No. 25-498

IN THE

# Supreme Court of the United States

WINSTON R. ANDERSON, et al.,

*Petitioners*,

v.

INTEL CORPORATION INVESTMENT POLICY COMMITTEE, et al.,

*Respondents*.

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* THE AMERICAN INVESTMENT COUNCIL & THE MANAGED FUNDS ASSOCIATION IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are leading trade associations in the alternative asset industry. The American Investment Council is an advocacy and research organization focused on the private investment industry and its contributions to the U.S. economy, American businesses, and workers' retirement security. Its mission is to advance access to capital, job creation, retirement security, innovation, and economic growth in the United States by promoting responsible long-term investment. AIC's members include many of the country's leading private equity and private credit firms.

Managed Funds Association represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA has more than 180 fund-manager members, including traditional hedge funds, private credit funds, and hybrid funds, which employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

*Amici* file this brief to explain how including alternative assets in retirement portfolios benefits 401(k) plan participants and how unwarranted litigation risk—exemplified by petitioners' suit—has

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

prevented workers from enjoying those benefits. The meaningful-benchmark standard applied by the court below appropriately shields ERISA fiduciaries from meritless litigation over investment decisionmaking, thereby enabling workers to benefit from investments in alternative assets.

## INTRODUCTION AND SUMMARY OF ARGUMENT

A chasm divides the American retirement landscape. On one side, defined-benefit plans—like other institutional investors—invest heavily in alternative assets such as private equity, private credit, and hedge funds. On the other, defined-contribution plans—including the 401(k) plans that countless American workers rely on to save for retirement—have scarcely any exposure to alternative assets at all.

The reason for that fissure is not that alternative assets are unsuitable for defined-contribution plans. On the contrary, alternative assets can increase 401(k) plan participants' retirement savings by offering better returns while mitigating downside risk through diversification. Exposure to alternative assets can readily be made available to participants through professionally managed products that address the unique needs of participants in defined-contribution plans. Yet such opportunities are nearly non-existent in today's 401(k) plan options.

The main explanation for the disparity between defined-benefit and defined-contribution plans' use of alternative assets is unwarranted litigation risk. Fiduciaries have learned through experience that adding a new or uncommon investment option to a 401(k) plan can invite costly ERISA litigation, regardless of the fiduciary's prudence in selecting the investment.

The danger is that a prudently selected but new or unique strategy will stand out—attracting nuisance suits. And once a case makes it past a motion to dismiss, the litigation becomes too costly to sustain, even if the fiduciaries would ultimately prevail. Plaintiffs' lawyers are thus often able to win settlements of meritless claims, on terms typically far more lucrative for the attorneys than their clients.

Petitioners' suit is a case in point. Respondents—the fiduciaries of Intel Corporation's retirement plans—adopted a risk-mitigation strategy designed to avoid large losses during a bear market and used alternative assets to implement that strategy. Petitioners contend that was imprudent because investing in alternative assets was uncommon among 401(k) plans and public equities happened to perform well from 2011 to 2018, allegedly outperforming the fiduciaries' conservative strategy.

That legal theory lacks merit. A fiduciary who chooses a strategy that is new or unique in the 401(k) context is not for that reason less prudent than one who follows the crowd, and the fact that public equities enjoyed a subsequent bull market says nothing about the fiduciary's decision "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B).

Affirming the meaningful-benchmark standard applied by the court below will help alleviate the unwarranted litigation risk that has discouraged fiduciaries from offering 401(k) plan participants investment options that include alternative assets. The standard derives from ERISA's text, trust-law roots, and its purpose—all of which establish that an investment's performance is seldom probative of the prudence of selecting it. For claimants who nonetheless allege that an investment's performance—rather than

fiduciaries' decisional process—supports an inference of imprudence, the meaningful-benchmark standard tests the plausibility of that inference by requiring that performance comparisons drawn by plaintiffs be with regard to investments that have a similar strategy and objective. The Court's affirmation of this standard will ensure that meritless suits based on Monday-morning quarterbacking are disposed of early, thereby reducing the pressure on fiduciaries to settle and enabling them to offer 401(k) plan participants access to alternative assets without undue fear of litigation.

## ARGUMENT

### I. WORKERS SHOULD HAVE GREATER ACCESS TO ALTERNATIVE ASSETS IN THEIR 401(K) PLANS.

Petitioners assert (at 1) that ERISA fiduciaries typically "sh[y] away from" alternative assets such as "[h]edge funds and private equity" because they "make little sense" as a significant component of a retirement fund. That is incorrect. Allocating a substantial portion of a retirement portfolio to alternative assets makes perfect sense: it tends to increase returns in the long run while diversifying the portfolio and reducing the risk of large losses. The real reason that ERISA fiduciaries have shied away from alternative assets is that "litigation expenses" driven by opportunistic plaintiffs' lawyers have "unduly discourage[d] employers from offering" these investments. *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

#### A. Alternative Assets Can Improve Long-Term Retirement Outcomes By Boosting Returns And Reducing Risk.

Alternative assets are, generally speaking, assets other than traditional, publicly traded stocks and

bonds. Alternative assets include "private market investments," "real estate," "digital assets," "commodities," and "infrastructure." Exec. Order No. 14330 § 3(a), 90 Fed. Reg. 38,921, 38,922 (Aug. 12, 2025). Private market investments—which include private equity, private credit, and hedge funds—are the type of alternative assets at issue in this case. See Pet. App. 6a.

