE JACKSON: I see.

13 MR. WESSLER: Yes.

14 JUSTICE JACKSON: All right. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. McCloud.

19 ORAL ARGUMENT OF CHARLES L. McCLOUD

20 ON BEHALF OF THE RESPONDENTS

21 MR. McCLOUD: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 I'd like to start today by noting that
24 much of my friend's arguments had little to do
25 with the question presented.

1 The question presented today is
2 important but narrow: Can a plaintiff state a
3 plausible claim for a breach of the duty of
4 prudence based on a comparison of two funds
5 that aren't meaningfully similar?

6 And as Judge Miller's opinion
7 explained for the Ninth Circuit below, the
8 answer is no for multiple reasons.

9 You can start with ERISA's text and
10 purpose. ERISA recognizes that fiduciaries
11 can make a wide range of prudent decisions,
12 including the decision that Intel's fiduciaries
13 made here to pursue a more conservative
14 strategy through diversification.

15 Just because one strategy produces
16 lower returns doesn't make it imprudent. And,
17 in assessing prudence, the statute commands a
18 comparison to a fiduciary with like aims acting
19 in like capacity, not an identical fiduciary
20 and not identical investments but similar
21 enough to make the comparison meaningful.

22 Requiring meaningful comparisons also
23 follows from well-established federal pleading
24 standards. Again, underperformance standing
25 alone is not a violation of ERISA, as my

1 friend conceded.

2 So the mere existence of a difference
3 in performance between two funds doesn't
4 plausibly suggest any wrongdoing, especially
5 when accounting for the obvious alternative
6 explanation that different funds are designed
7 to perform differently.

8 To rule out that explanation, a
9 plaintiff needs to allege that the funds being
10 compared had similar aims but performed better
11 or cost less.

12 Mr. Wessler has called this
13 requirement of an apples-to-apples comparison
14 an improper heightened pleading standard.
15 That's not correct.

16 This Court regularly draws clear lines
17 at the pleading stage. Twombly did it for
18 allegations of parallel conduct. Dudenhoeffer
19 did it for allegations based on insider
20 information. Hikma did it most recently for
21 allegations based on inaction.

22 The meaningful benchmark standard does
23 the same thing for allegations that a fund
24 costs too much or didn't earn enough.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: How would you define
2 a meaningful benchmark?

3 MR. McCLOUD: So, Justice Thomas, the
4 way that most of the courts have looked at it
5 is to start with the aims of the fund, so, for
6 example, are you targeting aggressive growth?
7 Are you trying to track the market? Do you
8 have a more conservative strategy like the
9 Intel fiduciaries?

10 From there, you could look at things
11 like how do you implement that goal, the
12 particular allocation decisions that you're
13 making, the sort of risk/reward tradeoff.

14 But, to be clear, I don't think the
15 Ninth Circuit required the sort of identicality
16 that Mr. Wessler has suggested. And I think
17 it's also true, when you look at the court
18 decisions that have applied this standard,
19 they're not requiring that you have materially
20 the same investment. I acknowledge that would
21 be an onerous standard. They are requiring
22 enough similarity to make the comparison
23 meaningful, and that's going to vary from
24 case to case.

25 JUSTICE THOMAS: Do you think it's

1 appropriate -- well, you probably do -- but
2 does it seem appropriate to make -- make this
3 determination at the pleading stage on a motion
4 to dismiss?

5 MR. McCLOUD: I do, Your Honor, for
6 this reason: In order to have a plausible
7 inference of wrongdoing, you need a comparison
8 that is itself meaningful. I think, in that
9 respect, it's very similar to the allegations
10 of parallel conduct in Twombly. In Twombly,
11 the Court said those allegations are equally
12 consistent with lawful conduct.

13 And the same thing is true here. The
14 fact that Fund A underperforms Fund B is
15 equally consistent with those funds either
16 being different because of the vagaries of the
17 market or because of intentional difference in
18 strategy between the two funds.

19 JUSTICE BARRETT: Mr. McCloud, can
20 I -- can I ask you, would you be -- or would
21 you be satisfied or would it be a good idea for
22 the Court to simply answer the QP in this way?
23 You know, it asks whether, when allegations are
24 based on underperformance, the plaintiff must
25 allege a meaningful benchmark. Yes, period.

1 Or do you think that we would need,
2 in a rules statement, to say more about what
3 "meaningful" means?

4 MR. McCLOUD: I don't think, Your
5 Honor, this is a case where you need to explain
6 what "meaningful" means. The lower courts have
7 not struggled with that question. They have
8 considered it for a number of years now, and I
9 think they are getting it right more often than
10 not. So this is not a case where I think it's
11 necessary for the Court to provide further
12 guidance.

