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

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondents' brief clarifies their position and underscores that the district court properly dismissed their claim. Respondents do not suggest that IBM's insider-fiduciaries should have traded based on inside information or disclosed it exclusively to plan participants, as the securities laws forbid both courses. Instead, respondents fault petitioners for not making disclosures to the entire market via IBM's "regular securities-law filings." Resp.Br.2. But there are at least two fatal problems with that suggested course. First, by underscoring that respondents' real beef is that corporate insiders did not use corporate disclosure procedures to reveal inside information gained in a corporate capacity, respondents make clear that they state no claim against the insiders in their distinct capacity as ERISA fiduciaries. Insider-fiduciaries have no duty to use inside information gained in a corporate capacity to benefit plan participants and certainly have no ERISA obligation to use "regular" corporate disclosure mechanisms to get that information to the broader market. Second, a prudent fiduciary could readily conclude that respondents' proposed course would do more harm than good, as it would have caused an immediate decrease in the value of the company stock to the detriment of the vast majority of plan participants.

The government for its part recognizes that layering a judge-made ERISA disclosure regime on top of the securities laws' elaborate disclosure framework has nothing to recommend it. But rather than following that observation to its logical conclusion—that a claim that corporate insiders failed to use

corporate disclosure mechanisms to timely reveal inside information should be brought as a securities claim or not at all—the government posits an entirely duplicative ERISA duty, *i.e.*, insider-fiduciaries violate their ERISA duty of prudence if, but only if, they violate their securities-law disclosure obligations. That position is theoretically flawed and practically disastrous. In theory, an insider-fiduciary has no *fiduciary* duty to use corporate information or corporate disclosure mechanisms to benefit plan participants. In practice, the government's position would cause failure-to-disclose litigation to migrate from securities actions (where it belongs and is limited by the Private Securities Litigation Reform Act (PSLRA) and prohibitions on holder suits) to ERISA actions (constrained by neither).

Congress and the SEC have already developed a finely-reticulated regime addressing when corporate insiders must disclose *and* when private litigants can bring actions to enforce those disclosure obligations. The government's approach would honor the objectives of the former while inexplicably ignoring the objectives of the latter. The far better course is to recognize that suits premised exclusively on the failures of corporate insiders to make disclosures required by the securities laws should be litigated as securities actions, not as hybrid ERISA actions unconstrained by the PSLRA and other sensible limits.

ARGUMENT

I. ESOP Fiduciaries Generally Have No ERISA Obligation To Use Corporate Inside Information Or Corporate Disclosure Mechanisms In Making Fiduciary Decisions.

A. Under *Pegram*, ESOP Fiduciaries Need Not Use Corporate Inside Information or Corporate Disclosure Mechanisms to Benefit Plan Participants.

Congress has authorized corporate insiders to serve as ESOP fiduciaries, *see* 29 U.S.C. §1108(c)(3), and ERISA "require[s] … that the fiduciary with two hats wear only one at a time," *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). It follows that a corporate officer who learns material nonpublic information while wearing her *corporate* hat has no duty to don her *fiduciary* hat and make investment-related decisions based on that inside information. And she certainly has no *fiduciary* obligation to plan participants to don her corporate hat to use "regular" corporate disclosure mechanisms (to which she has access only because of her corporate responsibilities) to disclose corporate inside information. Because the complaint here hinges on those nonexistent duties, it fails at the threshold. Pet.Br.23-27.

Respondents' brief only underscores the difficulties with their claim. First, they (but not the government) attempt to sidestep this argument as beyond the question presented. Resp.Br.37-38. But the "question presented is deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). The question presented here is whether respondents adequately pled a duty-of-prudence claim

under *Dudenhoeffer* by making generalized allegations that petitioners should have disclosed inside information sooner-rather-than-later because the harms of non-disclosure only increase over time. Pet.i. Whether an insider-fiduciary has a fiduciary obligation to disclose inside information obtained in a corporate capacity or to use corporate disclosure mechanisms to benefit plan participants "is a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 579 n.4 (2008); *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006). After all, ERISA requires a fiduciary to act with the prudence of someone "acting in a like capacity and familiar with such matters," 29 U.S.C. §1104(a)(1)(B), and *Dudenhoeffer* requires consideration of a specific proposed alternative course of action. It is difficult to evaluate the prudence of an insider-fiduciary (and the sufficiency of respondents' complaint) without knowing whether she is charged with familiarity with information learned in a corporate capacity or whether she must consider proposed alternative actions that require her to employ corporate disclosure mechanisms.

