No. 18-1165

In The
Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, et al.,

Petitioners,

v.

LARRY W. JANDER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF

SAMUEL E. BONDEROFF
Counsel of Record
JACOB H. ZAMANSKY
JAMES OSTASZEWSKI
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, NY 10004
(212) 742-1414
samuel@zamansky.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), this Court held that, per the plain language of the Employee Retirement Income Security Act of 1974 ("ERISA"), fiduciaries of an employee stock option plan ("ESOP") "are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets." *Id.* at 412 (citing 29 U.S.C. § 1104(a)(2)). ESOP fiduciaries merit no greater protection from liability than any other ERISA fiduciary. Congress did not intend to make it "impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances" or some other highly unusual fact pattern is alleged. *Id.* at 425. Courts should use the existing framework of motions to dismiss to "divide the plausible sheep from the meritless goats." *Id.* To guide courts in applying that framework, the Court articulated a pleading standard—the "more harm than good" standard—to balance the need to protect ESOPs from the costly meritless goats while ensuring that the plausible sheep could still plead a viable claim from time to time. *Id.* at 429-30. A key focus of the "more harm than good" test are claims that an ESOP's stock was artificially inflated in value, making it an imprudent retirement investment, and the ESOP's fiduciaries, based on their knowledge of inside information about the source of the artificial inflation, should have made public disclosure of that information in a minimally disruptive manner consistent with the federal securities laws. *Ibid.*

Respondents, participants in the ESOP of International Business Machine Corporation ("IBM"), brought such a claim on behalf of a putative class of ESOP participants, alleging that IBM's stock was overvalued for nine months in 2014 because IBM misrepresented the value of its Microelectronics business segment to the public while making aggressive efforts to sell the unit. They alleged that Petitioners, senior corporate officers of IBM who were also the ESOP's fiduciaries, knew that IBM's stock was trading at inflated values and should have used IBM's regular securities-law filings to disclose the true value of Microelectronics. Respondents also alleged that, if Petitioners had done so, thus limiting the period of artificial inflation instead of passively prolonging it, IBM ESOP participants would have been spared significant harm; in particular, the ESOP's participants would have seen IBM's stock endure a milder price correction and a brisker price recovery. The impending sale of Microelectronics, including the solicitation of, and negotiations with, multiple potential buyers made the revelation of Microelectronics's true value inevitable. No prudent fiduciary, Respondents alleged, could know these facts and believe that earlier disclosure of the truth would do "more harm than good" to IBM ESOP participants.

While the district court dismissed Respondents' complaint, the Second Circuit reversed, making a careful, considered assessment of the specific factual context in Respondents' allegations, along with Respondents' more general allegations about the increased risk of potential harm to ESOP participants, to conclude that, under *Dudenhoeffer*, Respondents had alleged a plausible breach of the duty of prudence.

Petitioners, in seeking certiorari, asked this Court to review the Second Circuit's application of *Dudenhoeffer*'s pleading standard. Having obtained a grant of review on this discrete question, however, Petitioners devote a substantial portion of their brief to an argument never pressed below and not encompassed by the Question Presented. Specifically, Petitioners argue that they cannot be liable as fiduciaries for failing to act on inside information where, as here, they learned that information in their capacity as corporate officers. Not only is this argument procedurally improper, it is without basis in ERISA or this Court's jurisprudence. *Dudenhoeffer*'s articulation of the "more harm than good" standard was premised on the idea that an ESOP fiduciary *could* be liable for failing to act on inside information. Petitioners' proposed rule casually jettisons that holding—and confers on ESOP fiduciaries virtual immunity from prudence claims to boot.

When Petitioners finally reach the Question Presented (at page 45 of their brief), they argue that the Second Circuit's decision should be reversed because, notwithstanding *Dudenhoeffer*'s holding that ESOP fiduciaries owe the same duty as any other ERISA fiduciary, ESOP fiduciaries actually do deserve special protection, and claims against them can only be plausibly pleaded if an ESOP has no stock in it or if the employer is on the brink of insolvency. This is precisely the kind of "extraordinary circumstances" pleading the Court rejected in *Dudenhoeffer* for having no basis in

ERISA. Petitioners also repeatedly mischaracterize Respondents' allegations as "generalized," ignoring the many factually unique allegations undergirding the complaint and relied on by the Second Circuit in its determination that disclosure of Microelectronics's true value was "inevitable."

Petitioners' twin attempts to grant ESOP fiduciaries near-total immunity from liability fly in the face of *Dudenhoeffer* and ERISA's plain language; they should not be countenanced by this Court.

In its *amicus curiae* brief, the Government takes a less tendentious approach, appearing to agree that not every duty-of-prudence claim against an ESOP fiduciary is a goat. But the Government deems the Court's "more harm than good" standard unworkable—too "ad hoc" and "indeterminate"—and instead argues for ignoring ERISA's duty of prudence, or at least letting it be subsumed by the federal securities laws' disclosure obligations. Congress chose, however, to have ESOPs be subject to the securities laws *and* ERISA. This Court should not force these overlapping but complementary statutory schemes into a single silo; the duty of prudence is separate from the securities laws' disclosure obligations, and it is a stricter duty, born of the law of trusts, than the duty not to commit fraud that a corporation owes to its shareholders. In its less partisan way, the Government is still asking for special treatment for ESOP fiduciaries, which is contrary to the principal holding of *Dudenhoeffer*. The Government's proposal may be more reasonable than either of

Petitioners', but it is still contrary to the intent of Congress expressed in the plain language of ERISA.

The duty of prudence for ESOP fiduciaries is not without its complexities, but those complexities do not mean that this Court should rewrite a federal statute. The decision below should be affirmed.

