No. 23-11097

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF UTAH; STATE OF TEXAS; COMMONWEALTH OF VIRGINIA; STATE OF LOUISIANA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF IDAHO; STATE OF IOWA; STATE OF KANSAS; COMMONWEALTH OF KENTUCKY; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NEW HAMPSHIRE; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF WEST VIRGINIA; STATE OF WYOMING; LIBERTY ENERGY, INCORPORATED; LIBERTY OILFIELD SERVICES, L.L.C.; WESTERN ENERGY ALLIANCE; JAMES R. COPLAND; ALEX L. FAIRLY; STATE OF OKLAHOMA,

Plaintiffs-Appellants,

v.

JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Utah v. Su

A certificate of interested persons is not required under Fifth Circuit Rule 28.2.1 as appellees are all governmental parties.

/s/ Daniel Winik
Daniel Winik

STATEMENT REGARDING ORAL ARGUMENT

This is a challenge to a federal regulation addressing the factors that fiduciaries may consider in selecting retirement-plan investments. Given the national importance of the regulation, the federal government agrees that oral argument is warranted.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUE 1

STATEMENT OF THE CASE 1

A. Statutory And Regulatory Background 1

1. Fiduciary duties under ERISA 1

2. Pre-2020 regulation and sub-regulatory guidance 3

3. The 2020 rules 10

4. 2021 executive orders and stakeholder outreach 13

5. The challenged rule 14

B. This Litigation 21

SUMMARY OF ARGUMENT 22

STANDARD OF REVIEW 24

ARGUMENT 25

I. The Challenged Rule Is Consistent With ERISA 25

II. The Challenged Rule Is Reasonable And Reasonably Explained 41

III. If This Court Concludes That The Rule Is Invalid, It Should Remand For The District Court To Consider The Proper Remedy 48

CONCLUSION 52

CERTIFICATE OF COMPLIANCE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s)**

Arizona v. Biden,
40 F.4th 375 (6th Cir. 2022) 50

Biden v. Nebraska,
600 U.S. 477 (2023)..37, 38, 40

Califano v. Yamasaki,
442 U.S. 682 (1979)...49

Cargill v. Garland,
57 F.4th 447 (5th Cir. 2023) 49-50, 50

Central & South West Services, Inc. v. EPA,
220 F.3d 683 (5th Cir. 2000) 50

Chevron USA Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984)...40

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006)...48

Data Marketing Partnership, LP v. U.S. Department of Labor,
45 F.4th 846 (5th Cir. 2022) 49

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009)...42

FCC v. Prometheus Radio Project,
592 U.S. 414 (2021)... 41, 42, 46, 47

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)...2, 25, 42

Franciscan Alliance, Inc. v. Becerra,
47 F.4th 368 (5th Cir. 2022) 50

Fulton National Bank v. Tate,
363 F.2d 562 (5th Cir. 1966) 36

Gulf Restoration Network v. Salazar,
683 F.3d 158 (5th Cir. 2012) 47

Halperin v. Richards,
7 F.4th 534 (7th Cir. 2021) 36

Kentucky v. Yellen,
54 F.4th 325 (6th Cir. 2022) 48

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988)..51

MD/DC/DE Broadcasters Ass'n v. FCC,
236 F.3d 13 (D.C. Cir. 2001) 51

Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)..41

NLRB v. Amax Coal Co.,
453 U.S. 322 (1981)..36

OnPath Federal Credit Union v. U.S. Dep't of Treasury, Cmty. Dev. Fin. Insts. Fund,
73 F.4th 291 (5th Cir. 2023) 24

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983)..1

Southwestern Electric Power Co. v. EPA,
920 F.3d 999 (5th Cir. 2019) 50

Star Athletica, L.L.C. v. Varsity Brands, Inc.,
580 U.S. 405 (2017)..34

Stringer v. Whitley,
942 F.3d 715 (5th Cir. 2019) 48

United States v. Craft,
535 U.S. 274 (2002)..34

United States v. Texas,
599 U.S. 670 (2023)..49

Utility Air Regulatory Group v. EPA,
573 U.S. 302 (2014).. 37, 38

West Virginia v. EPA,
597 U.S. 697 (2022).. 37, 39

Statutes:

Administrative Procedure Act (APA):
5 U.S.C. § 702(1) 50
5 U.S.C. § 706(2) 49
5 U.S.C. § 706(2)(A) 24
5 U.S.C. § 706(2)(C) 24

Employee Retirement Income Security Act of 1974,
Pub. L. No. 93-406, 88 Stat. 829 1

29 U.S.C. § 1102(a) 2

29 U.S.C. § 1103(c)(1) 2

29 U.S.C. § 1104(a)(1) 2, 25, 36

29 U.S.C. § 1104(a)(1)(C) 2, 32

29 U.S.C. § 1135 .... 3, 25

Regulatory Materials:

29 C.F.R. § 2550.404c-5(a)(1) 12

Exec. Order No. 13,990,
86 Fed. Reg. 7037 (Jan. 20, 2021) 13

Exec. Order No. 14,030,
86 Fed. Reg. 27,967 (May 25, 2021) 14

Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021),
https://perma.cc/3WAW-PZ26 13

Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,
85 Fed. Reg. 81,658 (Dec. 16, 2020) 12, 19, 26, 28

Financial Factors in Selecting Plan Investments,
85 Fed. Reg. 39,113 (June 30, 2020) 40

Financial Factors in Selecting Plan Investments,
85 Fed. Reg. 72,846 (Nov. 13, 2020) 11, 12, 16, 18, 26,
29, 40, 42, 44, 47

Interpretive Bulletin Relating to Exercise of Shareholder Rights,
73 Fed. Reg. 61,731 (Oct. 17, 2008) 9-10, 10

Interpretive Bulletin Relating to Investing in Economically Targeted Investments,
73 Fed. Reg. 61,734 (Oct. 17, 2008) 8, 28, 29

Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974,
59 Fed. Reg. 32,606 (June 23, 1994) 7, 29, 40

Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974,
59 Fed. Reg. 38,860 (July 29, 1994) 9

Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 81 Fed. Reg. 95,879 (Dec. 29, 2016) 10

Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments,
80 Fed. Reg. 65,135 (Oct. 26, 2015) 8, 9, 29

Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57,272 (Oct. 14, 2021) 14, 15, 17

Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,
87 Fed. Reg. 73,822 (Dec. 1, 2022) 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 25, 27, 30, 31, 32, 34, 35, 36, 38, 42, 43, 44, 45, 46, 47, 51

Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221 (June 26, 1979) 3, 4

U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans
(Mar. 10, 2021), https://perma.cc/W6SR-J534 14

Legislative Materials:

H.R. 8959, 116th Cong. (2020) 39

H.R. 3387, 117th Cong. (2021) 39

H.R. 3604, 117th Cong. (2021) 39

H.R.J. Res. 30, 118th Cong. (2023) 21

Roll Call 149, H.J. Res. 30 (Mar. 23, 2023),
https://perma.cc/R2RQ-R36K 21

S. 523, 118th Cong. (2023) 39

Other Authorities:

Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*,
120 Mich. L. Rev. 393 (2021) 6

James D. Hutchinson & Charles G. Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals*,
128 U. Pa. L. Rev. 1340 (1980) 34

Internal Revenue Service, *Retirement Topics – Participant-Directed Accounts*,
https://perma.cc/8QVT-4PFM 3

Restatement (Third) of Trusts (2007):
§ 78 cmt. f 34-35
§ 78 reporter's note to cmt. f 35
§ 90 cmt. c 35

Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*,
72 Stan. L. Rev. 381 (2020) 4, 5, 6

Message to the House of Representatives—President's Veto of H.J. Res. 30 (Mar. 20, 2023), https://perma.cc/YJW5-HDVF 21

U.S. Department of Labor, *Types of Retirement Plans*,
https://perma.cc/7FVX-2L6K 1

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. ROA.36. The district court entered judgment for the government on September 21, 2023. ROA.2303. Plaintiffs timely appealed on October 26, 2023. ROA.2316-2322; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE

This is a challenge to a Department of Labor rule addressing how the fiduciary duties imposed by the Employee Retirement Income Security Act of 1974 (ERISA) apply to fiduciaries' investment choices and exercise of shareholder rights. The issue is whether the rule is consistent with ERISA and not arbitrary or capricious.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Fiduciary duties under ERISA

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, known as ERISA, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA covers two types of retirement plans: "defined benefit plans," which use investments in plan assets to fund "a specified monthly benefit" to retirees, and "defined contribution plans," such as "401(k)" plans, in which employers and employees may contribute to individual investment accounts. *See* U.S. Dep't of Labor, *Types of Retirement Plans*, https://perma.cc/7FVX-2L6K.

ERISA provides for benefit plans to be managed by fiduciaries. 29 U.S.C. § 1102(a). Section 404 of ERISA, the provision most relevant here, specifies that a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of[] … providing benefits to" them, and must act "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." *Id.* § 1104(a)(1). These are known as the duties of loyalty and prudence. The Supreme Court has explained that "the term 'benefits' in the provision just quoted must be understood to refer to the sort of *financial benefits* (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014). Section 404 also states that fiduciaries must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C). And § 403, a neighboring provision, states that plan assets generally "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." *Id.* § 1103(c)(1).