Moreover, answering such questions would provide much-needed guidance to lower courts that "have struggled with" *Dudenhoeffer*'s "interpretive difficulties." Pet.App.11a. This Court granted certiorari in *Dudenhoeffer* principally to consider the presumption of prudence adopted by several circuits, and thus articulated a pleading standard without extensive briefing on predicate questions concerning the duties of insider-fiduciaries to disclose inside

information gained in a corporate capacity or to employ corporate disclosure mechanisms. This case provides an appropriate opportunity to provide that much-needed guidance. The parties addressed this issue at the certiorari stage, *see* Pet.17 n.9; BIO.23 n.2; Pet.Reply.10 n.3, have fully briefed it on the merits, and this Court has jurisdiction to consider it, *see United States v. Williams*, 504 U.S. 36, 40 (1992). Accordingly, there are "good reasons" to address this issue and no good reason to avoid it. *Jones v. United States,* 527 U.S. 373, 397 n.12 (1999) (plurality op.).

Respondents next suggest that this question was already asked and answered in *Dudenhoeffer*. Resp.Br.38-39. But *Dudenhoeffer* did no such thing. As noted, and as respondents admit (at 12-15), this Court granted review in *Dudenhoeffer* to address a different issue: the "presumption of prudence." As a result, the Court did not focus on the fact that inside information was learned in a corporate capacity or confront a specific allegation that disclosure should occur through corporate disclosure mechanisms. And while Justices raised some of these predicate questions at argument, *see, e.g.*, Tr. of Oral Arg.27, *Dudenhoeffer*, No. 12-751 (Apr. 2, 2014) (Justice Breyer asking, "[W]hat's wrong with just saying" that fiduciaries have no "obligation to use insider information"), the Court's opinion did not resolve them. Nor did *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). Indeed, neither opinion so much as cited *Pegram*. Accordingly, the notion that petitioners' argument is "plainly inconsistent" with this Court's precedent, Resp.Br.38 n.7, is plainly incorrect.

In fact, petitioners' argument follows directly from *Pegram* and its two-hats doctrine. Respondents' counter only reinforces their *Pegram* problem. They would limit *Pegram*'s "two hats" admonition to "the action at issue," insisting that inside information acquired in a corporate capacity must be used in taking fiduciary "actions." Resp.Br.40-41. There are multiple problems with that submission. First, it does not help respondents, as the particular no-more-harm-than-good course of action they propose is that petitioners "should have used IBM's regular securities-law filings to disclose." Resp.Br.2. Disclosure via regular corporate filings is plainly a corporate "action," taken while wearing a corporate hat. *See* Pet.Br.30.[1] Declining to impose personal liability on a fiduciary for taking or failing to take an action in a corporate capacity requires no extension of *Pegram*; such liability is precisely what *Pegram* prohibits.[2]

Second, respondents offer no rationale for requiring insider-fiduciaries to use information gained

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[1] To be sure, "when a plan fiduciary administers the ESOP, she is plainly wearing her plan-fiduciary hat." Pet.Br.25. But in clarifying that their specific proposed no-more-harm-than-good course required use of "IBM's regular securities-law filings," respondents have made clear beyond cavil that they seek to impose ERISA liability for a failure to take action while wearing a corporate hat. *Pegram* forecloses that effort.

[2] Respondents' *Pegram* problem is underscored by the government's observation that "companies can control what they have to disclose under [the securities laws] by controlling what they say to the market." U.S.Br.19. In respondents' world, a *corporate* statement can trigger an obligation to disclose through *corporate* channels, yet the failure to do so is a *fiduciary* breach.

in a corporate capacity to discharge fiduciary duties to plan participants. To the contrary, respondents concede that any use of the inside information—be it trading or disclosing—for the exclusive benefit of plan participants would violate the securities laws. *See*, *e.g.*, Resp.Br.18. Indeed, as a practical matter, when insider-fiduciaries serve as fiduciaries for plans that include ESOPs, the ESOP is set up to ensure that purchases and sales take place more or less automatically based on the investment decisions of plan participants—and not intervening trading decisions by insider-fiduciaries—to avoid securities-law liability for exploiting inside information. *See, e.g.*, U.S.Br.16-17; CA.J.A.638. In other words, ESOPs with insider-fiduciaries are constructed to avoid any possibility that inside information gained in a corporate capacity is used for the exclusive benefit of plan participants.

