No. 15-1199

In the Supreme Court of the United States

RAYMOND M. PFEIL and MICHAEL KAMMER,
Individually and on behalf of all others similarly situated,
Petitioners,

v.

STATE STREET BANK AND TRUST COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

ERISA subjects retirement plan fiduciaries to a duty of prudence. *See* 29 U.S.C. § 1104. In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), this Court rejected the "presumption of prudence" widely used in deciding ERISA cases involving alleged imprudence regarding company stock funds and held that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Id*. at 2471. The questions presented are:

1. Whether the Sixth Circuit correctly applied *Fifth Third*.

2. Whether the Sixth Circuit correctly concluded, based on an extensive summary judgment record, that there was no genuine issue of material fact regarding respondent satisfying its duty of prudence under ERISA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent State Street Bank and Trust Company is a wholly owned subsidiary of State Street Corporation. State Street Corporation is a publicly held corporation and has a financial interest in the outcome of this litigation because State Street Bank and Trust Company is a wholly owned subsidiary of State Street Corporation.

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INTRODUCTION

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court eliminated the "presumption of prudence" previously used in ERISA cases about company stock funds in retirement plans and announced a new standard for deciding company stock cases involving publicly traded companies. 134 S. Ct. 2459 (2014). Under *Fifth Third*, "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances" that "render[] reliance on the market price imprudent." *Id*. at 2471–72.

In this case, the Sixth Circuit correctly recognized and applied *Fifth Third.* The Court of Appeals rejected petitioners' breach of prudence claims, which were based solely on how State Street responded to publicly available information about General Motors and did not allege any special circumstances that might render reliance on GM's stock market price imprudent. The petition also claims the Sixth Circuit's decision conflicts with other circuit court cases about company stock funds, but that claim relies on cases decided before *Fifth Third* and identifies no actual conflict. The Sixth Circuit's decision is entirely consistent with the two other post-*Fifth Third* court of appeals decisions that involved company stock and alleged breaches of prudence based on publicly available information.

The Sixth Circuit's decision also does not conflict with *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). *Tibble* was not a company stock case. It involved the ERISA statute of limitations for breach of

fiduciary duty complaints, and its reference to an ERISA fiduciary's ongoing "duty to monitor investments and remove imprudent ones" simply summarized existing ERISA law. *Tibble* did not suggest or even discuss what petitioners argue for: a new standard of absolute liability for fiduciaries who hold any investment that loses value. Rather, *Tibble* describes the sort of prudence exercised by State Street and recognized by the Sixth Circuit in this case.

Petitioners attempt to manufacture conflicts with this Court's decisions and decisions of other courts of appeals where there are no conflicts, and they mischaracterize the Sixth Circuit's decision in the process. The decision below in no way confers "*per se* immunity" on ERISA fiduciaries; it does not use those terms or suggest such a rule. Rather, the Sixth Circuit's thorough opinion applies *Fifth Third* carefully and in accord with recent decisions from other circuits. The petition should be denied.

STATEMENT OF THE CASE

A Statutory Background

This case concerns the application of this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, which involved fiduciary duty under ERISA in connection with an employee stock ownership fund, or ESOP. ESOPs are a special kind of ERISA plan established by Congress for the purpose of encouraging investment in qualifying employer stock. 29 U.S.C. § 1107(d)(6)(A).

ERISA requires a plan fiduciary to "discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity

and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). Generally speaking, this duty of prudence includes a duty to diversify investment holdings. *Id.* § 1104(a)(1)(C). Because ESOPs are intentionally concentrated in a single investment, ESOP fiduciaries are exempt from the duty to diversify, but are otherwise bound to act prudently in managing the assets of a fund that is by definition not diversified. *Id.* § 1104(a)(2).

Before this Court's decision in *Fifth Third*, some courts of appeals applied a "presumption of prudence" in cases that challenged an ESOP fiduciary's decision to buy or hold employer stock, based on the premise that a fiduciary's decision to remain invested in employer stock was presumptively reasonable. In *Fifth Third*, this Court held that ESOP fiduciaries were not entitled to such a special presumption and that courts should instead evaluate complaints alleging ESOP fiduciary violations of the duty of prudence by applying the pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in light of specific considerations. 134 S. Ct. at 2471. Specifically, "where a stock is publicly traded, allegations that a fiduciary should have recognized on the basis of publicly available information that the market was overvaluing or undervaluing the stock are implausible as a general rule" and thus insufficient to state a claim under *Twombly* and *Iqbal*. 134 S. Ct. at 2471–72.

