No. 19-784

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefit plans governed by ERISA.

The American Benefits Council (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee-benefit plans. The Council's approximately 440 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's members also include organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

An important function of the Chamber and the Council is to represent the interests of their members in matters before the courts, Congress, and the Executive Branch. To that end, both organizations regularly

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[1] No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for petitioners and respondents received timely notice of this filing, and both parties consented to the filing of this brief.

participate as *amici curiae* in cases concerning employee-benefit plan design or administration. *See, e.g.*, *Intel Corp. Inv. Policy Comm. v. Sulyma*, No. 18-116 (argued Dec. 4, 2019); *Thole v. U.S. Bank, N.A.*, No. 17-1712 (argued Jan. 13, 2020); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013).

Amici's members include plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, a *uniform*, nationwide employee-benefit system that "assur[es] a predictable set of liabilities" and is not "so complex that administrative costs, or litigation expenses" discourage employers from sponsoring benefit plans or individuals from serving as fiduciaries. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citations omitted). That promise of uniformity is threatened when different circuits apply different legal standards to basic questions that arise in ERISA litigation, such as what must be alleged to plead a viable claim for fiduciary breach.

Moreover, ERISA litigation becomes extremely unpredictable when a federal appellate court rejects a fundamental rule of civil procedure articulated by this Court and instead adopts an ERISA-specific pleading rule. That is precisely what the Third Circuit did here when it "decline[d] to extend" to ERISA claims this Court's holding that district courts must scrutinize circumstantial factual allegations to determine whether they plausibly suggest wrongdoing or are instead "just as much in line with" lawful conduct, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Pet. App. 9a. Plan sponsors and plan fiduciaries alike, including *amici*'s members, have a strong interest in ensuring that courts evaluate lawsuits alleging breaches of ERISA under a

clear and uniform pleading standard—and one that accords with this Court's precedents.

SUMMARY OF THE ARGUMENT

This case involves one of the most basic, but important, questions in ERISA litigation today: what must be alleged to adequately plead an ERISA claim challenging plan fiduciaries' decisions?

Among countless other decisions, fiduciaries must determine general investment policies for their plan; which (and how many) of the thousands of investments on the market to make available to plan participants; the structure of those investment options; which providers to contract with to provide services (such as a brokerage window, participant loans, or investment-advice services) to plan participants; how to compensate service providers; and whether (and when) to make changes to the investment products in the plan line-up or the plan's service providers.

For each decision that must be made, there is generally a wide range of reasonable options available, and fiduciaries therefore enjoy enormous discretion in making them. Because ERISA "requires prudence, not prescience," *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (citation omitted), and fiduciaries' actions "cannot be measured in hindsight," *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007), courts have uniformly acknowledged that fiduciaries are judged not for the outcome of their decisions but for the *process* by which those decisions were made.[2] But in virtually every

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[2] *See, e.g.*, *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013);

ERISA case challenging these types of fiduciary decisions—and these cases have *flooded* federal dockets in recent years—plaintiffs allege no facts about fiduciaries' decision-making process. Instead, they offer hindsight-driven, circumstantial allegations about the *outcome* of fiduciaries' decisions—*e.g.*, that a fiduciary chose to make available X equity fund, but not Y equity fund, which performed better; or that a fiduciary chose X recordkeeper, but if Y recordkeeper had been chosen instead, participants would have paid lower fees. Then, the plaintiffs ask the court to *infer* from these circumstantial facts that fiduciaries must have employed an inadequate decision-making process. When faced with these types of pleading-by-inference complaints, how are courts supposed to evaluate their sufficiency on a Rule 12(b)(6) motion?

This Court has already provided some instruction: when a complaint lacks direct factual allegations of key elements of a civil claim, this Court has instructed lower courts to rigorously analyze the circumstantial allegations to determine whether they plausibly suggest wrongdoing or are instead "just as much in line with" lawful behavior. *Twombly*, 550 U.S. at 554. When the alleged facts, even when accepted as true, are "just as much in line with" lawful behavior—when, as this Court put it in *Twombly*, there is an "obvious alternative explanation" to the inference of wrongdoing that the plaintiffs ask the court to draw—the complaint fails Rule 8(a)'s plausibility requirement and must be dismissed. *Id.* at 567.

