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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Respondents insist the Third Circuit fully adheres to *Bell Atlantic Corp* v. *Twombly*, 550 U.S. 544 (2007). But they cannot overcome the panel majority's express rejection of *Twombly*'s instructions for determining whether a claim to relief is plausible. Pet. App. 8a-9a. So in the end, respondents retreat to defending the Third Circuit's erroneous view that those instructions are "limited to the specific context of antitrust actions" and hence inapplicable in ERISA litigation. Br. in Opp. 16. That view squarely conflicts with *Ashcroft* v. *Iqbal*, 556 U.S. 662, 684 (2009), and with decisions in four circuits. Other courts of appeals rigorously adhere to *Twombly* in ERISA cases and apply a pleading standard inconsistent with the standard adopted below. In those other circuits, plaintiffs cannot simply lard their complaints with allegations as consistent with prudence as they are with imprudence.

Such conflict over a fundamental question—what ERISA plaintiffs must allege to proceed to discovery—deserves this Court's review. Outside the particular context of plans that offer the option of investing in the employer's stock, this Court has never analyzed the pleading standard for ERISA claims. Yet class action litigation of such claims has exploded in recent years, with lower courts' divergent approaches undermining ERISA's promise of predictability and uniformity. See Chamber Br. 4-5. This Court's guidance is urgently needed.

And this case presents an ideal vehicle. The Third Circuit did not imply, much less hold, that the complaint states a plausible claim to relief under the pleading standard favored by petitioners and the district court. The selection of a different pleading standard was dispositive. Meanwhile, the concern respondents now raise—minor amendments to the complaint after remand from the Third Circuit—is no concern at all. This Court often reviews cases in the same posture and rejects respondents' objection. It should do likewise here.

A. The Courts Of Appeals Are Split Over Pleading Standards For ERISA Claims

1. Respondents' opening strategy is to deny that the Third Circuit rejected *Twombly*. They maintain that the parties merely disagree over whether the Third Circuit correctly applied a "properly stated rule of law." Br. in Opp. i. These assertions are baseless.

As petitioners have already detailed, *Twombly* holds that a complaint does not establish a plausible entitlement to relief if its allegations are consistent with the asserted legal violation but just as consistent with an alternative explanation under which the alleged behavior would be lawful. Pet. 14-17. That means that courts must consider lawful alternative explanations that would explain the allegations and be at least as likely as the complainant's theory of illegality. *Twombly*, 550 U.S. at 567; *Iqbal*, 556 U.S. at 681.

Here, however, the Third Circuit majority explicitly concluded that it was error for the district court to engage in that inquiry. Pet. App. 8a-9a. In its view, "*Twombly*'s discussion of alleged misconduct that is 'just as much in line with a wide swath of rational and competitive business strategy' is specific to antitrust cases." *Id.* at 8a (citation omitted). And "[t]o the extent that the District Court required [respondents] to rule out lawful explanations for [petitioners'] conduct, it erred." *Id.* at 9a. Those are incorrect statements of *Twombly*'s pleading standard, which *Iqbal* made clear applies in all civil cases.

It is no answer for respondents to note (at 14) that the majority prefaced this discussion with a quotation from *Iqbal* (which in turn quoted *Twombly*) recognizing that complaints must contain "sufficient factual matter * * * to state a claim to relief that is plausible on its face." Pet. App. 8a (citation omitted). The problem is not that the Third Circuit rejected the requirement that the claim to relief be plausible; the problem is that the majority rejected *Twombly*'s standard for determining *when* a claim to relief is plausible.

