No. 20-609

In the Supreme Court of the United States

GANNETT COMPANY, INC., ET AL., PETITIONERS

v.

JEFFREY QUATRONE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SEEMA NANDA
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
JEFFREY M. HAHN
Counsel for Litigation
ALYSSA C. GEORGE
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires the fiduciaries of an employee benefit plan to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Fiduciaries must also "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). Fiduciaries who breach their duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). The question presented is:

Whether participants in a defined-contribution ERISA plan stated a claim for relief against the plan's fiduciaries for breach of the duties of prudence and diversification by plausibly alleging that the fiduciaries failed to adequately monitor and liquidate a non-employer single-stock fund that the fiduciaries maintained as an investment option for the plan.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 20-609

GANNETT COMPANY, INC., ET AL., PETITIONERS

v.

JEFFREY QUATRONE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Background

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Every ERISA-governed plan must have at least one named fiduciary with au-

thority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). In addition, anyone who exercises discretionary authority or control respecting an ERISA plan's management, or any authority or control respecting disposition of plan assets, is a fiduciary. 29 U.S.C. 1002(21)(A)(i).

ERISA subjects plan fiduciaries to several fiduciary duties derived from the common law of trusts. See 29 U.S.C. 1104(a); *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). Fiduciaries must act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of "providing benefits" and "defraying reasonable [plan] expenses." 29 U.S.C. 1104(a)(1)(A). Fiduciaries must also adhere to "the documents and instruments governing the plan" so long as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(D).

Two of ERISA's fiduciary duties are particularly relevant here. First, the duty of prudence requires plan fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Second, the duty of diversification requires fiduciaries to "diversify[ ] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). Those duties are "overlapping": Fiduciaries must diversify a plan's investments under Section 1104(a)(1)(C), and they must act prudently with respect to all plan investments under Section 1104(a)(1)(B), which incorporates its own requirement to diversify. *Schweitzer* v. *Investment Comm. of* *the Phillips 66 Sav. Plan*, 960 F.3d 190, 194 (5th Cir. 2020) (citation omitted), petition for cert. pending, No. 20-1255 (filed Mar. 8, 2021).

ERISA establishes one notable exemption from the statutory diversification duties: In an employee stock ownership plan (sometimes called an "ESOP")—a type of retirement plan that invests primarily in the stock of the company that employs the plan participants—"the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) [are] not violated by the acquisition or holding of * * * qualifying employer securities." 29 U.S.C. 1104(a)(2); see 29 U.S.C. 1107(d)(3)-(6); see also *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 412, 416-417 (2014). Whereas diversification is typically a critical element of prudent investing, Congress wanted to encourage ESOPs even though "they are *not* prudently diversified." *Dudenhoeffer*, 573 U.S. at 416.

An ERISA plan participant or beneficiary may sue on behalf of the plan to remedy a breach of fiduciary duty, 29 U.S.C. 1132(a)(2), and plan fiduciaries are personally liable for such breaches, 29 U.S.C. 1109(a).

2. This case involves an ERISA-governed defined-contribution plan whose tax treatment is determined by 26 U.S.C. 401(k). See Pet. App. 6a. In a defined-contribution plan, participants maintain individual investment accounts, the value of which "is determined by the market performance of employee and employer contributions, less expenses." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 525 (2015); see 29 U.S.C. 1002(34). Fiduciaries of defined-contribution plans are responsible for assembling a menu of investment options, and plan participants then choose their investments from that menu.

See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan* 3, 25 (Sept. 2020), https://go.usa.gov/xAR44. ERISA requires fiduciaries to "exercise prudence in selecting investments" for the plan, and then imposes a "continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529.

B. The Present Controversy

1. This case follows the 2015 spin-off of the media company previously known as Gannett Co., Inc. (Old Gannett) into two separate publicly traded companies: a broadcasting and digital company called TEGNA and a publishing company that took the name Gannett (New Gannett). Pet. App. 116a. Respondents are participants in New Gannett's 401(k) Savings Plan (the Plan). *Id.* at 2a.[1] Petitioners are New Gannett, the Gannett Benefit Plans Committee (the Plan's administrator), and individual Committee members. Pet. App. 2a.

