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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
22 that 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 and ported 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 -- I'm
22 just trying to understand how the argument that
23 you just laid forward applies to your
24 complaint.

25 MR. WESSLER: Sure.

1 JUSTICE JACKSON: So you say we don't
2 rely solely on performance allegations, so what
3 do you rely on?

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

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

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

17 JUSTICE JACKSON: You don't need one?

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

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

1 And I think, going back to Justice
2 Thomas's question, the thing that you need
3 in addition is like another apple.

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

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

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

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

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

1 The Ninth Circuit ruled out all of the
2 proposed comparators in this complaint, okay?
3 It said none of them are "truly comparable"
4 under its definition of what can count.

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

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

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

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

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

1 comparators for these funds given the features,
2 what they are, what their objectives are, the
3 asset allocation, everything?

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

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

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

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

1 function of this meaningful benchmark rule that
2 was initially created in the Eighth Circuit,
3 where all you had were performance allegations.

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

11 JUSTICE ALITO: Well --

12 JUSTICE KAVANAUGH: Why --

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

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

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

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

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

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

14 JUSTICE KAVANAUGH: Why is --

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

17 MR. WESSLER: Yeah.

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

21 MR. WESSLER: Right. And --

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

1 as opposed to the strategy itself.

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

3 JUSTICE GORSUCH: So is that --

4 MR. WESSLER: -- a couple --

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

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

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

15 MR. WESSLER: Yeah.

16 JUSTICE GORSUCH: Let's suppose we're
17 going to answer the question presented, and --

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

19 JUSTICE GORSUCH: -- and -- let me
20 just -- let me just finish, counsel.

21 MR. WESSLER: Sorry.

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

24 But let's say we answer the question
25 presented and whether -- whether claims for

1 underperformance need -- require a meaningful
2 benchmark.

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

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

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

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

24 JUSTICE BARRETT: But don't you have
25 to do that to decide if an apple is an apple?

1 Don't you have to say, well, it has to be
2 round, you know, it has to come from a certain
3 kind of tree?

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

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

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

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

1 just on those performance allegations, does the
2 complaint demonstrate -- have a --

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

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

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

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

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

1 their objective.

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

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

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

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

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

23 MR. WESSLER: Right. So --

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

1 MR. WESSLER: -- not -- not in the way
2 that the fiduciaries did it. And I think
3 that's really the -- the thrust of this
4 complaint, is that no one -- if -- if risk
5 mitigation was your goal, the complaint
6 alleges, there were other, better-performing
7 ways to accomplish that goal. And the
8 complaint identified -- you asked, I think,
9 this --

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

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

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

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

1 imprudence?

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

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

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

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

1 JUSTICE JACKSON: Yes.

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

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

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

1 will fail to demonstrate imprudence and so
2 they're out of the case.

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

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

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

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

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

10 JUSTICE JACKSON: Can I just ask --

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

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

1 particular case doesn't really show you
2 anything, nor does the fact that it worked in a
3 particular case show you anything.

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

7 MR. WESSLER: Let --

8 JUSTICE ALITO: Maybe I'm not --

9 MR. WESSLER: Yeah. Let me --

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

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

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

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

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

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

11 JUSTICE GORSUCH: Let me --

12 MR. WESSLER: -- that were --

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

15 MR. WESSLER: -- alleged outside.

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

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

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

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

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

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

19 MR. WESSLER: Yeah, I understand. The
20 actual question.

21 JUSTICE GORSUCH: You wrote it. You
22 know it.

23 MR. WESSLER: Yes.

24 JUSTICE GORSUCH: It's -- it's
25 whether -- whether, for claims predicated on

1 fund underperformance, a meaningful benchmark
2 is required.

3 MR. WESSLER: Right.

4 JUSTICE GORSUCH: I'm paraphrasing,
5 but that's --

6 MR. WESSLER: Yes.

7 JUSTICE GORSUCH: -- that is what
8 you --

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

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

21 MR. WESSLER: Yep.

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

24 MR. WESSLER: Yep. I think it's
25 entirely context-dependent. What does the

1 complaint do to connect the dots between the
2 challenged fund and the proposed comparison?
3 But I -- and it could take --

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

8 MR. WESSLER: Yes.

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

16 MR. WESSLER: Yep.

17 JUSTICE SOTOMAYOR: -- these are
18 them --

19 MR. WESSLER: Yep.

20 JUSTICE SOTOMAYOR: -- who want to
21 control for long-term risk management --

22 MR. WESSLER: Yep.

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

1 MR. WESSLER: Yep.

2 JUSTICE SOTOMAYOR: I don't see that.

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas, anything?

