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 TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Teachers Insurance and Annuity Association of America (TIAA) was established in 1918 by the Carnegie Foundation for the Advancement of Teaching to provide guaranteed retirement income and life insurance to educators. Today, TIAA offers, among other things, annuities, mutual funds, and recordkeeping services to colleges, universities, and other not-for-profit and charitable institutions for the purpose of securing lifetime income during participating employees' retirement. TIAA has served more than 15,000 institutional clients, including petitioner University of Pennsylvania (Penn).

This case is one of about twenty lawsuits in which plaintiffs have alleged that universities breached their fiduciary duties under ERISA by including certain investment options in their retirement plans and overpaying for services. Most of those cases, including this one, involve allegations regarding TIAA's investment products and fees. Because the decision below is erroneous and has far-reaching impacts for many of TIAA's clients, TIAA files this amicus curiae brief to urge the Court to grant review.

SUMMARY OF ARGUMENT

Beginning in 2016, lawsuits have been brought against roughly twenty universities across the country

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than TIAA and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of TIAA's intention to file this brief at least ten days prior to the due date. All parties have consented to the filing of the brief.

alleging that the universities breached their fiduciary duties under ERISA by maintaining certain underperforming investment options in their retirement plans and paying excessive fees for recordkeeping and other services. *See* Pet. 1, 28 & n.5. Many of those allegations concern TIAA. Those lawsuits allege that the universities, including Penn, imprudently maintained TIAA's CREF Stock account and Real Estate Account in their retirement plans, and, as a result, participants have invested in those allegedly underperforming funds. They also allege that the universities (and their plan participants) paid too much for TIAA's services.

In the decision below, a divided panel of the Third Circuit allowed such claims to proceed to discovery, but only because it misinterpreted this Court's decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). This Court made clear in *Twombly* that allegations of violative behavior are not plausible (and thus fail the Rule 8 pleading requirement) where the conduct in question is "just as much in line with a wide swath of" common and lawful behavior as it is with illegality, and has an "obvious [lawful] alternative explanation." 550 U.S. at 554, 567. The Court reiterated that point in *Iqbal*, noting that, to be plausible, allegations in "'all civil actions and proceedings'" must be "context-specific" and "permit the court to infer more than the mere possibility of misconduct." 556 U.S. at 679, 684. The panel majority incorrectly cabined this critical aspect of the pleading standard to apply only to antitrust claims, and found respondents' allegations sufficient to state a claim for breach of fiduciary duty, even though they have not pleaded facts to account for obvious, lawful, alternative explanations for Penn's retention of TIAA's funds and payment of its fees.

The Court should grant review to correct the Third Circuit's deviation from this Court's decisions. The Third Circuit's decision allowing respondents' implausible claims to obtain discovery heightens the disagreement among the lower courts about the proper pleading standard in ERISA cases like this one. If the Third Circuit's decision is allowed to stand, other courts will also likely permit claims consistent with prudent conduct to move past the pleading stage, imposing unjustified litigation costs and enormous settlement pressure on universities. Already, six universities have settled, two after the Third Circuit's decision. Pet. 2. Further, the Third Circuit's decision is flatly inconsistent with this Court's case law that clarified that *Twombly*'s requirement of pleading facts to account for obvious, lawful, alternative explanations applies outside antitrust claims. The Court has even applied that standard in an ERISA case. *See Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 429-430 (2014).

This case also provides an ideal vehicle to clarify the pleading standard. Had the Third Circuit applied *Twombly* correctly, it would have rejected respondents' claims as implausible because Penn had good reasons to maintain the challenged funds and fees, particularly in light of the services TIAA provided. Indeed, other courts have rejected similar allegations. Penn, nonetheless, is subject to burdensome discovery solely because the Third Circuit misinterpreted *Twombly* and *Iqbal*.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT IMPLAUSIBLE CLAIMS OF FIDUCIARY BREACH UNDER ERISA SHOULD NOT PROCEED TO BURDENSOME DISCOVERY

Respondents' claims against Penn are substantially similar to those alleged in numerous other lawsuits against various universities. Those cases generally focus on two aspects of the universities' retirement plans: (a) performance of investment options included in the plan, and (b) the fees charged for recordkeeping and other services relating to those options. All of those cases face the problem that the challenged offerings and fees are "at least 'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." Pet. App. 8a (quoting *Bell Atl. Co.* v. *Twombly*, 550 U.S. 544, 554 (2007)); *see infra* pp. 13-22 (discussing features challenged in this case). To surmount that obstacle, the plaintiffs must plead additional facts that, if true, would establish that the challenged features reflect unlawful activity rather than lawful conduct—here, commonplace activity consistent with a fiduciary's prudent exercise of discretion. *Cf. Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679, 682 (2009).