Before the spin-off, Old Gannett's Section 401(k) plan included on its investment menu an employer-stock fund of Old Gannett stock, as permitted by Section 1104(a)(2)—the provision governing ESOPs. See Pet. App. 4a-6a. When Old Gannett made contributions to its employees' 401(k) accounts, it placed those contributions exclusively in the Old Gannett stock fund, after which employees could re-allocate the investments if they wished. *Id.* at 5a-6a.

---

[1] The original complaint was filed by Jeffrey Quatrone, on behalf of the Plan and a class of similarly situated Plan participants. See Pet. App. 54a. Quatrone subsequently moved to substitute Christina Stegemann as the named plaintiff. See *id.* at 48a. That motion was denied, *id.* at 51a, but Stegemann appealed and was a party in the court of appeals, see *id.* at 1a-2a. See also Sup. Ct. R. 12.6.

After the spin-off, when petitioners established the New Gannett Plan, they included on the Plan's investment menu an employer-stock fund for New Gannett stock. See Pet. App. 9a. But because New Gannett's employees were no longer employees of TEGNA, Section 1104(a)(2) no longer permitted petitioners to offer TEGNA stock without adhering to ERISA's diversification and prudence requirements. See *id.* at 6a. Nevertheless, petitioners included a single-stock "TEGNA Stock Fund" in the new Plan, in light of "the historical relationship between [New Gannett] and TEGNA," *id.* at 7a (citation omitted; brackets in original), and allowed participants to continue holding their pre-spin-off TEGNA stock in that fund, *id.* at 53a. Petitioners provided, however, that "the fund was 'frozen,' meaning that it started with the TEGNA stock in the Plan at the time of the spin-off," but participants were not permitted to add new investments to that fund and instead could only shift investments out of it to other funds on the Plan's menu. *Id.* at 7a (citation omitted). An "Employee Matters Agreement" executed around the time of the spin-off and referenced in the Plan documents allegedly stated that "all outstanding investments in the TEGNA Stock Fund shall be liquidated and reinvested in other investment funds offered in the Plan" on a timeline to be determined by petitioners. *Ibid.* (brackets and citations omitted). At the time of the June 2015 spin-off, the Plan allegedly "held $269 million invested in TEGNA common stock, representing more than 21.7% of the Plan's total assets." *Id.* at 8a (citation omitted).

Respondents allege that petitioners were warned by the Plan's auditors and investment consulting services in 2015 and 2016 that the Plan's investments in both TEGNA and New Gannett stock—two companies in the same economic sector whose value was likely to be correlated—"expose[d] the Plan to concentration risk." Pet. App. 8a-9a (citation omitted; brackets in original); see *id.* at 118a-125a, 130a-131a (amended complaint). Respondents further allege that TEGNA common stock "was significantly more volatile, and thus riskier, than other more-suitable investments," *id.* at 131a, and that "[d]uring 2015 several investment banks downgraded and/or were bearish about TEGNA common stock," *id.* at 135a. Respondents also allege that, "[d]espite the known issues with single-stock funds," petitioners "accepted qualitatively less thorough reports from [their] investment consultant on the TEGNA Stock Fund, as compared to the reports provided by the same consultant on the other funds on the Plan's menu." *Id.* at 9a; see *id.* at 126a-127a.

Petitioners allegedly continued to maintain the TEGNA Stock Fund in the Plan—frozen but otherwise unchanged—for two years after the spin-off until July 31, 2017, when they notified participants that the fund would be liquidated within a 12-month sunset period. Pet. App. 9a. Respondents further allege that, between the date of the spin-off and the end of 2016, TEGNA's stock price fell dramatically, causing Plan participants invested in that fund to lose tens of millions of dollars. See *id.* at 136a-138a.

2. Respondents brought this suit in March 2018, claiming that petitioners breached ERISA's duties of prudence and diversification by allowing the Plan to continue holding significant amounts of TEGNA stock until 2018. See Pet. App. 10a. Respondents assert that petitioners were or should have been on notice that the TEGNA Stock Fund—an undiversified single-stock fund—was an imprudent investment option for Plan

participants, particularly because the Plan also offered New Gannett stock, another single-stock fund in the same sector. See *id.* at 9a. Respondents therefore claim that petitioners should have divested the TEGNA Stock Fund immediately following the spin-off or at a minimum by mid-2016. See *id.* at 10a.

