No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Investment Company Act of 1940 to mitigate the conflicts of interest inherent in the relationship between investment advisers and the mutual funds they create and manage. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984). Section 36(b) of that Act imposes on investment advisers "a fiduciary duty with respect to the receipt of compensation for services" and authorizes fund shareholders to bring a claim for "breach of [that] fiduciary duty." 15 U.S.C. § 80a-35(b). The Act further provides that, in such an action, "approval by the board of directors" of the fund is not conclusive, but "shall be given such consideration by the court as is deemed appropriate under all the circumstances." *Id.* § 80a-35(b)(2). The question presented is:

Whether the court below erroneously held, in conflict with the decisions of three other circuits, that a shareholder's claim that the fund's investment adviser charged an excessive fee – more than twice the fee it charged to funds with which it was not affiliated – is not cognizable under § 36(b), unless the shareholder can show that the adviser misled the fund's directors who approved the fee.

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Jerry N. Jones, Mary F. Jones, and Arline Winerman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

The Seventh Circuit in this case expressly rejected the Second Circuit's standard, which the Third and Fourth Circuits follow, for assessing a claim that a mutual fund's investment adviser – a statutory fiduciary under the Investment Company Act of 1940 ("ICA" or "Act") – charged an excessive fee for investment-advisory services. The judges of the Seventh Circuit divided evenly (five-to-five, with one judge recused) on whether to rehear the panel's decision en banc. As Judge Posner explained in dissenting from the denial of rehearing en banc, "the creation of a circuit split, the importance of the issue to the mutual fund industry, and the one-sided character of the panel's analysis" warrant further review. Pet. App. 42a-43a.

Mutual funds ordinarily are formed and run by their investment advisers. Because of the symbiotic relationship between advisers and their funds, "the forces of arm's-length bargaining" over compensation "do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy." S. Rep. No. 91-184, at 5 (1969). In response to "the potential for abuse inherent in [that] structure," Congress enacted the ICA. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (internal quotation marks omitted). After several decades of practice under the ICA, Congress concluded that investment advisers continued to charge their funds excessive fees for investment-advisory services, despite the structural safeguards the original ICA imposed.

In 1970, to combat the persistent problem of excessive investment-adviser fees, Congress added § 36(b) to the ICA. Section 36(b) imposes on investment advisers "a fiduciary duty *with respect to the receipt of compensation for services*" and authorizes fund shareholders to bring a claim for "breach of [that] fiduciary duty." 15 U.S.C. § 80a-35(b) (emphasis added). In the leading case interpreting § 36(b), the Second Circuit held that an investment adviser breaches its fiduciary duty with respect to compensation when it charges "a fee that is so disproportionately large" that, in light of all pertinent facts, the fee "bears no reasonable relationship to the services rendered." *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir. 1982). Courts in the Second Circuit have applied that standard for more than 25 years. And the Third and Fourth Circuits have followed the Second Circuit's lead in adopting the *Gartenberg* standard.

In the decision below, the Seventh Circuit expressly rejected the prevailing interpretation of § 36(b) and "disapprove[d] the *Gartenberg* approach." Pet. App. 8a. Instead, the court held that an allegation that an adviser charged excessive fees for advisory services does not state a claim for breach of fiduciary duty under § 36(b), unless the adviser also misled the fund's board of directors in obtaining their approval of the compensation. *See id.* at 8a-9a. The court adopted that standard even though the ICA expressly provides that, in § 36(b) cases, approval of the fee by the fund's board is not conclusive, but "shall be given such consideration by the court as is deemed appropriate under all the circumstances." 15 U.S.C. § 80a-35(b)(2). The panel also gave no weight to powerful – and undisputed – evidence that the fee charged in this case would not have been agreed to in an arm's-length negotiation: the fee was more than twice what the investment adviser charges to clients it does not control. *See* Pet. App. 6a; *see also id.* at 39a (Posner, J.).

The proper interpretation of § 36(b) presents a question of surpassing importance to the 44 percent of American families with $11.5 trillion in retirement and personal savings invested in mutual funds.[1] This Court's immediate review therefore is warranted to resolve the square conflict in the circuits on whether an investment adviser's fiduciary duty "with respect to the receipt of compensation" under § 36(b) in fact encompasses the amount of compensation that the adviser may charge a fund it controls and is not limited to cases where the board has been misled.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 527 F.3d 627. The opinion of the district court (Pet. App. 15a-33a) is not reported but is available at 2007 WL 627640.

JURISDICTION

The court of appeals entered its judgment on May 19, 2008, and denied a petition for rehearing on August 8, 2008. *See* Pet. App. 34a-43a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] *See* Investment Company Institute, *Trends in Ownership of Mutual Funds in the United States, 2007*, at 1 (Nov. 2007) ("*2007 Trends in Ownership*"), *available at* http://www.ici.org/pdf/fm-v16n5.pdf; Investment Company Institute, *Trends in Mutual Fund Investing, August 2008* (Sept. 29, 2008) ("*Trends in Mutual Fund Investing*"), *available at* http://www.ici.org/stats/latest/trends_08_08.html#TopOfPage.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, are reproduced at Pet. App. 44a-64a.

STATEMENT

A. Statutory and Regulatory Background

1. Mutual funds are "typically created and managed by a pre-existing external organization known as an investment adviser." *Daily Income Fund*, 464 U.S. at 536 (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)). The relationship between a fund and its adviser "is fraught with potential conflicts of interest," because the adviser "generally supervises the daily operation of the fund and often selects affiliated persons to serve on the company's board of directors." *Id.* (internal quotation marks omitted). To mitigate such conflicts of interest, Congress enacted the ICA in 1940 and imposed a number of structural safeguards on the industry. *See id.* at 536-37.

