No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,
v.
JOHN DUDENHOEFFER, et al.,
Respondents.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of 12.5 million working men and women.[1] The collective bargaining agreements negotiated by the AFL-CIO's affiliates typically provide covered employees with pension benefits. Many of these negotiated pension plans are covered by the Employee Retirement Income Security Act ("ERISA"), and, as that statute requires, provide for the management of plan assets by named fiduciaries. The instant case concerns the statutory duty of such named fiduciaries to prudently manage pension plan assets for the sole purpose of providing retirement income to the covered employees and their beneficiaries. The proper definition of that statutory duty is crucial to protecting the legitimate expectations of employees in receiving retirement income from their pension plans.

STATEMENT

Petitioner Fifth Third Bancorp ("Company") sponsors the Fifth Third Bancorp Master Profit Sharing

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[1] Counsel for the Petitioners and counsel for the Respondents have filed letters consenting to the filing of all *amicus* briefs. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Plan ("Plan"), which is an "employee pension plan" taking the form of a "defined contribution" or "individual account" plan under ERISA. Pet. 4. *See* 29 U.S.C. §§ 1002(2)(A),1002(3), & 1002(34). The Plan offered Company employees, as plan participants, a choice of pension fund options. Pet. App. 4. One option was an employee stock ownership plan ("ESOP") called the Fifth Third Stock Fund. Pet. 4. The Plan provided that the Fifth Third Stock Fund was to be invested primarily in shares of Company stock. Pet. App. 4. Fifth Third matched a portion of participants' pre-tax contributions to one or more of the pension fund options through contributions to the Fifth Third Stock Fund. J.A. 574-75; Pet. App. 4. As required by ERISA, the Plan allowed participants to move both their own and the Company's matching contributions from the Fifth Third Stock Fund to one of the other fund options provided by the Plan. J.A. 141, 576-77.

Fifth Third is a bank holding company. In early 2007, the Company's financial condition severely worsened as a result of rising defaults on risky subprime mortgages. J.A. 76.[2] Initially, the Company's financial distress was concealed by overly optimistic public reports. J.A. 59, 67-69 & 76-77. However, in June 2008, the Company's distressed financial conditions became public, causing an immediate drop of 27% in value of the Company's common stock. J.A. 81-82. Over the ensuing year, the value of the Company's common stock dropped by almost 75%. Pet. App. 5. As a result, plan participants who had their retirement

[2] This statement of facts is based on the allegations in the Amended Complaint.

savings in the Fifth Third Stock Fund lost tens of millions of dollars. *Ibid.*

Because of their control over the management of Fifth Third, the Petitioners were in a position to know of the Company's financial distress before that information was disclosed to the public. Nevertheless, the Petitioners, in their capacity as plan fiduciaries, continued to invest plan assets in Company stock both before the public disclosure caused a precipitous decline in the value of that stock and after. In fact, neither the onset of the Company's financial crisis nor the steep drop in the price of its common stock altered the Petitioners' pattern of investing plan assets in Company stock.

The Respondents, who are plan participants, filed suit alleging that the Petitioners had breached their duty as fiduciaries under ERISA by failing to reevaluate whether the Company stock had become an imprudently risky investment for the assets of a pension plan. The District Court dismissed the Respondents' complaint on the grounds that the investment of ESOP assets in employer stock was prudent as a matter of law. Pet. App. 37-38. The Court of Appeals reversed that ruling and remanded the case for further proceedings. Pet. App. 3.

SUMMARY OF ARGUMENT

ERISA generally requires that the assets of covered pension plans be under the control of named fiduciaries. These fiduciaries are required to manage pension plan assets for the exclusive purpose of providing retirement or other forms of deferred income to the plan participants and their beneficiaries. In managing plan assets, the fiduciaries are required to exercise the

level of care, skill, prudence, and diligence that a prudent person would exercise in managing assets for a similar purpose.

The question presented by this case is whether fiduciaries of a pension plan that takes the form of an ESOP are entitled to a special presumption of prudence with respect to investment of plan assets in the common stock of the settlor-employer. The Respondents allege that the Petitioners behaved imprudently by continuing to invest pension plan assets in Company stock after circumstances revealed that the stock had become an unacceptably risky investment.

