

Justices Debate How Much 401(k) Benchmark Guidance to Give (2)

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- The US Supreme Court justices appeared to agree that meaningful comparisons are important when adjudging the merits of 401(k) investment performance lawsuits, but they seemed unsure of how much guidance they should give lower courts on the topic.
- The justices appeared torn between writing a narrow opinion addressing only the case at hand and crafting guidance that could help lower courts work through these issues, with Justice Amy Coney Barrett asking whether the court should rule that meaningful benchmarks for a 401(k) investment must have “like aims and strategies”.
- The court appears poised to require meaningful benchmarks, but it’s not clear how far they’ll go toward defining what those look like, with some justices favoring a flexible approach to benchmarks and others cautioning against attempting to universally define a meaningful benchmark without reference to individual facts and circumstances.

The US Supreme Court appeared to agree that meaningful comparisons are important when judging the merits of 401(k) investment performance lawsuits, but the justices seemed unsure of how much guidance they should give lower courts on the topic.

None of the justices’ questions suggested they were likely to rule that retirement plan participants can challenge investment performance without making comparisons among funds. But during Tuesday arguments, they appeared torn between writing a narrow opinion addressing only the case at hand and crafting guidance that could help lower courts work through these issues.

Justice Amy Coney Barrett crystallized that quandary, asking whether the court should rule that meaningful benchmarks for a 401(k) investment must have “like aims and strategies,” or if that language would risk having lower courts “look for a twin” to the fund in question.

The plaintiffs — Intel Corp. workers covered by the company’s retirement plan — “may lose on the question presented but still win an important limitation on the answer,” said Walcheske & Luzi LLC partner Paul Secunda who listened in on the arguments.

“The Court appeared likely to require a meaningful benchmark when plaintiffs rely on underperformance, while resisting any rule that demands an investment twin or allows courts to ignore distinct allegations of imprudence,” Secunda said. “The court seems ready to say apples-to-apples, yes; identical apples, no.”

Jordan Bock, a Goodwin Procter LLP partner who also listened to the arguments, observed “remarkably little disagreement” about some of the case’s potential fault-lines, including whether comparisons are required to state an underperformance claim.

“There are questions around the margins about what precisely constitutes a meaningful benchmark, but I don’t think the meaningful benchmark requirement is going anywhere,” she said.

Comparisons

The Intel employees are asking the high court to reject the “meaningful benchmark” standard that multiple federal appeals courts have used to assess claims of retirement plan mismanagement. This employer-friendly standard asks whether workers alleging fiduciary imprudence in their 401(k) plans have identified a better-performing fund that’s sufficiently similar to the one being challenged. Courts have used it to dismiss proposed class actions filed under the Employee Retirement Income Security Act — which are up markedly in 2026 — before they proceed to discovery.

The workers criticize that standard as contrary to the statutory text and “perverse,” because it immunizes fiduciaries that pursue uniquely reckless strategies. The chip maker’s retirement plan committee — backed by the solicitor general — says the standard is faithful to ERISA’s stated purposes and reflective of the reality that nearly every fund in existence “underperforms some other fund over a given timeframe.”

The underlying lawsuit stems from the 2008 financial crisis, which Intel employees say spurred the committee to move toward “costly and illiquid” investments like hedge funds and private equity. The US Court of Appeals for the Ninth Circuit ruled against the workers, saying they didn’t compare the disputed investments to better-performing funds with similar goals.

Narrow or Broad?

Justice Elena Kagan appeared to favor a flexible approach to benchmarks, worrying at one point that judges might reject comparisons between investments that don’t have identical percentages of assets devoted to international funds.

"We could do something useful here, couldn't we, by saying: Yeah, it needs to be meaningfully similar. That doesn't mean identical. Here are the kinds of things that you look to," she said in an exchange with Luke McCloud of Williams & Connolly LLP, who argued for the Intel committee.

Matt Wessler, the Gupta Wessler LLP attorney representing the employees, cautioned the court against attempting to universally define a meaningful benchmark without reference to individual facts and circumstances.

That's "ultimately a project doomed to fail," he said.

The court appears poised to require meaningful benchmarks, but it's not clear how far they'll go toward defining what those look like, said Will Delany, a principal and litigation practice leader at Groom Law Group, who also followed Tuesday's arguments.

"What seemed to be the focus of some justices at argument was whether the court should animate the 'meaningful' standard with a more specific definition, and what a more specific standard might look like," Delany said. "This may be another ERISA issue that inspires a unanimous judgment, albeit with separate opinions."

'Shifting Ground'

Arguing for the Intel workers, Wessler also attempted to distinguish ERISA cases premised solely on an investment's relative underperformance from those in which performance is one component of a larger picture of mismanagement. This case involves more than just performance, Wessler said, and the Ninth Circuit was wrong to discount the workers' performance-based allegations without reviewing the complaint holistically.

Justice Neil M. Gorsuch seemed concerned that Wessler was "shifting ground" from the question initially posed to the court — namely, whether claims predicated on fund underperformance require a meaningful benchmark.

"I don't doubt one could have an argument about the strategy being a good or bad one," Gorsuch said to Wessler. "But that's not the question you asked us to address in your cert petition."

Justice Brett M. Kavanaugh echoed these concerns, saying the court would decide the question presented, even though the complaint appeared more focused on challenging a particular investment strategy.

The justices appeared intent on keeping the case focused on the precise question of whether fiduciary breach claims premised on fund performance require a meaningful benchmark at the pleading stage, observed Jackson Lewis PC principal Stacey C.S. Cerrone.

"Their focus and questions centered around, if they answer that question in the affirmative, whether and how to define for the lower courts what makes a benchmark meaningful," Cerrone said.

The case is *Anderson v. Intel Corp. Investment Policy Comm.*, U.S., No. 25-498, argued 10/6/26.

(Updated with comments from Jordan Bock in sixth and seventh graphs. An earlier version updated with additional details from the arguments.)

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