B. Factual Background

In 2006, GM engaged State Street Bank and Trust Company, a corporate trustee, to serve as the independent fiduciary of its ESOP, the GM Common Stock Fund, which was invested almost exclusively in GM stock. Pet. App. 34–35a. The GM Common Stock Fund was just one of many investment options available to participants in GM's 401(k) plans. *Id*. No one was invested in company stock by default; participants only invested in the GM fund if they chose to do so, and they were free to move their money into another investment option whenever they wanted. *Id*.

In 2008 and early 2009, GM faced severe business problems that battered its stock. Pet. App. 71a. During that period, State Street vigorously monitored and evaluated GM stock using a formal, three-tiered process that included daily review of financial reports and other public information about GM and the broader economy, as well as input from outside financial and legal advisors hired to consult on the GM fund. *Id*. 73a, 87–88a. State Street fiduciary committees held more than 40 in-depth meetings to discuss GM stock and memorialized their deliberations and actions in meeting minutes. *Id*. 74–76a, 87–88a. In response to the evolving situation, State Street put a "freeze" on buying GM stock for the fund on November 8, 2008, and sold the fund's GM stock beginning on March 31, 2009, several months before GM filed bankruptcy court reorganization proceedings. *Id*. 75–76a.

C. Proceedings Below

After State Street had completed the sale of all the GM stock, petitioners filed this putative class-action suit. Petitioners sued only State Street, not GM or GM's officers or benefit plan administrators. As a result, this case presents none of the questions about fiduciaries who have adverse inside information that are common in other class actions about ESOP investments. *See, e.g.*, *Amgen Inc. v. Harris*, 136 S. Ct. 758, 759 (2016) (describing breach of prudence allegations based on non-public information). Petitioners alleged that State Street's decisions to continue to hold GM stock after four specific dates in 2008 breached ERISA's fiduciary duty of prudence, which requires that a fiduciary perform duties for a benefit plan "with the care, skill, prudence, and diligence [of a prudent man] under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B).

State Street moved to dismiss petitioners' complaint for failure to state a claim. The District Court granted that motion based on a causation defense. The Sixth Circuit reversed and remanded for further proceedings. Pet. App. 32a. Following extensive discovery, both sides moved for summary judgment. Based on the full evidentiary record, the district court granted State Street's motion, holding that State Street's decisions were those of "a reasonable prudent fiduciary." Pet. App. 65a. Petitioners appealed, and the parties postponed merits briefing on appeal until after this Court's decision in *Fifth Third* (which the petition refers to *Dudenhoeffer*).

A divided panel of the Sixth Circuit affirmed the summary judgment for State Street. The majority

opinion noted that although courts may no longer "*presume* that ESOP fiduciaries are prudent, the [*Fifth Third*] court suggested that a correct 'understanding of the prudence of relying on market prices' may lead courts to a very similar result." Pet. App. 81a. The court then quoted *Fifth Third* at length:

> [W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. . . .
>
> In other words, a fiduciary usually is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him. . . .

Pet. App. 82a (quoting 134 S. Ct. at 2471).

The Sixth Circuit also quoted the section of *Fifth Third* where this Court was quite specific about where the Sixth Circuit went wrong in deciding *Fifth Third*:

> . . . [T]he Court of Appeals held that the complaint stated a claim because respondents allege[d] that [the fiduciary was] aware of the risks of [investing in the company's business], and that such risks made [the] stock an imprudent investment. The Court of Appeals did not point to any special circumstance rendering reliance on the market price imprudent. The court's decision to deny dismissal therefore

> appears to have been based on an erroneous understanding of the prudence of relying on market prices.

Id. 82–83a (quoting 134 S. Ct. at 2472).