But in the decision below, the Third Circuit held that *Twombly*'s pleading requirement—that plaintiffs take account of obvious lawful explanations for the defendants' conduct and plead facts explaining why that conduct was nonetheless plausibly violative—does not apply in ERISA cases. Pet. App. 8a-9a. Moreover, that ruling was dispositive in this case, because the court of appeals did not question the district court's conclusion that *Twombly*'s pleading requirement would be fatal to

this lawsuit. *See* Pet. App. 8a. And on that basis, the court of appeals allowed respondents' implausible claims against Penn to proceed to burdensome discovery.

In so holding, the Third Circuit brought to the fore the disagreement among the lower courts about the proper pleading standard in ERISA cases and the consequences of a lax pleading requirement. If the Third Circuit's decision is allowed to stand, other courts could similarly allow claims that are just as consistent with prudent conduct as they are with a fiduciary breach to obtain discovery. The result—as Judge Roth noted in dissent (Pet. App. 42a-44a)—is a waste of resources as not-for-profit universities and their pension funds are required to defend against, and perhaps settle, plainly implausible claims.

A. The Third Circuit Erroneously Allowed Respondents' Implausible Claims Of Fiduciary Breach To Proceed To Discovery

Respondents make two kinds of claims, as relevant here. *First*, they claim that Penn imprudently maintained in its retirement plan two investment vehicles offered by TIAA—the CREF Stock account (CREF Stock) and the TIAA Real Estate Account (REA)—even though those investments allegedly underperformed compared to supposed benchmarks during the proposed class period. C.A. App. 108-124, 138-142. As explained below (pp. 14-16), CREF Stock is a variable annuity; it is TIAA's second most popular product and the second most popular product in Penn's plan based on assets under management. Goodman & Richardson, *TIAA and CREF: Program Features and Recent Evidence on Performance and Utilization* 3, TIAA-CREF Institute Research Dialogue, Issue No. 114 (Sept. 2014)

("Goodman & Richardson"), https://tinyurl.com/sarhftg; C.A. App. 354-376. REA, another option commonly included in university retirement plans, allows plan participants to invest directly in real estate. Goodman & Richardson, at 3. Respondents contend that Penn should have removed those options from its plan so that participants would not have been able to invest in them. C.A. App. 108-124.

Second, respondents also claim that Penn paid excessive fees for TIAA's services, particularly recordkeeping. C.A. App. 71-85, 134-137, 138-142. Recordkeeping is "a service necessary for every defined contribution plan." C.A. App. 48. In general, a recordkeeper keeps track of each plan participant's investments and provides education to participants about investment options in the plan. *Id.* Respondents maintain that recordkeeping is essentially a commodity service and contend that TIAA's recordkeeping fees were too high, in part because Penn paid for recordkeeping based on a percentage of assets under management, rather than a flat fee per participant. C.A. App. 81-82.

The district court correctly determined that respondents challenged conduct that is "'just as much in line with a wide swath of'" common and prudent actions as it is with imprudence, and thus failed *Twombly*'s pleading standard. Pet. App. 8a, 79a-80a. But a divided panel of the Third Circuit held that was error. Pet. App. 8a-9a. Notably, the Third Circuit did not deny that Penn's decisions are just as consistent with prudent conduct as with a fiduciary breach. Nor could it, for conspicuously missing in respondents' allegations is the relevant context for Penn's specific decision-making with regard to CREF Stock, REA, and TIAA's fees, including for recordkeeping. Respondents do not address, for example, that Penn could have retained

CREF Stock and REA in the plan based on obvious reasons that a prudent fiduciary would take into account, such as their popularity among participants and their distinctive features that contribute to a diversified portfolio. Nor do respondents' allegations account for the fact that TIAA's fees reflect the unique, high-touch services it provides as a recordkeeper, and that fees are commonly charged as a percentage of assets. Indeed, as courts have recognized, a per-participant fee disadvantages lower-income, lower-investment individuals. *See Loomis* v. *Exelon Corp.*, 658 F.3d 667, 672-673 (7th Cir. 2011).

