No. 17-3244

In the United States Court of Appeals for the Third Circuit

JENNIFER SWEDA; BENJAMIN A. WIGGINS; ROBERT L. YOUNG; FAITH PICKERING; PUSHKAR SOHONI; REBECCA N. TONER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Pennsylvania Matching Plan,

Appellants,

v.

UNIVERSITY OF PENNSYLVANIA; INVESTMENT COMMITTEE; JACK HEUER,

Appellees.

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania
No. 2:16-cv-04329-GEKP

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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RULE 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decisions of this court and the Supreme Court in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), and that this appeal involves a question of exceptional importance, *i.e.*, whether ERISA[1] fiduciaries who offer participants a wide, reasonable, and low-cost variety of investment options, who continue to monitor and improve those options, and who act with undivided loyalties, are nonetheless vulnerable to liability because of facts that are common in similar retirement plans.

[1] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461.

BACKGROUND

A recent wave of ERISA class action litigation seeks to impose massive liability on many of the nation's most prominent universities.[2] This is the first such case to be decided by an appellate court. Plaintiffs claim the University of Pennsylvania violated ERISA's duty of prudence—not because participants in the University's retirement Plan lost their savings or were forced into bad investments, but because some investment options offered to participants supposedly could have been marginally cheaper. Reversing the court below, a sharply divided panel held that Plaintiffs stated a plausible claim of imprudence. In so holding, the majority departed from Third Circuit and Supreme Court precedent.

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[2] *See, e.g.*, *Wilcox v. Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281 (D.D.C. Jan. 8, 2019); *Davis v. Wash. Univ. in St. Louis*, No. 17-cv-1641, 2018 WL 4684244 (E.D. Mo. Sept. 28, 2018); *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Divane v. Nw. Univ.*, No. 16-cv-8157, 2018 WL 2388118 (N.D. Ill. May 25, 2018); *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673 (D. Conn. 2018); *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056 (M.D. Tenn. 2018); *Nicolas v. Trs. of Princeton Univ.*, No. 17-cv-3695, 2017 WL 6514662 (D.N.J. Dec. 20, 2017); *Cunningham v. Cornell Univ.*, No. 16-cv-6525, 2017 WL 4358769 (S.D.N.Y. Sept. 29, 2017); *Kelly v. Johns Hopkins Univ.*, No. 16-cv-2835, 2017 WL 4310229 (D. Md. Sept. 28, 2017); *Daugherty v. Univ. of Chi.*, No. 17-cv-3736, 2017 WL 4227942 (N.D. Ill. Sept. 22, 2017); *Cates v. Trs. of Columbia Univ. in City of N.Y.*, No. 16-cv-6488, 2017 WL 3724296 (S.D.N.Y. Aug. 28, 2017); *Clark v. Duke Univ.*, No. 16-cv-1044, 2017 WL 4477002 (M.D.N.C. May 11, 2017); *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344 (N.D. Ga. 2017); *Munro v. Univ. of S. Cal.*, No. 16-cv-6191 (C.D. Cal. filed Aug. 17, 2016); *Stanley v. George Wash. Univ.*, No. 18-cv-878 (D.D.C. filed Apr. 13, 2018).

First, the panel majority effectively overruled this Court's holding in *Renfro*, 671 F.3d 314. As Judge Roth observed in dissent, the central question here is "virtually identical to the one addressed by this Court seven years ago, in *Renfro*." Dissent 3. That case examined how to plead a claim of imprudence with allegations like those in this case. The *Renfro* plaintiffs argued that plan "administrative fees," including "the fees associated with each retail mutual fund, [were] excessive in light of the services rendered as compared to other, less expensive, investment options not included in the plan." 671 F.3d at 319. But this Court ruled these excessive-fee allegations did not plausibly suggest a flaw in the fiduciary's decision-making "process," since the plan offered "funds with a variety of risk and fee profiles, including low-risk and low-fee options." *Id.* at 327 (citation omitted). The same allegations nonetheless succeeded before the panel here, even though the Plan is objectively *superior* to the *Renfro* plan. Comparison proves the point:

> **Plan A** offers 73 investment options, 4 of which are lower-fee "institutional" funds. Plan A covers administrative costs through asset-based charges on these funds, with participants paying all-inclusive (*i.e.*, investment and administrative) fees of 0.10% to 1.20%, depending on the funds they select.
>
> **Plan B** offers 78 investment options, 44 of which are lower-fee "institutional" funds. Plan B covers administrative costs through asset-based charges, with participants paying all-inclusive fees of 0.04% to 0.57%, except for a single fund charging 0.87%. Plan B's fiduciaries reduce these fees over the relevant period.