Private equity "invests capital in companies" that are not publicly traded and "are perceived to have growth potential." *Private Equity FAQs*, Am. Inv. Council, bit.ly/4wHUhCD (last visited July 8, 2026). The investor then "works with" the company "to expand or turnaround the business," before ultimately selling it for a profit. *Ibid.* Investors "gain from higher returns *** than public markets" while private equity-backed companies "benefit from access to capital as well as business mentorship and expertise." *Ibid.*

Private credit is "capital that businesses obtain from private investment firms outside of public bond markets and traditional bank lending." *Private Credit 101*, Managed Funds Ass'n, bit.ly/4dEeFf4 (last visited July 8, 2026). Private credit is more flexible than traditional banking, enabling private credit funds to "offer customized terms, longer durations, and faster execution," giving borrowers ready access to capital to "[h]ire workers, [i]nvest in research and development" and "equipment," and "[i]nnovate and grow," while providing investors "[s]table, risk-adjusted returns, [and] [d]iversification beyond public markets." *Ibid.*

Hedge funds "use a broader set of tools—such as short selling, derivatives, and investing in a broad

range of noncorrelated assets—to make money in all sorts of market environments, including periods of heightened volatility." *Hedge Funds 101*, Managed Funds Ass'n, bit.ly/4eWCT6E (last visited July 8, 2026). The purpose of hedge funds, as their name implies, is to hedge risk, not maximize returns. Investors use them to "diversify portfolios, manage risk, and generate returns in both rising and falling markets." *Ibid.*

Allowing workers access to these alternative assets in their 401(k)s makes sense. Defined-benefit retirement plans and other institutional investors—including sovereign wealth funds and universities like Harvard and Princeton—allocate substantial proportions of their portfolios to alternative assets. They do so because alternative assets can offer favorable returns while also providing diversification that guards against downside risk. Workers should be able to benefit from those advantages by accessing alternative assets in their 401(k) plans.

### 1. Defined-Benefit Plans And Other Institutional Investors Already Invest Heavily In Alternative Assets.

The value of alternative assets to a diversified investment portfolio is reflected in the widespread use of those assets by defined-benefit retirement plans and other institutional investors.

Managers of defined-benefit retirement plans (who owe the same duty of prudence as 401(k) plan managers) allocate substantial portions of their investment portfolios to alternative assets. They started doing so in the late 1970s and the practice has since become widespread. See *Why Pension Funds*

*Invest in Private Equity and What It Means For U.S. Savers*, EQT Grp. (Apr. 16, 2026), bit.ly/4gkvGxV. According to one recent study, 68% of Fortune 1000 companies that sponsor a defined-benefit plan invest in alternative assets, with an average allocation of 10.3%. See Mercedes Aguirre & Brandon McFarland, *2023 Asset Allocations in Fortune 1000 Pension Plans*, Willis Towers Watson (Apr. 30, 2025), bit.ly/4vnl8T9. Multi-employer union plans use them even more widely, with 90% of such plans invested in alternatives at an average allocation of 17%. See *Taft-Hartley Survey* 23, Morgan Stanley (2025), bit.ly/4tMOGIg. Similarly, 89% of public pension plans invest in private equity. See *2025 Retirement Security Report* 9, Am. Inv. Council, bit.ly/43mkokV. Alternative assets account for 35% of public pension assets on a dollar-weighted basis. See *id.* at 8.

Other sophisticated institutional investors also invest heavily in alternative assets. Sovereign wealth funds, for example, allocate nearly 29% of their investments to alternative assets. See Vladimir Gorshkov & Elliot Hentov, *Investment Trends Among Sovereign Wealth Funds*, State Street Inv. Mgmt. (Mar. 18, 2026), bit.ly/4ulUIAb. And private charitable foundations allocate 45% of their endowments to alternative assets. See Press Release, *Foundations' Endowed Portfolios Produced Double-Digit Investment Returns in 2024; Long-Term Return Data Also Positive*, Commonfund (Aug. 27, 2025), bit.ly/4xbpTk2.

Universities allocate on average 45% of their endowments to alternative assets. See *2025 NACUBO-Commonfund Study of Endowments* 7, Nat'l Ass'n of College & Univ. Business Officers & Commonfund Institute, bit.ly/4v1BEYw. The largest university

endowments are even more heavily allocated towards alternative assets. See *ibid.* Two of the largest endowments in the nation, Harvard and Princeton, allocate more than 40% of their portfolios to private equity alone. See Megan L. Blonigen, *Hellman & Friedman CEO Patrick Healy '89 Appointed to HMC Board*, Harvard Crimson (May 18, 2026), bit.ly/4dY8QKM; *Princeton University Consolidated Financial Statements*, *June 30, 2025 and 2024*, at 11, bit.ly/3RpQPwb.

