No. 20-866

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), this Court set forth the pleading standard for a claim that fiduciaries of an employee stock ownership plan who failed to act on the basis of inside information violated their duty of prudence under the Employee Retirement Income Security Act, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"). The Court subsequently reaffirmed this standard in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016).

The questions presented are:

1. Whether the allegations in petitioners' complaint satisfied the pleading standard set forth by this Court in *Dudenhoeffer* and *Amgen* for violations of ERISA's duty of prudence.

2. Whether petitioners' complaint plausibly alleged a violation of ERISA's duty of loyalty under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

RULE 29.6 STATEMENT

Respondent Wells Fargo & Company does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. The remaining respondents are not non-governmental corporations and are therefore not required to submit a statement under Supreme Court Rule 29.6.

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INTRODUCTION

The petition states a question that is not actually presented, seeks to correct application of this Court's settled precedent to the fact-specific allegations in this case, and points to no conflict in authority that is not explained by different facts in different cases. Just last year, this Court ruled that further consideration of the type of claims at issue—that fiduciaries of an employee stock ownership plan ("ESOP") violated ERISA's duty of prudence by failing to act on inside information—should await decision by the courts of appeals on two arguments not previously addressed, as petitioners' own counsel emphasized in opposing review in a different case this Term. The Eighth Circuit did not address those arguments below. Accordingly, while there may be opportunities to expand on this Court's jurisprudence in this area, this is certainly not the case in which to do so. The petition should be denied.

The first question the petition frames for review—whether, under *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), "ESOP fiduciaries are effectively immune from duty-of-prudence liability for the failure to publicly disclose inside information," Pet. i—is not remotely presented. The Eighth Circuit did not hold, expressly or implicitly, that ESOP fiduciaries are "effectively immune" from such suits. Rather, it engaged in the type of "context-sensitive scrutiny" *Dudenhoeffer* requires, 573 U.S. at 425, and its decision turned on the specific facts alleged in petitioners' complaint, notably concerning the presence and timing of ongoing government investigations.

Contrary to petitioners' assertion, this case is thus not about whether ESOP fiduciaries *ever* have a duty under ERISA to disclose material non-public information that they know as corporate insiders. Nor is it about the asserted stringency of the legal standard governing claims that an ESOP fiduciary violated ERISA's duty of prudence by failing to act on inside information. This Court set out the standard in *Dudenhoeffer* and reaffirmed it in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). The only question arguably presented is how that framework operates in a new and distinct factual context previously unaddressed by the courts of appeals. Such factbound applications of this Court's precedent do not warrant review. In arguing otherwise, petitioners ignore case-dispositive facts, mischaracterize the decision below, and rely on other cases raising broader questions that the court below found immaterial to the outcome of this case.

The Eighth Circuit correctly stated the rule of *Dudenhoeffer* and *Amgen*: To state a duty-of-prudence claim against ESOP fiduciaries for failure to act on inside information, a plaintiff must plausibly allege an alternative action that defendants could have taken consistent with the securities laws that a prudent fiduciary in the same circumstances could not have viewed as more likely to harm the plan than to help it. Petitioners' complaint did not satisfy that standard, the court of appeals found, because the alleged alternatives all required respondents—fiduciaries of Wells Fargo's 401(k) plan—to disclose alleged sales practices that were still being investigated by the government. As the court explained, even if delaying an inevitable disclosure

might *generally* be worse for a company, a prudent fiduciary could readily have concluded in the *specific* context of this case that disclosure while government investigations were pending and unresolved would trigger an outsized market reaction that would harm plan participants invested in Wells Fargo stock more than a disclosure accompanied by the announcement of a settlement and remedial measures.

Petitioners do not acknowledge this narrow ground for the decision below because it refutes their claim of a circuit split over the pleading standard. In fact, no other circuit's application of *Dudenhoeffer*'s standard has focused on the import of a complaint's allegations that ESOP fiduciaries were required to disclose inside information prior to the resolution of an ongoing government investigation. The Eighth Circuit had no need to decide whether ERISA ever imposes a duty to disclose inside information because the case-specific facts regarding the pending investigations of Wells Fargo's sales practices made a narrower ruling appropriate. That ruling does not implicate factually distinct circumstances, much less foreclose the possibility that future plaintiffs will plead other facts that state a claim for relief under *Dudenhoeffer*.

Nor does this case implicate any circuit split over the pleading standard. Petitioners cite only *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018), which they argue applied a more permissive standard than the Fifth, Sixth, or Eighth Circuits by allowing plaintiffs to rely on generic economic allegations to withstand dismissal. But the Eighth Circuit distinguished the Second Circuit's decision on its facts and specifically stated that it

would reach the same outcome after taking into account the general economic allegations the Second Circuit considered. Petitioners omit that inconvenient reasoning from their discussion.

