No. ____

IN THE

Supreme Court of the United States

FRANCESCA ALLEN, ET AL.,
Petitioners,

v.

WELLS FARGO & COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Fifth Third Corp. v. Dudenhoeffer*, 573 U.S. 409 (2014), this Court held that stating a claim against fiduciaries of an employee stock ownership fund, for breaching ERISA's duty of prudence requires plausibly alleging "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. It also held that such a claim is governed by ordinary pleading standards and requires a "careful, context-sensitive scrutiny" of whether the complaint plausibly alleges that fiduciaries "behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were [company] insiders." *Id.* at 425–28 (emphasis omitted).

The courts of appeal have adopted divergent interpretations of this Court's decision. Last term, this Court granted certiorari in *Retirement Plans Committee of IBM v. Jander* to clarify what it takes to plausibly allege a breach, but vehicle problems prevented it from doing so. 140 S. Ct. 592, 594–93 (2020). Meanwhile, the decision below has deepened the split, and interpreted *Dudenhoeffer* to effectively immunize all ESOP fiduciaries from duty-of-prudence claims premised on the failure to publicly disclose inside information because such disclosure would always cause an initial stock drop.

The questions presented are:

1. Whether, under *Dudenhoeffer*, ESOP fiduciaries are effectively immune from duty-of-prudence

liability for the failure to publicly disclose inside information.

2. Whether *Dudenhoeffer*'s framework extends beyond prudence-based claims and applies to duty-of-loyalty claims against ESOP fiduciaries.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Francesca Allen, John Sterling Ross and Mary Lou Shank, individually and on behalf of all other similarly-situated participants in, and beneficiaries of, the Wells Fargo & Company 401(k) Plan, were plaintiffs in the district court and appellants in the court of appeals.

The following respondents were defendants in the district court and appellees in the court of appeals: Wells Fargo & Company, Wells Fargo Employee Benefits Review Committee, Hope Hardison, Justin Thornton, John Shrewsberry, Kevin Oden, Patricia Callahan, Stanhope Kelly, Dawn Martin Harp, Suzanne Ramos, James Steiner, George Wick, Martin Davis, Thomas Wolfe, Lloyd Dean, John Chen, Susan Engel, Donald James, and Stephen Sanger.

RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:

- *Allen v. Wells Fargo & Co.,* No. 18-2781 (8th Cir. July 27, 2020) (reported at 967 F.3d 767).

United States District Court for the District of Minnesota:

- *In re: Wells Fargo ERISA 401(k) Litigation*, No. 16-cv-3405 (D. Minn. July 19, 2018) (reported at 331 F. Supp. 3d 868).
- *In re: Wells Fargo ERISA 401(k) Litigation*, No. 16-cv-3405, 2017 WL 4220439 (D. Minn. Sept. 21, 2017).

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INTRODUCTION

It is now well known that, beginning about 18 years ago, Wells Fargo adopted high-pressure sales practices that led its employees to open millions of unauthorized customer accounts. Between whistleblowers, misconduct reports, and eventually government investigations, Wells Fargo insiders knew all of this. But they concealed the fraud from the public—and from investors, including employees whose retirement accounts were deposited in an employee stock ownership fund, or ESOP, consisting of company stock. Once the problem was inevitably revealed, Wells Fargo stock collapsed and its reputation for integrity was ruined. Investors lost billions, and employees invested in the company's ESOP lost their retirement savings.

Private investors were able to recover for the harm Wells Fargo's concealment caused. They sued the bank under the federal securities laws and state corporate law, alleging that Wells Fargo executives breached their obligations to the company and its investors because they knew about the widespread fraud and yet failed to publicly disclose it. Those claims survived a motion to dismiss and reached a settlement—even though some (those alleging securities laws violations) are subject to one of the highest pleading standards in civil law, while others (those alleging breach of state-law fiduciary obligations) are considered "possibly the most difficult theory in corporation law" upon which to state a claim. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). On top of that, the SEC itself found that, by failing to make an earlier corrective disclosure concerning the fraud, Wells Fargo insiders had breached their obligations under the securities laws.

Wells Fargo employees, however, were limited exclusively to a different vehicle for recovery: ERISA. But the Eighth Circuit held that they could not even plead their claims under that statute. The court acknowledged that, based on the complaint's allegations, "earlier disclosure *may* have ameliorated some harm to the Fund," but it held that a duty-of-prudence claim against ESOP fiduciaries could not survive dismissal where "that course of action was not so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." App. 12a (quotation omitted). Declining to assess whether the plaintiffs had plausibly alleged that a prudent fiduciary would have taken action to protect the fund, the court then held that ongoing government investigations operate as a complete bar to relief, drawing the pro-fiduciary inference that delaying disclosure was necessarily prudent in such circumstances. The upshot was a novel standard exceeding even those applicable to private securities-fraud claims.

That decision deepens a split that developed in the lower courts following this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). While the Second Circuit has faithfully conducted the "careful, context-sensitive" review of the plausibility of duty-of-prudence allegations that decision called for, in the Fifth and Sixth Circuits—and now in the Eighth—that's not enough, and it's unclear what is. *Compare Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620, 628–31 (2d Cir. 2018), *with Martone v. Robb*, 902 F.3d 519, 526–27 (5th Cir. 2018), *Graham v. Fearon*, 721 F. App'x 429, 435–36 (6th Cir. 2018), *and* App. 11a–12a.

This Court granted certiorari in *Jander* last term to resolve this split. But vehicle problems emerged when the petitioners changed course in their merits briefing, arguing that a failure to disclose insider information can never violate the duty of prudence. Compounding the complexity, the government pressed its own novel argument that the duty of prudence imposes the same disclosure obligations the securities laws do. As a result, the Court opted not to resolve the question presented, but remanded the case for the Second Circuit's review of the new issues. After the Second Circuit reinstated its earlier judgment, this Court denied further review.

This case presents none of the problems that derailed review before. No party is pressing the argument that the petitioners tried to inject into *Jander*. And the government's concern is absent, too, because, here, the securities laws and ERISA impose congruent obligations. Meanwhile, the ongoing disagreement among the lower courts continues to call out for this Court's review.