### 2. Alternative Assets Offer Favorable Returns And Diversification.

Defined-benefit plans and other institutional investors invest so heavily in alternative assets for a reason: they can improve portfolios by offering both favorable returns and beneficial diversification.

Over the long run, alternative assets have outperformed traditional stocks and bonds. The White House Council of Economic Advisers concluded that, on average, an investment in a buyout fund that started between 1980 and 2014 returned 27% more over the course of the fund's life than an equivalent investment in public equities would have, net of fees. See Council of Economic Advisers, *Retail Access to Alternative Investments Via Defined Contribution Plans* 9-10 (2025), bit.ly/4x91OdS. (A buyout fund is the most common type of private equity fund, in which the investor buys a majority stake in a mature but underperforming company.)

Other studies—including one submitted with AIC's recent comment letter on a proposed Labor Department rule, *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16,088

(Mar. 31, 2026)—have shown that private equity has outperformed public markets even when adjusted for the relative risk of private and public investments, net of fees. See, *e.g.*, Greg Brown *et al.*, *Private Equity: Accomplishments and Challenges*, J. Applied Corp. Fin., Summer 2020, at 8-9; David T. Robinson, *Fiduciary Duties in Selecting Designated Investment Alternatives: Opportunities and Considerations* ¶ 4 (June 1, 2026), bit.ly/4ob2riO (finding "Private equity funds have outperformed public markets net of fees in 26 of 31 vintage years between 1990 and 2020" on "an absolute and risk-adjusted basis").

Another study found that North American private credit funds produced 13% more wealth over their lives than a comparable investment in publicly traded loans. See Gregory Brown *et al.*, *Risk-Adjusted Performance of Private Funds: What Do We Know?* 49, Inst. For Private Capital (Mar. 27, 2025), bit.ly/4dqrLxP (showing private debt had a "PME" of 1.13 compared to North American public debt). Notwithstanding recent "negative headlines" about private credit, "direct lending performance has held up well, outperforming leveraged loans and only modestly trailing high yield." *2026 Outlook: Disciplined Growth, Resilient Returns*, Antares Capital, bit.ly/43diMdu (last visited July 8, 2026).

To be sure, the performance of private assets varies across investments and time, as with all investments. In some years, public markets outperform private ones. For example, over the past few years the S&P 500 has had unusually high returns—in the 99th percentile of its historical average since 2001—driven mostly by the outsized performance of a handful of technology companies known as the "Magnificent 7."

See Hamilton Lane, *Private Markets Overview* 49 (2026), bit.ly/43eaXnM; *The S&P 500 Index in 2024: A Market Driven Once Again by the Mag 7,* First Trust (Jan. 8, 2025), bit.ly/4wOX11c. But private assets have outperformed public equities in the long run. And that will likely continue to be true, because "[t]here's little reason to believe that US equities will somehow break out of" their cyclical pattern and consistently "sustain *** double-digit returns." *Global Private Equity Report 2020*, at 84, Bain & Company, bit.ly/3REaTv5.

For workers saving for retirement in defined-contribution plans, it is the long run that matters. In 2022, nearly two-thirds of 401(k) participants were in their forties or younger while only 14% were in their sixties. See *Ten Important Facts About 401(k) Plans* 2, Inv. Co. Inst. Rsch. (July 2024), bit.ly/4uUXZqO. Those younger participants generally had at least ten years before they could withdraw from their 401(k) accounts without penalty, and many were decades away from retirement. See 26 U.S.C. § 72(t)(2)(A)(i) (imposing a penalty for distributions made before an employee is 59 ½ years old).

Reaping higher long-term returns from alternative assets could meaningfully improve retirees' annual income from their savings. Research from the Georgetown Center for Retirement Initiatives found that private-market returns, net of fees, outpaced public markets by 3.6% on an annualized basis since 2000—and even modest exposure to private assets could improve defined-contribution annual retirement income by 7% to 8% across a range of participant savings patterns. See Angela Antonelli, *Making the Case: Addressing the Myths About Private Assets in Defined*

*Contribution Retirement Plans* 11, Georgetown Univ. Ctr. for Ret. Initiatives & Willis Towers Watson (Aug. 2025), bit.ly/4eamc5Q; Angela M. Antonelli, *Making the Case: The Effect of Private Market Assets on Retirement Income in Cases of Disrupted Savings* 15, Georgetown Univ. Ctr. for Ret. Initiatives & Willis Towers Watson (Aug. 2025), bit.ly/43Rf8pC.

Other research corroborates that finding. The Council of Economic Advisers estimated that permitting workers to allocate part of their portfolios to private markets would increase annuitized lifetime income by 2.5% for those with the longest time in the market, and by 1% even for workers aged 55 to 64. See *Retail Access to Alternative Investments*, *supra*, at 18-21. Similarly, a study submitted with AIC's comments on the Labor Department's proposed rule found that allocating up to 15% of a portfolio to private assets improves risk-adjusted returns, net of fees, by 0.7% annually—16.8% over a 30-year time horizon—and that larger allocations to private assets would yield even larger risk-adjusted returns. See Conrad S. Ciccotello, *Private Investments in Defined Contribution Retirement Portfolios* 25, 29 tab. 6 (June 1, 2026), bit.ly/4ob2riO.

