No. 08-586

IN THE

Supreme Court of the United States

JERRY N. JONES, MARY F. JONES,
AND ARLINE WINERMAN,
Petitioners,

v.

HARRIS ASSOCIATES L.P.,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Harris Associates L.P. is the investment adviser to three funds that, during the relevant period, had significantly better returns than competing funds. Notwithstanding that exceptional performance, respondent charged those funds fees that were in line with the prevailing industry rates for its services; it likewise disclosed all relevant facts to the fund trustees responsible for negotiating its compensation. The question presented is:

Whether the district court and court of appeals erred in holding, on summary judgment, that the compensation received was not so unusual or disproportionate as to reflect a "breach of fiduciary duty with respect to the receipt of compensation" within the meaning of Section 36(b) of the Investment Company Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Harris Associates L.P. ("Harris") states that it is a Delaware limited partnership managed by its general partner, Harris Associates, Inc., which owns 0.33% of the limited partnership interests. Harris Associates, Inc. is a wholly-owned indirect subsidiary of Natixis Global Asset Management, L.P. ("Natixis U.S."). Natixis U.S. owns 99.67% of Harris's limited partnership interests and, through its wholly-owned subsidiary, Natixis Global Asset Management Holdings, LLC, all of the outstanding shares of Harris Associates, Inc. No publicly held corporation owns 10% or more of Harris's stock.

Natixis U.S. is part of Natixis Global Asset Management, an international asset management group based in Paris, France, that is ultimately owned principally, directly or indirectly, by three affiliated French financial services firms: Natixis, an investment banking and financial services firm; the Caisse Nationale des Caisses d'Epargne, a financial institution owned by French regional savings banks known as the Caisses d'Epargne; and the Banque Federale des Banques Populaires, a financial institution owned by regional cooperative banks known as the Banques Populaires. Natixis is a public company whose shares trade on the Euronext Paris exchange.

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BRIEF IN OPPOSITION

STATEMENT

I. STATUTORY BACKGROUND

A. The Investment Company Act

Congress enacted the Investment Company Act of 1940 ("ICA"), 15 U.S.C. §80a-1 *et seq.*, to protect mutual fund investors. A mutual fund is an investment company that pools money from multiple investors for investment in stocks, bonds, or other securities. Typically, a separate company—an investment adviser registered under the ICA's companion statute, the Investment Advisers

Act, 15 U.S.C. §80b-1 *et seq.*—professionally manages the mutual fund's portfolio, selecting investments and supervising the fund's daily operation. Investment advisers often provide services to other entities, such as institutional investors and pension funds. But the services provided to those entities, and the costs of providing them, are often very different. See John C. Coates & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 Iowa J. Corp. L. 151, 185 (2007) ("Significant product and cost differences separate the advising of retail mutual funds and the advising of public pension plans.").

As a matter of industry practice and law, investment advisers and mutual funds are separate. Nonetheless, investment advisers often form mutual funds as vehicles for selling services to the public. See *Daily Income Fund* v. *Fox*, 464 U.S. 523, 536 (1984). Most mutual funds are "formed, sold, and managed" by a "separately owned and operated" investment adviser that "selects the funds' investments and operates their business." *Burks* v. *Lasker*, 441 U.S. 471, 481 (1979) (quoting S. Rep. No. 91-184, at 5 (1969)).

The ICA protects mutual-fund investors by requiring that the mutual fund be independent from its investment adviser on a variety of issues, *Burks*, 441 U.S. at 482; 15 U.S.C. §§80a-10(a)-(b), 80a-15(a)-(c), so fund trustees can act as "'independent watchdogs.'" *Burks*, 441 U.S. at 484 (quoting *Tannenbaum* v. *Zeller*, 552 F.2d 402, 406 (2d Cir. 1977)). At least 40 percent of the mutual fund's trustees must be disinterested with respect to the investment adviser. 15 U.S.C. §80a-10(a). And those disinterested trustees have special roles. Critically, they must "review and approve the contracts of the investment advisor." *Burks*, 441 U.S. at 483. And while all fund trustees vote on the agreement between the fund and its investment adviser, the *fees* paid to the investment adviser can be established *only* by a majority of *disinterested* trustees. 15 U.S.C. §80a-15(c).

The ICA and SEC also require investment advisers to make, and mutual fund trustees to review, extensive disclosures relating to the adviser's fees, costs, and profits. Section 15(c) of the ICA requires investment advisers to furnish, and fund directors to examine, all information reasonably required to evaluate the terms of any advisory contract. 15 U.S.C. §80a-15(c). SEC rules require, among other things, disclosure of (a) the costs of the services the investment adviser provides to the fund, (b) the profits the investment adviser and its affiliates realize from their relationship with the fund, (c) the extent to which economies of scale are realized as the fund grows, and (d) how such economies of scale benefit investors. See 69 Fed. Reg. 39798, 39801 (June 30, 2004).

This case arises under §36(b) of the ICA, 15 U.S.C. §80a-35(b), which was added in 1970 together with other provisions reinforcing the independence of fund trustees. See Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1413. Section 36(b) provides that investment advisers have "a fiduciary duty with respect to the receipt of compensation" from the mutual funds they advise. 15 U.S.C. §80a-35(b). Section 36(b) also creates a private cause of action that shareholders may assert on behalf of a fund against the fund's investment adviser "for breach of fiduciary duty in respect of such compensation or payments paid" to the investment adviser. *Ibid.* The plaintiff in such an action has "the burden of proving a breach of fiduciary duty." 15 U.S.C. §80a-35(b)(1).

B. The Growth of the Mutual Fund Industry

Since the enactment of §36(b) in 1970, the mutual fund industry has experienced explosive growth and dramatically increased competition. Today, nearly 700 financial services companies compete aggressively, offering fund "families" with an array of individual funds across multiple asset classes and investment objectives. ICI Fact Book 16 (May 2008), http://www.ici.org/stats/latest/2008_factbook.pdf. Those companies offer investors a choice of over 8,700 open-end mutual funds, over 660 closed-end funds, and over 600 Exchange Traded Funds. *Id.* at 15. Multiple organizations publicly review and rate those funds' fees, costs, and performance.

Funds typically do not switch advisers; advisers thus rarely compete for the business of particular funds. But advisers and the funds they form compete intensely for investors' dollars on the basis of factors such as fees, performance, and service. Thus, "price competition is in fact a strong force constraining fund advisors." Coates & Hubbard, *supra*, at 153, 164, 196.[1]

II. PROCEEDINGS BELOW

Respondent Harris Associates L.P. ("Harris") is a highly regarded investment adviser. During the relevant period, the funds Harris managed outperformed the market benchmark and virtually every fund in their peer groups. Petitioners are various individuals who own shares in funds for which Harris served as investment adviser.