The rule challenged here addresses two responsibilities of plan fiduciaries: the selection of investments for a benefit plan and the exercise of any shareholder rights associated with those investments. For some plans, fiduciaries determine how to invest

plan assets. For others, known as participant-directed or self-directed plans, fiduciaries determine a menu of investment options and plan participants select investments from that menu. *See, e.g.*, Internal Revenue Serv., *Retirement Topics – Participant-Directed Accounts*, https://perma.cc/8QVT-4PFM. The duties of prudence and loyalty apply to both types of fiduciary choices.

2. Pre-2020 regulation and sub-regulatory guidance

Congress authorized the Secretary of Labor to promulgate "such regulations as [s]he finds necessary or appropriate to carry out" certain provisions of ERISA, including its fiduciary-duty provisions. 29 U.S.C. § 1135. Over the fifty years since ERISA's enactment, the Department of Labor has issued various regulations and sub-regulatory guidance addressing fiduciaries' duties with respect to investment choices and the exercise of shareholder rights.

a. The Department promulgated the first such rule in 1979. *Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule*, 44 Fed. Reg. 37,221 (June 26, 1979). The rule stated as relevant that, "[w]ith regard to an investment … taken by a fiduciary of an employee benefit plan … , the requirements of" the duty of prudence "are satisfied if the fiduciary (A) has given appropriate consideration to those facts and circumstances that[] … the fiduciary knows or should know are relevant to the particular investment … ; and (B) has acted accordingly." *Id.* at 37,225. The rule laid out various components of a fiduciary's "'appropriate consideration'" of an investment, including whether the investment is "reasonably designed, as part of the

portfolio … , to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment." *Id.*

b. After the 1979 regulation, questions arose about the degree to which the regulation's risk-and-return framework would permit a fiduciary, in determining an investment course of action, to consider factors not directly related to investment risk and return.

The consideration of such factors has an extensive historical pedigree. "In an eighteenth century sermon," for example, "John Wesley, the founder of the Methodist Church, called on his followers to avoid profiting from businesses harmful to one's neighbors, particularly the alcohol and slave trades, or to oneself or one's workers, such as the production of dangerous chemicals." Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 392 (2020).[1] The earliest fund devoted to "socially responsible investing," which launched in 1928 and remains in operation today, was an "ecclesiastical investment fund committed to the Christian values of its founder." *Id.* at 392-393 (capitalization altered). Other socially responsible funds likewise "emphasized the avoidance of morally questionable investments." *Id.* at 393. Such funds "gained additional prominence" in the 1970s and 1980s among investors who wanted to avoid funding defense companies or companies doing business in apartheid

[1] This article is in the record. ROA.1889-1962.

South Africa. *Id.* In the 1990s and 2000s, socially responsible "funds began explicitly to incorporate corporate governance … into their investment strategies, tying sound governance to their social mission and rebranding [socially responsible investing] as" Environmental, Social, and Governance, or ESG, investing. *Id.* at 395-396.

Today, the phrase "'ESG investing'" is "widely and confusingly used … to encompass" two distinct practices, which some scholars have called "collateral benefits ESG" and "risk-return ESG." *Id.* at 397. Collateral-benefits ESG is the choice to pursue or forgo certain investments for "collateral" reasons—that is, reasons other than the desire to achieve a higher economic return or lower economic risk. For example, an investor might choose to "avoid investment in a fossil fuel company" in order to promote "the collateral benefit of reducing pollution." *Id.* at 398. By contrast, risk-return ESG entails "the use of ESG factors as metrics for assessing expected risk and return with the aim of improved return with less risk." *Id.* at 398. For example, a fund might "reduc[e] or avoid[] investment in" a "fossil fuel company" because the fund "might conclude that the company's litigation and regulatory risks are underestimated by its share price," *id.*, given the long-term litigation and regulatory risks associated with climate change.

Both collateral-benefits and risk-return ESG can also encompass the exercise of shareholder rights, such as proxy voting or other forms of engagement with a company's management. Under a collateral-benefits approach, an ESG fund might engage in "shareholder voting or engagement[] with the aim of inducing a firm to change its

practices toward providing collateral benefits apart from improvement to investor risk and return." *Id.* at 398. Under a risk-return approach, a fund would vote proxies or engage with management in an effort to "improve[] firm performance and therefore investment returns." *Id.*

Between 1995 and 2005, the assets under management by socially responsible funds increased from some $12 billion to $179 billion. *Id.* at 395. In 2016, that figure (limited to funds using "ESG criteria in selecting investments and engaging with portfolio companies") was $22.9 trillion; by 2020, it had nearly doubled to $40 trillion. Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 Mich. L. Rev. 393, 404 (2021).[2]

c. As ESG and similar investment practices gained prevalence, the Department issued guidance to explain how ERISA fiduciaries should approach them under the risk-return framework of the 1979 regulations. The Department's guidance recognized that fiduciaries can consider all factors (including ESG factors) that bear on investment risk and return, and can exercise shareholder rights in service of the plan's financial interests, but can consider collateral factors only in tightly limited circumstances consistent with prioritizing the plan's financial interests.

In 1994, the Department issued Interpretive Bulletin 94-1, addressing investments "selected for the economic benefits they create in addition to the investment

[2] This article is likewise in the record. ROA.1374-1483.

return to the employee benefit plan investor." *Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974*, 59 Fed. Reg. 32,606, 32,606 (June 23, 1994). Summarizing prior "letters concerning a fiduciary's ability to consider the collateral effects of an investment," the Department explained that the "existence of such collateral benefits may be decisive in evaluating an investment only if the fiduciary determines that the investment containing the collateral benefits is expected to provide an investment return to the plan commensurate to alternative investments having similar risks." *Id.* at 32,606-32,607; *see also id.* (fiduciaries could consider collateral benefits in choosing investments as long as they were "equal or superior to alternative available investments"). An investment would "not be prudent," the bulletin explained, "if it would provide a plan with a lower expected rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return." *Id.* at 32,607. This became known as "the 'all things being equal' test or the 'tiebreaker' standard." *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822, 73,824 (Dec. 1, 2022).

The Department reaffirmed and refined the tiebreaker standard in 2008, explaining in Interpretive Bulletin 2008-01 that "ERISA's plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan," but that if "two or more investment alternatives are of equal economic value to a plan," then "fiduciaries can choose between the investment alternatives on

the basis of a factor other than the economic interest of the plan." *Interpretive Bulletin Relating to Investing in Economically Targeted Investments*, 73 Fed. Reg. 61,734, 61,735 (Oct. 17, 2008). That conclusion was appropriate, the Department explained,

> because (1) ERISA requires fiduciaries to invest plan assets and to make choices between investment alternatives, (2) ERISA does not itself specifically provide a basis for making the investment choice in this circumstance, and (3) the economic interests of the plan are fully protected by the fact that the available investment alternatives are, from the plan's perspective, economically indistinguishable.

Id. The Department emphasized that fiduciaries cannot "select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal." *Id.*

In 2015, the Department reiterated and further refined these principles in Interpretive Bulletin 2015-01. *Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments*, 80 Fed. Reg. 65,135 (Oct. 26, 2015). The bulletin explained that fiduciaries can choose an investment "based, in part, on [its] collateral benefits[,] so long as the investment is economically equivalent, with respect to return and risk to beneficiaries in the appropriate time horizon, to investments without such collateral benefits." *Id.* at 65,136. It emphasized that "[f]iduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors." *Id.* The bulletin also noted that ESG "issues may have a direct relationship to the economic value of" an investment, and that when they do, "such issues are

not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices." *Id.*

d. The Department has likewise issued sub-regulatory guidance addressing proxy voting and other exercises of shareholder rights, which are subject to the same duties of prudence and loyalty.

In 1994, the Department explained in Interpretive Bulletin 94-2 that "active monitoring and communication with corporate management is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such activities by the plan alone, or together with other shareholders, are likely to enhance the value of the plan's investment, after taking into account the costs involved." *Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974*, 59 Fed. Reg. 38,860, 38,862 (July 29, 1994).

The Department refined that guidance through Interpretive Bulletin 2008-02. As before, the Department explained that "[a]n investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management … will enhance the economic value of the plan's investment in the corporation, after taking into account the costs involved." *Interpretive Bulletin Relating to Exercise of Shareholder Rights*, 73 Fed. Reg. 61,731, 61,734 (Oct.

17, 2008). The bulletin added "that, in voting proxies, … the responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment and shall not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." *Id.* at 61,732.

