

# CORPORATE COLLUSION:

LIABILITY RISKS FOR  
THE ESG AGENDA  
TO CHARGE HIGHER  
FEES AND RIG THE  
MARKET

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# Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market

by C. Boyden Gray

## EXECUTIVE SUMMARY

We are in the middle of the largest wealth transfer in history. Experts expect older generations to transfer approximately \$68 trillion in wealth to rising generations over the next several years, and businesses want to capture this wealth by catering to young people's values.<sup>1</sup> Financial institutions know that millennials fear climate change and are often willing to sacrifice maximum financial benefits to achieve "socially responsible" goals.<sup>2</sup> This has contributed to an investment management strategy that is more concerned with marketing investments to young people specifically than with maximizing return for investors in general.

As social-values-based investing booms, progressive organizations and others are adopting more forceful methods for financing environmental and social causes—and for defunding politically incorrect industries. These tactics include coordinated action pressuring banks not to lend to oil, gas, or other "unclean" businesses; using private and public pension funds to finance "green" causes (and divest from others); and interfering with potential or existing contracts between lenders and disfavored industries.

This white paper examines causes of action that can be brought by federal or state enforcers or private parties to combat inappropriate attempts to defund businesses that do not align with progressive environmental policies. These bases for suit include antitrust violations, breaches of fiduciary duty in retirement plans, and tortious interference with contract. This white paper highlights how politically correct corporate practices may conflict with longstanding legal rights and obligations, concluding that investigations or civil suits may turn up the factual predicates for legal liability.

Additional legal issues not discussed in this paper may arise from federal regulatory policies designed to favor environmental and social causes, such as forthcoming Securities and Exchange Commission (SEC) disclosure rules or the likely reversal of the Department of Labor's regulation protecting private pension plans from non-pecuniary investment trends such as environmental, social, and governance (ESG). These and other federal regulatory actions may ripen into challenges to administrative agency action taken without statutory authority or in violation of the U.S. Constitution but are not the focus of this paper.

## Key Points

- Environmental, social, and governance (ESG) strategies and divestment campaigns could violate antitrust laws. Federal law prohibits companies from colluding on group boycotts or conspiring to restrain trade, even to advance political or social goals.
- ESG retirement plans could violate ERISA and public pension laws that require managers to invest solely for the purpose of maximizing financial returns for pensioners and beneficiaries.
- ESG divestment campaigns that pressure lenders to breach existing or prospective contracts with targeted companies could constitute tortious interference with contracts.
- Federal and state legislators and regulators should strengthen fiduciary requirements and forbid discrimination against politically targeted businesses.
- States should divest their assets from companies that collude to commit antitrust violations or deny financing or services to businesses operating in their jurisdictions.

## INTRODUCTION AND BACKGROUND

Due partly to the rise of millennial investors, environmental, social, and governance (ESG) investing has emerged as a dominant market trend in recent years. ESG “is an umbrella term that refers to an investment strategy that emphasizes a firm’s governance structure or the environmental or social impacts of the firm’s products or practices.”<sup>3</sup> Today, hundreds of commercial ESG indices provide ESG ratings of individual companies, and an S&P 500 ESG index tracking firms meeting “sustainability” criteria has been created. “Even index funds, such as those managed by Vanguard and BlackRock, which traditionally avoid consideration of firm-specific factors,” increasingly consider factors ranging from executive pay to carbon emissions in selecting investments.<sup>4</sup>

While ESG investing has become more popular, several studies have identified shortcomings. ESG is a broad term with subjective definitions and uncertain efficacy. A 2020 report by the Organization for Economic Co-operation and Development (OECD) found that “[c]urrent market practices, from ratings to disclosures and individual metrics, present a fragmented and inconsistent view of ESG risks and performance.”<sup>5</sup> The OECD report also highlights the uncertain impact of ESG investing on financial returns: “the mixed ratings results and mixed evidence on financial performance raise the need for more thorough assessment of how financial materiality and values alignment are captured.”<sup>6</sup>

Despite these uncertainties, widespread promotion of ESG values by progressive groups and large corporations continues and can take the form of pressure to divest from politically incorrect industries. For example, environmental advocacy groups successfully pressured banks to deny funding to any oil companies that sought to drill in the Arctic National Wildlife Refuge, despite the Trump administration opening it to development.<sup>7</sup> Partly in response to such pressure campaigns, the Office of the Comptroller of the Currency (OCC) finalized a rule that required large banks to provide fair access to bank services, regardless of the political connotations of the companies that seek funding. The Biden administration has since paused that rule.

While investors may use their money to further their preferred social goals, some strategies employed by ESG activists may be unlawful, amounting to antitrust violations, breaches of fiduciary duties, or improper interference with contracts. In addition, further ESG-related regulations from the SEC or other federal agencies during the Biden administration may signal legal problems such as mission creep beyond agency expertise and capacity and fundamental separation of powers concerns.

## ANALYSIS

### I. ESG pressure campaigns may violate antitrust laws.

#### 1) The antitrust laws in the United States protect free markets and consumers.

The seminal antitrust law in the United States, the Sherman Act of 1890, prohibits “[e]very contract, combination ... or conspiracy[] ... in restraint of trade or commerce.”<sup>8</sup> To protect consumers across the economy, courts have interpreted this law to prohibit “unreasonable” agreements in restraint of trade.<sup>9</sup>

Anticompetitive conduct enriches the few—members of a cartel—at the expense of everyone else, harming free markets, and ultimately consumers, through higher prices and reduced output. As Supreme Court Justice Thurgood Marshall wrote, “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>10</sup> Private parties who suffer antitrust injury can sue, including for treble damages.<sup>11</sup> Most states have analogous antitrust laws that attorneys general can enforce on behalf of their citizens.<sup>12</sup>

Agreements between competitors to fix prices, divide markets, or engage in certain forms of group boycott agreements prevent competition on the merits and are therefore illegal. As former Department of Justice (DOJ) antitrust division head Makan Delrahim has written, “[a]nti-competitive agreements among competitors—regardless of the purported beneficial goal—are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and ultimately harm consumers.”<sup>13</sup>

For an example of purportedly beneficial goals that violate antitrust law, look no further than *FTC. v. Superior Court Trial Lawyers Association*.<sup>14</sup> When a group of lawyers agreed to stop representing indigent criminal defendants in Washington, D.C., until the city government agreed to increase their compensation, the Federal Trade Commission (FTC) took them to court under Section 5 of the Federal Trade Commission Act.<sup>15</sup> The FTC argued that the lawyers’ collective group boycott action was a per se illegal conspiracy to fix prices and conduct a boycott. The lawyers defended their agreement as a justified strike in the public interest to increase the number of lawyers who can represent indigent D.C. criminal defendants who would otherwise go without representation. But the Supreme Court rejected this defense: Even if “the quality of representation may improve when rates are increased,” the “social

justifications proffered for [the lawyers'] restraint of trade ... do not make [the lawyers' agreement to boycott] any less unlawful.<sup>16</sup>

Broadly, antitrust enforcement in the United States is carried out by four groups: the DOJ antitrust division, the FTC, state attorneys general, and civil plaintiffs.

## 2) Antitrust enforcers have recently examined “green” corporate practices.

When four automakers announced an agreement in 2019 to meet California’s stringent fuel efficiency standards even if those standards were not federally required, the announcement attracted federal antitrust scrutiny.<sup>17</sup> Although that investigation was quietly dropped in February 2020, noted antitrust scholars such as Herbert Hovenkamp agreed that, had the investigation uncovered an agreement among automakers to raise car prices or even to maintain current prices at a particular rate, the four automakers could have been liable:

*[S]uppose that the four automakers had agreed with the state of California and with each other to reduce their automobile emissions? For example, suppose that they had discussed the standards with one another and then voted to implement them. That would satisfy the Sherman Act’s agreement requirement.<sup>18</sup>*

As explained above, many firms have moved in parallel to divest from certain industries under the banner of ESG principles. This type of conduct is unusual. “Money managers who believe they have found an over- or undervalued asset do not generally broadcast that fact to the world and invite others to share in the investment opportunity,” but ESG so far relies “heavily on bandwagon effects.”<sup>19</sup> This trend is particularly concerning given shifts recognized even by progressive scholars, such as the growing concentration in the market for asset managers, where just three firms—BlackRock, Vanguard, and State Street—manage the equivalent of more than three quarters of the U.S. gross domestic product.<sup>20</sup>

Environmentalists have also recognized the potential antitrust implications of these unusual corporate coordination efforts in the name of environmental responsibility. Indeed, several commentators have openly advocated for changes in antitrust law given the potential for corporate environmental agreements to trigger antitrust concerns over “collusion”:

*Congress should pass legislation immunizing corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions. Congress has provided similar exemptions before, permitting specific industries like railroads, insurance companies, and agricultural*

*cooperatives to coordinate on prices and terms of service where regulation was preferable to competition. ... Updating antitrust and corporate law ... would encourage much-needed corporate collaboration on climate change, reflect the changing nature of corporate activism, and acknowledge that consumer welfare can and must mean more than low prices. Saving the world may well depend on legalizing and incentivizing this kind of corporate collusion.<sup>21</sup>*

