No. 20-289

IN THE

Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, *et al.*,

Petitioners,

v.

LARRY W. JANDER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020), this Court granted certiorari to assess what kind of factual allegations are sufficient under this Court's holding in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), that a plaintiff alleging a breach of the duty of prudence against the fiduciary of an employee stock option plan ("ESOP") must propose an alternative action the fiduciary should have taken that she could not have believed would do "more harm than good" to the ESOP and its participants. Once the case was before the Court, however, Petitioners advanced a new argument that exceeded the scope of the question presented; the United States Government intervened in the case on behalf of neither party and did the same. This Court recognized that these new arguments were not addressed by the lower court and so were procedurally improper, but they "might well be relevant" and should be part of any future discussion of the *Dudenhoeffer* standard. The case was remanded to the Second Circuit to decide whether to consider these arguments.

The Second Circuit held that those arguments had not been properly raised, so it declined to address them. Petitioners have now returned with a virtually identical proposed issue for certiorari; they have also asked this Court to ignore its prior ruling and consider the new arguments. Thus, the questions presented are:

1. Whether *Dudenhoeffer*'s "more harm than good" standard can be evaluated without reference to the argument that ESOP fiduciaries have no obligation to act on inside information and the Government's argument

that the federal securities laws should determine the parameters of plausible duty-of-prudence claims against ESOP fiduciaries.

2. Whether this Court can and should act as a court "of first view" with respect to an argument not addressed by the lower court and deemed forfeited, particularly when Petitioners do not dispute the lower's court procedural ruling declining to address the argument.

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STATEMENT OF THE CASE

I. Factual and Legal Background

1. Respondents are former employees of International Business Machine Corporation ("IBM") who bought and held shares in IBM's ESOP, which invested primarily in IBM's publicly traded stock. Pet. App. 14. Petitioners are fiduciaries of the ESOP pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 1104(a)(1)(B) of ERISA required that Petitioners oversee the ESOP "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 like character and with like aims[.]" 29 U.S.C. § 1104(a)(1)(B). As this Court held in *Dudenhoeffer*, that duty of prudence is the same for ESOP fiduciaries as for ERISA fiduciaries overseeing any other type of investment. *Dudenhoeffer*, 573 U.S. at 412 (ESOP fiduciaries "are subject to the same duty of prudence that applies to ERISA fiduciaries generally, except that they need not diversify the fund's assets" (citing 29 U.S.C. § 1104(a)(2))). To state a claim that an ESOP fiduciary has breached his duty of prudence, "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 [ESOP] than to help it." *Id.* at 428. If the plaintiff alleges that the ESOP fiduciary should have made a public disclosure to correct an artificially inflated stock price, a lower court should consider whether "publicly disclosing negative information would do more harm than good to the [ESOP]

by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the [ESOP]." *Id.* at 429-30.

2. From January 21, 2014 through October 20, 2014, IBM's stock traded at artificially high values because IBM concealed from the public the true value of its Microelectronics business, which it had secretly put up for sale. Pet. App. 15. After publicly valuing Microelectronics at more than $2 billion, IBM announced in October 2014 that another company would be acquiring Microelectronics, and that IBM would pay that company $1.5 billion for it to take the business, while IBM announced a $4.7 billion pre-tax charge. *Id.* IBM's stock price plummeted at the news that it been radically overstating the value of Microelectronics, which not only was not worth $2 billion, but was, in fact, effectively worthless. *Id.*

3. Petitioners were the Chief Financial Officer, General Counsel and Chief Accounting Officer of IBM during this time in addition to being fiduciaries of IBM's ESOP. Pet. App. 14-15. Thus, they were well-situated to be aware of IBM's efforts to sell Microelectronics as well as IBM's significant overstatement of the business's actual value. *Id.* Petitioners could have disclosed the truth about the value of Microelectronics to the public at the beginning of 2014, when the attempt to sell the business had already been in progress for many months. *Id.* 16. Because IBM was intent on selling Microelectronics, disclosure of its true value was all but inevitable. *Id.* 30-31. Nevertheless, Petitioners took no action; IBM's stock price plummeted and remained depressed for years afterward.

