No. 12-751

In the Supreme Court of the United States

FIFTH THIRD BANCORP, ET AL., PETITIONERS

v.

JOHN DUDENHOEFFER, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, imposes duties on fiduciaries of employee benefit plans, including a duty of loyalty to plan participants and a duty to administer the plan prudently. 29 U.S.C. 1104(a)(1). The questions presented are:

1. Whether, to state a claim that a fiduciary of an employee stock ownership plan violated the duty of prudence by continuing to invest plan assets in the employer's stock, a plaintiff must rebut a presumption that the fiduciary acted prudently by alleging that the employer faced imminent financial peril.

2. Whether a plan fiduciary can be liable under ERISA for material misstatements contained in Securities and Exchange Commission filings that are incorporated by reference into an ERISA-mandated summary plan description.

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This brief is submitted in response to the order of this Court 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 granted limited to the first question presented, but that question should be reformulated as provided below. See p. 19, *infra*.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, is designed to "protect * * * 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). It requires every plan to be estab-

lished and maintained pursuant to a written instrument and to have named fiduciaries who have authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1).

ERISA imposes duties of loyalty and prudence on all plan fiduciaries. See 29 U.S.C. 1104(a). The statute provides that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" of the plan, and "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) and (B). In addition, for ordinary ERISA plans, the fiduciary must "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). Plan participants may seek judicial redress against a fiduciary for breaches of those duties. See 29 U.S.C. 1132(a)(2) and (3); *Varity Corp.* v. *Howe*, 516 U.S. 489, 507-515 (1996).

ERISA sets forth certain exceptions to its statutory duties for fiduciaries who administer "eligible individual account plan[s]." See 29 U.S.C. 1104(a)(2). An individual account plan (more commonly known as a "defined contribution plan") is "a pension plan which provides for an individual account for each participant" and generally "for benefits based solely upon the amount contributed to the participant's account." 29 U.S.C. 1002(34); see *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008). The statute defines an eligible individual account plan to include any individual account plan that is, *inter alia*, a

"profit-sharing, stock bonus, thrift, or savings plan," or "an employee stock ownership plan [ESOP]." 29 U.S.C. 1107(d)(3)(A). An ESOP, in turn, is a defined-contribution plan that "is designed to invest primarily in qualifying employer securities" and meets certain requirements. 29 U.S.C. 1107(d)(6). An employer's stock is one type of a "qualifying employer security." 29 U.S.C. 1107(d)(5)(A).

For a fiduciary who administers an eligible individual account plan, "the diversification requirement * * * and the prudence requirement (only to the extent that it requires diversification)" of Section 1104 are "not violated by acquisition or holding of qualifying employer real property or qualifying employer securities." 29 U.S.C. 1104(a)(2). In addition, ERISA provides an exemption for eligible individual account plans to the rules that would otherwise forbid a fiduciary from causing a plan to purchase stock from the employer. See 29 U.S.C. 1106(a), 1107, 1108(e).2. Petitioner Fifth Third Bancorp is a large financial-services company. Pet. 4. Fifth Third sponsors an individual-account retirement plan for its employees called the Fifth Third Bancorp Master Profit Sharing Plan (Plan). Under the Plan, employees make voluntary contributions from their earnings to any one of twenty different investment options, and Fifth Third matches the contributions up to four percent of each employee's salary. Pet. App. 4.

The Plan generally grants the company's Pension and Profit Sharing Committee "the discretionary authority and fiduciary duty to determine the investment funds to be made available," but provides that "in all events, the Fifth Third Stock Fund * * * shall be an investment option." Cert. Reply App. 8, 45. The

Plan designates the Fifth Third Stock Fund as an ESOP and provides that the fund must be "invested primarily in shares of common stock of Fifth Third Bancorp," although it "may also be invested in short-term liquid investments to the extent * * * desirable to accommodate the expected short-run liquidity needs of the Plan or Fund." *Id.* at 2-3, 27.[1] The Plan requires the Committee to "monitor[] [the] investment funds to determine the continued prudence of offering such funds" and to "change the investment funds available if and when it deems it prudent to do so." *Id.* at 45. The Plan, however, does not expressly state whether the Fifth Third Stock Fund is subject to the requirement for such monitoring.