Which fact-pattern—which *Renfro* makes the "backdrop" for evaluating these claims, 671 F.3d at 326—plausibly suggests an imprudent fiduciary process? According to the panel majority: Plan B, the Plan offered by the University of Pennsylvania. Plan A was *Renfro*, where it was implausible to infer an imprudent fiduciary process from the *same* allegations Plaintiffs make here: prudent fiduciaries do not offer "retail" share classes and avoid "asset-based" fees. *Id.* at 318-19. The majority never explained how claims based on Plan B get past the pleading stage when claims based on Plan A do not. The inescapable conclusion, as Judge Roth recognized, is that the majority "depart[ed] from the core principles in *Renfro*." Dissent 3.

ERISA fiduciaries are now in the unenviable position of evaluating their plans under the irreconcilable holdings of *Renfro* and this case. But the majority ruling offers them no real guidance. It never identifies the problem with the University's Plan, absent from *Renfro*, that fiduciaries must avoid. On the contrary, it opened the door to discovery, and the threat of individual liability, for a plan that was by any objective measure *superior* to the plan approved under binding circuit precedent. Rehearing is warranted to restore uniformity to this Court's ERISA decisions and to provide coherent guidance to fiduciaries who volunteer to help administer employers' retirement plans.

Second, rehearing is warranted because the panel majority rejected a pleading standard set by the Supreme Court. The majority *faulted* the district court for relying on *Twombly*, 550 U.S. 544, because, in the majority's words, the relevant *Twombly* principle "is specific to antitrust cases." Majority 8. But the Supreme Court unequivocally rejects the idea that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." *Iqbal*, 556 U.S. at 684. In fact, it has specifically held that *Twombly* governs *ERISA cases*, emphasizing its standard is an "important mechanism for weeding out meritless claims." *Dudenhoeffer*, 573 U.S. at 425-26. Here, the majority turned *Dudenhoeffer* on its head, somehow taking the Supreme Court's instructions to use *Twombly* to weed out meritless claims as a license to limit *Twombly* and allow a complaint past the pleading stage because it is "detailed and specific." Majority 25.

Third, the panel's decision threatens all ERISA fiduciaries, both those already embroiled in the recent wave of litigation and those struggling with how to manage plans going forward. Dozens of universities have been sued, in cookie-cutter fashion, for the same allegedly imprudent decisions. Even before the panel's ruling, universities unable to obtain full dismissal at the pleading stage have faced immense pressure to settle, irrespective of the merits of Plaintiffs' theories. Such settlements "avoid (1) expensive discovery and further motion practice, (2) potential individual liability for named fiduciaries, and (3) the prospect of damages calculations, after lengthy litigation, with interest-inflated liability totals." Dissent 1 (footnote omitted). To date, there have been four publicly announced, multimillion-dollar settlements in university-plan cases. Meanwhile, in the lone case that has gone to trial, the university obtained judgment completely in its favor, on largely indistinguishable claims. Because of the litigation costs and negative publicity associated with defending these actions, however, multimillion-dollar settlements can look comparatively attractive. That is why, even "at the earliest stage in litigation," Majority 7, courts must apply the correct legal standards and engage in the careful scrutiny that ERISA and Supreme Court precedent demand. The panel's decision falls short of that responsibility, and rehearing is warranted.

ARGUMENT

A motion to dismiss is an "important mechanism for weeding out meritless claims" for an alleged breach of ERISA's duty of prudence. *Dudenhoeffer*, 573 U.S. at 425. Such a motion "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Id.* Specifically, Plaintiffs must offer factual allegations sufficient to create a plausible inference that the fiduciary's decision-making "process was flawed." *Renfro*, 671 F.3d at 327 (citation omitted). Though centered on process, this is an objective inquiry: "Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway." *Id.* at 322 (citation omitted); *see also Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam) (reversing appellate court that "failed to assess whether the complaint in its current form '[had] plausibly alleged' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good'" (citation omitted)).

The panel here misapplied these principles. Instead of identifying allegations showing that no fiduciary using a prudent decision-making process would have done what Defendants did, the majority relied on the same allegations that were rejected as a basis for liability in *Renfro* and that are, at most, "merely consistent with" imprudence, *Twombly*, 550 U.S. at 557, but equally consistent with lawful behavior.