The Third Circuit, however, "decline[d] to extend" that rule to the plaintiffs' ERISA claims, instead hold-

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Bunch v. W.R. Grace & Co., 555 F.3d 1, 7 (1st Cir. 2009); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994).

ing that the rule was "specific to antitrust cases." Pet. App. 8a–9a. That conclusion is in direct conflict with this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); with every other circuit to consider the application of *Twombly* to circumstantial ERISA allegations; and with the widespread practice of federal appellate courts applying *Twombly*'s rule faithfully to any case premised on circumstantial allegations. The Court should grant certiorari to resolve this conflict.

Furthermore, although courts outside the Third Circuit have recognized that the *Twombly* rule applies in full to ERISA litigation, district courts across the country have struggled to put this rule into practice and would benefit considerably from this Court's guidance about how to do so. Some district courts apply *Twombly*'s rule rigorously and dismiss ERISA complaints that assert a fiduciary breach based merely on allegations that a fiduciary's choices resulted in less-than-optimal outcomes. As those courts recognize, such allegations alone cannot be enough under *Twombly* because a plaintiff will always be able to find, with the benefit of hindsight, a better-performing or less-expensive option the fiduciary could have chosen. But many other district courts have concluded that second guessing a fiduciary's choices in this way, without more, raises factual issues that cannot be decided on a motion to dismiss. This inconsistency undermines ERISA's promise of predictability and uniformity. This Court has provided similar guidance to lower courts on numerous occasions in the ERISA stock-drop context, *see, e.g.*, *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014), and those cases arise less frequently than cases, like this one, challenging the investment options in a plan line-up or a fiduciary's choice of service providers.

This Court's intervention is equally (if not more) warranted here.

Denials of motions to dismiss are not generally subject to appellate review. This means that the opportunities to provide guidance are limited, despite the frequency with which this issue arises and the deluge of ERISA lawsuits in recent years that shows no signs of slowing down. This case presents a rare opportunity to provide much-needed direction to lower courts.

ARGUMENT

I. The Third Circuit's Decision Conflicts with this Court's Decision in *Iqbal* and Every Other Circuit that Has Considered the Issue.

Federal Rule of Civil Procedure 8(a)(2) requires a plaintiff to plead "[f]actual allegations [that are] enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In some cases, a plaintiff may satisfy this standard through direct factual allegations of wrongdoing—*e.g.*, allegations that a city enacted a law unconstitutionally restricting speech and expressed its intention to enforce it against protestors or allegations that a prison guard physically assaulted an inmate. But in other cases, a plaintiff must rely on circumstantial allegations and ask the court to infer wrongdoing. In these latter cases, this Court's precedents require lower courts to scrutinize the complaint's circumstantial allegations to determine whether, even accepting them as true, they plausibly suggest wrongdoing, or are instead "just as much in line with" lawful conduct. *Id.* at 554. Where there is an "obvious alternative explanation" to the inference of wrongdoing the plaintiff is asking the court to draw, and that alterna-

tive explanation is consistent with lawful behavior, the complaint must be dismissed. *Id.* at 567.

That is precisely the standard the district court followed here. The court carefully reviewed the complaint's hindsight-based circumstantial allegations—*e.g.*, that plan fiduciaries selected and retained investment options that underperformed relative to alternatives in the market, Pet. App. 86a–87a, and that plan fiduciaries paid recordkeeping expenses through asset-based fees rather than through flat, per-participant fees, Pet. App. 81a–82a. Then, faithfully applying *Twombly*, it concluded that those allegations were "'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" and dismissed the complaint. Pet. App. 79a (quoting *Twombly*, 550 U.S. at 554); *see also* Pet. App. 80a–87a.