Following the Act's passage, investment advisers continued to exploit their control over mutual funds to charge excessive fees. One study concluded that "investment advisers often charged mutual funds higher fees than those charged the advisers' other clients and further determined that the structure of the industry, even as regulated by the Act, had proven resistant to efforts to moderate adviser compensation." *Id.* at 537. A subsequent Securities and Exchange Commission ("SEC") investigation found that "investment advisers were generally compensated on the basis of a fixed percentage of the fund's assets, rather than on services rendered or actual expenses," and that, "as a fund's assets grew, this form of payment could produce unreasonable fees in light of the economies of scale realized in managing a larger portfolio." *Id.*

The SEC also had concluded that "lawsuits by security holders challenging the reasonableness of adviser fees had been largely ineffective due to the standards employed by courts to judge the fees." *Id.* Courts applied either state common-law standards of corporate waste – under which fees could be challenged only if they were "unconscionable" or "shocking" – or, under the ICA, a standard requiring shareholders to prove "gross abuse of trust." *Id.* at 540 & n.12. As a consequence, courts often relied on director approval of fees to deny relief. *See id.*

2. To combat the continuing problem of excessive investment-adviser fees, Congress enacted the Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1413 ("1970 Amendments"). *See Daily Income Fund*, 464 U.S. at 537-39. The 1970 Amendments strengthened the ICA's structural protections by requiring that at least 40 percent of a fund's directors be persons who are not "interested" in the adviser. 15 U.S.C. § 80a-10(a); *id.* § 80a-2(a)(19)(A)(iii). The Act as amended also requires that a majority of the "noninterested" directors annually approve the adviser's compensation agreement, "at a meeting called for the purpose of voting on such approval." *Id.* § 80a-15(c).

Recognizing that the existence of procedural safeguards had not eliminated excessive adviser fees, Congress also enacted a substantive protection against undue compensation by adding § 36(b) to the ICA. *See Daily Income Fund*, 464 U.S. at 539-40. Section 36(b) imposes on investment advisers "a fiduciary duty with respect to the receipt of compensation for services." 15 U.S.C. § 80a-35(b). It also grants shareholders a private right of action. *Id.* Congress further specified that, in a shareholder suit under § 36(b), director approval of the adviser's compensation would not be conclusive, but rather "shall be given such consideration by the court as is deemed appropriate under all the circumstances." *Id.* § 80a-35(b)(2).

B. Facts

Petitioners own shares in several mutual funds – referred to as the "Oakmark funds" – for which respondent Harris Associates serves as the investment adviser. *See* Pet. App. 1a. Harris created the funds, manages the funds' daily operations, and even provides the funds' office space and equipment. *See id.* at 39a-40a. In addition, Harris selected each of the members of the funds' board of trustees. The Oakmark funds are thus typical "controlled" or "captive" mutual funds – exactly the type of fund that Congress sought to protect through the ICA. *Id.*

Harris charges the Oakmark funds fees for investment-advisory services that are based on a percentage of each fund's net assets. Those fees are more than twice what Harris charges independent funds that it advises. For example, during the relevant period, Harris charged one of the Oakmark funds one percent of the first $2 billion of the fund's assets. For institutional clients (such as pension funds) that Harris advises but does not control, Harris charged roughly one-half of one percent for the first $500 million in assets and roughly one-third of one percent for everything above. *See id.* at 6a, 17a, 39a.[2]

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[2] Specifically, Harris charged a comparable institutional client 0.75 percent of the first $15 million under management,

In addition to charging fees far exceeding those it billed to independent clients, Harris accepted compensation in violation of a number of the ICA's structural safeguards, which Congress designed to check adviser fees. For example, although Victor Morgenstern – the chair of the board and one of the funds' supposedly disinterested trustees – was a former Harris partner with a continuing financial interest in Harris worth hundreds of thousands of dollars per year, Morgenstern participated in the statutorily mandated disinterested-trustee meetings at which Harris's fee agreements were reviewed and approved. *See* 15 U.S.C. § 80a-15(c); Pet. App. 2a-3a; C.A. App. A78-A80, A87.[3] Further, the funds' registration statements did not disclose Morgenstern's financial interest in Harris, as the Act requires. *See* 15 U.S.C. § 80a-33(b); Pet. App. 3a; C.A. App. A88.

C. Proceedings Below

1. In August 2004, petitioners sued Harris in federal district court, alleging that Harris breached its fiduciary duty with respect to compensation under § 36(b) of the ICA. Petitioners asserted that Harris charged the Oakmark funds excessive investment-advisory fees, in violation of § 36(b). They also contended that Harris breached its fiduciary duty under § 36(b) by accepting fees in violation of the Act's structural protections against undue compensation – namely, the provisions requiring approval of fee agreements by disinterested directors and disclosure of conflicts.

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with the percentage decreasing thereafter. *See* Pet. App. 6a, 17a.

[3] *See also* Pet. App. 18a (describing other financial and personal relationships between the funds' directors and Harris).

Harris moved for summary judgment, arguing that it complied with § 36(b) because its fees were in line with those paid by similarly situated mutual funds and the fees were approved by the funds' trustees. Petitioners opposed Harris's motion, contending that, regardless of whether Harris's fees comported with those paid by other mutual funds, those fees were significantly higher than fees paid by independent clients and therefore were excessive under § 36(b). Petitioners further argued that the facts surrounding the trustees' oversight of Harris's compensation not only failed to establish the reasonableness of the fees – because the statute precludes giving conclusive weight to board approval – but also tended to show that Harris had breached its fiduciary duty with respect to compensation, considering the board members' extensive financial and personal associations with Harris. *See* Pet. App. 18a (describing some of those associations).

In addition, because the evidence of Harris's lack of compliance with the ICA's structural requirements was undisputed, petitioners moved for summary judgment on liability. In opposing petitioners' motion, Harris contended that it had complied with the ICA's structural requirements and that, in any event, any failure to comply with the ICA's institutional safeguards was irrelevant to a breach-of-fiduciary-duty claim under § 36(b).

2. The district court granted Harris's motion for summary judgment and denied petitioners'. In denying petitioners' motion, the court concluded that an adviser's fiduciary duty under § 36(b) does not include compliance with the structural provisions on which petitioners relied. *See* Pet. App. 24a-26a. The court also asserted that the board would have approved Harris's fees anyway and that the violations therefore were essentially harmless. *See id.* at 25a-26a.