1 Justice Alito?

2 Anything further, Justice Sotomayor?

3 Justice Kavanaugh?

4 Justice Gorsuch?

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

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

14 MR. WESSLER: No. But --

15 JUSTICE KAVANAUGH: And -- and why
16 does underperformance become relevant then?

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

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

24 MR. WESSLER: For -- for sure.

25 JUSTICE KAVANAUGH: -- a really good

1 strategy that ends up losing because of the way
2 the market turned.

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

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

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

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

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

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

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

14 And then the performance allegations
15 demonstrate --

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

19 MR. WESSLER: Sorry?

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

23 MR. WESSLER: Hedge funds are --
24 are --

25 JUSTICE KAVANAUGH: Were commonly used

1 by funds seeking to mitigate risk?

2 MR. WESSLER: Yes, but not in the
3 allocations that the Intel fiduciaries used
4 here. In fact, there is no other example of a
5 fund in a similarly sized plan that was
6 anywhere close to the allocation percentages
7 that the fiduciaries used here, which, if I
8 can, just points up one additional problem with
9 the Ninth Circuit's test because in requiring a
10 comparison to be materially indistinguishable
11 means that you would need to identify another
12 fund that was at the same asset allocation
13 levels as the Intel fiduciaries' fund, and the
14 absence of any such fund would mean that the
15 performance allegations are out of the case.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Justice Jackson?

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

1 comparator in order to establish or to support
2 that claim or those allegations?

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

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

11 MR. WESSLER: Yes.

12 JUSTICE JACKSON: -- you have some
13 performance allegations --

14 MR. WESSLER: Yes.

15 JUSTICE JACKSON: -- could you make
16 out the claim without the performance
17 allegations?

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

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

24 MR. WESSLER: No, I don't -- I don't
25 think so.

1 JUSTICE JACKSON: How -- wouldn't you
2 have to show or wouldn't -- wouldn't --

3 MR. WESSLER: Imagine --

4 JUSTICE JACKSON: Yes, please.

5 MR. WESSLER: -- if I can give you a
6 hypothetical.

7 JUSTICE JACKSON: Please.

8 MR. WESSLER: Imagine a situation
9 in which the fiduciaries' funds included
10 50 percent lottery tickets --

11 JUSTICE JACKSON: Mm-hmm.

12 MR. WESSLER: -- as a -- as a -- as --
13 as -- as implementing a particular strategic
14 objective.

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

20 JUSTICE JACKSON: Right. But, in the
21 world that we have --

22 MR. WESSLER: Yep.

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

1 Wouldn't, in order to make a plausible
2 claim with these facts, you have to demonstrate
3 that there were other funds that did not
4 have -- you know, that had the same aims, risks
5 and reward strategy but did not have that same
6 basket of assets, that did not --

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

8 JUSTICE JACKSON: So isn't that a
9 comparator?

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

14 JUSTICE JACKSON: I see.

15 MR. WESSLER: Yes.

16 JUSTICE JACKSON: All right. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. McCloud.

21 ORAL ARGUMENT OF CHARLES L. MCCLOUD
22 ON BEHALF OF THE RESPONDENTS

23 MR. MCCLOUD: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 I'd like to start today by noting that

1 much of my friend's arguments had little to do
2 with the question presented.

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

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

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

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

24 Requiring meaningful comparisons also
25 follows from well-established federal pleading

1 standards. Again, underperformance standing
2 alone is not a violation of ERISA, as my
3 friend conceded.

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

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

14 Mr. Wessler has called this
15 requirement of an apples-to-apples comparison
16 an improper heightened pleading standard.

17 That's not correct. This Court
18 regularly draws clear lines at the pleading
19 stage. Twombly did it for allegations of
20 parallel conduct. Dudenhofer did it for
21 allegations based on insider information.
22 Hikma did it most recently for allegations
23 based on inaction.

24 The meaningful benchmark standard does
25 the same thing for allegations that a fund

1 costs too much or didn't earn enough.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: How would you define
4 a meaningful benchmark?

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

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

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

1 case to case.