Nor do respondents improve matters by highlighting (at 15) what the panel majority called its "contextual" application of "Rule 8(a)(2), *Twombly*, and *Iqbal*." Pet. App. 10a. If anything, that statement only underscores the problem. The remainder of the paragraph confirms that the Third Circuit altered its "assessment of [respondents'] pleadings" based not on the substantive elements of an ERISA claim but on "ERISA's protective function." *Ibid.* Again, this Court has made

clear that *Twombly* and Rule 8 equally govern "all civil actions" and apply to "antitrust and [other] suits alike." *Iqbal*, 556 U.S. at 684 (citation omitted). Under *Iqbal*, courts may not alter *Twombly*'s plausibility standard based on their understanding of what best promotes individual statutes' purposes.[1]

The Third Circuit's approach also conflicts with the approach of four other circuits. These courts recognize that, under *Twombly*, allegations that are fully consistent with both lawful and ERISA-violating explanations are not enough to state a claim. The Eighth Circuit holds that "[i]f the pled facts are merely consistent with liable acts, the complaint 'stops short of the line between possibility and plausibility.'" *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018) (citation omitted); see also *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009). The Second Circuit likewise prohibits courts from inferring liability if the allegations are "merely consistent with[ ] a finding of misconduct." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (*St.*

[1] The majority's discussion is already causing confusion in the lower courts. One district court within the Third Circuit characterized the decision as holding "that heightened pleading standards applicable in antitrust cases * * * do not apply to ERISA plaintiffs." *Corman* v. *Nationwide Life Ins. Co.*, 396 F. Supp. 3d 530, 539-540 (E.D. Pa. 2019). Under this Court's clear precedent, however, antitrust claims are not governed by "heightened" pleading standards but by the basic Rule 8 standards, and in federal court those standards uniformly provide the minimum requirement for pleading any type of civil claim. See *Iqbal*, 556 U.S. at 684.

Vincent). The Ninth Circuit takes that view, too: "Where there are 'two *possible* explanations, only one of which can be true and only one of which results in liability, plaintiff cannot offer allegations that are "merely consistent with" its favored explanation but are also consistent with the alternative explanation.'" *White* v. *Chevron Corp.*, 752 Fed. Appx. 453, 454 (9th Cir. 2018) (citation and brackets omitted). And the Seventh Circuit has put this principle into action to reject attacks on the inclusion of retail-class investment options and options charging asset-based fees, identifying numerous potential explanations besides imprudence for including such options. *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 671-673 (7th Cir. 2011) (noting that retail-class options can give participants the benefits of competition or offer greater liquidity, that asset-based fees can benefit some participants, and that plan sponsors can appropriately favor "allow[ing] participants to make their own choices"); *Hecker* v. *Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009) (*Hecker II*) (noting that higher-fee options might fund the provision of more extensive services). The Third Circuit stands alone in its refusal to permit *any* similar consideration of alternative explanations. See Pet. App. 9a, 25a-26a.

Respondents devote pages (23-29) to trying to explain purported factual distinctions between the cases in those four circuits and the case here. Petitioners disagree with respondents' claims and maintain that these cases' treatment of excessive-fees and underperformance allegations are not meaningfully

distinguishable. But the critical point for present purposes is that these other courts indisputably apply a legal rule incompatible with the Third Circuit's approach below. In those four other circuits, when an ERISA plaintiff relies on specific elements of the plan's lineup or design to support the requisite inference that the fiduciary's decision-making was imprudent, courts consider whether those plan elements are likely attributable to alternatives other than imprudence. It is only when "a prudent fiduciary in like circumstances would have acted differently," to use the Second and Eighth Circuits' formulation, that an inference of imprudence is justified. *St. Vincent*, 712 F.3d at 720; *Meiners*, 898 F.3d at 822. The Third Circuit necessarily rejected that pleading standard when it forbade courts from requiring the exclusion of any "lawful explanations for [the fiduciary's] conduct." Pet. App. 9a.

2. After arguing that the Third Circuit followed *Twombly*, respondents shift gears and argue that the relevant "aspect of *Twombly* was limited to the specific context of antitrust actions." Br. in Opp. 16. Respondents then discuss the antitrust-law distinction between conspiratorial and merely parallel conduct. *Id.* at 16-17.