II. Procedural Background

1. Respondents brought a claim in the District Court for the Southern District of New York, alleging that Petitioners' inaction in the face of IBM's inevitable stock drop was a breach of their fiduciary duty of prudence under ERISA. Pet. App. 16. Respondents could have disclosed the truth about Microelectronics, thereby preventing ESOP participants from buying shares at artificially inflated prices and from suffering the stock's long-term failure to make up its losses owing to the reputational harm IBM's lack of trustworthiness caused. *Id.* 27-31. Petitioners could have accomplished this disclosure through IBM's periodic disclosure process under the securities laws. *Id.* 27-28. Such an action would still be taken in their fiduciary capacities based on their fiduciary obligations, and, because it would not have been prohibited by the securities laws, would not have run afoul of *Dudenhoeffer*. *Id.* 9 (Kagan, J., concurring).

2. The district court nevertheless found Respondents' allegations to be insufficient under *Dudenhoeffer*'s "more harm than good" standard. Pet. App. 16-17. Respondents appealed the decision to the Second Circuit, which reversed, holding that Respondent's general and specific allegations, particularly regarding the inevitability of the sale of Microelectronics, and, therefore, the disclosure of its true value, were sufficient when "considered in combination" to satisfy *Dudenhoeffer*. *Id.* 26-27.

3. Petitioners appealed that decision to this Court, characterizing the Second Circuit's holding as an endorsement of "generalized allegations" being sufficient under *Dudenhoeffer*. Pet. 14. Respondents disputed that

characterization, noting that the Second Circuit's holding was based on Respondent's more general allegations *and* a number of allegations unique to the conduct of Petitioners and IBM. *See* Br. for Resp'ts 45-57; Br. in Opp. to Pet. 10-23. Certiorari was granted as to Petitioners' limited question about the sufficiency of "generalized allegations" under *Dudenhoeffer*. *See Ret. Plans Comm. of IBM v. Jander*, 139 S. Ct. 2667 (2019).

4. In their merits brief, however, Petitioners broadened their arguments beyond the question presented, arguing "that ERISA imposes no duty on an ESOP fiduciary to act on inside information." Pet. App. 6. The Government intervened in the case on behalf of neither side, asserting its own novel interpretation of the *Dudenhoeffer* standard "that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would 'conflict' at least with 'objectives of' the 'complex insider trading and corporate disclosure requirements imposed by the federal securities laws[.]" *Id.* (quoting *Dudenhoeffer*, 573 U.S. at 429). Respondents opposed each of these arguments. Petitioners' new argument was misguided because it constituted a fundamental misunderstanding of this Court's holding in *Pegram v. Herdrich*, 530 U.S. 211 (2000), and because it undermined the very basis for the standard enunciated in *Dudenhoeffer*. Br. for Resp'ts 38-45. After all, if an ESOP fiduciary was never required to act on inside information, then the entire premise of *Dudenhoeffer*'s "more harm than good" standard was pointless. *See* Pet. App. 8-9 (Kagan, J., concurring). The Government's argument, which attempted to impose the pleading standards of the securities laws on ERISA, ultimately led to the same result—an approach that "would

mostly wipe out [the] central aspect of the *Dudenhoeffer* standard." *Id.* (citation omitted).

5. Respondents also argued, and the Court agreed, that these arguments had not been addressed by the Second Circuit and went beyond the question presented. Pet. App. 6-7. Rather, the Court vacated the Second Circuit's opinion and remanded the case so that the Second Circuit could decide "whether to determine [the] merits" of these new arguments, "taking such action as it deems appropriate." *Id.* 7.

6. The Court could have declined to consider these newly-raised arguments while ruling on the question presented regarding "generalized allegations" under *Dudenhoeffer*, but it elected not to do so. Noting that these new arguments, particularly the Government's, "might well be relevant" to the interpretation and application of the "more harm than good" standard, this Court sent the case back to the Second Circuit, recognizing the inadequacy of a decision that addresses the *Dudenhoeffer* standard but does not take into account these additional arguments. Pet. App. 7 (quoting *Dudenhoeffer*, 573 U.S. at 429 (internal quotation marks omitted)).

7. On remand, the Second Circuit requested supplemental briefs from the parties and the Government regarding Petitioners' and the Government's new arguments, including whether these issues had been properly raised or were forfeited. Pet. App. 3. The Second Circuit found that "[t]he arguments raised in the supplemental briefs either were previously considered by this Court or were not properly raised. To the extent that the arguments were previously considered, we

will not revisit them. To the extent that they were not properly raised, they have been forfeited, and we decline to entertain them." *Id.* (citation omitted). The Second Circuit reinstated its prior opinion. *Id.*

REASONS TO DENY THE PETITION

I. Petitioners' Second Question Presented Is Procedurally Defective

Petitioners make only a cursory effort to persuade the Court that their second question presented merits review—unsurprisingly so, because the issue they purport to raise is procedurally inappropriate for resolution by this Court.