Petitioners heavily rely on this Court's prior grant of review in *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020) ("*Jander I*"). But the same defects that led the Court to remand *Jander I* are present here: The Eighth Circuit did not decide whether there is a duty to disclose inside information under ERISA's duty of prudence and, if so, whether that obligation must be co-extensive with the disclosures required by the securities laws. This case is thus a poor vehicle to decide the issues raised in *Jander I* because here too the lower court did not address arguments this Court has deemed critical to the proper resolution of those issues.

Finally, petitioners are wrong to assert that the Eighth Circuit anomalously barred recovery by plan participants while permitting all other investors in Wells Fargo stock to recover their alleged losses. The 401(k) plan is a member of the plaintiff class in the related securities fraud class action. The plan is thus entitled to a proportional share of the class settlement, which it will distribute to the accounts of affected plan participants.

Petitioners' second question—regarding claims for breach of the duty of loyalty—again misstates the Eighth Circuit's analysis and sidesteps the true ground for its decision. The court did not extend *Dudenhoeffer* to duty-of-loyalty claims. To the contrary, it held that framework inapplicable to the legally distinct elements of such claims. Petitioners'

disloyalty claim failed for separate reasons: The claim repackaged petitioners' imprudence claim without alleging sufficient facts of conflicted or self-interested action that could clear the threshold of plausibility under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). That application of settled precedent likewise merits no further review.

STATEMENT

A. This Court's Precedent

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), this Court addressed the pleading requirements for claims that an ESOP fiduciary violated ERISA's duty of prudence by allowing plan participants to invest or remain invested in their employer's stock at a time when the fiduciary allegedly knew, based on inside information, that the stock was overpriced. Although the Court rejected "a special presumption of prudence for ESOP fiduciaries," it acknowledged that "in many cases," ESOP fiduciaries who believe that the employer's stock is overpriced will find themselves "between a rock and a hard place": If they keep the stock and its price goes down, they may be sued for imprudence; if they remove it and the price goes up, they may be sued for disobeying the plan document. *Id.* at 424–25. The Court also observed that ESOP fiduciaries who freeze the plan's investment in company stock based on inside information, without also disclosing that information to the public, may run afoul of insider trading laws. *Id.* at 429.

The Court accordingly ruled that:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

Id. at 428. A motion to dismiss, the Court stressed, is an "important mechanism for weeding out meritless claims" that ESOP fiduciaries with inside information imprudently allowed participants to invest in the employer's stock. *Id.* at 425, 430. In evaluating a motion to dismiss, courts must therefore undertake "careful, context-sensitive scrutiny of a complaint's allegations," because "the content of the duty of prudence turns on 'the circumstances … prevailing' at the time the fiduciary acts." *Id.* at 425 (quoting 29 U.S.C. § 1104(a)(1)(B)).

Dudenhoeffer delineated three points that must inform a court's determination of whether a complaint sufficiently states a claim for violation of ERISA's duty of prudence in this context:

First, the duty of prudence does not require fiduciaries to violate the securities laws—for example, by selling employer stock based on insider information. *Id.* at 428–29.

Second, courts should consider whether requiring fiduciaries with non-public information "to refrain from making additional stock purchases" or "to disclose that information to the public so that the

stock would no longer be overvalued" would conflict with federal securities laws or their purposes. *Id.* at 429. The Court noted that it did not have the benefit of the SEC's views, which "may well be relevant" to this assessment. *Id.*

Third, in cases where the plaintiff alleges that the fiduciary should have taken an alternative action based on inside information, courts should determine "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded" that the proposed alternative action "would do more harm than good to the fund by causing a drop in the stock price" that leads to outsized losses for the fund participants. *Id.* at 429–30.

This Court subsequently applied *Dudenhoeffer*'s framework for evaluating allegations of imprudence by ESOP fiduciaries who failed to act on inside information in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). In a short, per curiam opinion, the Court reversed a Ninth Circuit decision for "fail[ing] to properly evaluate the complaint" under *Dudenhoeffer*. *Id.* at 759. The proper inquiry, the Court reiterated, is "whether the complaint … 'has plausibly alleged' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Id.* at 760 (quoting *Dudenhoeffer*, 573 U.S. at 429–30).