All of those facts represent obvious lawful explanations for Penn's actions, rooted in practices commonplace in university retirement plans. Under *Twombly*, respondents could not ignore those points; rather, they were required to plead facts plausibly demonstrating why nonetheless Penn's actions reflected a breach of fiduciary duty. But respondents did not do so; rather, their contention is just that the challenged funds underperformed and the fees were high, and so Penn must have been imprudent in maintaining them, regardless of what other considerations supported Penn's retention of those funds and fees. *E.g.*, Pet. App. 21a (respondents alleged that "Penn's process of selecting and managing options *must have been* flawed if Penn retained expensive underperformers over better performing, cheaper alternatives") (emphasis added). That unadorned speculation is not enough to satisfy respondents' pleading obligation.

The court of appeals did not scrutinize respondents' allegations with the rigor that Rule 8 and *Twombly* require. Indeed, because the Third Circuit did not examine whether Penn had alternative lawful explanations for its decisions, the court focused solely on whether

respondents had plausibly alleged that the challenged options underperformed their supposed benchmarks, and whether the fees could have been lower. Pet. App. 21a-24a. And even then, the court's analysis was sparse. The majority did not examine, for example, whether respondents' supposed benchmarks for measuring CREF Stock's and REA's performance are appropriate comparators, as another district court had in dismissing a similar claim. *See Wilcox* v. *Georgetown Univ.*, 2019 WL 132281, at *11 (D.D.C. Jan. 8, 2019), *appeal pending*, No. 19-7065 (D.C. Cir.).

B. The Third Circuit's Decision Highlights The Lower Courts' Disagreement About The Proper Pleading Standard In ERISA Cases

The Third Circuit's decision emphasizes the disagreement among the lower courts about the proper pleading standard in ERISA cases like this one. Although similar claims have moved past the pleading stage in some other lawsuits,[2] three courts (besides the

[2] *See Vellali* v. *Yale Univ.*, 308 F. Supp. 3d 673 (D. Conn. 2018); *Cassell* v. *Vanderbilt Univ.*, 285 F. Supp. 3d 1056 (M.D. Tenn. 2018); *Short* v. *Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Cunningham* v. *Cornell Univ.*, 2017 WL 4358769 (S.D.N.Y. Sept. 29, 2017); *Henderson* v. *Emory Univ.*, 252 F. Supp. 3d 1344 (N.D. Ga. 2017); *Tracey* v. *Massachusetts Inst. of Tech.*, 2017 WL 4478239 (D. Mass. Oct. 4, 2017); *Daugherty* v. *University of Chic.*, 2017 WL 4227942 (N.D. Ill. Sept. 22, 2017); *Clark* v. *Duke Univ.*, 2017 WL 4477002 (M.D.N.C. May 11, 2017); *Kelly* v. *Johns Hopkins Univ.*, 2017 WL 4310229 (D. Md. Sept. 28, 2017). Six of those universities subsequently settled. *See* Wille, *MIT Inks Largest Settlement in College Retirement Plan Lawsuits*, Bloomberg Law (Oct. 29, 2019), https://tinyurl.com/sz7cgod. And in the only case to proceed to trial so far, the court rejected all of the plaintiffs' claims. *Sacerdote* v. *New York Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. July 31, 2018), *appeal pending*, No. 18-2707 (2d Cir.).

district court below) have dismissed in full the plaintiffs' allegations as implausible.

In *Divane* v. *Northwestern University*, the court explained that under *Twombly*, "[a]llegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient; rather, plaintiffs must include allegations that 'nudg[e] their claims across the line from conceivable to plausible.'" 2018 WL 2388118, at *4 (N.D. Ill. May 25, 2018), *appeal pending*, No. 18-2569 (7th Cir.). Applying that standard, the court noted that most of the plaintiffs' allegations were merely "a description of plaintiffs' opinions" on ERISA and sound investment, rather than plausible allegations of imprudent conduct. *Id.* at *2, *6-8. In *Wilcox*, the court rejected the plaintiffs' underperformance and fee allegations as implausible, noting the "'particular circumstances'" that explain the university's decisions. 2019 WL 132281, at *10-12; *see also Davis* v. *Washington Univ. in St. Louis*, 2018 WL 4684244, at *2-4 (E.D. Mo. Sept. 28, 2018) (dismissing similar allegations as those here), *appeal pending*, No. 18-3345 (8th Cir.).