But a divided Third Circuit panel reversed. The panel majority "decline[d] to extend" *Twombly*'s alternative-explanation pleading rule to ERISA claims, holding instead that this rule was "specific to antitrust cases." Pet. App. 8a–9a. That decision contradicts this Court's precedents and the decisions of numerous other circuits.

A. This Court has already held that *Twombly*'s pleading rule applies to *all* complaints governed by Rule 8(a). *See Iqbal*, 556 U.S. 662. In *Iqbal*, a case alleging that federal officials subjected Arab Muslim men to unconstitutional conditions of confinement because of their race, religion, or national origin, the respondent argued that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute." 556 U.S. at 684. The Court squarely rejected that argument, as it "is not supported by *Twombly* and is incompatible

with the Federal Rules of Civil Procedure." *Id.* The Court instead held unequivocally that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions.'" *Id.* (quoting Fed. R. Civ. P. 1). The Court went on to apply that rule to the petitioner's allegations, holding that the FBI Director's "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts" was an "obvious alternative explanation" to the "purposeful, invidious discrimination respondent asks us to infer." *Id.* at 682 (citation omitted). *See also* Pet. 15–17. The Third Circuit's decision is irreconcilable with *Iqbal*, which alone merits certiorari.

B. Every other circuit to have considered the question has held that *Twombly* applies in full where ERISA plaintiffs rely on circumstantial allegations and ask the court to infer an inadequate fiduciary decision-making process. They have concluded that these types of hindsight-based circumstantial allegations provide an insufficient basis to infer a flawed process.

The reason is not hard to understand—*every* fiduciary, no matter how diligent and scrupulous, will at one time or another make investment decisions that end up underperforming, or being more costly, relative to some comparable alternative over some timeframe. There are many service providers (including the University of Pennsylvania's recordkeepers, Vanguard and TIAA), which compete on a range of levels, with different fee structures, service offerings, quality, and reputations.[3]

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[3] *See, e.g.*, Terin Miller, *12 Best 401(k) Providers of 2019*, TheStreet (Oct. 31, 2019), https://www.thestreet.com/retirement/401k/12-best-401k-providers-15147547; Andrew Wang, *401K Providers:*

There are also thousands of reasonable investment options with different investment styles and risk levels—nearly 10,000 mutual funds alone,[4] several thousand of which are offered in retirement plans, in addition to many additional annuities, collective trusts, and other investment options. It will *always* be possible for a plaintiff to find *some* option (or even many options) that, by comparison, make a fiduciary's decision appear suboptimal. It is not possible to beat the market every time, nor is it required by ERISA. Accordingly, these types of hindsight-based allegations are, as in *Twombly* and *Iqbal*, "just as much in line with" lawful behavior as with an inference of misconduct; they are therefore inadequate to state a claim. *Twombly*, 550 U.S. at 554.

In *Meiners v. Wells Fargo & Co.*, for example, the Eighth Circuit held that the plaintiff did not state a plausible claim for fiduciary breach based on allegations that supposedly comparable alternative investments performed better or had lower fees than the ones the defendants chose. 898 F.3d 820, 823 (8th Cir. 2018). Faithfully applying *Twombly*, the court noted that these allegations did not establish that the plan fiduciaries made an imprudent decision; the court held that "[w]hen 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; *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("An inference pressed by the plaintiff is not plausible if

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2016 Top 20 Lists, Runnymede Capital Management Blog (July 26, 2016), http://blog.runnymede.com/401k-providers-2016-top-20-lists.

[4] Investment Company Institute, *2017 Investment Company Fact Book* 19 (57th ed. 2017), https://www.ici.org/pdf/2017_factbook.pdf.

the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.").

Likewise, in *White v. Chevron Corp.*, the Ninth Circuit observed that allegations "that [defendants] could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund" were insufficient for a plausible inference of a fiduciary breach. 752 F. App'x 453, 455 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2646 (2019). The court expressly relied upon *Twombly* and its own post-*Twombly* precedent providing that "[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." *Id.* at 454 (quotation marks omitted).