13 JUSTICE BARRETT: What do you make of
14 all of the arguments that your friend on the
15 other side is making about the extra
16 allegations that didn't relate to
17 underperformance that the complaint had that he
18 thinks should have gotten the allegations about
19 underperformance over the edge?

20 MR. McCLOUD: So, Justice Barrett, I
21 would have a harder case if the Ninth Circuit
22 had said your underperformance allegations
23 aren't sufficient and so we're not going to
24 consider anything else in your complaint.
25 That's clearly not what the Ninth Circuit did.

1 I think Mr. Wessler and I just
2 fundamentally disagree about how to read the
3 Ninth Circuit opinion. It went through in
4 detail the allegations about our supposedly
5 outlier strategy and the allegations about
6 hedge funds and private equity being evil, and
7 it found that those failed, but they failed for
8 reasons that are separate and apart from the
9 meaningful benchmark standard.

10 JUSTICE BARRETT: Thank you.

11 JUSTICE GORSUCH: Should we also
12 bracket the question that Justice Kavanaugh
13 raised and Judge Murphy have raised about
14 whether underperformance can ever be enough to
15 show imprudence?

16 MR. McCLOUD: So, Justice Gorsuch, I
17 think it is true that, as a general matter,
18 underperformance is going to rarely be
19 indicative of any sort of imprudence. The
20 example that comes to mind where it might be
21 probative is let's say you had two funds that
22 had a similar goal of trying to track the S&P
23 500. And you see Fund A consistently meets
24 that goal and Fund B consistently fails to meet
25 that goal.

1 That might suggest the fiduciaries of
2 Fund B were not adequately monitoring to make
3 sure that they were actually trying to hit
4 their goal. That could be indicative of
5 underperformance. It might get you close to
6 the line. I don't know that I would say that
7 that alone would plausibly suggest imprudence.

8 JUSTICE GORSUCH: And so we should
9 take care to bracket that question about the
10 relative importance of underperformance in a
11 prudence -- imprudence claim. We're not going
12 to answer that question. We're just going to
13 answer the question, when you're relying on
14 underperformance, whether a meaningful
15 benchmark --

16 MR. McCLOUD: I think that would be
17 appropriate, Your Honor.

18 JUSTICE GORSUCH: Thank you.

19 MR. McCLOUD: And I want to be clear,
20 requiring a meaningful benchmark does not
21 prevent plaintiffs from making other sorts of
22 allegations of imprudence.

23 JUSTICE GORSUCH: We should -- we
24 should make sure to take -- take care to say
25 that we're hardly suggesting you have to do

1 this?

2 MR. McCLOUD: Exactly. And I think
3 Judge Berzon's concurrence is exactly on point
4 on these issues. And so, if the Court wanted
5 to endorse the points that Judge Berzon made,
6 we would have no objection to that.

7 JUSTICE KAGAN: And, Mr. McCloud, if I
8 could go back to Justice Barrett's first
9 question. I mean, why wouldn't we want to say
10 something about what a meaningful comparator
11 is? You know, if you don't say anything about
12 that, this is -- all this opinion would do is
13 to say something that everybody agrees to and
14 leave a lot of questions open as to how that
15 should be applied.

16 And I would think that, you know, this
17 is a case where we have a decision that's
18 actually a pretty reasonable decision when I
19 read it in terms of what meaningfulness is
20 required and how that is different from
21 requiring essentially identical funds.

22 So why wouldn't we want to say some
23 things about that?

24 MR. McCLOUD: So, Justice Kagan, I
25 agree with you this decision is very

1 reasonable. I think the analysis that it
2 endorses is helpful and instructive and, in
3 fact, many district courts in the Ninth Circuit
4 have looked to it and applied it in assessing
5 these allegations.

6 JUSTICE KAGAN: Because, when I look
7 at some of the lower court decisions -- and
8 this may be different from what you said to
9 Justice Barrett -- I think that there is a
10 range of ways in which the circuit courts have
11 approached this, and some of them have
12 suggested you sort of need the same asset
13 allocations. So, you know, unless you invest
14 the same percentage in international funds,
15 we're going to strike your comparators. And
16 that seems to me to be going too far.

17 So we could do something useful here,
18 couldn't we, by saying: Yeah, it needs to be
19 meaningfully similar. That doesn't mean
20 identical. Here are the kinds of things that
21 you look to, and the kinds of things are
22 actually the kinds of things that you talk
23 about in your brief and, even more, the SG
24 talks about in its brief.

25 MR. McCLOUD: I don't have any

1 objection to that. I will say I think even the
2 narrower version of the opinion that just says
3 you need a meaningful comparison is still
4 helpful because we have the Sixth Circuit in
5 the Parker-Hannifin case that seemed to suggest
6 that you didn't need an apples-to-apples
7 comparison. And so you could bring the Sixth
8 Circuit in line through an opinion that's
9 narrower.