Respondents admit as much: they concede that either trading or disclosing only for the benefit of plan participants is *verboten* and so fault petitioners for failing to disclose inside information *to the market as a whole through the regular corporate channels*. But there already is a regime that exhaustively addresses the necessity and timing of disclosures to the market by corporate insiders via regular corporate mechanisms, and it is not ERISA. There is simply no basis for piling on a duplicative duty for insider-fiduciaries when even respondents concede that insider-fiduciaries cannot use inside information to distinctly benefit plan participants.

The problems with respondents' approach are reinforced by their efforts to explain the obligations of

insider-fiduciaries with *positive* inside information. Such situations would seem to pose an even more acute dilemma for insider-fiduciaries, as the undisclosed positive information would suggest that the company stock and thus the ESOP fund as a whole is undervalued. Respondents suggest that even if there is no securities-law obstacle to disclosing such positive inside information, disclosing it prematurely would likely violate "confidentiality restrictions" or other "legal obligations." Resp.Br.40. But that same reasoning describes *all* inside information learned in a corporate capacity; that information is nonpublic precisely *because* it is confidential and insiders are duty-bound to use it for corporate purposes only. Pet.Br.25-26; U.S.Br.20 n.2. Indeed, much of the edifice of insider-trading law is premised on the notion that corporate insiders owe fiduciary duties to the corporation and its shareholders to use inside information only for corporate purposes. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 652 (1997); *Dirks v. SEC*, 463 U.S. 646, 653 (1983). There is, by contrast, no obligation for insider-fiduciaries to use that information for the benefit of plan participants, and doing so would likely violate the securities laws, the insiders' duties to the corporation, or both.[3]

Congress expressly deviated from common-law trust rules to allow corporate insiders to serve as

[3] The dilemma for the insider-fiduciaries here would be acute because early disclosure would have surely complicated efforts to sell the Microelectronics business. Thus, premature disclosure would violate corporate duties, and late disclosure would violate ERISA. A proper application of *Pegram* avoids the dilemma.

ERISA fiduciaries.[4] The reason Congress did not place these insider-fiduciaries between a rock and a hard place is that the insider-fiduciaries have no obligation to use inside information gained in a corporate capacity (or to use regular corporate disclosure mechanisms) for plan participants' benefit.[5]

B. Obliging ESOP Fiduciaries to Use Corporate Inside Information Creates Tension Between ERISA and the Securities Laws and Other Anomalies.

Respondents have no persuasive response to the tension their theory creates with the objectives of the securities laws, which is reason enough to reject it under *Dudenhoeffer*. *See* 573 U.S. at 429; U.S.Br.18-22. The securities laws include detailed rules concerning disclosure obligations, and they do not demand immediate disclosure of all material inside information. *See* U.S.Br.19-20; Pet.Br.29 & n.2. Respondents, however, would have this Court countermand the policy choices of Congress and

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[4] Respondents suggest petitioners' position "would erase th[e] advantage" of insider-fiduciaries. Resp.Br.42. But companies do not appoint insider-fiduciaries because they are expected to use inside information; they appoint them because of their experience and judgment and for cost savings. *See* Pet.Br.8; SIFMA.Br.18.

[5] Respondents' acknowledgement that insider-fiduciaries must keep information about an "upcoming merger" confidential answers their own question as to "how … an ERISA fiduciary who is also a corporate insider is supposed to mentally segregate information he has learned in his corporate capacity from his fiduciary decision-making." Resp.Br.40. Regardless, petitioners' argument does not require strict mental segregation; it just prevents ERISA plaintiffs from *suing* fiduciaries for not exploiting inside information for their benefit.

regulators by authorizing a "separate" and "stricter" judge-made disclosure regime for insider-fiduciaries. Resp.Br.4.