I. The Panel Decision Is Inconsistent With *Renfro*.

The question here is "virtually identical" to the question in *Renfro*. Dissent 3. In both cases, this Court had to consider whether the complaint's allegations, taken as a whole, plausibly established an imprudent fiduciary-decision-making process. And in both cases, plaintiffs targeted retirement plans with dozens of funds in which participants were able, but not required, to invest, on the theory that some options charged "excessive" fees. Following the lead of the Seventh and Eighth Circuits, *Renfro* held that such "claims challenging fund selection" must first be evaluated "against the backdrop of the reasonableness of the mix and range of investment options." 671 F.3d at 326 (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)).

That does not mean, however, that a reasonable mix and range of investment options "insulates plan fiduciaries from liability." Majority 16. Nor do Defendants advocate that position, as the majority suggests. Defendants merely support the approach endorsed by *Renfro*, *Hecker*, and *Braden*: When a plan offers a sufficient mix and range of options, the plaintiff must do more to state a claim than allege that some options could have been obtained more cheaply, through more effective use of "bargaining power" or the like. *See Renfro*, 671 F.3d at 319, 327-28; *Hecker*, 556 F.3d at 586; *Braden*, 588 F.3d at 596 n.7. As Judge Roth explained, if the lineup as a whole is sound, ERISA requires "other allegations of mismanagement" to nudge the complaint past the pleading stage. Dissent 15; *see, e.g.*, *Renfro*, 671 F.3d at 327 (discussing the meager range of options and alleged "kickback scheme" in *Braden*); *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) ("significant allegations of wrongdoing"); *Tibble v. Edison Int'l*, 729 F.3d 1110, 1137 (9th Cir. 2013) ("fail[ure] to investigate" superior alternatives, where asset-based fees inured to employer's benefit), *vacated on other grounds*, 135 S. Ct. 1823 (2015).

The Plan here offers "a greater mix and range of options" than the plan approved in *Renfro*. Dissent 13-14. So Plaintiffs need other allegations to suggest imprudent fiduciary conduct. But they do not allege a limited investment menu coupled with kickbacks that all but forced participants into unreasonable investments (as in *Braden*), or that the employer improperly benefited from offering higher-cost options (as in *Tussey* and *Tibble*). Instead, they press three categories of allegations: (1) using an asset-based fee to pay for administrative expenses, rather than a flat, per-participant fee; (2) fee arrangements set against the backdrop of market competition rather than leveraging the Plan's bargaining power through individualized negotiations; and (3) offering some retail-class funds alongside dozens of lower-cost institutional-class options. *See* Majority 17-18. But these attributes could just as soon be found in a *prudently* managed fund as an imprudently managed one and, therefore, cannot alone create a reasonable inference of fiduciary breach under *Iqbal* and *Twombly*. Indeed, the Court rejected these *same* allegations in *Renfro* because they fail to show that the fiduciary's "process was flawed":

Asset-Based Fees

Renfro	***Sweda***
"Plaintiffs contend the services required to administer mutual funds do not vary based on the aggregate amount of assets in the funds [and] fees should be calculated on a per-participant basis," 671 F.3d at 326.	"Sweda . . . alleged that percentage-based fees went up as assets grew, despite there being no corresponding increase in recordkeeping services," Majority 17-18.

Lack Of Individualized Negotiation

Renfro	***Sweda***
"Plaintiffs allege Unisys could have . . . used the size of its plan as leverage to bargain for lower fee rates on mutual funds," 671 F.3d at 319.	"Sweda alleged that Penn . . . failed to leverage the Plan's size to obtain lower fees" and "could have negotiated for a cap on fees or renegotiated the fee structure," or "solicit[ed] competitive bids," Majority 17-18.

Inclusion Of Retail-Class Options

Renfro	***Sweda***
"[P]laintiffs take issue with the inclusion of an array of Fidelity retail mutual funds" and "allege the fees on the mutual fund options are excessive in comparison to the services rendered, . . . as compared to other mutual funds," 671 F.3d at 326.	"Sweda alleged that despite the availability of low-cost institutional class shares, Penn selected and retained identically managed but higher cost retail class shares. She included a table comparing options in the Plan with the readily available cheaper alternatives," Majority 18.

If *Renfro* remains good law, "[t]he allegations that failed in *Renfro* must fail here also." Dissent 17. It is fundamentally inconsistent with ERISA to sustain claims based on conduct that was allowed under circuit precedent. The prudence of a fiduciary's actions is measured under "the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). When Defendants oversaw this Plan, *Renfro* was prevailing law. Defendants were entitled to rely on it—and did. Even the majority recognized that "[p]lan sponsors and fiduciaries have reliance interests in the courts' interpretation of ERISA when establishing plan management practices." Majority 10. But that means allegations deemed inconsequential in *Renfro* cannot suddenly be red flags here.