The Petitioners do not deny that they continued to invest plan assets in Company stock after that stock had become a risky investment. Rather, they argue that "an ESOP fiduciary's decision to invest in employer securities is prudent as a matter of law, unless extraordinary circumstances exist that substantially impair the plan's purpose of furthering employee ownership." Pet. Br. 46. The Petitioners argue that "an ESOP fiduciary's decision to continue investing in employer securities is not imprudent absent extraordinary circumstances such as the impending collapse of the company," because only then would "the plan's core goal of employees holding an ownership interest in their employer . . . be jeopardized." *Id.* at 23 & 24 (quotation marks omitted).

ERISA directly addresses the question of whether ESOP fiduciaries have the same general duty of prudence as other pension plan fiduciaries. The statute provides that ESOP fiduciaries are under the same duty of prudence as other pension plan fiduciaries,

with the sole exception that ESOP fiduciaries are exempt from the statutory duty to diversify plan assets.

ERISA also directly addresses and refutes the Petitioners' argument that ESOP fiduciaries should single-mindedly pursue the "goal of employees holding an ownership interest in their employer." Pet. Br. 24. ERISA states that pension plan fiduciaries are required to act for the sole purpose of providing retirement and other similar forms of deferred income to plan participants and their beneficiaries. To the extent that plan documents direct ESOP fiduciaries to follow a course of action that would imprudently place at risk the plan's ability to deliver expected retirement income, ERISA provides that the fiduciaries must disregard the plan documents.

There is no question that the fiduciaries of a pension plan holding the common stock of a company whose sudden financial troubles cause the price of the stock to precipitously drop have a duty to carefully consider whether it is prudent for the plan to continue to hold that stock, much less continue to buy more of it. The Petitioners have never explained why they continued to invest plan assets in Company stock after the Company's financial distress caused the stock to drop steeply in value. The Petitioners' brief has suggested possible reasons for their action, but the suggested reasons seem dubious on their face and there is no evidence that the Petitioners themselves acted for those reasons. The amended complaint's allegations of imprudent investment of plan assets are sufficient to require the Petitioners to explain the basis for their action and to allow the Respondents to test the prudence of the Petitioners' action.

ARGUMENT

I. THE ROLE OF PLAN FIDUCIARIES HAVING AUTHORITY TO MANAGE PENSION PLAN ASSETS IN ACCORDANCE WITH A STRINGENT DUTY OF LOYALTY AND PRUDENCE IS ESSENTIAL TO PROTECTING THE INTERESTS OF PLAN PARTICIPANTS AND THEIR BENEFICARIES.

The role of the plan fiduciary in managing plan assets is crucial to ERISA's scheme for protecting employees' interest in receiving expected employment benefits. 29 U.S.C. § 1001(b). ERISA contemplates that each employee benefit plan will be administered by one or more fiduciaries having sufficient authority to effectively manage plan assets. *Id.* § 1102(a)(1). ERISA subjects the fiduciaries' exercise of that authority to stringent duties of loyalty and prudence. *Id.* § 1104(a)(1).

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," which "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). "[A]ll assets of an employee benefit plan [must] be held in trust by one or more trustees," who "shall have exclusive authority and discretion to manage and control the assets of the plan." *Id.* § 1103(a). The trustees have authority to "appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." *Id.* § 1102(c)(3). *See also id.* § 1103(a)(2).

In managing plan assets, an ERISA fiduciary is subject to a stringent duty of loyalty to the plan partici-

pants and their beneficiaries. "[T]he assets of a plan . . . [are] held for the *exclusive* purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1) (emphasis added). Accordingly, "a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries." *Id.* § 1104(a)(1) (emphasis added). In particular, the fiduciary is required to discharge his duties "for the *exclusive* purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." *Id.* § 1104(a)(1)(A) (emphasis added; punctuation omitted). With respect to a "pension plan," including defined contribution and individual account plans, the "benefits" in question are "retirement income" or other "deferral of income." *Id.* § 1102(2)(A).