Respondents suggest that insider-fiduciaries can minimize tension with the securities laws by disclosing through "the mechanism of the securities laws." Resp.Br.26. This preference reflects a recognition that disclosure outside "IBM's regular securities-law filings" would conflict with the objectives of the securities laws and could "spook the market," causing the kind of precipitous drop in the share price that a prudent fiduciary could readily conclude would do more harm than good to the plan. Resp.Br.2, 26.

But disclosure through regular corporate channels is no panacea. Not only does that approach create an insuperable *Pegram* problem; respondents would still demand disclosures in securities-law filings even when the securities laws do not. *See* Resp.Br.4, 60. While respondents contend that disclosures mandated by ERISA but not the securities laws would not actually "violate" the securities laws, Resp.Br.61, there can be little doubt that such otherwise unnecessary and non-compelled disclosure conflicts with "the objectives of" the securities laws. *Dudenhoeffer*, 573 U.S. at 429; *see also Chiarella v. United States*, 445 U.S. 222, 235 (1980) (rejecting greater disclosure as "inconsistent with the careful plan that Congress has enacted for regulation of the securities markets"); U.S.Br.19-20 (explaining risks of excessive disclosure). Moreover, demanding greater or faster disclosure only when companies offer ESOPs

and enlist insider-fiduciaries would plainly discourage actions that Congress intended to facilitate.

II. Respondents' Complaint Fails Because A Prudent Fiduciary Could Have Concluded That Disclosure Would Do More Harm Than Good To The Fund.

A. Respondents Concede That the "Could Not Have" Standard Governs.

Even if insider-fiduciaries must use inside information acquired in a corporate capacity and employ regular corporate disclosure mechanisms, respondents' complaint still fails to satisfy *Dudenhoeffer*. That conclusion follows directly from *Dudenhoeffer*'s demanding legal standard. As ERISA's text and structure, this Court's precedent, and sound policy all confirm, a fiduciary may not be held liable for breaching the duty of prudence unless no prudent fiduciary could have pursued the course that she did. *See* Pet.Br.33-44. That demanding could-not-have standard, not an ungrounded what-would-a-hypothetical-average-fiduciary-do inquiry, is what governs.

Respondents never defend the average-prudent-fiduciary inquiry envisioned by the Second Circuit and ultimately concede that "the standard is what a hypothetical prudent fiduciary could imagine." Resp.Br.47-48. Respondents instead dismiss the difference between the standards as a "tempest in a teapot" and "semantic ouroboros," Resp.Br.45, but in reality the difference is significant. As petitioners have explained, the could-not-have standard recognizes that there should be considerable play in the joints for fiduciaries such that only a decision that

no prudent fiduciary could make results in personal liability. Pet.Br.42-44. Respondents' allegations do not come close to satisfying that appropriately demanding standard.

Respondents insist that the could-not-have standard cannot make "prudence claims against ESOP fiduciaries … impossible to plead." Resp.Br.47. But respondents themselves describe the standard as "demanding." Resp.Br.50. And while the proper application of that demanding standard may render plausible claims against insider-fiduciaries of ESOPs relatively rare, that has more to do with the nature of ESOPs than with any defect in the *Dudenhoeffer* standard. ESOPs are designed to allow employee trading in company stock and are set up to allow that trading to occur based on the investment decisions of plan participants. *See* U.S.Br.16-17; CA.J.A.626, 638. The IBM plan in this case was a "net seller" of company stock during the relevant period, not because insider-fiduciaries thought it was time to sell, but because more plan participants redeemed investments than opted to put new money into company stock. Pet.App.34a-35a. While it is certainly possible to set up an ESOP in an imprudent manner—for example, by charging plan participants outsized commissions—it will be the rare case where the only prudent course for the ESOP fiduciary is to halt all trading in the company stock, especially given that such trading is the *raison d'être* of ESOPs.

Respondents, of course, do not propose that petitioners should have shut down ESOP trading, but rather assert that they should have disclosed inside information through regular corporate channels.