10 But, again, I have no objection to
11 endorsing the analysis in the Ninth Circuit
12 opinion. I think it's -- it's spot on.

13 CHIEF JUSTICE ROBERTS: Well, I mean,
14 your -- your friend on the other side spent
15 some time explaining the difficulty of giving
16 some substance to this. And I'm concerned, if
17 we're going to have a meaningful ruling, it --
18 it -- you can't simply make it sort of
19 everything -- almost everything works in
20 satisfying the test or -- or is required.

21 In other words, the point -- and I
22 think the Eighth Circuit emphasized this as
23 well -- is that it has to do some meaningful
24 work, and, I mean, there has to be some
25 difference between the discussion of what this

1 means from your friend and what you're saying
2 here.

3 MR. McCLOUD: So, if you want to --

4 CHIEF JUSTICE ROBERTS: So could you
5 give -- I mean, you've been very accepting of
6 various proposals about what it might mean, but
7 I wonder if you could give us a narrower
8 understanding, or maybe the answer is you
9 can't, in which case maybe the decision we
10 issue won't be much help at all.

11 MR. McCLOUD: Sure. And maybe I can
12 use the facts of this case to illustrate a
13 helpful comparison. So, in this case, as you
14 heard from Mr. Wessler, the argument was that
15 we had an acceptable strategy and we
16 implemented it in a bad way by over-allocating
17 the hedge funds in private equity.

18 To make the comparison meaningful, you
19 need to control for the strategy, keep the
20 strategy the same, but point to someone who
21 they say did it better by using fewer hedge
22 fund and private equity investments.

23 That's the sort of comparison that
24 might suggest imprudence because it would
25 suggest the difference in performance was

1 really due to our inclusion of hedge funds and
2 private equity.

3 That's not the comparison that they
4 tried to make in this case. In this case, they
5 were saying you didn't do as well as
6 equity-heavy funds that prioritized more
7 aggressive growth. Well, of course, we didn't
8 do as well because that wasn't our strategy.
9 We told everyone we were trying to be more
10 conservative and to make sure that retirees had
11 lots of money at the end of the day without
12 taking unnecessary risks.

13 So the obvious explanation for the
14 difference in performance in this case is the
15 difference in strategy.

16 JUSTICE ALITO: Do --

17 JUSTICE KAGAN: Is this --

18 JUSTICE ALITO: -- do experts on
19 portfolio management have analytical tools that
20 measure investment returns on a risk-adjusted
21 basis?

22 MR. McCLOUD: They do.

23 JUSTICE ALITO: And suppose that a
24 complaint relied on one of those. Would that
25 provide a meaningful comparison?

1 MR. McCLOUD: It could. It could be
2 the -- the basis for allegations of similar --
3 I would want to know more about the actual
4 allegations in the complaint, but I think that
5 sort of information could be relevant. And
6 there are district court decisions that have
7 credited similar sort of information.

8 JUSTICE JACKSON: Can I just go back
9 to your response to the Chief Justice? You
10 said that the claim, as you understood it from
11 them, is that there -- that you all have a
12 meaningful strategy but problematically
13 over-allocated the assets in these kinds of
14 risky funds. And so, for you, first of all,
15 would you need a comparator -- comparison in
16 your take on things to make out that claim?

17 MR. McCLOUD: If the argument is you
18 had an okay strategy, but you implemented it
19 poorly, I think you probably do want a
20 comparison. It's not required, but it would be
21 helpful because that's a way to control for the
22 strategy and show a difference.

23 I think you could have attacks on the
24 strategy itself that wouldn't require a
25 comparison. I agree with Mr. Wessler --

1 JUSTICE JACKSON: But --

2 MR. McCLOUD: -- on that.

3 JUSTICE JACKSON: -- but, if we have
4 this case, you're saying they wouldn't -- they
5 might not need to have a comparison, but if
6 they did, it would have to be meaningful, and
7 the meaningful nature of it would be someone
8 with the same strategy who perhaps allocated
9 differently?

10 MR. McCLOUD: Exactly. Exactly. But,
11 again, if you want to attack the strategy
12 itself, if you want to say you can't invest in
13 hedge funds, in private equity, that is an
14 argument you could make. And, in fact, they
15 did make it here. And the Ninth Circuit
16 rejected it, but it rejected it for reasons
17 that are outside of the question presented and
18 don't have anything to do with the meaningful
19 benchmark standard.

20 JUSTICE BARRETT: So, Mr. McCloud, do
21 you think it would be helpful then in defining
22 "meaningful" to say that the comparator must
23 have like aims and strategies? Does that give
24 enough guidance, or does that risk having lower
25 courts look for a twin?

1 MR. McCLOUD: I think that you could
2 say like aims and strategies, but "like" simply
3 means similar, not identical. I think that
4 would clear up, to the extent there's confusion
5 in the lower courts, some of that confusion.
6 And, again, from my read of the cases, all of
7 the courts seem to agree that like aims, the
8 goals of the investments, is the most important
9 consideration.