Because of the Third Circuit's misinterpretation of *Twombly*, however, Penn now faces burdensome discovery and unwarranted settlement pressure. Absent this Court's review, more universities likely will be subject to similar burdens and pressures. Six of the cases in which the plaintiffs' allegations survived the pleading stage have settled, two after the Third Circuit's decision. Pet. 2. And plaintiffs easily could bring more suits, emboldened by the Third Circuit's ruling that a fiduciary could plausibly be liable based on a few select aspects of its decisions, even if those decisions are consistent with the decisions of numerous other fiduciaries and have obvious explanations that point to prudent conduct. Judge Roth was exactly right when

she emphasized in her dissent that "reality demands that cases such as this one be carefully scrutinized in order not to permit implausible allegations to result in a large settlement, under which a substantial portion of the funds that are to be reimbursed to retirement plans are instead diverted to attorneys' fees." Pet. App. 44a.

II. THE THIRD CIRCUIT'S DECISION CONTRADICTS THIS COURT'S DECISIONS HOLDING THAT *TWOMBLY*'S PLEADING REQUIREMENT IS NOT LIMITED TO ANTITRUST CASES

The Third Circuit's decision further warrants review because it contradicts this Court's case law applying *Twombly*. As this Court made clear in *Iqbal* and *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409 (2014), *Twombly*'s requirement that plaintiffs plead facts accounting for obvious lawful explanations for the defendant's conduct is not limited to antitrust cases and applies generally, including in ERISA cases.

In *Iqbal*, the Court noted that *Twombly*'s pleading standard specifying when allegations are plausible is rooted in Rule 8 itself, and accordingly applies to "'all civil actions and proceedings.'" 556 U.S. at 684. Courts of appeals have heeded that directive and have applied *Twombly*'s requirement of pleading facts to refute obvious lawful explanations outside the antitrust context. *See, e.g.*, *McCleary-Evans* v. *Maryland Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 588 (4th Cir. 2015) (discrimination claims); *Smoke Shop, LLC* v. *United States*, 761 F.3d 779, 785 (7th Cir. 2014) (Federal Tort Claims Act case); *Gee* v. *Pacheco*, 627 F.3d 1178, 1185 (10th Cir. 2010) (First Amendment claim).

And this Court itself has applied *Twombly*'s alternative-explanations requirement in an ERISA case. In

Dudenhoeffer, the Court addressed a claim that defendants had breached their fiduciary duties by failing to act on inside information. 573 U.S. at 429-430. In explaining what Rule 8 requires to state such a fiduciary-breach claim, the Court emphasized that the pleading standard is designed to "divide the plausible sheep from the meritless goats," which requires considering whether "a prudent fiduciary in the defendant's position could not have concluded that" acting on the basis of inside information would "do more harm than good." *Id.* at 425, 429-430; *see also Retirement Plans Comm. of IBM* v. *Jander*, 2020 WL 201024, at *1 (U.S. Jan. 14, 2020) (per curiam) (reiterating *Dudenhoeffer*'s "'more harm than good' pleading standard"). In other words, the Court reasoned that where there is an obvious alternative explanation for a fiduciary's alleged inaction—namely, the rational belief that acting based on inside information would be detrimental to participants—courts must determine whether plaintiffs have plausibly alleged a breach of duty in light of that alternative explanation.

That requirement makes particular sense in ERISA cases. "No authority [under ERISA] requires a fiduciary to pick the best performing fund," *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820, 822, 823 (8th Cir. 2018), or to "scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)," *Hecker* v. *Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009). Instead, a prudent fiduciary (among other things) "diversif[ies] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. § 1104(a)(1)(C), and reasonably designs a portfolio to "further the purposes of the plan," 29 C.F.R. § 2550.404a-1(b). *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan*

v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717 (2d Cir. 2013) ("[T]he prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole.").