Even putting aside the *Pegram* problem with that course, *see* pp.3-11, *supra,* and the case-specific deficiencies with respondents' allegations, *see* pp.14-20, *infra*, it will be the rare case where an insider-fiduciary "could not have" concluded, without the benefit of hindsight, that such a course would do more harm than good to the fund as a whole. Absent unusual circumstances (like a newly-established ESOP that has not yet purchased company stock, or information that renders the company stock valueless), the only certainty of early disclosure will be an immediate reduction in the value of the fund and immediate damage to ESOP participants that hold or plan to sell company stock. Any benefits will be far more speculative. While a prudent fiduciary might be able to credit respondents' theory that early disclosure is always better in the long run, a prudent fiduciary could disagree or give greater weight to the certain and immediate harm of a fiduciary-induced price-drop than to the speculative and deferred benefits of a quicker stock-price rebound. Simply put, the could-not-have standard and its allowance for a range of prudent judgments is not satisfied by generic allegations that disclosure sooner-rather-than-later is always the prudent course.

That may make a duty-of-prudence claim premised on the failure of insider-fiduciaries to disclose inside information a *rara avis*. But that is no reason to reject the *Dudenhoeffer* standard. This Court articulated the standard as a mechanism to separate "the plausible sheep from the meritless goats," without articulating any *a priori* notion of the ratio of the former to the latter. The Court expressed doubt about the extent to which some proposed

alternative courses were consistent with the objectives of the securities laws, and respondents have now narrowed their proposed alternatives to a single course. If that course is one that reasonable fiduciaries could forswear, and so plausible duty-of-prudence claims based on inside information are rare, that is a feature of the standard, not a bug. *Cf. Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be."). After all, the Court in *Dudenhoeffer* recognized without regret that plausible claims based on public information would be nearly impossible to plead. *See* 573 U.S. at 426-27. If a full consideration of the objectives of the securities laws and the limited courses available to insider-fiduciaries means that plausible breach-of-duty-of-prudence claims based on inside information will be few and far between, that is no basis for abandoning the *Dudenhoeffer* standard.

B. Respondents' Generalized Allegations Fail to Plausibly Allege a Duty-of-Prudence Breach.

Once the demanding nature of the could-not-have standard is accepted, it is clear that the allegations here cannot survive, just as materially identical allegations by the same lawyer were rejected by the Fifth and Sixth Circuits. Respondents identify only one alternative course that they suggest every prudent fiduciary would pursue—disclosure of inside information via IBM's regular disclosure mechanisms without regard to whether such disclosures are required by the securities laws. Respondents' allegations that petitioners' failure to pursue that

course violates ERISA's duty of prudence fails to satisfy the demands of *Dudenhoeffer*.

At the outset, respondents have no answer for the tension their position creates with the objectives of the securities laws, as they demand early disclosure without regard to securities-law obligations. Respondents' position accordingly would require courts to fashion an *ad hoc* ERISA disclosure regime based on common-law trust principles that would be layered on top of the detailed securities-law disclosure regime. As the government emphasizes, *see* U.S.Br.20-21, imposing different obligations on corporate insiders just because they serve as ESOP fiduciaries makes little sense and frustrates the objectives of the securities laws.

More fundamentally, respondents' generic allegations that disclosure sooner-rather-than-later is always the prudent course cannot survive the "context-sensitive scrutiny" that *Dudenhoeffer* demands. 573 U.S. at 425. Respondents admit, with considerable understatement, that "[s]ome of [their] allegations … are not unique to this case" and that "identical allegations … had been made in other duty-of-prudence cases." Resp.Br.27. In reality, nearly all the critical allegations can be made (and have been made by respondents' counsel, often *in haec verba*) in any stock-drop case. The decision below focused on five allegations: (1) petitioners knew material negative inside information, (2) they had the power to disclose it, (3) the stock traded in an efficient market, (4) the harm from eventual disclosure grows over time, and (5) disclosure was "inevitable." Pet.App.15a-19a. Respondents focus on those same allegations here,

Resp.Br.25-30, and they barely contest that the first four could be made against insider-fiduciaries in any stock-drop case involving a public company's ESOP. Remarkably, respondents concede that this is "particularly" true of their allegation that disclosure sooner-rather-than-later is always better because the harm from eventual disclosure only grows over time. Resp.Br.27. Thus, the lynchpin allegation of their theory that no reasonable insider-fiduciary could have rejected early disclosure as the prudent course, *see* Resp.Br.48, 52, can concededly be made in every case.

