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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF

This Court previously granted certiorari to review the Second Circuit's initial decision in this case, which created a circuit split concerning the proper application of the pleading standard this Court adopted in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). This Court vacated the Second Circuit's decision, but the Second Circuit has now reinstated its decision and re-established the split, which the Eighth Circuit has since joined. The case for certiorari is thus even stronger than before.

Respondents do not contest that there is a clear and acknowledged circuit split on the first question presented or that the split has deepened since the Court last granted certiorari. Instead, respondents rest their opposition on the arguments that it is artificial to consider the first question presented apart from the second question presented, and that the latter is not properly before this Court. They are wrong on both counts. The first question presents a sufficient and independent basis for dismissing respondents' complaint. The Fifth, Sixth, and Eighth Circuits have all dismissed complaints based on a negative answer to the first question presented without addressing the second, which the defendants in those cases never raised. But if the Court thinks it would be prudent to consider both questions together, there is no obstacle to doing so, as the second issue was pressed below and provides an alternative basis to dismiss the complaint. The one course that makes no sense is allowing this case to proceed while materially identical complaints have been dismissed in every other circuit to consider the issue.

## I. The Court Should Grant Certiorari To Resolve The Undisputed Circuit Split On The First Question Presented.

Respondents do not and cannot contest the clear and acknowledged circuit split on the first question presented, which this Court previously accepted for review but did not resolve. By reinstating its previous decision, after this Court vacated it, the Second Circuit again created a circuit conflict over whether *Dudenhoeffer* can be satisfied by generalized allegations that the harm of an inevitable disclosure increases over time. Pet.19-25. That conflict has only deepened since, with the Eighth Circuit joining the Fifth and Sixth Circuits and explicitly refusing to follow the Second Circuit's reinstated decision in two separate cases, one brought by respondents' counsel and one brought by other lawyers. Pet.21-23. The conflict is especially stark, given that the Fifth, Sixth, and Eighth Circuits have all rejected materially identical allegations brought by respondents' own counsel, such that the same allegations, in some cases *in haec verba*, suffice in the Second Circuit and fall short elsewhere. Pet.23-24.

The Second Circuit's increasingly isolated approach remains incorrect and eviscerates the careful, context-driven approach to ERISA duty-of-prudence claims prescribed by *Dudenhoeffer*. Pet.25-32. The question also remains exceptionally important. Allowing the decision below to stand would invite a flood of meritless ERISA suits, discourage companies from using their own experienced corporate officers as ESOP fiduciaries (or discourage ESOPs entirely), and create an end-run around the strict

pleading requirements Congress has established for securities litigation. Pet.32-34. Put simply, the first question presented amply meets this Court's criteria for certiorari—as evidenced by this Court's earlier grant of certiorari on the question.

Respondents have no response to any of this. They do not attempt to refute the sharp and deepening circuit split on this issue; at most, they label it a "purported" split, but provide no argument to support the qualifier. BIO.9. In reality, the split is deep and widely acknowledged. *See* Pet.22-24. Respondents likewise make no attempt to defend the merits of the Second Circuit's reinstated decision beyond a cursory citation to their previous brief in opposition (which did not stop this Court from granting certiorari) and their previous brief on the merits (which did not stop this Court from vacating). BIO.9.[1] And respondents do not dispute the continuing significance of the question.

Rather, respondents rest their opposition on the claim that this case is "not the right vehicle" to resolve the first question presented. BIO.9 (capitalization altered). Respondents are plainly wrong. It is hard to imagine a better vehicle for resolving the clear circuit split than the very decision creating that split. The

[1] Notably, respondents do not dispute that the Second Circuit held, over petitioners' objections, that the complaint satisfied *Dudenhoeffer* by alleging that petitioners should have disclosed "through IBM's periodic disclosure process under the securities laws." BIO.3. As petitioners have explained—and respondents neither deny nor address—two circuits have rejected this regular-corporate-disclosure-channels theory as inconsistent with *Pegram v. Herdrich*, 530 U.S. 211 (2000), because it faults fiduciaries for failing to act in their corporate capacities. *See* Pet.29-32.

Second Circuit's reinstated decision not only squarely addresses the question presented but does so in the same context (addressing materially identical allegations made by the same counsel) as the three other circuits that have reached the opposite conclusion. Pet.19-25. Furthermore, the facts of this case powerfully demonstrate the end-run around the heightened pleading standards for securities cases, as a securities fraud suit based on the exact same allegations was dismissed and not appealed. *See* Pet.7-9, 13-14, 33-34. Finally, the first question presented is outcome-determinative here; a decision for petitioners would bring this case to an end.

Unsurprisingly in light of all that, respondents do not identify any traditional vehicle problem with the first question presented. Instead, respondents contend that this Court should not review the first question presented apart from the second question presented, and the second question is not properly presented. BIO.9-12. That novel argument is doubly mistaken. There is no obstacle to this Court granting the second question, *see infra*, but even if the Court were disinclined to consider the second question presented, that would provide no reason whatsoever to refrain from resolving the deepening circuit split on the first question.