B. The *Jander* Litigation

Following *Dudenhoeffer* and *Amgen*, the Court last Term granted review of a case from the Second Circuit to address whether *Dudenhoeffer*'s "'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable

disclosure of an alleged fraud generally increases over time." *Jander I*, 140 S. Ct. at 594 (quoting Pet. for Cert. i.). But after briefing and argument, the Court declined to reach that question because the petitioner and the government, as amicus curiae, raised two new and distinct merits arguments not addressed by the court of appeals. Specifically, the petitioner newly argued that "ERISA imposes no duty on an ESOP fiduciary to act on inside information." *Id.* And the government, for its part, argued that "an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws" would conflict with those securities laws or their goals. *Id.* at 594–95. The Court accordingly vacated and remanded the case so that the Second Circuit could decide whether to consider these arguments in the first instance. *Id.*

On remand, the Second Circuit held that the new arguments that had been presented to this Court were forfeited and reinstated its prior opinion. *Jander v. Ret. Plans Comm. of IBM*, 962 F.3d 85, 86 (2d Cir. 2020). The petitioner again sought this Court's review, arguing that there was an "entrenched circuit split" regarding *Dudenhoeffer*'s application. Pet. i, *Ret. Plans Comm. of IBM v. Jander*, No. 20-289 (U.S. Sept. 1, 2020) ("*Jander II*"). The petitioner specifically cited the Eighth Circuit's decision in this case as evidence of such a "circuit split." *Id.* at 21–22, 24–25.

The respondents in *Jander II*, represented by one of the same attorneys representing petitioners in this case, opposed further review on the ground that this Court's consideration of any "purported" split over *Dudenhoeffer*'s application would be incomplete for the same reasons that led the Court to remand in

Jander I: The court of appeals had addressed neither (1) the *Jander* petitioner's argument that ERISA imposes no duty on ESOP fiduciaries to act on inside information, nor (2) the government's argument that an ERISA duty to disclose information that the securities laws do not require to be disclosed would contravene those laws or their purposes. Br. in Opp. 9–11, *Ret. Plans Comm. of IBM v. Jander*, No. 20-289 (U.S. Oct. 5, 2020). The Court denied the *Jander II* petition. *Ret. Plans Comm. v. Jander*, --- S. Ct. ---, 2020 WL 6551787 (Nov. 9, 2020) (mem.).

C. District Court Proceedings

Like many employers, Wells Fargo offers employees the opportunity to contribute pre-tax earnings to a 401(k) plan (the "Plan") with matching and profit-sharing contributions from the company. Pet. App. 74a–75a. Employees may determine whether and how to invest in the Plan by choosing from among its investment alternatives. One option is a fund that invests in Wells Fargo stock.

Petitioners' complaint alleges that certain Wells Fargo employees engaged in improper sales practices by opening unauthorized customer accounts to meet sales quotas. Pet. App. 57a; Pet. App. 84a–89a. The Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Los Angeles City Attorney's Office conducted lengthy investigations into these allegations. Pet. App. 106a–110a; Pet. App. 111a–112a. All three completed their investigations on September 8, 2016; that same day, they publicly disclosed the alleged sales practice issues for the first time and announced a brokered settlement with Wells Fargo that included, among

other things, a $185 million fine. Pet. App. 111a–112a. Wells Fargo's stock price allegedly dropped by about $3.60 per share during the subsequent week. Pet. App. 117a; Pet. App. 122a.

Petitioners' first amended complaint alleges that Plan fiduciaries knew about the sales practice issues before they were publicly disclosed in September 2016 and were aware that Wells Fargo's "artificially inflated" stock price would drop as soon as the issues were disclosed. Pet. App. 58a; Pet. App. 92a–106a; Pet. App. 124a. The complaint asserts that Plan fiduciaries breached ERISA's duties of prudence and loyalty by failing to prevent the Plan from continuing to purchase "inflated" Wells Fargo stock prior to the announcement of the completed government investigations. Pet. App. 40a–41a; Pet. App. 146a–151a. Petitioners allege that Plan fiduciaries should have instead: (i) publicly disclosed the sales practice issues; (ii) frozen the Plan's purchases and sales of Wells Fargo stock; (iii) ceased matching employer contributions in company stock; (iv) stopped the sales practice issues; and (v) purchased a hedging product. Pet. App. 43a; Pet. App. 130a–135a.

