No. ________

In The
Supreme Court of the United States

UNIVERSITY OF PENNSYLVANIA, et al.,

Petitioners,

v.

JENNIFER SWEDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN T. ORTELERE
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 554, 557 (2007), the Court held that allegations that are "merely consistent with" antitrust violations—but "just as much in line with" lawful behavior—fail to state a claim for relief. It reaffirmed that principle in *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, 684 (2009), stressing that *Twombly* provides "the pleading standard for 'all civil actions.'" And in *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 426 (2014), it held that "the pleading standard as discussed in *Twombly* and *Iqbal*" governs breach of fiduciary duty claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*.

But here a divided Third Circuit panel "decline[d] to extend *Twombly*'s antitrust pleading rule to such claims." App., *infra*, 9a. Then it reversed the dismissal of respondents' claims based on allegations that other courts of appeals have found insufficient as a matter of law. The questions presented are:

1. Whether *Twombly*'s pleading standard governs breach of fiduciary duty claims under ERISA.

2. Whether a complaint states a plausible claim for breach of fiduciary duty under ERISA if it alleges that a retirement plan's investment options charged excessive fees and underperformed, but does not allege any fiduciary conduct inconsistent with lawful management of the plan.

PARTIES TO THE PROCEEDING

Petitioners were the appellees in the court of appeals. They are the University of Pennsylvania, the Investment Committee for The University of Pennsylvania Matching Plan, and Jack Heuer.

Respondents are Jennifer Sweda, Benjamin A. Wiggins, Robert L. Young, Faith Pickering, Pushkar Sohoni, and Rebecca N. Toner.

CORPORATE DISCLOSURE STATEMENT

The University of Pennsylvania is a private entity and not publicly traded. There is no parent or publicly held company owning 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

Sweda v. *Univ. of Pa.*, No. 16-cv-4239
(Sept. 21, 2017)

United States Court of Appeals (3d Cir.):

Sweda v. *Univ. of Pa.*, No. 17-3244 (May 2, 2019), petition for reh'g denied, July 19, 2019

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	4
JURISDICTION	5
STATUTORY PROVISIONS INVOLVED	5
STATEMENT	5
A. Statutory Background	5
B. Factual Background	6
C. Proceedings Below	10
REASONS FOR GRANTING THE PETITION	13
A. The Third Circuit's Departure From *Twombly* Conflicts With Decisions Of This Court And Other Circuits	14
B. The Third Circuit's Diluted Pleading Standard Conflicts With Decisions Of This Court And Other Circuits	21
C. This Court's Review Is Urgently Needed And This Is An Ideal Vehicle	27
CONCLUSION	32

TABLE OF CONTENTS—Continued

Page

APPENDIX

Opinion, United States Court of Appeals for the Third Circuit (May 2, 2019)....................................1a

Order, United States District Court for the Eastern District of Pennsylvania (Sept. 21, 2017)......60a

Memorandum, United States District Court for the Eastern District of Pennsylvania (Sept. 21, 2017)...61a

Denial of Rehearing, United States Court of Appeals for the Third Circuit (July 19, 2019)...........92a

29 U.S.C. 1104..94a

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Inc. v. *Davila*, 542 U.S. 200 (2004) 5, 27

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009)................*passim*

Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) .*passim*

Braden v. *Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009)..15, 17, 18

Conkright v. *Frommert*, 559 U.S. 506 (2010)......1, 6, 27

Fifth Third Bancorp v. *Dudenhoeffer*, 573 U.S. 409 (2014)...*passim*

Hecker v. *Deere & Co.*, 556 F.3d 575 (7th Cir. 2009)..24, 25

Hecker v. *Deere & Co.*, 569 F.3d 708 (7th Cir. 2009)..19, 23, 24

In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104 (9th Cir. 2013)..19

Loomis v. *Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011)..23, 24, 25

Meiners v. *Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018) ....*passim*

Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 (2d Cir. 2013) .....*passim*

Rush Prudential HMO, Inc. v. *Moran*, 536 U.S. 355 (2002)...4, 6, 27

Sacerdote v. *N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) 2, 30

TABLE OF AUTHORITIES—Continued

Page

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 6

White v. *Chevron Corp.*, 752 Fed. Appx. 453 (9th Cir. 2018) 19, 20, 23, 24, 25

Wilcox v. *Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019) 26

STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* .... *passim*
29 U.S.C. 1002 7
29 U.S.C. 1104 6
29 U.S.C. 1109 6

Technical Amendments Act of 1958, Pub. L. No. 85-866, § 23(a), 72 Stat. 1606 (codified as amended at 26 U.S.C. 403(b)) 7

28 U.S.C. 1254 5

OTHER AUTHORITIES

Chamber of Commerce Amicus Br., *Divane* v. *Nw. Univ.*, No. 18-2569 (7th Cir. Mar. 21, 2019) 30

Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451 (2004) 6, 7

Jacklyn Wille, *MIT Inks Largest Settlement in College Retirement Plan Lawsuits*, Bloomberg Law, Oct. 29, 2019, https://news.bloomberglaw.com/employee-benefits/mit-inks-largest-settlement-in-college-retirement-plan-lawsuits 2, 30

TABLE OF AUTHORITIES—Continued

Page

Letter from Louis J. Campagna, Chief, Div. of Fiduciary Interpretations, Office of Regulations & Interpretations, Employee Benefits Security Administration, U.S. Dep't of Labor, to Christopher Spence, Senior Dir., Fed. Gov't Relations, TIAA (Dec. 22, 2016), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/information-letters/12-22-2016.pdf 8

Stephen Saxon & David Powell, *Preparing Educational and Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, 127 J. Tax'n 53 (2017)..7, 29

Tara Siegel Bernard, *Employees Sue Four More Universities Over Retirement Plan Fees*, N.Y. Times, Aug. 11, 2016, https://www.nytimes.com/2016/08/12/business/employees-sue-four-more-universities-over-retirement-plan-fees.html 1