This Court should take this case to decide what should have been decided in *Jander*: ERISA imposes no heightened pleading standard on duty-of-prudence claims against ESOP fiduciaries, but simply calls for a careful, context-specific application of the ordinary pleading standards. In addition to providing much-needed guidance, granting review would enable the Court to correct the anomalous result that every Wells Fargo investor other than employees invested in the company's ESOP will have had an opportunity to recover.

And the Court should take this case for a further reason: it cleanly presents an opportunity to clarify the related question whether the approach articulated in *Dudenhoeffer* extends to other types of ERISA claims.

Here, the Eighth Circuit extended its already misguided heightened pleading standard to dismiss the plaintiffs' duty-of-loyalty claim. Because that question has generated related confusion among the lower courts, it should be considered alongside the first question presented.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 967 F.3d 767 (8th Cir. 2020) and reproduced at 1a. The district court's first decision dismissing the duty-of-prudence claim is unreported, but is available at 2017 WL 4220439, and is reproduced at 36a. Its second decision dismissing the duty-of-loyalty claim is reported at 331 F. Supp. 3d 868 (D. Minn. 2018) and reproduced at 17a.

JURISDICTION

The court of appeals entered judgment on July 27, 2020. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829, as amended and codified at 29 U.S.C. § 1001 *et seq.*, provides in relevant part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

> **(A)** for the exclusive purpose of:
>
> > **(i)** providing benefits to participants and their beneficiaries; and
> >
> > **(ii)** defraying reasonable expenses of administering the plan;
>
> **(B)** 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; . . . .

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title). . . .

STATEMENT

I. Factual background

A. The Employee Retirement Income Security Act and Employee Stock Ownership Plans

ERISA is a "comprehensive and reticulated statute" that protects the interests of participants and beneficiaries in private-sector employee benefit plans. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quotation omitted); 29 U.S.C. § 1001(b). Among other types of plans, ERISA governs employee stock ownership plans, or ESOPs—plans that "primarily invest[] in the common stock of the plan participant's employer." *Jander*, 910 F.3d at 622.[1]

At the heart of its protective framework, ERISA codifies a demanding fiduciary standard known as the "prudent man standard of care." *See* 29 U.S.C. § 1104. Under that standard, individuals with authority or control over plan assets must discharge their duties "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." *Id.*

This standard applies to all ERISA plans, ESOP or otherwise, with one minor exception—ESOP fiduciaries are not obligated to diversify plan assets. *See* 29 U.S.C. § 1104(a)(2). Although by no means required by ERISA, corporate insiders often serve as ESOP fiduciaries. *See, e.g.*, *Jander*, 910 F.3d at 623.

The duty of prudence is among the highest standards "known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (Friendly, J). Although derived from trust law, it is in critical respects even "more exacting." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 157 n.17 (1985) (Brennan, J., concurring). That is because it doesn't impose the duties of a "prudent lay person," but rather those "of a prudent fiduciary with experience dealing with a similar enterprise." *Whitfield v. Cohen*, 682 F. Supp. 188, 194 (S.D.N.Y. 1988) (quotation omitted); *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828–29 (2015).

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[1] ESOPs are one of several types of pension plans that invest primarily in employer securities and that are treated similarly under ERISA. *See* 29 U.S.C. § 1107(d)(3)(A). For the sake of simplicity, this petition refers to this category of plans as ESOPs.

ERISA also imposes a stringent duty of loyalty on plan fiduciaries. Distinct from the duty of prudence, this "strict" standard requires that a plan fiduciary discharge his duties "solely in the interest" of plan participants and beneficiaries and "for the exclusive purpose" of providing them benefits. *Central States, Se. & Sw. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570–71 (1985) (quoting 29 U.S.C. § 1104(a)(1)(A)); *see also* 29 U.S.C. § 1103(c)(1). This "fundamental" duty requires that a fiduciary display "complete loyalty to the interests of the beneficiary and . . . exclude all selfish interest and all consideration of the interests of third persons." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quotation omitted).

ERISA establishes stringent fiduciary duties for a very good reason: "to prevent the great personal tragedy" that occurs when employers promise their employees retirement benefits but fail to deliver them. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quotation omitted); *see also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (discussing the "congressional determination" that "enhanced protection" for employee benefits is necessary).

When applied as written, the standard has done just that. For instance, when WorldCom revealed in 2002 that it had adopted fraudulent accounting practices, the news caused its stock to collapse, wiping out many investors. That included WorldCom employees who had invested their 401(k) retirement accounts in the company's ESOP. *See In re Worldcom, Inc.*, 263 F. Supp. 2d 745, 751, 764–65 (S.D.N.Y. 2003); Kathy Chen, *WorldCom Retirees' Savings Get Battered by Stock's Slide*, Wall St. J. (July 23, 2002). Because the ESOP's corporate insider fiduciaries had done nothing to protect it, the company's employees turned to ERISA. Its strict fiduciary standards provided an avenue for holding WorldCom insiders accountable for failing to protect the plan. *See Worldcom*, 263 F. Supp. 2d at 763–65; Shawn Young, *MCI, Ex-Officers Settle Suit Over Retirement-Plan Losses*, Wall St. J. (July 7, 2004). Things played out similarly after Enron's infamous collapse. *See* Marcy Gordon, *Ex-Enron Workers To Get $85 Million In Settlement*, Washington Post (May 13, 2004).

Over time, however, the lower federal courts have watered down ERISA's strict fiduciary standards in the ESOP context. Their first effort was a judge-made "presumption" that ESOP fiduciaries' fund management was prudent. *See, e.g.*, *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011); *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). Although ERISA's text imposed no such presumption, many lower courts applied it at the pleading stage to foreclose duty-of-prudence claims unless a company was "on the brink of collapse" or faced "dire circumstances" that could not have been foreseen by the plan founder. *Quan v. Comput. Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010); *White v. Marshall & Ilsey Corp.*, 714 F.3d 980, 898 (7th Cir. 2013).

In 2014, however, this Court definitively rejected this approach for a simple reason: A "presumption of prudence" is inconsistent with ERISA's plain text. *Dudenhoeffer*, 573 U.S. at 418. As the Court explained, "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries." *Id.* at 418–19. When Congress wanted to limit fiduciaries' duties in the ESOP context, it knew how: It exempted them from the obligation to diversify fund holdings. *Id.*

Nor was the lower courts' presumption required to approximate the "careful balancing" of congressional priorities. *Id.* at 424–25. Congress had done that balancing itself, imposing the diversification exception and offering tax incentives for the creation of ESOPs. *Id.* at 422. And, the Court explained, applying a presumption of prudence did little to help "readily divide the plausible sheep from the meritless goats"; instead, it made it "impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad circumstances." *Id.* at 425.

