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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "Questions Presented" in the petition depend on the premise that the Third Circuit held that the pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), does not govern claims for breach of fiduciary duty under ERISA. In fact, the Third Circuit expressly relied upon the *Twombly* standard. Pet App. 8a, 10a. The actual question presented, then, is whether the Third Circuit *misapplied* that properly stated rule of law. *Cf.* S. Ct. R. 10. An accurate statement of the sole question raised by the decision below is:

Whether the Third Circuit correctly found that respondents' amended complaint contained sufficient factual matter to state a plausible claim that petitioners breached their ERISA fiduciary duties, where respondents' "detailed and specific" factual allegations (Pet. App. 27a) showed that petitioners:

(a) provided higher-cost retail-class shares of 58 mutual funds to participants in respondents' retirement plan instead of identical lower-cost institutional-class shares of the same funds;

(b) caused the plan to incur administrative fees in an amount six times higher than the market rate for the same services; and

(c) failed to properly monitor and remove certain plan investment options despite years of severe underperformance compared to lower-cost benchmark funds.

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INTRODUCTION

Petitioners mischaracterize the Third Circuit's decision and misstate the complaint's allegations.

I. The Third Circuit did not hold "that *Twombly*'s pleading requirements do not govern ERISA claims," as petitioners contend. Pet. 13. The court in fact explicitly relied on the *Twombly* plausibility standard in describing the "[p]leadings standards for claims brought under ERISA." Pet. App. 7a–8a. Thus, petitioners' first question presented—"[w]hether *Twombly*'s pleading standard governs breach of fiduciary duty claims under ERISA" (Pet. i)—depends on a false premise. Even the dissent agreed that the majority identified the correct pleading standards—it merely "disagree[d]" that those standards were met. Pet. App. 49a. There is no split of authority, and no need to grant review to restate what is settled law that was applied in the court below.

II. Petitioners' second question—whether a fiduciary breach claim is plausible if the complaint "does not allege any fiduciary conduct inconsistent with lawful management of the plan" (Pet. i)—also is illusory. The complaint shows that petitioners caused respondents' retirement savings to be depleted by excessive fees and failed to discharge their "continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1828–29 (2015). Not only are the alleged facts inconsistent with lawful fiduciary conduct, they present a compelling case of imprudent conduct. That other courts have dismissed fiduciary breach claims based on different facts merely reflects that such claims are "inevitably fact intensive." *See Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014). The factbound question of whether the particular facts alleged here satisfy *Twombly* does not warrant this Court's review.

III. The interlocutory posture of this case makes it a poor vehicle for review. The complaint evaluated by the Third Circuit has now been superseded. Respondents' amended pleading includes additional facts supporting their claims, which the lower courts have not addressed.

IV. Allowing plan participants to enforce ERISA's fiduciary standards furthers the purposes of the Act. The decision below could not possibly threaten the availability of retirement plans, as petitioners and their *amici* suggest. In fact, similar litigation has caused significant fee reductions and improved administration of defined contribution plans across the country, thus enhancing the retirement security of the tens of millions of American workers who participate in such plans.

For these reasons, discussed further below, the petition should be denied.

STATEMENT

I. Statutory background.

Congress, aware of the importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985); 29 U.S.C. § 1001(b).

To protect workers' retirement security, ERISA imposes upon plan fiduciaries "strict standards of trustee conduct . . . derived from the common law of trusts." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014). Fiduciaries must act "solely in the interest of the participants" and "with 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[.]" 29 U.S.C. § 1104(a)(1)(B). ERISA requires plan fiduciaries "to monitor trust investments" on an ongoing basis "and remove imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S.Ct. 1823, 1828–29 (2015). The duty of prudence also includes an obligation to minimize plan expenses. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc).

A fiduciary who breaches its duties "shall be personally liable to make good to such plan any losses to the plan resulting from" the breach, and is "subject to such other equitable or remedial relief as the court may deem appropriate[.]" 29 U.S.C. § 1109(a). Any plan participant may bring a civil action to obtain that relief, which is the same authority granted to fiduciaries and the Secretary of Labor. 29 U.S.C. § 1132(a)(2). The Secretary "depends in part on private litigation to ensure compliance with the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009). "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties[.]" *Id.* at 598.

II. Factual background.

The University of Pennsylvania ("Penn") maintains for its employees an individual-account defined contribution retirement plan (the University of Pennsylvania Matching Plan ("Plan")). Pet. App. 4a; *see* 29 U.S.C. § 1002(2)(A), § 1002(34). Participants' retirement benefits in a defined contribution plan "are limited to the value of their own individual investment accounts," meaning poorly performing investments—and, critically, excessive fees—can "significantly reduce the value" of retirement savings. *Tibble*, 135 S. Ct. at 1826.

Respondents are six of the 20,000 Penn employees and retirees who participate in the Plan. Pet. App. 3a–4a. Penn controls what investment options are included in the Plan and is responsible for the terms on which a recordkeeper is engaged to maintain participants' accounts. Penn established an internal Investment Committee to administer the Plan, and with whom it is a named fiduciary to the Plan. Pet. App. 4a, 64a–65a; 29 U.S.C. § 1102(a); 29 U.S.C. § 1002(21)(A).

Respondents brought suit under 29 U.S.C. § 1132(a)(2) on August 10, 2016 (D. Ct. Doc. 1) and filed the Amended Complaint that is the subject of the petition on November 21, 2016 (D. Ct. Doc. 27). They contend that petitioners breached their fiduciary duties under ERISA by failing to engage in a prudent and loyal decision-making process regarding the Plan's fees and investments. Pet. App. 4a. As a result, petitioners caused the Plan to incur excessive investment management and administrative fees and failed to remove imprudent investment options. *Id.* The Amended Complaint included the following facts relevant to respondents' fiduciary breach claims (Counts III and V).[1]

A. The Plan's excessive investment management fees.

The $3.8 billion Plan easily qualified for the lowest-cost share classes of any mutual funds that Penn chose to include in the Plan. C.A. App. A34 ¶3; A85–A87 ¶¶121, 124–27. For 58 of the Plan's mutual funds, however, Penn provided a higher-cost share class to participants even though a significantly lower-cost, but otherwise identical, share class of the *same*

[1] Additional causes of action dismissed below are not germane to the petition.

mutual fund was available. C.A. App. A88–A96 ¶128. The ready availability of the lower-cost share classes was apparent from a cursory review of the funds' prospectuses. C.A. App. A86 ¶122. By using the higher-cost share classes, Penn caused the Plan to pay wholly unnecessary fees, resulting in millions of dollars in lost retirement savings. C.A. App. A85–A86 ¶121; A96 ¶¶130–131.