The district court dismissed petitioners' first amended complaint. Applying *Amgen* and *Dudenhoeffer*, the court held that petitioners had not plausibly alleged an alternative action consistent with the securities laws that a prudent fiduciary could not have viewed as more likely to harm the Plan than to help it. Pet. App. 41a–51a. As the court emphasized, each of petitioners' proposed alternative actions would have required Plan fiduciaries to publicly disclose the sales practice issues before the conclusion of the government investigations. Pet. App. 43a. A prudent

fiduciary could have concluded that Plan participants who were already invested in Wells Fargo stock would be harmed less if the sales practice issues were disclosed after the investigations were completed, because that "would allow the company to make a more complete and accurate disclosure, to pair a disclosure with an announcement of remedial measures, and to disclose through regular corporate channels rather than through 401(k) fiduciaries—all of which would help to mitigate the impact of disclosure on the price of Wells Fargo stock." Pet. App. 50a.

Although the court dismissed the duty-of-prudence claim with prejudice, it granted petitioners leave to replead their claim for breach of the duty of loyalty. Pet. App. 51a–52a. Petitioners filed a second amended complaint, which added allegations that Plan fiduciaries acted disloyally by failing to disclose the sales practice issues to Plan participants and by failing to avoid conflicts of interest. Pet. App. 147a–148a.

The district court dismissed petitioners' second amended complaint as insufficient to state a duty-of-loyalty claim. Pet. App. 17a–35a. It recognized that "just about any prudence claim can easily be recast as a loyalty claim," but it declined to apply *Dudenhoeffer*'s "more harm than good" standard to petitioners' disloyalty claim, which has distinct elements from an imprudence claim. Pet. App. 24a–25a. Rather, the court evaluated the disloyalty claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and held that petitioners had not plausibly alleged any conflicted or self-interested action from which it would

be reasonable to infer a breach of the duty of loyalty. Pet. App. 28a–34a. ERISA's duty of loyalty, the court held, does not impose a duty to disclose material non-public information to plan participants, nor does it prohibit fiduciaries from being adverse to a plan when acting in a non-fiduciary capacity as long as they put the plan's interests first when acting in their fiduciary capacity. Pet. App. 29a–31a.

D. Court of Appeals Decision

The Eighth Circuit unanimously affirmed. Pet. App. 1a–16a. The imprudence claim, it held, did not satisfy the pleading standard of *Dudenhoeffer* and *Amgen* because petitioners had failed to plausibly allege that "a prudent fiduciary … could not have concluded that [their proposed alternative actions] … would do more harm than good." Pet. App. 7a (quoting *Dudenhoeffer*, 573 U.S. at 429–30); Pet. App. 11a–12a. The court of appeals found it "particularly important" that the government investigations were not completed until the very day the alleged sales practice issues were publicly disclosed. Pet. App. 11a. As the court explained, where a government investigation is ongoing, a prudent fiduciary "could readily conclude that it would do more harm than good to disclose [the] sales practices [issues] prior to the [investigation's] completion." *Id.* An unexpected disclosure by Plan fiduciaries outside normal corporate channels in that situation risked "spooking the market" and causing an overblown stock drop that would harm Plan participants already invested in Wells Fargo stock. Pet. App. 12a (quoting *Martone v. Robb*, 902 F.3d 519, 527 (5th Cir. 2018)).

The Eighth Circuit also distinguished the Second Circuit's decision in *Jander*, which sustained an imprudence claim based partly on allegations that the longer an alleged fraud is concealed, the more harm it causes to a company's stock price. Pet. App. 11a (citing *Jander*, 910 F.3d at 630). "[E]ven considering these general economic principles 'as part of the overall picture,'" the court below determined that petitioners failed to plausibly allege alternative actions a prudent fiduciary could not have concluded would do more harm than good given the ongoing government investigations—a factor not present in *Jander*. *Id.* (quoting *Jander*, 910 F.3d at 630). The Eighth Circuit notably did not suggest that petitioners' allegations of "general economic principles" were irrelevant to the inquiry, nor did it disagree with the reasoning the Second Circuit applied to the distinct facts alleged in *Jander*.

Regarding the separate disloyalty claim, the Eighth Circuit held that the disloyalty claim need not satisfy *Dudenhoeffer*'s pleading standard, which applies to only imprudence claims, and it affirmed the dismissal of that claim under *Iqbal* and *Twombly*. The court of appeals rejected petitioners' argument that ERISA's duty of loyalty requires fiduciaries to disclose material non-public information about an employer's stock. Pet. App. 13a. Plan fiduciaries, it noted, are not "investment advisors," and in any event, any rule requiring fiduciaries always to disclose non-public information to participants would "render [*Dudenhoeffer*] worthless" by superseding any inquiry into whether such a disclosure would be prudent. Pet. App. 14a. The court further held petitioners' conflict-of-interest allegations insufficient

to support an inference of disloyalty because ERISA permits fiduciaries to be adverse to a plan when acting in a non-fiduciary capacity. Pet. App. 14a–15a. The court ultimately concluded that petitioners' disloyalty claim was merely a repackaged imprudence claim that did not satisfy *Iqbal* and *Twombly*. Pet. App. 15a.