Turning to Harris's motion, the district court opined that "the only question we need consider is whether [the funds' board] could have agreed to the fee schedule in the advisory contracts after engaging in good-faith bargaining." *Id.* at 31a. The court answered that question in the affirmative, because the evidence "indicate[d] that the board as a whole was operating without any conflict that would [have] prevent[ed] it from engaging in arm's-length negotiations with Harris," *id.*, and because Harris's fees were comparable to those paid by other mutual funds, *id.* at 30a-32a. In the court's view, it did not matter whether independent clients paid far less for services that were "indistinguishable" from those the Oakmark funds received. *Id.* at 30a.

3. a. A panel of the Seventh Circuit affirmed the district court's judgment. The panel first addressed petitioners' evidence that Harris violated its fiduciary duty with respect to compensation by failing to comply with the ICA's structural safeguards against excessive adviser fees. It concluded that the financial relationship between Morgenstern (the supposedly disinterested trustee) and Harris would violate 15 U.S.C. § 80a-15(c) only if, taking away Morgenstern, the disinterested trustees who voted to approve Harris's compensation would not have made up a majority of all disinterested trustees. *See* Pet. App. 3a-4a. Put differently, in the panel's view, the Act's requirement that a majority of the disinterested directors approve adviser compensation can be satisfied even if one of the directors participating in the approval process is, in fact, interested in the adviser

– so long as his vote is not necessary to achieve a majority. *See id.* Similarly, the panel concluded that the funds' shareholders could not recover for the failure to disclose Morgenstern's financial ties to Harris, unless Morgenstern's vote to approve Harris's fees was decisive. *See id.* at 3a.

The panel next considered petitioners' claim that Harris charged excessive investment-adviser fees, in violation of § 36(b). It noted the Second Circuit's holding in *Gartenberg* that an adviser violates § 36(b) when it charges "'a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered.'" *Id.* at 5a (quoting 694 F.2d at 928). The panel also opined that the Third and Fourth Circuits had divided on the propriety of *Gartenberg*'s interpretation of § 36(b). *See id.* at 8a (citing *Green v. Fund Asset Mgmt., L.P.*, 286 F.3d 682 (3d Cir. 2002); *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d 321 (4th Cir. 2001)).

The panel "disapprove[d] the *Gartenberg* approach." *Id.* It instead held that an allegation that an adviser charged excessive fees for advisory services is not actionable under § 36(b). *See id.* The panel reasoned that "[a] fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation." *Id.* So long as the adviser candidly negotiates with the trustees, therefore, the trustees' decision to approve the adviser's compensation is "conclusive." *Id.* at 9a.

The panel allowed that 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.* But it held that such an inference could never be drawn where the adviser's compensation is "normal among similar institutions" – here, other mutual funds. *Id.*

Accordingly, the panel, like the district court, gave no weight to the fact that Harris charged more to the Oakmark funds than to its independent clients. *See id.* at 13a. (It also speculated that the Oakmark funds required more of Harris's time. *See id.*)

To support its interpretation of § 36(b), the panel analogized investment-adviser fees to compensation of fiduciaries such as corporate managers and lawyers. It asserted that courts do not review what corporate boards or clients pay officers or attorneys and drew the conclusion that "[j]udicial price-setting does not accompany fiduciary duties." *Id.* at 10a. In addition, the panel argued that its deregulatory approach was good policy. It asserted that, because there are many mutual funds, the mutual-fund industry must be competitive and that competition among mutual funds for investors' dollars must constrain adviser compensation. *See id.* at 11a-13a.

b. Petitioners sought rehearing. The Seventh Circuit's active judges split five-to-five on whether to grant rehearing, with one judge recused. Lacking a majority, the court of appeals denied rehearing. *See* Pet. App. 34a.[4]

Judge Posner, joined by Judges Rovner, Wood, Williams, and Tinder, dissented from the denial of rehearing en banc. *See id.* at 35a-43a. Judge Posner noted that the panel had "rejected the approach taken by the Second Circuit in *Gartenberg* . . . to deciding whether a mutual fund adviser has breached his fiduciary duty to the fund." *Id.* at 35a. Judge Posner explained that the panel's "rejection" of the *Gartenberg* standard was based on "an economic analysis that is ripe for reexamination on the basis of growing indications that executive compensation in

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[4] *See also* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a).

large publicly traded firms often is excessive because of the feeble incentives of boards of directors to police compensation." *Id.* at 37a (citing authorities). "Competition in product and capital markets can't be counted on to solve the problem," he wrote, "because the same structure of incentives operates on all large corporations and similar entities, including mutual funds." *Id.* at 38a; *see id.* at 40a-41a. After all, Judge Posner observed, "[m]utual funds are a component of the financial services industry, where abuses have been rampant." *Id.* at 38a.

Turning to this case, Judge Posner explained that "there is no doubt that the captive funds are indeed captive" and that the "Oakmark-Harris relationship matches the arrangement described in the Senate Report accompanying § 36(b): a fund 'organized by its investment adviser which provides it with almost all management services.'" *Id.* at 39a (quoting S. Rep. No. 91-184, at 5); *see id.* at 40a (describing the relationship in greater detail). Judge Posner emphasized that a "particular concern" was Harris's practice of "charging its captive funds," in which petitioners invested, "more than twice what it charges independent funds." *Id.* at 39a. And he rejected as "airy speculation" the panel's "suggestions on why this difference may be justified" – suggestions lacking "an evidentiary or empirical basis." *Id.* at 39a, 41a. Judge Posner concluded that this case warrants further review in light of "the creation of a circuit split, the importance of the issue to the mutual fund industry, and the one-sided character of the panel's analysis." *Id.* at 42a-43a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, AND FOURTH CIRCUITS ON A FUNDAMENTAL ISSUE OF FEDERAL SECURITIES LAW

The Seventh Circuit's decision in this case created a conflict with three other circuits in holding that an investment adviser's compensation, no matter how excessive, does not support a claim for breach of fiduciary duty under § 36(b) of the ICA, unless the adviser also misled the fund's directors in obtaining their approval of the fee. The majority rule traces its origins to the Second Circuit's decision in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982). Recognizing that Congress enacted § 36(b) because the usual arm's-length bargaining over compensation arrangements does not occur between investment advisers and the funds they control, the *Gartenberg* court held that an adviser breaches its fiduciary duty under § 36(b) when its fee is so disproportionate to the services rendered that the fee evidently would not have been agreed to in an arm's-length transaction. *See id.* at 928. Both the Third and Fourth Circuits have followed the Second Circuit's approach, establishing a firm three-circuit rule, and district courts in other circuits where there is no controlling precedent likewise have favorably cited *Gartenberg*. *See* Pet. App. 36a (citing cases from courts in the First, Fifth, Eighth, Ninth, and Tenth Circuits).