Accordingly, respondents' argument that they adequately pled context-specific facts boils down to their allegation that "disclosure of the truth" regarding IBM's Microelectronics assets "was [particularly] inevitable." Resp.Br.28, 53. That submission is doubly unavailing.

First, while the details that supposedly made disclosure inevitable will vary from case to case, the basic allegation of "inevitability" will be easy to allege routinely because *every* stock-drop case involves an actual disclosure; respondents themselves are the first to proclaim (and allege) that "no fraud last forever." J.A.97. Alleging that the disclosure that actually occurred was inevitable and providing some case-specific details about the circumstances and mechanism of disclosure will be possible in every stock-drop case. Pet.Br.52. Respondents concede as much. Resp.Br.29-30. They nevertheless contend that, here, they alleged "the specific facts to back up th[eir] claim of inevitability," Resp.Br.29-30—namely, "specific facts about IBM's impending sale of Microelectronics," Resp.Br.49. But every case has its

specific facts, so respondents' formula of alleging inevitability and some case-specific details would suffice in every case.

Second, the very case-specific details that respondents emphasize actually underscore that disclosure here was not, in fact, inevitable, but depended critically on the consummation of a sale that respondents themselves described as only "more likely than not" to occur. J.A.141; *see also* J.A.144 (referring to "the likely sale of Microelectronics"); Resp.Br.28-29. Disclosure that will inevitably occur if some "likely" future event occurs is not inevitable; it is only likely. There is nothing "shameless," Resp.Br.30 n.6, about pointing out that respondents' own complaint alleges only contingent inevitability, especially when respondents continue to acknowledge that the disclosure-triggering contingency faced considerable obstacles (particularly given the difficulties in arranging a long-term supply contract). *Cf.* Resp.Br.7, 29 (noting that "IBM … spent almost two years actively seeking a buyer," but "no buyer was interested" for most of that period). Given that the sale and thus disclosure were far from inevitable and ERISA precludes courts from analyzing events in hindsight, *see* 29 U.S.C. §1104(a)(1)(B), a prudent fiduciary easily could have concluded that the prudent course was to eschew an early disclosure with its certain and immediate harm to the value of the fund.

Moreover, even if an insider-fiduciary believed that disclosure was inevitable, she could still reasonably conclude that the immediate harm to plan participants who plan to sell or hold company shares would outweigh any benefit to new purchasers of

company stock. *See* Pet.Br.51-52; Council.Br.19-20. That is particularly true here given that the IBM ESOP was a net seller during the class period, meaning that disclosures depressing the stock price would have done more harm than good to plan participants during the class period. Pet.Br.16 & n.1.

Respondents contend that relying on the plan's net-seller status involves "hindsight" and "omits the possible harm to ESOP *holders*." Resp.Br.52. This argument ignores respondents' own complaint and the *Dudenhoeffer* pleading standard. As to the former, respondents alleged (incorrectly) that the ESOP "was a net buyer of IBM stock" during the class period and viewed that net-buyer status as incontrovertible proof that petitioners acted imprudently. *See* J.A.138 (¶106). Given the ESOP's now-undisputed net-*seller* status, those same allegations compel the conclusion that petitioners acted prudently. As to the latter, even if "[a] hypothetical prudent fiduciary could not have known whether IBM's ESOP was buying or selling more shares of stock during the period," Resp.Br.54, a prudent fiduciary of a long-established ESOP *could* reasonably conclude that the ESOP *would likely be* a net seller and prudently decide against disclosure on that basis.

Including "ESOP holders" in the calculation does not change the bottom line, but does underscore the difficult judgments confronting ESOP fiduciaries and the anomalies of allowing disclosure-based ERISA suits to proceed where securities suits would surely fail. Holders of company stock, no less than sellers, suffer an immediate harm from disclosure as the value of their holdings takes a disclosure-related hit.

Respondents' claim that holders nonetheless benefit from early disclosure in the long run depends on speculation as to how long they will hold their stocks and respondents' admittedly generic allegations that early disclosure allows a stock to rebound more quickly. As already noted, a reasonable fiduciary could decide to discredit respondents' theory or simply strike a different balance among the competing interests of sellers, buyers, short-term holders, and long-term holders.[6] Finally, the fact that respondents seek recovery on behalf of both buyers and holders of company stock, *see* J.A.152-53, just underscores the dangers of allowing disguised securities actions to proceed as ERISA suits, as this Court has long viewed holder suits under the securities laws as a bridge too far, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-55 (1975).