Tara Siegel Bernard, *M.I.T., N.Y.U. and Yale Are Sued Over Retirement Plan Fees*, N.Y. Times, Aug. 9, 2016, https://www.nytimes.com/2016/08/10/your-money/mit-nyu-yale-sued-4013b-retirement-plan-fees-tiaa-fidelity.html 1

TIAA Traditional Annuity, *Account Description* (Mar. 31, 2019), https://www.tiaa.org/public/pdf/ffs/878094101-RA.pdf 9

Vanguard Institutional Index Fund, *Summary Prospectus* (Apr. 26, 2019), https://personal.vanguard.com/pub/Pdf/spi094.pdf 9

INTRODUCTION

ERISA class actions impose immense economic and reputational costs on fiduciaries who choose to administer employee retirement plans. But the statute was not meant to generate "litigation expenses" that "unduly discourage employers from offering [such] plans." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). That is why this Court has identified the motion to dismiss as an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014).

This case illustrates the point. The last few years have seen a new wave of ERISA class action litigation against universities and the men and women who agree to serve as fiduciaries for their retirement plans. In a single week in 2016, respondents' counsel sued fiduciaries at seven different schools—including the University of Pennsylvania and its co-petitioners here.[1] All told, about twenty universities have been hit with such lawsuits.

The lawsuits are so numerous because they rest on substantively identical allegations and target retirement plan features that are commonplace among

---

[1] See Tara Siegel Bernard, *M.I.T., N.Y.U. and Yale Are Sued Over Retirement Plan Fees*, N.Y. Times, Aug. 9, 2016, https://www.nytimes.com/2016/08/10/your-money/mit-nyu-yale-sued-4013b-retirement-plan-fees-tiaa-fidelity.html; Tara Siegel Bernard, *Employees Sue Four More Universities Over Retirement Plan Fees*, N.Y. Times, Aug. 11, 2016, https://www.nytimes.com/2016/08/12/business/employees-sue-four-more-universities-over-retirement-plan-fees.html.

prominent universities. But this litigation is not a sign that retirees' savings are in jeopardy. As Judge Roth noted in dissent below, the University of Pennsylvania plan's assets increased by more than $1 billion during the class period. App., *infra*, 42a. And the only one of these cases to produce a trial verdict thus far established that the plan features that respondents criticize here—and that other plaintiffs criticize in the other university cases—do not constitute a breach of fiduciary duty under ERISA. *Sacerdote* v. *N.Y. Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018).

Yet even though no plaintiff has prevailed on the merits of these allegations, universities face immense pressure to quickly settle any claims that survive the pleading stage. It is extremely expensive to litigate ERISA class actions, and the amount of money theoretically at stake is staggering: the New York University plaintiffs alone claimed $358 million in losses. *Sacerdote*, 328 F. Supp. 3d at 279. So far, six universities have settled lawsuits like this after losing motions to dismiss, at an average rate of $11 million per university.[2] Two such settlements came after the decision below, and more will follow if that decision stands.

The divided Third Circuit panel reversed dismissal of respondents' two core claims. But its analysis rested on a fundamental mistake. It held that the district court "erred" by relying on the pleading standard

---

[2] See Jacklyn Wille, *MIT Inks Largest Settlement in College Retirement Plan Lawsuits*, Bloomberg Law, Oct. 29, 2019, https://news.bloomberglaw.com/employee-benefits/mit-inks-largest-settlement-in-college-retirement-plan-lawsuits.

set forth in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). App., *infra*, 9a. According to the panel majority, the relevant principle from *Twombly* "is specific to antitrust cases." *Id.* at 8a. The majority "decline[d] to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." *Id.* at 9a.

That conclusion conflicts with decisions from this Court and many circuits. This Court has rejected any suggestion that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 684 (2009). It has even held that courts "should apply the pleading standard as discussed in *Twombly* and *Iqbal*" to resolve ERISA fiduciary duty claims in particular. *Dudenhoeffer*, 573 U.S. at 426. Until now, no federal appellate court has disagreed.

On the contrary, the Second, Seventh, Eighth, and Ninth Circuits have all recognized that *Twombly* fully applies to these ERISA claims. And it is no accident that decisions in those four circuits have also dismissed complaints resting on the sorts of allegations that the Third Circuit allowed past the pleading stage here. The panel majority even conceded that respondents "may not have directly alleged *how* [petitioners] mismanaged the Plan." App., *infra*, 23a-24a (emphasis added). But it nonetheless found respondents' allegations—that some of the plan's investment options charged excessive fees or performed inadequately—sufficient to state a claim, regardless of the sound reasons that would support the decision to make such investment options available to plan participants. Other

circuits require more. Unless the allegations "show[] that a prudent fiduciary in like circumstances would have acted differently," they do not clear the *Twombly* threshold. *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 720 (2d Cir. 2013) (*St. Vincent*); accord *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018).

This Court should grant certiorari to reaffirm *Twombly*'s applicability and resolve the numerous circuit splits created by the Third Circuit. ERISA's promise of "uniform standards of primary conduct" cannot be fulfilled when courts treat identical allegations differently under inconsistent pleading standards. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Nor should the universities defending these cookie-cutter class actions be forced to remain in their current "unenviable position," to borrow Judge Roth's words, faced with mounting legal costs and the possibility of "interest-inflated liability totals" the longer the litigation runs. App., *infra*, 42a. The Third Circuit majority refused to scrutinize the complaint's allegations as this Court's precedent requires, and the Court should grant certiorari and reverse.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-59a) is reported at 923 F.3d 320. The opinion of the district court (App., *infra*, 61a-91a) is not published

in the Federal Supplement but is available at 2017 WL 4179752.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2019. A petition for rehearing was denied on July 19, 2019 (App., *infra*, 92a-93a). On September 25, 2019, Justice Alito extended the time for filing this petition to November 16, 2019. On November 5, 2019, Justice Alito further extended the time to December 16, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 94a-95a.