In rejecting the *Gartenberg* standard, the Seventh Circuit created a division of authority in the courts of appeals on the standard for determining compliance with an investment adviser's fiduciary duty under § 36(b). Significantly, there is now a conflict between the courts of appeals that hear cases from the country's two hubs of securities trading (New York and Chicago) on an important question of federal securities law.

A. The Second, Third, And Fourth Circuits Follow The *Gartenberg* Standard

1. *The Second Circuit.* In *Gartenberg*, shareholders in a money-market fund alleged that the fund's investment adviser charged the fund excessive fees, in violation of § 36(b). *See* 694 F.2d at 925. Like Harris, the adviser in *Gartenberg* charged the fund an advisory fee based on a percentage of the fund's net assets. *See id.* at 926.

After a bench trial, the district court ruled in favor of the adviser, finding that the "total fee was fair to the Fund." *Id.* at 927 (internal quotation marks omitted). In making that fairness determination, the court considered a number of factors, including "the nature and extent of the services, the fees charged by other advisers to other money market funds, the overall cost . . . of providing the services, and the fee schedule's allowance for economies of scale by reducing the rate as the Fund's net assets increased." *Id.* The court also "gave weight to the process by which the 6 noninterested trustees of the Fund" – whom the court found to be "competent, independent and conscientious in the performance of their duties" – approved the fee agreement. *Id.* It found that the trustees "were furnished with sufficient information to evaluate the contract" and, in fact, "thoroughly reviewed and weighed all facts pertinent to the fee" before approving it. *Id.*

In affirming, the Second Circuit explained that the fiduciary duty that § 36(b) imposes must be understood in light of the provision's purpose. Congress enacted § 36(b) in response to the reality that "the usual arm's length bargaining between strangers does not occur between an adviser and the fund." *Id.* at 928 (citing S. Rep. No. 91-184); *see id.* at 929-30 (describing "the potentially incestuous relationships between many advisers and their funds"). Accordingly, the Second Circuit held that an investment adviser breaches its fiduciary duty under § 36(b) when the adviser charges a fee that is "so disproportionately large" – or "excessive" – that it "bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." *Id.* at 928, 930-31.

The Second Circuit described "pertinent facts" that a court should consider "in determining whether a fee is so excessive as to constitute a 'breach of fiduciary duty'" under § 36(b). *Id.* at 929-30. Those include "the adviser-manager'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 *Gartenberg* court also noted the importance of examining the role of the fund's trustees: "the expertise of the independent trustees of a fund, whether they are fully informed about all facts bearing on the adviser-manager's service and fee, and the extent of care and conscientiousness with which they perform their duties are important factors to be considered." *Id.*; *see id.* at 933. But the Second Circuit cautioned that trustee approval does not automatically establish compliance with § 36(b), because, "even if the trustees of a fund endeavored to act in a responsible fashion, an adviser-manager's fee could be so disproportionately large as to amount to a breach of fiduciary duty in violation of § 36(b)." *Id.* at 930; *see also* 15 U.S.C. § 80a-35(b)(2).

In addition, the Second Circuit "disagree[d] with" the district court's suggestion that significant weight should be given to "the price charged by other similar advisers to funds managed by them." 694 F.2d at 929. It explained that competition between funds for shareholder business "does not support an inference that competition must therefore also exist between adviser-managers for fund business." *Id.* "The former may be vigorous," the court reasoned, "even though the latter is virtually non-existent," because "[e]ach is governed by different forces." *Id.* Therefore, the court held that an adviser's "[r]eliance on prevailing industry advisory fees will not satisfy § 36(b)." *Id.*[5]

Numerous subsequent cases in the Second Circuit have reaffirmed the *Gartenberg* standard.[6] For example, in *Meyer v. Oppenheimer Management Corp.*, 764 F.2d 76 (2d Cir. 1985), the Second Circuit

[5] The *Gartenberg* court also observed in a footnote that – in the context of the money-market fund at issue there, which resembled "a bank account" in that "[i]dle money [could] be invested in the Fund for as little as a day and put to work earning interest," 694 F.2d at 925 – a comparison between the fees charged to the money-market fund and the fees charged to pension funds was not especially meaningful. It reasoned that a "pension fund does not face the myriad of daily purchases and redemptions throughout the nation which must be handled by" a money-market fund, "in which a purchaser may invest for only a few days." *Id.* at 930 n.3.

[6] *See, e.g.*, *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 117-18 (2d Cir. 2007) (per curiam); *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 340 (2d Cir. 2006); *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 409 (2d Cir. 1989).

reiterated that "[a]n investment adviser violates section 36(b) when it, or an affiliated person, charges '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 arm's-length bargaining.'" *Id.* at 81 (quoting *Gartenberg*, 694 F.2d at 928). The district court in *Meyer* had dismissed the plaintiff's claim that the adviser's fee was "excessive," relying "principally on the approval of the . . . fees by the Fund's board of directors." *Id.* at 83. Applying *Gartenberg*, the Second Circuit reversed, explaining that, "in deciding whether a fee is so high as to constitute a breach of fiduciary duty, a court should examine all the facts surrounding a fee determination." *Id.*

2. *Fourth Circuit.* In *Migdal v. Rowe Price-Fleming International, Inc.*, 248 F.3d 321 (4th Cir. 2001), shareholders in two mutual funds sued the investment advisers of those funds, alleging that they "breached their fiduciary duty under Section 36(b) because the fees they received were excessive." *Id.* at 325. Like the Second Circuit, the *Migdal* court recognized that "the typical arm's-length bargaining does not occur between an investment adviser and a mutual fund because the operations of the fund are conducted by the adviser." *Id.* at 326. The court accordingly adopted the standard that the Second Circuit applied in *Gartenberg*, holding that an adviser violates its fiduciary duty under § 36(b) when it charges 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 arm's-length bargaining.'" *Id.* (quoting *Gartenberg*, 694 F.2d at 928).