After considering petitioners' arguments that GM stock was an imprudent investment on four specific dates in 2008, the court below concluded that petitioners' claims—which were based only on State Street's responses to public information about GM—were implausible under *Fifth Third*:

> Pfeil alleges that, in response only to various public announcements about GM's future, State Street's investment strategy failed to function as a prudent process if it did not recognize "that the market was over- or undervaluing" GM common stock. *Cf. Dudenhoeffer,* 134 S. Ct. at 2471. This allegation is implausible. *Ibid*. Pfeil failed to show a special circumstance such that State Street should not have relied on market pricing.

Id. 84a.

The court was not persuaded by petitioners' imprudence claims based on publicly available bad news about GM and subsequent stock price declines:

> [Petitioners'] argument, stripped of its particulars, rests on a sleight of hand: on each of [the dates petitioners cite], it would have been prudent, in hindsight, for State Street to decide to sell, and that decision would have resulted in less loss; State Street did not make such a prudent decision; therefore, what State Street did was imprudent. But State Street's decisions

> were not imprudent or unreasonable simply because it could have made a different decision in response to GM's financial difficulties.

Id. 85a.

The court noted that ESOP fiduciaries who continue to hold company stock are "always deciding not to divest" and that petitioners offered no legal reason why the circumstances at the four alleged "imprudence dates" were sufficient to trigger a duty to sell. Instead, "[t]o the extent that [petitioners] . . . rel[y] on the observation that, after the four [dates] it picked, GM's stock decreased in value, [they] invite[] us to engage in precisely the sort of post-hoc inquiry that the doctrine rightly forbids." *Id*. 85–86a.

The court below also addressed a practical problem that this Court's *Fifth Third* opinion had described as follows:

> [A]n ESOP fiduciary who fears that continuing to invest in company stock may be imprudent finds himself between a rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently in violation of § 1104(a)(1)(B), but if he stops investing and the stock goes up he may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D).

134 S. Ct. at 2470. To address that practical problem, which this Court had recognized, the court below concluded that company stock claims are implausible "when they allege that fiduciaries should have been able to beat the market." Pet. App. 87a (citing *In re Citigroup ERISA Litigation*, 104 F. Supp. 3d 599, 616

(S.D.N.Y. 2015)). Instead, as the court stated, "the mere fact that GM's stock value decreased after certain dates does not affect our judgment." *Id*.

There was a second basis for the summary judgment affirmance below. In addition to concluding that petitioners' allegations were implausible as a matter of law after *Fifth Third*, the court also found that there was no genuine issue of material fact regarding whether State Street had a prudent process for evaluating GM stock (which included three-tiered monitoring, specially engaged legal and financial advisors, and more than 40 committee meetings about GM stock). Pet. App. 87–88a. As to the decisions State Street made through that prudent process, "the decision of other expert professionals both to invest and not to divest on or near the dates that State Street made those decisions demonstrates the reasonable nature of those decisions." *Id*. at 88a. The court concluded that the record presented "no factual questions material to the outcome of this case" and that "State Street's actions were not actionably imprudent." *Id*.

Judge White dissented, arguing that the majority position "effectively immunizes fiduciaries from imprudence claims relating to publicly traded securities in the absence of special circumstances." Pet. App. 89a. Judge White wrote that "[o]ne can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell or hold are therefore prudent." *Id*. 90a. Judge White also disagreed that State Street's process for evaluating GM stock was prudent and wrote that she would reverse and remand for further proceedings. *Id*. 90–92a. The

majority opinion responded to Judge White by noting that "an ESOP's investment goals are to maintain, within reason, ownership of a particular employer's security," and that "[w]hatever evils the dissent identifies"—namely, risk—"are endemic to the ESOP form established by Congress." *Id*. 86a.

REASONS FOR DENYING THE PETITION

I. This case does not present either a conflict with *Fifth Third* or a conflict among the circuits about application of *Fifth Third*

A. The Sixth Circuit correctly applied this Court's decision in *Fifth Third*

Review is unwarranted because the majority opinion below correctly applied *Fifth Third*. Contrary to petitioners' creative description, the opinion does not "misinterpret" *Fifth Third* in a way that "provid[es] ESOP fiduciaries with *per se* immunity any time the company stock trades in an efficient market." Pet. 11. Rather, the opinion takes *Fifth Third* seriously and applies it as this Court instructed.