The Court's message was clear. As written, ERISA does not permit courts to apply a heightened pleading standard to duty-of-prudence claims involving ESOPs. Instead, lower courts should employ a careful, context-specific review of the allegations in each case, applying the ordinary plausibility pleading standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2008).

But despite this message, some lower courts have continued to apply a different pleading standard in the ESOP context. Unable to rely on a presumption of prudence, these courts have adopted a heightened standard in a new form that makes it next to impossible to plead an ESOP duty-of-prudence claim. *See, e.g.*, *Martone*, 902 F.3d at 526–27 (discrediting allegations on the ground that they could be made in "virtually every fraud case"); *Graham*, 721 F. App'x at 435–36 ("This court and all other courts considering th[e] alternative action [of corrective disclosures to cure a fraud] post-*Fifth Third* have rejected it."). Although this approach was first applied to duty-of-prudence claims, *see Martone*, 902 F.3d at 526–27, it has found purchase in other contexts as well. That's what happened here.

B. The Wells Fargo stock funds

Like many employers, Wells Fargo offers employees a 401(k) defined contribution plan as one of the benefits of employment. *See* JA at 94–447. Under that plan, eligible employees contribute a percentage of their compensation to investment funds and receive matching contributions from Wells Fargo. App. 74a–75a. The plaintiffs in this case, Francesca Allen, John Sterling Ross, and Mary Lou Shank, were among those who did so. *See* App. 59a–60a.

Two of the funds available under the plan invest primarily in Wells Fargo stock: the Wells Fargo ESOP Fund and the Wells Fargo Non-ESOP Fund. App. 75a–76a. All Wells Fargo contributions are automatically invested in those funds. App. 75a. As a result, by 2016 a large proportion of the plan's assets—roughly $11 billion—was invested in Wells Fargo common stock. *Id.*

Because the plan is a defined contribution plan rather than a traditional defined benefit plan, employees' benefits are limited to the value of their individual accounts as determined by "the market performance of employee and employer contributions, less expenses." *Tibble*, 135 S. Ct. at 1826; *see also* 29 U.S.C. § 1002(34). That means employees receive expected benefits as their accounts grow—but also renders them especially vulnerable to fluctuations in stock price.

C. Wells Fargo builds its business on unauthorized-account opening and similar fraudulent sales practices.

Cross-selling—and its evolution into fraud. Over the last 20 years, Wells Fargo's business model has leaned heavily on the practice of "cross-selling"—convincing existing customers to purchase new banking products. App. 78a.

The practice might have started off innocuously enough—after all, it's cheaper to sell an existing consumer a new product than it is to attract a new consumer altogether, *see* App. 82a, and consumers of one Wells Fargo product might be interested in using others.

But whatever its initial merits, under pressure from Wells Fargo executives, cross-selling evolved into outright fraud. Common tactics included creating new deposit accounts in consumers' names without their knowledge or authorization—and even secretly applying for new credit card accounts on their behalf, imposing fees and unwanted credit inquiries. App. 85a–87a.

Other approaches involved impersonation and deceit. Some employees would set new customer PINs and enroll customers in online banking without their knowledge, inputting false contact information to avoid detection. App. 87a. Others would tell customers an account could only be opened alongside other products—or that they would be charged a fee if they did not open an additional account. App. 87a–88a.

Pressure from the top. In all of this, Wells Fargo branch employees did not act on their own initiative. Executives understood that quarterly customer account growth would drive up the bank's stock price by showing investors that it was deepening relationships with its customers. App. 79a. As a result, unreasonably aggressive sales goals were set at the top and pushed down to local branches. App. 90a–91a. For instance, at one point, the company's former Chairman and CEO created a target called the “Gr-eight initiative,” which aimed to sell each household *eight* add-on products. App. 79a.

Wells Fargo leadership knew these goals were unattainable, yet set them anyway—and threatened employees with termination if they fell short. App. 90a–92a. More than 5,000 employees were fired. *See* App. 115a–16a. And leadership knew the pressure would drive fraudulent sales practices. As early as 2005, Wells Fargo’s Human Resources Department began receiving reports that employees were signing up customers without authorization so that they could inflate cross-selling metrics. App. 92a.

Regulators grow skeptical. Wells Fargo’s practices did not escape regulatory attention. Beginning in 2013, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the City of Los Angeles began investigations. App. 106a–10a, 111a–12a.

D. The scandal breaks and the market reacts.

From an investor’s perspective, Wells Fargo’s financial position looked superficially good. From 2009 to 2016, while cross-selling intensified, Wells Fargo touted skyrocketing cross-sales figures as evidence of customer loyalty and a testament to the company’s client-centric approach—and as a source of profits in themselves. App. 79a–84a. And it held itself up as a model of corporate integrity. *See* App. 78a. In turn, investors rewarded the company and its stock price rose—premised on the artificial picture Wells Fargo conveyed to the world. App. 84a–85a.

The inevitable reveal. But news of the misconduct inevitably broke. On September 8, 2016, banking regulators announced that between 2011 and 2015 Wells

Fargo employees had opened 1.5 million bank accounts and submitted half a million credit card applications, all without customer authorization. App. 112a–13a. As a consequence, Wells Fargo paid a $185 million fine, including significant penalties to each of the CFPB, the OCC, and the City of Los Angeles. *Id.*

The CFPB director at the time summed it up: "The gravity and breadth of the fraud that occurred at Wells Fargo cannot be pushed aside as the stray misconduct of just a few bad apples. The stunning nature and scale of these practices reflects instead the consequences of a diseased orchard." App. 113a. Less than a year later, Wells Fargo proved his point, revealing that its employees had opened *3.5 million* unauthorized accounts from 2009 through September 2016. App. 117a–18a.