Rather than following the multi-factor approach the Second Circuit articulated, however, the Fourth Circuit focused narrowly on one particular factor – "the relationship between the fees that the advisers received and the services which they provided in return." *Id.* at 327. The court upheld the dismissal of the plaintiffs' complaint because it lacked specific allegations regarding the services the advisers provided. *See id.* The court specifically noted, however, that the plaintiffs in that case had not made "any allegations about excess profits from economies of sale." *Id.* By making clear that such allegations were relevant to the inquiry about an investment adviser's breach of fiduciary duty, the Fourth Circuit's rule conflicts with the standard announced by the Seventh Circuit in this case.

3. *Third Circuit.* The year after *Migdal*, the Third Circuit confronted a § 36(b) claim in *Krantz v. Prudential Investments Fund Management LLC*, 305 F.3d 140 (3d Cir. 2002) (per curiam). There, too, an investor in a mutual fund alleged that the fund's adviser "received excessive compensation in breach of [its] 'fiduciary duty with respect to compensation' set forth in § 36(b)." *Id.* at 141 (quoting 15 U.S.C. § 80a-35(b)). Like the *Gartenberg* and *Migdal* courts, the Third Circuit recognized that an investment adviser breaches its fiduciary duty under § 36(b) when it charges a fee that is "excessive" in light of the services rendered. *Id.* at 143. Following the Fourth Circuit's interpretation of *Gartenberg* in *Migdal*, the Third Circuit required specific allegations regarding "'the relationship between the fees charged and the services rendered by the investment adviser.'" *Id.* (quoting *Migdal*, 248 F.3d at 327). Because the plaintiff "failed to allege any facts indicating that the fees received were disproportionate to the services rendered," the court of appeals affirmed the dismissal of the case. *Id.*[7]

B. The Seventh Circuit Rejected The *Gartenberg* Standard

In this case, the Seventh Circuit broke with the governing standard in the Second, Third, and Fourth Circuits and held that an allegation that an investment adviser charged an excessive fee does not state a claim under § 36(b) of the ICA. *See* Pet. App. 8a-9a. The court below "disapprove[d] the *Gartenberg* approach." *Id.* at 9a. It held instead that the fund's "trustees . . . determine how much advisory services are worth" and that, so long as the adviser "make[s] full disclosure and play[s] no tricks," the trustees' decision to approve the fee "is conclusive." *Id.* at 8a-9a. As Judge Posner explained, in "reject[ing]" the *Gartenberg* standard, the Seventh Circuit "created a circuit split" and engendered significant confusion regarding the standard for assessing excessive-fee claims under § 36(b). *Id.* at 35a, 42a.

The court below suggested that the amount of an adviser's fee could be "so unusual that a court will infer that deceit must have occurred, or that the persons responsible for [the] decision have abdicated." *Id.* at 9a. Harris may contend that the Seventh Circuit's approach is in fact not so different from *Gartenberg*, because compensation that is "'so unusual' might not seem to differ materially from compensa-

[7] The court below suggested that a different Third Circuit decision had rejected the *Gartenberg* standard. *See* Pet. App. 8a (citing *Green v. Fund Asset Mgmt., L.P.*, 286 F.3d 682 (3d Cir. 2002)). But, as Judge Posner explained, "the amount of compensation was not at issue" in the Third Circuit's *Green* case. *Id.* at 35a.

tion that is 'so disproportionately large.'" *Id.* at 41a (Posner, J.). But, as Judge Posner explained, such a suggestion "misses an important difference between the *Gartenberg* approach and the panel's approach": "The panel's 'so unusual' standard is to be applied solely by comparing the adviser's fee with the fees charged by other mutual fund advisers." *Id.* The Second Circuit's standard "is rightly not so limited" and would allow consideration of, among other things, the difference between the fees charged to captive funds and the fees charged to independent funds. *Id.*

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S DECISION

The Seventh Circuit held that a shareholder's allegation that an investment adviser charged excessive fees does not, without more, state an actionable claim for relief under § 36(b). *See* Pet. App. 8a ("A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation."). Instead, to state a claim, an investor would have to allege that the adviser misled the directors in some fashion. *See id.* at 9a, 13a-14a (describing the directors' decision as "conclusive," absent an allegation that the adviser "pulled the wool over the [directors'] eyes"). That holding cannot be reconciled with the ICA's text, structure, or purposes. Nor can it be squared with this Court's decisions interpreting the Act or the views of the SEC. Under a proper standard, petitioners are entitled to a trial on their claims.

A. An Adviser That Charges An Excessive Fee Breaches Its Fiduciary Duty "With Respect To The Receipt Of Compensation For Services" Under § 36(b)

1. Section 36(b) imposes on investment advisers "a fiduciary duty *with respect to the receipt of compensation for services*." 15 U.S.C. § 80a-35(b) (emphasis added). And it establishes a private right of action in favor of shareholders who have been injured by an adviser's "breach of fiduciary duty in respect of such compensation." *Id.* The statute also makes clear that, in a shareholder suit under § 36(b), "approval by the board of directors" of a fund "shall be given such consideration by the court as is deemed appropriate under all the circumstances." *Id.* § 80a-35(b)(2).

By its plain terms, therefore, § 36(b) not only obligates advisers to act as "fiduciar[ies]" – a status that carries with it disclosure obligations on a variety of topics in addition to fees – but also creates a specific, enforceable right "with respect to" an adviser's "receipt of compensation." *Id.* § 80a-35(b). The Seventh Circuit's assertion that § 36(b) is satisfied so long as the adviser "make[s] full disclosure and play[s] no tricks" (Pet. App. 8a) – regardless of the amount of compensation charged – thus gives short shrift to the operative phrase "with respect to the receipt of compensation," contrary to settled principles of statutory interpretation.[8] Furthermore, the lower court's decision to treat director approval as "conclusive" (*id.* at 9a) contradicts the express statutory mandate that director approval should be afforded only "such consideration by the court as is deemed

[8] *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

appropriate under all the circumstances." 15 U.S.C. § 80a-35(b)(2).