Fifth Third was another Sixth Circuit ERISA class action in which plaintiffs, former Fifth Third Bank employees and participants in the company's ESOP, alleged that the ESOP fiduciaries "knew or should have known in light of publicly available information, such as newspaper articles, that continuing to hold and purchase Fifth Third stock was imprudent" and that "[a] prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets were decimated." 134 S. Ct. at 2471. That claim is virtually identical to the petitioners' allegations and arguments in this case.

Fifth Third came to this Court on questions about whether to apply a "presumption of prudence" to a fiduciary's decision to hold company stock on a motion to dismiss. In a unanimous opinion, this Court eliminated the "presumption of prudence," vacated the Sixth Circuit decision and remanded with instructions to apply the pleading standard discussed in *Twombly* and *Iqbal* in light of additional guidance for two different situations—allegations about fiduciaries with adverse inside information, which is not an issue in this case, and imprudence allegations involving only publicly available information, as here. *Id*. at 2471–72.

For cases about publicly traded company stock, this Court's holding and directions to the Sixth Circuit were quite specific about the prudence of ERISA fiduciaries who rely on the market price of company stock as an assessment of the value of the stock:

> In our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. Many investors take the view that "they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information," and accordingly they "rely on the security's market price as an unbiased assessment of the security's value in light of all public information. [*Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2013).] ERISA fiduciaries, who likewise could reasonably see "little hope of

> outperforming the market . . . based solely on their analysis of publicly available information," *ibid*., may, as a general matter, likewise prudently rely on the market price.
>
> In other words, a fiduciary usually "is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 408 (C.A.7 2006). . . .

Id. at 2471–72.

This Court specifically criticized the Sixth Circuit for failing to recognize the prudence of relying on stock market prices:

> The Court of Appeals did not point to any special circumstance rendering reliance on the market price imprudent. The court's decision to deny dismissal therefore appears to have been based on an erroneous understanding of the prudence of relying on market prices.

Id. at 2472.

The majority opinion below cited, quoted, and applied the same passages of *Fifth Third* quoted above. It interpreted *Fifth Third* to mean "that a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss." Pet. App. 83a. This discussion was in part guidance for the district courts on an important change in case law. But the opinion also applied *Fifth Third* to the summary

judgment appeal in this case.[1] Because petitioners' allegations were based solely on public information about GM and "failed to show a special circumstance such that State Street should not have relied on market pricing," the court found petitioners' allegations implausible. *Id*. 84a. This is a straightforward application of *Fifth Third* in the context of a summary judgment. The opinion carefully followed this Court's opinion and in no way "directly conflicts" with it or "eviscerate[s] ERISA's statutory and regulatory duties," as petitioners claim. Pet. 11–12.

While petitioners argued below that State Street should have known based on publicly available information that GM stock was an imprudent investment for the employee stock fund as of four particular dates, petitioners never established a genuine issue of fact regarding, and indeed never even alleged, what *Fifth Third* requires: "*a special circumstance affecting the reliability of the market price as an unbiased assessment of a security's value in light of all public information . . . that would make reliance on the market's valuation imprudent*." *Id*. at 2472 (internal citations omitted) (emphasis added). There were no allegations in this case that the GM stock market price was distorted by any material omissions or misstatements by GM or that there was any adverse inside information known to State Street. Petitioners

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[1] The court below also affirmed the summary judgment on other grounds—a record demonstrating the procedural prudence of State Street's performance as a fiduciary and the prudence of holding GM stock when other fiduciaries were also holding GM stock in their benefit plans. Those grounds for the opinion below are discussed in Section II, below.

do not argue they pleaded any "special circumstances affecting the reliability of the market price as an unbiased assessment of a security's value." Instead, petitioners' allegations and arguments concern only what State Street did in response to public information about GM that is reflected in GM's market price.