Moreover, the Plan's variable annuities charged *four* layers of fees, including fees that benefited a Plan recordkeeper (TIAA) but provided no benefit to Plan participants. C.A. App. A71–A75 ¶¶90–93. The TIAA Real Estate Account charged the same four levels of fees, while adding a fifth layer for a "liquidity guarantee." C.A. App. A75 ¶¶94–95.

B. The Plan's excessive administrative fees.

Recordkeepers compete aggressively for the business of large defined contribution plans. C.A. App. A48 ¶¶40–41. The cost of providing these services varies by the number of participants, not the amount of money in each participant's account. It costs no more to recordkeep a $75,000 account than a $7,500 account. C.A. App. A76 ¶99. Due to economies of scale, a plan with 20,000 participants can obtain a lower per-participant rate than one with 2,000. C.A. App. A79 ¶104. Thus, prudent fiduciaries assess recordkeeping fees for reasonableness by determining how much their plan is paying on a per-participant basis and comparing that rate to the market price. C.A. App. A77–A78 ¶102. The surest way to determine a reasonable recordkeeping fee is to engage in a competitive bidding process on a regular basis. C.A. App. A78–A79 ¶103.

Penn retained two recordkeepers for the Plan (TIAA and Vanguard), both of which provided a group of overlapping and duplicative investment options. C.A. App. A66 ¶¶77–78, A80 ¶107, A97 ¶132. Penn allowed the recordkeepers to collect unlimited asset-based revenue sharing payments in an amount far exceeding the market rate for their services. C.A. App. A34–A35 ¶4; A80–A84 ¶¶108–117. Between 2009 and 2014, the Plan's assets increased by 73%, from $2.2 billion to over $3.8 billion, while the number of participants actually *declined* from 21,771 to 21,412. C.A. App. A38 ¶12; A83 ¶116; A259 (Line 5). This spike in assets caused a commensurate increase in payments to TIAA and Vanguard, even though their services to the Plan did not meaningfully change. C.A. App. A83 ¶116. As a result, the Plan's recordkeeping fees increased from $4.4 million to $5.5 million per year over 2010–2014 (an average of $200–$250 per participant). C.A. App. A83 ¶115. The market rate for those services was between $700,000 to $750,000 per year (an average of $35 per participant). C.A. App. A82–A83 ¶114. Thus, the Plan's fees were over *600% higher* than the market rate for the services. C.A. App. A83 ¶115. The Plan overpaid in part because Penn failed to put the Plan's recordkeeping services out to competitive bidding and failed to consolidate to a single recordkeeper. C.A. App. A80 ¶107; A84 ¶118. Petitioners' failure to monitor and control the Plan's administrative fees caused the Plan to lose over $26 million. C.A. App. A85 ¶120.

C. Petitioners' failure to monitor and remove imprudent and chronically underperforming investments.

Many of the Plan's investment options underperformed their benchmarks. C.A. App. A105 ¶151. Two specific options, the CREF Stock Account and TIAA Real Estate Account, are representative examples.

As of the start of 2010, the first year of the proposed class period, the CREF Stock Account had drastically underperformed comparable lower-cost alternatives over the preceding one-year, five-year, and ten-year periods. C.A. App. A115–A117 ¶167. In March 2012, independent investment consultant AonHewitt recommended that its clients eliminate CREF Stock from their plans due to its underperformance and ineffective investment strategy. C.A. App. A118 ¶169. The TIAA Real Estate Account had similarly abysmal performance compared to the Vanguard REIT Index Fund. C.A. App. A119–A122 ¶¶173–175.

Penn did not properly monitor the performance of these options, and so did not realize that they should have been removed from the Plan. C.A. App. A112 ¶¶160–162; A118–A119 ¶¶170–171; A123 ¶177. In fact, it had agreed to keep the CREF Stock Account in the Plan *regardless* of its performance. C.A. App. A69–A70 ¶¶86–87. Based on this extensive underperformance, a prudent fiduciary would have removed the funds well before the beginning of the class period. Due to Penn's failure to remove imprudent funds after extended periods of underperformance, the Plan has suffered substantial losses compared to what the assets would have earned if invested in prudent alternatives. C.A. App. A108–A109 ¶153; A112–A115 ¶¶161, 164–166; A119–A124 ¶¶171–178.

III. Procedural background.

A. The district court's dismissal.

On September 21, 2017, the district court dismissed the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 60a, 91a. Relying on *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), the court held that, to state a plausible claim for breach of fiduciary duty, plan participants had to show "systemic mismanagement" so severe that "individuals are presented with a Hobson's choice between a poorly-performing § 401(k) portfolio or no § 401(k) at all," meaning "there were *no* reasonable alternatives given to plan participants to choose from[.]" Pet. App. 72a–73a, 82a (emphasis added). According to the district court, as long as the plan provides sufficient "variety" and a "mix and range of options," then participants have no viable claim unless "all (or the vast majority of) options breach the fiduciary duty" or there is "a kickback scheme where the fiduciaries directly benefit at the expense of plan participants." Pet. App. 73a. Applying that standard, the district court dismissed each fiduciary breach claim. Pet. App. 77a–87a.

1. The district court found that Penn's decision to lock the Plan into using TIAA's investment products and recordkeeping services did not plausibly suggest a flawed fiduciary process. The court noted that "[c]able companies offer discounts for signing a two-year contract, landlords offer cheaper rates for longer leases, and cell phone companies give free phones for signing a two-year agreement." Pet. App. 78a. Thus, the court reasoned that because "[l]ocking in rates and plans is a common practice used across the business and personal world," petitioners' fiduciary decision to "'lock[] in' the Plan to TIAA-CREF" was consistent "with a wide swath of rational and competitive business strategy" and thus did not plausibly show a breach of duty. Pet. App. 78a–79a (citing *Twombly*, 550 U.S. at 554).