A. Harris's Services and Fees

Petitioners brought this action on behalf of three funds in the Oakmark "family" of mutual funds for which

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[1] The assertion that "an investment adviser has the ability to create its own clients by forming the very mutual funds to which it provides its services," Brief of *Amici Curiae* Law Professors 3, is thus misleadingly incomplete. An adviser may create an investment company that serves as a vehicle for pooling assets. But, in so doing, it does not create "clients," as it still must convince investors to put their money into that fund. Those potential clients have the option of investing in more than 9,000 other funds.

Harris serves as investment adviser: the Oakmark Fund, the Oakmark Equity and Income Fund, and the Oakmark Global Fund (the "Funds"). C.A. App. 66. The complaint alleged that Harris breached its fiduciary duty to the Funds with respect to the receipt of compensation under §36(b) by charging "excessive" fees. *Id.* at 46-47.

1. *Harris's Performance Record*

The complaint sought damages for the one-year period ending August 16, 2004. Pet. App. 29a.[2] Reports prepared for the Funds' trustees by a third-party industry consultant—Lipper, Inc.—showed that Harris's performance during that period was extraordinary. The Lipper materials compared each of the three Funds' investment performance and fees to a peer group as well as to a benchmark for each Fund's respective asset class. C.A. App. 71-72.

The Oakmark Global Fund. For the three-year period ending March 31, 2004, the Global Fund generated an average annual return of 22.36% net of fees, the single best performance of *any* of the 254 funds that Lipper considered comparable. That return was nearly 10 times the benchmark Lipper Global Fund Index, which had an average annual return of 2.31% during the same period. C.A. App. 74. The Global Fund's average annual net return over the preceding four-year period was 20.24%, again the single best performance of any comparable fund for that period—and far above the benchmark, which had an average annual *loss* of 4.8%. See *ibid.*[3]

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[2] Damages are limited to the "period prior to one year before the action was instituted." 15 U.S.C. §80a-35(b)(3); see *Daily Income Fund*, 464 U.S. at 526 n.2 ("[R]ecovery is limited to actual damages for a period of one year prior to suit * * * .").

[3] Shares of the Oakmark Global Fund were first offered for sale on August 4, 1999, so a five-year performance figure was not used in the 2004 Lipper report.

The Oakmark Equity and Income Fund. For the three-year period ending March 31, 2004, the Equity and Income Fund generated an average annual return of 12.49% net of fees, the third best performance of 445 peer funds during that period; the Fund's return was over three times the benchmark Lipper Balanced Fund Index, which had an average annual return of 3.76%. C.A. App. 73. For the five-year period ending March 31, 2004, the Equity and Income Fund had an average annual net return of 13.91%, the single best performance in its peer group, and far above the benchmark of 3.11%. *Ibid.*

The Oakmark Fund. For the three-year period ending March 31, 2004, the Oakmark Fund generated an average annual return of 6.22% net of fees. Lipper ranked it 12th out of the 307 funds Lipper considered comparable. It also comfortably outperformed the benchmark Lipper Large-Cap Value Index, which had an average annual return of 1.43%. C.A. App. 73. For the five-year period ending March 31, 2004, the Oakmark Fund's average annual net return was 5.29%, well above the benchmark's 1.22%, giving it a rank of 18 out of 224 comparable funds. See *ibid.*

2. *Harris's Fees*

Notwithstanding Harris's extraordinary performance during the relevant period, Harris's fees were unremarkable. For its services as investment adviser, each Fund paid Harris an advisory fee calculated as a percentage of the Fund's net assets at the end of each month. C.A. App. 67. As required by statute, that fee schedule was set forth in the written advisory agreement that governs the management of each Fund. The agreements, in turn, were negotiated and approved each year by the Funds' trustees, C.A. App. 67, and fully disclosed to shareholders in each Fund's Prospectus and Statement of Additional Information, *id.* at 68-69.

The fee schedule for each of the Funds also featured "breakpoints," *i.e.*, asset levels at which the percentage fee declines. C.A. App. 67. During the relevant period, the annual contract renewal process resulted in the initiation of additional breakpoints in the Funds' fee schedules—further decreasing the fee rate as the Funds grow in size. *Id.* at 68. The following table summarizes the fee schedule for each Fund:

<table>
<tr><th>The Oakmark Fund</th><th>Equity & Income Fund</th><th>Global Fund</th></tr>
<tr><td>First $2.0 billion under mgmt: 1.00%</td><td>First $5.0 billion under mgmt: 0.75%</td><td rowspan="3">First $2.0 billion under mgmt: 1.00%</td></tr>
<tr><td>Next $1.0 billion under mgmt: 0.90%</td><td>Next $2.5 billion under mgmt: 0.70%
(New breakpoint as of 11/1/2003)</td></tr>
<tr><td>Next $2.0 billion under mgmt: 0.80%</td><td>Next $2.5 billion under mgmt: 0.675%
(New breakpoint as of 11/1/03)</td></tr>
<tr><td>Next $2.5 billion under mgmt: 0.75%</td><td rowspan="2">Next $2.5 billion under mgmt: 0.65%
(New breakpoint as of 11/1/2003)</td><td rowspan="2">Next $2.0 billion under mgmt: 0.95%
(New breakpoint as of 11/1/2003)</td></tr>
<tr><td>Next $2.5 billion under mgmt: 0.70%
(New breakpoint as of 11/1/2004)</td></tr>
<tr><td>Net assets in excess of $10 billion: 0.65%
(New breakpoint as of 11/1/2004)</td><td>Net assets in excess of $12.5 billion: 0.60%
(New breakpoint as of 11/1/2004)</td><td>Net assets in excess of $4 billion: 0.90%
(New breakpoint as of 11/1/2003)</td></tr>
</table>

Ibid.

The Lipper materials included comparative data on fees. Each Fund paid fees approximating the median charged by Harris's peers for similar funds. The 2004 Lipper report shows that the Global Fund's total expenses were 0.168% below the median for its peer group, the Equity and Income Fund's were 0.025% above the median for its peer group, and the Oakmark Fund's were 0.174% above the median for its peer group. C.A. App.

71-72. The Funds thus produced extraordinary, above-market returns for at-market fees.