Petitioners nonetheless argue that their claims should have prevailed, apparently based on the idea that *Fifth Third*'s elimination of the presumption of prudence uniquely applicable to ESOP fiduciaries must or should have resulted in a more lenient standard for claims of fiduciary imprudence. However, this Court's opinion makes clear that there is no such new lower standard. Rather, *Fifth Third* instituted a more *uniform* standard, by eliminating a presumption of prudence applicable just to ESOP fiduciaries. And, as the Sixth Circuit recognized, "while courts may no longer *presume* that ESOP fiduciaries are prudent, the [*Fifth Third*] court suggested that a correct 'understanding of the prudence of relying on market prices' may lead courts to a very similar result." Pet. App. 81a.

Instead of claiming special circumstances that affected the reliability of the market price of GM stock, petitioners contend that their claims "involved a fundamentally different theory of liability" than the claims in *Fifth Third*—because they alleged that GM stock was "too risky and speculative," as opposed to "artificially inflated or mispriced." Pet. 12, 15. That argument is wrong for two reasons: First, the plaintiffs in *Fifth Third* also argued that their company's stock was "excessively risky" and that ESOP fiduciaries should have known it based on publicly available

information. This Court described the claims in *Fifth Third* twice:

> The complaint alleges that by July 2007, the fiduciaries knew or should have known that Fifth Third's stock was overvalued and excessively risky for two separate reasons. First, publicly available information such as newspaper articles provided early warning signs [about problems with subprime mortgages], which formed a large part of *Fifth Third's* business. . . .

134 S. Ct. at 2464.

> Respondents allege that, as of July 2007, petitioners knew or should have known in light of publicly available information, such as newspaper articles, that continuing to hold and purchase *Fifth Third* stock was imprudent. App. 48-53.

134 S. Ct. at 2471. Those allegations are the basis of the standard announced in *Fifth Third* that the Sixth Circuit applied to substantively identical claims in this case.

Second, in the context of imprudence allegations based only on public information about publicly traded securities, "overvalued" versus "too risky" is a semantic distinction without a difference, because the stock price in an efficient market *incorporates* the risk of holding the stock. On this point, the court below cited another company stock opinion explaining that the allegedly "'excessively risky' character of investing ESOP funds in stock of a company experiencing serious threats to its business in 2008 'is accounted for in the market

price.'" Pet. App. 83a (citing *In re Citigroup ERISA Litigation*, 104 F. Supp. 3d at 615). At bottom, petitioners' "excessively risky" claims assume liability is proven by a declining stock price; petitioners' arguments, like the appellate decision this Court reversed in *Fifth Third*, "appear[] to have been based on an erroneous understanding of the prudence of relying on market prices." *Fifth Third*, 134 S. Ct. at 2472.

The decision below also correctly followed *Fifth Third* by evaluating State Street's decisions in the context of "the circumstances . . . prevailing at the time the fiduciary acts." 134 S. Ct. at 2471 (citing 29 U.S.C. § 1104(a)(1)(B)). In contrast, as the Sixth Circuit pointed out, petitioners "invite [the court] to engage in precisely the sort of post-hoc inquiry that [ERISA] rightly forbids." Pet. App. 85–86a. As the Sixth Circuit explained, petitioners argued that on the dates of alleged imprudence that "it would have been prudent, in hindsight, for State Street to decide to sell, and that decision would have resulted in less loss; State Street did not make such a prudent decision; therefore, what State Street did was imprudent." *Id*. 85a. The court rejected this circular reasoning, noting that "State Street's decisions were not imprudent or unreasonable simply because it could have made a different decision in response to GM's financial difficulties." *Id*.

ERISA does not impose liability on fiduciaries because they do not sell publicly traded company stock before it declines in value; doing so would turn ERISA fiduciaries into insurers for investors and hold fiduciaries liable for failing to outguess the market. This is the central point of the unanimous opinion in

Fifth Third, which the Sixth Circuit recognized and applied.

B. There is no circuit split regarding the application of *Fifth Third*

Review is also unwarranted because there is no circuit split over the application of *Fifth Third* to claims about alleged breaches of fiduciary duty based on publicly available information. Specifically, the Sixth Circuit's opinion is consistent with the two other court of appeals decisions since *Fifth Third* applying that standard: *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016) and *Smith v. Delta Air Lines*, 619 F. App'x 874 (11th Cir. 2015). Petitioners cite only one of these two cases, *Rinehart*, and do so only to complain that *Rinehart agrees* with the Sixth Circuit's rationale. This is the opposite of the claimed "confusion and conflict in the lower courts." Pet. 17.