2. As to Count III, the court similarly stated that retaining two recordkeepers was "not inconsistent with lawful, free market behavior[.]" Pet. App. 79a–80a. Moreover, it was not "inevitable" that fees were excessive, and respondents had not alleged "that there were no reasonable alternatives given to plan

participants to choose from." Pet. App. 80a, 82a. The district court found it was within the fiduciaries' discretion whether to "allocate" recordkeeping costs as a percentage rather than a flat fee. Pet. App. 82a.

3. Regarding Count V, the district court dismissed respondents' share-class allegations based on the court's belief that institutional-class mutual fund shares suffered from the "drawback" of having "lower liquidity" than retail-class shares, and that the Plan's level of investment in the funds was too small to satisfy the advertised minimum investment requirements. Pet. App. 84a. The court also found that respondents failed to state a claim regarding petitioners' failure to remove underperforming investments, but did not address any of the specific factual allegations regarding the CREF Stock or TIAA Real Estate accounts. Pet. App. 86a–87a.

B. The Third Circuit's reversal.

The court of appeals affirmed the dismissal of certain counts, but reversed the dismissal of Counts III and V.

1. The court first identified the "[p]leadings standards for claims brought under ERISA." Pet. App. 7a–8a. The court recognized that *Twombly* and *Iqbal* establish the relevant standard: whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Pet. App. 8a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Twombly*, 550 U.S. at 570).

The district court erred in finding respondents' claims implausible to the extent Penn's actions were "'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." Pet. App. 8a; *see* Pet. App. 79a (quoting *Twombly*, 550 U.S. at 554). That portion of *Twombly* was specific to antitrust cases—this Court was analyzing whether certain allegations sufficed to plausibly establish an illegal agreement in violation of § 1 of the Sherman Act. Pet. App. 8a. The Third Circuit joined the Eighth Circuit in holding that *Twombly* does not require an ERISA plaintiff "to rule out every possible lawful explanation" for the fiduciary's conduct. Pet. App. 9a (quoting *Braden*, 588 F.3d at 597). To the extent the district court required respondents to do so, it erred.

2. The court then used a three-step process to analyze the plausibility of respondents' claims: (1) identifying the elements of the claim, (2) identifying and discarding conclusory allegations that are not entitled to the assumption of truth, and (3) determining whether the remaining facts "plausibly give rise to an entitlement to relief." Pet. App. 9a–10a.

a. The court first noted that a claim for breach of fiduciary duty under 29 U.S.C. § 1104(a)(1) has three elements: "(1) a plan fiduciary (2) breaches an ERISA-imposed duty (3) causing a loss to the plan." Pet. App. 13a. Because respondents undisputedly satisfied the first and third elements, the court focused on the second element: whether respondents "adequately alleged that Penn breached its fiduciary duties." *Id.*

The court then examined the duties that ERISA imposes on plan fiduciaries, including duties of acting "solely in the interest of the participants," "defraying reasonable expenses," and exercising "the care, skill, prudence, and diligence" that a prudent person "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[.]" Pet. App. 13a (quoting 29 U.S.C. § 1104(a)(1)). As stated in *Tibble*, ERISA fiduciaries are obligated to "monitor … investments and remove imprudent ones." Pet. App. 14a (quoting *Tibble*, 135 S.Ct. at 1828–29). Fiduciaries also must understand, monitor, and negotiate plan expenses, particularly in large plans with substantial bargaining power. Pet. App. 14a–15a.

b. The court next found that while the complaint included "a few conclusory allegations, such as "a prudent process would have produced a different outcome," "statements of that variety are rare in the complaint, and after discarding them, many well-pleaded factual allegations remain." Pet. App. 18a.

c. The court then reviewed and summarized the remaining "[w]ell-pleaded facts," and determined that respondents "plausibly stated a claim in Counts III and V." Pet. App. 18a–27a. Respondents' "factual allegations are not merely 'unadorned, the-defendant-unlawfully-harmed-me accusation[s].'" Pet. App. 22a (quoting *Iqbal*, 556 U.S. at 678). Rather, the complaint contained "numerous and specific factual allegations that Penn did not perform its fiduciary duties with the level of care, skill, prudence, and diligence to which Plan participants are statutorily entitled under § 1104(a)(1)." *Id.*

Regarding Count III, the alleged facts include that the Plan "paid between $4.5 and $5.5 million in annual recordkeeping fees at a time when similar plans paid $700,000 to $750,000 for the same services." Pet. App. 19a. The court further noted that the Plan's "percentage-based fees went up as assets grew, despite there being no corresponding increase in recordkeeping services," that "Penn could have negotiated for a cap on fees or renegotiated the fee structure, but failed to do either," and that "Penn could have assessed the reasonableness of Plan recordkeeping fees by soliciting competitive bids" but failed to do so, in contrast to the specific actions taken by similarly situated fiduciaries at other institutions. Pet. App. 19a–20a.

As to Count V, the court noted respondents' allegation "that despite the availability of low-cost institutional class shares, Penn selected and retained identically managed but higher cost retail class shares," and that the Amended Complaint "included a table comparing options in the Plan with the readily available cheaper alternatives." Pet. App. 20a. The court further noted that Penn included investment options charging "layers of unnecessary fees," included imprudently costly and duplicative funds which decreased the value of actively managed funds, reduced the Plan's leverage, and confused participants. Pet. App. 20a–21a. Moreover, "60% of Plan options underperformed appropriate benchmarks," which Penn failed to remove in favor of better-performing alternatives with lower fees. Pet. App. 21a.

Considering the well-pleaded factual allegations as a whole and other relevant factors, the court concluded that respondents plausibly alleged a breach of fiduciary duty. Pet. App. 21a–22a. The Amended Complaint's "numerous and specific factual allegations," such as the "specific comparisons" between the plan's investment options and "readily available alternatives," along with allegations regarding the "practices of similarly situated fiduciaries," raised a plausible inference "that Penn failed to 'defray[ ] reasonable expenses of administering the plan' and otherwise failed to 'discharge [its] duties' according to the prudent man standard of care." Pet. App. 22a–23a. (quoting 29 U.S.C. § 1104(a)(1)). Such allegations provided "substantial circumstantial evidence from which the District Court could 'reasonably infer' that a breach had occurred." Pet. App. 23a–24a.