The Act's structure reinforces those conclusions. The ICA contains numerous provisions imposing structural safeguards on the adviser-fund relationship. In addition, § 36(a) of the ICA authorizes the SEC to seek injunctive relief against "any act or practice constituting a breach of fiduciary duty" and contains no specific language regarding the receipt of compensation. *Id.* § 80a-35(a). Thus, the ICA contains multiple provisions – other than § 36(b) – that are intended to prevent advisers from playing "tricks" or "pull[ing] the wool over" the directors' eyes. Pet. App. 8a, 13a-14a. To hold, as the court below did, that § 36(b) does nothing more than duplicate those structural and general fiduciary requirements – and imposes no substantive check on an adviser's "receipt of compensation for services," 15 U.S.C. § 80a-35(b) – negates a critical aspect of the statutory scheme Congress created.

The Seventh Circuit's rule also contradicts Congress's purposes. Congress added § 36(b) to the ICA in 1970 because the problem of excessive investment-adviser compensation had proved resistant to the structural measures adopted in 1940. Concluding that "shareholders should not have to rely solely on the fund's directors to assure reasonable adviser fees," *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) (internal quotation marks omitted), Congress created a "mechanism by which the fairness of" those fees "could be tested in court," S. Rep. No. 91-184, at 5. The Seventh Circuit's interpretation disserves Congress's purpose, because it requires investors to rely solely on the fund's directors and essentially negates § 36(b) as an independent mechanism to test the fairness of adviser fees.

2. The Seventh Circuit's holding in this case also conflicts with this Court's decision in *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984), and with the views of the SEC. All nine Justices in *Daily Income Fund* clearly understood that "an important reason for the enactment of § 36(b)" was "to ensure reasonable adviser fees." *Id.* at 534 n.10; *see also id.* at 546 (Stevens, J., concurring in the judgment) (indicating that Congress intended to enable shareholders to challenge and to recover "excessive fees"). The Court there recognized that a major flaw in the existing rules governing shareholder actions against investment advisers was that courts too often deferred to director approval in denying relief. *See id.* at 537, 540 & n.12. Accordingly, the Court explained, Congress created a new federal standard for shareholder actions, "to act as [an] independent check[] on excessive fees." *Id.* at 541.[9] Yet, the court below read that independent check right out of the U.S. Code, reducing the provision to a prohibition on misleading or defrauding a fund's directors.

The lower court's ruling similarly conflicts with the SEC's views. In its brief in *Daily Income Fund*, the SEC explained that § 36(b) grants shareholders a "right to sue investment advisers *in order to recover excessive fees*." Brief for the SEC as Amicus Curiae in Support of Affirmance at 2, *Daily Income Fund*,

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[9] Although no party in *Daily Income Fund* argued for a contrary reading of the statute, this Court's conclusion was an essential premise of its holding that a demand on the fund's board of directors under Federal Rule of Civil Procedure 23.1 is not a prerequisite to a shareholder action under § 36(b). *See* 464 U.S. at 534-42.

Inc. v. Fox, 464 U.S. 523 (1984) (No. 82-1200) ("SEC *Daily Income Fund* Brief") (emphasis added). According to the SEC, "[s]ecurity holder suits under Section 36(b) provide a necessary supplement to the Commission's own enforcement authority under this Section." *Id.* The SEC also understood that director approval of a fee cannot be "conclusive," as the lower court held, Pet. App. 9a, because the statute "reflects a congressional determination that, due to conflicts of interest in assessing the fairness of compensation paid to a company's investment adviser, courts cannot defer to the business decisions of investment company directors." SEC *Daily Income Fund* Brief at 9. Indeed, the SEC characterized the need to provide effective judicial review of adviser fees as a "major impetus" for the 1970 Amendments to the ICA. *Id.* at 5. The inconsistency between the decision below and the views of the expert agency entrusted with implementing and enforcing the ICA further underscores the importance of granting review.

B. The Seventh Circuit's Policy Arguments And Analogies To Other Sources Of Law Do Not Support Its Interpretation Of The Act

The principal support for the Seventh Circuit's holding was its assertion that competition among mutual funds for shareholders' business will constrain adviser fees. *See* Pet. App. 7a, 11a-13a. But, as Judge Posner maintained, that conclusion rests on "an economic analysis that is ripe for reexamination." *Id.* at 37a. In addition to the growing body of scholarly work documenting "the feeble incentives of boards of directors to police compensation," *id.*, the panel's reasoning ignores that "the same structure of incentives operates" on all mutual funds, *id.* at 38a.

Thus, high fees are unlikely to drive mutual fund investors away, because fees are similar across the industry. *See id.* at 40a.

The Seventh Circuit also asserted that other fiduciaries are not held liable for charging excessive fees. *See id.* at 8a-10a. But the court misunderstood the other sources of law to which it looked, and its analogies are not apt. Under the law of trusts, which the court below invoked, it is not true that a fiduciary may accept whatever compensation is agreed on. Instead, "[i]f the amount of compensation provided by the terms of the trust is or becomes unreasonably high or unreasonably low, the court may allow a smaller or larger compensation." *Restatement (Third) of Trusts* § 38 cmt. e (2001).[10] The panel's analogy to lawyer compensation, *see* Pet. App. 10a, similarly is misplaced, because "[a] lawyer may not charge a fee larger than is reasonable in the circumstances." *Restatement (Third) of Law Governing Lawyers* § 34 (2000).

Nor does the panel's observation that courts ordinarily do not second-guess the compensation of corporate officers support its conclusion. Because Congress enacted § 36(b) in response to the inadequacy of existing state corporate-law standards governing excessive-compensation claims – standards that often required a showing of "corporate waste,"

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[10] *See also Restatement (Second) of Trusts* § 242 cmt. f (1959) ("If by an abuse of a fiduciary or confidential relationship existing between the trustee and the settlor at the time of the creation of the trust, the settlor is induced to provide that the trustee shall receive more than a reasonable compensation, the trustee is not entitled to the compensation provided by the terms of the trust but only to such compensation as is reasonable.").