Rinehart reaches the same result as the decision below based on careful application of *Fifth Third*. Petitioners describe *Rinehart* as "relying on the Sixth Circuit's faulty reasoning." Pet. at 19. Actually, *Rinehart* does not even cite the Sixth Circuit's decision below; instead, the Second Circuit opinion in *Rinehart* relies on *Fifth Third* and independently reaches the same conclusion. The *Rinehart* plaintiffs alleged that the fiduciaries of the Lehman Brothers ESOP "knew or should have known, based on publicly available information, that investment in Lehman had become increasingly risky throughout 2008" and that Lehman stock was an unsuitable investment as a result. 817 F.3d at 65. The Second Circuit held that these claims were implausible under *Fifth Third*, rejecting the very

same "excessive risk" argument petitioners make in this case:

> Plaintiffs attempt to plead around *Fifth Third* by saying that their claims concern "excessive risk" and therefore are not covered by *Fifth Third*, which Plaintiffs argue dealt only with claims concerning "market value." For purposes of this analysis, we agree with the District Court that the purported distinction between claims involving "excessive risk" and claims involving "market value" is illusory. . . . Although the language of *Fifth Third* refers primarily to "over- or undervaluing" stock, the *Fifth Third* Court applied [its] rule to the plaintiffs' risk-based claims in that case. Moreover, viewing this rule as applicable to *all* allegations of imprudence based upon public information—regardless of whether the allegations are framed in terms of market value or excessive risk—is consistent with the efficient market hypothesis that risk is accounted for in the market price of a security.

Id. at 65–66 (citing *Fifth Third*, 134 S. Ct. at 2471–72). In *Rinehart*, the Second Circuit followed *Fifth Third* in the same way the Sixth Circuit did below.

Similarly, in *Smith v. Delta Air Lines*, the Eleventh Circuit affirmed the dismissal of a complaint alleging that the fiduciaries of Delta's ESOP "imprudently invested in Delta securities in the face of disappointing financial performance, loss in competitive advantage, and concerns about Delta's ability to survive in the industry." 619 F. App'x 874, 875. After citing the same section of *Fifth Third* that the Sixth Circuit relied on in this case, the Eleventh Circuit wrote that the plaintiffs'

"prudence claim [fell] squarely within the class of claims the Supreme Court deems 'implausible as a general rule.'" *Id*. at 876. "The crux of [their] prudence claim is that the Delta fiduciaries should have foreseen that Delta stock would continue to decline." *Id*. However, absent any allegation "that the fiduciaries had material inside information about Delta's financial condition that was not disclosed to the market" or "any allegation of a 'special circumstance [that rendered] reliance on the market price imprudent,'" such as fraud, improper accounting, or illegal conduct, "the Delta fiduciaries cannot be held liable for failing to predict the future performance of the airline's stock." *Id*. The Eleventh Circuit's *Delta* decision is entirely consistent with the Sixth Circuit's decision in this case.

Finally, petitioners cite this Court's per curiam reversal in one other company stock case after *Fifth Third* as supposed evidence of "confusion in the lower courts that warrants . . . this Court's review." Pet. 19 (citing *Amgen Inc. v. Harris*, 136 S. Ct. at 759 (2016)). *Amgen* involved a complex issue not presented in this case: the overlapping ERISA and securities law responsibilities of insider fiduciaries who have adverse nonpublic information. *Amgen* resulted in a reversal because the Ninth Circuit failed to follow the new standard for evaluating insider fiduciary claims set forth in *Fifth Third*—"whether a complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund." 136 S. Ct. at 759 (2016), citing *Fifth Third*, 134 S. Ct. at 2473. That test has no bearing on this case,

where State Street had only public information about GM.