Finally, the Department reiterated in Interpretive Bulletin 2016-02 that fiduciaries voting proxies must "consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." *Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines*, 81 Fed. Reg. 95,879, 95,882-95,883 (Dec. 29, 2016). The bulletin confirmed that fiduciaries cannot "sacrifice investment returns[] … to promote collateral goals" and should not vote proxies where "the time and costs" required to do so "may not be in the plan's best interest." *Id.* at 95,881. But the bulletin also noted that voting proxies may lead to "long-term financial benefits" and that "many proxy votes involve very little, if any, additional expense." *Id.*

3. The 2020 rules

In 2020, the Department issued two rules that superseded the prior sub-regulatory guidance and amended the 1979 regulations for the first time since their adoption. *See* 87 Fed. Reg. at 73,823. Like the prior guidance, the 2020 rules recognized that fiduciaries can consider all factors (including ESG factors) that are relevant to investment

risk and return, and can exercise shareholder rights in service of the plan's financial interests, but can consider collateral factors only in tightly limited circumstances.

a. The first rule addressed investment selection. *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72,846 (Nov. 13, 2020). In the preamble, the Department discussed "ESG investing" and stated that it "raises heightened concerns under ERISA." The preamble expressed "concern[] … that the growing emphasis on ESG investing may prompt ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan." *Id.* at 72,848. The Department recognized, however, that ESG factors can be relevant to risk and return. It stated "that there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations." *Id.*

The rule required plan fiduciaries to choose investments solely on the basis of "pecuniary factors," which the rule defined to include "financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy." 85 Fed. Reg. at 72,851; *see id.* at 72,854-72,860. The rule retained the longstanding tiebreaker standard, *see id.* at 72,860-72,863, but modified its language, stating that a "fiduciary may use non-pecuniary factors as the deciding factor in [an] investment

decision" only "when choosing between or among investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone," *id.* at 72,884.

The rule also imposed novel documentation requirements on fiduciaries employing the tiebreaker. It required them to record, among other things, "[w]hy pecuniary factors were not sufficient to select the investment or investment course of action." *Id.* And the rule barred fiduciaries from adding or retaining as a qualified designated investment alternative (QDIA)—a default investment selection for participant-directed accounts, made "in the absence of an investment election by the participant," 29 C.F.R. § 2550.404c-5(a)(1)—any investment or model portfolio that "includes even one non-pecuniary objective in its investment objectives or principal investment strategies." 87 Fed. Reg. at 73,823; *see* 85 Fed. Reg. at 72,884.

b. The second 2020 rule addressed the exercise of shareholder rights. *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 81,658 (Dec. 16, 2020). It stated that fiduciary duties do "not require the voting of every proxy or the exercise of every shareholder right." 85 Fed. Reg. at 81,694. In the preamble, the Department opined that it was "likely" that "many" proxies "related to environmental, social, or public policy agendas" have "little bearing on share value or other relation to plan financial interests." *Id.* at 81,681. The rule also imposed specific monitoring and recordkeeping requirements. *Id.* at 81,694.

4. 2021 executive orders and stakeholder outreach

At the start of his Administration, days after the 2020 rules took effect, President Biden directed agencies to review regulations promulgated during the prior Administration and determine, "as appropriate and consistent with applicable law," whether they should be suspended, revised, or modified. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021). An accompanying fact sheet stated that the Department would reconsider the 2020 rule on investment selection. *See Fact Sheet: List of Agency Actions for Review* (Jan. 20, 2021), https://perma.cc/3WAW-PZ26.

The Department engaged with "a wide variety of stakeholders, including asset managers, labor organizations and other plan sponsors, consumer groups, service providers, and investment advisers," regarding the 2020 rules. 87 Fed. Reg. at 73,825. The Department learned that, instead of "provid[ing] clarity, some aspects of the" 2020 rules had "created further uncertainty about whether a fiduciary under ERISA may consider ESG and other factors in making investment and proxy voting decisions that the fiduciary reasonably believes will benefit the plan and its participants and beneficiaries." *Id.* The Department heard that the 2020 rules "and investor confusion about [them]," including about "whether climate change and other ESG factors may be treated as 'pecuniary' factors," "had begun to have a chilling effect on appropriate integration of climate change and other ESG factors in investment decisions." *Id.* Stakeholders expressed concern that, in promulgating the 2020 rules, the Department had "failed to adequately consider and address substantial evidence submitted by public

commenters suggesting that the use of climate change and other ESG factors can improve investment value and long-term investment returns for retirement investors." *Id.* The Department announced that it intended to revisit the 2020 rules and would not enforce the rules during the reconsideration process. *U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans* (Mar. 10, 2021), https://perma.cc/W6SR-J534.

A few months later, the President issued an executive order recognizing the financial risks created by the "intensifying impacts of climate change" and the "global shift away from carbon-intensive energy sources and industrial processes," such as "increased extreme weather risk leading to supply chain disruptions." Exec. Order No. 14,030, 86 Fed. Reg. 27,967, 27,967 (May 25, 2021). The order directed the Department to consider "suspend[ing], revis[ing], or rescind[ing]" the 2020 rules, and otherwise to "identify agency actions that can be taken under" ERISA and other statutes "to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk." *Id.* at 27,968.

5. The challenged rule

In October 2021, the Department proposed a rule altering the 2020 regulations in several respects. *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57,272 (Oct. 14, 2021). The Department expressed concern "that, as stakeholders warned, uncertainty with respect to the" 2020 rules could "deter fiduciaries from taking steps that other marketplace investors would take in enhancing

investment value and performance, or improving investment portfolio resilience against the potential financial risks and impacts often associated with climate change and other ESG factors." *Id.* at 57,275. In particular, the Department explained, it was "concerned that the" 2020 rules had "created a perception that fiduciaries [were] at risk if they include[d] any ESG factors in the financial evaluation of plan investments, and that they [might] need to have special justifications for even ordinary exercises of shareholder rights." *Id.* at 57,275-57,276. The Department proposed changes "to address" these "uncertainties" by "provid[ing] further clarity that [would] help safeguard the interests of participants and beneficiaries in the plan benefits." *Id.* at 57,276.

The Department received hundreds of written comments and thousands of form petitions regarding the proposal. 87 Fed. Reg. at 73,827. A wide array of financial institutions and investors, as well as organizations representing plan beneficiaries, supported essential elements of the proposed rule while recommending certain changes. *See, e.g.*, ROA.1579-1585 (Council of Institutional Investors); ROA.1606-1611 (International Brotherhood of Teamsters); ROA.1674-1677 (North American Securities Administrators Association); ROA.1790-1800 (American Bankers Association); ROA.1801-1805 (Investment Adviser Association); ROA.1834-1838 (American Federation of State, County and Municipal Employees); ROA.1963-1975 (Investment Company Institute); ROA.1976-1981 (Fidelity Investments); ROA.1982-1990 (AFL-CIO).

In the final rule, issued in November 2022, the Department responded to the comments and adopted some but not all of the changes it had proposed. 87 Fed. Reg. 73,822. Six points are most relevant here.

First, whereas the 2020 regulations required fiduciaries to choose investments solely on the basis of "pecuniary factors," 85 Fed. Reg. at 72,851, a term not used in ERISA or in prior regulations or guidance, the new rule states that a fiduciary must base investment decisions "on factors that the fiduciary reasonably determines are relevant to a risk and return analysis." 87 Fed. Reg. at 73,885. Many commenters supported this change, explaining that the 2020 language had created confusion as to whether fiduciaries could consider factors that "have a material effect on the bottom line of an investment" if the same factors might also "have the effect of supporting non-financial objectives." *Id.* at 73,833-73,834. Those commenters observed that the change "would encourage fiduciaries to take the same steps that other marketplace investors take in enhancing investment value and performance or improving investment portfolio resilience against the potential financial risks and impacts associated with climate change and other ESG factors." *Id.* at 73,834.

Second, the rule reaffirms that the "[r]isk and return factors" on which fiduciaries base their investment decisions—wholly apart from the tiebreaker standard—"may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action." *Id.* at 73,885. The rule explains that "[w]hether any particular consideration is a risk-return

factor depends on the individual facts and circumstances" and that "[t]he weight given to any factor by a fiduciary should appropriately reflect a reasonable assessment of its impact on risk-return." *Id.*

The Department declined to adopt a provision of the proposed rule that would have specified that a fiduciary's consideration of risk and return "'*may often require* an evaluation of the economic effects of climate change and other environmental, social or governance factors on the particular investment or investment course of action.'" *Id.* at 73,830 (emphasis added). The Department adopted the revised language of the final rule to "make it clear that climate change and other ESG factors may be relevant in a risk-return analysis of an investment and do not need to be treated differently than other relevant investment factors, without causing a perception that the Department favors such factors." *Id.* at 73,830-73,831.[3] Relatedly, the Department decided not to adopt in the final regulation's text a listing in the proposed rule of "example[s]" of ESG factors that "might," depending on the circumstances, be among those that "[a] prudent fiduciary" would consider as "material to the risk-return analysis," 86 Fed. Reg. at 57,302. *See* 87 Fed. Reg. at 73,831-73,832. The Department explained that it was "wary of creating an apparent regulatory bias in favor of particular investments or investment strategies." *Id.* at 73,832.