The court also discussed other appellate decisions which supported its conclusion. The Eighth Circuit affirmed a finding of breach based on fiduciaries' failure to properly monitor and control recordkeeping expenses paid through revenue sharing. Pet. App. 23a (citing *Tussey v. ABB, Inc*., 746 F.3d 327, 336 (8th Cir. 2014)). And on remand from this Court in *Tibble*, the en banc Ninth Circuit concluded that trial was warranted on claims that a defined contribution plan fiduciary breached its duty by retaining "a higher cost share class." Pet. App. 23a (citing *Tibble*, 843 F.3d at 1197–98). The court thus concluded that "Sweda plausibly alleged breach of fiduciary duty," (Pet. App. 22a, 41a), reiterating that the district court erred by "ignor[ing] reasonable inferences supported by the facts alleged," and by drawing "inferences in [Defendants'] favor, faulting [Plaintiffs] for failing to plead facts tending to contradict those inferences," (Pet. App. 23a, quoting *Braden*, 588 F.3d at 595).

3. Senior Judge Roth concurred in part and dissented in part. Pet. App. 42a–59a. Although the dissent disagreed with the majority's ultimate conclusion that the complaint stated plausible claims, the opinion did not assert that the majority used an incorrect pleading standard or violated *Twombly*. Indeed, the dissent acknowledged that "the majority [took] great care to lay out the pleading standards that govern this dispute" under *Twombly* and *Iqbal*, but merely "disagree[d] that those standards have been met." Pet. App. 49a.

4. The Third Circuit subsequently denied rehearing (Pet. App. 92a–93a), and denied Penn's motion to stay issuance of the mandate.

C. Proceedings on remand.

On October 18, 2019, respondents filed their Second Amended Complaint (D. Ct. Doc. 69), setting forth numerous additional facts in support of their claims (*see* D. Ct. Doc. 67-1 (redlined version)). Discovery is ongoing in the district court, and scheduled to close on June 15, 2020. D. Ct. Doc. 71 ¶1.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with *Twombly* or the decision of any other court of appeals. S. Ct. R. 10. Petitioners merely disagree with the Third Circuit's application of *Twombly*, which is rarely a basis for certiorari. *Id*. That the judgment is interlocutory, and the challenged pleading has now been superseded by a more detailed amended complaint, further support denying the petition. The policy arguments pressed by petitioners and their *amici* also provide no basis for certiorari.

I. The question of whether *Twombly* applies to ERISA claims is not properly presented and does not warrant review.

A. The Third Circuit held that *Twombly* applies to ERISA claims.

Petitioners' contention that the Third Circuit refused to apply *Twombly* to ERISA is false. *See* Pet. 13. The Third Circuit explicitly acknowledged that *Twombly* and *Iqbal* established the "[p]leadings standards for claims brought under ERISA." Pet. App. 7a–8a. The court stated that under *Iqbal* and *Twombly*, its task was to determine whether the Amended Complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Pet. App. 8a (quoting *Iqbal*, 556 U.S. at 678, in turn quoting *Twombly*, 550 U.S. at 570).

Nor, contrary to petitioners' assertion, did the Third Circuit hold "that the district court 'erred' by relying on the pleading standard set forth in [*Twombly*]." Pet. 2–3. It rejected the district court's reliance on the *portion* of *Twombly* which analyzed whether allegations of parallel conduct plausibly establish an illegal agreement for purposes of § 1 of the Sherman Act. Pet. App. 8a–9a. This is not a Sherman Act case. On the very next page of the opinion, the Third Circuit reiterated that its "evaluation of the complaint" would be based on "Rule 8(a)(2), *Twombly*, and *Iqbal*." Pet. App. 10a. Accordingly, petitioners' repeated assertion that the Third Circuit "denied *Twombly*'s applicability in the ERISA context" (Pet. 17) is baseless.

Indeed, the Third Circuit has consistently held that *Twombly*'s plausibility standard is not limited to antitrust cases, but rather applies to all civil actions. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009); *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008); *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (declining "to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context."). If Penn sincerely believed that the decision below limited *Twombly* to antitrust cases, in direct contradiction of Circuit precedent, surely it would have made that argument as an easy basis for rehearing. *See* Fed. R. App. P. 35(b)(1) (en banc consideration appropriate if "the panel decision conflicts with a decision … of the court to which the petition is addressed"). It did not, which belies the claim it makes in this Court. *See* Pet. Reh'g at 12–13 (asserting that majority "misappli[ed]" *Twombly*)

Because the premise that the Third Circuit "denied *Twombly*'s applicability in the ERISA context" is wrong, the purported conflict with "circuits that adhere to *Twombly*" is nonexistent. *See* Pet. 17–20. The cases cited by petitioners reached different outcomes not because they applied a different standard, but because they addressed significantly different facts, discussed *infra*, II.B.

B. The Third Circuit's context-specific application of *Twombly* is consistent with this Court's decisions and the Eighth Circuit's decision in *Braden*.

The Third Circuit held that the district court erred in finding respondents' claims implausible on the ground that Penn's actions were "'just as much in line with a wide swath of rational and competitive business strategy' in the market as they are with a fiduciary breach." Pet. App. 8a; *see* Pet. App. 79a (quoting *Twombly*, 550 U.S. at 554). The court correctly held that that aspect of *Twombly* was limited to the specific context of antitrust actions, in line with this Court's decisions. This is the same conclusion of the Eighth Circuit in *Braden*. *See* Pet. App. 9a; *Braden*, 588 F.3d at 597.

1. The requirements of Rule 8(a)(2) are "general standards." *Twombly*, 550 U.S. at 556. Applying those general standards to a particular cause of action requires a court to examine the claim's substantive elements. *Iqbal*, 556 U.S. at 675 ("In *Twombly*, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination … .") (citation omitted).

In the portion of *Twombly* relied upon by the district court here, the Court was discussing the principle that because § 1 of the Sherman Act prohibits "only restraints [of trade] effected by a contract, combination, or conspiracy," antitrust law limits the inferences that may be drawn from mere parallel business behavior. *Twombly*, 550 U.S. at 553–54. While parallel conduct with respect to price and output is consistent with conspiracy, it is also consistent with independent self-interested decisions. *Id*. To prevail on a § 1 claim, then, the plaintiff's evidence must tend to rule out the possibility of independent conduct. *Id.* at 554. Thus, a plausible § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556.