3. *The Annual Negotiation Process*

The ICA requires periodic renegotiation of investment advisory contracts and shareholder approval of material changes. 15 U.S.C. §80a-15(a). The Funds' trustees and Harris negotiated Harris's fees over a period of several months and through multiple meetings. C.A. App. 69-70. Throughout that process, the Funds' trustees were advised by independent, outside legal counsel. *Id.* at 70. As required by §15(c) of the ICA, Harris provided the Funds' trustees with information on a variety of topics at their request—information that far exceeded what a negotiator ordinarily provides its counterparty in arm's-length bargaining. That included the investment performance of the Funds; the profitability of the contracts to Harris (including detailed information about Harris's expenses); details of transactions between the Funds and entities affiliated with Harris; benefits accruing to Harris in addition to fees (*e.g.*, use of "soft dollars" to offset the cost of research services); and information regarding best execution of transactions for each Fund and compliance with investment restrictions. C.A. App. 70-71.

Harris also serves as investment adviser to a variety of non-mutual fund clients, including pension funds, institutional investors, and high net-worth individuals. In addition, Harris contracts to provide sub-advisory services to various mutual funds for which other investment advisers act as the primary adviser. C.A. App. 72. Harris provides a spectrum of services to those other accounts that often differ substantially from the services provided to the Funds; the fees are likewise often different. *Id.* at 73. At the request of the trustees, Harris provided the Funds' trustees with data comparing the fees Harris charged other clients to the fees it charged the Funds, as well as descriptions of how the services

Harris provided other clients differed from the services it provided to the Funds. *Ibid.*

B. The District Court's Decision

Petitioners alleged that, despite Harris's superior performance and its full disclosure of all fees, profits, and prices charged to other clients, Harris breached its fiduciary duty with respect to the receipt of compensation under §36(b) of the ICA. The complaint specifically invoked the formula articulated in *Gartenberg* v. *Merrill Lynch*, 694 F.2d 923, 928 (2d Cir. 1982) ("*Gartenberg*"), alleging that Harris's fees were "so disproportionately large that [they] bear[] no reasonable relationship to the services rendered." C.A. App. 33 (quoting *Gartenberg*, 694 F.2d at 928).

Following years of discovery, the parties filed cross-motions for summary judgment. The district court granted Harris's motion and denied petitioners'. Pet. App. 15a-33a. Applying *Gartenberg*, the district court held that petitioners had not raised a triable issue on "whether the fees charged to the Funds" during the relevant period were "so disproportionately large that they could not have been the result of arm's-length bargaining." *Id.* at 29a; see also *id.* at 28a. After careful examination of "all facts pertinent to the amount of fees paid"—including the amount of fees and the negotiations that set them—the district court had little difficulty concluding that petitioners' claims lacked merit. *Id.* at 27a. There was no "dispute that Harris's fees were comparable to those charged by other similar funds." *Id.* at 30a. Petitioners did not deny that the Funds "performed well"—extraordinarily well—"during the damages period." *Id.* at 30a, 32a. And there was no genuine dispute that the Funds' trustees "operat[ed] without any conflict" that would prevent "arm's-length negotiations" with Harris. *Id.* at 31a. The undisputed facts showed that the "shareholders' interests were represented at the negotiating table by a group of people who were capable of giving those interests primacy." *Ibid.* The district court further concluded that the "breakpoints" were not unreasonable; they were "comparable to what shareholders in other mutual funds had accepted." *Id.* at 31a-32a.

The district court also rejected petitioners' argument that Harris's fees were unreasonable because Harris charged some institutional clients lower rates than it charged the Funds. Pet. App. 30a. The undisputed facts established that Harris provided "more limited" services to those clients than it provided to the Funds. *Id.* at 16a.[4] The court further held that, even if one assumed that the institutional investors received identical services, the evidence did not show that the fees paid by the Funds exceeded the amount that could have resulted from arm's-length negotiations. The Funds' fees fell comfortably within the range of all fees Harris received from all types of clients. *Id.* at 30a. That, the court explained, "prevent[s] a conclusion that the amount of fees indicates that self-dealing was afoot." *Ibid.* The court concluded that evidence of bargaining by unconflicted and fully informed trustees acting in the shareholders' interest, Harris's unparalleled performance, and the fact that the fees fell within the range of market rates—when coupled with petitioners' failure to generate contrary proof—prevented the conclusion that the fee was "so disproportionately large" as to trigger liability under §36(b). Pet. App. 29a.

C. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-14a. On appeal, petitioners urged that the Seventh Circuit "should *not* follow *Gartenberg*" and should instead exa-

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[4] Any suggestion that the services were "indistinguishable," Pet. 9, is thus incorrect. The services provided to the institutional investors were "more limited than those * * * provided to the Funds." Pet. App. 16a.

mine the "reasonableness" of the adviser's fee. *Id.* at 6a (emphasis added). *Gartenberg*, petitioners complained, "relies too much on market prices as the benchmark." *Ibid.*

The court of appeals was not persuaded. The court explained that §36(b) by its terms imposes a "fiduciary duty" with respect to fees; it does not say that "fees must be 'reasonable' in relation to a judicially created standard." Pet. App. 8a. "A fiduciary duty differs from rate regulation." *Ibid.* Under traditional principles, a fiduciary "owes an obligation of candor in negotiation, and honesty in performance," but may negotiate in its own interest with respect to compensation. *Id.* at 8a-9a (citing *Restatement (Second) Trusts* §242 & cmt. f). The court also acknowledged limits: "It is possible to imagine compensation so unusual that a court will infer that deceit must have occurred, or that the persons responsible for decision have abdicated." *Id.* at 9a.

The court of appeals also rejected the premise that the relationship between an investment adviser and the fund necessarily produces excessive fees. Pet. App. 7a. Funds and their advisers must compete for investor dollars. "Holding down costs is vital in competition, when investors are seeking maximum return net of expenses." *Ibid.* Since "management fees are a substantial component of administrative costs, mutual funds have a powerful reason to keep them low unless higher fees are associated with a higher return on investment." *Ibid.* "That mutual funds are 'captives' of investment advisers does not curtail this competition. An adviser can't make money from its captive fund if high fees drive investors away." *Ibid.* Today, the court of appeals continued, "thousands of mutual funds compete." *Id.* at 11a. Consequently, even if funds do not fire their advisers, investors "can and do 'fire' advisers cheaply and easily by moving their money" to other funds. *Id.* at 11a-12a.