The two questions presented raise distinct legal issues and address independent fatal deficiencies in respondents' complaint. Although respondents claim that any decision on the first question presented would be "fundamentally incomplete" without also addressing the second, BIO.11, none of the circuits that have created the circuit split seems to agree. The

Second, Fifth, Sixth, and Eighth Circuits have all addressed the first question presented without addressing the second. Indeed, the Second Circuit decision below is the only case in which the second question was even pressed. Moreover, the Fifth, Sixth, and Eighth Circuits have all treated the first question presented as a wholly sufficient basis for dismissing the complaints. And both the Second and the Eighth Circuits addressed and resolved the first question presented alone *even after* this Court issued its previous decision in this case. Neither court suggested that there was anything artificial or "incomplete" about resolving the question of whether *Dudenhoeffer* can be satisfied by generalized allegations that the harm of an inevitable disclosure increases over time (the first question presented), without considering arguments regarding whether ERISA requires a fiduciary to use inside corporate information to benefit plan participants (the second question presented). *See* App.2-3; *Dormani v. Target Corp.*, 970 F.3d 910 (8th Cir. 2020); *Allen v. Wells Fargo & Co.*, 967 F.3d 767 (8th Cir. 2020).

Nor would resolving the first question presented without addressing the second somehow "sow confusion in the lower courts." BIO.12; *see* BIO.11. A decision from this Court on the first question presented, resolving whether allegations like those here are sufficient to state a plausible claim under *Dudenhoeffer*, will *end* ongoing confusion in the courts by resolving the deepening 3-1 circuit split on that issue. *See* Pet.19-25. This Court routinely resolves outcome-determinative issues while leaving other (potentially broader) issues for another day. *See, e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*,

140 S.Ct. 1009, 1018 (2020) (refusing to "take any position on whether §1981 as amended protects only outcomes or protects processes too"); *Gill v. Whitford*, 138 S.Ct. 1916, 1931 (2018) (holding that plaintiffs lacked standing and "leav[ing the merits] for another day"); *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1358 (2018) (refusing to afford *Chevron* deference, while "leav[ing *Chevron*'s continuing validity] for another day"). Such action is often applauded as judicial restraint or minimalism, and it certainly does not "sow confusion in the lower courts," especially when an outcome-determinative issue that has split the circuits is definitively resolved.

In a similar vein, respondents contend that if the Court were to grant review of only the first question presented here, and then adopt petitioners' arguments on the second question presented in a future case, it would "likely render the Court's ruling in this case moot." BIO.12. But that misunderstands mootness and runs counter to this Court's general preference for deciding no more than necessary to resolve a case. If this Court grants review and resolves the circuit split on the first question, there will be nothing "moot" about that resolution. If the Court grants and reverses, respondents' complaint will be dismissed and the need for further proceedings obviated. Future plaintiffs will need to plead with greater specificity, and if one of those more detailed complaints ultimately tees up the second question presented, this Court can resolve it based on that highly detailed complaint. Conversely, if the Court affirms, the pleading law of three circuits will change and complaints that would otherwise be dismissed will proceed. More fundamentally, respondents' argument

suggests that the Court should always decide cases on the broadest possible grounds lest a narrow ruling be overtaken by a subsequent broader ruling. Suffice it to say that this Court's general preference is strongly to the contrary. *See, e.g.*, *SAS Inst.*, 138 S.Ct. at 1358; *cf. PDK Labs. Inc. v. Drug Enf't Agency*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[I]f it is not necessary to decide more, it is necessary not to decide more.").

Respondents invoke this Court's previous *per curiam* decision, which vacated the Second Circuit's decision and remanded for the Second Circuit to consider the additional arguments raised by petitioners and the government. Respondents contend that this Court "could have" ruled on the question presented there—the first question presented here—but "elected not to do so." BIO.5. Respondents claim that the Court "recogniz[ed] the inadequacy of a decision that addresses the *Dudenhoeffer* standard but does not take into account" those additional arguments—and, thus, the Court cannot grant review of the first question presented without granting review of the second question presented. *Id.*; *see also* BIO.10 (contending that "having been presented with" additional arguments, "the Court now wanted those additional viewpoints … considered together").