In the end, respondents' claims of "inevitability" add nothing to distinguish this stock-drop case from any other, including the materially identical cases from the Fifth and Sixth Circuits brought by respondents' lawyer. *See Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018); *Graham v. Fearon*, 721 F. App'x 429 (6th Cir. 2018). While respondents' counsel's

[6] Respondents' contrary view cannot be reconciled with *Dudenhoeffer*. *Dudenhoeffer* plainly assumed that a prudent fiduciary could determine that the immediate price reduction caused by disclosure could do more harm than good to the fund as a whole (including holders). Respondents' position boils down to the opposite proposition: no prudent fiduciary could ever delay disclosure because reputational harm always increases until the inevitable disclosure, and so immediate disclosure and a short-term price drop is always best for the fund as a whole, especially holders, in the long run.

belated "clear-eyed assessment," Resp.Br.34, that two of his three complaints were inadequate is a diverting exercise in self-criticism, his basic theory in all three cases was identical—disclosure sooner-rather-than-later is always better and so non-disclosing fiduciaries are always imprudent. Everything else is just case-specific detail. These three cases stand or fall together. And if the basic allegations in all three cases suffice, then *Dudenhoeffer*'s promise of weeding out "meritless goats" was a false one.[7]

III. The Government Correctly Recognizes That ERISA Does Not Impose Independent Disclosure Obligations, But Its Proposed Hybrid ERISA Suits For Securities-Law Violations Would Skirt Sensible Limitations On Securities Litigation.

There is much to like in the government's brief. The government agrees with petitioners on many things, including that the decision below cannot stand. Most important, the government agrees that the securities laws already establish a carefully calibrated regime that governs the disclosure of inside information by corporate insiders, and that courts should not fashion additional, more demanding ERISA-based duties for corporate insiders who happen to serve as ESOP fiduciaries. U.S.Br.19-21; Pet.Br.27-31. In particular, the government confirms the concern this Court alluded to in *Duedenhoeffer*—

[7] Respondents' reliance (at 34-35) on the Second Circuit's unpublished decision in *O'Day v. Chatila*, 774 F. App'x 708 (2d Cir. 2019), is perplexing, as the plaintiffs there did not assert allegations comparable to those here. *See id.* at 711 (noting that "[t]his case is … quite different from *Jander*").

namely, that imposing more demanding disclosure obligations on ESOP fiduciaries would interfere with the objectives of the securities laws. In addition, the government agrees that insider-fiduciaries must have some discretion to balance conflicting interests among plan participants, with some participants benefitting from a stock-price rise and others benefitting from a drop. U.S.Br.25; Pet.Br.43. Finally, the government agrees that there cannot be a *per se* sooner-is-better-than-later rule, even where disclosure is "inevitable." U.S.Br.27; Pet.Br.50-52.

Rather than following these observations to their logical conclusion, however, the government proposes an odd hybrid: an ERISA action based entirely on the insider-fiduciary's violation of a securities-law disclosure obligation. While that proposal is a vast improvement over the Second Circuit's approach, it remains seriously flawed both theoretically and practically. It would routinely allow ERISA suits premised on securities-law violations to proceed where rules laid down by this Court and Congress would preclude actual securities-law suits. That regime has nothing to recommend it as a practical matter. Moreover, while the government never faces a private securities action and therefore may fail to appreciate it, limits on private securities actions set forth by this Court and Congress are every bit as important to the objectives of the securities laws as substantive disclosure obligations. Thus, the logic of the government's own arguments, which focus on the second *Dudenhoeffer* consideration and the objectives of the securities laws, strongly supports the conclusion that there is no basis for imposing an entirely duplicative disclosure obligation under ERISA that

mirrors securities-law rules without the critical protections of the PSLRA and *Blue Chip Stamps.* Whether the Court gets to that result by considering the objectives of the securities laws or by recognizing that, under *Pegram*, there is no duty for insider-fiduciaries to use corporate information or corporate disclosure mechanisms to benefit plan participants, the result is the same: the Second Circuit should be reversed and the district court's dismissal of respondents' complaint should be reinstated.

