No. 18-1165

IN THE

Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, ET AL.,
Petitioners,

v.

LARRY W. JANDER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Occupy the SEC ("OSEC") is a nonprofit charity with roots in the New York-based Occupy Wall Street movement. OSEC's mission is to advocate for specific improvements to legislation and regulations governing the financial services industry. We seek to ensure that the nation's laws serve the public interest, and not that of Wall Street and its lobbyists. Our group has previously filed several *amicus curiae* briefs in Supreme Court cases that raise significant issues of concern for financial activists, including the recent case, *Salman v. U.S.*, 137 S. Ct. 420 (2016). And as financial activists, we are well aware of the impact that the Court's decision in this matter will have on the financial security of retirement plan beneficiaries.

The instant case centers on a key safeguard against retirement plan abuses: the fiduciary duty of prudence established under Section 404(a)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a)(1) (2019). OSEC submits this brief in support of Respondents and the holding of the Second Circuit in the case below, *Jander v. Retirement Plans Cmte. of IBM*, 910 F.3d 620 (2d Cir. 2018).

The Financial Crisis Inquiry Commission, the government body charged with the task of unraveling the

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[1] The parties have consented to the filing of this brief. The Petitioner has filed a blanket consent to the filing of amicus briefs, and Respondents' counsel has provided written consent to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

causes of the Great Recession of 2008, bore testimony to the fact that retirement accounts are especially vulnerable to catastrophic loss. In the short time between September 2007 and December 2008, assets in retirement accounts lost around a third (or $2.8 trillion) of their value. The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 393 (2011). The Commission recognized that "an erosion of standards of responsibility and ethics . . . exacerbated the financial crisis" and that such "breaches stretched from the ground level to the corporate suites." *Id.* at xxii.

Employee stock ownership plans ("ESOPs") have not been immune to such catastrophic losses. For instance, when the parent company of United Airlines went bankrupt in 2002, ESOP participants permanently lost $2 billion in stock value. Sean M. Anderson, *Risky Retirement Business: How ESOPs Harm the Workers They Are Supposed to Help*, 41 Loy. U. Chi. L. J. 1, 4 (2009). And the collapse of Enron in 2001 famously spotlighted the dangers of employee reinvestment plans.

The fiduciary duties established under ERISA are an important bulwark against imprudent decisions made within the rarefied confines of corporate suites. This case involves an important legal standard that, if interpreted wrongly, could handcuff the ability of aggrieved investors in ESOPs to find justice through the courts for malfeasance committed by individuals entrusted with the care of plan assets.

OSEC files this amicus brief not for the corporate suites but for lay investors, whose access to justice

would be severely limited if the Court were to adopt the positions propounded by the Petitioner, their *amici* or the United States. Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by rejecting those positions.

SUMMARY OF ARGUMENT

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Court established a multi-factorial test that must be met by any complaint alleging that an ESOP fiduciary breached her duty of prudence on the basis of inside information. In this case, the Court granted certiorari to gauge whether the Respondents' complaint met *one* of those factors: would a prudent fiduciary view the alternative actions proposed in the complaint as more likely to be harmful than helpful to the fund?

In their merits briefs, the Petitioners and the government stray far afield from this singular issue. The Petitioners declaim at length that an ESOP insider-fiduciary *never* has a duty to disclose information learned in a corporate capacity. Pet. Br. 27-31. The government's brief is hardly less extreme, arguing that an ESOP insider-fiduciary *almost never* has a duty to disclose information beyond what is required under securities law. U.S. Am. Br. 11-34. Each of these arguments is outside the scope of the "more harm that good" issue that this Court agreed to hear, and there-

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), http://occupywallst.org/forum/first-official-release-from-occupy-wall-street/.

fore each must be disregarded pursuant to Supreme Court Rule 14.1(a) and relevant precedent.

Apart from being *ultra vires*, these disclosure theories are also contrary to the Congressional intent behind the passage of ERISA. Congress found the pre-existing regulatory landscape (securities law included) to be woefully inadequate to protect retirement plan participants. To ameliorate this situation, Congress imposed expansive fiduciary obligations on plan administrators and ensured that plan participants would enjoy ready access to both state and federal courts to vindicate their interests. Congress also recognized that plan participants would not be able to preserve their rights unless ERISA fiduciaries, like the Petitioners, were subjected to enhanced disclosure requirements.