The impact of this revelation on Wells Fargo's stock price was swift. By September 15, 2016, the bank lost more than $18 billion in market capitalization. App. 122a. The plan alone lost $1 billion. *Id.* By sharp contrast, the S&P 500 index increased 8.7% over the same period. *Id.*

The fiduciaries do nothing to protect the ESOP. None of this could have come as a surprise to the fiduciaries of Wells Fargo's ESOP. Defendant Hope Hardison, for instance, led Wells Fargo's Human Resources Department beginning in 2010. App. 94a. In this role, she managed the team with oversight of employees engaged in fraudulent sales practices while simultaneously serving as a named fiduciary over the ESOP. App. 62a, 92a–94a. Her department also received numerous whistleblower complaints reporting evidence of the fraud—and summarily terminated the employees who complained. App. 94a–95a. Other fiduciaries were similarly well informed. *See, e.g.*, App. 96a–103a.

But plan fiduciaries did nothing to halt the practices—or to protect plan participants from their damaging effects, such as undertaking a complete public disclosure of the problem. App. 130a–35a. Instead, the plan kept purchasing Wells Fargo stock—even late into the course of the fraud. The plan was even a net purchaser, to the tune of $1.5 billion between January 2014 and September 2016. App. 140a.

They did the opposite with respect to their own shares. One fiduciary dumped nearly a quarter of a million shares of Wells Fargo stock while it was at its inflated price. App. 110a. Others disposed of more modest amounts, and all reaped the benefits of bonuses accompanying inflated stock prices. App. 110a–11a. These choices enabled the fiduciaries to protect their own careers and financial interests at the expense of the plaintiffs'. App. 58a, 127a, 147a–48a.

E. Wells Fargo and its executives face securities-law liability.

After news of the account-openings scandal broke, criticism of Wells Fargo poured in. *See* App. 113a–16a. Federal and state prosecutors opened further investigations. App. 117a. And both the SEC and private investors zeroed in on the harm Wells Fargo had done to stockholders and to the public by artificially inflating its stock price through the ongoing fraud.

The SEC's investigation culminated in a settlement in which the SEC found—and Wells Fargo admitted for those purposes—that the company had violated the securities laws. *See In the Matter of Wells Fargo & Co.*, No. 3-19704, *Order Instituting Cease-and-Desist Proceedings,* Exchange Act Release No. 88257 (Feb. 21, 2020), https://perma.cc/CYF3-NZ6E ("SEC Order"). As the SEC explained, Wells Fargo failed to disclose to its investors that its sales model had caused "widespread unlawful and unethical sales practices misconduct that was at odds with" its disclosures to investors and the public. *Id.* at 3 ¶ 5. And senior executives knew or were reckless in not knowing that those disclosures were misleading or incomplete. *Id.*; *see also id.* at 12 ¶ 49, 13 (finding a violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, for which Wells Fargo agreed to pay a $500 million civil money penalty).

The securities laws also offered an opportunity for recovery for private investors. They brought a private securities-fraud action premised on the same basic factual allegations this case is. There, as here, Wells Fargo sought dismissal on the pleadings. But there, unlike here, that effort failed. Despite the fact that those claims *were* explicitly subject to the heightened pleading standards of Rule 9(b) and the Private Securities Litigation Reform Act, the district court concluded that the complaint had plausibly stated securities-fraud claims against Wells Fargo executives—and ultimately approved a $240 million settlement. *See In re Wells Fargo & Co. Shareholder Derivative Litig.*, 282 F. Supp. 3d 1074, 1091–1105 (N.D. Cal. 2017) ("*Wells Fargo I*"); *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508, 515 (N.D. Cal. 2020) ("*Wells Fargo II*").

II. Procedural background

Those employees who were likewise injured by their investment in Wells Fargo stock turned to ERISA. They brought suit on behalf of themselves and other participants and beneficiaries alleging that the defendants breached duties of prudence and loyalty to the ESOP because they had failed to take steps to protect the plan. *See* App. 147a–52a.

For instance, they alleged, the fiduciaries could have disclosed the fraud themselves, mitigating the impact of the disclosure on Wells Fargo stock. *See* App. 130a–35a. Given the scope of the fraud and the pending government investigations, the fraud's eventual disclosure was inevitable. App. 129a. And the longer it persisted, the harsher the "reputational penalty" the company would suffer. App. 136a–40a. That concern was well established in the economic literature. *See id.* (citing Jonathan M. Karpoff, D. Scott Lee, & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. Fin. & Quantitative Analysis 581 (Sept. 2008); Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. Rev. 883, 911 (1990)). Knowing this, a prudent fiduciary would have had little difficulty concluding that a preemptive disclosure would benefit, rather than harm, the fund.

The district court granted the defendants' motion to dismiss and the Eighth Circuit affirmed.

The Eighth Circuit first addressed the duty-of-prudence claim. It began by noting that stating such a claim in the ESOP context requires "'plausibly alleg[ing]' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" App. 7a–8a (quoting *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam)). But, as the Eighth Circuit understood it, evaluating whether a complaint included such allegations requires applying a distinct "*Dudenhoeffer* pleading standard" instead of the ordinary Rule 8 plausibility pleading standard. *Compare* App. 7a, 12a & n.5, 14a–16a, *with Dudenhoeffer*, 573 U.S.

at 429–30 (explaining that courts should apply *Twombly* and *Iqbal* to duty-of-prudence claims).

The court then observed that "[m]ost circuit courts" had "rejected the argument that public disclosure of negative information is a plausible alternative" action that a prudent fiduciary could have taken. App. 8a–9a. Courts had reached this result by reasoning that, generally speaking, a prudent fiduciary "could readily conclude that disclosure would do more harm than good 'by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.'" *Id.* (quoting *Singh v. RadioShack Corp.*, 882 F.3d 137, 149 (5th Cir. 2018)).

In this case, though, the plaintiffs had included specific allegations "that public disclosure of the fraud was inevitable" and that, as economic research recognized, "the longer [a] fraud is concealed, the greater the harm to the company's reputation and stock price." App. 9a; *see also* App. 138a–40a. But the Eighth Circuit disregarded these allegations. App. 11a. In doing so, it noted that the circuits were split on their significance: The Fifth had summarily rejected similar allegations, while the Second had allowed a complaint with similar allegations to proceed past the pleadings stage. App. 9a–10a. *Compare Martone*, 902 F.3d at 526–27, *with Jander*, 910 F.3d at 628–31. The Eighth Circuit sided with the Fifth Circuit.