Comparisons like these ignore the vast difference between antitrust exemptions justified to ensure the reliability of nationally important industries, such as food production and transportation, and granting exemptions for untested strategies to combat climate change and achieve politically charged social equality goals. And such exemptions generally “arose out of the late nineteenth and early twentieth century economic theories of the ‘benevolent cartel,’ whereby prominent economists and regulators believed that organizing industries into highly regulated cartels that would orient their collective industry decisions in light of the common good would be most beneficial to the national economy.”<sup>22</sup> But “economic theory has evolved to reject this foundation” and today, the American Bar Association “Section on Antitrust Law generally opposes this type of exemption.”<sup>23</sup> Perhaps this is why the Supreme Court has emphasized that there is a “heavy presumption against implicit exemptions” to the Sherman Act,<sup>24</sup> most recently illustrated by the Court’s unanimous decision to reject a college sports antitrust exemption in *NCAA v. Alston*.<sup>25</sup>

Another pro-ESG voice recognized that, for the ESG strategy to reach its long term agenda, “[m]ajor U.S. companies need protection from antitrust law so that they can feel free to work together in the fight against climate change, without fear of prosecution by ... any future administration.”<sup>26</sup> Thus, the commentator argued, companies should “petition Congress to pass a law immunizing all joint action taken to adopt energy-reducing practices and curtail greenhouse-gas emissions” because “[u]nder the First Amendment-based Noerr-Pennington doctrine—the result of two Supreme Court cases in the 1960s—firms can cooperate to seek the passage of laws without violating the antitrust law’s proscription on anticompetitive agreement.”<sup>27</sup> This type of analysis implies that when companies are cooperating to starve politically disfavored industries of capital through group boycotts, instead of merely petitioning for Congress to do so, those firms may be violating antitrust law.



### 3) Green activists and lenders may have invited competitors to collude on group boycotts of energy producers in violation of federal antitrust law.

If competitor banks have coordinated to boycott members of the energy sector, that conduct might violate federal antitrust law principles.

Normally, Citibank, Goldman Sachs, JPMorgan Chase, Morgan Stanley, Wells Fargo, and other banks compete to lend to corporate customers.<sup>28</sup> That competition ensures that worthwhile projects can access capital and use it to bring products to as many consumers as possible through affordable prices. But these ostensible competitor lenders have started moving in parallel to cut off liquidity and capital for America's "unclean" energy sector.<sup>29</sup> For example, each has announced promises to stop loaning money for Arctic oil drilling and coal mining.<sup>30</sup>

BlackRock, the world's largest investment firm, announced in January 2020 that it would divest from companies with more than 25% revenue from coal-fired power plants and has joined a pact called "Climate Action 100+" with over 370 global investors that aims to pressure companies to meet climate change goals.<sup>31</sup> "Banks are increasingly using environmental, social and governance ... factors when underwriting corporate borrowing," according to Barron's, such that according to one survey, "half the lending assets covered by 182 banks" were screened under these ESG factors.<sup>32</sup>

These announcements, in many respects, appear like invitations to collude on a boycott of America's energy infrastructure. The FTC has maintained that such invitations to boycott, on their own—even if the invitations go unheeded—can violate federal antitrust law. As the FTC and the DOJ reiterated last year in a joint statement, "[e]ven absent a collusive agreement," antitrust enforcers may "pursue a civil enforcement action against companies and individuals that invite others to collude."<sup>33</sup> If made with an intent to invite or signal competitors to join a group boycott, these announcements could violate the law.

### 4) Green activists and lenders may have established an illegal "hub-and-spoke" conspiracy.

Federal antitrust law also prohibits boycott agreements instigated by a third party to coordinate firms that ordinarily compete against each other to unreasonably restrain market competition. In these "hub-and-spoke" conspiracies, competitors can violate the law even without any direct communication with each other, and even though the only agreements they may make are with a third party that is not, itself, a competitor. "In antitrust law, a hub-and-spoke conspiracy is a cartel in which a firm (the hub) organizes

collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints."<sup>34</sup>

A hub-and-spoke conspiracy solves, or at least ameliorates, the problems an ordinary cartel might face. Three classic pitfalls afflict every would-be cartel: "(1) the problem of selecting and coordinating collusive strategies; (2) the problem of monitoring members and deterring defections; and (3) the problem of preventing entry or expansion of non-members."<sup>35</sup> But the hub can select anticompetitive strategies, monitor compliance with those strategies, and freeze out non-cartel-member firms.

The leading hub-and-spoke case involved the FTC's successful challenge to Toys"R"Us's (TRU) relationship to its toy suppliers.<sup>36</sup> The then-dominant toy company had aggressively negotiated vertical agreements with its suppliers that restrained those suppliers' deals with TRU competitors. TRU thus served as a "hub" for the conspiracy, "shuttling commitments back and forth between toy manufacturers and helping to hammer out points of shared understanding."<sup>37</sup>

Pressure campaigns by environmentalist activist groups (possible hubs)—followed by the pattern of announcements and parallel conduct by banks and suppliers of capital (possible spokes)—might follow a similar classic pattern of "shuttling commitments." "[E]vidence of agreement among the spokes is often found in vertical coordination between the hub and the spokes."<sup>38</sup>

For example, advocacy group Green America proclaims that it "is pressuring banks world-wide to stop funding fossil fuels" as part of "Fossil Banks," a campaign that aims to stop large commercial banks from financing the fossil fuel industry.<sup>39</sup> And longtime environmental lobby Sierra Club not only calls on consumers to assist in "pushing major financial institutions to reduce their investments in fossil fuels" and give the financial industry a "wake-up call"<sup>40</sup> but also boldly proclaims it has "met with representatives from major banks to discuss ... why action by the financial industry is necessary."<sup>41</sup> As a seemingly direct result of this coordination, the six largest banks in the United States will no longer finance oil and gas drilling in the Arctic National Wildlife Refuge.<sup>42</sup>

Any of this third-party activity could present the hub for tacit collusion between the spokes—banks collectively boycotting certain energy projects. However, any legal suit may require more specific factual allegations of tacit collusion—the "rim" of the agreement between the various competitors—than current public behavior supports. This type of predicate fact might be unearthed by a federal or state investigation.

Banks might defend their current activities as merely conscious parallelism—conduct that alone cannot demonstrate an antitrust violation. As a general matter, “consciously parallel behavior permits a court to infer the existence of a conspiracy only in the presence of ‘plus factors,’ such as the implausibility that the defendants would have acted as they did had they not been unlawfully conspiring in restraint of trade.”<sup>43</sup>

Here, a plaintiff or enforcer would likely need to show that banks and other lenders are leaving money on the table by moving in parallel to refuse to finance certain energy projects. “One prominent ‘plus factor’ ... is a showing that the defendants’ behavior would not be reasonable or explainable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade.”<sup>44</sup>

Banks might argue that lending to certain energy projects is not in their economic self-interest because anticipated government regulation might result in stranded assets. For example, a *Financial Times* study “concluded that if governments attempted to restrict the rise in temperatures to 1.5°C for the rest of this century, more than 80% of hydrocarbon assets, including coal, would be worthless. Under this scenario, \$900 billion, or one-third of the value of big oil and gas companies, would evaporate.”<sup>45</sup> It seems unlikely, however, that such audacious, century-long projections dispensed in gross suffice to assure sophisticated lenders that their conduct is rational. Refusing to finance energy projects disfavored by activist groups like Climate Action 100+ is less likely to leave potential returns on the table if competitor lenders have also agreed not to compete for those returns.

## II. ESG investment offerings may violate ERISA.

### 1) The Employee Retirement Income Security Act (ERISA) of 1974 protects retirement plan beneficiaries through private lawsuits.

ERISA regulates the “establishment, operation, and administration”<sup>46</sup> of employee benefit plans in the United States. It covers most employer-sponsored retirement plans, including both defined benefit and defined contribution plans, such as popular 401(k) plans offered by many employers.<sup>47</sup> It also may pose a legal obstacle to ESG investing—as the Trump administration’s Department of Labor recognized.

In enacting ERISA, Congress created “standards of conduct, responsibility, and obligation for fiduciaries”<sup>48</sup> with respect to the “establishment, operation, and administration”<sup>49</sup> of private pension plans, by requiring disclosure of “financial and other information”<sup>50</sup> to plan beneficiaries. It also imposes requirements for the vesting of accrued benefits

and the funding and insurance of benefit plans and protects beneficiaries by “providing for appropriate remedies, sanctions, and ready access to the federal courts”<sup>51</sup> if employees were deprived of their benefits through mismanagement or noncompliance with the law by plan administrators.

Section 404 of ERISA requires that a plan’s assets be used “solely in the interest of participants and beneficiaries” of a plan and “for the exclusive purpose of providing benefits ... and defraying reasonable expenses of administering a plan.”<sup>52</sup> Section 404 governs fiduciaries who are responsible for the administration and investment activities of an ERISA plan. In carrying out those activities, the fiduciary 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.”<sup>53</sup> This is known as the prudent expert standard.