REASONS FOR DENYING THE PETITION

I. Petitioners' First Question Is Not Presented By This Case.

Petitioners' lead question—"whether, under *Dudenhoeffer*, ESOP fiduciaries are effectively immune from duty-of-prudence liability for the failure to publicly disclose inside information," Pet. ii–iii—is not presented by this case. The Eighth Circuit did not hold that ESOP fiduciaries are "effectively immune" from claims that they breached ERISA's duty of prudence by failing to disclose inside information.

Even petitioners do not argue that the Eighth Circuit *expressly* held that ESOP fiduciaries are immune from such claims. Neither did it do so implicitly. Rather, the Eighth Circuit ruled narrowly, relying on the presence of multiple ongoing government investigations, and distinguishing on case-specific grounds the application of the factors the Second Circuit considered in sustaining the duty-of-prudence claim in *Jander*. *See infra* Part II.A–B. In short, having canvassed other courts' post-*Dudenhoeffer* decisions, the Eighth Circuit ultimately found it unnecessary to go beyond the facts of this case. That leaves open for future plaintiffs in the Eighth Circuit to plead other facts, successfully, under *Dudenhoeffer*.

II. The Question That *Is* Presented Does Not Warrant Review.

A. The Decision Below Is A Factbound Application Of *Dudenhoeffer*.

In *Dudenhoeffer*, this Court held that a claim that a plan fiduciary should have disclosed non-public information must plausibly allege that a prudent fiduciary could not have concluded that disclosure would cause more harm than good to the plan. 573 U.S. at 430. That inquiry, the Court explained, "will necessarily be context specific" because "the content of the duty of prudence turns on 'the circumstances … prevailing' at the time the fiduciary acts." *Id.* at 425 (quoting 29 U.S.C. § 1104(a)(1)(B)). Applying that standard, the Eighth Circuit here focused on one "particularly important" circumstance in this case: Government agencies were still investigating the alleged sales practice issues at Wells Fargo up until the date that those issues (and Wells Fargo's settlement with the investigating authorities) were publicly disclosed. Pet. App. 11a. That context was dispositive of the lower courts' analysis under *Dudenhoeffer* and thus sharply circumscribes its applicability to future cases.

After considering the totality of the complaint's allegations, the court of appeals held that a prudent fiduciary in this context could easily have concluded that disclosing alleged sales practice issues while government investigations were still ongoing would do more harm to the Plan than good. Pet. App. 11a–12a. That narrow ruling depends on the crucial fact that, at the time of the fiduciaries' alleged failure to act on inside information, government investigations

were still pending, and that they were disclosed immediately upon their resolution. It is thus entirely unclear whether the decision below will have any impact on cases that do not involve that specific factual scenario. And even in factually analogous cases, the Eighth Circuit did not foreclose the existence of additional facts that a plaintiff could plead to satisfy *Dudenhoeffer*. The Eighth Circuit held only that the specific facts alleged here did not state a violation of ERISA's duty of prudence. Pet. App. 11a–12a.

Petitioners try to deduce from the Eighth Circuit's decision "a heightened pleading standard" or "presumption of prudence" that they can recast as a legal rule worthy of review. But the Eighth Circuit articulated no such rule. Rather, it rested its decision on this Court's teachings in *Amgen* and *Dudenhoeffer*, as applied to petitioners' particular allegations concerning the existence and timing of the government investigations of Wells Fargo. *See* Pet. App. 6a–12a.

As the court of appeals explained, all of the alternative actions that petitioners alleged Plan fiduciaries could have taken would have resulted in public disclosure of inside information regarding the alleged sales practice issues at a time when government investigations were ongoing and their resolution was uncertain. Pet. App. 8a. Moreover, "the same conclusion" would hold, the court found, even after factoring in the general economic allegations the Second Circuit relied on in *Jander*, because "a prudent fiduciary—even one who knows disclosure is inevitable and that earlier disclosure may ameliorate some harm to the company's stock

price and reputation—could readily conclude that it would do more harm than good to disclose information about Wells Fargo's sales practices prior to the completion of the government's investigation." Pet. App. 11a. That analysis was entirely correct, as we explain in Part II.D below, but even if it were not, this Court does not grant review to "discuss specific facts," *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting denial of certiorari), or to correct "the misapplication of a properly stated rule of law," S. Ct. R. 10.