Further, fiduciaries must often decide among various paths, and the process by which they make that decision is not subject to mechanical principles. A choice may appear mistaken in hindsight, but it does not follow that the decision was imprudent at the outset given the information available at the time. It is therefore particularly important that plaintiffs point to facts plausibly establishing why one course of action was imprudent rather than consistent with commonplace and lawful conduct. Indeed, a plaintiff claiming a breach of fiduciary duty under ERISA based on circumstantial allegations must plausibly allege that "a prudent fiduciary in like circumstances would have acted differently." *St. Vincent*, 712 F.3d at 720; *accord Meiners*, 898 F.3d at 822; *see* 29 U.S.C. § 1104(a)(1)(B) (requiring fiduciaries to exercise "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims").

That objective-prudence standard goes hand in hand with *Twombly*'s requirement. If the conduct in question is consistent with "a wide swath of" common behavior and has an "obvious [lawful] alternative explanation," *see Twombly*, 550 U.S. at 554, 567, then it is not, without more, plausible that a prudent fiduciary was required to have acted differently. Conversely, for a plaintiff to plausibly allege that a prudent fiduciary would necessarily have acted differently in like circumstances, that plaintiff must plead facts showing why the decision did not rest on an obvious alternative explana-

tion that points to prudent behavior. Other courts of appeals addressing ERISA claims have applied *Twombly*'s rigorous pleading standard. *See Meiners*, 898 F.3d at 822 ("If the pled facts are merely consistent with liable acts, the complaint 'stops short of the line between possibility and plausibility.'"); *St. Vincent*, 712 F.3d at 719 (allegations are not plausible when they are "'merely consistent with[] a finding of misconduct'").

III. This Case Is An Excellent Vehicle To Clarify That *Twombly*'s Requirement Applies In ERISA Cases Because Respondents Allege Nothing More Than Conduct That Is Commonplace And Prudent

This case provides an ideal vehicle to clarify that *Twombly*'s requirement of pleading facts to account for obvious, lawful, alternative explanations applies in ERISA cases. The Third Circuit's opinion makes clear that the pleading standard was dispositive in finding respondents' allegations plausible; the court did not even examine any context for those allegations that would justify Penn's decisions. *See* Pet. App. 8a-9a, 21a-24a. Had the Third Circuit applied *Twombly* correctly, it would have affirmed the district court's dismissal because respondents allege nothing more than conduct that is commonplace and prudent.

A. CREF Stock And REA Are Popular Investment Options With Unique Features And Benefits

There are obvious reasons why Penn has retained CREF Stock and REA as investment options available to participants: CREF Stock and REA are popular investment options that provide plan participants with valuable benefits. Because those reasons support the

prudence of maintaining those options, respondents' allegations (which do not address any of them) fail under *Twombly*.

1. TIAA created CREF Stock—the nation's first variable annuity—in 1952, to help investors fight inflation. Historically, CREF Stock has performed well, with average annual returns of nearly 10% since its inception. *CREF Stock Account (Class R1)* 1 (data as of Sept. 31, 2019), https://tinyurl.com/swzpest.[3] Morningstar, a leading investment-research firm, has awarded five stars to the class of CREF Stock included in Penn's plan. *CREF Stock Account (Class R3)* 1 (data as of Sept. 30, 2019), https://tinyurl.com/sqzr5br.[4]

CREF Stock has unique features. *First*, CREF Stock is a companion to TIAA Traditional, the most popular investment option in Penn's plan, C.A. App. 354-376. TIAA Traditional, which TIAA has offered since 1918, is a guaranteed fixed annuity that provides safety and stability to retirement portfolios. Goodman & Richardson, at 3-4. The idea behind pairing the two

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[3] Although Penn's plan currently includes the R3 class of CREF Stock, TIAA cites here the fact sheet for the R1 class, which was included in Penn's plan prior to the expansion into three share classes in 2015, because it contains data on the average annual return since CREF Stock's inception in 1952.

[4] Courts have considered such publicly available information in determining whether plaintiffs have plausibly alleged a breach of fiduciary duty under ERISA. *See Wilcox*, 2019 WL 132281, at *4 n.5 (taking judicial notice of prospectuses and Morningstar data), *appeal pending*, No. 19-7065 (D.C. Cir.); *Davis*, 2018 WL 4684244, at *2 (because the plaintiffs' complaint "references returns data for TIAA and Vanguard funds, the court properly considers the TIAA and Vanguard prospectuses, fact sheets, and the like").

was that CREF Stock would offer the possibility of greater returns (with higher risk) by enabling participants to directly purchase an equity asset class within their retirement plans, while TIAA Traditional would provide stability. *Id.* at 3. Participants' funds in CREF Stock accumulate through investments similar to mutual fund investments, but upon retirement participants can convert those accumulations into a steady stream of lifetime income. *Id.* at 11.