Finally, the court of appeals rejected petitioners' claim that a breach of duty arose because Harris charges other clients lower rates. Pet. App. 13a. "Different clients call for different commitments of time," different services, and varying degrees of complexity in conducting "research, valuation and portfolio design." *Ibid.* For example, the court explained, "[p]ension funds have low (and predictable) turnover of assets." *Ibid.* But "[m]utual funds may grow or shrink quickly and must hold some assets in high-liquidity instruments to facilitate redemptions." *Ibid.* Different elasticities of demand also mean that joint costs are not necessarily allocated *pro rata. Ibid.*

In the course of its discussion, the court of appeals expressed "skeptic[ism]" that *Gartenberg* had relied sufficiently on "markets," and accordingly "disapprove[d]" of aspects of *Gartenberg's* "approach." Pet. App. 7a, 8a. The panel expressed concern that *Gartenberg* was not sufficiently tethered to §36(b)'s text. Liability for breach of an adviser's statutory "fiduciary duty with respect to the receipt of compensation," the court observed, should be tested against familiar principles of fiduciary obligation—and not by judicial review through a subjective lens of reasonableness tantamount to rate regulation. Nonetheless, the court of appeals agreed with *Gartenberg* that the amount of fees could by itself support a finding of fiduciary breach. A fee could be so "unusual" that it compelled the "infer[ence] that deceit must have occurred" or that there was an "abdicat[ion]" of responsibility. Pet. App. 9a. Here, however, petitioners had not identified facts to support such an inference. *Id.* at 13a-14a.

The court of appeals denied rehearing *en banc* by an equally divided vote. The dissenting judges acknowledged that "[t]he *outcome* of this case may be correct." Pet. App. 42a. And they agreed that the panel's test—whether the compensation is "so unusual" as to raise an inference of breach—"might not seem to differ materially from" *Gartenberg*, which asks whether compensation is "so disproportionate" as to bear no reasonable relationship to the services rendered. *Id.* at 41a. But the dissenting judges expressed concern that the panel opinion could be read to preclude courts from comparing the adviser's fee to anything but the fees charged to other mutual funds. *Ibid.*

REASONS FOR DENYING THE PETITION

Petitioners claim that the decision below creates a circuit conflict on the standard for determining whether the size of the fee charged by an investment adviser establishes that it breached its "fiduciary duty with respect to the receipt of compensation" under §36(b) of the ICA, 15 U.S.C. §80a-35(b). But the difference they posit is one of articulation, not substance.

In *Gartenberg* v. *Merrill Lynch*, 694 F.2d 923 (2d Cir. 1982), the Second Circuit established a demanding standard. Compensation will not violate §36(b), that court held, unless the fee is so "disproportionately large that it bears no reasonable relationship to the services rendered." *Id.* at 928. The decision below echoes that standard, acknowledging that fees that are "so unusual" as to create an inference of fiduciary breach trigger §36(b) liability. Pet. App. 9a. There is no reason to believe that the two formulations will lead to different results; any fee that is "so disproportionately large" as to have "no reasonable relationship" to the services rendered would almost certainly be "so unusual" as to raise an inference that fiduciary duties were violated and vice versa. Contrary to petitioners' claims, the decision below does *not* hold that approval by a fund's board of directors is conclusive. And while petitioners complain that the decision below refused to compare the fees Harris received from the Funds to the fees Harris received from certain institutional investors, they ignore the undisputed facts and *Gartenberg*'s own rejection of the identical comparison.

Tellingly, petitioners identify no case in any other court that would have been decided differently under the two articulations of the relevant standard. To our knowledge, no plaintiff has ever prevailed on a §36(b) claim, even under the *Gartenberg* articulation petitioners now propose (after opposing it in both courts below). Only two courts of appeals have thoroughly addressed this issue, which appears unlikely to arise with frequency in the future. And petitioners here cannot prevail under *any* standard adopted by any court of appeals. The district court rejected their claims under the *Gartenberg* formula they cited in their complaint, later abandoned, but now seek to resurrect.

Nor does the Seventh Circuit's view of competition in the mutual fund industry today provide any basis for review. Some 25 years of experience and industry growth informed the Seventh Circuit's perspective. This Court does not adjudicate competing law-and-economics analyses that lack real-world impact on the resolution of actual cases. Absent actual disparate outcomes, review is unwarranted.

I. THE ALLEGED CIRCUIT CONFLICT IS ILLUSORY

The decision below does not conflict with *Gartenberg* and cases that purportedly follow *Gartenberg*. To the contrary, the conflict petitioners posit is wholly academic. It does not alter the result in this case or any other.

A. The Legal Formula Adopted Below Is Substantively Identical to *Gartenberg*

1. In *Gartenberg*, the Second Circuit addressed the considerations that can support the conclusion that a mutual fund adviser violated its "fiduciary duty with respect to the receipt of compensation" under §36(b). Like the decision below, *Gartenberg* acknowledged that

conduct amounting to a traditional fiduciary breach—such as deceit, withholding relevant information, or failure to bargain in good faith—could establish a breach of the statutory obligation. And it went on to address the plaintiffs' claim that the fees paid to the adviser in that case were, by themselves, so excessive that they amounted to a breach of fiduciary duty. But *Gartenberg* recognized that §36(b) was not a license for courts to impose their own judgments about the fairness or reasonableness of fees, and it rejected the plaintiffs' claim that §36(b) requires fees to be substantively fair or reasonable. 694 F.2d at 928. Instead, the Second Circuit held that, to violate §36(b), "the adviser-manager must charge a fee that is *so disproportionately large* that it bears *no reasonable relationship* to the services rendered and could not have been the product of arms'-length bargaining." *Ibid.* (emphases added).

That determination must be made "in the light of all of the surrounding circumstances." *Gartenberg*, 694 F.2d at 928. Those circumstances included "rates charged by other adviser-managers to other similar funds," *id.* at 929, the adviser's "cost in providing the service, the nature and quality of the service, the extent to which the adviser-manager realizes economies of scale as the fund grows larger, and the volume of orders which must be processed by the manager." *Id.* at 930. The court also focused on investors' relative returns compared to competitor funds. *Ibid.* Finally, the Second Circuit pointed to good-faith bargaining by a fund's independent trustees as an important ingredient in the fiduciary calculus. *Id.* at 930, 931.

The decision below establishes a similar formula and looks to similar considerations. Like the Second Circuit in *Gartenberg*, the decision below refused petitioners' invitation to adopt a subjective "reasonableness" standard for adviser fees. Pet. App. 8a ("Section 36(b) does not say that fees must be 'reasonable.'"). Instead, the Seventh Circuit held that §36(b) by its terms established a breach-of-fiduciary-duty standard. That standard gives rise to liability when a fee results from conduct familiarly understood as a fiduciary breach—such as where there is incomplete disclosure, "deceit," trickery, or a failure to meet the requirements of "candor in negotiation" and "honesty in performance." Pet. App. 8a. If an adviser thwarts fair negotiation, that can violate §36(b). See *id.* at 14a.