Putting to one side the rather obvious solution of granting on both questions presented, respondents grossly overread the *per curiam* decision. That decision eliminated the circuit split by vacating the Second Circuit decision and gave the Second Circuit the opportunity to consider the views of the United States and other potential arguments, including those

implicated by the second question presented. The Second Circuit declined that opportunity and simultaneously underscored its view that there is nothing artificial or incomplete about deciding the first question alone and re-established the circuit split. None of that provides a reason for this Court to refrain from resolving that split now. If anything, the Second Circuit's emphatic reversion to its previous decision, followed by the Eighth Circuit's equally emphatic rejection of the Second Circuit's approach and alignment with the Fifth and Sixth Circuits—all in cases involving materially identical allegations brought by the same attorney—only heightens the need for review.[2]

At bottom, as respondents ultimately acknowledge, respondents' "only" basis for arguing against review of the first question presented is that petitioners "chose to make an argument in their [previous] merits briefing that was not encompassed by their question presented or addressed by the Second Circuit." BIO.12. That fully explains why petitioners have broken out that argument into a second question presented and given the Court the option of limiting its grant of certiorari to the first question or granting the petition in full. But it is not

[2] Respondents invoke the Court's observation that "the views of the [SEC] might well be relevant to discerning the content of ERISA's duty of prudence," and suggest that the Second Circuit's failure to consider those "views" counsels against review of the first question. BIO.5, 10 (quoting App.7). But the Second Circuit cannot insulate its decision from review by ignoring the government's views, and the Eighth Circuit proved perfectly capable of resolving the first question and dismissing a materially identical complaint without any government filing.

a basis for denying certiorari on the first question presented. The fact that petitioners previously pointed out a separate *additional* problem with the Second Circuit's decision—now encompassed by the second question presented—does not eliminate the need for review of the first, independent question presented. That question has divided the circuits and resulted in divergent decisions (none of which addressed the second question). That question is important. And there is no coherent reason to consign this case to further district court proceedings, when materially identical complaints filed by the same lawyer were dismissed in three circuits on the basis of the first question and that question alone.

## II. If The Court Prefers To Consider The Second Question Presented, There Is No Obstacle To Granting Certiorari On Both Questions Presented.

Respondents are equally wrong in claiming there is any obstacle to this Court granting certiorari on the second question presented. Thus, all of respondents' arguments about the prudence of considering both alternative grounds for dismissing their complaint together simply make the case for granting the petition in full, rather than limiting the grant to the first question presented.

As with the first question presented, respondents do not dispute the importance of the second question, nor do they address its merits (beyond a cursory footnote citing their previous briefing, *see* BIO.6 n.1). Instead, respondents again raise only a purported vehicle problem, claiming it would be "procedurally inappropriate" for this Court to address the second

question presented because the Second Circuit chose not to decide it. BIO.6. Their arguments are again mistaken.

First, respondents do not (and cannot) assert any jurisdictional barrier that would actually prevent this Court from reviewing the second question presented. The second question presented does not raise some new claim or entitle petitioners to any additional relief; it just provides an additional reason why the district court was correct to dismiss the complaint. Respondents nonetheless suggest that the Second Circuit's failure to address this issue after this Court remanded the case and the parties briefed the issue created a procedural obstacle to this Court's review. BIO.7. But in cases (like this one) arising from the federal courts, the general rule that a question should first be pressed or passed on below "is prudential only," not a jurisdictional bar. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). This Court commonly considers arguments raised for the first time by the government as amicus or even by a non-governmental amicus. *See, e.g.*, *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1802 (2019) (adopting argument raised by the government as amicus); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540-41 (1999) (deciding issue not "addressed by the parties" but discussed in "*amicus* briefing").

Equally important, the rule "operates (as it is phrased) in the disjunctive," allowing review of an issue that was *either* pressed *or* passed on below. *United States v. Williams*, 504 U.S. 36, 41 (1992). Respondents do not dispute that the second question

presented was pressed before the Second Circuit on remand, even though that court declined to rule on it. BIO.7 (recognizing that the second question presented "was pressed in the supplemental briefing that was submitted to the Second Circuit after this Court remanded the case"); *see* Pet.36; Br. for Defs.-Appellees at 16-22. There is thus no jurisdictional bar or even a prudential obstacle to prevent this Court from considering this issue.

Respondents suggest that this Court should not "act[] as the court 'of first view' regarding this issue." BIO.7 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). But that observation does not alter the well-established principle that this Court can and often does address issues that are "passed on *or* pressed" in the courts below. An issue pressed but not passed on below does not become unreviewable because this Court would be the first to pass on it. Respondents also assert that this Court cannot review the second question presented because the Second Circuit found that issue "forfeited." BIO.8; *see* App.3. In fact, the Second Circuit did not specify which arguments in the supplemental briefs below it deemed "previously considered" and which ones it deemed "forfeited." App.3. But even assuming that the Second Circuit declined to consider the second question presented here as forfeited, that prudential decision does not require this Court to make the same choice or insulate the Second Circuit's decision from review unless its forfeiture ruling is independently certworthy. On the contrary, this Court (like the Second Circuit) has independent discretion to decide "what questions may be taken up and resolved." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). This

Court's discretion to consider the second question presented here is not limited by the Second Circuit's refusal to do so.

In sum, there is no obstacle to this Court's review of either question presented. If the Court wishes to have merits briefing on both questions presented (and preserve the option of addressing them together), it should grant the petition in full. If the Court prefers to follow the lead of the four circuits that have created the split by addressing the first question alone, it can limit its grant to the first question. In either event, the Court should not leave the clear and consequential split on the first question unresolved.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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