Because the plaintiff in *Twombly* relied solely on "descriptions of parallel conduct," the complaint did not plausibly suggest conspiracy. *Id.* at 564–66. The alleged facts failed to rebut an "obvious alternative explanation" for the parallel conduct—that each defendant had independently decided that noncompetition best served their interests. *Id.* at 567–68.

In *Iqbal*, the Court similarly considered the elements of a claim of unconstitutional discrimination before determining whether the complaint stated a plausible claim. *Iqbal*, 556 U.S. at 675. Because Government officials may not be held vicariously liable for the unconstitutional conduct of their subordinates in a § 1983 suit, Iqbal had to plead facts showing "that each Government-official defendant"—specifically Attorney General John Ashcroft and FBI Director Robert Mueller—"through the official's own individual actions, has violated the Constitution." *Id.* at 676. Moreover, purposeful discrimination requires a showing that the official took the action *because of* its "adverse effects upon an identifiable group." *Id.* at 676–77 (citations omitted). Accordingly, to state a plausible claim, Iqbal had to plead sufficient factual matter to show that Ashcroft and Mueller "adopted and implemented" a policy of detaining Arab Muslim men "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 677.

The Court accepted as true Iqbal's allegation that the FBI "arrested and detained thousands of Arab Muslim men" under the direction of Ashcroft and

Mueller as part of the FBI's "investigation of the events of September 11." *Id.* at 681. But those facts did not plausibly establish purposeful discrimination in light of the more likely "obvious alternative explanation" for the arrests: that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 682–83.

In *Dudenhoeffer*, the court applied the plausibility standard to an ERISA claim that fiduciary defendants "behaved imprudently by failing to act on the basis of *nonpublic* information" calling into question the continued prudence of investing in a publicly traded employer stock. 573 U.S. at 427–28. The Court perceived two lawful explanations as to why an insider-fiduciary with knowledge that the stock was mispriced may decline to act: (1) to avoid violating the securities laws, or (2) to avoid a possible drop in the stock price due to stopping purchases or disclosing the negative information. *Id.* at 428–30. Thus, "[t]o state a claim for breach of the 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." *Id.* at 428.

The Third Circuit's analysis is consistent with *Twombly*, *Iqbal*, and *Dudenhoeffer*. As in those cases, the Third Circuit identified the elements of a breach of fiduciary duty claim under § 1104(a)(1), and then analyzed whether the well-pleaded facts established an entitlement to relief. Pet. App. 9a–27a. The court properly rejected the district court's reliance on *Twombly*'s discussion of "rational and competitive business strategy," because that antitrust principle is inapposite to this breach of fiduciary duty case.

ERISA fiduciaries are held to the high standard of a common law trustee. *Dudenhoeffer*, 573 U.S. at 416; *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) ("The fiduciary obligations of the trustees to the participants and beneficiaries of the plan are those of trustees of an express trust—the highest known to the law."). "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties." *Pegram v. Herdrich*, 530 U.S. 211, 224–25 (2000) (citation omitted). While the defendants in *Twombly* merely had to avoid participating in an illegal conspiracy to not run afoul of the antitrust laws, Penn had *affirmative* obligations to exercise "care, skill, prudence, and diligence" and to preserve plan assets by minimizing costs and removing imprudent investments. *Tibble*, 135 S. Ct. at 1828–29; *Tibble*, 843 F.3d at 1197–98.

There are no "obvious alternative explanations" for providing higher-cost retail-class shares instead of identical lower-cost institutional shares of 58 Plan funds, causing the Plan to pay administrative fees of up to $5.5 million when the market rate was a fraction of that amount, and failing to remove underperforming funds. While those decisions may be consistent with "rational self-interested" consumer or business decisions (Pet. App. 80a), they are contrary to lawful *fiduciary* conduct. In finding respondents' claims implausible on the ground that Penn's actions were "not inconsistent with lawful, free market behavior" (*id.*), the district court failed to recognize that ERISA fiduciaries are "held to something stricter than the morals of the market place," *Pegram*, 530 U.S. at 225. The Third Circuit thus properly declined to extend antitrust principles to respondents' ERISA claims, and correctly held that respondents were not required to rule out mere *possible* explanations for Penn's actions.

2. The Eighth Circuit reached the same conclusion in *Braden*. Like respondents here, the plaintiff claimed that his fiduciaries "failed adequately to evaluate the investment options" in a defined contribution plan. *Braden*, 588 F.3d at 589–90. He alleged that despite the plan's "substantial bargaining power in the highly competitive" retirement plan market and ability to obtain "institutional shares of mutual funds," the plan included "retail class shares, which charge significantly higher fees than institutional shares for the same return on investment." *Id*. at 590, 595. As here, the complaint included specific comparisons of "the relative cost of institutional and retail shares in the funds actually included in the Plan." *Id*. at 595 & n.5. Braden alleged that the higher-cost shares were used because they "made revenue sharing payments" to the plan trustee/recordkeeper, resulting in excessive compensation for the services rendered. *Id.* at 596. Braden further alleged that the fiduciaries failed to remove or change Plan options that "underperformed the market indices they were designed to track." *Id*. Accepted as true, the alleged facts raised a reasonable inference that the fiduciary's conduct in managing the plan was "tainted by failure of effort, competence, or loyalty," and thus stated a claim for breach of fiduciary duty. *Id.*

The Eighth Circuit rejected the district court's conclusion that the complaint was inadequate in light of the fiduciaries' claim that they "could have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility." *Id*. Unlike the "concrete, obvious alternative explanation" for the defendants' conduct that existed in *Iqbal* and *Twombly*, "speculation" that the fiduciaries "could have chosen funds with higher fees for various reasons" did not require Braden to rebut those possibilities in his complaint. *Id.* at 596–97 (emphasis added). "[A] defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct." *Id.* at 597. "Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the 'complaint is construed most favorably to the nonmoving party,' and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Id.* (citations omitted). Declining to impose a probability requirement is particularly important in the ERISA context because plan participants generally have no access to crucial facts which "tend systematically to be in the sole possession of" plan fiduciaries. *Id.* at 598.

In sum, limiting *Twombly*'s discussion of antitrust principles to Sherman Act claims is a proper context-specific application of *Twombly* that is in accord with the Eighth Circuit and is not in conflict with any other circuit. This Court's review is not warranted.