Plaintiffs offer no other allegations to suggest Defendants acted imprudently, nor did the majority identify any.[3] The majority did voice concern about immunizing fiduciaries "who, although imprudent, initially selected a 'mix and range' of investment options." Majority 25. But standing alone, Defendants' mix and range was not imprudent, and there is no contention that Defendants failed to monitor the plan after "initially select[ing]" the lineup. On the contrary, the "highly relevant and readily ascertainable facts" about the Plan, *Renfro*, 671 F.3d at 327, show Defendants offered funds across four distinct "tiers" for different types of investors and

[3] Unrelated to their core "excessive fee" allegations, Plaintiffs alleged that two of the Plan's 78 investment options "underperformed." But alleged underperformance cannot state a claim of imprudence without a meaningful benchmark that supports the inference that no reasonable fiduciary in the circumstances would have continued offering the challenged investment. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). Plaintiffs provided no such benchmark, and their own allegations bely any suggestion that no reasonable fiduciary would have retained the two supposed "underperformers." The panel majority let Plaintiffs' underperformance claim past the pleading stage without any scrutiny, in conflict with the Eighth Circuit's dismissal of materially identical claims in *Meiners*.

consistently *improved* the investment menu throughout the class period by increasing the number of low-fee options, facts not present in *Renfro*. Dissent 16.[4] Nor is this a "merits" issue, the only basis the majority gave for disregarding these facts. Majority 23. These facts are the "backdrop" this Court directed courts to consider when assessing the plausibility of these claims at the pleading stage. *Renfro*, 671 F.3d at 326.

There is thus no colorable allegation that Defendants shirked their duties. All that remains are the allegations that failed in *Renfro*, with the panel offering no meaningful explanation of how to square the two decisions. As a result, fiduciaries in this circuit and beyond are left to guess how to discharge their duties under ERISA in light of this Court's mixed messages. Meanwhile, class-action lawyers are free to flyspeck carefully curated retirement plans in search of individual options that could theoretically be improved. Nothing in ERISA supports that result, which tosses *Renfro* into the dustbin.

II. The Panel Decision Is Inconsistent With Supreme Court Precedent.

The panel majority's misapplication of *Renfro* flows from its misapplication of Supreme Court precedent. The majority faulted the district court for correctly observing that Defendants' actions were "at least 'just as much in line with a wide

[4] As a result of these efforts, the *majority* of Plan investments were lower-cost "institutional" class funds—*i.e.*, the very types of investments plaintiffs claimed the *Renfro* fiduciaries imprudently failed to obtain.

swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." Majority 8 (citations omitted). The majority did not disagree that Defendants' actions were consistent with lawful behavior, but concluded that "*Twombly*'s discussion" on this point "is specific to antitrust cases." *Id.* (citation omitted). The majority believed it was following the Eighth Circuit in "declin[ing] to extend *Twombly*'s antitrust pleading rule to breach of fiduciary duty claims under ERISA." *Id.* at 8-9. But this reading of *Twombly* contradicts Supreme Court precedent and the very Eighth Circuit ruling the majority cited.

In *Iqbal*, the Supreme Court rejected any suggestion that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." 556 U.S. at 684. Such a restriction is indefensible because *Twombly* construed the basic federal pleading standard, which governs "all civil actions and proceedings in the United States district courts." *Id.* (citation omitted). Unsurprisingly, then, the Supreme Court has since affirmed that *Twombly* applies with full force in ERISA actions. In *Dudenhoeffer*, for example, the Court vacated a holding that plaintiffs "stated a plausible duty-of-prudence claim" and remanded so the lower court could apply the proper "pleading standard as discussed in *Twombly* and *Iqbal*." 573 U.S. at 426.

Here, the majority cited the Eighth Circuit's *Braden* decision to support its rejection of *Twombly*, plucking a single line from its context for the principle that a plaintiff need not "rule out every possible lawful explanation for the conduct he challenges." Majority 8-9 (citation omitted). But that observation in *Braden* came only *after* the court found the plaintiffs had created a plausible inference of imprudence by alleging that the plan offered too narrow a range of investment options (not the reasonable "mix and range" here and in *Renfro*) owing in part to a "kickback scheme" involving plan service providers. 588 F.3d at 589-90. Of course, having done that, the *Braden* plaintiffs did not *also* have to refute every "lawful explanation" for the conduct. Nowhere does *Braden* permit a plaintiff to contrive an inference of fiduciary breach in the first instance merely by alleging facts that are equally consistent with lawful or unlawful conduct.