Respondents, two former participants in the Plan, filed putative class actions in the United States Dis-trict Court for the Southern District of Ohio against Fifth Third, its chief executive officer, the Committee, and other individuals who allegedly acted as fiduciar-ies of the Plan (collectively, petitioners). Respondents sued on behalf of all participants who were invested in Fifth Third stock between July 19, 2007, and Septem-ber 21, 2009. Am. Compl. ¶¶ 15, 28-36, Docket entry No. 54 (Sept. 21, 2009). They alleged that petitioners had breached ERISA's duties of loyalty and prudence by continuing to invest Plan assets in Fifth Third stock via the Fifth Third Stock Fund and by failing to divest the Fifth Third stock. Pet. App. 5; Am. Compl. ¶¶ 229-244. According to the complaint, petitioners knew or should have known that the company's stock

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[1] Under Department of Labor regulations, "[a]n ESOP may form a portion of a plan the balance of which includes a qualified pen-sion, profit-sharing, or stock bonus plan which is not an ESOP." 29 C.F.R. 2550.407d-6(a)(4).

was excessively risky because of the company's high-risk subprime mortgage lending practices, and that its price was artificially inflated because of the company's inaccurate financial statements that failed to properly disclose those practices. Pet. App. 4-5. Respondents attributed a 74% decline in stock price, and correspondingly large losses to the Plan, to the subsequent public disclosure of the company's actual financial condition. *Id.* at 5. Respondents further alleged that petitioners had violated their duties of loyalty and prudence by knowingly providing misleading information to participants about Fifth Third's financial condition through plan documents. *Id.* at 5-6, 15-16; Am. Compl. ¶¶ 213, 245.

3. Petitioners moved to dismiss the complaint for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), and the district court granted the motion. Pet. App. 28-52. The district court believed that it was required to presume at the motion-to-dismiss stage that petitioners' decision to continue investing in Fifth Third stock was prudent. *Id.* at 37. Relying on decisions of the Third, Fifth, and Ninth Circuits, the district court held that respondents could rebut that presumption only by showing that Fifth Third was in a "dire financial predicament." *Id.* at 40-45. Although respondents alleged that Fifth Third had "embarked on an improvident and even perhaps disastrous foray into subprime lending" that "caused a substantial decline in the price of its common stock," the district court concluded that those allegations did not rebut the presumption because "Fifth Third remained a viable company throughout the class period." *Ibid.*

The district court also rejected respondents' argument that petitioners had violated their duties of loyalty and prudence by incorporating materially misleading Securities and Exchange Commission (SEC) filings by reference into the Plan's summary plan description (SPD). See Pet. App. 47-50. An SPD is a plain-English summary of participants' rights and obligations under a plan that ERISA requires to be distributed to participants. See 29 U.S.C. 1022 (2006 & Supp. V 2011). The district court held that because petitioners had not "intentionally connect[ed]" statements contained in the incorporated SEC filings to the soundness of the Fifth Third Stock Fund, those statements, even if materially misleading, could not constitute a breach of an ERISA duty. See Pet. App. 49-50.

4. The court of appeals reversed. Pet. App. 1-25. The court acknowledged that under circuit precedent, an ESOP "fiduciary's decision to remain invested in employer securities is presumed to be reasonable." *Id.* at 10-11 (citation omitted). But the court held that the "presumption 'is not an additional pleading requirement and thus does not apply at the motion to dismiss stage.'" *Id.* at 11-12 (citation omitted). Rather, because the presumption "concerns questions of fact," it cannot apply at a phase in which "the court must accept the well pled factual allegations of a complaint as true." *Id.* at 12.