The Second and Seventh Circuits have similarly emphasized that circumstantial allegations of ERISA breaches must be measured against *Twombly*'s plausibility standard. *See Hecker v. Deere & Co.*, 556 F.3d 575, 586, 590 (7th Cir. 2009) (rejecting allegations as "implausible, to use the terminology of *Twombly*" where plaintiff could only show "that some other funds might have had even lower [expense] ratios"); *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 713, 717, 727 (2d Cir. 2013) (expressly applying *Twombly*, rejecting as implausible allegations based on "hindsight critique of returns," and holding that plaintiff must "allege facts that, if accepted as true, would show that a prudent fiduciary in like circumstances would have acted differently" (citation omitted)).

C. Applying *Twombly*'s alternative-explanation rule outside the antitrust context is hardly a novel concept. Federal appellate courts across the country have applied this rule to a wide range of non-antitrust claims. *See, e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990 (9th Cir. 2014) (RICO); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013) (securities); *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873 (7th Cir. 2012) (discrimination); *McCauley v. City of Chi.*, 671 F.3d 611 (7th Cir. 2011) (equal protection). Indeed, the Third Circuit *itself* has applied *Twombly*'s pleading rule to non-antitrust claims. *See George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013) (First Amendment retaliation). And for good reason—in all of these contexts, plaintiffs frequently attempt to rely on *circumstantial* allegations in an attempt to raise an inference of misconduct, rather than directly allege unlawful acts. There is no reason to treat ERISA claims that rely on circumstantial allegations any differently.

II. The Questions Presented Are Critically Important and Warrant this Court's Intervention.

The questions presented by the petition are sufficiently important and recurring to warrant this Court's review now. The explosion of ERISA lawsuits challenging plans' investment line-ups and choice of service providers is well documented, and it shows no signs of abatement. And nearly all of the complaints in this growing wave of litigation are founded on hindsight-based circumstantial allegations like plaintiffs' allegations here.

Since the early 2000s, plan participants have brought "hundreds of lawsuits against sponsors of large

retirement plans."[5] The trend has only intensified in recent years. In 2016-2017, for example, over 100 new 401(k) complaints were filed—the highest two-year total since 2008-2009.[6] Indeed, many of the most familiar names in American business have been the targets of this type of ERISA lawsuit,[7] and 20 of the country's

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[5] David McCann, *Passive Aggression*, CFO.com (June 22, 2016), https://www.cfo.com/retirement-plans/2016/06/passive-investment-aggression/.

[6] George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequence?*, Ctr. for Ret. Research at Bos. Coll., 1-2 (May 2018), https://crr.bc.edu/wpcontent/uploads/2018/04/IB_18-8.pdf; *see also* John Sullivan, *How to Put the Brakes on 401k Ambulance Chasers*, 401K Specialist Magazine (Mar. 2, 2017), https://401kspecialistmag.com/how-to-put-the-brakes-on-401k-ambulance-chasers/ (describing research showing a "rash of [ERISA] litigation" and reporting concerns that "an unfortunate byproduct [of the trend] is that it will stifle innovation in the 401K market, and development of new solutions could stop at the very moment the retiree demographic needs them most").