The district court granted petitioners' motion to dismiss for failure to state a claim on which relief could be granted. Pet. App. 52a-67a. The court then denied leave to amend, reasoning that respondents' proposed amended complaint did not cure the court's reasons for finding the original complaint deficient. *Id.* at 46a-51a.

3. The court of appeals reversed. Pet. App. 1a-45a.

The court of appeals first held that the amended complaint stated a claim for breach of ERISA's duty of prudence in Section 1104(a)(1)(B). See Pet. App. 15a-21a. The court relied on respondents' allegations that petitioners failed for two years to adequately monitor and remove the undiversified TEGNA fund despite the Employee Matters Agreement calling for that fund's liquidation, risk warnings from auditors and others, and the Plan's inclusion of the New Gannett single-stock fund in the same sector. See *id.* at 18a, 33a-34a. The court rejected the fiduciaries' argument that "diversification must be judged at the plan level rather than the fund level," holding that "each available fund on a [plan] menu must be prudently diversified" because "diversification is a component of prudence." *Id.* at 19a; see *id.* at 19a-21a.

The court of appeals also determined that respondents stated a claim for breach of ERISA's duty of diversification in Section 1104(a)(1)(C). See Pet. App. 21a-23a. "[E]ven assuming * * * that § 1104(a)(1)(C) does not extend down to the fund level, and that [the court] should instead seek diversity across the menu of funds in the plan," the court found that respondents' amended complaint plausibly alleges "that there was a failure to diversify at a plan level" given the fiduciaries' decision to offer both the TEGNA Stock Fund and the New Gannett ESOP—two single-stock funds "in the same sector" that would "tend to rise and fall together." *Id.* at 22a.

The court of appeals next rejected petitioners' contention that they had satisfied their fiduciary duties by freezing the TEGNA Stock Fund to new contributions. The court explained that prudent management sometimes requires fiduciaries to take the further step of divesting an imprudent investment. See Pet. App. 23a-26a. The court also rejected petitioners' argument that it was reasonable to afford Plan participants "the freedom to stay invested in" "legacy previous-employer stock in a frozen single-stock fund." *Id.* at 26a. The court explained that, while fiduciaries are not "liable for participant autonomy," *id.* at 29a; see 29 U.S.C. 1104(c)(1)(A), it is "inappropriate to assume * * * at the motion to dismiss stage" that Plan participants intentionally maintained holdings in their former employer's stock, as opposed to simply retaining their pre-existing investments out of inertia, Pet. App. 27a. See *id.* at 26a-30a.

Finally, the court of appeals determined that this Court's decision in *Dudenhoeffer* did not defeat respondents' claims. See Pet. App. 31a-33a. *Dudenhoeffer* held that ERISA fiduciaries managing an ESOP, like other investors, generally can "'rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information,'" and thus it is "implausible as a general rule" that a "fiduciary should have recognized from publicly available information alone that the market was overvaluing or undervaluing the stock * * * , at least in the absence of special circumstances." 573 U.S. at 426-427 (citation omitted). Here, the court of appeals explained, respondents "do not contend that [petitioners] should have outsmarted an efficient market," and their claims "do[] not turn on reading tea leaves to predict the *performance* of a stock—what *Dudenhoeffer* forecloses." Pet. App. 32a. Instead, respondents contend that the Plan's fiduciaries "should have recognized the imprudence of" the TEGNA Stock Fund "based on the fund's *composition*." *Ibid.* The court concluded that *Dudenhoeffer* does not control a claim that a fund was imprudent "due to lack of diversification." *Ibid.*

Judge Niemeyer dissented. Pet. App. 34a-45a. He reasoned that circuit precedent established that ERISA's diversification requirements apply "with respect to '*the plan*,' not with respect to *each investment* offered by the plan," *id.* at 40a (quoting 29 U.S.C. 1104(a)(1)(C)), and that it is not per se imprudent to offer single-stock funds in a defined-contribution plan, *id.* at 40a-44a. Judge Niemeyer further reasoned that *Dudenhoeffer* foreclosed respondents' contention that "the TEGNA stock's volatility made the inclusion of the TEGNA Stock Fund an imprudent investment." *Id.* at 44a. And he would have held that respondents' allegation that petitioners allowed the Plan's assets to be concentrated "in one company or one sector" does not reflect any breach of respondents' fiduciary duty but "merely reflects individual Plan participants' decisions as to how to allocate their own investments." *Id.* at 44a-45a.