II. Petitioners' factbound argument that the Third Circuit misapplied *Twombly* in finding that respondents stated plausible claims does not warrant review.

The question of whether a fiduciary breach claim is plausible if the complaint "does not allege any fiduciary conduct inconsistent with lawful management of the plan" (Pet i.), also rests on a false premise. The complaint alleges extensive facts showing that petitioners failed to limit plan expenses to a reasonable amount and to monitor and remove imprudent investments—conduct that is plainly inconsistent with ERISA's strict fiduciary standard.

Petitioners' true argument is that the Third Circuit misapplied *Twombly* in finding that the detailed facts set forth in respondents' complaint raised a plausible inference of a breach of fiduciary duty. Indeed, petitioners admitted as much in seeking rehearing below. Pet. Reh'g at 12–13 (asserting that the majority's decision resulted from a "*misapplication* of [*Twombly*]") (emphasis added). Such an argument is typically not a valid basis for review on certiorari, and is meritless in any event. The Third Circuit's conclusion was correct, and does not conflict with any other circuit decision.

A. The Third Circuit correctly held that respondents' allegations create a plausible inference of fiduciary breach.

Providing retail instead of institutional shares of Plan mutual funds was specifically recognized as a breach in *Tibble*, 843 F.3d at 1191–92, 1198, and *Braden*, 588 F.3d at 595–96. As this Court described the theory: "how could respondents have acted prudently in offering the six higher priced retail-class mutual funds when respondents could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the Plan?" *Tibble*, 135 S. Ct. at 1826. In *Tibble*, the government noted that "[b]ecause a defined-contribution plan generally 'seeks … to maximize retirement savings for participants,' no prudent fiduciary would pay fees that were higher than necessary." Br. for the United States as Amicus Curiae 9, *Tibble v. Edison Int'l*, No. 13-550 (Aug. 19, 2014) (quoting *Dudenhoeffer*, 573 U.S. at 420). Accordingly, Penn's decision to provide higher-cost shares of 58 plan mutual funds is not consistent with lawful fiduciary conduct, but rather plausibly shows a breach of duty.

Similarly, respondents' allegations that Penn caused the Plan to overpay for recordkeeping while failing to obtain competitive bids was specifically recognized as a breach in *Tussey*, 746 F.3d at 336, and *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798–800 (7th Cir. 2011). Respondents also identified the specific Plan investments they contend were imprudent, along with extensive performance and fee data compared to market indices and comparable funds. C.A. App. A85–A124. These facts raise plausible inferences that Penn failed to discharge its duties to defray reasonable plan expenses and to monitor and remove imprudent investments. Those actions are not consistent with lawful plan management. The Third Circuit thus rightly concluded that respondents' "numerous and specific factual allegations" plausibly show "that Penn did not perform its fiduciary duties with the level of care, skill, prudence, and diligence to which Plan participants are statutorily entitled under § 1104(a)(1)." Pet. App. 22a.

B. There is no circuit split.

Petitioners contend respondents' allegations would "have failed in the Second, Seventh, Eighth, and Ninth Circuits." Pet. 13. That is wrong. The complaints in those cases failed because they involved different facts and legal theories, not because those circuits applied different standards.

As noted, the Third Circuit's decision is entirely consistent with the Eighth Circuit's *Braden* standard. *Braden* held that allegations that plan fiduciaries used higher-cost mutual fund shares that paid excessive revenue sharing to the plan recordkeeper instead of identical lower-cost shares and failed to remove underperforming investments raised a plausible inference of a fiduciary breach. 588 F.3d at 589–90, 595–96. Respondents allege similar facts here. Pet. App. 19a–21a.

Petitioners nevertheless contend that respondents' allegations would have failed in that court because a later Eighth Circuit case requires a showing that "'a prudent fiduciary in like circumstances would have acted differently,'" a standard also adopted by the Second Circuit. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018) (quoting *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718 (2d Cir. 2013) ("*St.Vincent*")). But the facts here do indeed make that showing. The Second Circuit holds that an ERISA plaintiff can meet that standard by alleging that "a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative." *St. Vincent.* 712 F.3d at 719–20. Respondents did precisely that: the lower-cost institutional-class shares of the Plan's mutual funds would have provided a superior alternative investment at lower cost and were readily apparent from a review of the funds' prospectuses. C.A. App. A50 ¶45; A85–86 ¶¶121–22, A88–A96 ¶¶128–31. Superior alternatives to the CREF Stock and TIAA Real Estate accounts also would have been readily apparent to a prudent fiduciary diligently monitoring the Plan and other market options. C.A. App. A108–A124 ¶¶152–178. Respondents' allegations regarding the "practices of similarly situated fiduciaries" (Pet. App. 19a, 21a–22a), further support the conclusion that a prudent fiduciary would have acted differently. Indeed, multiple district courts within the Second Circuit have held that similar facts meet the *St. Vincent* pleading standard. *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 683–88 (D. Conn. 2018) (denying motion to dismiss similar Counts III and V); *Cunningham v. Cornell Univ.*, No. 16-6525, 2017 WL 4358769, at *6–8 (S.D.N.Y. Sept. 29, 2017) (same).

The Second Circuit dismissed the complaint in *St. Vincent* because it involved completely different facts.

The plaintiff, a fiduciary administrator of a defined benefit plan, alleged that an investment manager that it hired included excessively risky mortgage-backed securities in a portion of the plan's portfolio. *St. Vincent*, 712 F.3d at 709–12. The Second Circuit adopted *Braden*'s holding that stating a plausible ERISA claim does not require participants to plead factual details to which they lack access. *Id.* at 718. But the *St. Vincent* plaintiff failed to meet that standard, despite having access to more information than would a plan participant. *Id.* at 709. The plaintiff alleged only "large declines in the overall subprime market during 2007 and 2008," but no facts "suggesting that a prudent investor" would have viewed the mortgaged-backed securities held by the plan as "improvidently risky" under a "metric or method used by prudent investors at the time." *Id*. at 721–23 & n.20. Such sparse facts bear little resemblance to respondents' "detailed and specific" factual allegations here. Pet. App. 27a.