The court of appeals "recognized that some circuits have reached a different conclusion and apply the presumption of reasonableness at the pleading stage." Pet. App. 12. And it further acknowledged that unlike other circuits, it has "not adopted a specific rebuttal standard that requires proof that the company faced a

'dire situation,' something short of 'the brink of bankruptcy' or an 'impending collapse.'" *Ibid.* (quoting *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 595 (6th Cir.), cert. denied, 133 S. Ct. 758 (2012)). Instead, a plaintiff need only "prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" *Ibid.* (quoting *Kuper* v. *Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)). This "unembellished standard," the court held, "closely tracks the language of [Section 1104(a)(1)(B)]," which "imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13. The court then held that respondents' allegations that petitioners were aware of information that rendered Fifth Third stock an imprudent investment but had continued to invest in the stock, causing losses to respondents' retirement accounts, were sufficient to state a claim. *Id.* at 15.

The court of appeals also held that petitioners could be liable under ERISA for misleading statements made in SEC filings incorporated into the SPD by reference, a question that "[n]o circuit court ha[d] answered." Pet. App. 15-24. Because petitioners had "exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock," the court explained, any misstatements contained in the incorporated filings would constitute a breach of an ERISA duty. *Id.* at 22-23.

DISCUSSION

Petitioners seek review of the court of appeals' decision declining to apply a judge-made presumption that they acted reasonably (and thus prudently) in continuing to invest plan assets in Fifth Third's ESOP. Because the courts of appeals are divided over when such a presumption applies and what showing is required to rebut it, this Court should grant review. But in the view of the United States, ERISA's text and purposes do not call for application of a presumption at any stage of the proceedings. Rather, ESOP fiduciaries are governed by the duty of prudence in Section 1104(a) just as other ERISA fiduciaries are, except that they cannot be held liable for concentrating plan assets in qualifying employer securities on the ground that the investment is insufficiently diversified.

Petitioners also seek review of the court of appeals' holding that statements contained in documents incorporated by reference into an SPD are fiduciary communications. Further review of that holding is not warranted. No circuit has shielded plan fiduciaries from liability for misleading statements contained in documents incorporated by reference into an SPD. See Pet. App. 20.

A. The First Question Presented Warrants This Court's Review

The courts of appeals are divided over what a plaintiff must plead and prove to establish that an ESOP fiduciary has violated the duty of prudence imposed

by ERISA.[2] This Court should grant review to resolve that conflict of authority.

1. a. ERISA requires a plan fiduciary to "discharge his duties * * * with the care, skill, prudence, and diligence" that "a prudent man" would exercise under similar circumstances. 29 U.S.C. 1104(a)(1)(B). Congress drew that standard from the "objective prudent person standard developed in the common law of trusts." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (*St. Vincent*); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). The prudent-person stand-ard "focus[es] on a fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a par-ticular investment." *St. Vincent*, 712 F.3d at 716 (cita-tion omitted; brackeIn the ordinary cats in original). se, therefore, to state a claim based on losses resulting from imprudent plan investments, a complaint must "allege[] facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." St. Vincent, 712 F.3d at 718 (quoting In re Citigroup ERISA Litig., 662 F.3d 128, 141 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012)); see also id. at 735 (Straub, J., dissenting in part) (same). As the court of appeals found, respondents' complaint satisfies that standard.

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[2] Some courts have applied the presumption only to ESOP fiduciaries, while others have applied it to fiduciaries of all eligible individual account plans. See *Peabody* v. *Davis*, 636 F.3d 368, 374 n.6 (7th Cir. 2011) (citing cases).

Pet. App. 15. Indeed, respondents plausibly allege not only that petitioners failed to conduct an adequate investigation, but also that, due to their positions within the company, they knew (or reasonably should have known) that Fifth Third stock was significantly overvalued and yet failed to take action to protect participants. *Id.* at 13-14. Knowingly investing plan assets in a significantly overvalued asset is unquestionably imprudent.