[3] One of plaintiffs' amicus briefs, submitted by the National Center for Public Policy Research, the Manhattan Institute, and Dr. Allen Mendenhall, quotes the "may often require" language (Br. 5) as if the final rule included that language, rather than expressly determining not to include it.

Third, whereas the 2020 regulations had articulated the tiebreaker standard by stating that a fiduciary could "use non-pecuniary factors as the deciding factor" only when choosing among investment options that the fiduciary was "unable to distinguish on the basis of pecuniary factors alone," 85 Fed. Reg. at 72,884, the new rule adopts a slightly different formulation of the longstanding tiebreaker standard. It states that a fiduciary may choose among investments on the basis of "collateral benefits other than investment returns" only if the "fiduciary prudently concludes that competing investments, or competing investment courses of action, *equally serve the financial interests of the plan* over the appropriate time horizon." 87 Fed. Reg. at 73,885 (emphasis added). The Department explained that commenters regarded the 2020 language as "unrealistically difficult and prohibitively stringent," to the degree that "it effectively eliminated the Department's historical tiebreaker test." *Id.* at 73,835. That is because "differences exist even among very similar investments," *id.*, such that virtually all investments can be "distinguish[ed] on the basis of pecuniary factors," 85 Fed. Reg. at 72,884. The Department observed that "investments may … serve the financial interests of the plan equally well," "when considered in their totality," even if they "differ on a wide range of attributes." 87 Fed. Reg. at 73,837.

Fourth, the rule eliminates certain documentation requirements that the 2020 rule had imposed on fiduciaries invoking the tiebreaker standard. *Id.* at 73,837-73,838. The Department agreed with commenters' concerns that these specific requirements were "very likely to chill and discourage plan fiduciaries from using the tiebreaker test

generally, including in cases involving the appropriate consideration of ESG factors." *Id.* at 73,838. It also found the requirements to be "unnecessary given the general obligations of prudence under ERISA," and it noted that they could "lead to conduct contrary to the plan's interests," such as "the risk that fiduciaries [would] over-document" investment choices, "result[ing] in increased transaction costs for no particular benefit to plan participants." *Id.* For "similar" reasons, the Department declined to adopt a provision of the proposed rule requiring certain disclosures from fiduciaries who employ the tiebreaker to choose a designated investment alternative for a participant-directed individual account plan. *Id.* at 73,839-73,841.

Fifth, the rule eliminated the 2020 provision barring fiduciaries from adding or retaining as a QDIA any investment or model portfolio that "includes even one non-pecuniary objective in its investment objectives or principal investment strategies," *id.* at 73,823; *see id.* at 73,842-73,843. "Commenters overwhelmingly supported" that change, principally on the view "that the legal standards under ERISA's prudence and loyalty rules should be the same for all plans, including plans with QDIAs, with respect to the selection and retention of investment alternatives." *Id.* at 73,842.

Finally, the rule eliminated the 2020 provision stating that fiduciaries are not required to "vote[] … every proxy or exercise … every shareholder right," 85 Fed. Reg. at 81,694. The Department agreed with commenters that that provision "could be misread as suggesting that plan fiduciaries should be indifferent to the exercise of their rights as shareholders" and that "[s]uch indifference could leave plan investments

unprotected, as the exercise of shareholder rights is important to ensuring management accountability to the shareholders that own the company." 87 Fed. Reg. at 73,844. The Department noted that "abstaining from a vote is not a neutral act"; rather, it can "determine whether a particular matter or proposal is approved." *Id.* The Department accordingly reiterated its "longstanding view … that proxies should be voted … unless a responsible plan fiduciary determines voting proxies may not be in the plan's best interest." *Id.* at 73,845.

Relatedly, the rule eliminates the specific monitoring and recordkeeping requirements that the 2020 regulations imposed with respect to proxy voting and other exercises of shareholder rights. *Id.* at 73,845-73,847. The Department observed that ERISA already "requires proper documentation both of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager." *Id.* at 73,846. And it shared commenters' concerns that the 2020 recordkeeping requirements "could be viewed by some as treating proxy voting and other exercises of shareholder rights" as "disfavored" activities that could "carry greater fiduciary obligations, and therefore greater potential liability, than other fiduciary activities." *Id.* at 73,846. The Department offered similar reasoning as to the 2020 monitoring requirement. *Id.* at 73,847.

Aside from two provisions that became effective on December 1, 2023, most of the rule took effect on January 30, 2023. *Id.* at 73,886. Shortly thereafter, Congress passed a joint resolution disapproving the rule under the Congressional Review Act.

H.R.J. Res. 30, 118th Cong. (2023). The President vetoed the resolution. *Message to the House of Representatives—President's Veto of H.J. Res. 30* (Mar. 20, 2023), https://perma.cc/YJW5-HDVF. Congress did not override the veto. *Roll Call 149, H.J. Res. 30* (Mar. 23, 2023), https://perma.cc/R2RQ-R36K.

The rule contains a severability provision stating that if any of its components "is held to be invalid or unenforceable," the remainder should remain in effect. 87 Fed. Reg. at 73,886.

B. This Litigation

Plaintiffs—26 States, two corporations, a trade association, and two individuals—brought this challenge to the rule in January 2023. ROA.32-77 (complaint); ROA.672-719 (amended complaint). After plaintiffs sought a preliminary injunction, ROA.440-495, the parties agreed to consolidate the preliminary-injunction hearing with the merits, Fed. R. Civ. P. 65(a)(2), and briefed cross-motions for summary judgment, ROA.1060-1069.

The district court entered summary judgment for the government. ROA.2289-2302. The court observed that the "State Plaintiffs likely do not have standing" but noted that the government had not disputed the standing of the private plaintiffs. ROA.2293 n.1. On the merits, the district court rejected plaintiffs' argument that "'the plain text of ERISA forecloses consideration of non-pecuniary factors, including for tiebreakers.'" ROA.2294. The court reasoned that "Congress has not 'directly spoken to'" that question, "[b]ecause ERISA does not contemplate the possibility of a 'tie'

between two financially equivalent investment options," and concluded that "the reasonableness of [the Department's] interpretation is supported by its prior rulemakings[,] including the 2020 Rule." ROA.2294-2295. The court noted that the challenged rule "changes little in substance from the 2020 Rule and other rulemakings." ROA.2295. The court further held that the challenged rule is not arbitrary and capricious, rejecting plaintiffs' arguments to the contrary. ROA.2297-2302.

SUMMARY OF ARGUMENT

I. The challenged rule is consistent with ERISA.

First, the rule reaffirms that fiduciaries may consider all factors, including ESG factors, that are relevant to investment risk and return. And it reaffirms that fiduciaries may exercise shareholder rights in service of the plan's financial interests. Plaintiffs do not appear to contend on appeal that these elements of the challenged rule are inconsistent with ERISA.

Second, the rule reaffirms the Department's longstanding view that ERISA permits fiduciaries to consider collateral factors—that is, factors unrelated to the expected risk and return of an investment—only as a tiebreaker in choosing among investments that "equally serve the financial interests of the plan." 87 Fed. Reg. at 73,885. The rule recognizes that considering collateral factors in that way is consistent with fiduciaries' obligation to act solely in service of the plan's financial interests, because fiduciaries invoking the tiebreaker are not elevating any other factor over the plan's financial interests.

Plaintiffs chiefly respond that, if fiduciaries confront a tie between two investment options, their duty is to choose both. But given transactional and monitoring costs, that is not always in the plan's financial interest. The tiebreaker standard applies only where transactional and monitoring costs necessitate a choice among the options.

In that circumstance, plaintiffs would require fiduciaries to break ties by choosing randomly among the options. But a coin flip is itself a collateral factor—that is, a factor unrelated to risk and return. And plaintiffs do not explain how the plan's financial interests are any better served by using a coin flip to break a tie than by using a collateral benefit under the rule's tiebreaker standard. Again, there is no tie unless the plan is equally well off financially regardless of how the fiduciary makes the investment choice.

As the district court recognized, the major questions doctrine lends no additional support to plaintiffs' argument, because the tiebreaker standard implicates none of the usual triggers for application of the doctrine. And the tiebreaker standard is valid even aside from the *Chevron* framework, because it is not just a reasonable construction but the best construction of ERISA.

II. The challenged rule is also reasonable and reasonably explained. Plaintiffs assert that the rule is internally inconsistent, principally insofar as it asserts the need for a tiebreaker provision while recognizing that no two investments are exactly alike. But that is no inconsistency at all: A central reason the rule gives for departing from the 2020 tiebreaker standard is that two or more investments may serve the plan's financial interests equally well *even when* they are distinguishable in some respects. Plaintiffs'

contention that the Department relied on improper considerations rests on repeated misstatements of the Department's reasoning. Plaintiffs are wrong to suggest that the Department did not consider the possibility that the challenged rule would invite breaches of fiduciary duty; the Department considered that concern and found it unpersuasive. And the challenged rule is consistent with the Department's prior observation that fiduciaries sometimes fall short of their duties; nothing in the challenged rule rests on the premise that such shortfalls do not exist.