This discussion is widely off base. Antitrust law had nothing to do with the district court's decision. It did not dismiss the complaint for failing to raise an inference of conspiracy or alleging merely parallel conduct, but for resting on allegations that were at most "consistent with fiduciary breach, but also in line with a wide swath of other rational actions." Pet. App. 80a;

see also *id.* at 79a, 87a. And the Third Circuit reversed because it believed plaintiffs should not have to overcome such alternative explanations. *Id.* at 9a. As discussed above, other circuits rightly endorse the district court's approach as the proper approach for antitrust claims and ERISA claims alike. They also take that approach with many other types of civil claims. See TIAA Br. 10 (collecting cases); Chamber Br. 11 (collecting different cases). The Third Circuit's contrary holding is not defensible.[2]

B. The Pleading Standard For ERISA Claims Is A Tremendously Important Issue Deserving The Court's Attention

Respondents do not deny the importance of the pleading standard for ERISA claims—an issue on which this Court has provided no direct guidance outside the specific context of employee stock ownership plans. See, *e.g.*, *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409 (2014). Instead, respondents change the topic and argue that private litigation furthers ERISA's

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[2] Respondents surprisingly suggest (at 15) that petitioners did not sufficiently identify the Third Circuit's erroneous departure from *Twombly* when petitioning for rehearing en banc. But petitioners unequivocally objected that "the panel majority rejected a pleading standard set by the Supreme Court" because "[t]he majority *faulted* the district court for relying on *Twombly*." C.A. Pet. for Reh'g 5; see also *id.* at 12-14 (discussing the problem at length). And respondents understood petitioners' argument perfectly well, arguing that other Third Circuit precedent supported the majority's departure from *Twombly*. C.A. Opp. to Reh'g 7.

purposes, serves a valuable function, and provides benefits to those who take part in class action settlements. Br. in Opp. 30-33.

Certainly, private litigation can accomplish all those things, but problems arise if courts get the basic pleading standard wrong. Respondents' one-sided account of ERISA's purposes ignores this Court's repeated emphasis that "ERISA represents a '"careful balancing" between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans,'" *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (citation omitted), and does not tilt every question "in favor of potential plaintiffs," *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). For ERISA to fulfill it whole purpose, courts must apply *Twombly* correctly. Otherwise, as the Second Circuit has stressed, courts enable "settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *St. Vincent*, 712 F.3d at 719 (citation omitted).

The Third Circuit's ruling compounds that risk. Given the countless decisions fiduciaries make—not to mention the significant room for reasonable disagreement—plaintiffs will always be able to identify particular plan options or features that other plan fiduciaries would not have chosen. They then can assert that those other fiduciaries' approach is the prudent one, and automatically prevail if the court is barred from considering alternative explanations that would show the defendant's approach to be prudent, too. This

is already a common problem at the district court level: the Chamber of Commerce recounts numerous examples where one fiduciary was sued for making one decision and another fiduciary was sued for making the opposite decision. See Chamber Br. 14-15. Courts and litigants would greatly benefit from better guidance from this Court.

Huge sums of money hang in the balance. Over the three years that universities have been defending these cases, ERISA class actions have yielded about $1.3 billion in settlements. See Jacklyn Wille, *ERISA Class Settlements Rebounded to $449 Million in 2019*, Bloomberg Law, Dec. 26, 2019, https://news.bloomberglaw.com/employee-benefits/erisa-class-settlements-rebounded-to-449-million-in-2019. Although ERISA class actions come in different types and settle for various reasons, many involve the type of allegations found in the twenty or so university plan cases, which frequently are raised against for-profit corporations as well. In fact, "[a]bout half of 2019's settlements stemmed from lawsuits challenging the fees associated with 401(k)-style retirement plans," with university plan cases accounting for four of the year's top-ten settlements. *Ibid.* Several other defendants facing excessive-fees lawsuits have already announced anticipated settlements in early 2020. *Ibid.*

Every moment that this Court stays silent on the pleading standards for this type of lawsuit increases the likelihood that plan fiduciaries will settle class action claims that should have been kicked out of court. Such settlements may provide real benefits to class

members and plainly benefit their attorneys, but they do not promote the carefully calibrated purposes of ERISA.