But the decision below also recognized that §36(b) could be violated based on the size of the fee alone—such as where compensation is "so unusual that a court will infer that deceit must have occurred, or that the persons responsible for decision have abdicated." Pet. App. 9a. That ruling closely echoes *Gartenberg*. In the Second Circuit, liability is triggered by a fee that is "so disproportionate" that it has "no reasonable relationship" to the services rendered and thus "could not have been the product" of arm's-length negotiations. *Gartenberg*, 694 F.2d at 928. Under the decision below, a breach similarly may be shown if compensation is "*so unusual*" that deceit or an "abdicat[ion]" of arm's-length bargaining "*may be inferred.*" Pet. App. 8a, 13a-14a. Thus, both circuits will consider a fee's size, by itself, in determining whether the fiduciary relationship has broken down. And they use similar standards—compensation that is "so disproportionate" as to have no reasonable relationship to services (*Gartenberg*) or "so unusual" as to evidence deceit or abdication (this case) can violate §36(b).

The slight differences in articulation between those two formulations cannot conceivably produce different legal outcomes on similar facts. One district court has already observed that *Gartenberg* and the decision below "lead to the same place." *In re Mutual Funds Inv. Litig.*, MDL No. 04-MD-15863, — F. Supp. 2d —, 2008

WL 5412407, at *15 (D. Md. Dec. 30, 2008). And the district court here easily rejected petitioners' claims under *Gartenberg*'s approach. See pp. 22-24, *infra*. Under any articulation of the §36(b) standard, Harris's fees are neither "so unusual" as to raise an inference of fiduciary breach nor "so disproportionately large" as to have no relationship to the services rendered—particularly considering the Funds' extraordinary, first-in-class performance.

2. Ignoring the virtual identity of the two formulations, petitioners repeatedly claim that the decision below requires proof that the adviser "misled the fund's directors" in obtaining approval of the compensation. Pet. 2, 13; *id.* at i (Question Presented). Without this proof, petitioners allege, the Seventh Circuit will uphold compensation, "no matter how excessive." *Id.* at 13, 19. The decision below, they further urge, makes approval of an adviser's fees "conclusive," contravening the ICA's direction that board approval "shall be given such consideration by the court as is deemed appropriate under all the circumstances." *Id.* at 2, 19, 21-22 (citing 15 U.S.C. §80a-35(b)(3)).

That misreads the decision below. The decision does hold that directly proving "deceit," or lack of "candor in negotiation" and "honesty in performance," *can* establish breach of fiduciary duty with respect to compensation. But petitioners ignore the opinion's express statement that a highly "unusual" fee *itself* can cause a court to "*infer* that deceit" or abdication of responsibility "*must have* occurred." Pet. App. 9a (emphases added).[5] In

[5] Petitioners draw their claim that board approval is "conclusive" from the Seventh Circuit's description of the *general* law of trusts. See Pet. App 9a (citing John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995)). But the court nowhere held that board approval is "conclusive" with respect to

other words, an excessive fee can be enough to prove liability. That ruling mirrors *Gartenberg*, which likewise considers whether trustees "are fully informed" by advisers and whether trustees exercise "care and conscientiousness," but also asks whether a fee is "so disproportionately large" as to raise flags about "a breach of fiduciary duty." 694 F.2d at 930.

The Seventh Circuit's claim to "disapprove the *Gartenberg* approach" thus is best understood as an objection to aspects of *Gartenberg's* reasoning, not its standard. Pet. App. 8a. The decision below reads *Gartenberg* as invoking §36(b)'s legislative history rather than its text and as having articulated its formula as a substantive limit on the amount of fees—*i.e.*, as a form of "judicial rate setting" that, in both courts' view, was not the statute's object. Pet. App. 8a, 14a. The decision in this case, by contrast, invokes §36(b)'s text, which imposes a "fiduciary duty," to require courts to draw on familiar fiduciary principles in adjudicating §36(b) claims. But the decision below agreed with *Gartenberg* in substance that the amount of fees by itself can establish liability, because truly unusual compensation can *evidence* a fiduciary breach. *Id.* at 9a. Even the Seventh Circuit judges favoring *en banc* review agreed with the panel's approach. They did not construe §36(b) as a rate-regulation statute that substantively limits compensation. "[T]he point," they urged, "is that unreasonable compensation can be *evidence* of a breach of fiduciary duty." *Id.*

§36(b) claims. The court expressly required, for example, that the adviser "make full disclosure and play no tricks." Pet. App. 8a. More importantly, immediately after that discussion, the court of appeals recognized that a fee could be "so unusual that a court will infer that deceit must have occurred or that the persons responsible for decision have abdicated." *Id.* at 9a.

at 41a-42a (emphasis added).[6] To the extent the decision below departs from *Gartenberg*'s reasoning, it does so to anchor *Gartenberg*'s result in statutory text and familiar principles of fiduciary responsibility. And, while the decision in this case also criticizes *Gartenberg* for insufficient focus on "markets," *id.* at 8a, 11a-13a, that merely represented the panel's effort to modernize *Gartenberg*'s reasoning to account for the spectacular growth in competition over the past 30 years—not disagreement with *Gartenberg*'s substantive standard. See pp. 25-26, *infra*.

3. Ultimately, petitioners rest their argument on the claim that Harris charged certain institutional clients lower rates than it charged the Funds. The court of appeals, they claim, erred in failing to consider that difference. Pet. 2-3, 19-20. There is no dispute that Harris fully disclosed the different fees it charged its other clients. It provided disclosures (such as its profit margins) that far exceeded the information that is typically exchanged in arm's-length negotiation. Pet. App. 16a; C.A. App. 73. Nor can there be a serious claim that the different charges themselves violate Harris's fiduciary duty or support a conflict with *Gartenberg*.

As the opinion below explained, different clients impose different costs. They call for "different commitments of time," Pet. App. 13a, and impose other constraints. For example, while "[p]ension funds have low (and predictable) turnover of assets[,]" mutual funds "must hold some assets in high-liquidity instruments to facilitate redemptions," which "complicates an adviser's task." *Ibid.* The district court reached that conclusion on

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[6] For the same reason, the court of appeals' decision does not conflict with *Meyer* v. *Oppenheimer Management Corp.*, 764 F.2d 76 (2d Cir. 1985). See Pet. 16. *Meyer* rejected the view that board approval by itself is conclusive—a view likewise rejected by the decision in this case. See pp. 17-18 & n.5, *supra*.

the undisputed facts here: "The services Harris provided to institutional clients * * * were more limited than those they provided to the Funds." Pet. App. 16a. As petitioners state, "the evidence here showed" that "Harris charged the Oakmark funds more than institutional clients, but also that it cost Harris significantly less to serve the institutional clients." Pet. 27.