The court of appeals denied rehearing en banc. Pet. App. 68a-69a.

DISCUSSION

The court of appeals correctly determined that respondents' amended complaint states claims for breach of ERISA's duties of prudence and diversification. Respondents plausibly allege that petitioners acted imprudently by failing to investigate red flags about the Plan's TEGNA stock holdings and to divest that stock within an appropriate time. Respondents also plausibly allege that the Plan as a whole was not adequately diversified because petitioners offered the TEGNA Stock Fund in addition to the New Gannett ESOP in the same sector. Contrary to petitioners' contention, the court of appeals' decision does not create any clear conflict with the decision of another federal court of appeals that warrants this Court's review. And petitioners likewise err in asserting that the court of appeals' decision conflicts with *Dudenhoeffer*. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals' Decision Is Correct

Taking respondents' factual allegations in the amended complaint as true at the pleading stage, they have shown that petitioners breached ERISA's duties of prudence and diversification. The court of appeals thus correctly reversed the district court's judgment dismissing respondents' claims for failure to state a claim on which relief could be granted.

1. Respondents plausibly allege that the Plan's fiduciaries breached their duty of prudence by retaining a non-employer single-stock fund in the circumstances here

a. Respondents have stated a claim for breach of ERISA's duty of prudence under Section 1104(a)(1)(B) by plausibly alleging that petitioners failed to adequately investigate whether to maintain TEGNA stock in the Plan and failed to divest that stock earlier, despite a number of factors indicating that it was imprudent to continue offering TEGNA stock.

As an undiversified single-stock fund, the TEGNA Stock Fund was significantly riskier than other potential investments that petitioners could have selected for the Plan. See *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 416 (2014) (observing that single-stock funds are "*not* prudently diversified"); *Schweitzer* v. *Investment Comm. of the Phillips 66 Sav. Plan*, 960 F.3d 190, 198 (5th Cir. 2020) (noting that "courts have expressed concern about the prudence of single-stock funds"), petition for cert. pending, No. 20-1255 (filed Mar. 8, 2021). That risk obligated petitioners to exercise particular caution when continuing to offer the TEGNA fund. Yet petitioners maintained that fund in the Plan not because of its merit as a vehicle for "providing benefits" to participants—which should have been petitioners' "exclusive purpose" in selecting Plan investments, 29 U.S.C. 1104(a)(1)(A)(i)—but rather because of New Gannett's historical affiliation with TEGNA. See Pet. App. 127a-128a. If respondents prove those allegations, then petitioners breached their duty of prudence under Section 1104(a)(1)(B). A prudent investing trustee would not select a trust's investments based on historical relationships as opposed to each investment's potential for generating returns for beneficiaries. See *Dudenhoeffer*, 573 U.S. at 421 (ERISA holds plan fiduciaries to the standard of prudent "trustees who manage investments * * * to secure [benefits] for the trust's beneficiaries.").

Respondents' amended complaint also included several additional allegations to bolster their claim that petitioners acted imprudently under the particular circumstances here. Courts have recognized that, "[b]ecause of the built-in imprudence, * * * fiduciaries for plans investing in employer securities must be especially careful to do nothing to increase the risk faced by the participants still further." *Schweitzer*, 960 F.3d at 198 (citation and internal quotation marks omitted). Yet petitioners offered the TEGNA fund in the Plan in addition to the New Gannett ESOP, another single-stock fund in the same sector, which magnified the risk of both funds. See Pet. App. 111a-112a, 135a. Respondents also allege that petitioners were advised throughout 2015 and 2016 that the Plan's TEGNA holdings were over-concentrated and unduly risky, but petitioners nevertheless did not act. See *id.* at 118a-125a, 130a-131a. Indeed, whereas petitioners allegedly received "highly detailed information" from consultants regarding the Plan's other investments, they allegedly did not monitor the TEGNA Stock Fund with the same analysis. See *id.* at 126a-127a. Respondents further allege that the Employee Matters Agreement *required* petitioners to liquidate the Plan's investments in TEGNA. See *id.* at 116a-117a; see also 29 U.S.C. 1104(a)(1)(D) (Fiduciaries must follow "the documents and instruments governing the plan.").