10 JUSTICE SOTOMAYOR: That is. But your
11 opposing counsel seems to suggest that courts
12 are looking for exact asset allocations when
13 the challenge here is that the asset allocation
14 here was imprudent.

15 So how do we address that?

16 MR. McCLOUD: I think you can simply
17 say you don't need an identical asset
18 allocation. And, in fact, in many cases, a
19 difference in asset allocation will be
20 probative of whether there's imprudence,
21 especially where, as here, you're saying the
22 asset allocation was the problem.

23 And the Ninth Circuit, to be clear, I
24 don't think, required a similar asset
25 allocation.

1 JUSTICE SOTOMAYOR: Neither do I, and
2 that's what I find interesting, because I think
3 what they were saying is that Intel didn't
4 identify anybody specifically whose intent was
5 risk management over the long term, correct?

6 MR. McCLOUD: That the allegation was
7 that there were no similarly situated --

8 JUSTICE SOTOMAYOR: Yes. That they
9 didn't even allege --

10 MR. McCLOUD: Oh, that the plaintiffs
11 didn't allege?

12 JUSTICE SOTOMAYOR: Yes, that the
13 plaintiffs.

14 MR. McCLOUD: Yes, absolutely.
15 They -- they never even tried to allege that
16 there was another fund that had a similar goal
17 that they were trying to compare us to. They
18 wanted to compare us to things like the S&P
19 500, which isn't even a -- an investment
20 strategy. It is just the agglomerated
21 strategies of 500 different companies.

22 The other thing they could have
23 done -- and I disagree with Mr. Wessler about
24 this too -- is they could have tried to compare
25 us to our own disclosed benchmarks. We had a

1 benchmark that we told participants --
2 participants about.

3 Mr. Wessler suggested they did that
4 comparison. The Ninth Circuit was very clear
5 and the district court was very clear that the
6 things that they called our benchmarks were not
7 our benchmarks. But I think that is an
8 available option for plaintiffs in these cases.

9 And there are a number of cases that
10 have found, if you make allegations against a
11 fund's own benchmarks, that can be probative of
12 imprudence.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas, anything further?

15 Anything else?

16 JUSTICE GORSUCH: Sorry.

17 CHIEF JUSTICE ROBERTS: Okay.

18 JUSTICE GORSUCH: Do you think --

19 (Laughter.)

20 JUSTICE GORSUCH: -- do you -- do you
21 think that under -- in an underperformance
22 claim, you always have to have a benchmark?

23 MR. McCLOUD: I think you do because
24 the premise --

25 JUSTICE GORSUCH: That's -- that's

1 enough. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE BARRETT: I'm confused. You
5 do always have to have a benchmark? Because I
6 thought that before -- maybe I misheard --
7 Justice -- I think it was Justice Gorsuch who
8 asked you a question. I mean, what if, to use
9 Mr. Wessler's example, you have a fund that's
10 50 percent lottery tickets?

11 I mean, couldn't there be some kind of
12 res ipsa where you didn't need a benchmark?

13 MR. McCLOUD: I don't view that as an
14 underperformance claim, Your Honor. That would
15 just be you had a --

16 JUSTICE BARRETT: Bad strategy?

17 MR. McCLOUD: -- bad strategy.

18 JUSTICE BARRETT: Okay. Thanks.

19 MR. McCLOUD: But, to the extent you
20 are premising your underperformance on saying A
21 did worse than B, I do think that comparison
22 has to be meaningful.

23 JUSTICE BARRETT: Got it. Thanks.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 Thank you, counsel.

2 MR. McCLOUD: Thank you.

3 CHIEF JUSTICE ROBERTS: Ms. Brown.

4 ORAL ARGUMENT OF AIMEE BROWN

5 FOR THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENTS

7 MS. BROWN: Thank you, Mr. Chief

8 Justice, and may it please the Court:

9 ERISA allows prudent fiduciaries to
10 make a range of reasonable judgments when
11 adopting investment objectives. They can
12 pursue varying degrees of exposure to market
13 upside and varying degrees of protection from
14 market downside. When different objectives
15 lead to different results, that does not
16 suggest imprudence.

17 In this case, Intel's fiduciaries had
18 the objective of reducing exposure to losses at
19 the acknowledged expense of some potential
20 upside. Petitioners have not challenged the
21 prudence of that objective. Instead, they have
22 asked the lower courts to infer that the
23 fiduciaries imprudently implemented that
24 objective based on the fact that Intel's funds
25 underperformed other funds.

1 But, to create that inference,
2 Petitioners have to compare Intel's funds to
3 other funds with similar objectives.
4 Otherwise, the obvious alternative explanation
5 for the difference in results is the difference
6 in objectives.