The Petitioners argue that allowing the Respondents' claim to proceed would serve as an end run around the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, but PSLRA is plainly inapplicable to ERISA claims like that of the Respondents. Moreover, PSLRA was passed to constrain the private right of action for securities fraud lawsuits. In sharp contrast, ERISA granted aggrieved retirement plan participants a purposely broad private right of action that is justiciable in both state and federal courts and incorporates personal liability for breaching fiduciaries.

The legislative history of ERISA is also completely devoid of any ratification of the securities disclosure regime serving as a proxy for the appropriate course of conduct under the fiduciary duty of prudence.

ARGUMENT

I. THE COURT SHOULD DISREGARD ARGUMENTS BY THE PETITIONERS AND *AMICI* THAT STRAY FROM THE QUESTION PRESENTED

In this case, the Court has granted certiorari on the following question:

> Whether *Fifth Third*'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

The merits brief of the Petitioners and their *amici* raise several arguments that the Court should disregard for straying far afield from the question presented. And the amicus brief of the United States should be disregarded in its entirety for the same reason.

In *Dudenhoeffer*, the Court established two main pleading requirements for any complaint alleging breach of ERISA's fiduciary duty of prudence on the basis of inside information: "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws *and* 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 (emphasis added). The first pleading requirement – consistency with the securities laws – can be broken into two sub-considerations: a) the proffered alternative action should not violate securities laws, and b) a reviewing court should consider whether the fiduciary's ERISA-based obligations might conflict with insider trading

and disclosure requirements under federal securities laws. *Id.* at 429-30. The second pleading requirement – whether the proposed alternative would do more harm than good – constitutes the gravamen of this case.

The government attempts to breezily agglomerate these disparate factors, suggesting that "to intelligently consider whether public disclosure would do 'more harm than good,' it is important first to address *Dudenhoeffer*'s other considerations." U.S. Am. Br. 15. However, nothing in *Dudenhoeffer* suggests that the multiple pleading considerations established therein were one and the same. Indeed, only two years after *Dudenhoeffer*, the Court clarified in *Amgen Inc. v. Harris* that *Dudenhoeffer* "laid out *standards* to help 'divide the plausible sheep from the meritless goats.'" 136 S. Ct. 758, 759 (2016) (referring to "standards" in the plural tense) (emphasis added).

The Question Presented in this case only addresses the "more harm than good" pleading requirement and does not touch the issue of consistency with securities laws. Under Supreme Court Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Therefore, the Court should disregard arguments by the Petitioners, their *amici*, and the United States that are premised on the "consistency with the securities law" issue.

The Petitioners squarely address this ancillary issue for the first time in their merits brief, by arguing that there is no duty for corporate insiders to use inside information for purposes of satisfying their ERISA-based duty of prudence because doing so conflicts with securities laws. Pet. Br. 27-31. The Petitioners also exceed the scope of the Question Presented by arguing

that allowing the Respondents' ERISA claim to go forward would lead to an end run around the heightened pleading standards for securities fraud suits set out in PSLRA. Pet. Br. 19.

As Justice Alito has recently explained, "[o]ur Rules make it clear that we grant certiorari to decide the specific question or questions of law set out in a petition for certiorari." *Madison v. Alabama*, 139 S. Ct. 718, 732 (2019) (Alito, J., dissenting). Here, the petition for certiorari's "Question Presented" contained no hint of argumentation regarding the ostensible tensions between the ERISA-based fiduciary duty of prudence and insider trading or securities disclosure laws. Cert. Petn. *i*. Instead, the petition focused on whether the allegations contained in the underlying complaint met the "more harm than good" standard – the sole question certified by the Court. *Id.*

Allowing a petitioner to alter the question presented threatens "the integrity of the process of certioriari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *accord Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 159 (1999) (Stevens, J., concurring in part and dissenting in part) ("[I]t is neither fair to the litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition."). It comes as no surprise, then, that where petitioners "choose to rely on a different argument" than that raised in the initial petition, a writ of certiorari may be dismissed as improvidently granted. *Visa v. Osborn*, 137 S. Ct. 289, 289-90 (2016).

While the Petitioners' merits brief does contain some argumentation relating to the Question Presented, the amicus brief submitted by the United States is com-

pletely out of bounds. The government argues (without the benefit of any direct precedent) that ERISA's duty of prudence requires an ESOP fiduciary to publicly disclose inside information only when the securities laws require such a disclosure (absent extraordinary circumstances). U.S. Am. Br. 11. Again, the Petitioners' certiorari petition did not substantively pursue the claim that ERISA is bounded by securities disclosure law. As Justice Thomas has stated, "it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*." *Turner v. Rogers*, 131 S. Ct. 2507, 2524 (2011) (Thomas, J., dissenting).