Finally, plaintiffs suggest that if this Court holds the rule invalid, it should remand with instructions to vacate the rule. But as explained below, universal vacatur would be improper for several reasons. If this Court concludes that the rule is in any respect invalid, the district court should address any remedy in the first instance.

STANDARD OF REVIEW

This Court reviews de novo a summary-judgment ruling in a challenge to agency action, and it reviews the underlying agency action under the standard prescribed by the Administrative Procedure Act (APA). *OnPath Fed. Credit Union v. U.S. Dep't of Treasury, Cmty. Dev. Fin. Insts. Fund*, 73 F.4th 291, 296 (5th Cir. 2023). An agency action may be held unlawful and set aside under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

ARGUMENT

I. The Challenged Rule Is Consistent With ERISA

Plaintiffs principally argue (Br. 25-50) that the challenged rule improperly licenses fiduciaries to defy their statutory obligations by taking actions that are not in the financial interests of plan beneficiaries. The rule does no such thing. To the contrary, a fiduciary engaging in such conduct would defy the clear text of the rule.

1. ERISA obligates fiduciaries to act "solely in the interest of the participants and beneficiaries" of a plan and "for the exclusive purpose of[] … providing benefits to" them. 29 U.S.C. § 1104(a)(1). All agree that "the term 'benefits'" in that provision refers only to "*financial* benefits." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014). The challenged rule, issued under the Secretary's authority to promulgate "such regulations as [s]he finds necessary or appropriate to carry out" the relevant provisions of ERISA, 29 U.S.C. § 1135, faithfully adheres to those statutory terms.

a. First, the rule reaffirms that fiduciaries may consider any factor, including but not limited to ESG factors, that is relevant to the expected economic risk and return of an investment. *See* 87 Fed. Reg. at 73,885 ("[r]isk and return factors" on which fiduciaries base investment decisions "may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action"). And it reaffirms that they may exercise shareholder rights in ways meant to advance the plan's financial interests. *Id.* ("When deciding whether to exercise shareholder rights and when exercising shareholder rights, plan

fiduciaries must[] … [a]ct solely in accordance with the economic interest of the plan and its participants and beneficiaries, … [c]onsider[ing] any costs involved[.]").

In that respect, as the district court recognized, the rule is not materially different in operation from the 2020 rules. *See* ROA.2295 ("[S]ince at least 2015, [the Department] has posited that ESG factors 'may have a direct relationship to the economic value of the plan's investment.'"). The 2020 rule on selecting investments recognized "that there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations." 85 Fed. Reg. at 72,848. Such considerations qualified as "pecuniary factors" under that rule. *Id.* at 72,851. And the 2020 rule on exercising shareholder rights recognized that fiduciaries could exercise shareholder rights "in accordance with the economic interest of the plan and its participants and beneficiaries," taking into consideration "any costs involved." 85 Fed. Reg. at 81,694.

Fiduciaries who consider factors relevant to risk and return are doing precisely what ERISA demands of them, as are fiduciaries who exercise shareholder rights in ways meant to advance the plan's financial interests. Indeed, fiduciaries may violate their duties if they choose investments without considering factors relevant to risk and return, or if they fail to exercise shareholder rights in service of the plan's financial interests. The 2020 rules recognized as much, as the district court noted. ROA.2295.

b. Second, the challenged rule recognizes that ERISA permits fiduciaries to consider collateral factors—that is, factors unrelated to risk and return—under tightly limited circumstances. The rule states that if a "fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon," then ERISA does not prohibit the fiduciary from considering "collateral benefits other than investment returns" in choosing among the options. 87 Fed. Reg. at 73,885. It emphasizes, however, that "[a] fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan." *Id.*; *see also id.* ("A fiduciary may not[] … accept expected reduced returns or greater risks to secure such additional benefits."). And as to the exercise of shareholder rights, the rule states that fiduciaries must "[a]ct solely in accordance with the economic interest of the plan and its participants and beneficiaries," "[c]onsider[ing] any costs involved," and again states that they may "[n]ot subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective." *Id.*

The language of these provisions differs somewhat from that of the parallel 2020 provisions, but as the district court recognized, the substance of the provisions is similar. *See* ROA.2295 ("The 2022 Rule changes little in substance from the 2020 Rule and

other rulemakings."). The 2020 rule on investment selection expressly permitted fiduciaries to consider collateral factors in choosing between tied investments. As the district court explained, that rule allowed "collateral factors [to] be considered when a fiduciary is 'unable to distinguish' between two investment options based on financial factors alone," whereas the challenged rule "allows the same when the two options 'equally serve the financial interests of the plan.'" ROA.2295. The district court found "little meaningful daylight between" those standards from the perspective of their alignment with the statute. ROA.2295. Nor did the 2020 rule on exercising shareholder rights preclude fiduciaries from voting proxies if doing so was "in accordance with the economic interest of the plan and its participants and beneficiaries," taking into consideration "any costs involved." 85 Fed. Reg. at 81,694. It simply expressed doubt that "many" proxies "related to environmental, social, or public policy agendas" would have the kind of "relation to plan financial interests," *id.* at 81,681, necessary for voting them to be a cost-effective choice.

These provisions of the challenged rule, like the others discussed above, are consistent with the statutory obligations of prudence and loyalty. As the Department explained in guidance issued during the George W. Bush Administration, when "two or more investment alternatives are of equal economic value to a plan," "ERISA requires fiduciaries to … make choices between [those] alternatives," but "ERISA does not itself specifically provide a basis for making the investment choice in this circumstance." 73 Fed. Reg. at 61,735. For that reason, the Department has for three decades recognized

that ERISA permits fiduciaries to make such choices on the basis of collateral factors, because "the economic interests of the plan are fully protected by the fact that the available investment alternatives are, from the plan's perspective, economically indistinguishable." *Id.*; *see* 59 Fed. Reg. at 32,607 (1994: "investment return to the plan commensurate to alternative investments having similar risks"); 80 Fed. Reg. at 65,136 (2015: "economically equivalent, with respect to return and risk to beneficiaries in the appropriate time horizon"); 85 Fed. Reg. at 72,884 (2020: "unable to distinguish on the basis of pecuniary factors alone"). The differences in the articulation of that standard across time have been far less significant than the commonalities.

2. Plaintiffs' objections are unpersuasive.

a. As an initial matter, plaintiffs' brief does not appear to contest the statutory validity of the provisions of the challenged rule that allow the consideration of all factors (including ESG factors) that may bear on risk and return.

Some of plaintiffs' amici appear to attack even risk-return ESG strategies, such as those employed by a number of large asset managers. One amicus brief, for example, suggests that ERISA would prohibit a fiduciary from seeking to invest in companies that are "better prepared for or actively working to avoid a future climate crisis"; the brief contends that "[f]inancial advisors serving as fiduciaries may be qualified to predict financial markets" but "are certainly unqualified to predict fluctuations in the global climate." NFIB et al. Br. 8-9. But the "'complex[ity]'" of climate change, *id.* at 9, does not distinguish its potential influence on financial markets from the hundreds of other

factors that asset managers routinely consider as relevant to risk and return, ranging from economic growth to unemployment to inflation to global currency values. Amici do not explain why it would be prudent for a fiduciary to consider some but not other factors relevant to risk and return.

b. Rather than disputing the propriety of considering all factors relevant to risk and return, plaintiffs argue that the challenged rule is unlawful to the extent it allows the consideration of collateral factors—that is, factors irrelevant to risk and return—as tiebreakers in investment selection. Those arguments are unpersuasive, chiefly because they rest on an overly broad understanding of the circumstances where the tiebreaker standard applies.

i. As plaintiffs note (Br. 25), ERISA's fiduciary-duty provisions "require[] fiduciaries to act 'solely' and 'for the exclusive purpose of' providing" financial "'benefits to participants and their beneficiaries.'" That is why the challenged rule emphasizes, as noted above, that "[a] fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives." 87 Fed. Reg. at 73,885.

The tiebreaker standard comes into play only where an investment choice *cannot be resolved* merely by applying that statutory duty. Suppose, for example, that a fiduciary has decided to invest in a construction project. Suppose there are two competing projects and that, given the minimum investment required for either project, the plan cannot invest in both without exceeding the amount the fiduciary has determined it can

prudently allocate to such projects. And suppose the two investments have the same expected risk and return over the time horizon for which plan assets are invested, such that the "fiduciary prudently concludes that" the two investments "equally serve the financial interests of the plan," 87 Fed. Reg. at 73,885. In that scenario, the fiduciary is satisfying his duties of loyalty and prudence *no matter how* he resolves the choice, because an investment in either asset will equally advance the plan's financial interests. That is all the tiebreaker standard does: It recognizes that, in that limited scenario, the duties of loyalty and prudence do not dictate what choice the fiduciary should make.