The second benefit of alternative assets is increased diversification. A "diversified portfolio *** spreads *** money across multiple investments," so if "one drops in value, the others can help offset the losses." *Diversifying Your Portfolio*, Vanguard, bit.ly/4fTZaCw (last visited July 8, 2026). For this reason, ERISA commands fiduciaries to "diversif[y] 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).

In recent years, however, it has become increasingly difficult to have a fully diversified portfolio without exposure to alternative assets. Public markets have become concentrated in fewer companies and fewer sectors. In 1996, there were more than 8,000 publicly listed companies in the United States. See World Bank Group, Listed Domestic Companies, Total – United States, bit.ly/4udpeMk (last visited July 8, 2026). By 2025, there were fewer than 4,000. See *ibid.* That is because many formerly public companies have gone private, and new companies are remaining private for longer than they once did. See *Retail Access to Alternative Investments, supra*, at 4-5. SpaceX waited over 20 years to offer equity to the public, growing to a valuation of over $1.7 trillion and greatly benefiting the institutional investors that privately held equity in it. See Corrie Driebusch, *SpaceX Officially Raises $75 Billion in Record-Breaking IPO*, Wall St. J. (June 11, 2026), bit.ly/49RqrBY; Juliet Chung, *University Endowments Are About to Strike It Big on the SpaceX IPO*, Wall St. J. (June 8, 2026), bit.ly/4eic0rT. The bottom line is that as a result of the reduced number of public companies, a portfolio limited to public stocks and bonds may give workers less exposure to the broader economy than it once did—especially because growth in the public markets has been concentrated in a small handful of public companies. Alternative assets can help solve that problem.

That is especially true because private markets do not always move in lockstep with public markets. See *Adding Alts to Your 401(k) Mitigates Risk, Reduces*

*Volatility, and Makes It More Resilient*, Managed Funds Ass'n (Dec. 17, 2025), bit.ly/4eUittb. For example, even at the public markets' recent nadir—the Great Recession—private equity produced a positive 10-year rolling return whereas the S&P 500 did not. See Hamilton Lane, *supra*, at 49. In fact, the goal of guarding against future public market volatility is part of what led respondents to increase the allocation of alternative assets in the target-date funds at issue in this case. See Resp. Br. 8.

In short, defined-benefit plans and other institutional investors recognize alternative assets as wise investments because they offer favorable returns and valuable diversification benefits.

### 3. There Is No Sound Basis To Exclude Alternative Assets From 401(k)s.

The millions of Americans who depend on 401(k) plans for their retirement security should have access to alternative assets for the same reasons. While petitioners assert (at 1) that alternative assets are too "opaque" and "illiquid" for 401(k)s, neither criticism is correct.

Start with opacity. As an initial matter, plan participants are hardly left to fend for themselves in evaluating whether alternative assets are suitable investments. Rather, their exposure to alternative assets is guided by numerous professionals, many of whom are subject to fiduciary obligations of their own. Consider Company A, which offers a 401(k) plan to its workers. Both the committee that oversees the plan and its members are ERISA fiduciaries. The committee hires an independent investment adviser to advise on the selection of investment options; that adviser is also a

fiduciary. On the recommendation of the adviser, the committee selects as a plan option a target-date fund—the most common 401(k) investment option, in which the asset allocation gradually becomes less risky as the worker approaches his "target" retirement date. The manager of the target-date fund may also be an ERISA fiduciary or a fiduciary under the Investment Advisers Act of 1940. And the managers of the vehicles in which the fund invests are sometimes also SEC-registered investment advisers. So when a worker at Company A chooses the target-date fund to invest his retirement savings, he does so with the guidance of multiple layers of fiduciaries, each tasked with evaluating alternative assets on behalf of participants who may not themselves be knowledgeable about the investments. See 29 U.S.C. § 1104(a)(1)(B).

It is also not correct that a "lack of transparency" makes alternative assets "difficult to value." Pet. Br. 17. To be sure, alternative assets do not have a market price like public stocks. But alternative assets can nevertheless be valued using established accounting methods and are subject to extensive independent oversight. While the "reported values" of alternative assets "often depend on appraisals, models, or periodic judgments about comparable transactions, borrower health, and expected cash flows," Investment Law Scholars Amici Br. 14, those valuations are typically supported by independent third-party reviews. There is no reason to think the valuations are unreliable. On the contrary, the discipline of the market discourages inflated valuations: Studies have shown that investors "punish" fund managers by withholding further capital investment if there is an "appearance of

overstated performance." Gregory W. Brown *et al.*, *Do Private Equity Funds Manipulate Reported Returns*, 132 J. Fin. Econ. 267 (2019). Petitioners' complaints about opacity fall short from every angle.

Petitioners' complaints about liquidity fare no better. Liquidity can easily be managed when alternative assets are one part of a diversified, professionally managed investment option. For example, in addition to investing in public stocks and bonds, a target-date fund might invest directly in an alternative asset vehicle, or might invest indirectly through another pooled vehicle such as a collective investment trust, which invests in one or more alternative asset vehicles. Either way, alternative assets would ordinarily make up only a portion of the total retirement product (and typically would decline as a percentage of the fund's holdings over time as the worker approaches retirement), substantially reducing any impact on liquidity. Moreover, the alternative-asset vehicles used in 401(k) products are typically "evergreen" funds, which are more liquid than a traditional "drawdown fund" because they continually raise and invest capital instead of raising initial capital and investing it over time as opportunities arise. See *Structuring an Allocation: A Primer on Drawdown & Evergreen Funds*, Blue Owl, bit.ly/4atdj5Y (last visited July 8, 2026).