The government correctly emphasizes that there is an entire statutory and regulatory regime that governs the timing and extent of the disclosure of inside information by corporate insiders. That regime allows employees who trade in ESOP stock to recover for losses suffered as a result of breaches of disclosure obligations, *cf. Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014), but it also accounts for the realities that material inside information is ubiquitous in the C-suite, that corporations can legitimately keep such information from the market, and that over-disclosure can be counterproductive. For all these reasons, establishing any additional or earlier disclosure obligations unique to insider-fiduciaries would interfere with the objectives of the securities laws (and run afoul of *Dudenhoeffer*'s admonition that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general," 573 U.S. at 412).

Congress, however, has repeatedly recognized that striking the proper balance between the needs of corporate insiders and the rights of market participants not only is a matter of the substantive

securities law, but also requires adjusting the rules for private litigation to enforce those substantive requirements. As a result, Congress has repeatedly enacted statutes to address the proper and properly limited role for private securities litigation and to ensure that the threat of meritless securities litigation any time a stock drops does not chill legitimate corporate activity. The most prominent example is the PSLRA. That statute was specifically enacted to counter the reflexive filing of litigation alleging a failure to make earlier disclosures every time a stock-price drop followed the disclosure of negative information. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Two prominent aspects of the reforms introduced by the PSLRA include heightened pleading requirements and an automatic stay of discovery pending resolution of a motion to dismiss. *See* 15 U.S.C. §78u-4(b).

This Court has likewise recognized the need for sensible limits on private securities litigation. For example, as relevant here, this Court has limited private securities suits to those who actually bought or sold the relevant security during the time period when its value was allegedly distorted. *See Blue Chip Stamps*, 421 U.S. at 731.

None of these important and sensible limitations on securities actions would be obviously applicable to the hybrid ERISA suits the government envisions, even though the suits would be necessarily premised on the violation of securities-law duties. This case well-illustrates the anomaly. While a putative

securities class action (that appeared to include ESOP participants) based on the identical allegations and involving (in the government's view) the self-same securities-law disclosure obligation was dismissed due to the PSLRA's heightened pleading standard for scienter, this ERISA suit was allowed to proceed. Moreover, while a securities suit involving these allegations would need to exclude holder claims, the complaint here included them.

And while this case well-illustrates the anomalies created by the government's position, the perverse results would be widely felt. It has long been common for ERISA actions to be filed as follow-ons to private securities actions based on the same alleged fraud. *See* Pet.App.3a-5a; Cornerstone Research, *Employee Retirement Income Security Act (ERISA) Company Stock Cases*, https://bit.ly/2LVMuxK (last visited Oct. 23, 2019) ("Almost 70 percent of ERISA stock drop cases follow securities class actions."). While those follow-on ERISA actions have traditionally been the tail on the securities litigation, the government's position threatens to turn them into the main event, allowing them to proceed where the PSLRA would shut down the actual securities litigation. None of that makes any sense. If ERISA disclosure obligations simply duplicate securities-law disclosure obligations and respondents' proposed means of disclosure are IBM's regular securities-law filings, then the proper vehicle for remedying any violation is a regular securities action, subject to the PSLRA and *Blue Chip Stamps*.

There are two sensible ways of avoiding the anomalies created by the government's position. One involves simply following the logic of the government's own position to its logical conclusion. When an ERISA suit is premised on a failure to disclose inside information to the market as a whole, there is no need for a duplicative ERISA suit, and allowing a suit to proceed based on either more demanding disclosure obligations or less demanding litigation requirements interferes with the objectives of the securities laws. Alternatively, if the Court recognizes that, under *Pegram*, an insider-fiduciary has no fiduciary duty to use corporate information or corporate disclosure mechanisms to benefit plan participants, then the focus of stock-drop suits will be where they belong—in securities-law actions subject to the duties and litigation requirements that this Court and Congress have deemed appropriate for securities actions. Either way, the proper disposition is to reverse the Second Circuit.

CONCLUSION

The Court should reverse the Second Circuit's judgment.

Respectfully submitted,

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