In any event, *Gartenberg* rejected the identical argument—"that the lower fees charged by investment advisers to large pension funds should be used as a criterion for determining fair advisory fees for money market funds." 694 F.2d at 930 n.3. The court observed that "[t]he nature and extent of the services required by each type of fund differ sharply": "the pension fund does not face the myriad of daily purchases and redemptions throughout the nation which must be handled by the [money market] Fund." *Ibid.* The fact that the decision below and *Gartenberg* rejected the same comparison for the same reasons demonstrates consistency, not conflict.

For like reasons, petitioners err in claiming that the court of appeals' "so unusual" standard is different from *Gartenberg*'s "so disproportionate" standard because the former compares only the fees charged to different mutual funds. See Pet. 19-20. The court of appeals did not hold that institutional-client fees are irrelevant where the services provided are similar. To the contrary, the decision suggested that comparison with "similar" or "comparable" funds would be highly relevant. Pet. App. 9a. What was lacking here was the factual predicate of similarity. *Id.* at 13a, 16a. Other authorities have likewise refused to compare fees charged to mutual funds with rates charged to institutional clients where the services provided to each were distinct. See, *e.g.*, *Strougo* v. *BEA Assocs.*, 188 F. Supp. 2d 373, 384 (S.D.N.Y. 2002); Coates & Hubbard, *supra*, at 185 ("Significant product and cost differences separate the advising of retail mutual funds and the advising of public pension plans," making "simple price comparisons * * * invalid").

Petitioners thus err when they claim that institutional-client fees constitute "powerful—and undisputed—evidence that the fee charged in this case would not have been agreed to in an arm's-length negotiation." Pet. 2-3. The court of appeals below, the district court below, *Gartenberg*, and other cases have all concluded in factually similar circumstances that such a comparison is inapt because institutional-client services are different from mutual-fund services. Petitioners may disagree with that conclusion *factually*, but they did not adduce competent evidence to support that contention. And any such factbound dispute does not warrant review.[7]

B. There Is No Conflict with the Decisions of Other Circuits

Petitioners claim that the Third and Fourth Circuits "follow the *Gartenberg* standard" and that the Seventh Circuit's decision therefore conflicts with decisions of those courts. Pet. 14-19. That claim, however, is entirely derivative of the alleged (but nonexistent) conflict with *Gartenberg*. It is also independently unpersuasive.

Petitioners, for example, claim a conflict with *Migdal* v. *Rowe Price-Fleming International, Inc.*, 248 F.3d 321 (4th Cir. 2001). But that decision did not adopt *Gartenberg* wholesale. As petitioners concede, "[r]ather than following the multi-factor [*Gartenberg*] approach," the Fourth Circuit there "focused narrowly on one particular

[7] The point is also irrelevant on this record. After concluding that the services rendered to pension funds and mutual funds were different, the district court nonetheless "assum[ed] for the mere sake of comparison" that the services provided were "indistinguishable." Pet. App. 30a. Yet, applying *Gartenberg*, the district court nonetheless granted summary judgment because Harris's fees were within the range that would result from arm's-length bargaining. *Ibid.*

factor." Pet. 18. The Fourth Circuit reasoned that, "in order to determine whether a fee is excessive for purposes of Section 36(b), a court must examine the relationship between the fees charged and the services rendered by the investment adviser." *Migdal*, 248 F.3d at 327. The court then dismissed the case because plaintiffs failed to plead *anything* about that relationship, despite repeated opportunities. *Id.* at 327-328. That hardly establishes a conflict with the decision below.

Petitioners also invoke *Krantz* v. *Prudential Investments Fund Management LLC*, 305 F.3d 140 (3d Cir. 2002). See Pet. 18. But *Krantz* does not even cite *Gartenberg.* Instead, the court summarily "adopt[ed] the Fourth Circuit rationale" in *Migdal* that "dismissal for failure to state a claim with respect to excessive compensation was appropriate since Plaintiff failed to allege any facts indicating that the fees received were disproportionate to services rendered." *Krantz*, 305 F.3d at 143. That hardly establishes a conflict either.

C. This Case Is Not an Appropriate Vehicle

1. Even if *Gartenberg* and the decision below *could* yield different results on the same facts, they certainly would not do so on these facts. Applying *Gartenberg*, the district court concluded that petitioners lacked the necessary proof to prevail. Pet. App. 27a-33a. The undisputed facts established that Harris's fee was not so "disproportionately large that it bears no reasonable relationship to the services rendered." *Gartenberg*, 694 F.2d at 928. In urging otherwise, petitioners relied almost exclusively on the fees Harris charged institutional clients. Pet. App. 30a. But *Gartenberg* expressly refused to consider fees charged to institutional clients as evidence of disproportionate fees, 694 F.2d at 930 n.3, other courts have as well, see p. 20, *supra*, and the district court found the comparison factually inapt here, Pet. App. 16a; pp. 19-20, *supra*. In any event, taking into account fees charged to

institutional clients, the district court held that Harris's fees fell within "a range of prices that investors were willing to pay," "thus preventing a conclusion * * * that self-dealing was afoot." Pet. App. 30a.

All the other factors considered in *Gartenberg* weigh heavily against petitioners. As in *Gartenberg*, "the services rendered by [Harris]" were "of the highest quality"—a factor that figured prominently in the *Gartenberg* decision. 694 F.2d at 930. Indeed, while investors in *Gartenberg* received slightly "better-than-average return[s]," *id.* at 926, 930, investors in Harris funds enjoyed first-in-class performance—returns during the relevant period were often two, three, or almost ten times the benchmark norm, see pp. 5-6, *supra*.[8] Moreover, petitioners "do not dispute that Harris's fees were comparable to those charged by other similar funds," another factor considered by *Gartenberg*. Pet. App. 30a; *Gartenberg*, 694 F.2d at 927, 929; see also Pet. App. 31a ("Plaintiffs do not provide any evidence of what savings were gained from economies of scale.").