A plan fiduciary must exercise prudent judgment in single-mindedly pursuing the interests of plan participants and their beneficiaries. ERISA requires that a fiduciary exercise his authority "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

"The duty of an ERISA trustee to behave prudently in managing the trust's assets . . . is fundamental." *Armstrong v. LaSalle Bank Nat'l Assoc.*, 446 F.3d 728, 732 (7th Cir. 2006). ERISA mandates the appointment of trustees with authority to manage plan assets, and it imposes exacting obligations on those trustees with

regard to plan administration. These requirements are intended to ensure that the plan is operated by knowledgeable, prudent individuals who are responsible for acting solely in the interests of the participants and their beneficiaries.

The rule advocated by the Petitioners – that "an ESOP fiduciary's decision to invest in employer securities is prudent as a matter of law," Pet. Br. 46 – would effectively relieve ESOP fiduciaries of any duty of prudence with regard to the management of ESOP plan assets. Doing so, would seriously undermine the protections accorded ESOP pension plan participants by ERISA.

II. THE FIDUCIARIES OF PENSION PLANS TAKING THE FORM OF AN EMPLOYEE STOCK OWNERSHIP PLAN HAVE THE SAME DUTY OF PRUDENCE IN MANAGING PLAN ASSETS AS THE FIDUCIARIES OF OTHER PENSION PLANS.

The Petitioners maintain that "an ESOP fiduciary's decision to invest in employer securities – that is, to do exactly what the terms of the plan require – [is entitled to] a presumption of prudence . . . unless extraordinary circumstances, such as a serious threat to the employer's viability, mean that continued investment would substantially impair the purpose of the plan." Pet. Br. 16. This assertion rests on the Petitioners' mistaken assumption that an ESOP's principal purpose is "to allow employees to build a long-term ownership stake in their employer." *Ibid.* *See also id.* at 24 ("the plan's core goal of employees holding an ownership interest in their employer"). From their erroneous premise that "the fundamental

purpose of an ESOP is to build employees' equity interest in their employer," the Petitioners draw the conclusion that the fiduciary must "adhere[] to the trust's investment instructions" unless "there is a serious threat to the company's ongoing viability [such that] continued investment in its securities may no longer advance the plan's primary purpose, because a collapse would leave employees with no meaningful ownership interest in their employer." *Id.* at 17.

In short, it is the Petitioners' position that an ESOP fiduciary must manage plan assets with the single-minded purpose of fostering employee ownership and may deviate from that purpose only where the employer is in such dire financial circumstances that it appears likely there will be no business left for the employees to own. That position betrays a fundamental misunderstanding of the statutory duty of an ESOP fiduciary under ERISA.

It is true that a fiduciary has a general obligation to exercise his authority "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). And, all things being equal, that obligation would require an ESOP fiduciary to follow plan directions to invest plan assets in employer stock. But "trust documents cannot excuse trustees from their duties under ERISA." *Cent. States Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 568 (1985). "[A]ny provision in an . . . instrument which purports to relieve a fiduciary from responsibility . . . or duty under [ERISA] [is] void." 29 U.S.C. § 1110(a). Thus, a fiduciary may follow investment directions contained in plan documents *only* "insofar as such documents and instruments are consistent with the provisions of

[ERISA]," *id.* § 1104(a)(1)(D), and "[a]n imprudent direction cannot be a proper direction since the trustee has an express statutory duty of prudence," *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 406 (7th Cir. 2006).

The fact that ESOP fiduciaries are exempt from the general requirement to "diversify[] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. § 1104(a)(1)(C), does not relieve them of the duty to exercise prudence in all other respects. ERISA directly addresses this issue by providing that the general "prudence requirement" is relaxed with respect to ESOP purchases of employer stock "*only* to the extent that it requires diversification." *Id.* § 1104(a)(2) (emphasis added). Thus, "even though, by the very nature of an ESOP, the trustee does not have a *general* duty to diversify . . . the absence of any general such duty from the ESOP setting does not eliminate the trustee's duty of prudence." *Armstrong*, 446 F.3d at 732 (emphasis in original).