At subsequent stages of this case, of course, respondents will bear the burden of substantiating their allegations with evidence produced during discovery or otherwise, such as documents indicating what petitioners knew (or should have known) about the company's undisclosed problems and what steps they took to investigate the prudence of continued investment in Fifth Third stock. But respondents' well-pleaded, plausible allegations suffice to state a claim.

b. Petitioners argue that a special presumption that they acted prudently should apply at the motion-to-dismiss stage because this case involves an ESOP, and therefore the complaint should be dismissed because it lacks "plausible allegations that [Fifth Third] was in a dire situation, or that its viability was threatened." Pet. 3. Petitioners contend that the court of appeals "impermissibly disregarded the *ESOP-specific* exemptions included in ERISA when it applied an ordinary prudent man standard." Pet. 23.

The text of the statute does not support petitioners' position. The exemptions to which petitioners advert—in particular, the exemptions from the duty to diversify investments and from the duty of prudence "only to the extent that it requires diversification," 29 U.S.C. 1104(a)(2)—eliminate the specific requirement

that a plan's investment portfolio be sufficiently diversified to minimize risk. They do not suggest that a plaintiff must prove that the employer was in a "dire situation" in order to state a claim for breach of the basic duty of prudence. Indeed, the text of ERISA indicates the opposite: By preserving the duty of prudence for ESOPs *except* insofar as it requires diversification, Congress expressed its intent that the same general standard of prudence would govern ESOP fiduciaries as other ERISA fiduciaries.

Petitioners appear to view any allegation that an ESOP fiduciary acted imprudently by investing in employer stock as logically indistinguishable from a claim that the fiduciary failed to diversify plan assets. That view is mistaken. The exemption merely absolves ESOP fiduciaries from the ordinary obligation to reduce risk by spreading plan assets among multiple prudent investments. It does not permit them to concentrate plan assets in an *imprudent* investment.

c. The courts of appeals that have imposed a presumption of prudence have rested it largely on policy considerations that extend beyond ERISA's text and are unconvincing in their own right. Courts have, for example, perceived a conflict between the duty of prudence and plan documents requiring or encouraging fiduciaries to offer employer stock as an investment option. See *Citigroup*, 662 F.3d at 137; *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 249, 253-255 (5th Cir. 2008). But the statute itself resolves that conflict by mandating that fiduciaries follow plan documents only "insofar as such documents and instruments are consistent with" ERISA's fiduciary duties and other requirements—obligations that sensibly take precedence over the specific directives in

plan documents. 29 U.S.C. 1104(a)(1)(D); see also 29 U.S.C. 1110(a); S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973).

Some courts have expressed the concern that without a presumption of prudence, a fiduciary who is also a corporate insider might be forced to violate the securities laws by engaging in transactions on behalf of the plan based on material nonpublic information. See, *e.g.*, *White* v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013). Even if that concern were well-founded, the presumption of prudence would not resolve it, because even under petitioners' view there would still be some cases in which continuing to invest in employer stock would violate the duty of prudence (*e.g.*, where the company is in "dire" financial straits for reasons not disclosed to the public). But in any event, although plan fiduciaries who have undisclosed inside knowledge about the company cannot trade on that information on behalf of plan participants, they may take other lawful actions to protect the participants, such as publicly disclosing the inside information. See *Kopp* v. *Klein*, 722 F.3d 327, 340 (5th Cir. 2013); *Harris* v. *Amgen, Inc.*, No. 10-56014, 2013 WL 5737307, at *13-*14 (9th Cir. Oct. 23, 2013).

Petitioners assert that without a presumption of prudence, "ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates." Pet. 12. That assertion is exaggerated. As respondents appear to concede (Br. in Opp. 23), a plaintiff cannot state a claim merely because the company or industry was suffering financial difficulties. See, *e.g.*, *DiFelice* v. *U.S. Airways, Inc.*, 497 F.3d 410, 422-424 (4th Cir. 2007) (finding that fiduciaries acted prudent-

ly under the statutory standard in investing in employer stock); *Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1, 9-10 (1st Cir. 2009) (finding that fiduciaries acted prudently in selling employer stock after conducting investigation). But in a case like this one, in which it is plausibly alleged that petitioners knew (or should have known) that the stock price was significantly inflated due to market misrepresentations or could have ascertained that fact from a proper investigation, no statutory basis exists to provide fiduciaries with a "substantial shield" against liability. *Kirschbaum*, 526 F.3d at 256.