On the contrary, *Braden* followed *Twombly*. It began by acknowledging that "a plaintiff *cannot proceed* if his allegations are '*merely consistent* with a defendant's liability." 588 F.3d at 597 (emphases added) (quoting *Twombly*, 550 U.S. at 557). That is the very point the district court made here, relying on *Twombly*, 550 U.S. at 554 (refusing to accept allegations "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy"). As the district court recognized, even accepting Plaintiffs' allegations as true, Defendants' conduct is (at worst) merely consistent with imprudence, and *Twombly* teaches that is not enough.

III. Rehearing Is Warranted Because Of The Importance Of These Issues.

Although Plaintiffs must allege that "a prudent fiduciary in like circumstances would have acted differently," *Meiners*, 898 F.3d at 822 (citation omitted), Defendants' alleged actions are similar to those taken by many other university plan fiduciaries now facing similar lawsuits (mostly brought by the same law firms). These boilerplate complaints revolve around the same basic allegations: using asset-based fees and offering retail-class funds, the CREF Stock Account, and the TIAA Real Estate Account. "This type of lawsuit seems to have taken higher education by storm, with suits brought all over the country." *Wilcox*, 2019 WL 132281, at *1.[5]

To date, only one of these cases has proceeded to trial, where none of plaintiffs' theories of liability withstood a full factual record. *Sacerdote*, 328 F. Supp. 3d at 317. But even so, universities face immense pressure "to settle quickly" when they cannot obtain full dismissal at the pleading stage. Dissent 1. So far, plaintiffs have extracted over $35 million total in four settlements with Brown University, the University of Chicago, Duke University, and Vanderbilt University.[6]

Such settlement pressure comes in part from the high costs of litigating ERISA cases. The threat of "ominous" discovery can be used as "extortion" to "impose

[5] In this circuit, for instance, a case with "substantially overlapping factual allegations" was stayed pending this appeal. *Princeton Univ.*, 2017 WL 6514662, at *2.

[6] Jacklyn Wille, *Vanderbilt Inks $14.5M Settlement in Retirement Plan Class Suit*, Bloomberg, Apr. 23, 2019, https://news.bloomberglaw.com/employee-benefits/vanderbilt-inks-14-5m-settlement-in-retirement-plan-class-suit.

asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (citation omitted).[7] Additional pressure comes from the sheer "size of the plan, regardless of the merits," because a plan that manages billions of dollars risks far greater exposure than a plan that manages less, even for the *same* alleged misconduct. Dissent 1. The reality that "[t]hese cases typically are not litigated to conclusion" underscores why such complaints must "be carefully scrutinized." *Id.* at 3, 6.

"Congress enacted ERISA to ensure that employees would receive the benefits they had earned." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). But it also struck a balance and did not resolve every tradeoff "in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *accord Renfro*, 671 F.3d at 321. That is in part because Congress did not want "litigation expenses [to] unduly discourage employers from offering ERISA plans," which employers are under no obligation to offer. *Conkright*, 559 U.S. at 517 (citation and brackets omitted).

Contrary to the majority's suggestion, then, showing appropriate concern for universities' undeserved exposure to ERISA claims does not require "Congress to

[7] For example, Northwestern produced over 450,000 pages of documents and incurred nearly $4 million in discovery-related expenses. *See* Brief of *Amici Curiae* at 44, *Divane v. Nw. Univ.*, No. 18-2569 (7th Cir. Mar. 21, 2019), ECF No. 43.

address the possibility of a *different* fiduciary standard." Majority 24 n.9 (emphasis added). It simply requires adherence to the statute Congress already enacted, to this Court's precedent in *Renfro*, and to the Supreme Court's directive in *Twombly*.

CONCLUSION

The Court should grant rehearing.

Dated: May 30, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPE-VOLUME LIMITATION, AND VIRUS CHECK

In accordance with Local Appellate Rule 28.3(d), I certify that all counsel whose names appear on this petition are members in good standing of the bar of this Court.

In accordance with Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing Petition For Panel Rehearing Or Rehearing En Banc meets the type-volume limitations of Rules 35(b)(2)(A) and 40(b)(1) because it contains 3,883 words.

In accordance with Local Appellate Rule 31.1(c), I certify that McAfee Endpoint Security 10.6 was run on the file and did not detect a virus.

Dated: May 30, 2019

s/ Brian T. Ortelere
Brian T. Ortelere

Counsel for the University of Pennsylvania, Investment Committee, and Jack Heuer

CERTIFICATE OF SERVICE

I certify that, on this May 30, 2019, I electronically filed the foregoing Petition For Panel Rehearing Or Rehearing En Banc with the Clerk for the United States Court of Appeals for the Third Circuit through the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users.

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