STATEMENT

A. Statutory Background

ERISA is a comprehensive regulatory regime for employee benefit plans. See *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004). Like many statutes, ERISA reflects the legislature's balancing of competing objectives. The statute seeks to ensure that employees receive the benefits they were promised—but without discouraging employers from establishing

benefit plans, which employers are not obligated to do. *E.g.*, *Conkright*, 559 U.S. at 516-517. Congress took care not "to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Among other things, that means that ERISA aims to provide "uniform standards of primary conduct" in place of a patchwork of state laws. *Rush Prudential*, 536 U.S. at 379.

One of ERISA's core features is a standard of care for plan fiduciaries. Fiduciaries must act loyally ("solely in the interest of the participants and beneficiaries") and prudently ("with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"). 29 U.S.C. 1104(a)(1). A fiduciary is "personally liable" if he or she breaches these duties, and must "make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a).

B. Factual Background

1. Employer-sponsored retirement plans come in two main varieties. Retirees in "defined benefit" plans are entitled to fixed, periodic payments—a guaranteed, lifelong pension funded by the employer. See, *e.g.*, Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 456 (2004). In contrast, retirees in

"defined contribution" plans receive the value of their own individual accounts, which turns on the amounts contributed to that account and ensuing investment performance. See 29 U.S.C. 1002(34). These employees can direct the investments in their individual accounts. Zelinsky, 114 Yale L.J. at 478. But instead of the periodic payments that characterize defined benefit plans, defined contribution plans typically offer a single, lump-sum payout. *Id.* at 456-457.

The plan in this case is an example of a particular sort of defined contribution plan common among universities: a 403(b) plan (named for Section 403(b) of the Internal Revenue Code). See Technical Amendments Act of 1958, Pub. L. No. 85-866, § 23(a), 72 Stat. 1606, 1620 (codified as amended at 26 U.S.C. 403(b)). The 403(b) plan remains the normal retirement savings arrangement for universities today. See Zelinsky, 114 Yale L.J. at 471.

Unlike most 401(k) plans, 403(b) plans characteristically allow participants to invest in annuities. Stephen Saxon & David Powell, *Preparing Educational and Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, 127 J. Tax'n 53, 59 (2017). An annuity is an insurance contract that provides a stream of payments at regular intervals over a set period, often starting with retirement. Investors can thus use annuities to replicate the lifetime periodic payments that defined contribution plans normally lack. See Zelinsky, 114 Yale L.J. at 462.

Lifetime income is important to protect retirees from the "longevity risk of outliving the assets they

saved." Letter from Louis J. Campagna, Chief, Div. of Fiduciary Interpretations, Office of Regulations & Interpretations, Employee Benefits Security Administration, U.S. Dep't of Labor, to Christopher Spence, Senior Dir., Fed. Gov't Relations, TIAA 3 (Dec. 22, 2016), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/information-letters/12-22-2016.pdf. For that reason, the Labor Department supports "broader use of lifetime income options in defined contribution plans as a supplement to and enhancement of accumulation of retirement savings." *Ibid.*

2. University of Pennsylvania employees may contribute a portion of their wages to fund individual accounts in the university's 403(b) plan on a tax-deferred basis. C.A. App. 178. The University voluntarily matches such contributions up to 5% of the contributing employee's income. App., *infra*, 5a. Employees may choose from a diverse lineup of Vanguard and TIAA-CREF mutual funds and TIAA-CREF annuities that the plan fiduciaries have monitored and modified over time.

In 2012, the University revamped the plan to make these options more user-friendly. C.A. App. 246-250. It organized the investment options into four different tiers based on plan participants' desire to control the details of their investments. *Id.* at 247. These included a tier of lifecycle or target date retirement funds pegged to a specific retirement time horizon for "Do-it-for-me" investors (Tier 1); a tier of core money market, stock, and bond funds for "Help-me-do-it" investors (Tier 2); an expanded set of options in

various asset classes for "Mix-my-own" investors (Tier 3); and a brokerage account offering access to hundreds of options for "Self-directed" investors (Tier 4). *Id.* at 247-248.

By the end of 2015, plan participants had collectively invested over $900 million—nearly one-quarter of the plan's $3.8 billion in total assets—in the TIAA Traditional Annuity. C.A. App. 158, 160-161. That option guarantees investors their principal plus a contractually specified minimum interest rate. *Id.* at 71. It is designed to provide "a 'salary' in retirement that can help cover [participants'] basic, everyday living expenses" regardless of their longevity or market fluctuations. TIAA Traditional Annuity, *Account Description* (Mar. 31, 2019), https://www.tiaa.org/public/pdf/ffs/878094101-RA.pdf. The Traditional Annuity thus provides the sort of pension-like, guaranteed lifetime income stream that 401(k) plans generally do not offer.

But plan participants have a great number of other investment options as well. These include institutional-class shares of the popular Vanguard Institutional Index Fund (which seeks to track the performance of the S&P 500 Index), as well as many other equity and fixed-income options. See C.A. App. 160-161, 237; Vanguard Institutional Index Fund, *Summary Prospectus* 3 (Apr. 26, 2019), https://personal.vanguard.com/pub/Pdf/spi094.pdf.