ERISA permits a plan beneficiary to bring a lawsuit in federal court against either a plan administrator or the retirement plan as an entity.<sup>54</sup> To state a successful claim for breach of fiduciary duty under ERISA, a plaintiff “must make a prima facie showing that a defendant acted as a fiduciary, breached his fiduciary duties, and thereby caused a loss to the [p]lan.”<sup>55</sup>

The Supreme Court has articulated several key principles governing private lawsuits by ERISA beneficiaries. The Court recognized that ERISA’s “principal function” is to “protect contractually defined benefits” and that “[t]he statutory scheme . . . ‘is built around reliance on the face of written plan documents.’”<sup>56</sup> The Supreme Court also recognized that “[i]n enacting ERISA, Congress’s primary concern was with the mismanagement of funds ... and the failure to pay ... benefits from accumulated funds,”<sup>57</sup> not “guarantee[ing] substantive benefits.”<sup>58</sup> And it has insisted that “ERISA represents a ‘careful balancing between ensuring fair and prompt enforcement of rights ... and the encouragement of the creation of [employee benefit] plans’”;<sup>59</sup> the system should not be “so complex” as to “discourage employers from offering plans in the first place.” These principles have shaped the doctrines governing private ERISA litigation.<sup>60</sup>

### 2) The Department of Labor has read ERISA to circumscribe ESG investment decisions.

In June 2020, the Department of Labor proposed a new investment duties rule in response to President Trump’s 2019 executive order that directed the department to review its existing guidance on ESG and ERISA “to ensure consistency with current law and policies that promote long-term growth and maximize return on [pension] plan

assets.”<sup>61</sup> The department stated that its proposed rule explicitly affirms what it has consistently stated in previous Interpretive Bulletins, “that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations.”<sup>62</sup> Noting that “ESG investing raises heightened concerns under ERISA,” the department emphasized that “[p]roviding a secure retirement for American workers is the paramount, and eminently-worthy, ‘social’ goal of ERISA plans; plan assets may not be enlisted in pursuit of other social or environmental objectives.”<sup>63</sup>

The department acknowledged, in keeping with its previous guidance, that if alternative investment options “appear economically indistinguishable, a fiduciary may then, in effect, ‘break the tie’ by relying on a non-pecuniary factor.” But the department cautioned that “true ties rarely, if ever, occur.” Although highly correlated investments exist, the proposed rule states that “[s]eldom ... will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition.”<sup>64</sup>

On November 13, 2020, the department published a final rule on “Financial Factors in Selecting Plan Investments,” which amended the “investment duties” regulation under Title I of ERISA.<sup>65</sup> The amendments generally required plan fiduciaries to select investments and investment courses of action based solely on consideration of “pecuniary factors.”

The new administration is rapidly reversing course. Shortly after his inauguration, President Biden signed an executive order that ordered federal agencies to review regulations that “may be inconsistent” with protecting the environment.<sup>66</sup> Consequently, the department announced on March 10, 2021, that it would “not enforce” the November 2020 final rule.<sup>67</sup> Nevertheless, the department intoned in standard regulatory boilerplate that its enforcement statement “does not preclude the Department from enforcing any statutory requirement under ERISA, including the statutory duties of prudence and loyalty in section 404 of ERISA.”<sup>68</sup>

Even nonenforcement may be short-lived. On May 20, 2021, President Biden signed another executive order regarding “Climate-Related Financial Risk” that directed the secretary of labor to “protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk” by proposing a rule by September 2021 to “suspend, revise, or rescind” the November 2020 rule under ERISA, and the spring 2021 regulatory agenda now advises that the Department of Labor plans to promulgate a Notice of Proposed Rulemaking in September 2021.<sup>69</sup>

To the extent that the November 2020 final rule merely clarified and reinforced existing statutory principles, those principles may still undergird a private lawsuit despite the department’s current nonenforcement policy and may cabin the department’s flexibility to reverse course. And should the department promulgate a new rule that conflicts with ERISA, it may be ripe for a legal challenge under the Administrative Procedure Act.

Unlike such a challenge to a future proposed rule, however, a private ERISA lawsuit challenging a fiduciary’s encouragement of ESG investing would most likely involve a claim for breach of fiduciary duty against a plan administrator or investment manager under section 404.<sup>70</sup> The legal theory would not be novel: Courts have long condemned instances when fiduciaries acted with mixed motives even when those motives were not linked to self-dealing.<sup>71</sup>

ESG investing may be afflicted by such mixed motives. ESG funds may be the last, best hope for many asset managers to draw investors back into actively managed funds, as an ever-increasing share of investors have internalized the strategy of investing primarily in passively managed, low-fee index funds with a small percentage invested into bonds. The success of this basic, long-term strategy is borne out by 8-11% growth in the overall market over 100 years of history (Great Depression and all recessions included).<sup>72</sup> Such a strategy does not rely on a fund manager, who inevitably siphons fees from clients over decades. The simple, manager-less strategy offers a handsome return. In fact, in the decade between 2010 and 2020, passive management “celebrated a 10-year winning streak over actively-managed stock funds.”<sup>73</sup>

Such simple logic is increasingly a problem for active fund managers.<sup>74</sup> ESG may be a marketing strategy to draw younger investors back into their offices for managed funds. Indeed, actively managed funds have constituted the bulk of ESG investing historically.<sup>75</sup> If a fiduciary’s motives for investing plan funds include expanding active management, that may violate the duty to administer the 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.”<sup>76</sup>

### 3) A plan beneficiary could sue under ERISA for an ESG-related breach of fiduciary duty.

An ideal plaintiff to bring a breach of fiduciary duty suit under ERISA for improper ESG investing would be a participant or beneficiary of a 401(k)-type plan who can show that ESG investing has reduced his or her plan benefits “below the amount that participants would otherwise receive.”<sup>77</sup> While ESG investments currently may be on par with or outperforming peer funds,<sup>78</sup> a sufficient injury to



401(k) plan assets could be shown if non-ESG fund investments have outperformed ESG funds over a multiple-year period.<sup>79</sup> In the alternative, this suit could ideally be brought when the performance of non-ESG funds has rebounded due to factors associated with a post-coronavirus economy, such as increased gasoline use.

Two ERISA provisions empower plan participants and beneficiaries to sue for breaches of fiduciary duty.<sup>80</sup> Under the first provision, a plaintiff may seek either equitable or monetary relief, including restoration of profits lost to the plan through the fiduciary's breach, but only "appropriate equitable relief" under the second.<sup>81</sup> In order to succeed on a breach of fiduciary duty claim under the first provision, a plaintiff must show harm to his or her individual plan assets as well as harm to the general plan assets.<sup>82</sup> By contrast, a breach of fiduciary duty suit under the second provision need only show individual harm. Some courts treat this second provision as a "catch-all" remedial provision that is generally used when the plaintiff lacks an adequate remedy under a more specific remedial provision.<sup>83</sup>

Although plan participants<sup>84</sup> or beneficiaries are the most common plaintiffs, the statute also provides that fiduciaries can bring suit, which encompasses companies or employers that "exercise any discretionary authority or discretionary control" over administering the plan or managing its assets.<sup>85</sup> For example, a small company was found to have standing as a fiduciary under § 502(a)(2) to bring a claim against other fiduciaries who designed and administered a group health insurance plan for the company.<sup>86</sup> Most courts have held that only the parties expressly named in the statute are authorized to institute a civil action to enforce ERISA, which would exclude employers that do not act as fiduciaries.<sup>87</sup> But the way those enumerated classes are defined can expand the universe of eligible plaintiffs. For example, while employers are not expressly named in ERISA, employers who are working owners of their businesses may also be defined as "participants."<sup>88</sup>

The statute authorizes recovery for "the plan as an entity"<sup>89</sup> and "does not permit individuals to bring suit when they do not seek relief on behalf of the plan."<sup>90</sup> But courts have also required that participants establish an "injury in fact"<sup>91</sup> in the form of actual injury to participants' interests in the plan, not just a loss to the plan in general.<sup>92</sup> Therefore, participants in defined contribution plans may bring actions under ERISA when the value of their individual accounts is impaired because the fiduciary breach results in harm to the plan itself in the form of diminished plan assets.<sup>93</sup> Participants in a 401(k)-type plan are better situated to bring a claim than participants in a defined benefit plan because misconduct by the latter plan's administrators will

not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.<sup>94</sup>

Even if the plaintiff demonstrated an injury in fact, the plaintiff would also need to prove the defendants caused the loss. In *Plasterer's Local Union No. 96 Pension Plan v. Pepper*, the U.S. Court of Appeals for the Fourth Circuit noted that simply finding a failure to investigate or diversify does not automatically equate to causation of loss and therefore fiduciary liability; rather, the court must also find that the chosen investments were objectively imprudent. "ERISA requires an independent finding of causation of loss before liability for a breach of a fiduciary duty is incurred."<sup>95</sup> And consistent with the basics of Article III, a plaintiff must also show that the court can redress such injuries caused by the breach.<sup>96</sup>

In bringing a suit for improper ESG investing for non-pecuniary motives, a plaintiff would need to carefully research whether the ESG aspects of the companies in which the fiduciary invested were reasonable indicators of financial success. One method for proving that the ESG factors were not reasonable indicators of the best pecuniary performance might be gathering evidence that, despite the financial benefits associated with certain ESG factors, other stocks consistently outperformed the companies with ESG emphases over a long period of time.