It then provided its own gloss on the "*Dudenhoeffer* standard," holding that, in cases where ESOP fiduciaries know that government regulators are investigating the company's alleged misconduct, it is prudent for them to delay public disclosure until "the completion of the government's investigation." App. 11a. Applying that presumption, although the Eighth Circuit recognized that "earlier disclosure *may* have ameliorated some harm to the Fund," it nevertheless concluded that dismissal was required because "that course of action was not so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." App. 12a (quoting *Graham*, 721 F. App'x at 437).

The Eighth Circuit then turned to the duty-of-loyalty claim. Although it initially acknowledged that *Dudenhoeffer* was "limited to imprudence claims," the court ultimately concluded that the "concerns that the Supreme Court cited in relation to imprudence claims apply with equal force to disloyalty claims." App. 12a & n.5; *see also* App. 14a, 15a–16a. It therefore refused to permit, as a matter of law, any loyalty-based claims that would impose an "affirmative duty" to disclose non-public information; doing so "would circumvent the *Dudenhoeffer* standard and render it worthless." *Id.* at 14a. As a result, it dismissed the plaintiffs' duty-of-loyalty claim as well.

REASONS FOR GRANTING THE PETITION

I. The courts of appeal have long been split over what a plaintiff must plead to plausibly allege an ESOP duty-of-prudence claim.

What an ESOP plaintiff must plead in order to state a duty-of-prudence claim is an issue that has long vexed the lower courts. This Court stepped in to provide clarity once before, in *Dudenhoeffer*, but the confusion has not abated. Instead, the Eighth Circuit below, together with the Fifth and Sixth Circuits, has constructed a nearly insurmountable bar for pleading duty-of-prudence claims, while the Second Circuit has followed *Dudenhoeffer* in refusing to do so.

Just last term, this Court tried to provide guidance on this issue—but it was unable to do so after vehicle problems emerged. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 594–95 (2020) (per curiam). In the meantime, the split has persisted, and litigants on both sides would benefit from the clarity this Court can provide.

A. On one side stands the Second Circuit's approach in *Jander*. There, the Second Circuit followed *Dudenhoeffer*'s instruction to evaluate the plausibility of duty-of-prudence allegations by conducting a careful, context-specific review. The case arose out of IBM's sale of its microelectronics business. 910 F.3d at 623. That business was, contrary to IBM's public representations, underwater—as became clear when IBM announced that it was selling the business at unfavorable terms. *Id.* IBM's share price collapsed, and IBM employees whose retirement savings were invested in the company's ESOP sued. They alleged that the plan's corporate insider fiduciaries were well aware that the company's stock price was artificially inflated—and that they breached their duty of prudence by failing to disclose the company's problems as part of the regular SEC reporting process. *Id.* at 628.

The Second Circuit relied on three key sets of allegations in the operative complaint. *First*, that the fiduciaries knew that accounting violations had artificially inflated IBM stock and had the power to make a corrective disclosure—especially because two had primary responsibility for the disclosures that were responsible for the artificial inflation in the first place. *Id.* at 628–29. *Second*, that the fund was harmed by their failure to do so promptly because, under settled economic principles, "reputational harm is a common result of fraud and grows the longer the fraud is concealed." *Id.* at 629–30.

And *third*, that the fiduciaries had every reason to make a corrective disclosure. They could have relied on the ordinary disclosure process to avoid spooking the market, and they knew that disclosure of the company's problems was inevitable: The company was likely to sell its floundering microelectronics business, and any prospective buyer would inevitably discover its problems—at which point IBM could not conceal the overvaluation from the public. *Id.* at 629, 630.

Accepting the plaintiffs' allegations as true and drawing reasonable inferences in their favor, the Second Circuit concluded that they had stated a claim for relief. A reasonable business executive armed with the information alleged in the complaint, the court explained, "could plausibly foresee that the inevitable disclosure of longstanding corporate fraud would reflect badly on the company and undermine faith in its future pronouncements." *Id.* at 629. Because these allegations were at least plausible, the court concluded, the plaintiffs had sufficiently pleaded that no prudent fiduciary in the defendants' position "could have concluded that earlier disclosure would do more harm than good." *Id.* at 631.

The court's analysis rejected a few counterarguments. The "possibility of similar allegations" in other cases did not undermine their plausibility—just as it wouldn't in any other case. *Id.* at 629. Nor was it of any significance that corrective disclosure might have an impact on the value of the stock already held by the fund, because "non-disclosure . . . was no longer a realistic option," and whatever stock drop followed the corrective disclosure would not be worse for the fund than one that came later. *Id.* at 631.

The Second Circuit summed it up: Whether or not the plaintiffs' allegations were likely, they were at least plausible—and under *Dudenhoeffer* that was enough.

B. A plaintiff pleading a duty-of-prudence claim against ESOP fiduciaries outside of the Second Circuit will have a quite different experience. No court other than the Second Circuit has allowed such claims past the pleadings stage following *Dudenhoeffer*. And that's unlikely to change. Despite *Dudenhoeffer*'s contrary command, *see* 573 U.S. at 425, other circuits have erected new hurdles to relief that make it virtually impossible for a plaintiff to state a claim in this context. These circuits have, in varying ways, all discarded the ordinary plausibility pleading standard in favor of a heightened one requiring that a plaintiff show that a proposed alternative action was so clearly beneficial that no prudent fiduciary could have opted against it.

The Fifth Circuit. The Fifth Circuit interprets *Dudenhoeffer* to impose a stringent standard: "[T]he plaintiff bears the significant burden," it has said, of "proposing an alternative course of action so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it." *Martone*, 902 F.3d at 525 (quotation omitted). No complaint in the Fifth Circuit has met this burden, and it is difficult to imagine one that could do so.

In *Whitley v. BP, P.L.C.*, for instance, the Fifth Circuit considered allegations brought by BP employees whose ESOP retirement accounts suffered significant losses following the Deepwater Horizon explosion. 838 F.3d 523, 525 (5th Cir. 2016). The employees alleged that the ESOP fiduciaries were aware of safety concerns prior to the disaster, and had breached the duty of prudence by failing to disclose those concerns. *See id.* at 529.