As Petitioners acknowledge, this Court previously chose not to rule on the question whether "'ERISA imposes no duty on an ESOP fiduciary to act on inside information[.]'" Pet. 15-16 (quoting Pet. App. 6). Because this question went beyond the scope of the question Petitioners had actually presented and had not been raised in the lower court, the Court concluded that "the Second Circuit did not address these arguments, and, for that reason, neither shall we." Pet. App. 6 (quoting *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 175 (2004) (internal quotation marks and brackets omitted)). The case was remanded to the Second Circuit to determine whether this argument should be addressed. *Id.*[1]

1. Respondents have already set forth in prior briefing before this Court the reasons why Petitioners' argument is meritless. *See* Br. for Resp'ts 38-45.

The Second Circuit decided that Petitioners' argument about whether ERISA imposes a duty on ESOP fiduciaries to act on inside information "was not properly raised," and, therefore, was "forfeited[.]" Pet. App. 3 (citing *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998)). The Second Circuit "decline[d] to entertain" Petitioners' new argument. *Id.*

Petitioners now suggest that, because their argument about ESOP fiduciaries' obligation to act on inside information "was pressed in the supplemental briefing" that was submitted to the Second Circuit after this Court remanded the case, "there is no obstacle to this Court's review" of that issue. Pet. App. 36. Petitioners are wrong for at least two reasons.

First, this Court has already held that it will not address arguments that the Second Circuit has not addressed. That state of affairs has not changed; the Second Circuit still has not addressed Petitioners' argument because it was found to be forfeited. It does not matter whether this argument "is a purely legal question" or "was pressed in the supplemental briefing" to the Second Circuit, because the Second Circuit expressly declined to address it. Thus, if this Court were to grant certiorari on Petitioners' second question, it would be acting as the court "of first view" regarding this issue, which this Court has made clear time and again is something it does not do. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address an argument not addressed by the lower court because "we are a court of review, not of first view"). Petitioners offer no reason for this Court to depart from its longstanding practice of refusing such procedurally improper arguments.

Second, the Second Circuit did not merely decline to address Petitioners' argument; it held that the argument was "not properly raised [and therefore] ha[s] been forfeited[.]" Pet. App. 3. This Court left that purely procedural determination to the judgment of the Second Circuit, holding that it was up to the Second Circuit "whether to determine [the argument's] merits[.]" Pet. App. 7. The Second Circuit did so. Accordingly, if Petitioners want this Court to freshly consider this forfeited argument, they would first have to persuade this Court that the Second Circuit erred in making that procedural determination.

Yet, Petitioners do not even argue that the Second Circuit erred or abused its discretion in finding their argument forfeited. Pet. App. 19, 35-37. Instead, Petitioners claim to be offering the Court the gift of "optionality." *Id.* 36. If this Court were to certify Petitioners' second question, however, it would not only have to assume the role of a court "of first view," it would have to decide that the Second Circuit exceeded its authority or committed reversible error by finding Petitioners' argument forfeited, and it would have to do so *sua sponte* because Petitioners have not raised that procedural issue for potential review.

Even Petitioners seem to recognize that obtaining review of this question is not appropriate, breezing through their argument in favor of certiorari in little more than two pages and citing no legal authority to justify their desired outcome. Petitioners' groundless request for review should be denied.

II. This Case Is Not the Right Vehicle to Properly Address *Dudenhoeffer*'s "More Harm Than Good" Standard

Petitioners' primary question presented is virtually identical to the question presented in their prior petition for certiorari. Their only argument why review of this question is warranted is their citation of two recent decisions by the Eighth Circuit that, they claim, have "deepened" the purported "circuit split that led this Court previously to grant certiorari." Pet. 1. Respondents have already argued to this Court why Petitioners' position on this issue is deeply misguided and would vitiate the central holding of *Dudenhoeffer* that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general[.]" *Dudenhoeffer*, 573 U.S. at 412. *See* Br. for Resp'ts 12-36, 45-57; Br. in Opp. to Pet. 10-23. These arguments continue to militate against granting certiorari.