A plaintiff may also have a claim against plan administrators that turn employees' defined contribution retirement accounts loose via an imprudent menu of investment options. Under many defined contribution plans, such as a 401(k) plan, participant employees are allowed to direct their investments under Section 404(c). Under these circumstances, a fiduciary generally will first establish a platform of investments from which a participant can select. The participant will then select investment options, and Section 404(c) will absolve the fiduciary of liability if the participant makes a poor selection and incurs a loss provided that certain conditions are met, such as the judgment that the administrator offered "a broad range of investment alternatives" on the account platform from which a participant may select.<sup>97</sup>

In order to satisfy demand from young investors for environmentally friendly or ESG investment options, some investment committees and plan administrators may offer a self-directed brokerage window in the platform of investments, where an employee can directly purchase mutual funds or other investment vehicles, including investments in funds that may sacrifice returns in order to further ESG-related goals. It remains an open question that neither the Department of Labor nor the judiciary has definitively

addressed whether offering a broad brokerage window satisfies plan administrators' duty of prudence. In 2012, the department issued guidance indicating that the department's investment disclosure regulations could apply to brokerage window investments that attract more than a certain threshold percentage of plan participants' investments, indicating that there remains tension between the fiduciaries' duty of prudence and the amount of options offered to plan participants.<sup>98</sup>

In addition, a prospective plaintiff could rebut a defendant's argument that ESG investing was permitted under the "tie" theory by subjecting the investment to some of the rigorous comparison standards mentioned in the final rule: Do the two investment funds have "the same target risk-return profile or benchmark, the same fee structure, the same performance history, [and the] same investment strategy?"<sup>99</sup>

Finally, ESG funds frequently involve higher fees than traditional funds. According to one study, "[e]xchange-traded funds that explicitly focus on socially responsible investments have 43% higher fees than widely popular standard ETFs."<sup>100</sup> As a rule, "cost-conscious management is fundamental to prudence in the investment function."<sup>101</sup> Thus, several courts have held that plaintiffs plausibly alleged a breach of fiduciary duty by failing to control fees.<sup>102</sup> The relatively high fees involved in ESG investing might be an element of a successful ERISA suit against an ESG-heavy retirement plan, though high fees alone may be inadequate.

#### 4) A plan fiduciary is the proper defendant under an ERISA suit.

An ideal defendant for an ERISA breach of fiduciary duty suit founded on improper ESG investing would be a fiduciary. That fiduciary could take the form of a small company-employer, a small third-party plan administrator, or a plan supervisor because these small entities will tend to have fewer resources to drag out litigation against the plaintiff. The defendant must have "discretionary authority" over the management or administration of the plan in keeping with the fiduciary definition in § 1002(21)(A) and must be shown to have invested in ESG funds that are unreasonably underperforming peer investment funds.

Under § 502(a)(2) of ERISA, plaintiffs may only bring a breach of fiduciary duty claim against a "fiduciary."<sup>103</sup> A "fiduciary" is statutorily defined as a person that "(i) exercises any discretionary authority or discretionary control respecting management of such plan or ... disposition of its assets, (ii) ... renders investment advice for a fee or other compensation ... or (iii) ... has any discretionary authority or discretionary responsibility in the administration of such plan."<sup>104</sup>

Investment fiduciaries are responsible for the investment policies keeping an employee benefit plan in compliance and managing the plan for the exclusive benefit of participants and beneficiaries. Investment fiduciaries are usually identified as such in the plan documents or may be the "named fiduciary" in the plan documents.

The two basic duties of fiduciaries—the duty of loyalty and the duty of prudence<sup>105</sup>—both "relate to the proper management, administration, and investment of fund assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to participants and beneficiaries."<sup>106</sup> The Supreme Court has held that an ERISA fiduciary can "wear different hats" as an employer and plan fiduciary, but ERISA requires "that the fiduciary with two hats wear only one at a time."<sup>107</sup>

Courts do not evaluate the prudence of a fiduciary's conduct based on the investment's performance.<sup>108</sup> "[T]he ultimate outcome of an investment is not proof of imprudence" because such a standard "would convert the [plan] into an account with a guaranteed return and would immunize plaintiffs from assuming any of the risk of loss associated with their investment."<sup>109</sup> Courts do not judge the prudence of a fiduciary's actions from the vantage of hindsight. Instead, courts consider what a reasonable fiduciary would have done at the time.<sup>110</sup>

### III. ESG investing may violate public pension laws.

In Ernest Hemingway's *The Sun Also Rises*, a man describes how he went bankrupt: "Two ways. Gradually, then suddenly." Many state public pension funds have been traveling a gradual path to bankruptcy, and ESG investing likely accelerates the journey.<sup>111</sup> Currently, at least a trillion-dollar gap exists between the assets in the 50 states' public pension funds and their liabilities.<sup>112</sup>

Although various laws govern public pensions in different states, the fiduciary duties imposed on public pension plan managers are often comparable to those imposed by ERISA. To successfully bring a suit challenging ESG investing strategies for public pensions, plaintiffs will need to demonstrate a breach of those fiduciary duties and that this breach resulted in a financial injury to them.

#### 1) Public pension law in the United States imposes some fiduciary duties on fund managers.

Unlike ERISA and private pensions, no uniform body of law governs state and local retirement plans, but all 50 states protect public pensions to some extent.<sup>113</sup> According to a 2019 50-state survey by the Pew Charitable Trusts, "eight states rely exclusively on the state constitution; six states rely solely on statutes enacted by the legislature; and 26 states rely exclusively on court rulings that find pensions

to be part of a contract between the employer and the employee—also known as the ‘common-law contractual approach.’ Five states use a combination of judicial decisions and state statutes to protect retirement benefits for public employees, and one state relies solely on judicial decisions. Four states protect pensions in different ways.”<sup>114</sup>

Therefore, the states that use ESG investing strategies to manage their public pension funds also impose some form of fiduciary duty responsibilities on their public pension managers. According to the National Association of State Retirement Administrators, ESG investing for public pension funds is currently more widespread in Canada and Europe than in the U.S., but a handful of states, with two of the nation’s largest state pension funds, in California and New York, incorporate ESG principles into their investment processes.<sup>115</sup>

For example, under both California and New York law, public pension managers are subject to the same fiduciary duties of loyalty and care that ERISA imposes.<sup>116</sup> California’s Constitution requires public pension fund managers to “discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries ... and defraying reasonable expenses of administering the system,” thereby imposing a duty of loyalty.<sup>117</sup> California also imposes a duty of care, requiring its public pension managers to “discharge their duties with respect to the system with the care, skill, prudence, and diligence” that a prudent person would use in a similar situation.<sup>118</sup> Similarly, New York state law also imposes fiduciary duties of loyalty and care in managing state pensions.<sup>119</sup>

Some states and municipalities allow plan participants to sue public retirement fund managers directly for fund mismanagement, but plaintiffs should consult the case law and statutes in their state or municipality to determine whether the relevant law grants them a private right of action.<sup>120</sup>

## 2) A successful challenge to ESG investing for public pensions will hinge on demonstrating a loss.

As explained in the ERISA section of this paper, a federal court plaintiff must satisfy standing requirements to bring a lawsuit alleging a breach of fiduciary duty. Most state courts also require that a plaintiff demonstrate similar standing requirements, such as an injury suffered that is traceable to the defendant’s conduct, but these requirements vary by state and can be stricter or more lenient than in federal court.<sup>121</sup> Therefore, suits alleging breaches of fiduciary duties of loyalty or care based on ESG investing for public pensions will typically need to demonstrate that a plan manager invested plan funds with some other aim than providing benefits to a plan participant or imprudently invested

in funds that were objectively not likely to perform well and that this caused a financial loss to a plan participant.

Demonstrating that a financial loss occurred may be the most difficult prerequisite to satisfy when suing for mismanagement of a public pension plan. Recently, in the ERISA context, the U.S. Supreme Court held in *Thole v. U.S. Bank N.A.* that a loss to a defined benefit plan participant must consist of the plan participant receiving less than his or her promised benefit, not merely a reduction in the total plan funds.<sup>122</sup> The Court noted that “a bare allegation of [defined benefit] plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail.”<sup>123</sup> Public pensions are defined benefit plans in which a plan participant receives a fixed payout from the fund, in contrast to a 401(k) plan in which a plan participant deposits fixed contributions into a fund and the payout fluctuates based on the performance of those investments.

Although the U.S. Supreme Court has not explicitly stated that this definition of a loss as a reduction to plan benefits, rather than mere underfunding of the plan, applies beyond the ERISA context, other courts have held that it does.<sup>124</sup> For example, a court held that participants in a Tennessee public pension plan could not bring suit for a breach of fiduciary duty regarding the plan because the participants merely claimed they were injured by the plan managers’ decision to pay certain benefits out of an allegedly inappropriate account and not that they suffered “any actual loss or decrease in their benefits.”<sup>125</sup> The court noted that no concrete injury existed because the alleged depletion of the pension fund’s savings account “did not put the plan at risk of default.”<sup>126</sup> Therefore, a suit challenging ESG investing regarding public pension funds will need to persuasively argue that this green investing contributed to a real likelihood that the pension fund will default on its obligations.

## 3) Plaintiffs must show ESG investing violated public pension fiduciary duties.

Before demonstrating an injury, however, a plaintiff challenging ESG investing in public pensions must demonstrate a breach of fiduciary duty. Although ESG funds currently appear to be performing well financially,<sup>127</sup> the core principles of ESG investing are at variance with considering purely financial aspects of an investment, which is likely to lead to a breach of the fiduciary duties of loyalty and care under the right circumstances. When ESG funds have begun to perform poorly compared to peer funds, and a public pension fund manager has neglected to monitor and assess those comparatively declining returns, a participant could persuasively argue that the manager has breached his duty of care by not exercising prudence and diligence



in investing the fund assets to maximize value. Or the plan participant could argue that the manager has demonstrated greater loyalty to a social cause than to the participant's financial interests, which would constitute a breach of the duty of loyalty.