Over the course of the proposed class period, Petitioners made adjustments to the plan's investment

menu. Those adjustments included shifting twenty funds from retail-class shares to institutional-class shares, which charge investors lower overall fees. App., *infra*, 57a. The plan's investment options collect fees from investors based on the total amount of the investor's assets in the particular investment option. C.A. App. 80-81. These asset-based fees, known as expense ratios, are expressed in terms of a percentage of assets under management. *Id.* at 49. The plan's expense ratios decreased over the proposed class period: from a range of 0.05%-0.98% in 2011 down to a range of 0.04%-0.87% in 2016. *Id.* at 237, 242-243. In fact, only one of the 78 investment options charged an expense ratio anywhere near 0.87% in 2016. *Id.* at 237. The remaining options ranged from 0.04%-0.57%. *Ibid.*

C. Proceedings Below

1. In August 2016, six participants in the University of Pennsylvania's plan (respondents here) filed this putative class action alleging that the university, its investment committee, and its Vice President of Human Resources (petitioners) breached their fiduciary duties under ERISA. In relevant part, the amended complaint alleges that petitioners breached those duties by failing to control the recordkeeping fees paid by plan participants through the investment options' expense ratios (Count III) and by including options in the plan lineup that, according to respondents, are too expensive and poorly performing (Count V). Am. Compl. ¶¶ 196-204, 210-223. Respondents contend that "[e]ach defendant is personally liable * * *

to make good to the Plan any losses to the Plan resulting from the breaches of fiduciary duties alleged in [these] Count[s]." *Id.* at 203, 222.

2. The district court granted petitioners' motion to dismiss the amended complaint. App., *infra*, 60a-91a. Adhering to the *Twombly* pleading standard, the court concluded that the allegations failed to "meet the plausibility threshold." *Id.* at 79a. Petitioners' alleged "actions are at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." *Ibid.* (quoting *Twombly*, 550 U.S. at 554); see also *id.* at 80a.

3. A divided panel of the court of appeals reversed the dismissal of Counts III and V. App., *infra*, 1a-41a.

a. The Third Circuit majority began by analyzing the pleading standards for ERISA claims. In particular, it criticized the district court's reliance on *Twombly*, which the majority believed to be "specific to antitrust cases." App., *infra*, 8a. The majority said that it "declined to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." *Id.* at 9a. And it held that the district court "erred" to the extent that it had required respondents "to rule out lawful explanations for [petitioners'] conduct." *Ibid.*

Applying its preferred pleading standard, the majority reversed the dismissal of Counts III and V. It felt constrained to "take[ ] as true" respondents' allegation that petitioners' decision-making process "must have

been flawed if [they] retained expensive underperformers over better performing, cheaper alternatives." App., *infra*, 21a. While acknowledging that ERISA fiduciaries have discretion to manage plans in various permissible ways, the majority nevertheless rejected petitioners' attempt to defend the prudence of its decision-making because such an "argument goes to the merits and is misplaced at this early stage." *Id.* at 25a.

b. Judge Roth dissented in relevant part. App., *infra*, 42a-59a. She voiced concern about the growing trend of ERISA class action litigation against corporations and universities that administer large retirement plans. *Id.* at 42a-43a. In her view, "cases such as this one [should] be carefully scrutinized in order not to permit implausible allegations to result in a large settlement, under which a substantial portion of the funds that are to be reimbursed to retirement plans are instead diverted to attorneys' fees." *Id.* at 44a. And to avoid discouraging universities from offering these plans and discouraging individuals from serving as fiduciaries for them, courts "enforcing the pleading standards under *Twombly* and *Iqbal* * * * must take great care to allow only plausible, rather than possible, claims to withstand a motion to dismiss." *Id.* at 49a. In Judge Roth's view, respondents' claims did not cross the plausibility threshold. *Id.* at 54a-59a.

4. Petitioners sought rehearing en banc. Over the dissenting vote of Judge Jordan, and without the participation of Judges Restrepo, Bibas, or Phipps (or Judge Roth, who holds senior status), the en banc court

denied rehearing on July 17, 2019. App., *infra*, 92a-93a.

REASONS FOR GRANTING THE PETITION

By holding that *Twombly*'s pleading requirements do not govern ERISA claims, the Third Circuit contradicted the decisions of this Court and four courts of appeals. That holding then led the Third Circuit into further conflict with those courts when it came time to assess the plausibility of respondents' claims: allegations that sufficed for the Third Circuit have failed in the Second, Seventh, Eighth, and Ninth Circuits. Decisions in those circuits (mostly ignored by the panel majority) have upheld the dismissal of complaints premised on the sorts of allegations that respondents advance. Had the Third Circuit viewed respondents' complaints with the proper scrutiny, consistent with *Twombly*, it would have reached the same result.

This Court should grant review to reinforce the applicability of *Twombly* and resolve the numerous conflicts that the Third Circuit's ruling creates. That ruling sows enormous confusion for plan fiduciaries, who must decipher conflicting messages from the Third Circuit and other courts, without real guidance as to what decisions they must make now to avoid liability later. As the current wave of university litigation shows, it is easy to become the target of a lawsuit like this. This Court's guidance is urgently needed, and this case provides an ideal vehicle.

A. The Third Circuit's Departure From *Twombly* Conflicts With Decisions Of This Court And Other Circuits

The district court stressed that while respondents' allegations were perhaps consistent with imprudent plan management, they were equally consistent with prudent decision-making. "As in *Twombly*, the actions are at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." App., *infra*, 79a (quoting *Twombly*, 550 U.S. at 554); see also *id.* at 80a (respondents' allegations are "perhaps consistent with fiduciary breach, but also well in line with a wide swath of other rational actions" (citing *Twombly*, 550 U.S. at 554)); *id.* at 87a (respondents' theory "*may* be consistent with a breach of fiduciary duty, but does not show that the plaintiffs have 'nudged their claims across the line from conceivable to plausible'" (quoting *Twombly*, 550 U.S. at 570)).