Finally, the disclosures to the trustees here were extensive, indeed, extraordinary. Harris disclosed not only the services it rendered, but also the amount of its *profits* from advising the funds, as well as the amounts it charged all its *other* clients. See pp. 8-9, *supra*. No arm's-length negotiator would have access to such information. As in *Gartenberg*, that evidence demonstrated "the trustees were aware of or could obtain the essential

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[8] Rather than dispute the "returns the Funds produced up until March 2004," petitioners urged the district court to consider performance after the damages period. Pet. App. 32a. The district court properly declined to do so because "how the Funds performed after the damages period is not relevant to the quality of services rendered before that time." *Ibid.* Nowhere does the petition take issue with that factbound determination.

facts needed to negotiate a reasonable fee" and that the "non-affiliated Fund trustees * * * had considered extensive relevant information" before approving the fee. 694 F.2d at 933; see Pet. App. 16a (detailing information provided to trustees); *id.* at 31a (finding that "the shareholders' interests were represented at the negotiating table by a group of people who were capable of giving those interests primacy"). Indeed, the trustees' good-faith negotiations resulted in the inclusion of additional breakpoints, which *Gartenberg* recognized as a strong indicator of arm's-length negotiation. 694 F.2d at 931; Pet. App. 29a-30a, 31a-32a. The district court thus correctly concluded that, under *Gartenberg*, petitioners had failed to show "a fundamental disconnect between what the Funds paid and what the services were worth," and so could not show a breach of fiduciary duty. Pet. App. 32a. Even the judges favoring rehearing *en banc* agreed that "the *outcome* of this case may be correct." *Id.* at 42a. This Court should not grant review in a case where the outcome is the same regardless of which purportedly conflicting test is applied, much less where things may yet be unresolved even in the circuit below.

2. Perhaps recognizing that they could not prevail even under *Gartenberg*, in both courts below petitioners urged *rejection* of *Gartenberg*, characterizing it as too demanding. Pet. App. 6a, 28a. It is obviously incongruous for petitioners to champion now the very case they criticized below. More important, petitioners would be in no position to defend or promote *Gartenberg* in this Court if their petition were granted. After all, they *lost* under that formula in the district court. Unable to prevail under any formula pronounced by any court of appeals, petitioners would require the adoption of a new, more lenient standard that no court of appeals has ever adopted. This Court should not grant review based on a

purported conflict where the petitioner cannot prevail under any formula adopted to date.

3. Finally, petitioners devote a substantial portion of their petition to the claim that one of Harris's disinterested directors was in fact interested, and that Harris committed various other fiduciary breaches. Pet. 26-29. The district court specifically rejected those claims, Pet. App. 24a-26a, 30a-32a, and the court of appeals affirmed, *id.* at 2a-3a.[9] Those factbound allegations also make this case an unsuitable vehicle to address the §36(b) question the petition purports to present.

D. The Petition Raises Largely Academic Issues That Lack Recurring Significance

The petition does not so much raise a genuine dispute concerning the proper standard that must be applied in recurring disputes as it raises an academic dispute about economics.

1. In the courts below, petitioners urged that *Gartenberg* should not be followed because it relies too much on market comparisons. The decision below, by contrast, expressed "skepticism" about *Gartenberg* because *Gartenberg* "relied too little on markets." Pet. App. 7a-8a. While *Gartenberg* commented on the absence of competition among investment advisers for fund advisory contracts, *Gartenberg* did not mention that investment advisers compete with each other for investors' dollars through the funds they form. "[A] lot has happened" in the many years since *Gartenberg* was decided in 1982. *Id.* at 11a. Now that the fund industry has matured into

[9] The court of appeals dismissed petitioners' interested-director argument because that director's vote was immaterial to the Board's approval of advisory fees, and because violations of the ICA's independent-director requirements cannot be pursued under §36(b)'s private right of action. No court has reached a contrary result. See *Migdal*, 248 F.3d at 328-329.

a vibrant and competitive marketplace, the Seventh Circuit observed, there is every incentive for funds to keep fees down: Funds compete based on performance net of costs (including fees). *Id.* at 7a. The explosion in the number of mutual funds, and the resulting intense price competition between funds, ensures that competition keeps advisory fees low—since investors can vote with their feet and invest in lower-cost funds. *Id.* at 11a-13a.

The Second Circuit and Judge Posner, of course, may have a different view about mutual fund markets. Judge Posner flagged the panel's "economic analysis" as "ripe for reexamination," Pet. App. 37a, and offered four pages of his own economic musings, *id.* at 37a-41a. But it is hard to see how that discussion is anything but academic. The statutory question is what it means to violate a fiduciary duty in connection with compensation—not where supply and demand curves intersect. On the legal question, the courts' "two approaches lead to the same place." *In re Mutual Funds Inv. Litig.*, 2008 WL 5412407, at *15. Because any economics debate is beside the point, there is no reason for review at this point. This Court reviews judgments, not statements in opinions—and it certainly does not grant review to address abstract debates not grounded in legal principles.

2. The Second and Seventh Circuits, moreover, are the only ones to have addressed §36(b) in any analytical detail in the nearly 40 years since that provision was enacted. Petitioners have identified no case that would be resolved differently under either articulation. It is therefore hard to see how the issue can be deemed important, much less sufficiently important to warrant this Court's review.

To the contrary, on the infrequent occasions these questions are litigated, the outcomes are uniform. As Judge Posner noted, even under *Gartenberg*, "litigation in excessive fee cases has resulted almost uniformly in judgments for the defendants." Pet. App. 36a (quoting James D. Cox *et al.*, *Securities Regulation: Cases and Materials* 1211 (3d ed. 2001)). Indeed, since *Gartenberg*, there have been only four trials *ever* on claims that advisory fees violated §36(b)—and all of them were in the Second Circuit.[10] No claim under §36(b) in any other circuit appears to have progressed to summary judgment until this case. Moreover, since the adoption of §36(b) in 1970, the Securities and Exchange Commission has not brought a single action for breach of an adviser's fiduciary duty with respect to compensation. Rather, the SEC has expressed the view that "[t]he Investment Company [Act's] requirements concerning the organizational structure of open-end investment companies, which interpose independent directors as a check on investment company sponsors, are fundamentally sound [and] provide significant protections against the inherent conflict between the interests of public investors and the interests of fund sponsors." SEC Div. of Inv. Mgmt., *Protecting Investors: A Half Century of Investment Company Regulation*, at xxix (1992), http://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf.

That should come as little surprise. The comprehensive regulatory scheme embodied in the ICA, the requirement of independent and informed trustees, the SEC's aggressive monitoring of standards of independence and disclosure, and competition have all combined to promote shareholder welfare and constrain costs. The SEC regularly monitors conditions in the mutual fund markets, publishes disclosure and conduct guidelines,

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[10] *Kalish* v. *Franklin Advisers, Inc.*, 742 F. Supp. 1222 (S.D.N.Y. 1990); *Meyer* v. *Oppenheimer Mgmt. Corp.*, 715 F. Supp. 574 (S.D.N.Y. 1989); *Krinsk* v. *Fund Asset Mgmt., Inc.*, 715 F. Supp. 472 (S.D.N.Y. 1988); *Schuyt* v. *Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962 (S.D.N.Y. 1987).

and when appropriate, engages in rulemaking to protect investors with respect to management and advisory fees. In recent years, for example, the Commission has adopted rules that effectively increase the statutory minimum requirement of 40% independent trustees to 75% by conditioning certain exemptive orders on meeting the higher threshold. 17 C.F.R. §270.0-1(a)(7); 17 C.F.R. §270.12b-1(c). The SEC also adopted rules that oblige mutual funds to disclose "the material factors and the conclusions with respect to those factors that formed the basis for the board's approval of advisory contracts," and to do so with "adequate specificity." SEC, Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies (June 23, 2004), http://www.sec.gov/rules/final/33-8433.htm. Finally, competitive forces appear to have rendered resort to §36(b) infrequent and unnecessary, as the SEC has observed. Mem. from Paul F. Roye, Dir. of SEC Div. of Inv. Mgmt., to SEC Chairman William H. Donaldson, at 6 (June 11, 2003), http://financialservices.house.gov/media/pdf/061803kanememo.pdf ("[E]mpirical evidence suggest[s] that there is significant competition based on costs in the fund industry.").