7 That common-sense understanding does
8 not mean that plaintiffs in every case need to
9 plead a comparator. There are myriad ways of
10 pleading imprudence without relying on
11 performance at all. But, when a claim is
12 premised on underperformance, the comparator
13 has to be similar to make the comparison
14 probative of the claim.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Do you have any
17 disagreement with the argument of Mr. McCloud?

18 MS. BROWN: I don't. I think we're --
19 we're well-aligned on the instances in which a
20 comparator is necessary, the work that it's
21 doing in these kinds of cases.

22 JUSTICE ALITO: Well, Mr. McCloud,
23 representing his client, I think, would be
24 satisfied with an affirmance in any opinion. I
25 certainly would if I were in his position.

1 But you're in a different position.

2 So how much guidance do you think it would be
3 prudent for us to give in this case?

4 MS. BROWN: I do think that it would
5 be helpful to suggest some parameters for what
6 the meaningful benchmark here, the meaningful
7 comparator needs to be. I think the easiest
8 way to do that is to assess it within the
9 confines of what we're doing with the duty of
10 prudence. Prudence is about process and not
11 about performance.

12 And so the plaintiff does have to
13 connect the dots back from the performance to
14 the process. In a case like this, that's going
15 to mean that the plaintiff is essentially
16 alleging that if its fiduciaries were acting
17 prudently, they would have selected the
18 better-performing fund, but, again, in order
19 for that to be the correct inference, you have
20 to hold constant the things that go into that
21 decision that the Petitioners are not
22 challenging as imprudent themselves.

23 And, here, that is the goals, the
24 objectives, the aims, sometimes it's been
25 called the strategy, of the funds to -- to

1 mitigate against potential down -- down --
2 downturns in the market. And when you hold
3 those constant and you provide two, you know,
4 different funds, one of which performed better
5 than the other, then maybe you have an
6 indication of some imprudence in selecting kind
7 of the worst performing of the funds. But,
8 without that kind of comparison that holds
9 constant the factors that go into the decision,
10 the implication just isn't there.

11 And it might be helpful to actually
12 apply that to this case and to show how the
13 Ninth Circuit, I think, did that correctly
14 because, here, the plaintiffs identified funds
15 that had different objectives entirely from
16 Intel's objective. They were these
17 equity-heavy retail funds that wanted more
18 exposure to the potential market upside.

19 And, you know, they were not
20 challenging, again, that Intel could have
21 prudently decided that that was not the right
22 strategy for them. The comparator funds did
23 end up overperforming Intel's funds. That's
24 not very surprising. The market ended up doing
25 pretty well during this relevant time period.

1 But that doesn't suggest that Intel's
2 fiduciaries were imprudent for wanting to
3 protect against potential downside, even if
4 that didn't end up materializing during the
5 relevant period here.

6 JUSTICE KAGAN: If you were to
7 fly-spec the Ninth Circuit's opinion and not --
8 I'm not asking for things you think are wrong
9 with it such that it would change the result
10 because you've clearly said you think it should
11 be affirmed.

12 But consistent with that disposition,
13 if I asked you to fly-spec the circuit court's
14 decision, would you have said anything
15 different? Would you have added things? Would
16 you have subtracted things? Is there anything?

17 MS. BROWN: So I think, at various
18 points -- I would have to go back and look at
19 the very, very precise language that they used.
20 Sometimes the courts in these cases have said
21 that it has to have the same objectives, the
22 same risk/reward profile, and the same
23 strategy, use an "and" instead of an "or" and
24 sometimes asset allocation is thrown into some
25 of those decisions. I agree that the Ninth

1 Circuit certainly didn't do that here. We --
2 we think that's correct. It does not have to
3 be the same asset allocation.

4 I think where some confusion could
5 happen is how you define what the strategy is.
6 So I've been using kind of objectives and aims
7 as this broader goal of we want to reduce
8 downside. We want to have kind of a
9 risk-mitigating approach.

10 The strategy in some cases is going to
11 be the way that you implement that objective.
12 And so, here, that would have been allocating
13 assets to the hedge funds and the private
14 equity funds. Obviously, we don't think you
15 have to hold that constant because that would
16 then have some of the problems that Petitioners
17 have suggested.

18 But I think that the Ninth Circuit
19 generally did the right thing. And -- and we
20 read the opinion the same way that -- that Mr.
21 McCloud does.

22 JUSTICE KAGAN: And on this asset
23 allocation point, I mean, your brief says --
24 this is -- I'm reading from page 25, "Where two
25 funds seek to achieve similar levels of risk

1 using different asset allocation strategies,
2 the challenged fund may be compared to a fund
3 with more conventional assets that bear the
4 same level of risk."