Admittedly, the *Dudenhoeffer* court observed that the Securities and Exchange Commission ("SEC") had not advised it of the agency's views on the tensions between ERISA-based obligations and SEC disclosure obligations, and that those views may have been relevant to that case. 573 U.S. at 428. However, this case is not *Dudenhoeffer*, and the Petitioners have not brought *Dudenhoeffer*'s "consistency with the securities law" prong into this Court's purview. Moreover, Rule 14.1(a), relevant precedent and separation of powers principles militate against the Court's *sua sponte* consideration of that issue here.

To be sure, under Rule 24.1(a) the Court has the power to broaden the scope of its decision to include collateral issues in case of "plain error." However, the exercise of that power is limited to exceptional circumstances where the error threatens to "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). The controversy presented here (though

important) is a somewhat esoteric one that, even if decided wrongly, would hardly undermine the integrity of the judiciary. Therefore, the plain error exception should present no bar to the application of Rule 14.1(a) to arguments that deviate from the Question Presented.

II. THE DISCLOSURE THEORIES PROPOUNDED BY THE PETITIONERS AND THE UNITED STATES ARE CONTRARY TO CONGRESSIONAL INTENT

The Petitioners and the United States ask the Court to adopt stilted interpretations of the duty of disclosure that applies to an ESOP fiduciary's knowledge of non-public corporate information. The Petitioners argue that such a duty cannot exist with respect to information gained by an ESOP fiduciary while wearing a "corporate hat." Pet. Br. 25. Meanwhile, the United States argues that, absent extraordinary circumstances, such a duty cannot exist if it exceeds the disclosure duties imposed by securities law. U.S. Am. Br. 13.[3]

Each of these arguments would mechanistically reduce the scope of the fiduciary duty of prudence in a manner akin to the *Moench* presumption, which this court unanimously repudiated in *Dudenhoeffer*, 573 U.S. at 425 (favoring "careful, context-sensitive scrutiny"). And crucially, these arguments run afoul of Congressional intent.

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[3] As argued above, these arguments are impermissible under Rule 14.1(a).

A. Congress Required ERISA Fiduciaries to Abide by Broad Disclosure Obligations

The House Committee that crafted ERISA specifically endorsed an expansive interpretation of fiduciary liability: "[t]he Committee has adopted the view that the definition of fiduciary is *of necessity broad* and it intends to impose strict duties on those whose activities bring them within the definitions." House Comm. on Educ. and Labor, *Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together With Supplemental Views*, 120 Cong. Rec. 3977, 3983 (Feb. 25, 1974) (emphasis added).

Logically speaking, a broad definition of fiduciary necessarily subsumes a broad duty to disclose information gained by a fiduciary. Indeed, both houses of Congress expressed their desire for enhanced disclosure to play a key part in ERISA's fiduciary regime.

> [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection and the individual participants and beneficiaries will be *armed with enough information to enforce their own rights* as well the obligations owed by fiduciary to the plan in general.

S. Rep. No. 93-127, at 27 (1973) (emphasis added); H.R. Rep. No. 93-533, at 11 (1973) (emphasis added). Enhanced disclosure was considered essential to ERISA's fiduciary rubric because Congress found the preexisting law to be woefully lacking in its disclosure and fiduciary requirements.

> Experience in the decade since the passage of the above amendments has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards.

S. Rep. No. 93-127, at 4; H.R. Rep. No. 93-533, at 17. Robust disclosure was considered not just an attribute but a vital component of the prudent ERISA fiduciary's conduct. In light of that fact, it is highly unlikely that the crafters of ERISA would give sanction to the curtailed disclosure standards that have been proffered by the Petitioner and the government. If adopted, these standards would return ESOPs back to the feckless state in which they existed prior to the enactment of ERISA.