Because alternative asset vehicles designed for 401(k)s typically allocate only a portion of the fund to alternative assets (and often use an evergreen structure), they ensure that there will be sufficient liquidity to pay out workers who take distributions or change jobs and roll over their 401(k)s. Indeed, one of the studies AIC submitted in commenting on the

Department of Labor's proposed rule examined historical cash flows of 401(k) plans and confirmed that a fund with up to a 35% allocation to private assets would have sufficient liquidity to meet withdrawal demands greater than those experienced by 99% of plans and still retain a majority of its liquid assets. See Robinson, *supra*, ¶¶ 74-76; see also Committee on Capital Markets Regulation, Comment on Fiduciary Duties in Selecting Designated Investment Alternatives 17-22 (May 29, 2026), bit.ly/3PNDI7P (performing similar analysis).

### B. Unwarranted Litigation Risk Has Discouraged Fiduciaries From Offering Alternative Assets In 401(k)s.

Despite the clear benefits alternative assets can provide participants in 401(k) and other defined-contribution plans, very few defined-contribution plans offer investment options that include alternative assets. "[O]nly 0.1 percent of all defined contribution plan assets were in alternative investments in 2024." 91 Fed. Reg. at 16,106.

The main reason for that deficit is the risk of class-action litigation. ERISA lawsuits challenging the selection or maintenance of investment options on 401(k) menus have become increasingly common. According to one report, 155 lawsuits alleging fiduciary breaches against retirement plans were filed in 2025 alone. See *ERISA Fiduciary Litigation in 2025: Plaintiff Law Firms Continue the Frenetic Pace, with Broader Allegations Against Both Retirement Plans and Health Plans*, Encore Fiduciary (Feb. 9, 2026), bit.ly/43Oxurm.

That flood of litigation has risen not because of the quality of the underlying legal claims, but in spite of it. Many of the scores of recent ERISA suits rely on nothing more than hindsight. A plaintiff may point, for example, to an investment that later performed better than the one in his 401(k) to argue that the fiduciary should have made a different decision. Such hindsight-based claims are weak because ERISA demands "prudence, not prescience." *DeBruyne* v. *Equitable Life Assurance Soc'y of the United States*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted). But even those weak claims can be expensive to defend. "[G]etting by a motion to dismiss is often the whole ball game because of the cost of discovery." *Cunningham* v. *Cornell Univ.*, 604 U.S. 693, 710 (2025) (Alito, J., concurring). As a result, ERISA defendants who do not prevail at the pleading stage often conclude "that it is efficient to settle a case even though they are convinced that they would win if the litigation continued." *Id.* at 710-11.

The scale of the problem is great. In the past five years alone "there have been over 200 settlements of excessive fee and imprudent investment lawsuits totaling more than" $1.3 billion. *ERISA Fiduciary Litigation*, *supra*. The beneficiaries of those lawsuits are the plaintiffs' attorneys—not plan participants. While class-action attorneys have received almost $450 million in settlements, "individual plan participants each obtain only $55-70 on average from these same settlements." *Ibid*.

The risk of unwarranted litigation is especially acute when a fiduciary selects an investment option that is newer or less common in 401(k) plans, such as one that includes alternative assets. A new or unique

strategy sticks out, whereas a common strategy blends in even when it offers lower returns than anticipated. The result is a herding effect, with fiduciaries concluding that the safest course is to offer the most familiar investment options, even if other products would better serve participants over the long term. See Erin Cho & Richard Nowak, *401(k) Alternative Investment Critiques Gloss Over Key Details*, Bloomberg (Mar. 24, 2026), bit.ly/4e3ToMf. The Department of Labor has recognized the problem, citing survey evidence that "roughly 29 percent of respondents" had "decided against offering services or investment options simply because other similar plans were not doing so, making the additional services or options vulnerable to litigation." 91 Fed. Reg. at 16,106 (citation omitted).

The fear of litigation that drives this behavior is well founded. As one former chair of the Labor Department's ERISA Advisory Council boasted: "[A]s soon as I see a platform that has private equity or a hedge fund" or any other "type of alternative asset, I will sue in a second." *As Private Equity Firms Work to Access 401(k) Market, Plaintiff Lawyers Gear Up to Sue*, The Capitol Forum (Apr. 10, 2023), bit.ly/3S5zOYp. By and large, ERISA fiduciaries have lain low rather than expose themselves to that danger.

While that head-down strategy reduces litigation risk for the fiduciary, it also limits investment choices for workers—costing them access to the long-term return and diversification opportunities that defined-benefit plans and other institutional investors commonly enjoy. Congress sought to avoid exactly this scenario, in which "litigation expenses[] unduly

discourage employers from offering welfare benefit plans" in the best interests of their workers. *Varity*, 516 U.S. at 497.