ERISA requires a fiduciary to "discharge his duties with respect to a plan . . . for the *exclusive* purpose of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added). And with respect to "pension plans," including ESOPs and other kinds of defined contribution plans, the relevant "benefits" are "retirement income" or other "deferral of income." 29 U.S.C. § 1002(2)(A). The fiduciary cannot allow the employer-settlor's "purpose . . . to allow employees to build a long term ownership stake in their employer," Pet. Br. 16, to override the fiduciary's statutory duty to manage the plan pru-

dently for the purpose of delivering deferred income to the participants and their beneficiaries. The fiduciary's duty to manage the plan in a manner that is "consistent with the provisions of [ERISA]," 29 U.S.C. § 1104(a)(1)(D), entails an obligation to remain continuously vigilant regarding whether it is prudent to continue investing plan assets in accordance with the directions contained in the plan documents.[3]

Precisely because "a stock can be imprudently risky for an employee savings plan even in the absence of . . . imminent collapse," *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 892 (E.D. Mich. 2008), an ESOP fiduciary must do more than satisfy himself that the employer will ultimately survive a business crisis before continuing to invest plan assets in employer stock. Rather, the fiduciary must exercise "a degree of caution that is reasonably appropriate or suitable to . . . the beneficiaries' interests." *Restatement (Third) of Trusts* § 77, cmt. b (2007). Doing so requires the fiduciary to carefully attend to "the needs, independent resources, and other personal financial circumstances and concerns or goals of the various beneficiaries," most particularly, "the risk tolerance . . . of the trust and its beneficiaries." *Id.*, cmt. b(1).

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[3] ERISA's direction that the fiduciary "discharge his duties with respect to a plan . . . for the exclusive purpose of providing benefits to participants and their beneficiaries," 29 U.S.C. § 1104(a)(1)(A)(i), overrides any provision of the plan. *See Restatement (Third) of Trusts* § 72, p. 18 (2007). Thus, the extended discussion in the Petitioners' brief (pp. 31-34) regarding "the trust law . . . establishing a standard for departing from th[e] terms [of a trust]," *id.* at 31, is completely irrelevant.

The fiduciary of an ESOP pension plan must manage plan assets with the sole aim of protecting the interests of plan participants and their beneficiaries in receiving deferred income. An ESOP fiduciary cannot allow any secondary plan purpose of fostering employee ownership to interfere with his duty to protect those interests. Accordingly, an ESOP fiduciary is entitled to no presumption that continued investment of plan assets in employer stock is prudent per se.

III. TO DETERMINE WHETHER A PENSION PLAN FIDUCIARY ACTED PRUDENTLY IN CONTINUING TO INVEST PLAN ASSETS IN EMPLOYER STOCK IN THE FACE OF CHANGED CIRCUMSTANCES, IT IS NECESSARY TO KNOW THE ACTUAL BASIS FOR THE FIDUCIARY'S DECISION AND TO TEST THAT BASIS FOR PRUDENCE IN THE CIRCUMSTANCES AT THE TIME OF THE FIDUCIARY'S DECISION.

Like other employee benefit plan fiduciaries, the fiduciary of an ESOP pension plan must "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). In other words, the ESOP fiduciary must exercise the same sort of care, skill, prudence, and diligence that a prudent person charged with the duty of protecting the pension interests of the plan participants and beneficiaries would exercise in similar circumstances. ESOP fiduciaries are not charged with guaranteeing the success of plan investments.

Nor does the duty of prudence dictate a single course of conduct in any given set of circumstances.[4]

The relevant circumstances in this case are that, during the course of 2008 it became increasingly clear to the management of Fifth Third Bancorp – and hence to the Petitioners who were both plan fiduciaries and part of the Company's management – that the Company was facing rapidly deteriorating financial conditions as a result of losses on risky mortgage loans. Once these conditions were made public, it became clear to the market that Fifth Third common stock was a very risky investment and the value of the stock began a steep slide. Throughout the entire period leading up to the public disclosure of the Company's financial distress and thereafter throughout the period of decline in the value of the Company's stock, the Petitioners continued to invest plan assets in Fifth Third common stock, just as they had during periods when the Company's stock was a much less risky investment. The question presented by this case is whether in so doing the Petitioners were exercising the same "care, skill, prudence, and diligence" that a "prudent man" would have exercised in those circumstances.