Various studies express doubt that ESG funds are financially superior to peer funds over time.<sup>128</sup> Recently, a study by Boston College's Center for Retirement Research examined the phenomenon of ESG investing for public pensions from 2001 to 2018 and concluded that "social investing of any form" did not appear to improve returns and had "the potential to reduce them."<sup>129</sup> Ultimately, the researchers concluded that ESG investing was "not appropriate for public pension funds."<sup>130</sup> This supports the hypothesis that, over time, ESG funds are likely to sink below peer funds again, and that a plan participant could then credibly allege a breach of fiduciary duty if the public plan manager continues to invest in them.

#### 4) ESG investing may reduce a public pension plan participant's retirement benefits.

Once a breach of fiduciary duty can credibly be alleged, a public pension plan participant must demonstrate that this breach injured her by reducing the benefits to which she was entitled. As noted, the Supreme Court has held that a "mere allegation of underfunding" is insufficient to establish this injury. But the Court has not ruled out the possibility of demonstrating an injury by presenting evidence that the mismanagement of funds increased the likelihood that a pension fund will default on its obligations. In *Thole*, the Court left a door open to this form of injury when it noted that the plaintiffs "did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits."<sup>131</sup> Therefore, this argument is likely still available to future plaintiffs wishing to challenge mismanagement of public pension funds.

Due to the precarious situation of some states' pension funds, a plaintiff could argue that ESG investing contributes to the likelihood that these funds will be unable to meet their payout obligations.<sup>132</sup> California would be an ideal state against which to bring this suit because California's Constitution contains clear fiduciary duty protections for public pensions, the state has pledged to use ESG strategies in its public pension fund management, and the state's pension funds are drastically underfunded.<sup>133</sup> As noted by the Public Policy Institute of California, California's two largest pension funds, CalPERS and CalSTRS, "have reported gaps of more than \$138.9 billion and \$107.3 billion, respectively, between their estimated obligations to retirees and the

current value of their assets."<sup>134</sup> Other sources estimate that CalPERS has barely two thirds of the money it needs to pay the benefits promised to its plan participants.<sup>135</sup>

Furthermore, CalPERS's own generous estimate that it is 70% funded relies on an assumption of future investment earnings averaging 7% a year, which is probably unrealistic.<sup>136</sup> In the 2019-20 fiscal year, CalPERS only posted a 4.7% return, and during the last 20 years, it has averaged 5.5%, although CalPERS claims it has averaged 8.0% annually over the last 30 years.<sup>137</sup> Plaintiffs could rely on facts like these to argue that any investment strategies that do not maximize financial returns are contributing to a strong likelihood that their state pension fund will ultimately default. And this increased likelihood of default may constitute an injury that a court will recognize as a valid basis for a lawsuit.

In summary, a plan participant seeking to challenge ESG investing in the context of public pension funds will need to identify the relevant state law protections for public pensions, demonstrate that ESG investing has violated these protections, and then explain why this violation credibly increased the likelihood that the state's pension fund would default. This will require identifying a state that has adopted ESG investing strategies for its public pension fund management and also has a public pension system at risk of default, and then waiting to bring suit until ESG funds objectively perform less well financially than peer funds, so that a fiduciary breach can be alleged.

#### IV. ESG practices may constitute tortious interference with contract.

Earlier in this white paper, we examined antitrust violations that can occur when banks combine to boycott politically incorrect industries, but the law also forbids third parties from improperly pressuring banks to breach existing contracts with unpopular parties. This meddling with existing contracts or prospective contracts is a common-law wrong called tortious interference with contract.

Relevantly, environmental activist groups have lately deployed an array of tactics to discourage banks from lending to non-ESG industries. These tactics range from focusing unfavorable media attention on the banks to calls for institutional investors to pull their money from these banks. For example, the Sierra Club has touted its successful campaign to convince all six major U.S. banks to pledge not to finance oil and gas development in the Arctic.<sup>138</sup> Sierra Club acknowledged that these banks' commitments were a result "of years of pressure from shareholders ... and hundreds of thousands of activists from the Sierra Club and other organizations."<sup>139</sup> Similarly, Chase Bank faced pressure from several members of the Interfaith Center on



Corporate Responsibility to disclose how it might mitigate greenhouse gas emissions resulting from its lending activities.<sup>140</sup> Additionally, the Norwegian Bank DNB, an original funder of the Dakota Access Pipeline, reportedly withdrew its funding to pipeline developers in 2017 after a delegation of tribal protesters traveled to Norway to face off with bank executives.<sup>141</sup>

Depending on the aggressiveness of the strategies used by these organizations to influence banks' lending decisions, these actions could be challenged on the grounds that they constitute tortious interference with existing contracts or prospective contractual relations.

**1) A successful tortious interference with contract claim related to ESG activist pressure will require showing "improper" interference.**

The common-law cause of action for intentional interference with a contract provides a remedy against anyone who intentionally interferes with the contractual rights and prospects of private parties. This tort is a crucial tool for preserving the sanctity of contracts, which is essential to orderly and prosperous societies.<sup>142</sup>

Because tortious interference with a contract is a common-law claim, each state has its own definition of what constitutes unlawful interferences. Generally, claims for tortious interference with contract are brought for conduct such as misrepresentation, threats of physical violence, threatened litigation, economic pressure, or other unlawful conduct.<sup>143</sup>

In most jurisdictions, the basic elements of a tortious interference with contract claim are (1) the plaintiff business has a valid contract, or legitimate and identifiable business expectancy with another entity; (2) a third party seeks to interfere with that contract or expected contract and knew or should have known of the contract or expectancy; (3) the third party acted intentionally to induce the other entity into a breach of that contract or loss of that expectancy; and (4) the plaintiff business suffered damages caused by the third party's interference.<sup>144</sup>

In many states, the key inquiry is usually whether the third party's interference was "improper." The Restatement (Second) of Torts lists seven factors for whether interference with contractual relations is "improper": (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.<sup>145</sup>

Prevailing on a claim for interference with prospective contractual relations is usually more difficult than on a claim for interference with an existing contract. Courts are often not as willing to protect interests in prospective contractual relations as to protect interests in existing contracts. Therefore, the standard for culpable conduct necessary to show improper interference can be higher than for the conduct necessary for interference with current contracts.<sup>146</sup>

**2) The de-banking of non-ESG businesses may tortiously interfere with contracts.**

Any politically incorrect business, such as a pipeline developer, a firearms manufacturer, or an oil and gas company, should consider filing suit against a protesting organization that uses coercion or threats to destroy an existing or potential contract with its lender. Ideally, the plaintiff would be a business that had a contract with a bank which was ultimately breached due to pressure from third-party activist groups.

In the mid-1990s, the U.S. District Court for the District of Columbia allowed a suit to proceed that involved similar threats against a business based on its relationship to another business.<sup>147</sup> A church brought a claim against a public relations firm that had represented it as well as against a pharmaceutical company. That pharmaceutical company had allegedly threatened to cut off substantial business to the public relations firm unless the firm ordered one of its subsidiaries to stop working for the church because the church had been opposing the use of certain prescription drugs. The court determined that the church presented sufficient evidence to allege that the company's exertion of economic pressure could amount to an improper attempt to inflict harm on the church due to its different ideological views and interests.<sup>148</sup>

Similarly, businesses that seek to pressure banks to cease lending to oil and gas companies may be subject to a legal challenge on the grounds of tortious interference with contract. This application of the tort to de-banking non-ESG companies satisfies the tort's elements and its purpose of protecting the integrity of contractual relations. The elements of proving a known contract or expectancy, an intent to interfere and induce a breach, an actual breach, and damages are present when progressive groups threaten and coerce banks into ending financing agreements with certain companies. Furthermore, bringing such a claim would protect private parties' freedom to contract and the dependability of contracts that have already been formed.

As others have noted, not only *can* such claims be brought against progressive groups that seek to defund businesses, but such claims *should* be brought to help safeguard our representative democracy.<sup>149</sup> Environmental and corporate

governance issues are already subject to extensive regulation and oversight. One small group of people should not be permitted to overrule the judgment of elected government officials and their appointees by forcing certain industries out of the market because they do not measure up to these groups' standards.

## V. Legislative and other policy proposals may be required.

As previous sections of this paper demonstrate, the current legal framework governing ESG strategies may pose serious obstacles to the ESG trend and result in legal liability for pressure campaigns, ESG private or public pension pushes, or interference with existing contractual relationships. However, Congress or state legislatures might wish to further protect American industry against the ESG trend.

- Congress could expressly adopt the Office of the Comptroller of the Currency's "Fair Access to Financial Services" rule. Proponents of this rule ground it in the Obama administration-era Dodd-Frank banking overhaul. The OCC rule makes it illegal for banks to use category-based risk evaluations to deny access to financial services. States could pass laws that forbid discrimination against certain politically incorrect businesses. For example, in 2017, Georgia's Legislature passed a law prohibiting banks from denying firearms firms financial services solely based on the firms' involvement with the "lawful commerce of firearms or ammunition products."<sup>150</sup> A similar bill was proposed in Kansas, and lobbyists urged adding amendments that would also prohibit discriminatory lending based on sexual orientation and gender identity.<sup>151</sup> Allowing amendments like these would align with the "Fair Access to Financial Services" rule's approach that bans all category-based risk evaluations and could promote bipartisan support for such laws.