If those allegations are proven, then petitioners knew or should have known that they were obligated not to maintain TEGNA stock in the Plan, and the remaining question for trial will be simply whether petitioners moved quickly enough to divest that stock. Respondents' allegations suffice to make it plausible that a prudent trustee would have done more to closely monitor the TEGNA Stock Fund and would not have retained that fund for two years after the spin-off.

b. Petitioners assert (Pet. 22) that the court of appeals' holding that the amended complaint states a claim for relief would "erode[] the freedom of participants in defined contribution plans to choose how best to invest their savings." But while defined-contribution plan participants are free to direct their own investments *within* the plan menu, ERISA imposes "strict standards of trustee conduct," *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985), that require the plan's fiduciaries to "exercise prudence in selecting [the] investments" that populate that menu and in "continuing * * * to monitor trust investments and remove imprudent ones," *Tibble* v. *Edison Int'l*, 575 U.S. 523, 529 (2015). The court's analysis here accords with ERISA's objective "to ensure that imprudent options are not offered to plan participants." *Howell* v. *Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir.), cert. denied, 565 U.S. 816 (2011); see *Schweitzer*, 960 F.3d at 197 ("[F]iduciaries must engage in a reasoned decision-making process for investigating the merits of each investment option and ensure that each one 'remain[s] in the best interest of plan participants.'") (citation and footnote omitted).

The court of appeals also correctly accounted for plan participants' freedom of choice at the motion-to-dismiss stage. See Pet. App. 26a-30a. If petitioners can ultimately prove that offering TEGNA stock on the Plan menu was prudent, and that the losses that participants experienced when TEGNA's stock price dropped were attributable to their own deliberate choices to concentrate their investments in that stock, then petitioners will not be liable under Section 1104(c), which shields certain fiduciaries from liability for losses that "result[] from [a] participant's * * * exercise of control."

29 U.S.C. 1104(c)(1)(A)(ii); see 29 C.F.R. 2550.404c-1. That provision protects fiduciaries against losses that arise from plan participants' idiosyncratic or unwise allocation decisions. See, *e.g.*, 29 C.F.R. 2550.404c-1(f)(5). But Section 1104(c) does not protect fiduciaries against claims for including imprudent funds on a plan menu. See Pet. App. 30a; see also *Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans)*, 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992) ("[T]he act of limiting or designating investment options * * * is a fiduciary function."). And as multiple courts of appeals have explained, the Section 1104(c) defense requires a fiduciary to establish specified prerequisites and therefore typically cannot be resolved on a motion to dismiss. See Pet. App. 30a (citing decisions from four other circuit courts). That conclusion was particularly appropriate here, where the court of appeals found it "dubious" that Plan participants intentionally favored TEGNA stock after the spin-off, as opposed to simply leaving unchanged their prior employer-contributed stock holdings as a matter of inertia. *Id.* at 27a.

Petitioners emphasize the court of appeals' statement that "each available fund on a menu must be prudently diversified," Pet. App. 19a, which petitioners portray as a holding that fiduciaries may never offer single-stock or other non-diversified funds in an ERISA plan. See Pet. 26-28. If the court had actually interpreted ERISA to categorically prohibit single-stock or non-diverse funds from being included in a defined-contribution plan, then that would have been error, because such a per se rule would "conflict with the fact-specific focus of the duty of prudence." *Schweitzer*, 960 F.3d at 198. While "a single-stock investment option may be imprudent in some circumstances," and prudence requires fiduciaries to be "'especially careful'" when offering non-diverse investments, *ibid.* (citation omitted), the duty of prudence ultimately depends on "the circumstances then prevailing" at the time the fiduciary acts, 29 U.S.C. 1104(a)(1)(B). See *Dudenhoeffer*, 573 U.S. at 425 (observing that "the appropriate inquiry will necessarily be context specific"). But the court of appeals in fact disclaimed creating any "per se rule against single-stock, non-employer funds," and made clear that its holding in this case was based instead on respondents' allegations of "a single-stock fund with a relatively high degree of risk and [petitioners'] failure to consider the surrounding facts and circumstances." Pet. App. 20a n.9. As explained above, that analysis correctly applied principles of prudent investing to the factual allegations in respondents' amended complaint.

c. Contrary to petitioners' contention (Pet. 23-26), this Court's decision in *Dudenhoeffer* does not cast doubt on the plausibility of respondents' claims. *Dudenhoeffer* held that it is generally "implausible" that "a fiduciary should have recognized from publicly available information alone that the market was overvaluing or undervaluing" a publicly traded stock. 573 U.S. at 426. Thus, absent special circumstances, fiduciaries managing an ESOP may rely on the market price of a publicly traded stock as reflecting the stock's value based on all publicly available information, and the fiduciaries are not expected to "outsmart a presumptively efficient market." *Id.* at 427 (citation omitted).