ERISA's basic policy objectives, in fact, counsel against a judicially fashioned presumption that ESOP fiduciaries have acted prudently. Non-diversified retirement plans like ESOPs put "retirement assets at much greater risk than does the typical diversified ERISA plan." *Moench* v. *Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) (citation omitted), cert. denied, 516 U.S. 1115 (1996). That is all the more reason to steadfastly enforce ERISA's other protections, including its basic duty of prudence, that Congress has not seen fit to relax for ESOPs. Particularly given the Department of Labor's considered, longstanding view that the presumption contravenes the objectives of ERISA,[3] and the lack of any textual basis for it, courts should not erect that artificial hurdle to enforcement of ERISA's protections. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944).

2. a. The seven circuits to consider the question have held that, where the terms of either an eligible individual account plan generally or an ESOP specifi-

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[3] See, *e.g.*, Secretary of Labor Amicus Br. 9-23, *Moench*, *supra* (No. 94-5637).

cally "require or encourage the fiduciary to invest primarily in employer stock," a fiduciary who continues to invest in employer stock "is entitled to a presumption that he has been a prudent investor." *Harris*, 2013 WL 5737307, at *9 (9th Cir.); see *Citigroup*, 662 F.3d at 138 (2d Cir.); *Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 346-347 & n.11 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 255 (5th Cir.); *Kuper*, 66 F.3d at 1457-1459 (6th Cir.); *White*, 714 F.3d at 988-991 (7th Cir.); *Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267, 1277-1279 (11th Cir. 2012).

The courts, however, have diverged on two interrelated subsidiary questions: what a plaintiff must show to rebut the presumption, and at what stage in the proceedings the plaintiff must make that showing. Six circuits have held that a plaintiff must show that the fiduciary knew or should have known that the employer faced a "dire situation" financially, *Edgar*, 503 F.3d at 348-349 & n.13—or put another way, that the company's "viability as a going concern was * * * threatened," or its "stock was in danger of becoming essentially worthless," although not necessarily that it was "about to collapse," *Kirschbaum*, 526 F.3d at 255-256. See *Citigroup*, 662 F.3d at 140-141; *White*, 714 F.3d at 994-995; *Quan* v. *Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010); *Lanfear*, 679 F.3d at 1282. Under that view, the "presumption is very difficult to overcome." *Rinehart* v. *Akers*, 722 F.3d 137, 148 (2d Cir. 2013). To prove that the fiduciaries managed the plan imprudently, it is "not * * * enough for plaintiffs to prove that the company's stock was not a 'prudent' investment." *Quan*, 623 F.3d at 882.[4]

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[4] The Seventh Circuit has also permitted plaintiffs to allege "extreme risks imposed upon participants by fiduciaries that outweigh

Three of those circuits have stated, however, that courts should apply a sliding-scale approach under which "judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries" over investment decisions. *Citigroup*, 662 F.3d at 138; see *Kirschbaum*, 526 F.3d at 255; *Quan*, 623 F.3d at 883.

Those same circuits, with the exception of the Ninth Circuit (which has not resolved the question), have further held that the presumption applies at the motion-to-dismiss stage. See *Citigroup*, 662 F.3d at 139-140; *Edgar*, 503 F.3d at 349; *Kopp*, 722 F.3d at 339; *White*, 714 F.3d at 990-991; *Lanfear*, 679 F.3d at 1281. They have reasoned that because the presumption of prudence is "a standard of review applied to a decision made by an ERISA fiduciary, * * * [w]here plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss." *Citigroup*, 662 F.3d at 139.[5]

The Sixth Circuit has departed from the other circuits in both respects. As the decision below explained, in the Sixth Circuit, "an ESOP plaintiff c[an] 'rebut th[e] presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" Pet. App. 12 (emphasis omitted) (quoting

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the flexibility of a plan that allows employees to select from among a variety of investment options." *White*, 714 F.3d at 994.