[7] *See Ortiz v. Am. Airlines Inc.*, No. 16-cv-00380 (N.D. Tex.); *Alas v. AT&T, Inc.*, No. 17-cv-08106 (C.D. Cal.); *Sims v. BB&T Corp.*, No. 15-cv-00732 (M.D.N.C.); *White v. Chevron Corp.*, No. 16-cv-00793 (N.D. Cal.); *Leber v. Citigroup, Inc.*, No. 07-cv-09329 (S.D.N.Y.); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-cv-09936 (S.D.N.Y.); *Quatrone v. Gannett Co.*, No. 18-cv-00325 (E.D. Va.); *Pizarro v. Home Depot, Inc.*, No. 18-cv-01566 (N.D. Ga.); *Lo v. Intel Corp.*, No. 16-cv-00522 (N.D. Cal.); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-00701 (S.D. Ill.); *Reetz v. Lowe's Cos.*, No. 18-cv-00075 (W.D.N.C.); *McCorvey v. Nordstrom, Inc.*, No. 17-cv-08108 (C.D. Cal.); *Ramsey v. Philips N. Am. LLC*, No. 18-cv-01099 (S.D. Ill.); *Catalfamo v. Sears Holdings Corp.*, No. 17-cv-05230 (N.D. Ill.); *Meriwether v. Sears Holdings Corp.*, No. 17-cv-05825 (N.D. Ill.); *Dormani v. Target Corp.*, No. 17-cv-04049 (D. Minn.); *Richards-Donald v. Teachers Ins. & Annuity Ass'n of Am.*, No. 15-cv-08040 (S.D.N.Y.); *Jacobs v. Verizon Commc'ns Inc.*, No. 16-cv-01082 (S.D.N.Y.); *Solano v. Wal-Mart Stores Inc.*, No. 17-cv-03976 (C.D. Cal.); *Wayman v. Wells Fargo & Co.*, No. 17-cv-05153 (D. Minn.).

leading universities were sued for alleged ERISA violations in the past 3 years alone. *See* Pet. 28 (collecting cases). And these lawsuits show no sign of slowing down—new actions continue to be routinely filed against institutions with large retirement plans. *See, e.g.*, *Pinnell v. Teva Pharm. USA, Inc.*, No. 19-cv-05738 (E.D. Pa. filed Dec. 6, 2019) (alleging underperforming investment options and excessive fees); *Cho v. Prudential Ins. Co. of Am.*, No. 19-cv-19886 (D.N.J. filed Nov. 5, 2019) (same); *Martin v. CareerBuilder, LLC*, No. 19-cv-06463 (N.D. Ill. filed Sept. 30, 2019) (same).

These large plans are easy targets because in cases challenging the entire investment line-up of a multi-billion-dollar plan, or scrutinizing the last *six years* of its contractual relationships with service providers, 29 U.S.C. § 1113(1) (statute of repose), the potential losses can be astronomical, reaching into the hundreds of millions of dollars—for retirement plans that are offered by employers *voluntarily*.[8]

Fiduciaries of smaller plans have been sued as well. *See, e.g.*, *Damberg v. LaMettry's Collision, Inc.*, No. 16-cv-01335 (D. Minn.) (suit against company with $10 million under management); *Bernaola v. CheckSmart Fin. LLC*, No. 16-cv-00684 (S.D. Ohio) (suit against

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[8] *See, e.g.*, *Sanford Heisler Files One Hundred Million Dollar ERISA Class Action Against Columbia University On Behalf of 27,000 Retirement Plan Beneficiaries*, PR Newswire (Aug. 16, 2016), https://www.prnewswire.com/news-releases/sanford-heisler-files-one-hundred-million-dollar-erisa-class-action-against-columbia-university-on-behalf-of-27000-retirement-plan-beneficiaries-300314358.html; Rebecca Moore, *Walgreen 401(k) Participants Seek $300M in Lawsuit Over TDF Mismanagement*, PlanSponsor (Aug. 12, 2019), https://www.plansponsor.com/walgreen-401k-partici pants-seek-300m-lawsuit-tdf-mismanagement/.

company with $15 million under management).[9] Because the fiduciaries of these smaller plans tend to have fewer resources and district courts sometimes take a default view that ERISA allegations are too factually intensive to dispose of at the motion-to-dismiss stage, these lawsuits can pose a significant threat to small businesses and create substantial disincentives for them to offer retirement plans to their employees.