These rules could potentially go further than the OCC rule but would need to survive federal preemption challenges under laws like the National Bank Act.

- States could support legislation like Texas's SB 13 that seeks to ensure that state-managed funds, including state pension funds, do not rely on private investment management firms that refuse to invest in fossil fuels.<sup>152</sup>

SB 13 requires all Texas state agencies to withdraw or divest from all publicly traded securities of companies that have such boycotts. Moreover, the law requires that any contract into which a governmental entity enters with a private company for goods or services must contain written verification from the company that it does not and will not boycott energy companies during the life of the contract. The amount of state and municipal assets and debt that could be impacted by this legislation are significant. Texas pensions manage over \$300 billion,<sup>153</sup> and municipal debt stands at about \$376 billion.<sup>154</sup>

- If the Biden administration's Department of Labor promulgates a new rule decreeing consideration of ESG factors permissible or even required when managing ERISA funds, a legal challenge could be brought on the grounds that the new rule violates ERISA's fiduciary duty requirements.
- Congress or state legislatures could seek to define the appropriate consideration of regulatory risk by lenders. Many lending decisions facially justified by the assumption that policymakers will eventually adopt laws or regulations that strand entire asset categories may lack the type of rigor that project finance ordinarily requires.

Any advocate for legislative or policy changes to curb ESG should remain attentive to the risk that existing laws may be more favorable to targeted industries than the rules that would emerge from the policymaking process. Pro-ESG interests have the momentum in the public arena and the media and thus may overwhelm political actors seeking to restrict aggressive ESG investing.

## CONCLUSION

Politically correct corporate practices may conflict with longstanding legal rights and obligations, resulting in liability for antitrust violations, breaches of fiduciary duty in the private and public retirement plan contexts, and tortious interference with contract. The recent wave of ESG enthusiasm might crash on the rocks of state or federal investigations or private party civil suits enforcing the law. It may also trigger legislative or policy solutions that enshrine explicit neutrality requirements in law. ★

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- <sup>32</sup> Leslie P. Norton, *More Banks Are Screening for ESG Risk in Underwriting, Survey Shows*, Barron’s (Jan. 7, 2020), [https://www.barrons.com/articles/banks-screening-esg-risk-underwriting-borrowing-fitch-51578415298?mod=article inline](https://www.barrons.com/articles/banks-screening-esg-risk-underwriting-borrowing-fitch-51578415298?mod=article_inline).
- <sup>33</sup> *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets*, Federal Trade Commission (Apr. 2020), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement\\_on\\_coronavirus\\_and\\_labor\\_competition\\_04132020\\_final.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf).
- <sup>34</sup> Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 Antitrust Source 1, 1 (2016).
- <sup>35</sup> *Id.*
- <sup>36</sup> *In re Toys “R” Us, Inc.*, 126 F.T.C. 415, 574-75 (1998), *aff’d*, TRU, 221 F.3d 928.
- <sup>37</sup> *Id.* at 574.
- <sup>38</sup> Orbach, *supra* at 1.
- <sup>39</sup> Green America, <https://www.greenamerica.org/better-banking> (last visited Jun. 12, 2021); Fossil Banks, <https://www.fossilbanks.org/> (last visited Jun. 12, 2021).



<sup>40</sup> Sierra Club, *Fossil Free Financing*, <https://www.sierraclub.org/dirty-fuels/fossil-free-financing> (last accessed Jun. 12, 2021).

<sup>41</sup> Sierra Club, *Following Goldman Sachs and JPMorgan Chase Announcements, Wells Fargo Rejects Funding for Arctic Drilling* (Mar. 2, 2020), <https://www.sierraclub.org/press-releases/2020/03/following-goldman-sachs-and-jpmorgan-chase-announcements-wells-fargo-rejects>.

<sup>42</sup> Beals, *supra* at 27.

<sup>43</sup> *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 570 n.34 (11th Cir. 1998).

<sup>44</sup> *Id.* at 572.

<sup>45</sup> Laura Hunt, ‘Stranded Assets’ Risk Rising With Climate Action and \$40 Oil, Washington Post (Apr. 12, 2020), [https://www.washingtonpost.com/business/energy/stranded-assets-risk-rising-with-climate-action-and-40-oil/2020/09/18/89f90d3a-f963-11ea-85f7-5941188a98cd\\_story.html](https://www.washingtonpost.com/business/energy/stranded-assets-risk-rising-with-climate-action-and-40-oil/2020/09/18/89f90d3a-f963-11ea-85f7-5941188a98cd_story.html).

<sup>46</sup> 29 U.S.C. § 1001(a) (2018).

<sup>47</sup> *See id.* § 1003.

<sup>48</sup> *Id.* § 1001(b).

<sup>49</sup> *Id.* § 1001(a).

<sup>50</sup> *Id.* § 1001(b).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 1104(a)(1).

<sup>53</sup> *Id.* § 1104(a)(1)(B).

<sup>54</sup> 29 U.S.C. § 1132(d)(1).

<sup>55</sup> *Vigeant v. Meek*, 953 F.3d 1022, 1029 (8th Cir. 2020) (internal quotation marks omitted).

<sup>56</sup> *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 100–01 (2013) (quoting *Curtiss–Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995)).

<sup>57</sup> *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 324 (2016) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)).

<sup>58</sup> *Id.* at 320.

<sup>59</sup> *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (first quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004); then quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

<sup>60</sup> For instance, equitable principles cannot “override the clear terms of a[n ERISA] plan.” *U.S. Airways*, 569 U.S. at 91. Although ERISA “authorizes the kinds of relief ‘typically available in equity’ before the merger of law and equity,” it countenances “only such [equitable] relief as will enforce ‘the terms of the plan’ or the statute.” *Id.* at 100 (first quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993); then quoting 29 U.S.C.

§ 1132(a)(3)). The Court is also “especially ‘reluctant to tamper with [the] enforcement scheme’ embodied in [ERISA] by extending remedies not specifically authorized by its text.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)).

<sup>61</sup> Exec. Order No. 13,868, § 5(b), 84 Fed. Reg. 15,495, 15,497 (Apr. 15, 2019).

<sup>62</sup> Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (proposed June 2020) (to be codified at 29 C.F.R. pt. 2550).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 85 Fed. Reg. 72846 (November 13, 2020).

<sup>66</sup> Exec. Order No. 13990, 63 Fed. Reg. 7,037 (Jan. 20, 2021).

<sup>67</sup> 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://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/state-ment-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> Exec. Order No. 14,030, § 4(b) 86 Fed. Reg. 27,967, 27,968–69 (May 20, 2021); see also Employee Benefits Security Administration, Department of Labor, *Implementing Executive Orders 13990 and 14030*, RIN 1210-AC03 (Spring 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC03>.

<sup>70</sup> See Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 29 C.F.R. § 2509.2015-01 (2020) (setting forth the Department of Labor’s interpretation of 29 U.S.C. §§ 1103-04 in response to inquiries regarding the legality of ESG investing by administrators of employee benefit plans).

<sup>71</sup> See *Matter of Rothko’s Estate*, 372 N.E.2d 291 (1977) (holding that a fiduciary who was the trustee of a deceased artist’s estate breached his duty to act in the sole interest of the beneficiaries when he sold all the artist’s paintings to a gallery of which he was an officer with a motive to “seek aggrandizement of status”); see also *Conway v. Emeny*, 96 A.2d 221, 225 (Conn. 1953) (noting that a trustee who does “not act for personal advantage,” and instead is “motivated by a desire to assist a worthy project,” still violates the fiduciary duty of loyalty).

<sup>72</sup> J.B. Maverick, *What Is the Average Annual Return for the S&P 500?*, Investopedia (Feb. 19, 2020), <https://www.investopedia.com/ask/answers/042415/what-average-annual-return-sp-500.asp>.

<sup>73</sup> Lawrence Carrel, *Passive Management Marks Decade of Beating Active U.S. Stock Funds*, Forbes (Apr. 20, 2020), <https://www.forbes.com/sites/lcarrel/2020/04/20/passive-beats-active-large-cap-funds-10-years-in-a-row/?sh=5181391c47b0>.

<sup>74</sup> E.g., Jeffrey Carrado, Sean Kruzel, and Evan Schnidman, *Active Management Is in Trouble (Again)*, Portformer & Passiv. AI (June 2020), <https://www.portformer.com/active-management-trouble-white-paper/>.

<sup>75</sup> See, e.g., Christine Idzelis, *Active Funds Dominate ESG—But Their Market Share Is Slipping*, Institutional Investor (Sept. 30, 2020), <https://www.institutionalinvestor.com/article/b1nlkhzs80xh42/Active-Funds-Dominate-ESG-But-Their-Market-Share-Is-Slipping>.

<sup>76</sup> 29 U.S.C. § 1104(a)(1) (emphasis added).

<sup>77</sup> *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 256 (2008); see also, e.g., *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 593-94 (8th Cir. 2009) (finding that plan participant had standing under § 502(a)(2) for breach of fiduciary duty based on Wal-Mart’s alleged failure to adequately evaluate the investment options included in its 401(k) plan); *Falberg v. Goldman Sachs Grp., Inc.*, 2020 WL 3893285, at \*8 (S.D.N.Y. July 9, 2020) (denying a motion to dismiss for lack of standing when plan participants brought suit under §§ 502(a)(2) and 502(a)(3) for breach of fiduciary duty based on relative underperformance of the plan administrators’ selected funds compared to peer funds over 3-, 5-, and 10-year periods).