5 MS. BROWN: Exactly.

6 JUSTICE KAGAN: If you didn't allow
7 that, you would be essentially foreclosing
8 these claims from the outset.

9 MS. BROWN: Exactly. And we think
10 that Petitioners were perfectly capable of
11 doing that here. There are many different
12 assets that have the kind of downside
13 protection that Intel said it was using the
14 private equity funds and the hedge funds here
15 to accomplish.

16 And so they could have compared this
17 to a fund that had more allocations to bonds or
18 to high-yield savings accounts or something
19 like that. Intel -- or the -- the plaintiffs
20 here just chose not to do so. Instead, they
21 were comparing these to these kind of
22 equity-heavy funds that wanted to have more --
23 more exposure to the potential for the upside.

24 And I -- I don't think that the
25 correct kind of implication to draw from that

1 is that there weren't those kinds of funds
2 available. I think, more likely, the case is
3 that if they had tried to draw those kinds of
4 comparisons, Intel's funds just wouldn't really
5 have underperformed to any significant degree.

6 That's consistent with the way the
7 Ninth Circuit kind of understood the -- the
8 complaint here. Some of the charts in the
9 complaint tend to just suggest that Intel's
10 funds performed pretty much exactly as they
11 anticipated they would.

12 JUSTICE JACKSON: On this question of
13 the Ninth Circuit's opinion, do -- do you --
14 how do you respond to Petitioners' reading of
15 the opinion as isolating the underperformance
16 allegations and treating them in a certain way
17 before dealing with the others or however he
18 characterized it? Do you -- does the -- do you
19 agree with that view?

20 MS. BROWN: I think it's correct that
21 the Ninth Circuit first looked at the
22 underperformance allegations and determined
23 whether those under -- whether those
24 allegations were going to be probative at all
25 in the analysis, and it held that they were

1 not.

2 I don't think that that's incorrect
3 to -- to do that that way. I think that's very
4 consistent with Twombly, for example. In order
5 for those allegations to do any work, they have
6 to be tied to a meaningful comparator because,
7 otherwise, they are equally consistent with the
8 lawful alternative explanation here that these
9 just had different objectives, and so the
10 different results don't tell you anything.
11 That's not enough to take the complaint outside
12 of neutral territory, is the term that Twombly
13 uses at one point.

14 But then I think the Ninth Circuit did
15 continue on to look at all of the rest of the
16 allegations in the complaint and assess them on
17 their own merit to see if those allegations
18 moved the complaint outside of neutral
19 territory. They were insufficient on their own
20 for reasons that had nothing to do with
21 underperformance, as Mr. McCloud was saying.

22 I do want to reiterate, though, that
23 we agree that there is going to be
24 circumstances in which it's very possible to
25 plead these kinds of complaints without any

1 need for underperformance allegations at all.
2 And that can be the case when you are
3 challenging both, you know, the overall
4 objective that the fund is adopting or it could
5 be the case even when you're challenging the
6 implementation of that objective.

7 So if you had a fund, for example,
8 that stated that its objective was be -- to be
9 quite conservative and to not have a lot of
10 exposure to market downside, and then they
11 turned around and invested, you know,
12 45 percent of their assets in the biotech
13 industry alone, that on its face is just
14 inconsistent with the -- with the objective
15 that they have announced. I don't think you
16 need to find a comparator in order to make that
17 kind of claim.

18 And I think the same thing is going to
19 be true for allegations that go to the strategy
20 itself. You're not necessarily -- or go to the
21 overall objective itself. You don't
22 necessarily need a comparator.

23 The cases in which a comparator has
24 generally been more useful is when you're
25 challenging fees, because it can be helpful to

1 see kind of what else is on the market,
2 fees-wise. Even in those cases, you know, if
3 you -- if you made some kind of allegation
4 that the -- the -- the fees you're paying are
5 for duplicative services or something like
6 that, that can be a situation in which you
7 don't need a comparator too.

8 So it really all depends on whether
9 the Petitioner or the plaintiff, in this case,
10 has decided to put that comparison in the
11 complaint. That's when this kind of benchmark
12 analysis is going to come into play.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Anything further down on this end?

16 JUSTICE ALITO: No.

17 CHIEF JUSTICE ROBERTS: Thank you.

18 Rebuttal, Mr. Wessler?

19 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER

20 ON BEHALF OF THE PETITIONERS

21 MR. WESSLER: Thank you. Just a few
22 quick points in rebuttal.

23 You just heard the government agree
24 that the Ninth Circuit's approach requires
25 isolating a specific subset of allegations and

1 asking, separate and apart from the rest of the
2 allegations, whether those isolated allegations
3 are sufficient to permit an inference of
4 imprudence.

5 That is flatly inconsistent with Rule
6 8 and the approach that this Court has said
7 time and again applies to ERISA as it does
8 everywhere else, that all of the allegations
9 have to be taken together and assessed
10 holistically. I think that matters in a case
11 like this, where you have an allegation about
12 an imprudent either strategy or implementation
13 of that strategy, that then turns out badly.