This reasoning earned the Third Circuit's reproach. It did not disagree with the district court that respondents' allegations were as consistent with lawful behavior as they were with imprudent plan management. Instead, it faulted the district court simply for applying that pleading standard—in the Third Circuit's words, for "observing at various points in its memorandum that '[a]s in *Twombly*, the actions are at least "just as much in line with a wide swath of rational and competitive business strategy" in the market as they are with a fiduciary breach.'" App., *infra*, 8a (citations omitted). According to the panel, "*Twombly*'s

discussion of alleged misconduct that is 'just as much in line with a wide swath of rational and competitive business strategy' is specific to antitrust cases." *Ibid.* Believing that view supported by *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009), the panel "declined to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." App., *infra*, 9a. It also held that "[t]o the extent that the District Court required [respondents] to rule out lawful explanations for [petitioners'] conduct, it erred." *Ibid.*

The panel fundamentally misunderstood *Twombly*. No matter the subject area, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The complaint must contain "allegations plausibly suggesting (not merely consistent with)" the alleged violation of law. *Id.* at 557. In the antitrust conspiracy context, allegations of parallel conduct are inadequate because they are "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. Allegations of illegality may thus be undercut by "obvious alternative explanation[s]." *Id.* at 567. These principles apply equally to respondents' allegations, except that here the allegations are "merely consistent with" fiduciary breach (rather than conspiracy) and "just as much in line" with prudent and loyal (rather than parallel) acts.

Iqbal confirms that *Twombly*'s reasoning extends beyond antitrust law. There the Court reiterated that dismissal is proper "[w]here a complaint pleads facts

that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The *Iqbal* plaintiff's problem was that his nonconclusory allegations were "consistent with" the defendants' purposefully targeting Muslim individuals "because of their race, religion, or national origin," but did not "plausibly establish this purpose" because of "more likely explanations." *Id.* at 681. Specifically, the defendants' actions "were likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682. "As between that 'obvious alternative explanation' for the arrests" and "purposeful, invidious discrimination * * * , discrimination [was] not a plausible conclusion." *Ibid.* (quoting *Twombly*, 550 U.S. at 567).

In addition to replicating *Twombly*'s analysis, *Iqbal* unequivocally rejected the claim that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute":

> This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard

> for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike, see 550 U.S., at 555-556, and n. 3.

Id. at 684.

The Court soon made clear that *Twombly* also applies to ERISA suits. In *Dudenhoeffer*, it rejected a special "presumption of prudence" that some courts had adopted in the context of ERISA plans that allow participants to invest in the employer's stock. 573 U.S. at 412. The Court concluded that fiduciaries of such plans are generally "subject to the duty of prudence just as other ERISA fiduciaries are" and therefore needed no special presumption to protect them from "meritless, economically burdensome lawsuits." *Id.* at 419, 424. Instead, courts should "weed[ ] out meritless claims" through "careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Id.* at 425 (citing *Iqbal*, 556 U.S. at 677-680; *Twombly*, 550 U.S. at 554-563). But, critically, the Court remanded the case, instructing that "the Court of Appeals should apply the pleading standard as discussed in *Twombly* and *Iqbal*" in light of a few further, ERISA-specific considerations. *Id.* at 426.

Until now, no federal appellate court had ever denied *Twombly*'s applicability in the ERISA context. The Third Circuit purported to draw support from the Eighth Circuit's *Braden* decision, App., *infra*, 9a, but that ruling actually refutes the Third Circuit's approach by acknowledging that the *Twombly*/*Iqbal*

standard "applies uniformly in 'all civil actions,'" *Braden*, 588 F.3d at 597 (citation omitted). True, the Eighth Circuit recognized that plaintiffs need not "rule out *every* possible lawful explanation" for conduct that otherwise raises a plausible inference of imprudence. *Ibid.* But even so, "a plaintiff cannot proceed if his allegations are '"merely consistent with" a defendant's liability.'" *Ibid.* (quoting *Iqbal*, 556 U.S. at 678).

The Eighth Circuit also recognized that "where there is a concrete, 'obvious alternative explanation' for the defendant's conduct[,] a plaintiff may be required to plead additional facts tending to rule out the alternative." *Braden*, 588 F.3d at 597 (quoting *Iqbal*, 556 U.S. at 682). That application of *Twombly* and *Iqbal* clearly contradicts the Third Circuit's ruling, which concluded that the district court "erred" by requiring respondents "to rule out lawful explanations for [petitioners'] conduct." App., *infra*, 9a.

In short, there is no basis for the Third Circuit's statement that *Braden* "declined to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." App., *infra*, 9a. *Braden* conscientiously applied *Twombly* and *Iqbal* to ERISA claims, as *Dudenhoeffer* also requires.

More recent ERISA case law from the Eighth Circuit reinforces the divergence between the Third and Eighth Circuits. In the latter circuit, but not the former, if the complaint's allegations "are merely consistent with liable acts, the complaint 'stops short of the line between possibility and plausibility.'" *Meiners*,

898 F.3d at 822. "When both lawful and unlawful conduct would have resulted in the same decision, a plaintiff does not survive a motion to dismiss by baldly asserting that unlawful conduct occurred." *Id.* at 824.

The panel's decision also conflicts with decisions from other circuits. The Seventh Circuit, for example, recognizes that courts must "[a]pply[] the pleading standards enunciated in *Bell Atlantic Corp.* v. *Twombly*" to breach of fiduciary duty claims under ERISA. *Hecker* v. *Deere & Co.*, 569 F.3d 708, 710 (7th Cir. 2009) (*Hecker II*). Similarly, the Second Circuit holds that courts may not "draw a reasonable inference of liability when the facts alleged are * * * merely consistent with[] a finding of misconduct." *St. Vincent*, 712 F.3d at 719 (citation omitted).

This should not be controversial. It is entirely consistent with how courts evaluate complaints in many areas of the law. Hence a recent Ninth Circuit ERISA ruling grounded its statement of the pleading standard for fiduciary breach claims in one of that court's applications of *Twombly* to securities claims: "[w]here there are two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiff cannot offer allegations that are merely consistent with its favored explanation but are also consistent with the alternative explanation." *White* v. *Chevron Corp.*, 752 Fed. Appx. 453, 454 (9th Cir. 2018) (quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)) (internal quotation marks and brackets omitted). "Something more is needed, such as facts tending to exclude the possibility that the

alternative explanation is true, in order to render plaintiff's allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* at 454-455 (citation and ellipsis omitted).