B. Congress Did Not Intend for Securities Disclosure Laws to Circumscribe the ERISA Duty of Prudence

The United States forwards an unprecedented theory of fiduciary liability: absent extraordinary circumstances, an ESOP fiduciary need only disclose inside information when the securities laws require it.[4] By so

[4] The Court rejected a similar argument in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Specifically, the Court rejected the theory that a fiduciary's disclosure obligations begin and end with the disclosure requirements mandated by the ERISA statute or by plan documents. *See id.* at 489. Disclosure obligations that are expressly stipulated in a "statutory regime" are merely the minimum requirements that a fiduciary must meet. *Id.* at 504.

arguing, the government would have securities law supplant ERISA. However, it must be recognized that ERISA was passed in 1974, four decades after the establishment of the nation's securities regime. The crafters of ERISA were surely aware of securities law and the potential interplay between that law and the fiduciary duties being imposed under ERISA. Yet in the thousands of pages that constitute the legislative history of ERISA, there is no scintilla of support for the proposition that securities disclosure laws should serve as some sort of outer boundary around the conduct required by the fiduciary duty of prudence.

To the contrary, there is strong evidence that Congress found existing securities law, disclosure requirements included, to be insufficient for purposes of protecting plan beneficiaries like the Respondents in this case.

> [Retirement] assets are the largest single source of virtually *unregulated* capital in our country. . . The simple fact is that at the present time, there is *no law* which guarantees that the pension promised in past years, for which a worker has de-

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Such obligations do not define the entire scope of a fiduciary's potential liability. *Id.* ("If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose."). This holding militates against the government's proposition that the securities disclosure regime should serve as a proxy for disclosure responsibilities under the duty of prudence. ESOP fiduciary liability must serve some purpose beyond serving as a handmaiden to the securities disclosure regime. There is no evidence that Congress drafted 29 U.S.C. § 1104(a)(1)(B) to play that servile role.

> voted a lifetime of loyal service, will be paid.

119 Cong. Rec. 30,003 (1973) (statement of Sen. Williams) (emphases added).

While *Dudenhoeffer* observed some tension between securities law and an ERISA fiduciary's duty to disclose secret information, 573 U.S. at 428, it adroitly resolved that tension via a heightened pleading requirement. Unlike the United States, *Dudenhoeffer* did not find that tension to be virtually insurmountable. When two statutes are capable of co-existence it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (brackets and quotations omitted). Here, there is no legislative history supporting the exaltation of securities disclosure law and the curtailment of the fiduciary duty of prudence, as the government has proposed.

C. Congress Did Not Exempt ESOP Fiduciaries Acting in a Corporate Capacity from their Disclosure Obligations Under the Duty of Prudence

The Petitioner makes much of Congress' intent to encourage ESOPs, citing, as examples, the exemption from diversification under 29 U.S.C. § 1104(a)(2) and Congress' ratification of corporate officers also serving as plan fiduciaries under 29 U.S.C. § 1108(c)(3). We acknowledge that, in adopting these provisions, Congress "made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the

free private enterprise system." Pet. Br. 6 (citing *Dudenhoeffer*, 573 U.S. at 416).

Yet, no matter how favored the ESOP structure may be, ESOP fiduciaries are nevertheless constrained by the *very same* obligations as other ERISA fiduciaries. The legislative history of ERISA makes this crystal clear: "[a] fiduciary is subject to civil action for breach of fiduciary if the plan meets [the statutory] definitions, *regardless of the legal form* of the plan." S. Rep. No. 93-383, at 104 (1973). Congress did not envision any diminution of the duty of prudence for ESOP employer-fiduciaries possessing inside information, let alone the near extinguishment of that duty, as proposed by the Petitioners.

III. THE PRIVATE SECURITIES LITIGATION REFORM ACT (PSLRA) HAS NO BEARING ON THIS CASE

The Petitioners express concern that allowing the Respondents to proceed with their ERISA claim, though a similar claim under securities law has failed, would lead to an end-run around the heightened pleading standards for securities fraud suits set out in PSLRA. *See* Pet. Br. 58. This concern is misplaced.

As the Second Circuit noted, PSLRA was passed to curb frivolous securities lawsuits. *Jander*, 910 F.3d at 631-32 (citing the legislative history of the PSLRA); *see also* 15 U.S.C. §78u-4(b) ("The provisions of this subsection shall apply in each private action arising under this title"). However, the Respondents' instant claim, premised on 29 U.S.C. § 1104(a)(1)(B), does not invoke securities law, and so PSLRA is plainly inapplicable.