## II. THE MEANINGFUL-BENCHMARK STANDARD DETERS MERITLESS SUITS BY IMPLEMENTING THE TENET THAT PERFORMANCE IS RARELY PROBATIVE OF PRUDENCE.

The meaningful-benchmark standard helps alleviate the litigation risk that has deterred fiduciaries from including alternative assets in 401(k) plans by cutting off meritless hindsight-based claims at the pleading stage. Far from a freshly-minted, judge-made pleading requirement, the standard flows from a fundamental principle of ERISA law—that the performance of an investment alone is a poor proxy for the fiduciary's prudence in selecting it. To support any plausible inference of imprudence, performance must at a minimum be gauged against a comparator sharing the same investment horizon, risk profile, strategy, and related attributes—in other words, a meaningful benchmark. Contrary to petitioners' assertion, applying that standard will not categorically foreclose imprudence claims involving novel investments. Rather, it will weed out meritless lawsuits based on after-the-fact second-guessing, enabling workers to gain the same access to prudently selected alternative assets that defined-benefit plans and other institutional investors currently enjoy.

### A. Under ERISA, Investment Performance Is Seldom Probative Of Prudence.

ERISA provides that a fiduciary must "discharge his duties with respect to [the] plan * * * 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). That duty "is 'derived from the common law of trusts.'" *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)). Accordingly, "courts often must look to the law of trusts" to "determin[e] the contours of an ERISA fiduciary's duty," *Tibble*, 575 U.S. at 528-29, in addition to consulting ERISA's "language[,] *** its structure, or its purposes," *Varity*, 516 U.S. at 497.

ERISA's text and its purpose as recognized by this Court, as well as trust law, all establish that whether an investment performs well relative to other options is almost never probative of whether a fiduciary discharged his duty to select investments "with the care" of "a prudent man." 29 U.S.C. § 1104(a)(1)(B).

### 1. ERISA's Text And Purpose Establish That Performance Says Little About Prudence.

ERISA's text indicates in three ways that investment performance is ordinarily not probative of a fiduciary's prudence.

First, ERISA requires a fiduciary to "discharge his duties *** with the care" of "a prudent man." 29 U.S.C. § 1104(a)(1)(B). The preposition "with" refers to the fiduciary's "manner of action." *Webster's New Collegiate Dictionary* 1355 (9th ed. 1983). The statute thus places the focus on the fiduciary's manner of decisionmaking on the front end, rather than the outcome of those decisions on the back end. In other

words, the statute "focuses on 'the *process* by which' decisions are made, 'rather than the *results* of those decisions,'" *Davis* v. *Wash. Univ. in St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020) (emphases added; citation omitted), confirming that "[t]he duty of prudence is a process-driven obligation," *Johnson* v. *Parker-Hannifin Corp.*, 122 F.4th 205, 213 (6th Cir. 2024).

Second, ERISA specifies that the prudence of a fiduciary's decision must be evaluated based on "the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). An investment's performance—let alone its performance relative to other investment options—cannot be known in advance, so it is not a circumstance the fiduciary can account for at the time of its decision. And though a fiduciary must monitor the ongoing performance of an investment, see *Tibble*, 575 U.S. at 529-30, whether its past performance, be it strong or poor, will characterize future results cannot be known at the time the fiduciary decides to retain the investment.

Third, besides requiring an ERISA fiduciary to "discharge his duties * * * with the care" of "a prudent man," the statute also requires a fiduciary to "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(B), (C). Diversifying a portfolio by selecting a range of investments with different characteristics naturally may result in some "underperform[ance] relative to a winning investment." *Diversifying Your Portfolio*, *supra*. An ERISA investment's relative underperformance often will reflect nothing more than a fiduciary's prudent decision to reduce risk by diversifying the portfolio.

ERISA's purpose as recognized by this Court cuts in the same direction as the statutory text. The statute balanced Congress's "desire to offer employees enhanced protection for their benefits" against "its desire not to create a system that is so complex that * * * litigation expenses[] unduly discourage employers from offering welfare benefit plans in the first place." *Varity*, 516 U.S. at 497.

That undue discouragement is exactly what would happen if investment performance were treated as a proxy for prudence. Consider petitioners' insinuation (at 21) that respondents might have been imprudent because "[t]he returns from Intel's GDF were regularly lower than * * * the median fund returns." It is axiomatic that half of all investment funds will fall below the median in any given year. If the fiduciaries of those funds could be liable for breaching their duty of prudence on that basis, many employers would stop offering plans altogether.

**2. Trust Law Confirms That Performance Rarely Indicates Imprudence Under ERISA.**

The common law of trusts from which ERISA's duty of prudence is derived supports the same conclusion. Under longstanding principles of trust law, a trustee's compliance with the duty of prudence when selecting investments "depends upon the circumstances at the time when the investment is made and not upon subsequent events," including whether "the investment depreciates in value." Restatement (Second) of Trusts § 227, cmt. o (1959); see also Restatement (Third) of Trusts § 90, cmt. b (2007) (explaining that compliance with the duty of prudence "turns on

the prudence and propriety of the trustee's conduct, not on the eventual results of investment decisions").