To begin with, it clearly would not have been prudent for the plan fiduciaries to simply ignore the Company's changed financial condition and the increased risk of investing in its stock. "When the exercise of a

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[4] In this regard, it bears emphasis that "judicial intervention on the ground of abuse is called for, not because the court would have exercised the discretion differently, but because the trustee's decision is one that would not be accepted as reasonable by persons of prudence." *Restatement* § 87, cmt. c, p. 245.

discretionary power is left to the judgment of a trustee, an abuse of discretion may result . . . if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion." *Restatement* § 87, cmt. c, at 244. Thus, "[a] trustee who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent." *Armstrong*, 446 F.3d at 734.

It would have been equally imprudent for the Petitioners to have acted on the assumption – advanced in their brief – that they were powerless to deviate from the Plan's instructions regarding the investment in Company stock unless the Company was on the verge of collapse. As we demonstrated in the prior section, that assumption is legally erroneous. And, a fiduciary who acts on "a misunderstanding of applicable fiduciary law" does not exercise the required prudence. *Restatement* § 87, cmt. c, p. 244. *See also id.* § 76(2)(a) & cmt. c, at 68 & 70.

Rather, the Petitioners were required to carefully consider whether the steep drop in the price of the Company stock in reaction to the disclosures concerning its financial difficulties indicated that the stock was no longer a prudent investment for a pension plan. "[T]he fall in the market price of [Company stock] was increasing the risk borne by owners of the stock," because "the higher the ratio of fixed-interests debt to equity is, the riskier is the position of the equity holders (the common stockholders)." *Summers*, 453 F.3d at 408-09. While pension plan fiduciaries might be entitled to treat the market price of common stock as "the best estimate of the value of the stocks," *id.* at 408, they cannot simply assume that purchase

of common stock at the market price is always a good investment for a pension fund. "[T]rustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer." *Restatement* Ch. 17, Introductory Note, at 290. "[T]he downside risk built into [the market] price [of the stock may be] simply intolerable for a plan of this type," and "at the point at which company stock becomes so risky that no prudent fiduciary, reasonably aware of the needs and risk tolerance of the plan's beneficiaries, would invest *any* plan assets in it," the fiduciary must cease the investment. *Ford Motor Co.*, 590 F. Supp. 2d at 890 & 893 (emphasis in original). There is no evidence that the Petitioners even considered this highly relevant factor in deciding to continue to invest plan assets in Company stock.

In their brief to this Court, Petitioners' attorneys have suggested reasons why the Petitioners may not have been able to dispose of the Plan's holdings of Company stock and why it may have been imprudent simply to stop purchasing more Company stock. Pet. Br. 42-45 & ns. 17 & 18. However, because the District Court granted the Petitioners' motion to dismiss the complaint, the record is devoid of any evidence that the Petitioners themselves actually relied upon the reasons suggested by their attorneys, and thus it is impossible to tell whether the Petitioners actually "discharge[d] [their] duties" with the requisite level of "care, skill, prudence, and diligence." 29 U.S.C. § 1104(a)(1)(B). *See King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, 999 (8th Cir. 2005) (internal quotation marks omitted) (courts evaluating

whether fiduciaries have breached their duties "must focus on the evidence available to the plan administrators at the time of their decision and may not admit new evidence or consider post hoc rationales."). What is more, the reasons suggested by the Petitioners' attorneys seem questionable on their face and should be subject to probing in discovery and at trial.