The plaintiff in *Meiners* failed to plead facts showing that the challenged investment options underperformed or charged excessive fees relative to a "meaningful benchmark." 898 F.3d at 823. Unlike *Braden*, where the plaintiff's comparison to "the market index" and "different shares of the same fund" provided a meaningful benchmark, the *Meiners* plaintiff relied on a conclusory assertion "that cheaper alternative investments with *some* similarities exist in the marketplace." *Id.* at 822–23. Here, respondents provide factual comparisons to market indices and lower-cost shares of the same funds that are in the Plan, including the market index that Penn itself identified as the appropriate benchmark to measure performance. C.A. App. A75 ¶93, A88–A96 ¶128, A112–14 ¶¶163–164; *see Brotherston v. Putnam Investments, LLC*, 907 F.3d 17, 34 (1st Cir. 2018), *cert. denied,* No. 18-926, 2020 WL 129535 (U.S. Jan. 13,

2020) (approving use of benchmark index funds or market indices to measure loss) (citing RESTATEMENT (THIRD) OF TRUSTS, § 100 cmt. b(1)). The complaint here is thus like *Braden* and unlike *Meiners*.

There is also no conflict with the Seventh Circuit. Like the decision below, the Seventh Circuit endorses *Braden*'s application of *Twombly* to ERISA fiduciary breach claims. *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678–80 (7th Cir. 2016). The court explicitly rejected a "heightened pleading standard" in the ERISA context, *id.* at 674, instead holding that a complaint is sufficient if it "allege[s] facts from which a factfinder could infer that the [fiduciary's] process was inadequate," *id.* at 678 (citing *Braden*, 588 F.3d at 595, 598). "All the plaintiff must do is to plead the breach of a fiduciary duty, such as prudence, and to explain how this was accomplished." *Id.* at 679.

The *Allen* plaintiff met that standard by alleging that the fiduciary failed to make an "independent assessment" of the merits of an investment transaction, the resulting investment declined in value, and the plan paid an "uncommonly high" rate of interest compared to the customary market rate. *Id.* at 673, 678–79. Because plausibility is not synonymous with probability, the existence of valid reasons the fiduciary might have made the challenged decision was not grounds for dismissal. *See id.* at 679–80. Determining whether the fiduciary's investigation was in fact adequate, whether the interest rate was indeed excessive, and whether the fiduciary could have predicted the decline in stock value, were all matters for discovery. *Id.*

Petitioners nevertheless rely on two earlier Seventh Circuit cases to argue that respondents' allegations would have been dismissed. Pet. 22–23 (citing *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011), and *Hecker v. Deere & Co.*, 556 F.3d 575 (7th

Cir. 2009)). In so doing, petitioners misstate respondents' allegations.

1. Respondents do not allege, as in *Loomis*, that Penn's *method* of charging asset-based rather than flat per-person recordkeeping fees was *per se* imprudent. *See Loomis*, 658 F.3d at 672–73. The Amended Complaint in fact disavows any claim that the mere use of an asset-based arrangement, standing alone, is a fiduciary breach. C.A. App. A77 ¶¶101–102. Rather, it is imprudent to allow a plan to pay *uncapped*, *unmonitored* asset-based payments that greatly exceed the per-person market rate for the same services. C.A. A79 ¶105; A82–A84 ¶¶113, 116–117; *see Tussey*, 746 F.3d at 336 (court did not "condemn" asset-based revenue sharing itself; fiduciaries breached duties by failing to "monitor and control" excessive revenue sharing fees). The Seventh Circuit did not address that issue in *Loomis* or *Hecker*. *See Tussey*, 746 F.3d at 336 (finding that *Loomis* and *Hecker* "carefully limited" their decisions "to the facts presented" and did not support a defense to claim of excessive recordkeeping fees); *George v. Kraft Foods Global, Inc.*, 674 F. Supp. 2d 1031, 1048 n.17 (N.D. Ill. 2009) ("[A]t a fundamental level, *Hecker* says nothing regarding the duty a fiduciary holds with respect to a 401(k) investment plan's administrative services fees.").

As to *Loomis*' observation that "flat payments" may harm individuals with small accounts (658 F.3d at 672–73), the facts here refute that concern. Once the fiduciary negotiates a fixed fee, the expense can easily be converted to a percentage for allocation purposes, so that individuals with small balances pay less. C.A. A77 ¶100.

2. Petitioners also misstate the facts and law in arguing that the Seventh Circuit "has repeatedly rejected" retail fee allegations similar to respondents'.

Pet. 24. *Loomis* and *Hecker* addressed a claim that it was *per se* imprudent to include "retail" investment vehicles (*i.e.*, mutual funds) in a large plan instead of unspecified "institutional investment *vehicles*" ("Institutional trusts and pools"), which have qualitative differences from mutual funds, such as varying liquidity. *Loomis*, 658 F.3d at 672 (emphasis added). The court was not addressing a claim, as here and in *Tibble* and *Braden*, that a fiduciary provided retail-class shares of the plan's mutual funds instead of identical lower-cost institutional-class shares of the *same* mutual funds. *Tibble*, 135 S. Ct. at 1826; *Braden*, 588 F.3d at 595; *see also Tibble v. Edison Int'l*, 729 F.3d 1110, 1134–35, 1137–39 (9th Cir. 2013) (relying on *Hecker* and *Loomis* to reject "broad-side" attack against retail mutual funds compared to institutional "non-mutual fund alternatives" such as "'commingled pools' or 'separate accounts,'" while also concluding that fiduciary imprudently provided retail-class shares of mutual funds instead of available institutional-class shares); *Bell v. Pension Comm. of ATH Holding Co.*, No. 15-2062, 2017 WL 1091248, at *4 (S.D. Ind. Mar. 23, 2017) ("Neither [*Loomis* nor *Hecker*] addressed whether a defendant violates their fiduciary duty in selecting high-cost investment options where *identical* investment options are available at a lower-cost.").