[5] Contrary to respondents' assertion (Br. in Opp. 16), the Third Circuit held in *Edgar* that the presumption of prudence applies at the motion-to-dismiss stage. See 503 F.3d at 349. It found the complaint insufficient to rebut the presumption because it did not allege "the type of dire situation which would require [fiduciaries] to disobey the terms of the Plan by not offering [employer] stock." *Id.* at 348.

Kuper, 66 F.3d at 1459). Given that a plaintiff ordinarily bears the burden of proof for a breach-of-fiduciary-duty claim, that standard does not on its face appear to differ materially from the standard that applies to such a claim involving an ordinary ERISA plan. The Sixth Circuit has nevertheless described its standard as imposing a "demanding burden." *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 595, cert. denied, 133 S. Ct. 758 (2012). It does not, however, require proof that the employer faced "dire circumstances" at the time of the investment in employer stock. *Ibid.*

Because the Sixth Circuit has conceived of the presumption as an evidentiary principle that "concerns questions of fact," it does not require plaintiffs to plead facts rebutting it. Pet. App. 11-12; see *Pfeil*, 671 F.3d at 592-593. Rather, the Sixth Circuit has framed the presumption as merely a framework for weighing the evidence of the fiduciary's allegedly imprudent investment. For that reason, the court has found it important to afford plaintiffs the "opportunity to conduct formal discovery." *Id.* at 595.

b. Respondents contend (Br. in Opp. 12-13) that no conflict exists because in each of the decisions applying the presumption of prudence at the pleading stage, "the plan directed the fiduciaries to invest in employer stock," whereas in this case "the Plan gave petitioners full authority to cease investing in or divest the employer's stock." That argument is mistaken. As an initial matter, at least four courts of appeals, including the court below, have acknowledged the conflict of authority. See Pet. App. 12; *Kopp*, 722 F.3d at 338; *White*, 714 F.3d at 991; *Lanfear*, 679 F.3d at 1281 n.16; see also *Rinehart*, 722 F.3d at 145. The

Sixth Circuit in this case, moreover, ascribed no legal significance to whatever discretion the Plan affords petitioners. And no circuit has suggested that the existence of discretion would convert the presumption from a standard of review into an evidentiary principle.

In any event, not all of the precedents from other circuits relied on mandatory plan terms to apply the presumption of prudence. In *Kopp*, for example, the Fifth Circuit held that "regardless of whether the [fiduciaries] had discretion to cease permitting new Fund investments in [employer] stock or liquidate Fund investments in [employer] stock, the 'presumption of prudence' applies at the motion to dismiss stage." 722 F.3d at 336. Likewise, in *Lanfear*, the Eleventh Circuit concluded that "[t]he Plan did provide the defendants with some discretion," in that "it did not require th[e] [employer stock] fund to be invested exclusively in [employer] stock," but nevertheless applied the presumption to affirm the dismissal of the plaintiffs' complaint. 679 F.3d at 1277, 1282.

The Second and Ninth Circuits have concluded that the presumption applies unless the Plan does not even *encourage* a fiduciary to invest plan assets in employer stock. See *Taveras* v. *UBS AG*, 708 F.3d 436, 445-446 (2d Cir. 2013); *Harris*, 2013 WL 5737307, at *9-*11. Here, however, the court of appeals did not find that the Plan conferred on fiduciaries the sort of open-ended discretion that the Second and Ninth Circuits have determined would render the presumption inapplicable. The court of appeals stated only that the Fifth Third Stock Fund is not required to be invested "*solely* in Fifth Third stock" (presumably because it permits investment in other assets for short-term

liquidity purposes, see Cert. Reply App. 27) and that its terms do "not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock fund, *as prudence dictates*." Pet. App. 4 (emphases added). See *Rinehart*, 722 F.3d at 146 ("presumption applies in full force" where plan authorizes fiduciary to curtail investments as required by ERISA duties); *Taveras*, 708 F.3d at 444 (presumption applies even if fiduciaries have "the ability to remove the company's fund from those funds available to plan investors").