Daily Income Fund, 464 U.S. at 540 n.12 – it would be absurd to rely on those same standards to narrow the statute's scope. Moreover, Congress's greater concern over the compensation of investment advisers than that of corporate officers makes sense. As courts and scholars have recognized, conflicts of interest "occur[] much more frequently in the relations between a mutual fund and its investment adviser than in ordinary business corporations." *Fogel v. Chestnutt*, 533 F.2d 731, 745 (2d Cir. 1975) (Friendly, J.); *see* Donald C. Langevoort, *Private Litigation To Enforce Fiduciary Duties in Mutual Funds: Derivative Suits, Disinterested Directors and the Ideology of Investor Sovereignty*, 83 Wash. U. L.Q. 1017, 1032 (2005) (explaining that "[t]hinking about mutual funds . . . as a species of 'corporations' . . . is completely misguided").

C. Under A Proper Standard, Petitioners' Evidence Justifies A Trial On The Merits

Evaluated under a correct legal standard, petitioners' evidence was more than sufficient to raise genuine issues of material fact for trial. Most significantly, it is undisputed that Harris charged the Oakmark funds more than twice what it charged independent, institutional investors that it advises. *See* Pet. App. 6a, 17a, 39a. That comparison to fees negotiated through actual arm's-length bargaining alone suffices to support a finding that Harris's fees were "so disproportionately large" that they bore "no reasonable relationship to the services rendered." *Gartenberg*, 694 F.2d at 928; *see Strigliabotti v. Franklin Res., Inc.*, No. C 04-00883 SI, 2005 WL 645529, at *3-*4 (N.D. Cal. Mar. 7, 2005) (denying motion to dismiss § 36(b) claim where plaintiffs alleged that the adviser charged the fund significantly more than it charged institutional investors for equivalent services); *see also Daily Income Fund*, 464 U.S. at 537 (explaining that Congress enacted § 36(b) partly as a response to investment advisers' practice of charging "mutual funds higher fees than those charged the advisers' other clients"). Indeed, the evidence here showed not only that Harris charged the Oakmark funds more than institutional clients, but also that it cost Harris significantly *less* to serve the institutional clients. *See* C.A. App. A145. In addition, the record contained ample evidence that Harris was enjoying significant, and increasing, economies of scale, exacerbating the discrepancy between its fees and the cost of providing the services it rendered. *See id.* at A137-A142.

It is no answer to assert, as did the panel below, that the fees paid by the Oakmark funds resemble the fees paid by other mutual funds. As Judge Posner explained, "[t]he governance structure that enables mutual fund advisers to charge exorbitant fees" – the structure to which Congress responded in enacting § 36(b) – "is industry-wide." Pet. App. 41a. Consequently, the panel's approach would "allow those fees to become the industry's floor." *Id.*

Petitioners also demonstrated that Harris violated the ICA's structural protections against excessive adviser compensation in multiple ways. They showed that Harris had secured approval of its fees from a group of supposedly disinterested trustees that in fact included a former Harris partner with a continuing financial interest in Harris worth hundreds of thousands of dollars per year, in violation of § 15(c) of the ICA, 15 U.S.C. § 80a-15(c). *See supra* p. 7. Petitioners also demonstrated that Harris had failed to report to the SEC and the investing public its continuing financial relationship with the board's supposedly disinterested chair, in violation of § 34(b) of the ICA, 15 U.S.C. § 80a-33(b). *See supra* p. 7.[11] In addition, petitioners adduced substantial other evidence of Harris's breaches of its fiduciary duty under § 36(b), including:

- failing to disclose that three supposedly disinterested trustees were heavily invested in hedge funds managed by a corporate affiliate of Harris, *see* C.A. App. A85-A86, A88;
- misleading the board about its profitability, *see id.* at A130-A137;
- failing to provide the board with information about its economies of scale, *see id.* at A137-A139;
- resisting the board's efforts to institute breakpoints – that is, decreases in the fee percentage on assets exceeding a certain amount – and threatening to close one of the funds to new investors if breakpoints were instituted that

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[11] To resolve the question presented, the Court need not decide whether a violation of § 15(c) or § 34(b) of the ICA is, in and of itself, sufficient to establish a breach of fiduciary duty actionable under § 36(b) (an issue the court below did not directly address, although it was properly presented). For present purposes, it is sufficient to recognize that evidence of violations of those provisions is relevant to, and highly probative on, the issue of whether an adviser has breached its fiduciary duty under § 36(b). *See, e.g., Krinsk*, 875 F.2d at 409 (explaining that "the independence . . . of the trustees" is a factor to be considered in applying the *Gartenberg* standard); *Gartenberg*, 694 F.2d at 929 (holding that, under § 36(b), "all pertinent facts must be weighed"); *see also Galfand v. Chestnutt Corp.*, 545 F.2d 807, 809 (2d Cir. 1976) (holding that investment adviser violated § 36(b) by obtaining a "one-sided revision" of its advisory contract without full disclosure to the board).

would impact Harris's profits, *see id.* at A140-A142;

- misleading the board about the extent and cost of the services it provided to its other clients in comparison to the mutual funds, *see id.* at A146-A148;
- misleading the board about its use of a Harris affiliate to double-charge the funds for commissions, *see id.* at A148-A149; and
- misleading the board in an effort to cause the funds to pay increased distribution payments to intermediaries who sold shares of the funds, *see id.* at A149-A151.

By failing to discuss that evidence in analyzing petitioners' § 36(b) claim, the Seventh Circuit implicitly deemed it irrelevant (or at least insufficient to raise a triable issue of fact) under the standard the court adopted. For this reason, the lower court's holding is doubly pernicious. It erroneously held that the size of an adviser's fee ordinarily cannot be the basis of a claim for breach of fiduciary duty under § 36(b) and required shareholders to prove that the adviser "pulled the wool over the eyes of the disinterested trustees" that approved its compensation. Pet. App. 13a-14a. At the same time, however, the court ignored substantial evidence that Harris engaged in exactly the type of "tricks" that the court suggested would form the basis of an actionable § 36(b) claim. *Id.* at 8a.