Second, CREF Stock invests in both domestic and foreign equities, *CREF Stock Account (Class R3)* 1, which makes CREF Stock "unique," *Sacerdote*, 328 F. Supp. 3d at 313; *accord Wilcox*, 2019 WL 132281, at *11. Because of that investment profile, TIAA uses a custom benchmark—CREF Composite Benchmark—to track CREF Stock's performance. *CREF Stock Account* 1 & n.1, https://tinyurl.com/v2tr8rz (visited Jan. 15, 2020). The composite benchmark consists of a weighted average of the Russell 3000 Index and another index. *Id.*[5]

Third, TIAA manages CREF Stock through a combination of three investment strategies: active management, indexing, and quantitative management. *CREF Stock Account (Class R3)* 1; CREF Prospectus 29 (May 1, 2019), https://tinyurl.com/w5fj9l9. With active management, TIAA "looks for stocks that it believes are attractively priced" and "whose assets appear undervalued in the market." *CREF Prospectus*

[5] As another court has explained, some plan participant disclosures have identified the Russell 3000 Index as a benchmark for CREF Stock because "applicable Department of Labor regulations do not permit the use of a composite benchmark." *Wilcox*, 2019 WL 132281, at *11.

29. Indexing, in turn, "is designed to track various segments of the … Account's composite benchmark index" by purchasing "most, but not necessarily all, of the stocks" in that index. *Id.* The quantitative strategy uses "proprietary, quantitative modeling techniques" in an "attempt to outperform the index by over- and underweighting certain stocks in the index," while still remaining close to the benchmark. *Id.*

Over time, CREF Stock has become one of TIAA's most popular investment options, second only to TIAA Traditional, based on the assets under management. Goodman & Richardson, at 3. As of 2013, which is during the proposed class period, CREF Stock held $126.46 billion in assets. *Id.* CREF Stock is also the second most popular investment option in Penn's plan, holding $772 million in assets for Penn's participants as of 2013. C.A. App. 368.

2. Similarly, REA is a commonly included investment option in retirement plans, holding $16 billion in assets as of 2013. Goodman & Richardson, at 3. It has returned an average of more than 6% since its inception in 1995. *TIAA Real Estate Account* 1 (data as of Sept. 30, 2019), https://tinyurl.com/vqh9ot6.

Like CREF Stock, REA offers distinctive and valuable benefits to participants by enabling them to invest in directly owned commercial and multi-family real estate assets while offering guaranteed liquidity. *TIAA Real Estate Account Frequently Asked Questions* 3, https://tinyurl.com/sz8rjrf (visited Jan. 15, 2020). That direct investment in real estate means that the returns on REA "are driven by the 'fair value' of the real property it holds and the income these properties generate," rather than by stock performance, which makes REA less volatile. *Wilcox*, 2019 WL 132281, at

*5; *accord TIAA Real Estate Account Frequently Asked Questions* 11-12, 14-15. Moreover, unlike real estate investment trusts (REITs) that invest in securities of publicly traded companies that own and manage real estate investments, REA does not closely track, or correlate with, the stock market. *Id.* at 11-12, 16. For these reasons, REA provides participants a chance to truly diversify their retirement portfolio.

The distinctive features and benefits of these options—as reflected by their popularity—provide a prudent reason for Penn to maintain them as investment opportunities for participants. By offering CREF Stock in a menu of options, Penn provides participants the *choice* to invest in one of TIAA's most popular products and to diversify their retirement portfolios. And by including REA in the plan, Penn allows participants to invest directly in real estate, further diversifying their investments. These obvious reasons for including CREF Stock and REA cannot be ignored in determining the plausibility of respondents' allegations, particularly where a fiduciary is directed to "diversify[] the investments of the plan" and pursue the broader purposes of the plan. 29 U.S.C. § 1104(a)(1)(C); 29 C.F.R. § 2550.404a-1(b).