Plaintiffs suggest that it is "far from clear that true 'ties' exist in investing," because "'no two investments are the same in each and every respect.'" Br. 28-29. But as the challenged rule explains, investments do not need to be "the same in each and every respect" in order to present a "tie[]"; rather, investments "may serve the financial interests of the plan equally well" even when they "differ in a wide range of attributes." 87 Fed. Reg. at 73,836. As the Department explained in the challenged rule, that circumstance may be particularly likely to arise in the context of "investments outside liquid financial markets." *Id.* If two or more investments "serve the financial interests of the plan equally well," *id.*, then the fiduciary is satisfying his duties of loyalty and prudence no matter how he resolves the choice, as discussed above. If plaintiffs are correct that such ties are infrequent, that does not mean the tiebreaker standard is invalid; it just means the standard applies infrequently.

Plaintiffs also posit (Br. 29) that fiduciaries confronting a tie between two investment options have a duty to "choose both rather than just one." Plaintiffs base that assertion on ERISA's requirement for fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so," 29 U.S.C. § 1104(a)(1)(C). But that provision recognizes that diversification across multiple investments is *not* appropriate if the fiduciary concludes that it is clearly imprudent. And one scenario in which it may be imprudent is "when investing in two (or more) alternatives that equally serve the financial interests of the plan, rather than one, entails additional costs (such as transactional or monitoring costs) that offset the benefits" of that approach. 87 Fed. Reg. at 73,836. Contrary to plaintiffs' apparent understanding (Br. 47), the tiebreaker standard applies only in such circumstances, where a fiduciary determines that prudence requires a choice among the competing investments. If the fiduciary determines that it is financially advantageous for the plan to invest in both assets rather than just one, then there is no tie: In that case, the invest-in-both approach would serve the financial interests of the plan better than an investment in either asset alone, so the fiduciary would not need to choose between the assets.[4]

[4] Plaintiffs' amicus Professor Zelinsky is thus incorrect to suggest (Br. 15) that the challenged rule "permits the pursuit of collateral benefits in all tie-breaking contexts, even when diversification is costless." If diversification is costless, then there is no tie.

Plaintiffs make virtually no attempt to explain how they think ERISA's fiduciary duties should apply when prudence requires a choice among competing investments that equally advance the plan's financial interests. They address that scenario—which lies at the heart of their challenge to the tiebreaker standard—only in a footnote (Br. 29 n.2). In that footnote, plaintiffs argue that if it is "imprudent to diversify in some situations where investment options are equal," then ERISA requires fiduciaries to "choose (even randomly, if needed) between the options." All that matters, plaintiffs say, is that "the answer *cannot* be determined by some collateral factor."

But how else could it be determined? A "collateral factor," as discussed above, is any consideration aside from risk and return. When two or more investment options equally serve the plan's financial interest, any means of choosing among them is definitionally "collateral." Plaintiffs recognize that fiduciaries must be permitted to "choose" among the competing options in that scenario (Br. 29 n.2), and a coin flip is no less collateral to risk and return than any other criterion a fiduciary might employ. Plaintiffs fail to explain why the duties of loyalty and prudence require fiduciaries to base such choices on a coin flip.

Finally, plaintiffs rely on the fact that, when drafting ERISA, "Congress considered several proposals to permit fiduciaries to engage in 'social investing,'" such as one "that would have allowed retirement funds to put up to ten percent of their assets in 'social' investments." Br. 30. But those proposals would have allowed fiduciaries to consider collateral factors much more extensively than the tiebreaker standard allows.

See James D. Hutchinson & Charles G. Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals*, 128 U. Pa. L. Rev. 1340, 1365-1366 (1980) (discussing the proposals). In any event, the Supreme Court has repeatedly held "that failed legislative proposals are 'a particularly dangerous ground'" for statutory interpretation, given the various "'equally tenable inferences'" that "'may be drawn from'" Congress's "'inaction.'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting prior cases); *see, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 423-424 (2017) (rejecting reliance on Congress's refusal to pass a particular provision in enacting the statute at issue).

In short, the tiebreaker standard challenged here—like similar formulations dating back to 1994—is consistent with the fiduciary duties articulated by ERISA. The standard applies only where two or more "competing investments, or competing investment courses of action, equally serve the financial interests of the plan," 87 Fed. Reg. at 73,885. When a fiduciary cannot prudently invest in both or all such assets, so that he must instead choose among them, he is satisfying the duties of loyalty and prudence regardless of what choice he makes, and there is no reason he must rely on a coin flip as opposed to any other collateral consideration.

ii. Plaintiffs' invocation of common-law principles (Br. 31-34) does not advance their argument. The discussion in the latest Restatement of Trusts that most directly speaks to the question presented here is a comment stating that a "trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust." Restatement

(Third) of Trusts § 78 cmt. f (2007). But the reporter's note to that comment, after quoting a discussion of "'social investing'" in a comment to the Uniform Prudent Investor Act, explains that there is "considerable disagreement" among courts and scholars "about what loyalty should require in this context." *Id.* § 78 reporter's note to cmt. f. The comment provides no basis to believe that the common law forbids a fiduciary's consideration of collateral factors in the narrow circumstance where the tiebreaker standard applies. Nor do the other Restatement sections on which plaintiffs rely. *See, e.g.*, *id.* § 90 cmt. c (discussing divergent case law and scholarship on "the propriety of fiduciaries engaging in what has come to be called 'social investing'").

The Restatement suggests that "'social investing'" cannot be "consistent with the [common-law] duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of persons supposedly benefited by pursuing the particular social cause." *Id.* § 78 reporter's note to cmt. f. But the challenged rule agrees; it recognizes that "[a] fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan." 87 Fed. Reg. at 73,885.

Plaintiffs draw no further support from the cases they cite (Br. 32-33). The principle that a fiduciary cannot "allow[] himself to be placed in a position where his

personal interest might conflict with the interest of the beneficiary," *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571 (5th Cir. 1966), has no bearing on the tiebreaker standard. As discussed above, that standard applies only where no such "conflict," *id.*, can exist. And the tiebreaker standard does not "put the fiduciary in a position to engage in self-serving behavior at the expense of beneficiaries," *Halperin v. Richards*, 7 F.4th 534, 546 (7th Cir. 2021); again, the challenged rule emphasizes that fiduciaries breach their duties where they undermine the plan's financial interests in an attempt to secure collateral benefits, 87 Fed. Reg. at 73,885.

iii. Plaintiffs' reliance (Br. 34-35) on *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), is also inapposite. The question there was whether, if an employer creates a trust fund for the benefit of its employees and selects trustees of the fund, those trustees "are 'representatives' of the employer 'for the purposes of collective bargaining or the adjustment of grievances'" under the National Labor Relations Act. *Id.* at 325. In answering in the negative, the Supreme Court observed that ERISA would prohibit this sort of dual loyalty; it requires plan trustees to "'discharge [their] duties … solely in the interest of the participants and beneficiaries'" of a plan. *Id.* (quoting 29 U.S.C. § 1104(a)(1)). For the reasons discussed above, the challenged rule is consistent with that principle. It recognizes that plan fiduciaries "may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives," 87 Fed. Reg. at 73,885, and may consider collateral factors

in choosing among investments only when the choices equally serve the plan's financial interests.

iv. As the district court recognized, ROA.2295 n.3, the major questions doctrine does not help plaintiffs.

The major questions doctrine reflects the principle that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014). Applying that principle, the Supreme Court has expressed skepticism of agencies' claims of authority where the agency "claim[ed] to [have] discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy," *Biden v. Nebraska*, 600 U.S. 477, 519 (2023) (Barrett, J., concurring) (quotation marks omitted); or where the Court perceived a "'mismatch[]' between" the agency's "broad 'invocation[] of power'" and the "relatively narrow 'statute[] that purport[ed] to delegate that power,'" *id.* at 517-518; or where the Court regarded the agency's action as "outside its wheelhouse," *id.* at 518; or where the Court believed that the agency was "attempting to work [a]round the legislative process to resolve for itself a question of great political significance," *West Virginia v. EPA*, 597 U.S. 697, 743 (2022) (Gorsuch, J., concurring) (quotation marks omitted); or where the agency action "require[d] 'billions of dollars in spending' by private persons or entities," *id.* at 744.

The tiebreaker standard implicates none of those "triggers," *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring). The Department did not interpret a "narrow"

statute aggressively, to assert "an unheralded power" that veered "outside" the agency's "wheelhouse," *Nebraska*, 600 U.S. at 517-519 (Barrett, J., concurring) (quotation marks omitted). The challenged rule reaffirms the Department's three-decade-old view of how the statute it administers should be applied in narrow circumstances. Nor does the challenged rule impose "vast" obligations, *Utility Air*, 573 U.S. at 324. Indeed, the tiebreaker standard imposes no obligations at all; it simply recognizes that the obligations imposed on fiduciaries by ERISA do not preclude them from considering collateral factors in a highly limited context.