Notably, this Court's opinion in *Amgen* described the general import of *Fifth Third* in much the same way the Sixth Circuit did in this case, stating that "[n]otwithstanding the lack of a presumption of prudence, *Fifth Third* noted that 'Congress sought to encourage the creation of' employee stock-ownership plans, [*Fifth Third*, 134 S. Ct. at 2470], a purpose that the decision recognized may come into tension with ERISA's general duty of prudence." *Id*.

Finally, the other court of appeals cases petitioners cite to argue for a circuit split all predate *Fifth Third*. Petitioners' selective quotes from those earlier cases do not demonstrate a circuit split or "conflict" about or after *Fifth Third*.[2]

Fifth Third laid out a new standard for courts to use in evaluating the kinds of claims at issue here, and the Sixth Circuit was one of the first to apply it. That two other circuits have considered similar claims since

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[2] Petitioners' claim of a "conflict" based on these earlier cases disintegrates on closer examination. For instance, the allegedly conflicting Seventh Circuit case *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003), actually involves allegations of an imprudent failure to diversify a benefit plan's assets, a statutory duty inapplicable to company stock funds. *See id.* at 1105 (describing "holding such an unbalanced portfolio" as "a form of 'imprudence' expressly authorized for ESOPs"). *Summers v. State Street Bank and Trust Co.*, 453 F.3d 404, 410 (7th Cir. 2006), actually affirmed a district court's grant of summary judgment to State Street in a company stock case involving United Airlines' ESOP, and noted that "an ESOP is at once a permissible form of ERISA trust and nondiversified by definition."

Fifth Third and independently reached the same result indicates that the purported circuit conflict is nonexistent. To the extent that courts of appeals diverge in future cases regarding the application of *Fifth Third*, this Court could then revisit its decision.

II. The Sixth Circuit correctly determined that petitioners did not establish the existence of a genuine issue of material fact concerning the reasonableness of respondent's fiduciary decisions

Petitioners' second principal argument is that the Sixth Circuit's decision conflicts with *Tibble v. Edison International,* 135 S. Ct. 1823 (2015) and other circuit court decisions by ignoring the fiduciary's duty to divest investments when they have become imprudent. *See* Pet. 20–22.

Tibble involved the ERISA statute of limitations for breach of fiduciary duty complaints about the expenses of other pension fund investments, not company stock. As part of determining when a breach of fiduciary duty claim accrues, this Court recognized that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." 135 S. Ct. at 1828–29. This is a principle of trust law, incorporated into ERISA law, and a statement with which all of the parties in *Tibble* agreed. *Id*. at 1829. The parties disagreed about the scope of that responsibility. This Court "express[ed] no view on the scope of respondents' fiduciary duty" in the case and remanded to the Ninth Circuit for further proceedings. *Id*.

Tibble made new law on the statute of limitations for ERISA fiduciary claims about investments held for more than six years, but that question is not at issue in this case. If petitioners are trying to argue that the decision below is inconsistent with *Tibble* on a duty to monitor and remove investments, that argument is wrong because *Tibble* expressly did not decide whether or how an ERISA fiduciary breaches its duty of prudence with respect to monitoring investments, and *Tibble* plainly was not suggesting any new standard of liability for fiduciaries who hold an investment that later loses value. Indeed, this Court in *Tibble* explicitly left open for the lower courts in that case the same general questions about prudence that the Sixth Circuit decided on a full record and solid legal grounds in this case. 135 S. Ct. at 1829.

While arguing about *Tibble*, petitioners fail to cite the one other court of appeals decision following *Fifth Third* that does decide the general questions about fiduciary prudence left unresolved in *Tibble*.[3] *Tatum v. RJR Pension Investment Committee* is a company stock decision in which the Fourth Circuit held that a court evaluating ERISA breach of prudence claims must first

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[3] By eliminating the presumption of prudence and declaring new pleading standards for company stock cases, *Fifth Third* changed the standards applied in every Court of Appeals case petitioners cite on page 22 of their petition (to the extent those cases offer more than generalities about fiduciary prudence). As such, those cases have been superseded by *Fifth Third*. The separate opinion by then-Judge Scalia dissenting in relevant part in *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985)—a case about whether ERISA claims relating to a holding company's non-public stock were time-barred—was not even controlling law at the time it was published, much less in conflict with the decision below.