<sup>78</sup> Audrey Cher, *Sustainable Funds Are Outperforming Their Peers During the Pandemic*, BNP Paribas Says, CNBC (June 2, 2020), <https://www.cnbc.com/2020/06/02/esg-funds-outperforming-peers-during-coronavirus-pandemic-bnp-paribas.html>.

<sup>79</sup> See, e.g., *Falberg*, 2020 WL 3893285, at \*9 (noting that a fiduciary’s choice of investment funds which had underperformed peer funds over a 10-year period was evidence of a violation of a fiduciary’s “continuing duty of some kind to monitor investments and remove imprudent ones”).

<sup>80</sup> 29 U.S.C. § 1132(a)(2) & (3).

<sup>81</sup> *Id.* §§ 1132(a)(2) & (3), 1109.

<sup>82</sup> *Harley v. Minnesota Min. and Mg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002).

<sup>83</sup> See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (“Th[e] structure [of section 502] suggests that” § 502(a)(3) acts as a safety net, “offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.”); *Pfahler v. Nat’l Latex Prod. Co.*, 517 F.3d 816, 834 (6th Cir. 2007) (holding that, “because plaintiffs [were] entitled to seek relief under § 502(a)(2)” for their alleged fiduciary breaches, they could “not bring suit for these same actions under § 502(a)(3). Section 502(a)(3) is a catch-all provision which permits individual beneficiaries to bring suit for equitable relief.”). *But see Falberg*, 2020 WL 3893285 (allowing a suit to proceed under both §§ 502(a)(2) and (a)(3)).

<sup>84</sup> ERISA defines a “participant” as “any employee or former employee ... or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan ... or whose beneficiaries may be eligible to receive any such benefit.” 29 U.S.C. § 1002(7).

<sup>85</sup> *Id.* § 1002(21)(A); see also *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252 (1993).

- <sup>86</sup> *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1466 (4th Cir. 1996) (finding that company had standing as a fiduciary because it had power to appoint, retain, and remove plan fiduciaries, and this constituted “management or administration of a plan within the meaning of § 1002(21)(A)”).
- <sup>87</sup> See, e.g., *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995) (noting that 9th Circuit has moved toward a stricter reading of whether the categories of persons authorized to sue under § 502 are exclusive); *Tuvia Convalescent Ctr., Inc. v. Nat’l Union of Hosp. & Health Care Emps.*, 717 F.2d 726, 730 (2d Cir. 1983) (holding that employer is not entitled to bring suit under § 502(a)(2) because it is not expressly named in ERISA).
- <sup>88</sup> *Raymond B. Yates Profit Sharing Plan v. Hendon*, 541 U.S. 1, 5 (2004).
- <sup>89</sup> *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985).
- <sup>90</sup> *LaRue*, 552 U.S. at 260 (Thomas, J., concurring).
- <sup>91</sup> To meet the requirements for Article III standing, a plaintiff bringing a suit under ERISA bears the burden of showing: (1) an injury in fact that is “concrete and particularized” and “actual or imminent,” (2) that the injury is “fairly traceable to the challenged conduct of the defendant,” and (3) that the injury is likely to be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547–48 (2016).
- <sup>92</sup> *Harley*, 284 F.3d at 907 (holding that no injury in fact existed when alleged imprudent investment and loss to defined benefit plan did not affect the rights of participants because the plan had a substantial surplus before and after the breach).
- <sup>93</sup> *LaRue*, 552 U.S. at 256.
- <sup>94</sup> *Id.* at 255. For an example of this type of injury in fact in § 502(a)(2) fiduciary breach cases, consider *Rogers v. Baxter Intern., Inc.*, 521 F.3d 702 (7th Cir. 2008). There, the U.S. Court of Appeals for the Seventh Circuit held that participants whose defined contribution accounts suffered a loss when their investments in company stock fell had a right of action under section 502(a)(2) against plan fiduciaries, even though other participants were uninjured by the alleged fiduciary breach. See also *Harley*, 284 F.3d at 907 (holding that no injury in fact existed when alleged imprudent investment and loss to defined benefit plan did not affect the rights of participants because the plan had a substantial surplus before and after the breach); *Thole v. U.S. Bank, N.A.*, 140 S.Ct. 1615, 1616 (2020) (holding similarly to *Harley* that a surplus in a defined benefit plan prevented standing); *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 215 (4th Cir. 2008) (finding an injury in fact when participants in defined contribution plans claimed that, had the fiduciaries acted in accordance with their duties, their accounts would have held more money at the time they cashed out); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm’n of Nassau Cty., Inc.*, 710 F.3d 57, 66 (2d Cir. 2013) (finding that an employer and employee had standing to sue other employers and CEOs as trustees of a trust fund on behalf of a welfare benefits plan under § 502(a)(2) even though the recovery inuring to the plan may ultimately have indirectly benefitted the plaintiffs individually).
- <sup>95</sup> 663 F.3d 210, 217 (4th Cir. 2011). See also *Nelson v. Hodowal*, 512 F.3d 347, 350–51 (7th Cir. 2008) (applying securities law causation analysis to loss causation under § 409(a) and noting that a non-disclosure that does not relate to the value of securities or investments does not yield loss causation or liability); *Matassarini v. Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (finding that alleged failure of fiduciaries to conform ESOP to tax code did not result in loss to the plan; therefore no liability under section 409(a)).
- <sup>96</sup> *Glanton v. Advance PCS, Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) (holding there is no redressability when “prospective benefits depend on an independent actor who retains ‘broad and legitimate discretion the courts cannot presume either to control or to predict.’” (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989))).
- <sup>97</sup> 29 C.F.R. § 2550.404c-1(b)(1)(ii).
- <sup>98</sup> Field Assistance Bulletin (FAB) 2012-02R
- <sup>99</sup> See 85 Fed. Reg. 39113, *supra* note 56.
- <sup>100</sup> Michael Wursthorn, *Tidal Wave of ESG Funds Brings Profit to Wall Street*, Wall Street Journal (Mar. 16, 2021), <https://www.wsj.com/articles/tidal-wave-of-esg-funds-brings-profit-to-wall-street-11615887004>.
- <sup>101</sup> *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (quoting Restatement (Third) of Trusts § 90(c)(3), cmt. b).
- <sup>102</sup> *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 332 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020) (mem.) (holding that failing to “adequately leverage the Plan’s size to reduce fees” was breach of fiduciary duty) (quoting *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014)).

- <sup>103</sup> See, e.g., *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004); *Daniels v. Thomas & Betts*, 263 F.3d 66, 73 (3d Cir. 2001).
- <sup>104</sup> 29 U.S.C. § 1002(21)(A).
- <sup>105</sup> See *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999). The duties of prudence and loyalty, respectively, form the background to the duties to diversify the plan's investments to minimize risk and to administer the plan in accordance with its governing documents, imposed by § 1104(a)(1)(C) and (D), respectively. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006) (describing the duty to diversify as "an essential element of the ordinary trustee's duty of prudence"); *O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc.*, 37 F.3d 55, 61 (2d Cir. 1994) ("The fiduciary duty of loyalty imposed by ERISA . . . does not require . . . that a fiduciary resolve every issue of interpretation in favor of the plan beneficiaries . . . [A] fiduciary must [act] in accordance with the documents and instruments governing the plan.").
- <sup>106</sup> *LaRue*, 552 U.S. at 253 (internal quotation marks omitted).
- <sup>107</sup> *Pegram v. Herdrich*, 530 U.S. 211, 225(2000).
- <sup>108</sup> See *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009).
- <sup>109</sup> *DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990).
- <sup>110</sup> See, e.g., *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) (upholding judgment for defendant fiduciaries despite U.S. Airways' bankruptcy because "whether a fiduciary's actions are prudent cannot be measured in hindsight"); *Summers v. UAL Corp.*, No. 03 C 1537, 2005 WL 2648670, at \*6 (N.D. Ill. Oct. 12, 2005) (finding plaintiffs could not say through hindsight that bankruptcy was inevitable because at the time "[t]here were sufficient indications that UAL could recover from its setbacks").
- <sup>111</sup> See Alix Ollivier & Leonard Gilroy, *Public Pension Funds Should Avoid Social Investing Strategies*, Reason Foundation (Nov. 32, 2020), <https://reason.org/commentary/public-pension-funds-should-avoid-social-investing-strategies/>.
- <sup>112</sup> See *The State Pension Funding Gap: 2018*, Pew (June 11, 2020), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2020/06/the-state-pension-funding-gap-2018>.
- <sup>113</sup> *Legal Protections for State Pension and Retiree Health Benefits: Findings from a 50-State Survey of Retirement Plans*, Pew (May 30, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits>.
- <sup>114</sup> *Id.*
- <sup>115</sup> NASRA, *ESG – Environmental, Social and Governance* (Mar. 29, 2021) <https://www.nasra.org/esg>; see also Cal. Const., art. XVI, § 17; N.Y. Comp. Codes R. & Regs. tit. 11, § 136-2.3(a); Conn. Gen. Stat. § 5-155a(c); D.C. Code § 1-741; Md. Code Ann., State Pers. & Pens. § 21-203; Or. Rev. Stat. § 243.435(2).
- <sup>116</sup> See Cal. Const., art. XVI, § 17; N.Y. Comp. Codes R. & Regs. tit. 11, § 136-2.3(a); see also Leigh T. Anenson, *Public Pensions and Fiduciary Law: A View from Equity*, Univ. Mich. J. of Law Reform 251, 287-89 (2016).
- <sup>117</sup> Cal. Const., art. XVI, § 17(b).
- <sup>118</sup> *Id.* at § 17(c).
- <sup>119</sup> N.Y. Comp. Codes R. & Regs. tit. 11, § 136-2.3(a); N.Y. Educ. Law 502(3) (McKinney 2014).
- <sup>120</sup> See, e.g., *O'Neal v. Stanislaus Cty. Employees' Ret. Assn.*, 214 Cal. Rptr. 3d 591, 594 (2017) (allowing county employees to bring an action against the county's employee retirement association for breach of fiduciary duty related to fund mismanagement); *Withers v. Teachers' Ret. Sys. of City of New York*, 447 F. Supp. 1248, 1250 (S.D.N.Y. 1978), *aff'd sub nom. Withers v. Teacher's Ret. Sys. of City of New York*, 595 F.2d 1210 (2d Cir. 1979) (allowing retirees to bring suit against a public retirement system board for a breach of fiduciary duty related to purchasing allegedly unmarketable and highly speculative city bonds).
- <sup>121</sup> See, e.g., *Estes v. Walters*, 601 S.W.2d 252 (Ark. Ct. App. 1980) (holding that a petitioner must allege a concrete injury); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (acknowledging that Maine's law of standing is more liberal than its federal counterpart); *Langford v. Superior Court*, 729 P.2d 822, 833 n.6 (Cal. 1987) ("California's [standing] requirements are less stringent than those imposed by federal law").
- <sup>122</sup> 140 S. Ct. 1615, 1619 (2020).