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

This case raises a question of vital importance to investors in mutual funds – whether the excessiveness of an investment adviser's fee can support a claim for breach of fiduciary duty under § 36(b). The significant number of reported federal appellate opinions addressing the issue in recent years reflects that the issue is one of recurring significance.[12] And the circuits with some of the largest mutual funds in the nation – the Second Circuit (Merrill Lynch), the Third Circuit (Vanguard), and the Fourth Circuit (T. Rowe Price) – now have firmly established rules. The question presented is ripe for this Court's review, and this case presents an ideal vehicle in which to resolve it.

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[12] *See Bellikoff*, 481 F.3d 110; *Amron*, 464 F.3d 338; *Krantz*, 305 F.3d 140; *Migdal*, 248 F.3d 321. In addition, a case presenting the propriety of the *Gartenberg* standard is pending in the Eighth Circuit. *See* Am. Mem. Op. and Order, *Gallus v. Ameriprise Fin., Inc.*, Civil No. 04-4498 (D. Minn. July 10, 2007), *appeal pending*, No. 07-2945 (8th Cir. argued Apr. 17, 2008). The decision below has been brought to the attention of the Eighth Circuit panel. Regardless of whether the Eighth Circuit follows *Gartenberg*, the reasoning of the Seventh Circuit in this case, or strikes out on its own, the outcome of the Eighth Circuit appeal can only deepen the circuit conflict, and the pendency of that case underscores the recurring significance of the question presented.

A. The Standard For Claims Of Breach Of Fiduciary Duty Under § 36(b) Affects Millions Of Shareholders, Who Have Trillions Of Dollars Invested In Mutual Funds

Mutual funds play a critical role in the national economy. Nearly 51 million U.S. households, or about 44 percent of American families, and 88 million individuals own mutual funds.[13] As of August 2008 (before the stock-market crash of October 2008), investors held more than $11.5 trillion in retirement and personal savings in mutual funds.[14]

The consequences of the Seventh Circuit's decision are well explained in a litigation alert posted on the website of Harris's counsel the day after the decision issued. It declared that the ruling "eras[es] nearly 30 years of precedent and practice" that grew out of the widely applied *Gartenberg* decision.[15] The alert also suggested that, at least in the Seventh Circuit, the holding could "influence" – presumably by relaxing – directors' review of adviser fees. *See* Litigation Alert at 2.[16]

Thus, as Harris's counsel evidently acknowledges, the Seventh Circuit's decision not only restricts

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[13] *See 2007 Trends in Ownership* at 1.

[14] *See Trends in Mutual Fund Investing.*

[15] Ropes & Gray, *Appeals Court Rejects Mutual Fund Excessive Fee Claims, Adopting New Standard for Evaluation of Fees* 1 (May 20, 2008) ("Litigation Alert"), *available at* http://www.ropesgray.com/litigationalert/?PublicationTypes=0c16874b-f94e-4696-b607-de259b87a13f.

[16] *See also* Floyd Norris, *Fund Fees Revisited In Court*, N.Y. Times, May 23, 2008, at C1 (opining that if the decision below "becomes widely accepted it could lead boards to forgo the often extensive process of gathering information to determine if fees are reasonable").

investors' ability to recover excessive adviser fees, but also reduces incentives for directors to provide rigorous oversight of adviser compensation. Moreover, for both advisers of and investors in large nationwide fund complexes, the conflict and confusion in the circuits creates the possibility of disparate results depending on the venue in which a suit is heard. This Court's intervention is required to restore uniformity in the interpretation and application of § 36(b).

B. The Question Presented Is Ripe For The Court's Review, And This Case Is An Ideal Vehicle For Resolving It

The Court will not benefit from further percolation of this issue in the lower courts. The proper standard for addressing an excessive-fee claim under § 36(b) of the ICA has now been discussed in the courts of appeals for more than a quarter century. Four circuits have fully considered the issue, with three following the *Gartenberg* standard and holding that an adviser breaches its fiduciary duty under § 36(b) when it charges a fee disproportionate to the services rendered, such that it would not have been agreed to by parties bargaining at arm's length. *See supra* pp. 14-19. The Seventh Circuit has now reached a contrary conclusion, holding that excessive-fee claims generally are not cognizable under § 36(b). *See supra* pp. 19-20. The court below acknowledged that conflict, *see* Pet. App. 8a; *id.* at 35a, 42a-43a (Posner, J.), as have a host of legal commentators, *see id.* at 42a (citing sources). The conflict is thus fully developed.

Furthermore, there is no realistic prospect of the conflict being resolved without this Court's intervention. The Seventh Circuit denied rehearing on the question, *see id.* at 34a, over Judge Posner's dissent, which argued that "the creation of a circuit split" warranted en banc review, *id.* at 42a-43a. Numerous (and recent) Second Circuit decisions have adhered to the approach in *Gartenberg*, and there is no reason to believe that court will deviate from the standard set forth in that case. *See supra* p. 16 & note 6. Accordingly, the question presented is ripe for adjudication by this Court. Declining to intervene will only lead to further confusion and inconsistent results in the lower courts.

In addition, this case is an ideal vehicle for resolving the question presented. There is no preliminary or threshold issue that this Court would have to decide before reaching the question presented. Nor is there any alternative ground for affirming the district court's grant of summary judgment for Harris if the Court reverses the decision below.

Furthermore, this case is a particularly good vehicle for addressing whether, as Judge Posner opined, the comparison between the fees an adviser charges its captive funds and the fees it charges its independent clients has probative value under § 36(b). The record here contains specific evidence on Harris's costs to serve each type of client – such as the number of Harris employees dedicated to managing the funds versus the number of employees dedicated to other clients. *See* C.A. App. A145. Such evidence is not available in all cases, and it makes this case an extraordinarily good vehicle for addressing whether the disparity between fees charged to different types of investment clients can support a claim for breach of fiduciary duty under § 36(b).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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