Rather than evaluating whether the complaint plausibly alleged a violation of the duty of prudence, the Fifth Circuit applied the onerous standard it purportedly derived from *Dudenhoeffer*. *See Whitley*, 838 F.3d at 529. Without additional elaboration, the Fifth Circuit ruled that, because any disclosure would likely have lowered the stock price, it did not "seem reasonable" to say that a prudent fiduciary could not have concluded that disclosure would do more harm than good. *Id.*

The Fifth Circuit's decision in *Martone* reinforces this approach. There, it likewise concluded that the plaintiff failed to state a claim without engaging in a careful, context-specific analysis of the plausibility of the complaint's allegations. *Id.* at 526–27. The plaintiff's allegations (that Whole Foods insiders had breached their fiduciary duty to the ESOP when they failed to disclose that the company had systematically overcharged customers by misstating the weight of pre-packaged goods) relied, in part, on the "widely-known" economic understanding that the longer a fraud goes on the harsher the eventual correction will be. 902 F.3d at 521, 526–27. The Fifth Circuit discredited the point altogether on the novel ground that its applicability in other cases meant a plaintiff couldn't use it in this one. It worried that allowing such a claim to proceed would open the floodgates to meritless ESOP claims—disregarding the many other criteria that are required to state a duty-of-prudence claim. *See Jander*, 910 F.3d at 629–30 (noting the need to evaluate whether (1) "there was an ongoing act of concealment" that (2) "was known by the fiduciaries" when (3) “disclosure would not be premature,” and (4) other factors, such as market conditions, would not “have made immediate disclosure particularly dangerous”). In its view, the plaintiffs failed to meet their “significant burden” to show that a proposed alternative action was “so clearly beneficial” that no prudent fiduciary could have declined to take it. *See Martone,* 902 F.3d at 525–26 & n.24 (quoting *Whitley*, 838 F.3d at 529).

The Fifth Circuit thus declines to apply the ordinary Rule 8 plausibility pleading standard. Instead, it applies a heightened standard in at least two respects: It will draw inferences against rather than for the plaintiff, and it will disregard some well-pleaded allegations altogether. The Fifth Circuit has not explained how a plaintiff could ever plead a duty-of-prudence claim if she could not rely on allegations that could be made in other cases—or if courts had license to draw inferences against her about the impact on the fund of her proposed alternative actions.

The Sixth Circuit. The Sixth Circuit follows a similar approach. In *Graham*, 721 F. App’x at 429, for instance, the Sixth Circuit refused to consider many of the plaintiffs’ allegations, drew inferences against them, and applied a stringent test like the Fifth Circuit’s, asking whether a course of action was “so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it.” *Id.* at 435–37. While it purported to follow *Dudenhoeffer*, the stringent standard that emerged is anything but the plausibility pleading standard this Court had called for.

The *Graham* plaintiffs alleged that their employer company had engaged in fraud and misrepresentation about the feasibility of a lucrative spinoff arrangement, causing its stock price to trade at artificially inflated prices that led the ESOP to overpay for the stock. *Id.* at 431–32. They contended that the plan fiduciaries, who were corporate insiders, breached their duty of prudence by failing to issue corrective disclosures. *Id.* at 432. The plaintiffs also alleged that the eventual disclosure of a longer-running fraud caused greater harm to shareholders. *Id.* at 436.

The Sixth Circuit rejected the claim. Like the Fifth Circuit, it refused to consider allegations concerning the impact of long-running fraud. *Id.* It, however, invoked a different reason—that *Dudenhoeffer* had "implicitly" rejected the plausibility of such allegations. *Id.* (noting that the government had embraced this view but that the Court didn't address it). It also speculated that disclosure could have led to a "market overreaction" and "a decline worse than actually warranted," asserting that any alternative conclusion would require fiduciaries to act with "prescience" rather than "prudence." *Id.* at 436–37 (quotation omitted); *see also Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 865 (6th Cir. 2017) (drawing similar inferences against ESOP plaintiffs).

The Eighth Circuit. The court below took a similar approach—but it added yet another hurdle to the mix.

After making clear that it understood the "*Dudenhoeffer* standard" as distinct from the normal Rule 8 plausibility pleading standard, App. 7a–9a, 12a n.5, the Eighth Circuit refused to consider the plaintiffs' long-running fraud theory because it could have been alleged in other cases. App. 11a–12a (relying on *Martone*). It then speculated that, even if it were to consider all of the plaintiffs' allegations, a prudent fiduciary "could readily conclude" that the fund would be harmed by disclosing information while government investigations were ongoing. App. 11a. Quoting *Graham*, the Eighth Circuit concluded that preemptive disclosure "was not so clearly beneficial that a prudent fiduciary could not conclude it would be more likely to harm the fund than to help it." App. 12a (quotations omitted). Because their allegations fell short of that onerous standard—at least when accompanied by the court's pro-fiduciary inferences—the plaintiffs had failed to state a claim.

* * *

To be sure, courts applying any pleading standard will screen out a wide variety of claims. But under the Fifth, Sixth, and Eighth Circuits' approach, it is unclear what ESOP duty-of-prudence claims—if any—could survive a motion to dismiss.

II. The Court has already recognized that this issue is worthy of review, and this case presents an ideal vehicle.

This is not the first time this Court has been presented with this issue. In *Jander*, this Court agreed to decide what standard lower courts should apply when confronting duty-of-prudence claims in the ESOP context. But problems that emerged in the merits briefing ultimately prevented the Court from providing any clarity. *See Jander*, 140 S. Ct. at 594 (noting that both the petitioners and the government focused their arguments before the Court on matters other than the question presented). This case suffers from none of those problems and cleanly presents the primary issue—whether a heightened pleading standard applies to ESOP duty-of-prudence claims. It therefore provides an ideal vehicle.

A. The last vehicle for this issue suffered from several flaws.

When the Court granted the petition in *Jander*, it seemed like an opportunity to clarify "what it takes to plausibly allege an alternative action 'that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.'" *Id.* (quoting *Dudenhoeffer*, 140 S. Ct. at 428).

But after that petition was granted, the petitioners adopted a different strategy. Their brief on the merits argued that ESOP fiduciaries can never have an ERISA-based duty to act on information obtained in their capacity as corporate insiders. *See* Pet. Br. at 22–32.