Plaintiffs contend that the challenged rule, writ broad, affects "20 percent of all plans, comprising 28.5 million participants." Br. 36 (citing 87 Fed. Reg. at 73,857). But as the rule explains, those figures significantly overstate the proportion of plan assets that are likely to be "invested in ESG options"; as of 2020, "the average participant-directed [defined contribution] plan ha[d] approximately 0.03 percent of its assets invested in ESG funds." 87 Fed. Reg. at 73,857.[5] And to the extent fiduciaries consider ESG factors in their investment choices, they may well do so not because of the tie-breaker standard but because they reasonably determine that ESG factors bear on the risk and return of a given investment—a type of ESG consideration that plaintiffs rightly do not appear to argue is inconsistent with the statute, *see supra* pp. 29-30.

[5] Plaintiffs note (Br. 37) that "public pension plans … 'applied ESG to … more than half of all assets,'" but that statistic is meaningless because, as plaintiffs recognize, such plans "are not subject to ERISA."

Plaintiffs also invoke (Br. 38) recent legislative proposals on the subject of ESG investing. But this is not a situation where the agency "attempt[ed] to work [a]round the legislative process to resolve for itself a question of great political significance," *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (quotation marks omitted). The Department's tiebreaker guidance long predates the legislative efforts that plaintiffs cite, and the proposed legislation would have allowed fiduciaries to consider ESG factors in circumstances well beyond those contemplated by the tiebreaker standard. The Freedom to Invest in a Sustainable Future Act and the Financial Factors in Selecting Retirement Plan Investments Act would have given fiduciaries broad power to "consider [ESG] or similar factors[] in connection with carrying out an investment … strategy" as long as they acted "in a manner otherwise consistent with" their statutory duties. S. 523, 118th Cong. (2023); H.R. 3387, 117th Cong. (2021). And the Retirees Sustainable Investment Opportunities Act of 2021 and Retirees Sustainable Investment Policies Act of 2020 would, among other things, have *required* plans to "adopt a sustainable investment policy of the plan" unless they gave notice of their election not to do so. H.R. 3604, 117th Cong. (2021); H.R. 8959, 116th Cong. (2020). The Department's refinement of the longstanding tiebreaker standard hardly amounts to an end-run around Congress's decision not to pass those bills.

Contrary to plaintiffs' assertion (Br. 42-45), the Department nowhere suggests that the long history of the tiebreaker standard is independently sufficient to justify it. But the history is relevant because it undercuts any notion that the Department has

"claim[ed] to [have] discover[ed] … an unheralded power" "in a long-extant statute," *Nebraska*, 600 U.S. at 519 (Barrett, J., concurring) (quotation marks omitted). And plaintiffs' efforts to diminish the history are unpersuasive. Although the Department did not articulate the tiebreaker standard in the Federal Register until some two decades after ERISA's enactment, its analysis reflected "broad principles" that had been "established" by prior responses to "opinion requests." 59 Fed. Reg. at 32,606-32,607. Although the Department did not conduct notice and comment on the tiebreaker standard until 2020, its prior consideration of the issue was hardly cursory. *See supra* pp. 6-9. And although the Department considered in 2020 whether the tiebreaker standard "should be abandoned as inconsistent with the fiduciary duties" prescribed by ERISA, *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 39,113, 39,123 (June 30, 2020), the resulting comments "persuaded" the Department to retain and refine the tiebreaker standard rather than eliminating it, 85 Fed. Reg. at 72,862.

v. Finally, plaintiffs contend that the validity of the challenged rule should not be determined under the deference framework of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court is currently considering in *Relentless, Inc. v. Department of Commerce* (No. 22-1219) and *Loper Bright Enterprises v. Raimondo* (No. 22-451) whether to overrule or refine *Chevron*, and the government would be pleased to submit any supplemental briefing that the Court would find helpful after those cases are decided.

But the tiebreaker standard is valid even aside from the *Chevron* framework, because it is not just a reasonable construction but the best construction of ERISA. As discussed above, there is no basis for plaintiffs' view that ERISA requires fiduciaries to break a tie among investments by choosing randomly.

For all these reasons, the district court correctly concluded that the challenged rule is consistent with ERISA.

II. The Challenged Rule Is Reasonable And Reasonably Explained

The district court also correctly rejected plaintiffs' arguments that the Department acted arbitrarily or capriciously in promulgating the challenged rule.

Review under "[t]he APA's arbitrary-and-capricious standard … is deferential," requiring only "that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Agency actions are arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or" rendered a decision "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When an agency changes course, it must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy," but "it need not demonstrate to a court's satisfaction that

the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The Department's determinations here, including its departures from the 2020 rules, are "reasonable and reasonably explained," *Prometheus*, 592 U.S. at 423. Plaintiffs' objections are unpersuasive.

1. Plaintiffs characterize the rule as "internally inconsistent" in two ways. Br. 51-53. The first is that the rule "asserts the need for a tiebreaker provision" even as it recognizes "that 'no two investments are the same in each and every respect.'" Br. 51 (quoting 87 Fed. Reg. at 73,836). But that is no inconsistency at all. As the rule explains, a tie arises when two or more investments "serve the financial interests of the plan equally well," and that can be true even if the investments "differ on a wide range of attributes." 87 Fed. Reg. at 73,837. That is a central reason why the Department's prior articulation of the tiebreaker standard was "impractical and unworkable," "causing a great … deal of confusion." *Id.* at 73,836.

Second, plaintiffs charge the Department with inconsistency for revising the 2020 requirement that fiduciaries choose investments solely on the basis of "pecuniary factors," 85 Fed. Reg. at 72,851, when the Supreme Court held in *Dudenhoeffer* that Congress used the word "'benefits'" in the relevant ERISA provision to refer to "financial benefits," which it distinguished from "nonpecuniary benefits," 573 U.S. at 421 (emphasis omitted). But as the challenged rule explains, the 2020 rule's use of the term "pecuniary factors," 85 Fed. Reg. at 72,851—a term not used in ERISA or in prior

regulations or guidance—created confusion in the marketplace. It left fiduciaries unsure whether they could consider factors that "have a material effect on the bottom line of an investment" if the same factors might also "have the effect of supporting non-financial objectives," 87 Fed. Reg. at 73,834. The Department thus concluded that "the pecuniary-only requirement" could "effectively prohibit" consideration of ESG factors even when they are relevant to the risk and return of a given investment and thus to a plan's financial outcomes. *Id.* That is why the Department believed that refining its articulation of the standard, to provide that investment decisions "must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis," *id.* at 73,885, would better reflect *Dudenhoeffer*'s "fundamental principle" that "fiduciaries must protect the financial benefits of plan participants and beneficiaries," *id.* at 73,834.

2. Plaintiffs' contention that the Department '"relied on factors which Congress has not intended it to consider"' (Br. 53-56) is also unfounded, because it rests on persistent misstatements of the Department's rationale.

Plaintiffs first suggest (Br. 53-54) that the Department was simply trying "to make use of tiebreakers easier" when it observed that the 2020 articulation of the tiebreaker standard "was 'impractical and unworkable.'" But the Department's point was not, as plaintiffs suggest (*id.*), to expand the scope of the tiebreaker standard beyond "true ties." It was to explain how the statutory duties apply *in the case of true ties*. As the Department noted, the problem with the 2020 language ("unable to distinguish on the

basis of pecuniary factors alone," 85 Fed. Reg. at 72,884) is that investments are frequently "distinguish[able]," *id.*, even when they can be expected to "serve the financial interests of the plan equally well," 87 Fed. Reg. at 73,837. If two or more investments "serve the financial interests of the plan equally well," *id.*—and if it is imprudent to invest in all the options at once—then a true tie exists, and plaintiffs recognize (Br. 29 n.2) that fiduciaries must be permitted to "choose" among the competing options in that scenario.

Plaintiffs next challenge (Br. 54-55) the Department's elimination of the novel documentation requirements that the 2020 rule imposed on fiduciaries invoking the tiebreaker standard, 87 Fed. Reg. at 73,837-73,838. But the Department's point in eliminating those provisions was not, as plaintiffs suggest (Br. 55), to "reduc[e] litigation risks" in order to "protect[] fiduciaries." Rather, the Department's rationale was that a disclosure requirement specific to invocations of the tiebreaker standard could "uniquely direct[] potential litigants' attention to tie-breaker decisions as inherently problematic, even though there is no necessary or presumed inconsistency between their use and the requirements of ERISA," and that "the potential for litigation" could "cause fiduciaries to consciously or unconsciously skew their investment analyses to avoid open acknowledgment of a 'tie,'" thus "discourag[ing], rather than promot[ing], proper fiduciary activity and transparency." 87 Fed. Reg. at 73,838. The Department further reasoned that the specified documentation requirements could "lead to conduct contrary to the plan's interests," including "the risk that fiduciaries [would] over-

document" investment choices, "result[ing] in increased transaction costs for no particular benefit to plan participants." *Id.* That reasoning is consistent with ERISA.[6]