But, even if this Court believes that the "circuit split" Petitioners purport to identify is real, and that *Dudenhoeffer*'s "more harm than good" standard needs further explication, this case is the wrong vehicle for that project, because the additional arguments raised by Petitioners and the Government when this case was first before this Court cannot be evaluated as part of this case.

Whether the Second Circuit's decision in this case conflicted with decisions of the Fifth and Sixth Circuits was the gravamen of Petitioners' original question presented. The parties, the Government and various amici briefed and argued that issue thoroughly. When it came time for this Court to rule on the merits of this

case, it had an ample legal record from which to draw to determine whether Respondents' allegations satisfied the "more harm than good" standard. Petitioners do not contest otherwise.

The Court elected not to make that determination, however, instead choosing to send the case back to the Second Circuit to potentially consider the new arguments made by Petitioners and the Government. Pet. App. 7. Indeed, the Court explained that it was taking that action "in light of [its] statement in *Dudenhoeffer* that the views of the 'U.S. Securities and Exchange Commission' might 'well be relevant' to discerning the content of ERISA's duty of prudence in this context[.]" *Id.* (quoting *Dudenhoeffer*, 573 U.S. at 429). The Court may have granted certiorari on Petitioners' original question focused on the interplay of general and specific factual allegations under the "more harm than good" standard, but, having been presented with Petitioners'—and especially the Government's—arguments in favor of different ways of applying that standard, the Court now wanted those additional viewpoints to be vetted by the lower court (if procedurally practicable) so that all of these proposed applications of *Dudenhoeffer* could be considered together.

Unfortunately, Petitioners failed to properly preserve their argument before the Second Circuit. Pet. App. 3. Petitioners' argument about the obligation of ESOP fiduciaries to act on inside information is not, therefore, properly before this Court. The same holds true for the Government's argument that the federal securities laws' pleading standard should primarily inform the application of "more harm than good"—that argument was also held by the Second Circuit to have been "not properly raised" and therefore was not addressed by that court. *Id.*

As Petitioners concede, if the Court grants certiorari only on their first question presented, neither Petitioners' inside-information argument nor the Government's securities-laws argument can be considered by this Court. Any decision the Court reaches on the merits of that question, therefore, will be fundamentally incomplete.

It makes little sense to rule on "more harm than good" in such an artificially circumscribed fashion. Whatever the Court might hold on Petitioners' primary question, it will not tell the lower courts how to deal with other defendants who argue that ESOP fiduciaries have no duty to use inside information in their fiduciary decision-making or that a duty-of-prudence claim cannot be pleaded against an ESOP fiduciary absent a concomitant obligation under the securities laws. The lower courts will gain little clarity; in fact, greater confusion is the much more likely result.

The Court presumably understands the deficiency now inherent in Petitioners' first question, which is why it did not decide that question the first time it was presented, even though it could have done so (while simply declining to address the arguments that went beyond its scope). The only thing that has changed since then is that the Eighth Circuit has issued two opinions, *Allen v. Wells Fargo & Co.*, 967 F.3d 767 (8th Cir. 2020), and *Dormani v. Target Corp.*, 2020 WL 4289987 (8th Cir. July 28, 2020), neither of which, as Petitioners tacitly admit, addresses Petitioners' inside-information argument or the Government's securities-laws argument. Pet. App. 21-23. The "circuit split" that Petitioners claim has "deepened" has only done so within the narrow scope of their first question; there is still no word from any circuit court on whether Petitioners', or the Government's, additional arguments have merit.

What is more, if the Court takes up the first question now, then at some point in the future chooses to adopt a version of the inside-information argument or the securities-laws argument in some other case, it will likely render the Court's ruling in this case moot, regardless of which way the Court rules now. The Court presumably recognized that concern last time as well, providing it with yet another reason not to rule on Petitioners' original "more harm than good" question until *all* the germane arguments could be considered at the same time.

Every substantive argument Petitioners made in favor of certiorari of their first question was made to this Court last time—not to mention to the Second Circuit and the district court on multiple occasions. The only reason the parties are debating whether this Court should grant certiorari on virtually the same question as it did a little over a year ago is Petitioners chose to make an argument in their merits briefing that was not encompassed by their question presented or addressed by the Second Circuit. But the bells of Petitioners' and the Government's new arguments cannot be unrung. This Court should wait for the right vehicle to grapple with these issues in a complete manner; it should not rule on "more harm than good" in a piecemeal fashion that only will only sow confusion in the lower courts.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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