The near-irrelevance of subsequent investment performance to prudence is also confirmed by the deference due to trustees' investment decisions at common law. "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Restatement (Second) of Trusts § 187. That deferential rule "is applicable * * * to powers to lease, sell or mortgage the trust property or"—as relevant here—"to invest trust funds." *Id.* § 187 cmt. c; accord *id.* § 227.

The rule that trustees' exercise of their discretionary power is reviewable only for abuse of discretion affords them considerable insulation from judicial second-guessing. Indeed, "[a] court is likely to find an abuse of discretion only where the trustee's action is extraordinarily imprudent or unreasonable." Amy M. Hess, George G. Bogert & George T. Bogert, *Bogert's The Law of Trusts and Trustees* § 558 (2026 ed.). As this Court put it over a century-and-a-half ago, "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act." *Nichols* v. *Eaton*, 91 U.S. 716, 724-25 (1875).

The Court has applied that same rule in the ERISA context. In *Firestone Tire & Rubber Co.* v. *Bruch*, the Court observed that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." 489 U.S. 101, 111, 115 (1989) (citing Restatement (Second)

of Trusts § 187). It accordingly held that when a plan confers an ERISA fiduciary with discretionary authority to determine eligibility for benefits or to construe the terms of the plan, courts must review a denial of benefits deferentially. *Ibid.*[2]

Like a trustee's decision to invest trust funds, the selection of plan menu options for a defined-contribution plan is a prototypical exercise of discretion. In the case at hand, Intel's plans gave "asset management responsibility" to the Investment Policy Committee. J.A. 422, 545. The "Investment Committee Defendants [accordingly] had the authority, discretion, and responsibility to select, monitor, and remove or replace investment options in the 401(k) Savings Plan and the Retirement Contribution Plan." J.A. 59. In selecting investment options for plan participants, respondents therefore acted in the heartland of the discretion committed to them by the plans.

It follows that courts should review such discretionary decisions deferentially under ERISA. "Such a wide berth," the United States has explained, "is consistent with the common law of trusts, under which a trustee must weigh the competing interests of

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[2] The Eighth Circuit has held that there is "no compelling reason to limit *Firestone* deference to benefit claims." *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 335 (8th Cir. 2014). Indeed, *Firestone* relied on the same Restatement section that reported an abuse of discretion standard for trust investments. 489 U.S. at 111 (citing Restatement (Second) of Trusts § 187); see also 91 Fed. Reg. at 16,092 (describing potential application of *Firestone* deference outside benefits-eligibility context). The question whether *Firestone* deference applies to fiduciary decisionmaking beyond benefits eligibility is an important one, but this Court need not resolve it to affirm the judgment below.

maximizing returns and minimizing risks." U.S. Amicus Br. at 12-13, *Parker-Hannifin Corp.* v. *Johnson*, No. 24-1030 (Dec. 9, 2025) (citing Restatement (Second) of Trusts §§ 176, 181). As this Court has put it, because "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs," courts reviewing duty-of-prudence claims must "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes* v. *Nw. Univ.*, 595 U.S. 170, 177 (2022).

That deferential standard confirms that *post hoc* investment performance is rarely indicative of an ERISA fiduciary's prudence. Even where the relative underperformance of an investment might lead a reviewing court to conclude that it "would have exercised the power differently," that "is not a sufficient reason for interfering with the exercise of the power." Restatement (Second) of Trusts § 187, cmt. e.

### B. Performance Can Be Probative Of Prudence Only By Reference To A Meaningful Benchmark.

The meaningful-benchmark standard helps effectuate this principle that, under ERISA, investment performance is rarely probative of prudence. While "circumstantial factual allegations" can sometimes allow "the court [to] reasonably infer from what is alleged that the [fiduciary's] process was flawed," the mere fact that one investment did not perform as well as some other possible investment does not. Pet. App. 11a (citation and internal quotation marks omitted). There are multiple "obvious alternative explanation[s]" for relative underperformance, ranging from the fiduciary selecting the investment for diversification purposes, to the fiduciary discharging his duty

with care and selecting an investment that performed well, but less well than some other alternative. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007). Because a fiduciary's selection is necessarily forward looking, subsequent performance is inherently dependent on market events that cannot be known at the time of even the most prudent decisionmaking. And when a fiduciary decides to retain an investment that has not performed as well as another on the market, an "obvious alternative explanation" to imprudence is the fiduciary's assessment that the market conditions responsible for the relative underperformance will likely soon reverse—and that it would be an error to sell low and buy high into the current market-leading investment.

To adequately plead after the fact that relative underperformance "plausibly suggest[s] ([and is] not merely consistent with)" imprudence, a plaintiff must allege (among other things) that the investment underperformed relative to an investment using a similar strategy to pursue similar objectives. *Twombly*, 550 U.S. at 557. For example, consider a fiduciary who selects Fund A, which is meant to track the S&P 500. If Fund A underperforms Fund B, which also tracks the S&P 500, because the manager of Fund A failed to actually track the index, that might indicate that the fiduciary acted imprudently by failing to adequately consider the qualifications of the manager of Fund A. But if Fund A underperforms Fund C, which invests in both public and private equities to mitigate risk, that does not imply that the fiduciary's selection of Fund A was imprudent. It just means that the fiduciary exercised her discretion to make a different investment decision within "the range of reasonable

judgments a fiduciary may make." *Hughes*, 595 U.S. at 177. The requirement to allege a meaningful benchmark therefore appropriately reflects the content of the duty of prudence in light of ERISA's text, purpose, and trust-law roots.