Petitioners' attorneys assert that the federal securities law prohibition against insider trading barred the Petitioners from disposing of the Company stock held by the Plan on the basis of the Petitioners' personal knowledge of the Company's precarious position. Pet. Br. 42. But that is just another way of saying that the Petitioners were personally disabled from fully exercising their authority to responsibly manage plan assets. ERISA gives plan fiduciaries the authority to "appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan." 29 U.S.C. § 1102(c)(3). Were the Petitioners personally disabled from disposing of Company stock, because of their inside knowledge of the Company's financial conditions, the proper course would be for them to turn management of the fund over to an independent financial manager, who would not be similarly disabled. *Restatement* § 80(1) & cmt. d(1), at 156 & 159. Petitioners' attorneys assert that such a delegation would have accomplished little, since the investment managers would not have possessed the Petitioners' disabling insider information. Pet. Br. 45 n. 18. However, it is undeniable that the investment managers would have been free to make an independent assessment of whether holding Company stock continued to be a prudent plan investment unhindered by any concern that their actions would sub-

ject them to personal liability under the securities laws.[5]

Petitioners' attorneys acknowledge that the Petitioners "could lawfully cease making *new* investments" in Company stock. Pet. Br. 43 (emphasis in original). However, the attorneys characterize this course as "self-defeating," because "[i]f a company makes an unexplained decision to bar new investments by its ESOP in its own stock, the market would have ample reason to suspect that something was wrong and to react unfavorably," thereby "put[ting] at risk the considerable number of shares *already* held by the plan." *Id.* at 43-44 (emphasis in original). But the attorneys' point is a non sequitur. The Petitioners did not need to publicly announce their decision to refrain from purchasing more shares of Company stock, and, given the relatively small number of current purchases made by the Plan, their action in ceasing such purchases likely would have gone unnoticed by the market. *Id.* at 44 n. 17 ("the number of shares of employer stock already held by the plan . . . vastly exceeds the number of shares currently being acquired under the plan each year"). In any event, whether it would have been prudent to respond to the Company's financial crisis by ceasing to purchase more Company stock is a factual question that should have been tested in discovery and perhaps at trial.

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[5] To the extent that the Petitioners allowed their position as part of the Company's management to influence their management of plan assets, they were operating under a conflict of interest. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008). An independent investment manager would not have faced a similar conflict of interest.

It is possible to imagine other hypothetical justifications for the plan fiduciaries' continued investment of plan assets in Company stock. If the plan participants were relatively young and thus far from retirement, the fiduciaries could have appropriately considered the effect of continued Plan purchases of Company stock on the continued viability of the Company as a going concern and hence on the continued employment prospects of the participants. Continued employment with the Company is directly related to the participants' ability to accrue retirement benefits under the Plan and thus could have been an entirely appropriate ground for the fiduciaries' decision to continue to invest plan assets in Company stock. *See Restatement* § 77, cmt. b(1), p. 84. On the other hand, if the participants were relatively near to retirement age, the prospect of continued employment would have been less relevant than the immediate health of the fund. But the fiduciary's focus in making the decision must be on the retirement income interests of the plan participants. Since the fiduciaries here are part of the Company's management, plan investment decisions that are based on the health of the Company would raise obvious conflict of interest issues and thus must be subject to close scrutiny. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. at 108

The critical point is that, on the present state of the record, there is nothing indicating why the fiduciaries continued to invest plan assets in Company stock despite the increasingly risky nature of that investment. Precisely "because the statutory standard itself – 'prudence' – has no tidy limiting principle," it "must be applied through a thorough analysis of the facts of each case . . . rely[ing] on common sense and experience

to supplement airtight logic." *Ford Motor Company*, 590 F.Supp.2d at 892.[6] The legal presumption of prudence advocated by the Petitioners would preclude that sort of sound, concrete judicial review and thus would effectively leave employees who place their retirement savings in ESOPs unprotected from imprudent plan management.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[6] The appropriate standard of judicial review is often referred to as "abuse of discretion." *Restatement* § 87, p. 242. However, "fail[ure] to satisfy the applicable standard of care, skill, and caution" is an "abuse of discretion." *Id.* cmt. c, p. 245. The standard for determining whether the Petitioners abused their discretion by failing to exercise their authority in a prudent manner is the standard of prudence set by ERISA.