As the court of appeals explained, however, respondents do not claim that petitioners should have outsmarted the market by recognizing that TEGNA's stock price was inflated; respondents instead claim that the fiduciaries were imprudent for failing to diversify the Plan's investments. See Pet. App. 32a-33a. *Dudenhoeffer* might foreclose a claim "that a fiduciary should have known from public information that the market underestimated the risk of holding a publicly traded security," but *Dudenhoeffer* "do[es] not apply" to a claim like respondents' that the Plan was "imprudent because of the risk inherent in failing to diversify." *Schweitzer*, 960 F.3d at 197. That is because "the Efficient Market Hypothesis and modern portfolio theory" hold that "stock prices in efficient markets do not reflect risks that an investor could eliminate through diversification." *Id.* at 197 n.36.

Respondents' claim here would not require proof that petitioners should have "beat the market" by predicting the decline in TEGNA's stock price. *Schweitzer*, 960 F.3d at 197. Rather, respondents contend that petitioners failed to exercise prudence when continuing to maintain the TEGNA Stock Fund on the Plan menu, including by failing to prudently monitor that fund, despite its status as an undiversified (and thus riskier) investment. See Pet. App. 113a (alleging that "[p]rudent fiduciaries of retirement plans would not have permitted such a concentrated investment in the volatile stock of a single company, particularly for so long"). The court of appeals thus correctly determined that *Dudenhoeffer* does not control a claim like respondents' based on the TEGNA fund's undiversified *composition*, as opposed to its performance. See *id.* at 32a.

2. Respondents plausibly allege that the Plan's fiduciaries breached their duty of diversification

The court of appeals also correctly determined that respondents stated a claim for breach of ERISA's duty of diversification, which requires plan fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C).

Respondents allege that the fiduciaries' decision to offer the TEGNA Stock Fund in addition to the New Gannett ESOP "subjected participants to additional risks" because the two stocks are in the same industry and therefore "exhibit high correlation." Pet. App. 111a-112a. The court of appeals found that those facts "caused the Plan overall to have a diversification problem." *Id.* at 22a. Respondents further allege that those risks were exacerbated by the substantial volume of TEGNA stock held in the Plan—more than $269 million, comprising about 21.7% of the Plan's total assets at the time of the spinoff—which resulted from petitioners' decision to maintain participants' significant pre-spin-off TEGNA stock holdings. See *id.* at 117a-118a. Respondents' allegations state a plausible claim for failure to diversify because concentrating a substantial volume of the Plan's assets in two single-stock funds that were also highly correlated exposed Plan participants to a "risk of large losses." 29 U.S.C. 1104(a)(1)(C). And petitioners' stated reason for assuming that risk—the historical relationship between New Gannett and TEGNA—was not "clearly prudent." *Ibid.*

Petitioners assert (Pet. 13 n.4) that the court of appeals' holding regarding the duty to diversify was based on respondents' allegations that the Plan "was excessively concentrated in media sector funds." As the court explained, however, its conclusion rested on petitioners' "fund selection," not "investment volume alone." Pet. App. 23a n.10. The court's analysis was sound. The fact that participants in a defined-contribution plan have concentrated their investments in a non-diverse manner is not itself sufficient to show a breach of the fiduciaries' duty of diversification, though that behavior may be a material consideration for fiduciaries who are prudently monitoring the plan's investments and determining which funds to continue offering in the plan "so as to minimize the risk of large losses." 29 U.S.C. 1104(a)(1)(C). See Pet. App. 23a n.10. Ensuring proper diversification may also require the fiduciaries to consider whether plan participants likely simply left unaltered a former employer's contributed stock.