3. Respondents' allegations of underperformance do nothing to undermine these explanations. As noted above, ERISA fiduciaries are not obligated to include only the highest-performing investment options in the plan. *Meiners*, 898 F.3d at 823. But even setting that aside, respondents' allegations are misleading. For example, respondents compare CREF Stock to certain purely or primarily domestic funds, C.A. App. 114-117, even though CREF Stock invests in both domestic and foreign equities. As the court explained in *Wilcox*, "[t]hat the CREF Stock Account, with its deliberate

mix of foreign and domestic investments, may not have performed as some purely domestic accounts with different investments does not indicate imprudence." 2019 WL 132281, at *4-5, *11.[6]

Respondents' allegations regarding REA's performance are also insufficient to satisfy *Twombly*. Respondents allege that REA underperformed a REIT (Real Estate Investment Trust), C.A. App. 121-123, but a REIT is a fundamentally different investment option. Unlike REA, which invests directly in real estate, a REIT invests in liquid real estate securities, which makes it more volatile. *Cf. Sacerdote*, 328 F. Supp. 3d at 309; *Wilcox*, 2019 WL 132281, at *5. Respondents cannot plausibly allege that Penn acted imprudently by comparing REA to a wrong benchmark.

B. The Challenged Aspects Of TIAA's Fees Are Commonplace And Reasonable In Light Of The Service TIAA Provides

Respondents' allegations about TIAA's fees, including for recordkeeping, fare no better. Two things are essential to understanding respondents' fee allegations: (1) the expense ratios and fee structure associated with certain challenged options, and (2) TIAA's recordkeeping services and the asset-based model through which

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[6] Respondents' comparisons are further inappropriate because they fail to take into account CREF Stock's mix of investment strategies and compare CREF Stock to actively or passively managed funds at different points in time. *Cf. Meiners*, 898 F.3d at 823 ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [plan's funds] were an imprudent choice at the outset."); *Sacerdote*, 328 F. Supp. 3d at 314-315 (noting, after trial, that "a more accurate comparison shows the CREF Stock Account did not underperform").

Penn pays for those services. These facts provide the necessary context and obvious explanations for the challenged fees.

1. Respondents claim that the expense ratios—*i.e.*, the percentage of fund assets used for administrative, management, and other expenses—associated with some of TIAA's mutual funds are excessive. C.A. App. 95-96. But whether or not those fees could have been lower, it was not imprudent for Penn to maintain those funds because the range of fees at issue—from 0.23% to 0.8%—is objectively reasonable, consistent with the ranges that courts have deemed reasonable. *Compare* C.A. App. 95-96 *with Tibble* v. *Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013) (0.03% to 2% range), *vacated on other grounds*, 575 U.S. 523 (2015); *Loomis*, 658 F.3d at 669 (0.03% to 0.96%); *and Hecker*, 556 F.3d at 586 (0.07% to around 1%). In fact, the fees at issue are well within the 0.1%-to-1.21% range that the Third Circuit itself deemed reasonable in *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 319, 327 (3d Cir. 2011).

Respondents also fault CREF Stock and REA for having multiple layers of fees within the total expense ratios—*e.g.*, the administrative expense, distribution expense, and investment management expense. C.A. App. 71-78. But different components are common features in retirement plans. As the U.S. Department of Labor has explained, retirement plan fees "generally fall into three categories," "[p]lan administration fees," "[i]nvestment fees," and "[i]ndividual service fees," which serve different purposes. U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses* 3-4 (Dec. 2011), https://tinyurl.com/y2dlz77y. And TIAA explains what costs are factored into the total expense ratio. *See CREF Stock Account (Class R3)* 1; *TIAA Real Estate Account Frequently Asked Questions* 6, 17.

2. Respondents' other fee allegation is that Penn paid excessive recordkeeping fees to TIAA, in part because Penn paid those fees based on total assets under management, rather than on a per-participant basis. C.A. App. 72, 75-85.

As an initial matter, the reasonableness of fees must be evaluated in light of the services provided. Where "fiduciaries have good reasons for preferring a more expensive recordkeeper," such reasons can "make the fee reasonable." *George* v. *Kraft Foods Global, Inc.*, 641 F.3d 786, 799 n.11 (7th Cir. 2011). Although respondents apparently believe that recordkeeping is a commodity service that can be performed equally well by any firm for any investment, fiduciaries often consider it prudent to have different recordkeepers for different investment services and to bundle proprietary investment options with recordkeeping services from the firm that offers those options.