Thus, contrary to petitioners' claim, further "percolation" is clearly appropriate. Pet. 32. In the event this issue arises with some frequency in the future (unlike now), the academic debate ripens into a genuine dispute over legal standards that affect outcomes (which has yet to occur), and other courts of appeals actually address the issue, this Court may consider further review. But, at this point, review would clearly be premature.

II. THERE IS NO CONFLICT WITH *DAILY INCOME FUND*

The decision below does not conflict with this Court's decision in *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523 (1984). See Pet. 23-24. *Daily Income Fund* did not address the standard for determining whether there was a breach of fiduciary duty under §36(b). Instead:

> The question for decision [was] whether Rule 23.1 of the Federal Rules of Civil Procedure requires that an investment company security holder *first make a demand upon the company's board of directors* before bringing an action under §36(b) * * *.

Daily Income Fund, 464 U.S. at 524 (emphasis added). The Court focused exclusively on whether a stockholder's right to sue a recipient of compensation "derived" from the mutual fund itself—and thus was a "derivative" suit that triggered Rule 23.1—or whether the statute granted independent standing, whether or not the fund had a claim. *Id.* at 534-542. That question did not depend on the scope of an adviser's fiduciary duty with respect to compensation.

The decision below, moreover, is entirely consistent with the background discussion from *Daily Income Fund* that petitioners invoke. The decision below did not dispute that Congress enacted §36(b) to promote "reasonable" adviser fees and eliminate "excessive" ones or that, before §36(b)'s enactment, courts too often deferred to director approval. See *Daily Income Fund*, 464 U.S. at 534 n.10, 537, 540 n.12. Likewise, the court of appeals did not contest that Congress intended courts to serve as an "independent chec[k] on excessive fees." *Id.* at 541. But Congress sought to achieve those goals by imposing a fiduciary duty on investment advisers with respect to compensation. The Second Circuit has held that the receipt of compensation does not by itself violate the adviser's fiduciary duty unless fees are "so disproportionate" to services rendered that the fee falls outside the range that could result from arm's-length bargaining; and the Seventh Circuit here echoed that standard, holding that fees that are "so unusual" as to create an inference of fiduciary breach can support liability. Those standards conflict neither with each other nor with *Daily Income Fund.* See 464 U.S. at 539 (discussing Congress's rejection of "reasonableness" standard in favor of creation of fiduciary duty).

Nor is there any conflict with the SEC's position in *Daily Income Fund.* The SEC's observations about congressional intent, the right "to recover excessive fees" under §36(b), and the impropriety of blindly deferring to board approval are all consistent with the opinion below. The court of appeals correctly reasoned that §36(b) achieves its goal, not by providing for judicial review of whether fees are "excessive" in the abstract, Pet. App. 12a, but through review to ensure that advisers do not breach their fiduciary duty with respect to compensation. Moreover, the SEC cannot possibly agree with petitioners' view that courts should compare mutual-fund fees to those charged to pension funds and other dissimilar institutional clients. Since §36(b)'s adoption in 1970, the Securities and Exchange Commission has *never* brought an action to enforce liability for breach of an adviser's fiduciary duty with respect to compensation.

III. THE SEVENTH CIRCUIT'S APPROACH IS CORRECT

In any event, the Seventh Circuit's approach is clearly correct. Section 36(b) creates a "*fiduciary duty* with respect to the receipt of compensation" and charges plaintiffs with "the burden of proving a breach of *fiduciary duty.*" 15 U.S.C. §80a-35(b) & (b)(1) (emphasis added). Unlike the open-ended excessiveness review petitioners propose, the Seventh Circuit's approach is faithful to that statutory text.

Consistent with the statutory language, the opinion below directs focus to the fund adviser's conduct. An adviser can breach its fiduciary duty, for example, through lack of candor in negotiation. Pet. App. 8a. Likewise, "a fiduciary must make full disclosure and play no tricks." *Ibid.* But, as the court of appeals persuasively explained, "the existence of the fiduciary duty"—whether for lawyers, trustees, corporate officers, or fund advisers—"does not imply judicial review for reasonableness." Pet. App. 10a.

Petitioners object that §36(b) creates a fiduciary duty "with respect to the receipt of compensation." Pet. 21. But those words most naturally mean that advisers have a fiduciary duty when negotiating their compensation with the fund. In other words, advisers must not "pul[l] the wool over the eyes of the disinterested trustees or otherwise hinde[r] their ability to negotiate a favorable price for advisory services." Pet. App. 13a-14a. Likewise, if the fees are so unusual as to raise an inference of fiduciary breach or abdication by the fiduciary, §36(b) may be violated. See *id.* at 9a.

Petitioners' contrary interpretation—which effectively requires all fees to be "reasonable"—reads the words "fiduciary duty" out of the statute and eliminates the plaintiff's statutory "burden of proving a breach of fiduciary duty." Under petitioners' view, there is no need to prove a fiduciary breach, such as misleading conduct or bad-faith negotiation, so long as a fee can be called excessive or unreasonable compared to fees charged to other clients. But that substitutes subjectivity for statutory text. Congress could easily have authorized courts to strike down "excessive," "unreasonable," or discriminatory fees. (Indeed, precisely that language appears in a variety of regulatory statutes. See, *e.g.*, 15 U.S.C. §717c(a), (b); 47 U.S.C. §201(b).) But Congress did not do that. Congress rejected bills that would have required courts to review advisers' fees under a "reasonableness" standard. Pet. App. 10a-11a. Instead, Congress required plaintiffs to prove "*a breach of fiduciary duty*" with respect to compensation. Even the legislative history makes that clear. S. Rep. No. 91-184, at 6 (1969) (explaining that §36(b) was not intended "to introduce general concepts of rate regulation" or to allow "a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees"). Petitioners' argument is, in any event, foreclosed by the statutory text.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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