And the government, for its part, injected yet another set of issues into the briefing. Although it dismissed the petitioners' position as "squarely inconsistent with *Dudenhoeffer*," Gov. Br. at 12, it argued that a different novel hurdle foreclosed the plaintiffs' claims. In the government's view, ERISA's duty of prudence requires ESOP fiduciaries to publicly disclose inside information only when the securities laws do—at least in the absence of extraordinary circumstances. *See id.* at 13–24. A securities fraud lawsuit premised on IBM's accounting fraud had been rejected at the pleading stage, *see Jander*, 910 F.3d at 631, so the government's position posed a formidable hurdle to the plaintiffs' recovery.

Because neither of these arguments had been presented to the Second Circuit, this Court declined to entertain them in the first instance. *See Jander*, 140 S. Ct. at 595. But the Court thought that the Second Circuit should have an opportunity to do so, especially in light of *Dudenhoeffer*'s statement that the SEC's views "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 therefore vacated the Second Circuit's judgment and remanded the case.

On remand, the Second Circuit reinstated its earlier judgment. *See Jander v. Ret. Plans Comm. of IBM*, 962 F.3d 85, 86 (2d Cir. 2020). And when, after all this complexity had been introduced, the defendants filed a second petition including both their questions, this Court denied it.

B. This case poses none of the same problems.

This case presents an opportunity for the Court to cleanly review the question it sought to address in *Jander* without navigating the unique complexities posed by that case.

For one thing, this case doesn't require grappling with the issues the government raised in *Jander.* There is no doubt that the fiduciaries' conduct here violated the securities laws' disclosure requirements. *See supra* Part I.E. The SEC has already concluded that Wells Fargo "failed to disclose to investors" that its "sales model had caused widespread unlawful and unethical sales practices misconduct that was at odds with its investor disclosures" and other publicly reported metrics. SEC Order at 3 ¶ 5. Moreover, senior executives "knew, or were reckless in not knowing," that the disclosures were incomplete and, under the securities laws, should have made an earlier corrective disclosure. *Id.*

Accordingly, unlike in *Jander*, there is no gap between the disclosure obligations Wells Fargo insiders faced under the securities laws and those that the plaintiffs argue they faced under ERISA. As a result, even if the government were correct that both regimes impose the same standard, that standard was violated here—providing yet another reason why the Eighth Circuit was wrong to dismiss the duty-of-prudence claims as implausible.

Nor does this case ask the Court to grapple with issues that may have been forfeited or improperly presented below. Instead, this case squarely raises the straightforward but consequential question what pleading standard applies to ESOP duty-of-prudence claims.

C. Review is warranted now.

The lower courts are no less divided—or confused—as to how to evaluate ESOP duty-of-prudence claims than they were when this Court granted review in *Jander.* Just the opposite: The Eighth Circuit's new contributions underscore the need for this Court's guidance.

Courts are split as to whether duty-of-prudence claims are subject to a heightened pleading standard. The Second Circuit applies a plausibility pleading standard, while the Fifth, Sixth, and Eighth Circuits insist that plaintiffs' allegations meet a higher bar. And among the courts that apply a heightened pleading standard, what that standard is—and the reasons for applying it—varies considerably. For instance, the Fifth Circuit has crafted a pleading rule that forbids any reliance on basic economic principles as part of an explanation for why it would be plausible for a prudent fiduciary to disclose known fraud sooner. *See Martone*, 902 F.3d at 526. The Sixth Circuit has held that *Dudenhoeffer* itself silently disapproved of considering similar allegations that "the longer a securities fraud goes on, the more harm it causes to shareholders." *See Graham*, 721 F. App'x at 436.

And the Eighth Circuit has introduced a whole new hurdle, insisting that the pendency of a government investigation will defeat the plausibility of an earlier corrective disclosure—even where such a disclosure "*may* have ameliorated" harm to the fund—because, in its view, a fiduciary "could readily conclude" that such a disclosure is not "so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." App. 11a–12a (quotation omitted).

The Second Circuit in *Jander* identified one possible source of the confusion. It observed that, in explaining how courts should evaluate the plausibility of duty-of-prudence claims, this Court in *Dudenhoeffer* adopted slightly different formulations of a similar point. The Court first instructed courts to evaluate whether the plaintiff has plausibly alleged "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." *Dudenhoeffer*, 573 U.S. at 428.

But when it used similar language a short while later, the Court tweaked it, instructing courts to assess whether a prudent fiduciary "could not have concluded" that the proposed alternative action would do more harm than good. *Id.* at 429–30.

The difference between the two formulations is subtle: the first asks what conclusions a fiduciary *would* not reach, while the second asks which she *could* not reach. As the Second Circuit has pointed out, while the former seems to examine "what an *average* prudent fiduciary might have thought," the latter seems to examine instead "whether *any* prudent fiduciary could have considered the action to be more harmful than helpful." *Jander*, 910 F.3d at 626. This confusion was amplified by the Court's decision in *Amgen*, 136 S. Ct. 758, where the Court briefly quoted only the second, conceivably more restrictive formulation. *Id.* at 760.

Largely taking their cue from *Amgen*, most of the courts that have adopted a heightened pleading standard have relied on the second formulation.[2] But it is far from clear that this Court meant to develop this distinction—or to endorse one formulation over the other. The Second Circuit, for its part, declined to resolve this confusion—but held that, either way, no heightened pleading standard applies. *See Jander*, 910 F.3d at 628.

By granting review here, this Court can provide much-needed clarity concerning the meaning of *Dudenhoeffer*—and whether a heightened pleading standard applies to ESOP duty-of-prudence claims.

III. The Eighth Circuit's application of a heightened pleading standard for ESOP duty-of-prudence claims is inconsistent with *Dudenhoeffer* and the plain text of ERISA.

The Court should grant certiorari for an additional reason: The Eighth Circuit is wrong. As this Court explained in *Dudenhoeffer*, courts evaluating duty-of-prudence claims should look no further than the ordinary pleading standards and the text of ERISA in evaluating whether ESOP plaintiffs have stated a claim. The Eighth

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[2] In *Whitley*, the Fifth Circuit cited both formulations interchangeably, but by *Martone*, the court seemed to settle on the "could have" language. *See Whitley*, 838 F.3d at 528; *Martone*, 902 F.3d at 525.

Circuit's approach strays far afield from the basic framework.