The Third Circuit stands alone in holding ERISA complaints to lower standards. And unfortunately that idiosyncratic error was outcome-determinative here. The only point on which the panel majority faulted the district court was its *Twombly*-based scrutiny of respondents' allegations. App., *infra*, 8a, 23a-24a. In contrast, the Third Circuit refused to consider petitioners' alternative explanations showing why the challenged conduct was well within the realm of a prudent fiduciary's sound discretion. It believed that such arguments went "to the merits and [were] misplaced at this early stage," where supposedly the Court could not entertain any "inferences in [petitioners'] favor." *Id.* at 25a.

As discussed next, the allegations that the Third Circuit uncritically accepted have been found insufficient as a matter of law in circuits that adhere to *Twombly*. Under this Court's precedents, the Third Circuit was not free to disregard any aspect of *Twombly*'s pleading standard, and its decision to do so should be reversed.[3]

---

[3] In *Retirement Plans Committee of IBM* v. *Jander*, No. 18-1165 (argued Nov. 6, 2019), the Court is considering the appropriate pleading standard under *Dudenhoeffer* for plans offering the stock of the employer. Because that case is likely to reinforce *Twombly*'s applicability to ERISA claims, the Court may wish to hold this petition pending its decision in *Jander*.

B. The Third Circuit's Diluted Pleading Standard Conflicts With Decisions Of This Court And Other Circuits

In criticizing the district court's reliance on *Twombly*, the Third Circuit made clear that a complaint can survive dismissal merely by making allegations that are consistent with either prudent or imprudent behavior. Indeed, the majority conceded that respondents "may not have directly alleged how [petitioners] mismanaged the Plan." App., *infra*, 23a-24a. But it nonetheless let their claims proceed because the allegations supposedly furnished "circumstantial evidence from which the District Court could 'reasonably infer' that a breach had occurred." *Id.* at 24a (quoting *St. Vincent*, 712 F.3d at 718). This approach conflicts with the approach taken by other circuits, which require allegations of conduct inconsistent with lawful plan management.

1. Although the Third Circuit cited *St. Vincent* on this point, the Third Circuit did not actually apply the legal standard that the Second Circuit adopted in that case. Far from suggesting that complaints need not establish how alleged conduct amounted to a breach, the Second Circuit held that plaintiffs must "allege facts, accepted as true, showing that a prudent fiduciary in like circumstances would have acted differently." *St. Vincent*, 712 F.3d at 720. The Eighth Circuit has adopted the same requirement: alleged evidence of mismanagement must "show that 'a prudent fiduciary in like circumstances would have acted differently.'" *Meiners*, 898 F.3d at 822 (quoting *St. Vincent*, 712 F.3d

at 720). In both the Second and Eighth Circuits, then, plaintiffs' allegations must show that the way the defendants managed the plan was inconsistent with the conduct of a prudent fiduciary.

That requirement is also consonant with this Court's ruling in *Dudenhoeffer*. Focusing on a fiduciary decision to make the employer's stock available to plan participants, *Dudenhoeffer* required plaintiffs to "plausibly allege an alternative action * * * that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 573 U.S. at 428. Again, plaintiffs must allege conduct inconsistent with prudent plan management.

By allowing respondents to allege conduct that is fully consistent with either prudent or imprudent behavior and that does not establish how petitioners mismanaged the plan, the Third Circuit adopted a pleading standard completely contrary to these other courts' rulings.

2. These differences in pleading standards lead to differences in case outcomes. Other circuits affirm dismissal of complaints making the allegations that respondents make here. Such allegations can be made about countless retirement plans and do not suffice to show that a prudent fiduciary would have acted differently.

a. Consider, for example, respondents' core contention that the plan overpaid for its administrative expenses through fees calculated as a percentage of plan participants' holdings. App., *infra*, 19a. Because

these fees were charged in proportion to the assets under management rather than as a flat, per-person fee, respondents object that these "percentage-based fees went up as assets grew, despite there being no corresponding increase in recordkeeping services." *Ibid.* The complaint asserts that petitioners should have tried to renegotiate the fees or moved to lower-cost recordkeeping service providers. *Ibid.*

These allegations have repeatedly failed in the Seventh Circuit. For example, in *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 672 (7th Cir. 2011), the plaintiffs alleged that the plan sponsor could have "exercise[d] 'buying power' by negotiating lower fees" or "insist[ing] that mutual funds charge a capitation fee (an annual flat price per investor) in lieu of expenses as a percentage of capital under management." But Judge Easterbrook's opinion for the court noted that such renegotiations may conflict with the securities laws and that some participants—especially younger investors with small balances—might prefer a percentage-based fee to a flat fee: "flat payments per participant may help some participants but hurt others, depending on the size of each participant's account." *Id.* at 672-673; see also *Hecker II*, 569 F.3d at 711 (finding allegation that defendants "did not negotiate presumptively lower * * * fees" insufficient to state a claim).

The Ninth Circuit likewise rejects allegations that a plan fiduciary could have "sought lower fees for administration of the fund." *White*, 752 Fed. Appx. at 455. Such allegations do not make "it more plausible than

not that any breach of a fiduciary duty ha[s] occurred." *Ibid.*

b. Similarly unsuccessful are respondents' allegations that defendants impermissibly selected higher-cost, retail-class investment options instead of lower-cost, institutional-class shares. App., *infra*, 20a. As the district court observed, *id.* at 85a, the Seventh Circuit has repeatedly rejected allegations that "Plans were flawed because [the defendant] decided to accept 'retail' fees." *Hecker II*, 569 F.3d at 711; see also *Hecker* v. *Deere & Co.*, 556 F.3d 575, 580-581, 586 (7th Cir. 2009) (*Hecker I*); *Loomis*, 658 F.3d at 671-672. The allegation that a plan sponsor "should have offered only 'wholesale' or 'institutional' funds" has always "flopped" in the Seventh Circuit. *Loomis*, 658 F.3d at 671.