B. The Decision Below Neither Creates Nor Deepens Any Split On The Application of *Dudenhoeffer*.

Although petitioners spill considerable ink on a putative divide among the courts of appeals over *Dudenhoeffer*'s application, the question actually presented by this case is whether a prudent fiduciary could conclude that public disclosure during an ongoing government investigation would on balance harm plan participants. As to that issue, there is no split. The Eighth Circuit appears to be the only court of appeals that has addressed it. Petitioners identify no other circuit decision on point, and Wells Fargo is aware of none.

Nor does this case implicate the purported split that petitioners proclaim concerning the weight a court should give allegations of general economic principles. Pet. 24–25. Petitioners argue that the Second Circuit, but not the Fifth or Sixth, properly gives weight to general allegations of the professed economic truism that the longer corporate misdeeds are hidden, the worse the eventual fallout will be. Pet.

19–24. But the key factual allegation here—that there were ongoing government investigations during the period when a disclosure allegedly should have been made—was not present in *Jander*. It is that factual distinction, not petitioners' touted general economic principles, that accounts for the different outcomes of the two cases. As the Eighth Circuit explained, "even considering these general economic principles 'as part of the overall picture,' as the Second Circuit did in *Jander*," a prudent fiduciary could have concluded that public disclosure of the sales practice issues before the investigations had concluded would do more harm to the Plan than good. Pet. App. 11a (quoting *Jander*, 910 F.3d at 630). The Second Circuit itself has distinguished *Jander* based on different factual allegations. *Varga v. Gen. Elec. Co.*, 834 F. App'x 686, 688 (2d Cir. 2021).

Petitioners' other putative "circuit splits" fare no better. *First*, petitioners are incorrect in asserting that the Eighth Circuit treated the *Dudenhoeffer* standard "as distinct from" or more "onerous" than the normal Rule 8 plausibility pleading standard. Pet. 24–25. Consistent with this Court's teachings, 573 U.S. at 425, the Eighth Circuit recognized that the *Dudenhoeffer* test is a specific application of the Rule 8 plausibility standard in the ESOP stock-drop context, describing the *Dudenhoeffer* standard as a "rigorous[] appl[ication]" of the plausibility standard discussed in *Iqbal* and *Twombly*. Pet. App. 13a n.5. It therefore applied the exact same legal standard as the Second Circuit in *Jander*. *Compare* Pet. App. 7a *with Jander*, 910 F.3d at 626.

Second, the Eighth Circuit was not "confus[ed]" about the proper formulation of the *Dudenhoeffer* standard. Pet. 29. The petition contends that lower courts are unsure of the proper formulation of *Dudenhoeffer*'s test—whether a prudent fiduciary "would not have" concluded that an alternative action would do more harm than good to the plan or "could not have" concluded the same. *Id.* But *Amgen* resolved any residual ambiguity when it held that the Ninth Circuit had erred by "fail[ing] to assess whether the complaint in its current form 'has plausibly alleged' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" 136 S. Ct. at 760. To be sure, courts have sometimes recited both *Dudenhoeffer*'s "would not have" and "could not have" formulations. Pet. App. 7a–8a. But consistent with *Amgen*, the circuits apply the "could not have" locution. *See Martone*, 902 F.3d at 525; *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 864 (6th Cir. 2017); *Varga*, 834 F. App'x at 688; *Loeza v. John Does 1-10*, 659 F. App'x 44, 46 (2d Cir. 2016). The Eighth Circuit did the same. Pet. App. 7a–8a. And, in any event, petitioners do not suggest that the difference between these two formulations—which they concede is "subtle," Pet. 29—at all affected the outcome of this case.

C. This Case Is A Poor Vehicle To Consider *Dudenhoeffer*'s Application.

Even if the Court wished to resolve the broader issues briefed and argued in *Jander I*, this case would be ill-suited to accomplish that goal because, as in *Jander I*, the court of appeals did not address those issues in the first instance. As this Court explained,

it did not make sense to resolve whether generalized economic allegations regarding the timing of an inevitable disclosure may ever state a duty-of-prudence claim under *Dudenhoeffer*, given that pivotal arguments had not been addressed by the court of appeals. *Jander I*, 140 S. Ct. at 594–95. In particular, in the course of merits briefing and argument in *Jander I*, the petitioner and the government raised two significant arguments that the Second Circuit had not discussed: (1) whether ERISA's duty of prudence imposes a duty to act on inside information; and (2) whether any ERISA disclosure duty must be co-extensive with the obligations imposed by the securities laws. *Id.* at 594. On remand, the Second Circuit declined to address those arguments, and this Court denied further review in *Jander II*.