A. The Eighth Circuit's heightened pleading standard conflicts with *Dudenhoeffer* by making it virtually impossible to plead duty-of-prudence claims against ESOP fiduciaries.

In *Dudenhoeffer*, this Court made clear that ERISA applies its stringent duty-of-prudence standards to all ERISA fiduciaries, including ESOP fiduciaries except where the statute provides otherwise. 573 U.S. at 418–19. Accordingly, the Court rejected the application of any pleading presumption to ESOP fiduciaries, disapproving an approach that made it "impossible to state a duty-of-prudence claim." *Id.* at 422.

Yet the Eighth Circuit does just this. It requires plaintiffs to satisfy hurdles that are so onerous that it is difficult to imagine how a plaintiff could ever successfully plead a claim for relief. According to the Eighth Circuit. plaintiffs are flatly barred from relying on generally-applicable economic principles that any prudent fiduciary would be required to consider. So, they are deprived of the very context-specific circumstances that *Dudenhoeffer* identified as necessary for explaining how or why a prudent fiduciary should have known to take alternative actions such as earlier corrective disclosure. It will be similarly difficult to overcome inferences favoring fiduciary delay—the Eighth Circuit's presumption of prudence in the face of any ongoing investigation all but shuts the door on any earlier-disclosure claim, even when such a claim could proceed under the securities laws.

And, most importantly, pleading that an action was "so clearly beneficial" that it was *impossible* for a prudent fiduciary to reject it invites the very speculation this Court disapproved in *Twombly* and *Iqbal*. *See* App. 11a–12a (quotation omitted).

These are precisely the sorts of atextual hurdles this Court disapproved in *Dudenhoeffer*, and they are inconsistent with that case's instruction to apply the ordinary Rule 8 pleading standards.

B. The Eighth Circuit's approach incongruously disfavors ESOP participants and beneficiaries.

Left to stand, the Eighth Circuit's decision erects a pleading rule that incongruously treats ERISA participants and beneficiaries less favorably than private investors.

Recall that those non-ERISA investors brought securities-fraud and state-law fiduciary-duty claims against Wells Fargo and its insiders for the same misconduct that formed the basis of the plaintiffs' duty-of-prudence claims here. And recall also that those claims were all subject to pleading standards that are indisputably higher than they are supposed to be here.

But, unlike here, when courts had the opportunity to examine those claims, they had little difficulty concluding that those plaintiffs stated claims for relief--even under those heightened pleading standards. *See Wells Fargo I*, 282 F. Supp. 3d at 1091–1105. That was true with regard not only to claims that Wells Fargo executives breached the securities laws by failing to make an early corrective disclosure, but also to claims that they violated *state-law* fiduciary obligations—which are considered "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967. Allegations of Wells Fargo officers' knowledge and conduct met even this high bar: they plausibly established that officers were "aware of the fraud allegations" and failed to take "appropriate action" in response. *Wells Fargo I*, 282 F. Supp. 3d at 1108–09 (quoting *Rich ex rel. Fuqi Int'l, Inc v. Yu Kwai Chong*, 66 A.3d 963, 984 (Del. Ch. 2013)).

Under the Eighth Circuit's decision, however, *Dudenhoffer* silently created a pleading standard even more onerous than the standards that control under state corporate law.

If true, then *every shareholder* other than a company's ESOP participants will enjoy a mechanism to seek redress for a company's admittedly fraudulent conduct. So it is here. It is only Wells Fargo's own employees—because of the novel, artificially inflated pleading standard the Eighth Circuit imposed on them—who have no means to recover. And this is so even though ERISA imposes fiduciary duties that are "the highest known to the law." *Donovan*, 680 F.2d at 272 n.8. Nothing in ERISA's text or this Court's precedent permits such an incongruous result.

IV. This Court should also resolve whether a heightened pleading standard derived from *Dudenhoeffer* applies to duty-of-loyalty claims.

This Court should also decide whether the framework articulated in *Dudenhoeffer* applies to other claims against ESOP fiduciaries and, if so, whether it applies in the heightened form it has taken on here.

In the decision below, the Eighth Circuit ultimately concluded that it does, rejecting plaintiffs' duty-of-loyalty claims under a heightened pleading standard functionally equivalent to the standard it purported to derive from *Dudenhoeffer*.

This Court's review of this issue is warranted here for three reasons. *First*, the idea that *Dudenhoeffer*—and especially a heightened pleading standard derived therefrom—applies to claims other than duty-of-prudence claims is increasingly finding purchase. *See, e.g.*, App. 12a–16a; *In re Pilgrim's Pride Stock Inv. Plan ERISA Litig.*, 2016 WL 8814356, at *4 (E.D. Tex. Aug. 19, 2016). Indeed, courts have also begun to apply some of *Dudenhoeffer*'s language outside of the ESOP context altogether. *See, e.g.*, *Usenko*, 926 F.3d at 473. But, by its own reasoning, *Dudenhoeffer* was limited in crucial ways. Its narrow, textual framework focused on ERISA's statutory language with respect to prudence and ESOP-specific policy considerations lower courts had identified. *See* 573 U.S. at 411–12, 418–25. It did not purport to apply beyond that context—and certainly not to duty-of-loyalty claims.

Second, even if the standards applicable to a duty-of-prudence claim should extend to some other areas, they do not apply to an obligation defined by its own distinct statutory text. The duty of loyalty appears in a different subsection of ERISA than the duty of prudence, and it is described by different terms. *See* 29 U.S.C. § 1104(a)(1)(A). Any faithful examination of the statute—and indeed, any faithful extension of *Dudenhoeffer*—would require examining these textual differences.

And *third*, whether a heightened pleading standard applies to duty-of-loyalty claims is closely bound up with the first question presented. The Eighth Circuit's concern that permitting such claims to proceed in circumstances where duty-of-prudence claims could not would render the *Dudenhoeffer* standard "worthless" proves the point. *See* App at 14a–15a. So long as courts misinterpret

Dudenhoeffer as imposing a heightened pleading standard to duty-of-prudence claims, they are likely to apply such an approach to similar duty-of-loyalty claims as well.

As a result, this Court should also decide whether the Eighth Circuit was correct to apply its understanding of *Dudenhoeffer*'s approach to evaluating claims against ESOP fiduciaries outside of its narrowly cabined context.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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