But it was not a flop here, even though the University of Pennsylvania plan was far better in this regard than the plans in *Hecker* and *Loomis*. The university's plan offered 44 institutional-class investment options—over half of all options—when this lawsuit was filed in 2016. C.A. App. 237.[4] That number had risen during the class period—"a shift," Judge Roth observed, "that demonstrates that defendants, in choosing investment options, were not deliberately ignoring the benefits of institutional-class shares." App., *infra*, 57a. Respondents' argument here really is "that the

[4] For CREF investment options, the share class with the lowest expenses is known as an "R3" class rather than an "institutional" class. See C.A. App. 233.

number of 'retail funds' must be zero," *Loomis*, 658 F.3d at 671, which is a non-starter in the Seventh Circuit but now a success in the Third.

c. Another major departure by the Third Circuit concerns the level of scrutiny given to allegations that particular investment options underperformed during the class period. Just as other circuits do not obligate fiduciaries "to find and offer the cheapest possible fund," *Hecker I*, 556 F.3d at 586, neither do they obligate fiduciaries "to pick the best performing fund," *Meiners*, 898 F.3d at 823.

And for good reason. This Court has noted "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing [publicly traded] stock are implausible as a general rule." *Dudenhoeffer*, 573 U.S. at 426. In the same vein, the Second Circuit has stressed that underperformance allegations can be little more than a "hindsight critique of returns," which cannot show that a fiduciary acted imprudently at the time the fiduciary made the challenged decision. *St. Vincent*, 712 F.3d at 713, 716 (citation omitted). Plaintiffs accordingly must show that a reasonable fiduciary "would have acted differently"—for example, by not offering the investment because it was "so plainly risky" or by offering "a superior alternative" instead. *Id.* at 719-720; see also *White*, 752 Fed. Appx. at 455 (rejecting allegations that the plan sponsor "could have chosen different vehicles for investment that performed better during the relevant period").

The Eighth Circuit also follows that approach. In *Meiners*, the court rejected underperformance allegations where the plaintiff pleaded that one fund, "which he allege[d] [was] comparable, performed better" than investment options in the plan. 898 F.3d at 823. But "[t]he fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [plan's funds] were an imprudent choice at the outset." *Ibid.* Courts therefore may and should review fund "prospectuses," even when "not attached to the Complaint," to ensure that the comparator fund provides a "meaningful benchmark." *Ibid.*

Here, the Third Circuit relieved respondents of that requirement. The majority accepted, without any scrutiny at all, respondents' allegations that two of the plan's investment options—the CREF Stock Account and TIAA Real Estate Account—consistently underperformed the benchmarks that respondents put forward as a basis for comparison. App., *infra*, 21a. Other courts would have entertained petitioners' arguments that respondents were making apples-to-oranges comparisons that disregarded the particular investment strategies of the CREF Stock Account and TIAA Real Estate Account. See *Wilcox* v. *Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281, at *4-5, *10-11 (D.D.C. Jan. 8, 2019) (explaining differences between the CREF Stock Account and TIAA Real Estate Account and respondents' comparators). They also would have entertained petitioners' arguments that a prudent fiduciary may have decided to retain those two options

because they are bundled with the popular TIAA Traditional Annuity. But the Third Circuit treated all such arguments as off-limits at the pleading stage, contrary to *Meiners* and *St. Vincent*.

* * *

Instead of considering whether "a prudent fiduciary in like circumstances would have acted differently," *St. Vincent*, 712 F.3d at 720, the Third Circuit accepted allegations that were fully consistent with prudent or imprudent behavior because the complaint was "detailed and specific," App., *infra*, 27a. In doing so, the Third Circuit applied a pleading standard and accepted allegations that other courts reject. The Court should grant certiorari to resolve these circuit conflicts and address the Third Circuit's outlier approach to fiduciary duty claims under ERISA.

C. This Court's Review Is Urgently Needed And This Is An Ideal Vehicle

As this Court has often stressed, uniformity is particularly important in this setting. ERISA was enacted to replace state-by-state regulation with a comprehensive federal framework: indeed, its purpose "is to provide a uniform regulatory regime over employee benefit plans." *Aetna Health*, 542 U.S. at 208. Employers are not required to establish benefit plans for their employees, *Conkright*, 559 U.S. at 516, but ERISA encourages them to do so by "assuring a predictable set of liabilities, under uniform standards of primary conduct," *Rush Prudential*, 536 U.S. at 379.

The preceding discussion shows that the Third Circuit's ruling undermines this promise of uniformity. Allegations that fall flat in other circuits raised an inference of fiduciary breach here under the Third Circuit's novel rejection of *Twombly*. And the majority gave no explanation of what steps fiduciaries should take to stave off costly litigation like this.

That is particularly troubling because the allegations in this case are extremely easy to make. Roughly twenty prominent universities have found themselves subject to substantively identical allegations in the past three years.[5] They commonly offer many of the same investment options from TIAA-CREF, which has