Petitioners' attempt (at 30) to disparage the meaningful-benchmark standard as a "judicially crafted rule[]" falls flat. As an initial matter, it is petitioners, not respondents, who seek a special "judicially crafted rule[]" at the outer fringes of ERISA—a rule under which a prudence claim survives a motion to dismiss on hindsight underperformance alone, with no well-pleaded allegation of an imprudent process. Pet. Br. 30. And in any event, this Court has not hesitated to articulate pleading rules that reflect the content of the duty of prudence. For example, because "the duty of prudence * * * does not require a fiduciary to break the law," this Court held that "[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 428 (2014). Similarly, this Court held that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Id.* at 426.

The meaningful-benchmark standard works the same way. Allegations that a fiduciary should have selected a different investment because it subsequently underperformed "are implausible as a general

rule, at least in the absence of" the "special circumstance[]" where it underperformed relative to a similar investment. *Dudenhoeffer*, 573 U.S. at 426.

That principle applies neatly to this case. Petitioners' assertion (at 19) that the "fiduciaries' strategy of high allocations to nontraditional investments like hedge funds and private equity caused the Intel retirement funds to underperform" does not plausibly plead imprudence. In an exercise of their discretion over investment selections, the fiduciaries gave participants the option to allocate a portion of their plan funds to alternative assets in order to "diversif[y]" away from public equities, which had experienced "large losses" in 2008. 29 U.S.C. § 1104(a)(1)(C). That those investments generated lower returns than public markets is a natural result of diversification during a period in which public equities—driven by a small handful of technology stocks—have performed unusually well. The recent overperformance of public equities does not imply that it was imprudent to allow investment in alternative assets any more than the overperformance of alternative assets for many years implies it was imprudent *not* to allow investment in alternative assets. Imprudence could be a plausible inference only if Intel's funds demonstrated marked underperformance relative to a fund with similar strategies and with similar stated investment objectives—an allegation petitioners failed to make.

Because the meaningful-benchmark standard operates at the pleading stage, it works to weed out meritless hindsight-based claims early. In so doing, it permits fiduciaries to avoid the cost of unnecessary discovery, mitigating the financial pressure to settle and disincentivizing meritless future litigation. That

relief from litigation risk in turn encourages fiduciaries to include a wider array of investment options—including alternative assets—in defined-contribution plans, giving workers the benefits of favorable returns and diversification broadly enjoyed by institutional investors and those whom they serve.

### C. The Meaningful-Benchmark Standard Does Not Confer Immunity From Suit.

Petitioners maintain that requiring a meaningful benchmark "confers almost complete immunity on fiduciaries who pursue novel *** investment strategies," which they suggest is especially inappropriate because at common law "'securities in new and untried enterprises' [were] not considered to be 'a proper trust investment.'" Pet. Br. 47-48 (quoting Restatement (Second) Trusts § 227, cmt. f). But both the premise (that investing in the sorts of alternative assets respondents chose is novel) and the conclusion (that the meaningful-benchmark standard immunizes fiduciaries) are wrong.

The premise of petitioners' argument is off-base because there is nothing "novel or reckless" about investing in alternative assets like private equity and hedge funds. Pet. Br. 47. Investments in most alternative assets are not investments in "new and untried enterprises." Restatement (Second) of Trusts § 227, cmt. f. On the contrary, "[p]rivate equity funds invest in more mature companies *** and work to improve efficiencies and boost growth" of those companies. *Private Equity FAQs*, *supra*. Hedge funds similarly invest in established types of assets such as "stocks, bonds, or commodities," and are distinguished by the strategies they use to trade those assets. *Ibid.* Moreover, defined-benefit plans and other institutional

investors allocate large portions of their portfolios to alternative assets and have done so for nearly a half century. See pp. 6-7, *supra*. Though investing in alternative assets is currently less common for defined-contribution plans, that is the result of the unwarranted litigation risk exemplified by this case.

Petitioners' conclusion is just as flawed as their premise. The requirement to allege a meaningful benchmark does not immunize a fiduciary pursuing a novel strategy from imprudence claims. As the Ninth Circuit explained, a plaintiff could "alleg[e] facts that would directly show that the fiduciaries employed unsound methods in making their investment decisions." Pet. App. 11a. Alternatively, even if a sufficiently similar comparator fund did not exist, a plaintiff could construct a composite benchmark—a blended benchmark that uses subsidiary benchmarks for each of the fund's types of assets. That would allow for a meaningful comparison to the selected investment because the composite benchmark's similar asset allocation would reflect a similar strategy to the fund at issue.

What a plaintiff cannot do is bring claims based on nothing more than hindsight. Because that is all petitioners' claims amounted to in this case, the Ninth Circuit correctly affirmed their dismissal.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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