Many of the complaints in this growing wave of litigation are founded, like the complaint in this case, on hindsight-based circumstantial allegations that fiduciaries should have chosen different investment options or service providers. Indeed, it seems that virtually *any* decision taken by an ERISA administrator can and frequently does provoke lawsuits in which plaintiffs argue *post hoc* that a fiduciary should have done something different. Fiduciaries are sued for offering numerous investments in the same style (as in this case), and for offering only one investment in a given investment style;[10] for failing to divest from stocks with declining share prices or high risk profiles, and for *not* holding onto such stocks (because high risk can lead to high returns);[11] for offering mutual funds from one particular investment manager, and for failing to offer mutual

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[9] *See also* Greg Iacurci, *401(k) lawsuits creeping down to smaller plans*, InvestmentNews (Aug. 6, 2019), https://www.investmentnews.com/article/20190806/FREE/190809961.

[10] *Compare* Pet. App. 85a *with* Am. Compl., *In re GE ERISA Litig.*, No. 17-cv-12123 (D. Mass. Jan. 12, 2018), ECF No. 35.

[11] *Compare In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 611 (N.D. Tex. 2008) (claim based on alleged failure to divest despite alleged knowledge that stock price was inflated) *with Thompson v. Avondale Indus., Inc.*, No. Civ.A.99-3439, 2000 WL 310382, at *1 (E.D. La. Mar. 24, 2000) (claim that fiduciary "prematurely" divested from stock).

funds from *that same* manager;[12] for taking too risky an approach, and for being too cautious.[13] Indeed, plaintiffs have advanced "diametrically opposed" theories of liability *against the same defendant*.[14] This truly puts plan fiduciaries on a "razor's edge"—they are sued no matter what they do. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006).

For plans both large and small, these types of strike suits undermine the innovation and participant choice that ERISA is supposed to encourage. If plaintiffs can state a claim merely by second guessing outside-the-box investment options (such as bundled products, as plaintiffs challenge here, *see, e.g.*, Pet. App. 79a–80a) or service-provider arrangements that look different from

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[12] *Compare White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *9 (N.D. Cal. Aug. 29, 2016) (claim that fiduciary should have offered mutual funds from Vanguard), *aff'd*, 752 F. App'x 453 (9th Cir. 2018), *with Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016) (claim that fiduciary should not have offered mutual funds from Vanguard).

[13] *Compare In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015) (claiming fiduciary made imprudently risky investments), *aff'd*, 649 F. App'x 110 (2d Cir. 2016), *with* Compl., *Barchock v. CVS Health Corp.*, No. 16-cv-00061 (D.R.I. Feb. 11, 2016), ECF No. 1 (alleging plan fiduciaries breached the duty of prudence by investing portions of the plan's stable value fund in overly conservative money market funds and cash management accounts).

[14] *See, e.g.*, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008) (involving claims that fiduciaries breached ERISA duties by maintaining a "heavy investment in Grace securities when the stock was no longer a prudent investment" and noting "[a]nother suit challenging the actions of Plan fiduciaries" that "asserted a diametrically opposed theory of liability"—"that the Plan fiduciaries had imprudently *divested* the Plan of its holdings in Grace common stock despite the company's solid potential to emerge from bankruptcy" (citation omitted)).

other plans, it will deter companies from designing a plan specifically for their workforce—all to the detriment of participants and beneficiaries.

III. This Court's Guidance Is Urgently Needed by Lower Courts.

This Court has granted certiorari to provide guidance on the pleading standard for ERISA claims in the specific context of claims based on the fiduciaries' failure to act on inside information they had about the value of employer stock offered in employee stock ownership plans (ESOPs). *See Ret. Plans Comm. of IBM v. Jander*, __ S. Ct. ____, 2020 WL 201024 (Jan. 14, 2020) (per curiam); *Amgen Inc.*, 136 S. Ct. 758; *Dudenhoeffer*, 573 U.S. at 425 (holding that courts should subject such claims to "careful, context-sensitive scrutiny" in order to "divide the plausible sheep from the meritless goats"). But the Court has never provided guidance to lower courts about how to analyze ERISA complaints challenging fiduciaries' selection of non-employer-stock investment options or their choice of service providers to the plan. These cases arise far more frequently than employer-stock-drop claims.