C. This Case Is An Ideal Vehicle

1. In response to petitioners' observation that the pleading standard questions are cleanly presented in this case, respondents speculate that the Third Circuit would have reversed the district court's dismissal under the ERISA pleading standard applied by other circuits. Br. in Opp. 20-21, 23-24.

This speculation is unfounded. The majority's only specific point of disagreement with the trial court was over the articulation of the pleading standard. There is no hint anywhere in the Third Circuit's decision that it would have reversed under the trial court's pleading standard. Pet. 31; TIAA Br. 4. By the same token, if this Court corrected the Third Circuit's articulation of the pleading standard, the judgment below would fall. The legal questions here are squarely presented and dispositive, and that is no small thing—particularly considering that the pleading-standard issue normally can reach the appellate level only if the trial court grants dismissal on all counts. Hence petitioners and amici agree that this case is an ideal vehicle for addressing these important questions. Pet. 30-32; TIAA Br. 3; Chamber Br. 21.

2. In a last-ditch effort to find a vehicle problem, respondents accuse petitioners of seeking an "advisory opinion" because respondents made certain

amendments to their complaint after the Third Circuit's ruling. Br. in Opp. 29.[3] This objection has no merit.

First, respondents cannot have it both ways. Surely they wish to continue relying on the Third Circuit's decision in the ongoing district court proceedings. They do not disclaim its status as law of the case or suggest vacatur on mootness grounds. Cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). But if the Third Circuit's decision has continuing consequences for the parties, a reversal of that decision from this Court would have a concrete effect, too.

Second, it is hardly unusual for this Court to agree to review a decision that analyzed a since-superseded complaint. See, *e.g.*, *Ret. Plans Comm. of IBM* v. *Jander*, No. 18-1165 (cert. granted June 3, 2019; third amended complaint filed Apr. 25, 2019 and fourth amended complaint filed May 10, 2019 in *Jander* v. *Int'l Bus. Machs. Corp.*, No. 15-cv-3781 (S.D.N.Y.)); *Wells Fargo & Co.* v. *City of Miami*, No. 15-1112 (cert. granted June 28, 2016; second amended complaint filed Nov. 30, 2015 and third amended complaint filed Apr. 29, 2016 in *City of Miami* v. *Wells Fargo & Co.*,

[3] Respondents suggest (at 2) that they supported their claims with "additional facts," but the redline comparison of the two complaints shows only modest changes: respondents deleted allegations relevant to the claims whose dismissal the Third Circuit affirmed; provided additional detail about particular named plaintiffs' holdings; included two more University of Pennsylvania retirement plans; and added a large number of additional investment options that respondents claim underperformed. D. Ct. Doc. 67-1 (Oct. 11, 2019).

No. 13-cv-24508 (S.D. Fla.)). In *Wells Fargo*, the Court rejected a similarly meritless "advisory opinion" objection from the respondents. See Br. in Opp. at 18, *Wells Fargo*, *supra* (No. 15-1112).

And the hornbook rule that respondents invoke—an amended complaint supersedes the earlier complaint—in no way inhibits this Court's ability to review legal conclusions premised on that earlier complaint's allegations. The Court has already made that clear. See *Pac. Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 456 n.4 (2009) (citing 6 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1476, at 556-557 (2d ed. 1990)). In *Pacific Bell*, the court of appeals accepted a certified interlocutory appeal from the denial of the defendants' motion for judgment on the pleadings. *Id.* at 444-445. After the denial of that motion, the plaintiffs amended the complaint that had been the subject of the motion. *Id.* at 444. This Court nonetheless granted certiorari to review the decision addressing that original complaint and simply confined its analysis to the original complaint. *Id.* at 456 & n.4. The Court left the district court to evaluate the claims in the amended complaint. *Id.* at 456-457. The same approach would be appropriate here.[4]

[4] Upon the Court's invitation, the Solicitor General filed a cert-stage brief, which recommended grant. 5/22/08 U.S. Br. at 1, *Pac. Bell*, *supra* (No. 07-512). That brief acknowledged that an amended complaint had been filed, but correctly explained that the fact of that amendment was "not a basis for denying review." *Id.* at 17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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