Penn had ample reasons to maintain TIAA as a recordkeeper for TIAA investments. TIAA provides services that are critical to both the successful administration of the plan—particularly TIAA's core annuity products—and to help participants understand how they can maximize their benefit from TIAA's products. "Lifetime income products," such as TIAA Traditional and CREF Stock, "are more complex and require more education for participants to make sure they fully understand how they work." Saxon & Powell, *Preparing Educational and Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, 127 J. Taxation 53, 59 (2017).

As the provider of the relevant investment options, TIAA is uniquely positioned to provide the recordkeeping services that properly guide the investors. Indeed,

a district court in a similar lawsuit observed that the plaintiffs had cited "no example of any non-TIAA entity performing recordkeeping for TIAA annuities, which, of course, are based on decades worth of investment." *Wilcox*, 2019 WL 132281, at *12; *see also Sacerdote*, 328 F. Supp. 3d at 302-303.

High-quality recordkeeping services also fill a critical need. The U.S. Department of Labor, "along with the Treasury Department and other stakeholders," has "identified the need for lifetime income as an important public policy issue and … supported initiatives that could lead to broader use of lifetime income options." Letter from Louis J. Campagna, U.S. Dep't of Labor, to Christopher Spence, TIAA (Dec. 22, 2016), https://tinyurl.com/w57unnm. And the demand for financial advisers is projected to grow, as baby boomers approach retirement and as individual retirement accounts continue to replace traditional pension plans. U.S. Dep't of Labor, *Occupational Outlook Handbook: Personal Financial Advisors*, https://tinyurl.com/um8lxk9 (visited Jan. 15, 2020). TIAA provides high-touch services to help plan participants achieve the important goal of retirement security. Respondents have not alleged that Penn imprudently maintained TIAA as a recordkeeper *despite* TIAA's valuable services.

Further, the fact that Penn paid for TIAA's recordkeeping services through asset-based fees does not indicate any imprudence. Asset-based fees are a "common and 'acceptable' investment industry practice[] that frequently inure[s] to the benefit of ERISA plans." *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *see* U.S. Dep't of Labor, Advisory Opinion No. 2013-03A, 2013 WL 3546834, at *3-4 (July 3, 2013) (approving asset-based fees as a means of paying administrative fees, provided that fiduciaries understand the

formula through which fees are calculated and ensure that fees paid are reasonable in light of the services provided). And there is a good reason for that: Because a per-participant fee applies to every participant equally, it disproportionately disadvantages lower-income, lower-investment individuals, who tend to be younger participants. *See Loomis*, 658 F.3d at 672-673; *America's retirement score: In fair shape—but fixable* 7, Fidelity, https://tinyurl.com/tv6lxl2 (visited Jan. 15, 2020). For example, if the recordkeeping fee is $75 a year and a participant has a small initial balance ($1,000), the fee is disproportionately high for that participant. That helps explain why fees calculated as a percentage of assets under management is a commonplace feature of retirement plans, including plans administered by nonprofit entities such as Penn. Given the pervasiveness of the practice, under *Twombly*, respondents had the obligation to plead facts showing that Penn's decision to follow that well established practice was imprudent, and they failed to do so.

* * *

This case presents the important question whether *Twombly*'s requirement of pleading facts to account for and refute obvious lawful alternative explanations applies to ERISA cases. The Court has already held that *Twombly* is not limited to antitrust claims and that its pleading standard applies to ERISA cases. *Iqbal*, 556 U.S. at 684; *Dudenhoeffer*, 573 U.S. at 429-430. The Third Circuit, however, departed from those decisions and erroneously allowed respondents' claims against Penn to move past the pleading stage, even though Penn's retention of the challenged funds and fees is consistent with common fiduciary behavior and has alternative explanations perfectly consistent with pru-

dent conduct. Because of the Third Circuit's deviation, Penn will be subject to burdensome discovery and enormous settlement pressure, and if the Third Circuit's decision is not reversed, the harm will likely spread to other universities as well. The Court should grant review to make clear that *Twombly* and ERISA demand more than the Third Circuit has required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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