That guidance is sorely needed, particularly given the flood of ERISA litigation described above. Although federal appellate courts (aside from the Third Circuit) agree that *Twombly* applies to ERISA claims, lower courts have struggled to understand what that means in the context of these types of ERISA claims, producing inconsistent results for substantively identical allegations.

Some district courts have adhered to this Court's admonition that ERISA complaints should receive "careful, context-sensitive scrutiny" to "divide the plau-

sible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. at 425. They have applied *Twombly* rigorously and dismissed complaints that point, with the benefit of 20/20 hindsight, to alternative investments or service providers that could ultimately have earned participants more money or been less costly. For example, the U.S. District Court for the Northern District of California properly dismissed an ERISA complaint, "[t]he gist [of which was] that the value of the proposed class members' retirement accounts would have been greater had defendants chosen alternative funds or investment options with either higher returns or lower administrative and management fees." *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *3 (N.D. Cal. Aug. 29, 2016), *aff'd*, 752 F. App'x 433 (9th Cir. 2018). The court concluded that these allegations were "improper hindsight-based challenge[s] to the Plan fiduciaries' investment decision-making" and therefore did not state a plausible claim for fiduciary breach. *Id.* at *8.

The U.S. District Court for the Northern District of Illinois similarly dismissed as "paternalistic" allegations that a fiduciary offered too many investment options, including what plaintiffs claimed was a suboptimal investment choice (a TIAA-CREF Stock Account, allegedly inferior to index funds), and did not use the plaintiffs' preferred structure for recordkeeping fees. *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *5–9 (N.D. Ill. May 25, 2018), *appeal filed*, No. 18-2569 (7th Cir. July 18, 2018); *see also, e.g., Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685 (ALC), 2019 WL 4466714, at *9 (S.D.N.Y. Sept. 18, 2019) (dismissing ERISA claims based on, among other things, purported underperformance of plan investments, because the investments had periods of both

outperformance and underperformance, which did not "create a reasonable inference that plan administrators failed to conduct an adequate investigation" (citation omitted)); *Birse v. CenturyLink, Inc.*, No. 17-cv-02872-CMA-NYW, 2019 WL 1292861, at *5 (D. Colo. Mar. 20, 2019) (dismissing complaint where plaintiff "improperly rel[ied] on hindsight to allege [that the fiduciary] should have offered a better performing fund rather than indicating how an investigation would show an improvident process").

But many other district courts have simply thrown up their hands at the purported complexity of hindsight-based circumstantial ERISA allegations. The District of Massachusetts's handling of a 65-page amended complaint that prominently featured second-guessing of the plan's investment performance and fees is a perfect example. *See* Am. Compl., *Brotherston v. Putnam Invs., LLC*, No. 15-cv-13825 (D. Mass. Jan. 19, 2016), ECF No. 22. Rather than engage in the "careful, context-sensitive scrutiny of a complaint's allegations" this Court's precedent requires, *Dudenhoeffer*, 573 U.S. at 425, the district court denied the defendants' motion to dismiss in a two-paragraph order, *see Brotherston v. Putnam Invs., LLC*, No. 15-13825-WGY, 2016 WL 1397427, at *1 (D. Mass. Apr. 7, 2016). The court declared that "[i]n factually complex ERISA cases like the instant ones, dismissal is often inappropriate," and then the court summarily concluded that "[a]t the current stage of litigation," the allegations were "sufficient to state plausible claims." *Id.*; *see also, e.g.*, *Short v. Brown Univ.*, 320 F. Supp. 3d 363, 372 (D.R.I. 2018) (allegations that university's retirement plan charged excessive fees and offered underperforming investment options "raise[d] factual issues that cannot be decided at the pleading stage").