"focus . . . on whether the fiduciary engaged in a reasoned decision[-]making process, consistent with that of a prudent man acting in [a] like capacity." 761 F.3d 346, 356 (4th Cir. 2014). If a fiduciary acts with procedural prudence—by, for instance, "seeking outside legal and financial expertise, holding meetings to ensure fiduciary oversight of the investment decision, and continuing to monitor and receive regular updates on the investment's performance"—then ERISA's duty of prudence is satisfied. *Id*. at 358. In this case, the Sixth Circuit reviewed an extensive record and affirmed the district court's grant of summary judgment, holding that petitioners had failed to raise any issue of material fact about whether State Street's actions as trustee of the GM stock were imprudent: "Even viewed in the light most favorable to [petitioners], State Street's actions were not actionably imprudent." Pet. App. 88a.

Citing *Tatum*, the Sixth Circuit focused on the prudence test set by the statutory language of ERISA: "whether the fiduciary engaged in a reasoned decision-making *process*, consistent with that of a prudent man acting in [a] like capacity." *Id*. 80a (citing *Tatum*, 761 F.3d at 356) (emphasis in Sixth Circuit opinion). As the court below noted, "[C]ourts have readily determined that fiduciaries who act reasonably—i.e., who appropriately *investigate the merits of an investment decision* prior to acting—easily clear this bar." *Id*. (quoting *Tatum*, 761 F.3d at 358) (emphasis in Sixth Circuit opinion). Evaluating State Street's conduct based on a full record, the court recognized that "State Street discussed GM stock scores of times during the class period" and that State Street's "managers repeatedly discussed at length whether to continue the

investments in GM that are at issue in this case." *Id*. 87a. In particular:

> *State Street's independent fiduciary committee held more than forty meetings during the Class Period of less than nine months to discuss whether to retain GM stock*. At those meetings, State Street employees discussed the performance of General Motors, both its stock and its business, and factors that may have affected that performance. Meetings often culminated in decisive votes, ultimately to divest the fund of GM stocks. It was advised by outside legal and financial advisors. In documents filed with the district court, State Street's experts opined that State Street's process for monitoring GM (and other) stock was prudent. And other experts—fiduciaries of other pension plans and non-pension-plan investment funds—decided, like State Street, to hold GM Common Stock on each of the four "imprudent dates" chosen by [petitioners].

Pet. App. 87–88a (emphasis added). In light of all this evidence, the court held that petitioners "failed to demonstrate a genuine issue as to whether State Street satisfied its duty of prudence," and that the evidence presented "demonstrate[d] the reasonable nature of" State Street's decisions. *Id*. 88a.

Contrary to petitioners' argument about a supposed conflict with *Tibble,* the Sixth Circuit's opinion is soundly based in the law about prudent process and does not create "immunity from ERISA's duty of prudence" for trustees who have a prudent stock evaluation process. Rather, the Sixth Circuit

recognized that an inquiry into whether a fiduciary breached ERISA's duty of prudence focuses on process because ERISA says courts must review how a fiduciary approached decision-making at the time of the challenged actions, not post-hoc and based on investment results, as petitioners urge here. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring that a fiduciary perform duties for a benefit plan "with the care, skill, prudence, and diligence [of a prudent man] under the circumstances then prevailing").

The decision below found that voluminous record evidence demonstrated that State Street followed a prudent deliberative process and made decisions regarding the GM company stock fund that were both procedurally and substantively reasonable. As to the latter point, the Sixth Circuit noted that State Street's decisions were consistent with investment decisions of other ERISA fiduciaries who continued to hold large blocks of GM stock at the same time. *See* Pet. App. 88a ("We hold that . . . the decision of other expert professionals both to invest and not to divest on or near the dates that State Street made those demonstrates the reasonable nature of those decisions."). In so doing, the court applied the statutory standard of fiduciary prudence, i.e, what another prudent person would do "in the conduct of an enterprise of a like character and with like aims." *Fifth Third*, 134 S. Ct. at 2465 (quoting 29 U.S.C. § 1104(a)(1)(B)). The summary judgment affirmance by the Sixth Circuit presents fact-bound issues manifestly unworthy of this Court's review.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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