Moreover, the plain terms of the Plan mirror the terms of plans that other courts of appeals have determined "strongly encourage" investment in company stock, or provide only limited discretion, by stating that "in all events, the Fifth Third Stock Fund * * * *shall* be an investment option." Cert. Reply App. 45 (emphasis added); see *id.* at 26-27 (Committee "shall direct [Fifth Third] to make available at least three investment funds in addition to the Fifth Third Stock Fund"); see also Cert. Reply Br. 4-6. Nothing in the court of appeals' opinion suggests that it viewed the Plan as the sort of purely discretionary plan that some other circuits have found not to trigger the presump-tion.

c. Respondents further contend (Br. in Opp. 11) that this case is not a suitable vehicle for resolving the question presented due to "the absence of a more developed factual record." That is not a sound reason to deny review, given that the question is whether respondents' complaint suffices to state a claim for breach of fiduciary duty. They also argue (*id.* at 21-22) that their complaint would not have been dismissed even under the standard adopted by other

courts of appeals, because it "did in effect allege that Fifth Third faced a 'dire situation.'" In the event that this Court concludes that the court of appeals should have applied that standard, it could remand the fact-bound question of its application to the particular allegations here.

3. This Court should resolve this conflict of authority to ensure that lower courts and plan administrators understand the legal duties of ESOP fiduciaries. For the reasons discussed above, the proper resolution is to hold that courts should not apply a presumption that an ESOP fiduciary has acted prudently at any stage of the proceedings. See pp. 9-13, *supra*. The wording of the first question presented in the petition is closely bound up with the question whether a presumption of prudence applies at all, and that question is logically antecedent to any questions concerning when such a presumption applies and what is necessary to rebut it. See *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1876 (2011) (addressing issue logically antecedent to ERISA question presented); *Varity*, 516 U.S. at 495-496 (same). To ensure adequate briefing, however, the government recommends reformulating the first question presented as follows:

1. Whether, in a suit claiming that an ESOP fiduciary violated the statutory duty of prudence, 29 U.S.C. 1104(a)(1)(B), the fiduciary should be accorded a presumption that he acted prudently.

2. If so, whether the presumption applies at the pleading stage and what a plaintiff must allege to rebut it.

B. The Second Question Presented Does Not Warrant This Court's Review

Petitioners also seek review (Pet. 25-34) of the court of appeals' holding that respondents stated a claim for breach of fiduciary duty based on material misstatements contained in SEC filings incorporated by reference into the SPD distributed to plan participants. See Pet. App. 17-23. The court of appeals' conclusion, however, was correct, and no conflict of authority exists on that issue. This Court should therefore deny review.

1. ERISA requires plan fiduciaries to create and disseminate an SPD. See 29 U.S.C. 1022, 1024 (2006 & Supp. V 2011); see also *Varity*, 516 U.S. at 504; *CIGNA*, 131 S. Ct. at 1877. Accordingly, communications contained in an SPD are made in a fiduciary capacity and can give rise to an action for breach of fiduciary duty when they contain material misrepresentations. See *Varity*, 516 U.S. at 503.

Petitioners maintain that the result should be different where, as here, an SPD does not make a misrepresentation expressly but rather directs plan participants to other documents that contain misleading statements. That rule would allow ERISA fiduciaries to make misrepresentations with impunity. The SPD here, for example, told plan participants that petitioners "can disclose important information to you by referring you to [SEC] documents" and that the "information incorporated by reference is an important part of this booklet." Pet. App. 18 (citation omitted). The obvious import of those statements was that the SEC documents contain information that petitioners intended to convey to plan participants as part of their ERISA-mandated duty to "reasonably apprise * * *

participants and beneficiaries of their rights and obligations under the plan" in an SPD. 29 U.S.C. 1022(a). The statements contained in the SEC filings therefore should be treated as if they were contained in the SPD itself. See 11 Richard A. Lord, *Williston on Contracts* § 30:25, at 304 (4th ed. 2012) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument.").

