No. 12-256

In the Supreme Court of the United States

STATE STREET BANK AND TRUST COMPANY,
Petitioner,

v.

RAYMOND M. PFEIL AND MICHAEL KAMMER,
individually and on behalf of all others
similarly situated,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY TO BRIEF IN OPPOSITION

1. Respondents do not dispute that a circuit split exists concerning ERISA Section 404(c), 29 U.S.C. § 1104(c), *see* Pet. at 12-14, that the Sixth Circuit below joined one side of that split, *id*., and that in so doing the Sixth Circuit categorically precluded petitioner from raising a Section 404(c) defense on summary judgment or at trial because that safe harbor "'does not relieve fiduciaries of the duty to screen investments.'" *Id*. at 9 (quoting Pet. App. 28a). Instead, respondents contend that the courts of appeals agree that Section 404(c), as an affirmative defense, should not be applied on a motion to dismiss, Br. Opp. 21, that the Sixth Circuit's interpretation of Section 404(c) was correct on the merits, *id.* at 23-26, and that even the Third and Fifth Circuits would not have applied Section 404(c) on the facts of this case. *Id.* at 28-31. Each of these arguments fails.

a. Respondents are indeed correct that the courts of appeals to consider the question, including the Sixth Circuit below, have unanimously concluded that Section 404(c) does not apply at the pleadings stage. But that is irrelevant here, as respondents do not dispute that the court of appeals held that Section 404(c) categorically does not apply at any stage because it does not shield fiduciaries such as petitioner from liability for an imprudent investment selection. Pet. App. 28a. In so holding, the Sixth Circuit adopted a Labor Department interpretation that "eliminate[s] a § 404(c) defense altogether, rather than determining its scope on a transactional, case-by-case basis." *Langbecker v. Electronic Data Systems Corp*., 476 F.3d 299, 311 (5th Cir. 2007) (Jones, J.).

b. Respondents' merits argument that the Sixth Circuit's interpretation of Section 404(c) is consistent with the statutory language also fails. The statute provides that "if a participant or beneficiary exercises control over the assets in his account," the ERISA fiduciary shall not be liable for any loss "which results from such participant's or beneficiary's exercise of control . . . " 29 U.S.C. § 1104(c)(1)(A)(ii). Adopting the Labor Department's interpretation and the Seventh Circuit's reasoning in *Howell v. Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011), the Sixth Circuit held that Section 404(c) shields a fiduciary from a breach of fiduciary duty "for decisions over which it had no control" and deemed petitioner's retention of the GM Fund to be control of investment selection. Pet. App. 29a.

In so holding, the Sixth Circuit imposed a limitation (that the safe harbor only applies to decisions over which the fiduciary had no control) absent from the statutory text. As explained in the petition, Section 404(c) *presumes* that the fiduciary committed a breach of duty in connection with a decision over which the fiduciary had control, but then insulates that fiduciary decision where any actual loss results from the participant's own exercise of control. *See* Pet. at 19-20; *see also Langbecker,* 476 F.3d at 311 (noting that the Labor Department's interpretation followed by the Sixth Circuit below "would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary").

c. Finally, respondents argue that the Third Circuit, and "presumably" the Fifth Circuit, would not apply Section 404(c) here because on these facts, petitioner

allegedly did not follow the specific investment instructions set forth in the plan. Br. Opp. 29. That is irrelevant for this Court's purposes because the Sixth Circuit below held that Section 404(c) does not apply as a matter of law, expressly rejecting the reasoning of the Fifth Circuit. *See* Pet. App. 28a-31a. This Court should grant the petition to resolve the circuit split. If this Court thereafter rules in favor of petitioner and adopts the reasoning of the Third and Fifth Circuits, then on remand respondents can argue that on these facts Section 404(c) does not apply.

Respondents also argue that the Fifth Circuit's interpretation of Section 404(c) in *Langbecker* "was heavily dependent upon its conclusion that the plaintiffs" had not "sufficiently shown the investment at issue was an imprudent investment option for fiduciaries." Br. Opp. 20 (citing *Langbecker*, 476 F.3d at 308). This assertion is doubly wrong. First, *Langbecker* concluded that at the class certification stage, it "[could] not rule out" plaintiff's imprudent investment claim. *Langbecker*, 476 F.3d at 308. Second, *Langbecker's* Section 404(c) analysis was entirely distinct from its analysis of plaintiff's imprudent investment claim and did not hinge upon the relative strength of the latter. *See id.* at 309-13 (Section 404(c) discussion).

2. With respect to causation under ERISA Section 409(a), 29 U.S.C. § 1109(a), respondents first contend that there is no circuit split because "every single circuit to consider the issue has held that there must be a causal connection between the alleged fiduciary breach and the losses that were suffered by the plan." Br. Opp. 31. Respondents gloss over the circuit split

concerning the precise standard for causation under Section 409(a). Four circuits, the Fourth, Eighth, Ninth, and Eleventh, apply a proximate cause standard. Pet. 15. Two circuits, the Seventh and Tenth, apply a much more relaxed "but for" standard. *Id.* 15-16. Two circuits, the Fifth and the Eighth, presume causation upon a showing of breach and loss, which shifts to the fiduciary the burden of proving that the loss was not caused by the breach of the duty. *Id.* 16-17.

Respondents contend that the Sixth Circuit's standard still requires them to prove "a causal link between State Street's breach and losses to the plan." Br. Opp. 35 (quoting Pet. App. 35a). But respondents do not deny, as petitioner argued (*see* Pet. at 17) that the Sixth Circuit's decision categorically forecloses petitioner from attempting to rebut causation at summary judgment or trial by showing, as the Fifth and Eighth Circuits would allow, that respondents' own investment decision caused their loss. *See* Pet. App. 24a ("we reject the district court's approach because it would insulate the fiduciary from liability for selecting and monitoring the menu of plan offerings so long as some of the investment options were prudent"); *id.* ("we reject [petitioner's] argument that plan participants, who enjoyed access to all of the same publicly-available information about GM's woes during the class period as [petitioner], caused the plan losses"). Nor do respondents deny that the Sixth Circuit's categorical rule similarly precludes petitioner from attempting to prove at summary judgment or trial, as the Fourth, Eighth, Ninth, and Eleventh Circuits would permit, that respondents' investment decisions, rather than petitioner, were the proximate cause of the loss. Hence,

the Sixth Circuit's decision further splinters the circuits over the applicable legal standard for causation at trial and summary judgment by foreclosing as a matter of law a fiduciary from attempting to prove that a plan member's own investment decision caused the loss.

3. Finally, respondents do not dispute that the questions presented are both important and recurring. *See* Pet. 18.

CONCLUSION

For the reasons provided above and in the petition, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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