Those same vehicle problems militate against review here. As in *Jander*, the Eighth Circuit in this case did not decide whether ERISA's duty of prudence ever imposes a duty to disclose inside information. Nor did the Eighth Circuit consider or address the government's position in *Jander I* that any disclosure obligation rooted in ERISA should be limited to what is required by the securities laws. Because the Eighth Circuit did not address these issues, neither should this Court. *Id.* at 595 (citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004); *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005)); *see also NCAA v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). The Court should wait to address those issues with "the benefit of a well-developed record and

a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988).

Moreover, were the Court to hold in a future case that ERISA imposes no duty to disclose inside information (or no duty beyond what is required by the securities laws), the *Dudenhoeffer* pleading standard would become obsolete and any discussion of it in this case would be rendered meaningless. Notably, when opposing the *Jander II* petition, the plaintiffs—represented by one of the lawyers representing petitioners in this case—explained that consideration of how *Dudenhoeffer* applies would be "fundamentally incomplete" without having all of these arguments "considered together" after being vetted by the court of appeals. Br. in Opp. 10–11, *Jander II*, No. 20-289 (U.S. Oct. 5, 2020) (signed by Counsel of Record Samuel E. Bonderoff, who represents petitioners here). That logic equally counsels denial of certiorari here.[1]

Petitioners contend that *Jander* was different because, they claim, a violation of the disclosure requirements of the securities laws has already been established here, such that the government's concern in *Jander I* about imposing an ERISA-based duty beyond those requirements is not implicated. That is both untrue and irrelevant. It is untrue because no court has ever found that Wells Fargo violated the securities laws; the government investigations and

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[1] Petitioners argue that this case is differently situated from *Jander* because there is no issue of forfeiture. Pet. 28. But this Court deferred its decision because the lower court there, as here, did not address key arguments on the merits. The reason why they were not addressed is beside the point.

the class action were each settled. *See* SEC Order 1, 2 n.1, https://perma.cc/CYF3-NZ6E. In any event, it is irrelevant: The Eighth Circuit did not address the petitioner's broader argument in *Jander I* that ERISA's duty of prudence imposes no duty to act on non-public information that plan fiduciaries know by virtue of their non-fiduciary roles as corporate insiders. And in *Dudenhoeffer*, this Court explained that lower courts must consider whether an ERISA-based disclosure duty would conflict with the requirements or purposes of the federal securities laws, and the views of the SEC may well bear on that analysis. 573 U.S. at 429. This Court's consideration of *Dudenhoeffer*'s application would benefit from the lower court's evaluation of the issue and the views of the SEC—neither of which was offered in this case.

D. The Decision Below Was Correct.

Finally, review is unwarranted because the court of appeals' legal analysis and result were plainly correct. The Eighth Circuit adhered to this Court's mandate in *Dudenhoeffer* and *Amgen* to engage in "careful, context-sensitive scrutiny of a complaint's allegations." *Dudenhoeffer*, 573 U.S. at 425; *see Amgen*, 136 S. Ct. at 760. It then focused on the most salient allegations in this case—concerning the ongoing government investigations—and it found that a prudent fiduciary "could readily conclude that it would do more harm than good to disclose information about Wells Fargo's sales practices prior to the completion of the government's investigation." Pet. App. 11a.

That reasoning makes eminent sense: 34% of the Plan's assets were already invested in Wells Fargo

stock. Pet. App. 75a. Had Plan fiduciaries disclosed the sales practice issues outside normal corporate channels before all relevant information had been gathered and remedial measures instituted, it would have signaled to the market that the issues were worse than they were. It also would have left open to conjecture whether the government investigations would uncover further problems, whether the government agencies would litigate against or enter into a consent order with the bank, how severe any sanctions the government might impose would be, and whether the bank would remain solvent or even continue operations thereafter. Premature disclosure could have caused long-term, disproportionate harm to the company and to Plan participants already invested in company stock. All of that supports the Eighth Circuit's holding that, in this context, petitioners failed to allege a plausible alternative action that a prudent fiduciary could not have concluded would do more harm than good. Pet. App. 11a–12a.

Petitioners offer no persuasive rebuttal to this fact-specific rationale for the Eighth Circuit's decision. Instead, they broadly assert that the court of appeals effectively barred recovery for Plan participants while other non-ESOP investors are made whole through securities lawsuits. Pet. 32–33. That is untrue. Here, as is often the case, the Plan itself is a member of the plaintiff class in the related securities class action. It will therefore participate in the settlement based on its total investment in Wells Fargo stock. *See Hefler v. Wells Fargo & Co.*, No. 16-cv-5479, Dkt. No. 225-1, Ex. A-1 at 14 (question 49) (N.D. Cal. Jul. 31, 2018). And the Plan's recovery will

be allocated to the accounts of the affected Plan participants.