Petitioners also attempt to portray a conflict with the Ninth Circuit. Pet. 23 (citing *White v. Chevron Corp.*, 752 Fed. Appx. 453 (9th Cir. 2018)). *White* is an unpublished memorandum with no precedential value even in the Ninth Circuit. 9th Cir. R. 36-3(a). *White* does not even discuss the factual allegations before the court, which are significantly different from the facts here. For instance, the *White* defendants largely eliminated the challenged practices near the beginning of the statutory period and four years prior to the plaintiffs' complaint. *White v. Chevron Corp.*, No. 16-793, 2017 WL 2352137, *2, *17 (N.D.Cal. May 31, 2017). Here, in contrast, Penn caused the Plan to suffer losses throughout the six-year statutory period and to date. *See, e.g.*, C.A. App. A36 ¶8(a), A65 ¶75, A83 ¶115, A88 ¶128, A102 ¶143, A103 ¶146, A109 ¶154, A119 ¶173, A122–23 ¶¶176–77, A136 ¶201, A141 ¶217.

The varying results in the cases cited by Penn merely reflect the fact-intensive nature of fiduciary breach claims. *Tussey*, 746 F.3d at 336. Until an actual conflict develops in the circuits, review is not warranted.

III. This case would be a poor vehicle for considering the questions petitioners seek to present.

Because the pleading reviewed by the Third Circuit has now been superseded by respondents' Second Amended Complaint (D. Ct. Doc. 69), petitioners are effectively seeking an advisory opinion on a pleading with no legal effect. *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000) ("[A]n amended pleading ordinarily supersedes the original and renders it of no legal effect."); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1476 (3d ed.) ("Once an amended pleading is interposed, the original pleading no longer performs any function in the case.").

Penn answered the Second Amended Complaint without first moving to dismiss. D. Ct. Doc. 74. Thus, the lower courts have had no occasion to pass on the legal sufficiency of the operative pleading. Of course, this Court should not address that issue in the first instance. *Ret. Plans Comm. of IBM v. Jander*, No. 18-1165, 2020 WL 201024, at *2 (U.S. Jan. 14, 2020) ("The Second Circuit 'did not address the[se] argument[s], and, for that reason, neither shall we.'").

IV. Petitioners' policy arguments do not support review.

Permitting plan participants to enforce ERISA's fiduciary duties furthers Congress's stated purpose of "protect[ing] . . . the interests of participants in employee benefit plans and their beneficiaries, . . . 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). And because the Secretary of Labor "depends in part on private litigation to ensure compliance with the statute," "unnecessarily high pleading standards" undermine ERISA's purposes. *Braden*, 588 F.3d at 597 n.8 (quoting Secretary's amicus brief).

The Third Circuit's decision does not pose a risk, as petitioners and their *amici* speculate (Pet. 1, 5–6, 12, Chamber Br. 2), of discouraging "employers from offering . . . benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). The Third Circuit properly dismissed this as a policy argument to be directed to Congress. Pet. App. 26a n.9.

These apocalyptic warnings also are entirely baseless. Enforcing ERISA's long-standing statutory duties cannot possibly pose any significant risk to the availability of retirement plans. Penn and its *amici* offer no evidence that any employer has terminated its retirement plan in the face of ERISA fiduciary breach litigation such as this. Instead of harming retirement plans, participant-led ERISA fiduciary breach litigation has reduced by nearly 50% the expenses of retirement plan investments. George S. Mellman and Geoffrey T. Sanzenbacher, *401(K) Lawsuits: What Are The Causes And Consequences?*, Center For Retirement Research (May 2018) at 2 (fig. 1), 5 (fig.

5).[2] It has resulted in enhanced fiduciary awareness, reduction of investment and administrative fees, and enhanced employee retirement accounts. Anne Tergeson, *401(k) Fees, Already Low, Are Heading Lower*, WALL ST. J. (May 15, 2016).[3]

Many courts have recognized how this litigation has benefited retirement plans across the country. *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (noting "dramatic reductions in fees paid by 401(k) plan participants throughout the United States, through heightened awareness and scrutiny of fees, self-dealing, and imprudent investment options"); *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) ("has significantly improved 401(k) plans across the country"); *Beesley v. Int'l Paper Co.*, No. 06-703, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (litigation has "benefited employees and retirees throughout the country by bringing sweeping changes to fiduciary practices"); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015, at *2 (C.D. Ill. Oct. 15, 2013) ("$2.8 billion in annual savings for American workers"); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) ("these cases, collectively, have brought sweeping changes to fiduciary practices within 401(k) plans and have changed the 401(k) industry for the benefit of employees and retirees throughout the country").

Penn's complaint about settlements in similar cases (Pet. 2), ignores the significant benefits that those settlements have created for participants in those plans. For instance, after participants in Duke

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[2] https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf; https://crr.bc.edu/briefs/401k-lawsuits-what-are-the-causes-and-consequences/.

[3] https://www.wsj.com/articles/401-k-fees-already-low-are-heading-lower-1463304601.

University's plan filed suit in 2016, Duke in 2019 reduced its plan to one primary recordkeeper under a fixed-fee contract with a streamlined range of investment options. *Clark v. Duke Univ.*, No. 16-1044, Doc. 160-5 at 2–3 (M.D.N.C. Apr. 19, 2019).[4] In addition to restoring millions of dollars to its retirement plan, the settlement provided participants additional non-monetary benefits worth over $25 million. *Id.* at 4–6. Duke will engage an independent consultant to advise on plan administrative services, improve the process for negotiating recordkeeping compensation and selecting plan investment options, allow for external monitoring of plan investments, and provide participants information for transferring legacy investments into new plan investments. *Clark v. Duke Univ.*, No. 16-1044, 2019 WL 2588029, at *3 (M.D.N.C. June 24, 2019). In addition to restoring millions of dollars to its retirement plan, Vanderbilt has agreed, *inter alia*, to put plan recordkeeping services out for competitive bidding, improve the process for selecting plan investments, prohibit plan recordkeepers from soliciting non-plan business from participants, and provide an easy process for participants to transfer legacy investments into the plan's new and monitored investment options. *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 146 at 5–6 (M.D. Tenn. Apr. 22, 2019). Like the other settlements and judgments that preceded them, these settlements have resulted in vastly improved retirement plans and enhanced employee retirement savings, and have not led to termination or diminution of any plan.

All of the fiduciary breach litigation that Penn and its *amici* bemoan has resulted in significant and valuable changes in the administration of defined contribution retirement plans to the benefit of

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[4] https://today.duke.edu/2018/02/fidelity-become-dukes-primary-retirement-plan-provider.

employee-participants. That would not have happened with the heightened pleading standards that Penn and its *amici* seek through the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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