---

[5] *Short* v. *Brown Univ.*, No. 17-cv-318 (D.R.I. filed July 6, 2017); *Cates* v. *Trs. of Columbia Univ. in City of N.Y.*, No. 16-cv-6524 (S.D.N.Y. filed Aug. 17, 2016); *Cunningham* v. *Cornell Univ.*, No. 16-cv-6525 (S.D.N.Y. filed Aug. 17, 2016); *Clark* v. *Duke Univ.*, No. 16-cv-1044 (M.D.N.C. filed Aug. 10, 2016); *Henderson* v. *Emory Univ.*, No. 16-cv-2920 (N.D. Ga. filed Aug. 11, 2016); *Wilcox* v. *Georgetown Univ.*, No. 18-cv-422 (D.D.C. filed Feb. 23, 2018); *Stanley* v. *George Wash. Univ.*, No. 18-cv-878 (D.D.C. filed Apr. 13, 2018); *Kelly* v. *Johns Hopkins Univ.*, No. 16-cv-2835 (D. Md. filed Aug. 11, 2016); *Tracey* v. *Mass. Inst. of Tech.*, No. 16-cv-11620 (D. Mass. filed Aug. 9, 2016); *Sacerdote* v. *N.Y. Univ.*, No. 16-cv-6284 (S.D.N.Y. filed Aug. 9, 2016); *Divane* v. *Nw. Univ.*, No. 16-cv-8157 (N.D. Ill. filed Aug. 17, 2016); *Nicolas* v. *Trs. of Princeton Univ.*, No. 17-cv-3695 (D.N.J. filed May 23, 2017); *Daugherty* v. *Univ. of Chi.*, No. 17-cv-3736 (N.D. Ill. filed May 18, 2017); *D'Amore* v. *Univ. of Rochester*, No. 18-cv-6357 (W.D.N.Y. filed May 11, 2018); *Munro* v. *Univ. of S. Cal.*, No. 16-cv-6191 (C.D. Cal. filed Aug. 17, 2016); *Cassell* v. *Vanderbilt Univ.*, No. 16-cv-2086 (M.D. Tenn. filed Aug. 10, 2016); *Davis* v. *Wash. Univ. in St. Louis*, No. 17-cv-1641 (E.D. Mo. filed June 8, 2017); *Vellali* v. *Yale Univ.*, No. 16-cv-1345 (D. Conn. filed Aug. 9, 2016).

long been a leading provider of retirement products for universities and other non-profit institutions. See Saxon & Powell, 127 J. Tax'n at 54-55. TIAA-CREF offers the TIAA Traditional Annuity, which is by far the most popular investment option in the University of Pennsylvania plan, as well as the CREF Stock Account (the second most popular option) and the TIAA Real Estate Account. See C.A. App. 160-161; p. 9, *supra*. But any university whose plan offers such options is now at risk of being sued on the theory that these investments have not produced high enough returns. So is any university whose plan relies on asset-based recordkeeping fees or allows participants to invest in any non-institutional share classes. Countless institutions meet this description, and that is why so many now face class action litigation.

The best targets are the institutions with the biggest plans. As Judge Roth noted, the "pressure to settle increases with the size of the plan, regardless of the merits of the case." App., *infra*, 42a. "Alleged mismanagement of a $400,000 plan will expose fiduciaries to less liability than mismanagement of a $4 billion plan," like the University of Pennsylvania's plan. *Ibid.* "[N]otwithstanding the strength of the claims, a plaintiff's attorney, seeking a large fee, will target a plan that holds abundant assets." *Id.* at 42a-43a. For good reason, Judge Roth was "concerned that this is the case both here and in numerous other lawsuits that have targeted large corporations and universities that administer some of the largest retirement plans in the country." *Id.* at 43a.

The proof of that concern is in the settlements. With only one trial verdict so far in these look-alike cases—a complete defense verdict, *Sacerdote*, 328 F. Supp. 3d at 317—six universities have still agreed to pay more than $65 million collectively to end the litigation against them. See Wille, *MIT Inks Largest Settlement in College Retirement Plan Lawsuits*.

These settlements can easily make sense from a defendant's perspective. Even a tiny probability of liability is menacing when plaintiffs claim $358 million. *Sacerdote*, 328 F. Supp. 3d at 317. And regardless of the amount of possible liability, the Second Circuit has explained that "*in terrorem*" settlements can happen simply because "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous." *St. Vincent*, 712 F.3d at 719 (citation omitted). Northwestern University, for example, has produced over 450,000 pages of documents and incurred nearly $4 million in discovery-related expenses. See Chamber of Commerce Amicus Br. at 18, *Divane* v. *Nw. Univ.*, No. 18-2569 (7th Cir. Mar. 21, 2019).

University defendants—"often staff members who volunteer to serve" on plan committees, App., *infra*, 43a—should not have to bear these burdens without the "careful judicial consideration" at the pleading stage that this Court's precedent requires. *Dudenhoeffer*, 573 U.S. at 425.

This case is a perfect vehicle for this Court to take up these important issues. Both questions are cleanly presented. The Third Circuit majority squarely held

that *Twombly*'s pleading requirements do not apply to ERISA breach of fiduciary duty claims. App., *infra*, 8a-9a. Under the Third Circuit's holding, alleged conduct that is consistent with both lawful and unlawful behavior suffices to state a claim. *Ibid.* Plaintiffs need not overcome "lawful explanations" for the alleged conduct, and defendants may not press those alternative explanations at the pleading stage. *Id.* at 9a, 24a-26a. The Third Circuit did not question the district court's conclusion that respondents' allegations are fully consistent with prudent behavior. It simply rejected the district court's legal standard, ruling instead that inconsistency with prudent plan management is not required.

The University of Pennsylvania and its plan fiduciaries have worked hard to manage and make improvements to the university's plan over the years. There is no allegation that they personally benefited in any way from the alleged decisions. On the contrary, they have every reason and incentive to offer university employees the best possible options to save for retirement—and the university provides voluntary matching contributions to help them do so. App., *infra*, 5a. Far from wanting to see retirement savings wasted, petitioners have worked to steadily reduce the costs of the plan's investment options over the proposed class period. They increased the number of institutional-class shares available and reduced the investment options' expense ratios overall. Pet. C.A. Br. 10. If respondents' garden-variety allegations can subject petitioners to costly class-action litigation

despite all their efforts, it is hard to imagine a retirement plan fiduciary that can rest easy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@
morganlewis.com

BRIAN T. ORTELERE
MORGAN, LEWIS &
BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS &
BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

Counsel for Petitioners

DECEMBER 2019