14 The performance allegations play a
15 significant role in allowing a court to assess
16 whether, taken together, they permit a
17 plausible inference of imprudence, but that
18 kind of holistic analysis is foreclosed under
19 the Ninth Circuit's approach.

20 I also would caution this Court
21 against attempting to define at the outset what
22 can count as meaningful in this context. It's
23 ultimately a project doomed to fail because it
24 doesn't take account of the broad range of
25 contexts in which some kind of comparator could

1 be relevant.

2 Is it aims? Is it asset allocations?
3 Is it risks? All of that could be relevant or
4 none of it could be relevant. And a -- and an
5 attempt to provide a comparator could be
6 pointing to a dissimilar fund that is different
7 in the kinds of aims or objectives that the
8 challenged fund has.

9 That's why Rule 8 contemplates -- and
10 ERISA as well -- a context-specific inquiry
11 that doesn't rely on the kind of bright-line
12 rules that the Ninth Circuit embraced here.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 11:04 a.m., the case
18 was submitted.)

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1 10:03 [1] 4:2 14a [2] 24:2,9 15a [1] 24:10 2 248 [1] 32:3 25 [1] 63:24 25-498 [1] 4:4 3 30 [1] 20:8 39 [1] 3:7 4 4 [1] 3:4 40 [1] 32:9 45 [1] 67:12 5 50 [2] 38:8 57:10 500 [3] 45:23 55:19,21 58 [1] 3:11 6 60/40 [1] 32:5 68 [1] 3:14 8 8 [2] 4:22 69:6 A a.m [1] 4:2 ability [1] 15:23 able [2] 26:7 28:2 about [38] 13:8 15:18, 22 16:8 17:8 19:6 21: 10 23:4,20 26:12,13, 14 27:12 28:17 33:5 34:11,16 38:22 44:2, 15,18 45:2,4,5,13 46: 9 47:10,11,23 48:23, 24 50:6 52:3 55:23 56:2 60:10,11 69:11 absence [1] 36:12 absolutely [2] 12:14 55:14 acceptable [1] 50:15 accepting [1] 50:5 access [1] 34:15 accomplish [3] 22:6 24:11 64:15 accomplished [1] 20: 18 account [1] 69:24 accounting [1] 41:5	accounts [1] 64:18 accurate [1] 12:23 achieve [6] 21:15,21 22:11 27:17 35:10 63: 25 acknowledge [1] 42: 20 acknowledged [1] 58: 19 acting [2] 40:18 60:16 actual [2] 29:18 52:3 actually [8] 8:17 10:13 24:12 34:10 46:3 47: 18 48:22 61:11 added [1] 62:15 adding [1] 20:12 addition [2] 11:24 12: 2 additional [1] 36:6 address [4] 28:23,24 29:4 54:15 adequately [1] 46:2 admit [1] 37:7 adopt [1] 34:6 adopted [6] 8:16 10:7 13:17 16:3 27:17 32: 14 adopting [2] 58:11 67: 4 affirmance [1] 59:24 affirmed [1] 62:11 after [1] 27:20 again [11] 19:19 24:16 28:1 35:6 40:24 49: 10 53:11 54:6 60:18 61:20 69:7 against [6] 7:13 13:12 56:10 61:1 62:3 69: 21 agglomerated [1] 55: 20 aggressive [2] 42:6 51:7 agree [11] 7:14 8:6 16: 10 18:11 47:25 52:25 54:7 62:25 65:19 66: 23 68:23 agreeing [1] 19:4 agrees [2] 5:19 47:13 aim [2] 31:4,8 aimee [3] 2:6 3:9 58:4 aims [12] 8:18 9:2 23: 17 39:2 40:18 41:10 42:5 53:23 54:2,7 60: 24 63:6 alito [12] 15:10,12 16: 7 26:10 27:7,9 32:24 51:16,18,23 59:22 68:	16 all [26] 5:13 7:15 9:22 11:22 12:7,25 15:2,4 17:21 18:7 21:8 26:6 31:7 39:14 44:14 47: 12 50:10 52:11,14 54: 6 59:11 65:24 66:15 67:1 68:8 69:8 allega [1] 17:11 allegation [8] 9:3 14: 18 25:6,24 27:21 55: 6 68:3 