2 JUSTICE THOMAS: Do you think it's
3 appropriate -- well, you probably do -- but
4 does it seem appropriate to make -- make this
5 determination at the pleading stage on a motion
6 to dismiss?

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

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

21 JUSTICE BARRETT: Mr. McCloud, can
22 I -- can I ask you, would you be -- or would
23 you be satisfied or would it be a good idea for
24 the Court to simply answer the QP in this way?
25 You know, it asks whether, when allegations are

1 based on underperformance, the plaintiff must
2 allege a meaningful benchmark. Yes, period.

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

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

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

22 MR. McCLOUD: So, Justice Barrett, I
23 would have a harder case if the Ninth Circuit
24 had said your underperformance allegations
25 aren't sufficient and so we're not going to

1 consider anything else in your complaint.

2 That's clearly not what the Ninth Circuit did.

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

12 JUSTICE BARRETT: Thank you.

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

18 MR. McCLOUD: So, Justice Gorsuch, I
19 think it is true that, as a general matter,
20 underperformance is going to rarely be
21 indicative of any sort of imprudence.

22 The example that comes to mind where
23 it might be probative is let's say you had two
24 funds that had a similar goal of trying to
25 track the S&P 500, and you see Fund A

1 consistently meets that goal and Fund B
2 consistently fails to meet that goal.

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

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

18 MR. McCLOUD: I think that would be
19 appropriate, Your Honor.

20 JUSTICE GORSUCH: Thank you.

21 MR. McCLOUD: And I want to be clear.
22 Requiring a meaningful benchmark does not
23 prevent plaintiffs from making other sorts of
24 allegations of imprudence.

25 JUSTICE GORSUCH: We should -- we

1 should make sure to take -- take care to say
2 that we're hardly suggesting you have to do
3 this?

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

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

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

24 So why wouldn't we want to say some
25 things about that?

1 MR. McCLOUD: So, Justice Kagan, I
2 agree with you this decision is very
3 reasonable. I think the analysis that it
4 endorses is helpful and instructive and, in
5 fact, many district courts in the Ninth Circuit
6 have looked to it and applied it in assessing
7 these allegations.

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

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

1 talks about in its brief.

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

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

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

23 In other words, the point -- and I
24 think the Eighth Circuit emphasized this as
25 well -- is that it has to do some meaningful

1 work, and, I mean, there has to be some
2 difference between the discussion of what this
3 means from your friend and what you're saying
4 here.

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

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

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

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

25 That's the sort of comparison that

1 might suggest imprudence because it would
2 suggest the difference in performance was
3 really due to our inclusion of hedge funds and
4 private equity.

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

15 So the obvious explanation for the
16 difference in performance in this case is the
17 difference in strategy.

18 JUSTICE ALITO: Do --

19 JUSTICE KAGAN: Is this --

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

24 MR. McCLOUD: They do.

25 JUSTICE ALITO: And suppose that a

1 complaint relied on one of those. Would that
2 provide a meaningful comparison?

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

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

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

25 I think you could have attacks on the

1 strategy itself that wouldn't require a
2 comparison. I agree with Mr. Wessler --

3 JUSTICE JACKSON: But --

4 MR. McCLOUD: -- on that.

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

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

22 JUSTICE BARRETT: So, Mr. McCloud, do
23 you think it would be helpful then in defining
24 "meaningful" to say that the comparator must
25 have like aims and strategies? Does that give

1 enough guidance, or does that risk having lower
2 courts look for a twin?

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

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

17 So how do we address that?

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

25 And the Ninth Circuit, to be clear, I

1 don't think, required a similar asset
2 allocation.

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

8 MR. McCLOUD: That the allegation was
9 that there were no similarly situated --

10 JUSTICE SOTOMAYOR: Yes. That they
11 didn't even allege --

12 MR. McCLOUD: Oh, that the plaintiffs
13 didn't allege?

14 JUSTICE SOTOMAYOR: Yes, that the
15 plaintiffs.

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

24 The other thing they could have
25 done -- and I disagree with Mr. Wessler about

1 this too -- is they could have tried to compare
2 us to our own disclosed benchmarks. We had a
3 benchmark that we told participants --
4 participants about.

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

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas, anything further?

17 Anything else?

18 JUSTICE GORSUCH: Sorry.

19 CHIEF JUSTICE ROBERTS: Okay.

20 JUSTICE GORSUCH: Do you think --

21 (Laughter.)