<sup>123</sup> *Id.* at 1622; *see also LaRue*, 552 U.S. at 255 (“Misconduct by the administrators of a defined benefit plan will not affect an individual’s entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan”).

<sup>124</sup> *See, e.g., Duncan v. Muzyn*, 885 F.3d 422, 427 (6th Cir. 2018); *Overstreet v. Mayberry*, 603 S.W.3d 244, 256 (Ky. 2020) (holding that participants of a state defined benefit retirement plan lacked standing for breach of fiduciary duty claim because they only made speculative allegations that plan mismanagement would result in the plan’s actuarial shortfall, not that the state would be unable to pay participants their benefits).

<sup>125</sup> *Duncan*, 885 F.3d at 427.

<sup>126</sup> *Id.*

<sup>127</sup> *See, e.g., Morgan Stanley, Sustainable Funds Outperform Peers in 2020 During Coronavirus* (Feb. 24, 2021) <https://www.morganstanley.com/ideas/esg-funds-outperform-peers-coronavirus>; John Hale, *U.S. ESG Funds Outperformed Conventional Funds in 2019*, Morningstar (Apr. 16, 2020) <https://www.morningstar.com/articles/973590/us-esg-funds-outperformed-conventional-funds-in-2019>.

<sup>128</sup> *See, e.g., Lubos Pastor, Robert F. Stambaugh & Lucian A. Taylor, Sustainable Investing in Equilibrium* (June 2020) Chicago Booth Research Paper No. 20-12 (“Green assets have negative CAPM alphas, whereas brown assets have positive alphas. Consequently, agents with stronger ESG preferences, whose portfolios tilt more toward green assets and away from brown assets, earn lower expected returns.”); *see also* Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good?* (March 20, 2020) NYU Stern School of Business (noting that the study’s results were “inconclusive” on whether “higher ESG ratings are associated with greater risk-adjusted returns.”).

<sup>129</sup> Jean-Pierre Aubry et al., *ESG Investing and Public Pensions: An Update*, Center for Retirement Research at Boston College (Oct. 2020).

<sup>130</sup> *Id.*

<sup>131</sup> 140 S. Ct. at 1622.

<sup>132</sup> *See, e.g., Edward Siedle, Kiss Your State Pension Goodbye*, Forbes (Apr. 23, 2020), <https://www.forbes.com/sites/edwardsiedle/2020/04/23/kiss-your-state-pension-goodbye/?sh=a9f24f161f91> (noting that multiple lawmakers have suggested allowing states to declare bankruptcy in order to reduce their public pension obligations).

<sup>133</sup> *See* Governor’s Exec. Order N-19-19 (Sept. 20, 2019).

<sup>134</sup> Patrick Murphy & Radhika Mehlotra, *Just the Facts: Public Pensions in California*, Public Policy Institute of California (March 2019), <https://www.ppic.org/publication/public-pensions-in-california/>.

<sup>135</sup> Dan Walters, *California’s Immense Pension Dilemma*, CalMatters (Aug. 10, 2020) <https://calmatters.org/commentary/dan-walters/2020/08/california-court-pension-debt-unfunded/>.

<sup>136</sup> *See CalPERS Reports Preliminary 4.7% Investment Return for Fiscal Year 2019-20*, CalPERS (Jul. 15, 2020), <https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/calpers-preliminary-investment-return-2019-20>.

<sup>137</sup> *See id.*

<sup>138</sup> *See* Cushing, *supra* note 6.

<sup>139</sup> *Id.*

<sup>140</sup> Laura Alix, *JPMorgan Rejects Calls to Disclose Lending’s Impact on Climate*, American Banker (Feb. 12, 2020), <https://www.americanbanker.com/news/jpmorgan-rejects-calls-to-disclose-lendings-impact-has-on-climate>.

<sup>141</sup> *Standing Against the Banks: DAPL Divestment and Water Protectors’ Fight for Justice, Indigenous Rights, Water and Life*, EcoWatch (Jul. 5, 2017), <https://www.ecowatch.com/divest-dapl-2453760771.html>.

<sup>142</sup> *See Enforcing Contracts*, The World Bank, <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters> (last accessed Apr. 8, 2021) (asserting that effective protection of contracts and related property rights is essential for economic and social progress).

<sup>143</sup> *See* The Restatement (Second) of Torts § 767, comment on clause (a) (Oct. 2020 Update).

<sup>144</sup> *See* § 9:9. *The elements of tortious interference*, 2 Callmann on Unfair Comp., Tr. & Mono. § 9:9 (4th Ed.) (Dec. 2020 Update).

<sup>145</sup> Restatement (Second) of Torts § 767 (1979) (October 2020 Update).

<sup>146</sup> 86 C.J.S. Torts § 46 Interference with Prospective Contractual Relations (Nov. 2020 Update).

<sup>147</sup> *Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018 (D.D.C. 1994).

<sup>148</sup> *Id.* at 1029.

<sup>149</sup> Phil Goldberg, Jamie Thompson, & Dalton Mott, *Vigilante Regulation: When Anti-Pipeline Activism Becomes Tortious Interference*, *Grow America's Infrastructure Now* (Apr. 18, 2019).

<sup>150</sup> Ga. Code Ann. § 10-1-439.2 (2019); *see also* Brian Knight and Trace Mitchell, *Private Policies and Public Power: When Banks Act as Regulators Within a Regime of Privilege*, *NYU J. of L. & Liberty* 13, no. 1 (2019): 66-149 at 146; Josh Blackman, *Four Problems with Citi's U.S. Commercial Firearms Policy* (Josh Blackman's Blog, Mar. 23, 2018), archived at <https://perma.cc/AZA2-NUQJ>.

<sup>151</sup> Jonathan Shorman and Nicole Asbury, *Kansas Bill Bans Discrimination Against Firearms Industry. It Faces an Uncertain Future*, *Wichita Eagle* (Feb. 19, 2020), <https://www.kansas.com/news/politics-government/article240427586.html>

<sup>152</sup> SB 13, 2021 Leg., 87th Sess. (Tex. 2021).

<sup>153</sup> "Aggregate Data," Texas Pension Review Board, <https://data.prb.texas.gov/aggregate.html> (last accessed June 24, 2021).

<sup>154</sup> "Local Debt Soars to \$376 Billion" Texas Public Policy Foundation (Jan. 28, 2021) <https://www.texaspolicy.com/press/tppf-local-debt-soars-to-376-billion>.

## ABOUT THE AUTHOR



**Ambassador C. Boyden Gray** is the managing partner of Boyden Gray & Associates, a boutique litigation firm in Washington, D.C., where he practices law.

Gray served George H. W. Bush for 12 years in the White House—first as vice presidential counsel during all 8 years of the Reagan administration, and then as White House counsel under President Bush. During his White House tenure, Gray was closely involved with President Bush’s work on a variety of domestic issues, including eliminating unnecessary regulation and enacting the landmark Clean Air Act Amendments of 1990, the Civil Rights Act of 1991, and the Americans with Disabilities Act. He was also in charge of overseeing the authorization to use force in the first Gulf War and the judicial selection process.

During the presidency of George W. Bush, Gray was U.S. ambassador to the European Union and special envoy for Eurasian energy. He formerly practiced law at the firm of Wilmer, Cutler & Pickering (now WilmerHale). He teaches law at the Antonin Scalia Law School at George Mason University.

Born in Winston-Salem, North Carolina, Gray graduated *magna cum laude* from Harvard College and with high honors from the Law School of the University of North Carolina at Chapel Hill, where he was editor of the law review. He clerked for Chief Justice Earl Warren at the Supreme Court of the United States and served in the United States Marine Corps Reserves.

Gray is the recipient of the Presidential Citizens Medal and the Distinguished Alumnus Award of the University of North Carolina Law School.

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