Finally, petitioners at times suggest that, because the Eighth Circuit did not volunteer other circumstances under which plaintiffs could plausibly allege imprudence, the court supposedly held that no such circumstances exist. *See, e.g.*, Pet. 25, 31. But, as discussed, the Eighth Circuit did not hold that fiduciaries effectively cannot be liable for breach of the duty of prudence when failing to act on inside information. *See supra* Part I. It held merely that, on the facts alleged here, a prudent fiduciary could have concluded that disclosing the sales practice issues during ongoing government investigations would harm, not help, Plan participants. None of that prevents other plaintiffs, on different facts, from stating a claim under *Amgen* and *Dudenhoeffer*.

III. Petitioners' Second Question Does Not Merit Review.

The Court should likewise decline to review petitioners' second question, which asks whether they plausibly stated a duty-of-loyalty claim by repackaging their insufficient allegations regarding the duty of prudence. The courts that have addressed this question in other contexts have agreed on the general principle the Eighth Circuit applied here: Litigants must do more than recast allegedly imprudent acts as breaches of the duty of loyalty, because disloyalty claims require plausible allegations that the fiduciary was motivated by self-interest or the interests of a third party. *See, e.g.*, *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 718 F.

App'x 3, 7 (2d Cir. 2017); *Sacerdote v. New York Univ.*, No. 16-cv-6284, 2017 WL 3701482, at *5 (S.D.N.Y. Aug. 25, 2017); *White v. Chevron Corp.*, No. 16-cv-793, 2017 WL 2352137, at *7 (N.D. Cal. May 31, 2017), *aff'd*, 752 F. App'x 453 (9th Cir. 2018). The Eighth Circuit's application of that general principle makes particularly good sense in the ESOP context, where *Dudenhoeffer* sets out a detailed framework for addressing duty-of-prudence claims. If petitioners could avoid that framework by simply relabeling alleged imprudence as disloyalty, *Dudenhoeffer* would be meaningless. *See* Pet. App. 15a–16a.

To divert attention from their request for this Court to review a factbound dispute in an area of law devoid of circuit conflict, petitioners reframe the question as implicating *Dudenhoeffer*. They ask "whether *Dudenhoeffer*'s framework extends beyond prudence-based claims and applies to duty-of-loyalty claims against ESOP fiduciaries" as well. Pet. iii. But that issue does not warrant this Court's attention either, not least because the Eighth Circuit decided it in the way petitioners themselves advocate.

Contrary to petitioners' assertion, the Eighth Circuit did not apply to their disloyalty claim a "pleading standard functionally equivalent to the standard it purported to derive from *Dudenhoeffer*." Pet. 33. The court of appeals acknowledged that "the *Dudenhoeffer* standard is limited to imprudence claims" and that "*Twombly* and *Iqbal* provide the proper pleading standard for disloyalty claims." Pet. App. 12a & n.5. It then applied the *Iqbal* and *Twombly* plausibility standard to the facts alleged, Pet. App. 12a–16a, and relied on cases decided under that standard to conclude that dismissal was

appropriate, *id.* (citing, for example, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009)). The court of appeals accordingly applied the very standard petitioners urge.

Ignoring the court's actual analysis, petitioners rest the weight of their petition on a footnote acknowledging that some concerns "the Supreme Court cited in relation to imprudence claims apply with equal force to disloyalty claims." Pet. App. 12a n.5. But that observation is immaterial to the petition: The Eighth Circuit did not apply *Dudenhoeffer* to petitioners' duty-of-loyalty claim. Instead, it properly grounded its analysis solely in duty-of-loyalty precedent.

There is no reason for this Court to wade into these waters because courts uniformly take the same approach the Eighth Circuit did. Petitioners fail to identify a single case holding that *Dudenhoeffer* extends to duty-of-loyalty claims. Rather, their case citations (Pet. 34) confirm that petitioners manufactured this issue out of whole cloth. The district court in *In re Pilgrim's Pride Stock Investment Plan ERISA Litigation* dismissed duty-of-loyalty claims under *Iqbal* and *Twombly*'s pleading standard after expressly noting that *Dudenhoeffer* was limited to duty-of-prudence claims. 2016 WL 8814356, at *4–5 (E.D. Tex. Aug. 19, 2016). Petitioners' other case—*Usenko v. MEMC LLC*—did not examine a duty-of-loyalty claim at all. 926 F.3d 468, 473 (8th Cir. 2019). Accordingly, petitioners have shown neither a division of authority nor an error in the Eighth Circuit's analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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