B. The Court Of Appeals' Decision Does Not Warrant Further Review

Petitioners contend (Pet. 16-21) that a writ of certiorari is warranted to address a "conflict between the federal courts of appeals concerning the duties of prudence and diversification under § 1104(a)(1)," specifically "whether fiduciaries face a duty to diversify each investment option in a defined contribution plan, or whether the duty of diversification is limited to the overall menu of investment options in the plan." Pet. 16. Petitioners also assert (Pet. 25) a conflict over the application of *Dudenhoeffer*. Contrary to petitioners' contention, there is no conflict that warrants this Court's review.

1. In the first place, the decision below did not create a conflict over the scope of the duty of diversification in Section 1104(a)(1)(C). Petitioners emphasize (Pet. 17-18) the Fifth Circuit's holding in *Schweitzer*, *supra*, that Section 1104(a)(1)(C) "looks to a pension plan as a whole, not to each investment option." 960 F.3d at 195; see *id.* at 196. The Second Circuit interpreted Section 1104(a)(1)(C) the same way in *Young* v. *General Motors*

Investment Management Corp., 325 Fed. Appx. 31, 33 (2009).

The Fourth Circuit was willing, however, to "assum[e] [that] the Second Circuit [in *Young*] was correct that § 1104(a)(1)(C) does not extend down to the fund level, and that [the court] should instead seek diversity across the menu of funds in the plan," because *Young* did not involve a claim that selecting an undiversified fund for a plan breached the separate ERISA duty of prudence under Section 1104(a)(1)(B). Pet. App. 22a. Moreover, the Fourth Circuit found that respondents' amended complaint states a plausible claim for relief even if the duty to diversify is considered at the plan level—as the Fifth and Second Circuits have concluded—because respondents' allegations that "New Gannett and TEGNA are in the same sector and tend to rise and fall together" means that "the interplay between the two single-stock funds caused *the Plan overall* to have a diversification problem." *Ibid.* (emphasis added); see *id.* at 23a n.10 ("[W]e emphasize that the § 1104(a)(1)(C) diversification claim here turns on fund selection.").

The court of appeals thus did not disagree with the Fifth and Second Circuits' interpretation of Section 1104(a)(1)(C), nor did it hold that including a single-stock fund on a diverse menu of options in a defined-contribution plan necessarily states a claim for breach of that provision.

2. Respondents further have not shown a significant circuit conflict regarding the scope of ERISA's duty of prudence in Section 1104(a)(1)(B). The Fourth Circuit's decision does not conflict with *Young*, which did not consider a claim that including an undiversified non-employer

fund in a defined-contribution plan breached the duty of prudence.[2]

Nor does the court of appeals' decision meaningfully conflict with the Fifth Circuit's decision in *Schweitzer*. Petitioners focus on the court's statement that "each available fund on a menu must be prudently diversified," Pet. App. 19a, which they describe as a holding that it "was sufficient [for respondents] to state a claim for breach of the diversification requirement of the duty of prudence" merely by alleging that the TEGNA Stock Fund itself was undiversified, Pet. 19. That holding, petitioners say, conflicts with *Schweitzer*'s conclusion, in another case arising from a corporate spin-off, that ERISA fiduciaries were not "obligated to force [p]lan participants to divest from" a legacy employer's single-stock fund. Pet. 18 (quoting 960 F.3d at 198). Petitioners' account misreads the court of appeals' holding here, and the different outcomes in this case and *Schweitzer* can be explained by different factual allegations between the two complaints.

As discussed above (pp. 14-15, *supra*), the court of appeals' opinion cannot be reasonably understood to adopt a per se rule against offering single-stock or other undiversified funds. The court expressly stated that it was *not* adopting such a rule, and that its conclusion was grounded on "[respondents'] allegations," which must be taken as true and held to a "plausibility standard" at the motion-to-dismiss stage. Pet. App. 20a n.9. Moreover, the court gave multiple reasons for finding that the amended complaint stated a claim for relief beyond merely the undiversified character of the TEGNA Stock

---

[2] The only duty-of-prudence claim discussed in *Young* concerned whether the plan had charged participants excessive fees. See 325 Fed. Appx. at 33.