2. a. Petitioners contend that the decision below conflicts with decisions of this Court holding that "a fiduciary is not liable under ERISA for actions taken in a non-ERISA capacity." Pet. 26 (citing *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000)). The court of appeals, however, expressly acknowledged that principle, and it concluded, based on respondents' concession, that "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 16-17. But the court determined that the act of incorporating SEC statements into an SPD—a document ERISA requires to be provided to plan participants—is a fiduciary act. Petitioners also argue that the holding below is "irreconcilable" with *Varity* (Pet. 27), where this Court held that company officers had acted in a fiduciary capacity when making misleading statements to plan participants at an employee meeting. See 516 U.S. at 498-505. But *Varity* supports the court of appeals' holding, because the Court determined that the meeting was a fiduciary act in part by analogizing it to an SPD. See *id.* at 502-503 (citing 29 U.S.C. 1022, 1024(b)(1)). Petitioners' argument (Pet. 29) that the statements here were not "intentionally connected" to the Plan ignores that the

very purpose of an SPD is to apprise participants of their rights under a plan.

b. Petitioners also contend that the court of appeals' holding conflicts with decisions of the Second, Fifth, and Eleventh Circuits. See Pet. 29-34. As the court of appeals recognized, however, no conflict exists. See Pet. App. 20.

In *Kirschbaum*, for example, the Fifth Circuit held that incorporating SEC filings into a stock fund prospectus, which comprised documents that the securities laws required the employer to distribute to plan participants, was not a fiduciary act. See 526 F.3d at 256-257. A stock fund prospectus, unlike an SPD, is not an ERISA-mandated communication to plan participants. Most pertinently, the Fifth Circuit found the case "easily distinguishable" from a district-court decision holding that a plan fiduciary could be liable for breach of fiduciary duty for misleading statements incorporated by reference into a prospectus that the employer had designated as the SPD. See *ibid.* (distinguishing *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 869 (S.D. Tex. 2004)). The Eleventh Circuit's decision in *Lanfear* similarly held that the defendants were not acting as ERISA fiduciaries when they created and distributed stock prospectuses that incorporated SEC filings, reasoning that the defendants "were conducting business that was regulated by securities law and not by ERISA." See 679 F.3d at 1283-1284.

Contrary to petitioners' contention, the Second Circuit's decision in *Gearren* v. *McGraw-Hill Cos.*, 660 F.3d 605 (2011), cert. denied, 133 S. Ct. 476 (2012), strongly suggested that a fiduciary who prepared an SPD would be liable for statements in SEC filings

incorporated by reference if he knew that the statements were false. See *id.* at 611. And in any event, the Second Circuit has recently confirmed that it "agree[s]" with the Sixth Circuit that defendants "act[] as ERISA fiduciaries when they incorporate[] [the employer's] SEC filings into the SPD distributed to plan-participants." *Rinehart*, 722 F.3d at 152. The Ninth Circuit has also now reached the same conclusion. See *Harris*, 2013 WL 5737307, at *16-*17.

3. In their reply brief (at 10 n.3), petitioners argue, contrary to the evident understanding of the court of appeals, that respondents' complaint does not sufficiently allege that the Plan SPD incorporated SEC filings by reference. If true, that deficiency would render this case an unsuitable vehicle to resolve the question whether the "incorporation of SEC filings by reference into a SPD is a fiduciary activity" (Pet. 25), even if that issue otherwise warranted review.

CONCLUSION

The petition for a writ of certiorari should be granted only on the first question presented.

Respectfully submitted.

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