The same is true of the Department's decision not to adopt a provision of the proposed rule that would have required fiduciaries to disclose "'the collateral-benefit characteristic of [any] fund, product, or model portfolio'" selected on the basis of its collateral benefits for inclusion in a participant-directed individual account plan. *Id.* at 73,839-73,841. Plaintiffs characterize that decision, too, as driven by a desire to "protect fiduciaries from litigation" (Br. 56). But the Department based its decision on the Securities and Exchange Commission's ongoing consideration of rules "designed to provide consistent standards for ESG disclosures," as well as on a range of concerns expressed by commenters—concerns ranging from the requirement's ambiguity to its potential interference with other disclosure requirements to the chilling effect that it might have on consideration of ESG factors relevant to risk and return. 87 Fed. Reg. at 73,839-73,841. And the Department stated that it "may revisit the need for collateral

[6] One of plaintiffs' amici suggests that the elimination of the regulatory documentation requirement for invocations of the tiebreaker standard "represent[s] a stark departure from traditional trust law, which requires documentation whenever a potential conflict of interest … could arise." Hughes Br. 9-10. But under the limited circumstances where the tiebreaker standard applies, there is no "conflict of interest" between fiduciaries and the plan, because the choices on the table serve the plan's financial interests equally well. *See supra* pp. 30-32. And in any event, the Department explained in the challenged rule that the duty of prudence separately obligates fiduciaries to document any investment decision to the extent appropriate under the "circumstances particular to that decision," and that such documentation "is a common practice." 87 Fed. Reg. at 73,838; *see* ROA.2300.

benefit reporting or disclosure depending on the findings of" the Securities and Exchange Commission. *Id.* at 73,841. Once again, the Department's actual reasoning is wholly consistent with ERISA.

3. Finally, plaintiffs claim (Br. 56-59) that the Department "[a]t no point" considered the possibility that the changes made by the challenged rule would "requir[e] sponsors and participants to spend additional resources to monitor fiduciaries." But as plaintiffs go on to acknowledge (Br. 57), the Department expressly recognized commenters' "concern" that "changes to the tiebreaker standard and related documentation provisions[] would invite abuse and open the door to using pension plan assets for policy agendas, or encourage fiduciaries to advance personal policies and agendas at the expense of" the plan. 87 Fed. Reg. at 73,835. Far from "'acknowledg[ing] the concern and mov[ing] on'" (Br. 58), the Department responded in detail. It explained "that fiduciaries utilizing the tiebreaker provision remain subject to ERISA's prudence requirements" and to the rule's "explicit prohibition against accepting expected reduced returns or greater risks to secure" collateral "benefits." 87 Fed. Reg. at 73,836. The Department concluded that "these provisions, coupled with the safeguards added by ERISA's statutory prohibited transaction provisions, … sufficiently protect participants' and beneficiaries' retirement benefits in this context." *Id.* That conclusion is "reasonable and reasonably explained," *Prometheus*, 592 U.S. at 423.

Plaintiffs object (Br. 58) that the Department's response does not address "concerns about increased monitoring costs" for plan participants and beneficiaries. But

plaintiffs identify no comment raising such concerns, and "'[u]nder ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency.'" *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 174-175 (5th Cir. 2012); *see id.* at 176 (exceptions to this principle apply "'only in extraordinary circumstances'").

Plaintiffs also object (Br. 58-59) that the Department did not "acknowledge and confront" its prior description of "shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace," 85 Fed. Reg. at 72,847, 72,850. But the Department did not have to "repudiate" that statement, as plaintiffs suggest (Br. 58), for the challenged rule to be "reasonable and reasonably explained," *Prometheus*, 592 U.S. at 423. Nothing in the challenged rule rests on the premise that the 2020 rule overestimated the need to ensure that fiduciaries act in service of the plan's financial interests. Rather, the Department changed course in part because it concluded that the 2020 rule was in various ways *undermining* fiduciaries' ability to serve those financial interests. The rule's "pecuniary factors" language, for example, threatened to chill fiduciaries from considering factors that "have a material effect on the bottom line of an investment" if the same factors might also "have the effect of supporting non-financial objectives." 87 Fed. Reg. at 73,834. And the rule's novel documentation requirements for fiduciaries invoking the tiebreaker standard threatened to "lead to conduct contrary to the plan's interests," *id.* at 73,838, as discussed above (at 44-45). Plaintiffs do not explain why the fact that fiduciaries sometimes breach their

duties—a problem both in 2020 and in the present—would require the Department to maintain policies that were adopted to address that concern but that the Department has come to regard as insufficiently protective of the interests that ERISA seeks to promote.

The district court therefore correctly concluded that the challenged rule is reasonable and reasonably explained, including in its departures from the 2020 rules.

III. If This Court Concludes That The Rule Is Invalid, It Should Remand For The District Court To Consider The Proper Remedy

Finally, plaintiffs are incorrect to suggest in passing (Br. 8, 62), that this Court should "remand with instructions to vacate" the challenged rule if it reverses the district court's judgment that the rule is valid. Universal vacatur would be improper for several reasons, and the district court should address the proper remedy for any invalidity in the first instance.

As an initial matter, because a judicial "'remedy must … be limited to the inadequacy that produced the injury in fact that the plaintiff has established,'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006), a court must "limit relief only to those parties who established … jurisdiction to award it," *Kentucky v. Yellen*, 54 F.4th 325, 341 n.12 (6th Cir. 2022); *see Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) ("The redressability requirement [of Article III standing] limits the relief that a plaintiff may seek to that which is likely to remedy the plaintiff's alleged injuries."). Principles of equity reinforce that jurisdictional limitation: Injunctive relief may "be no more burdensome

to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see United States v. Texas*, 599 U.S. 670, 702-703 (2023) (Gorsuch, J., concurring in the judgment).

The district court did not need to "discuss the standing issues at length" in its ruling on the dispositive motions, because "'only one [plaintiff] needs standing for [an] action to proceed.'" ROA.2293 n.1. But to determine the scope of the appropriate remedy for any defect in the challenged rule, the district court would need to determine which of the plaintiffs has standing and what relief is necessary to redress the injuries of those plaintiffs (and only those plaintiffs). If the State plaintiffs lack standing, as the district court concluded was "likely," ROA.2293 n.1, then the relief could be no greater than necessary to remedy the harms asserted by the other plaintiffs.

The APA's provision for courts to "set aside" unlawful agency actions, 5 U.S.C. § 706(2), does not authorize broader relief. As a matter of first principles, that language should not be read as authorizing remedies (which are governed by § 703); it should be read as a rule of decision directing the reviewing court to disregard unlawful "agency action, findings, and conclusions" in resolving the case before it. We recognize that this Court has described vacatur of an unlawful agency action as the "default rule." *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 859-860 (5th Cir. 2022). But even if the APA authorizes *some* sort of vacatur, this Court has treated *universal* vacatur—that is, vacatur as to every person who might be affected by an agency action—as a discretionary equitable remedy, not one that is automatic or compelled. *See, e.g.*, *Cargill v.*

Garland, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality opinion) (concluding without contradiction from any other member of the Court that the district court could consider on remand "a more limited remedy" than universal vacatur, and instructing the district court to "determine what remedy … is appropriate to effectuate" the judgment), *cert. granted*, 144 S. Ct. 374 (2023); *see also id.* (recognizing that "'[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury'"); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-375, 375 n.29 (5th Cir. 2022) (stating that "[v]acatur is the only statutorily prescribed remedy for a successful APA challenge," but not suggesting that universal vacatur is mandatory, and acknowledging circumstances where courts do not vacate successfully challenged actions); *Central & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (declining to enter vacatur in favor of remand). That makes sense, since the APA states explicitly that its authorization of judicial review does not affect "the power or duty of the court to … deny relief on any … equitable ground." 5 U.S.C. § 702(1). The problems caused by universal remedies are well catalogued and do not depend on whether the universal remedy takes the form of a nationwide injunction or universal vacatur. *See, e.g.*, *Arizona v. Biden*, 40 F.4th 375, 395-398 (6th Cir. 2022) (Sutton, C.J., concurring).

Finally, a defect in one part of the challenged rule would not justify any remedy as to other parts. *See Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only "those portions of the rule" held invalid). "Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon

whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broads. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (emphasis omitted) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)). Here, the agency's intent is shown by the rule's express provision that if any of its components "is held to be invalid or unenforceable," the remainder should remain in effect. 87 Fed. Reg. at 73,886. And the invalidation of any given provision would not affect the sensible functioning of the rest, *MD/DC/DE Broads. Ass'n*, 236 F.3d at 22. For example, provisions that recognize the propriety of considering factors relevant to risk and return—which plaintiffs do not appear to challenge, *see supra* pp. 29-30—would be valid and enforceable even if the tiebreaker standard were held invalid.

If this Court concludes that the challenged rule is in any respect invalid, it therefore should not, as plaintiffs suggest (Br. 8, 62), "remand with instructions to vacate" the rule. Rather, it should remand for the district court to determine an appropriate remedy in light of the principles set forth above.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,972 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
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ADDENDUM

TABLE OF CONTENTS

29 U.S.C. § 1104 .... A1

29 U.S.C. § 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

…