Fund, including the Plan's additional inclusion of New Gannett stock, the Employee Matters Agreement requiring liquidation of the TEGNA fund, and risk warnings from auditors and others regarding continuing to hold TEGNA stock. See *id.* at 18a. The court also recognized that petitioners could ultimately prevail in this case by proving "either that they did undertake a thorough investigation, or that a hypothetical prudent fiduciary would have retained the TEGNA Stock Fund in its undiversified form had such a hypothetical prudent fiduciary investigated." See *id.* at 20a n.9. Those statements in the court's opinion are inconsistent with petitioners' contention that the court held that merely alleging the presence of an undiversified fund suffices to state a claim for imprudence.

The court of appeals' fact-specific analysis for evaluating the prudence of petitioners' alleged management decisions—which included considering the TEGNA fund's lack of diversification and the broader lack of diversification for the Plan as a whole—accords with the Fifth Circuit's approach. Like the Fourth Circuit here, the Fifth Circuit in *Schweitzer* recognized that undiversified funds generally carry "'built-in imprudence'" such that fiduciaries "must be 'especially careful to do nothing to increase the risk faced by the participants still further.'" 960 F.3d at 198 (citation omitted). Indeed, the Fifth Circuit determined that the plaintiffs there had "plausibly alleged" that the legacy employer's stock, "by its resulting concentration of investment, became an imprudent investment with the spinoff." *Ibid.* That conclusion is fully consistent with the Fourth Circuit's holding here.

The only difference between the results here and in *Schweitzer* concerns the circumstances under which prudence requires ERISA fiduciaries to divest a legacy employer's single-stock fund, as opposed to merely freezing the fund to new investments. The Fifth Circuit held that ERISA did not obligate the *Schweitzer* fiduciaries to divest such a fund where they gave participants the freedom to allocate their investments; where they "repeatedly" warned plan participants that single-stock investments carry higher risk and that diversification "'is a key principle of sound investing'"; and where participants had chosen "[w]ith a rising market * * * [to] balanc[e] the risk of a want of portfolio diversity against the rising values of [the legacy employer's] stock." 960 F.3d at 198-199. That holding does not substantially conflict with the Fourth Circuit's conclusion that petitioners here were required to divest the TEGNA stock, because the Fourth Circuit's conclusion was based on facts that were not alleged in *Schweitzer*. In particular, respondents allege that petitioners did not even "take up the matter of retaining a single-stock fund in the Plan for nearly two years after [that stock] lost its employer stock exemption," despite the Employee Matters Agreement obligating petitioners to divest the TEGNA stock, the additional risks created by offering New Gannett stock, and the risk warnings that petitioners had received about maintaining the TEGNA fund. Pet. App. 25a; see *id.* at 18a.

In sum, both the Fifth Circuit and the Fourth Circuit agree that a duty-of-prudence claim requires a "fact-specific focus." *Schweitzer*, 960 F.3d at 198; see Pet. App. 16a ("What counts as an imprudent investment that must be removed depends on the circumstances."); accord *Dudenhoeffer*, 573 U.S. at 425. And there is a meaningful difference between the facts of *Schweitzer* and those alleged here, where petitioners were warned about the risks of TEGNA stock and obligated by a Plan-incorporated document to liquidate that fund.

3. Finally, petitioners are also incorrect in suggesting (Pet. 25) that the decision below creates a circuit conflict concerning the application of *Dudenhoeffer*. As described above, the Fifth Circuit has read *Dudenhoeffer* the same way as the court of appeals in this case. See p. 16, *supra*; *Schweitzer*, 960 F.3d at 197. Petitioners invoke the Eighth Circuit's decision in *Usenko* v. *MEMC LLC,* 926 F.3d 468, cert. denied, 140 S. Ct. 607 (2019), which held that certain ERISA claims were implausible in light of *Dudenhoeffer*, see *id.* at 473-474. But unlike the amended complaint in this case, the *Usenko* complaint merely "fault[ed] the defendants for failing to act on * * * publicly available information" about the stock's declining value. *Ibid.* The Eighth Circuit thus found that the plaintiff's allegations were "undeniabl[y]" "similar[ ]" to those that this Court rejected in *Dudenhoeffer*. *Id.* at 473. The Eighth Circuit did not even address allegations that the defendants had breached their fiduciary duties by failing to diversify. See *id.* at 475 n.5. There is accordingly no tension between *Usenko* and the court of appeals' decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General

SEEMA NANDA
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
JEFFREY M. HAHN
Counsel for Litigation
ALYSSA C. GEORGE
Attorney
Department of Labor

NOVEMBER 2021