Similarly, when plaintiffs sued the fiduciaries of the ExxonMobil and Texas Instruments plans, alleging that fiduciaries failed to anticipate the effect of the subprime mortgage crisis on the securities lending program in which certain funds participated, the U.S. District Court for the Northern District of Illinois acknowledged that the plaintiffs did not "identify a single investment that was indicative of an imprudent investment strategy." *Diebold ex rel. ExxonMobil Sav. Plan v. N. Tr. Invs., N.A.*, No. 09 C 1934, 2010 WL 3700387, at *3 (N.D. Ill. Sept. 7, 2010). But it refused to dismiss the complaint, concluding that "whether a particular investment choice was imprudent is a particularly fact-sensitive inquiry that would not be appropriate to resolve on a motion to dismiss." *Id.* The court reached this conclusion even though the complaint "failed to point to a single investment that deviated from the guidelines [governing investment of the collateral pools] or was otherwise indicative of an imprudent investment strategy." *Id.; see also, e.g.*, *Daugherty v. Univ. of Chi.*, No. 17 C 3736, 2017 WL 4227942, at *8 (N.D. Ill. Sept. 22, 2017) (concluding, with virtually no analysis or discussion, that allegations of underperformance raised factual issues precluding dismissal).

These decisions are not anomalies. They reflect a widespread misimpression among district courts that virtually *any* after-the-fact quibble regarding a fiduciary's discretionary decisions raises a factual dispute precluding dismissal. Some courts hold that as long as a complaint includes comparators that were allegedly better performing, they *cannot* dismiss fiduciary breach claims even when confronted with judicially noticeable, public information demonstrating that the supposedly better-performing "comparators" were not comparable at all or did not actually perform better. *See, e.g.*, *Cryer*

v. Franklin Templeton Res., Inc., No. C 16-4265 CW, 2017 WL 818788, at *4 (N.D. Cal. Jan. 17, 2017); *Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1352 (N.D. Ga. 2017).

This approach provides a clear roadmap for ERISA plaintiffs and their attorneys to defeat a motion to dismiss in every case. All they must do is simply include numerous comparators in the complaint (and they need not even be truly comparable), find a period of time in which they outperformed the options in a plan line-up, and the door to discovery swings wide open. This is precisely what *Twombly*'s "context-sensitive scrutiny," is supposed to prevent. *Dudenhoeffer*, 573 U.S. at 425. And as courts have recognized, this careful scrutiny serves a critical purpose in ERISA and other complex commercial litigation in which discovery is not only "probing and costly" but also overwhelmingly asymmetrical. *St. Vincent*, 712 F.3d at 719. In these cases, "settlement extortion" is a real concern that can be ameliorated only through rigorous application of Rule 8(a). *Id.* (citation omitted); *see also Twombly*, 550 U.S. at 559 (describing how the "threat of discovery expense" in complex commercial cases "will push cost-conscious defendants to settle even anemic cases" before summary judgment or trial); *Dudenhoeffer*, 573 U.S. at 425 (motion to dismiss is an "important mechanism for weeding out meritless [ERISA] claims").

IV. The Inconsistent Approaches Taken by Lower Courts Undermines ERISA's Promise of Uniformity and Predictability.

Uniformity is an overriding goal of ERISA. "Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the

first place." *Conkright*, 559 U.S. at 516. And so, to "induc[e] employers to offer benefits," Congress crafted ERISA to establish "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002).

The circuit split created by the Third Circuit's decision and the confusion among federal district courts about how to evaluate these types of fiduciary-breach claims therefore undermine a primary purpose of the statute itself. Whether an ERISA complaint is deemed to state a claim is not based on any uniform understanding about what must be pled in cases like this; instead, it is based on particular district judges' subjective impressions of the allegations' relative factual heft, which is often informed by misimpressions about what information must be alleged. And because so many district courts erroneously believe that they cannot evaluate the sufficiency of these types of fiduciary-breach claims on a motion to dismiss, the opportunities for appellate guidance are limited—the pleading standard is addressed by appellate courts only when complaints are actually dismissed.

This case therefore presents the ideal vehicle for the Court to clarify that *Twombly*'s alternative-explanation rule applies in full to ERISA claims, and to offer much-needed guidance to lower courts regarding the proper application of that rule to hindsight-based circumstantial ERISA allegations.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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January 17, 2020

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