By its own terms, PSLRA is limited to private actions under securities law, and nothing in PSLRA's legislative history evinces an expectation that that act would curtail the number of ERISA-based lawsuits. It would be improper to suggests, as do the Petitioners, that the Respondents' ERISA claim is implicitly the kind of claim that "PSLRA was meant to prevent." Pet. Br. 60. Congress would not have implicitly curtailed the ERISA private right of action when it enacted PSLRA without some statement to that effect. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Indeed, 29 U.S.C. § 1104, which imposes the fiduciary duty of prudence on ESOPs, has been amended seven times, including five times after the passage of PSLRA. *See, e.g.*, Pub. L. No. 109–280, 120 Stat. 979 (2006). In none of those amendments was the duty of prudence constrained to fall in line with PSLRA. And no court has ever read PSLRA to explicitly curb breach of fiduciary duty claims under § 1104(a)(1)(B).

In passing PSLRA, Congress expressed a clear intention to constrain the private right of action for securities fraud. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007) (recognizing that PSLRA was "[d]esigned to curb perceived abuses of the § 10(b) private action"). However, in passing ERISA, Congress expressed the opposite intention. The "Congressional findings and declaration of policy" section prefacing the corpus of Title 29, Chapter 18 of the U.S. Code (i.e., ERISA) proclaims the following:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and *ready access to the Federal courts*.

29 U.S.C. § 1001(b) (emphasis added). Far from discouraging private actions, ERISA insured "ready access to the Federal courts" for litigants bringing such actions.[5]

It should be noted that this declaration of policy could have simply stated that ERISA provides for "remedies, sanctions, and [] access to the Federal courts." Congress' affirmative decision to use the adjective "ready" speaks volumes about its posture towards lawsuits like that of the Respondents. Not only did Congress want the courtroom doors to be open for ERISA claims, it wanted the doors to be wide open.

The word "ready" in this context cannot be disregarded as mere surplusage. The Supreme Court has "stated time and again that courts must presume that a

[5] The statute empowers a plan participant or beneficiary to sue fiduciaries who breach their duties, and exposes those fiduciaries to personal liability for such breaches. 29 U.S.C. §§ 1132(a), 1109(a).

legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). It is a cardinal principle of statutory construction that courts must "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (O'Connor, J., concurring) (citations and quotations omitted).

In fact, the drafters of ERISA believed that preserving "ready access" to private litigation was a vital component of that law's fiduciary protections.

> [W]ithout provisions (lacking in the present [Welfare and Pension Plans Disclosure] Act) allowing *ready access to both detailed information about the plan and to the courts*, and without standards by which a participant can measure the fiduciary's conduct (also lacking in the present Act) he is not equipped to safeguard either his own rights or the plan assets.

S. Rep. No. 93-127, at 29 (emphasis added). This explanatory passage also reinforces what we argue above in Section II: that Congress imposed robust disclosure obligations on ERISA fiduciaries, in order to safeguard retirement plans and their beneficiaries.

The foregoing passage evinces a remarkable solicitude by Congress towards litigants like the Respondents. This solicitude is also evident at 29 U.S.C. §1132(e), which allows claims like the Respondents' to be brought under federal or state law. *See Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 832 (1988) ("Suits for benefits or to enforce a

participant's rights under a plan may be brought in either federal or state court."). In sharp contrast, "Congress intended to make 'federal law, not state law, . . . the principal vehicle for asserting class-action securities fraud claims.'" *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1075 (2014) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 (2006)).

The drafters of ERISA fashioned concurrent state and federal jurisdiction for ERISA claims with the express purpose of facilitating lawsuits against fiduciaries: "the committee bill *strengthens the enforcement of fiduciary duties* by providing that individual participants and beneficiaries may bring civil actions in State or Federal courts to redress or prevent fiduciary breaches." S. Rep. No. 93-383, at 103 (emphasis added). This is exactly the opposite purpose of PSLRA.

The Petitioners and the government attempt to deploy the securities law regime as a weapon against Respondents' ERISA claim. However, such attacks can find no support in the Congressional history, which evidently reveals a far more favorable stance towards private rights of action under ERISA than under securities law.

This Congressional favor towards private actions under ERISA also warrants the Court's reconsideration of whether it may have wrongly subjected claims like those of the Respondents to a heightened pleading requirement in *Dudenhoeffer*.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondents and reject the feeble duty of disclosure standards that are proposed by the Petitioners and the government. The fiduciary duty of prudence cannot function in the manner that Congress intended in the absence of adequate disclosure from corporate insiders such as the Petitioners.

September 29, 2019

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