69:11 allegations [95] 4:16 5: 1,6,14 6:16,19 7:5,20 9:20,21,23 10:5,9,17 11:1,4,13,21,21 14: 19,20,22 15:2,6,7 16: 12 17:11 18:16,21 19: 21,23,24,25 20:4,17 21:1,3 22:23,24,24 23:2,4 24:13,13,20, 24 25:3,4,7 26:6 27: 15 28:6 29:1 30:9 33: 9 35:6,12 36:13,25 37:3,7,11,15,18 39: 10 41:18,19,21,23 43: 9,11,23 44:16,18,22 45:4,5 46:22 48:5 52: 2,4 56:10 65:16,22, 24 66:5,16,17 67:1, 19 68:25 69:2,2,8,14 allege [7] 4:17 33:18 41:9 43:25 55:9,11, 15 alleged [2] 7:1 28:14 alleges [1] 22:5 alleging [3] 5:20 25: 12 60:16 allocated [1] 53:8 allocating [1] 63:12 allocation [19] 14:2 23: 14 25:18 28:2 32:17, 18 36:4,10,20 42:12 54:13,18,19,22,25 62: 24 63:3,23 64:1 allocations [6] 8:19 27:22 36:1 48:13 54: 12 64:17 allow [1] 64:6 allowed [2] 13:17 22: 22 allowing [1] 69:15 allows [1] 58:9 almost [1] 49:19 alone [4] 33:11 40:25 46:7 67:13 also [8] 10:15 11:7 13: 16 16:22 40:22 42:17	45:11 69:20 alternative [3] 41:5 59: 4 66:8 always [2] 56:22 57:5 amicus [3] 2:8 3:10 58:5 amounts [1] 25:16 an [43] 6:3 7:9 8:9,9, 13,17 12:7,23 14:7 15:5 18:4,24,24 20: 13 22:11 25:8,12,19 26:2 28:17 31:9 32:8 40:19 41:13,14 42:21 49:6,8 50:15 52:18 53:13 54:17 55:19 56: 7,21 57:13 59:24 61: 5 62:23,23 69:3,11, 12 analysis [9] 10:18 14: 17,24 20:7 48:1 49: 11 65:25 68:12 69:18 analytical [1] 51:19 analyze [1] 26:20 anderson [2] 4:4 16: 22 announced [1] 67:15 another [5] 5:21 8:23 12:2 36:9 55:16 answer [9] 17:16,23 22:17 29:5 40:8 43: 22 46:12,13 50:8 answered [2] 8:10 30: 16 anticipated [1] 65:11 any [12] 17:8 18:2 26: 5 36:12 41:4 45:19 48:25 59:16,24 65:5 66:5,25 anybody [1] 55:4 anything [16] 21:16 23:19 27:1,2 32:23, 25 35:2 44:24 47:11 53:18 56:14,15 62:14, 16 66:10 68:15 anywhere [1] 36:4 apart [3] 19:23 45:8 69:1 appearances [1] 2:1 appears [1] 23:13 appendix [1] 24:3 apple [7] 8:9 12:2,5,8 18:24,24 30:18 apples [7] 7:9 8:7 15: 14 18:14 29:1,1 30: 21 apples-to-apples [2] 41:13 49:6 application [1] 14:8	applied [3] 42:18 47: 15 48:4 applies [4] 10:23 17:9 26:4 69:7 apply [2] 39:9 61:12 approach [9] 10:7 12: 18 14:11 26:1 32:13 63:9 68:24 69:6,19 approached [1] 48:11 approaches [1] 28:9 appropriate [4] 19:5 43:1,2 46:17 are [58] 4:20 5:6,23 6: 6 10:9,17 13:2 14:1,1, 3,23 15:7,12 19:4 20: 21,22,24 21:8,18 23: 16 24:8 26:7 27:21 29:9 30:10 31:15 35: 7,9,9,21,22 36:13 37: 2,5 39:10 41:6 42:6,7, 21 43:11,23 44:9 45: 8 48:20,21 52:6 53: 17 54:12 56:9 57:20 59:9 60:21 62:8 64: 11 66:7 67:2 68:4 69: 3 aren't [2] 40:5 44:23 arguing [1] 27:10 argument [22] 3:2,5,8, 12 4:4,8 10:22 22:13 23:12,13 26:13,13 28: 17 29:4 34:20 39:19 50:14 52:17 53:14 58: 4 59:17 68:19 arguments [3] 26:12 39:24 44:14 around [1] 67:11 as [45] 2:8 3:10 4:13, 17 8:11,22,24 15:23, 23 16:1,24,25 17:5 18:6,6 28:20 32:3 35: 8 36:11 37:3 38:10, 10,10,11,11 40:6,25 45:17 47:14 49:22 50: 13 51:5,5,8 52:10 54: 21 57:13 58:5 60:22 63:7 65:10,15 66:21 69:7,22 ask [9] 10:20 19:24 21: 23 22:23 25:2,7 26:6, 9 43:20 asked [9] 13:24 22:7 28:22 29:3,12,15 57: 8 58:22 62:13 asking [4] 7:5 14:19 62:8 69:1 asks [6] 4:25 22:10 24: 5,20 28:24 43:23
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