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

25 MR. McCLOUD: I think you do because

1 the premise --

2 JUSTICE GORSUCH: That's -- that's
3 enough. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE BARRETT: I'm confused. You
7 do always have to have a benchmark? Because I
8 thought that before -- maybe I misheard
9 Justice -- I think it was Justice Gorsuch who
10 asked you a question. I mean, what if, to use
11 Mr. Wessler's example, you have a fund that's
12 50 percent lottery tickets?

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

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

18 JUSTICE BARRETT: Bad strategy?

19 MR. McCLOUD: -- bad strategy.

20 JUSTICE BARRETT: Okay. Thanks.

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

25 JUSTICE BARRETT: Got it. Thanks.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 Thank you, counsel.

4 MR. McCLOUD: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Brown.

6 ORAL ARGUMENT OF AIMEE BROWN
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE RESPONDENTS

9 MS. BROWN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

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

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

1 objective based on the fact that Intel's funds
2 underperformed other funds.

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

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

17 I welcome the Court's questions.

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

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

24 JUSTICE ALITO: Well, Mr. McCloud,
25 representing his client, I think, would be

1 satisfied with an affirmance in any opinion. I
2 certainly would if I were in his position.

3 But you're in a different position.
4 So how much guidance do you think it would be
5 prudent for us to give in this case?

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

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

25 And, here, that is the goals, the

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

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

21 And, you know, they were not
22 challenging, again, that Intel could have
23 prudently decided that that was not the right
24 strategy for them. The comparator funds did
25 end up overperforming Intel's funds. That's

1 not very surprising. The market ended up doing
2 pretty well during this relevant time period.

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

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

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

19 MS. BROWN: So I think, at various
20 points -- I would have to go back and look at
21 the very, very precise language that they used.
22 Sometimes the courts in these cases have said
23 that it has to have the same objectives, the
24 same risk/reward profile, and the same
25 strategy. It's used an "and" instead of an

1 "or," and sometimes asset allocation is thrown
2 into some of those decisions. I agree that the
3 Ninth Circuit certainly didn't do that here.
4 We -- we think that's correct. It does not
5 have to be the same asset allocation.

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

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

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

24 JUSTICE KAGAN: And on this asset
25 allocation point, I mean, your brief says --

1 this is -- I'm reading from page 25, "Where two
2 funds seek to achieve similar levels of risk
3 using different asset allocation strategies,
4 the challenged fund may be compared to a fund
5 with more conventional assets that bear the
6 same level of risk."

7 MS. BROWN: Exactly.

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

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

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

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

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

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

22 MS. BROWN: I think it's correct that
23 the Ninth Circuit first looked at the
24 underperformance allegations and determined
25 whether those under -- whether those

1 allegations were going to be probative at all
2 in the analysis, and it held that they were
3 not.

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

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

24 I do want to reiterate, though, that
25 we agree that there is going to be

1 circumstances in which it's very possible to
2 plead these kinds of complaints without any
3 need for underperformance allegations at all.
4 And that can be the case when you are
5 challenging both, you know, the overall
6 objective that the fund is adopting, or it
7 could be the case even when you're challenging
8 the implementation of that objective.

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

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

25 The cases in which a comparator has

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Anything further down on this end?

18 JUSTICE THOMAS: No.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Rebuttal, Mr. Wessler?

21 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER

22 ON BEHALF OF THE PETITIONERS

23 MR. WESSLER: Thank you. Just a few
24 quick points in rebuttal.

25 You just heard the government agree

1 that the Ninth Circuit's approach requires
2 isolating a specific subset of allegations and
3 asking, separate and apart from the rest of the
4 allegations, whether those isolated allegations
5 are sufficient to permit an inference of
6 imprudence.

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

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

22 I also would caution this Court
23 against attempting to define at the outset what
24 can count as meaningful in this context. It's
25 ultimately a project doomed to fail because it

1 doesn't take account of the broad range of
2 contexts in which some kind of comparator could
3 be relevant. Is it aims? Is it asset
4 allocations? Is it risks? All of that could
5 be relevant, or none of it could be relevant.
6 And a -- and an attempt to provide a comparator
7 could be pointing to a dissimilar fund that is
8 different in the kinds of aims or objectives
9 that the challenged fund has.

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

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 The case is submitted.

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

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