STATEMENT

Petitioners served as ERISA fiduciaries of the IBM 401(k) Plus Plan, including its ESOP, which was invested primarily in IBM's publicly-traded stock. From January 21, 2014 through October 20, 2014, IBM's stock traded at an artificially high level because IBM concealed from the public the true value of its struggling Microelectronics business. Thus, during that time, the IBM ESOP became an imprudent retirement investment. Respondents, participants in the Plan who bought and held shares of the ESOP, brought claims under ERISA alleging that Petitioners breached their fiduciary duty of prudence by failing to effectuate corrective disclosure to end the artificial inflation of IBM's stock.

A. Factual Background

1. Section 1104(a)(1)(B) of ERISA required that Petitioners, as fiduciaries of IBM's ESOP, oversee the ESOP "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]" This Court confirmed in *Dudenhoeffer* that ESOP fiduciaries must abide by the same duty of prudence as other ERISA fiduciaries; *Dudenhoeffer* also delineated a means under ERISA for assessing the merits of duty-of-prudence claims against ESOPs at the pleading stage. *Dudenhoeffer*, 573 U.S. at 419, 428-30.

2. Petitioner Retirement Plans Committee of IBM was a fiduciary for the Plan with discretionary authority and control over the management of the Plan's assets, including those in the ESOP. Petitioners Martin Schroeter and Robert Weber were members of the Committee and also the Chief Financial Officer and General Counsel, respectively, of IBM. Petitioner Richard Carroll was IBM's Chief Accounting Officer and the Plan Administrator. J.A. 109-10.

3. IBM is a global information technology company. Its Microelectronics business operated within its Systems and Technology Segment. In 2013 and 2014, Microelectronics incurred annual losses of nearly $1 billion, its long-lived assets had suffered significant deterioration, but IBM nevertheless assigned a carrying value to Microelectronics of approximately $2.4 billion. Under Generally Accepted Accounting Principles ("GAAP"), IBM should have done impairment testing and recognized an impairment loss to Microelectronics once it saw that the carrying cost of Microelectronics would not be recoverable and exceeded its fair value, but it did not do so. Instead, IBM began to search for a

buyer for Microelectronics, seeking more than $2 billion for the business. No buyer was interested at that price, although Goldman Sachs was hired to find buyers, and companies such as GlobalFoundries, Intel and Taiwan Semiconductor Manufacturing Company all considered a purchase. Eventually, GlobalFoundries agreed to acquire Microelectronics, but IBM had to pay GlobalFoundries $1.5 billion to accept the business. J.A. 113-28.

4. Because IBM did not disclose the impairment of Microelectronics between January 21 and October 20, 2014 (when the GlobalFoundries acquisition was announced), IBM's stock traded at an artificially high price during that time. In announcing the GlobalFoundries acquisition, Petitioner Schroeter acknowledged that IBM would be taking a one-time after-tax charge of $3.3 billion in connection with the transaction. IBM subsequently admitted in its Form 10-Q for the third quarter of 2014 that a pre-tax charge of $4.7 billion would be taken, $2.4 billion of which was attributable to impairment to the long-lived assets of the Microelectronics business. Microelectronics, previously valued at $2.4 billion by IBM, was now deemed worthless. In response to this news, IBM's stock price declined more than $12 per share in one day of heavy trading. Meanwhile, during the period of artificial inflation, Plan participants purchased over $100 million of ESOP shares at artificially high prices. Moreover, IBM's stock failed to recover from these losses, still trading below its post-decline price more than two years later. J.A. 128-33.

5. Petitioners knew or should have known that Microelectronics was overvalued and that IBM's failure to disclose this information to the public had inflated IBM's stock price. As the Chief Financial Officer, Chief Accounting Officer and General Counsel of IBM, Petitioners were closely involved in the efforts to sell Microelectronics and to ensure that IBM's disclosures regarding Microelectronics complied with GAAP. Petitioners were also directly involved in the preparation of those disclosures and thus were well-situated to try to effectuate corrective disclosure, as part of IBM's regular reporting under the securities laws, to return IBM's stock price to its real value and restore the ESOP to prudence. J.A. 134-37.

6. Particularly in light of the pending sale of Microelectronics, disclosure of the business's real, impaired value was inevitable. Petitioners could have chosen to make an earlier disclosure, ensuring that fewer Plan participants would purchase artificially inflated ESOP shares and decreasing the risk of reputational damage to IBM and thereby the risk of a slow and painful stock-price correction and recovery. Petitioners did not take that action. Under these specific circumstances, no prudent fiduciary could have concluded that earlier action would do more harm than good to participants in the IBM ESOP. J.A. 137-45.

B. Procedural Background

1. Respondents brought a claim against Petitioners in the United States District Court for the

Southern District of New York for breach of the fiduciary duty of prudence under ERISA. Respondents' first complaint was dismissed by the District Court without prejudice for failing to satisfy the pleading standard articulated in *Dudenhoeffer*. Respondents pleaded an amended complaint that was also dismissed by the District Court on similar grounds, this time with prejudice. Pet. App. 37a.

2. Respondents appealed to the Second Circuit Court of Appeals, which reversed and remanded, finding that Respondents' allegations were sufficient to satisfy *Dudenhoeffer*'s pleading standard. Pet. App. 21a. Petitioners sought a panel rehearing, or, in the alternative, rehearing *en banc*. Their request was denied with no judge dissenting. Pet. App. 46a.

SUMMARY OF ARGUMENT

This Court recognized in *Dudenhoeffer* that ESOP fiduciaries are required to meet the same standard of prudence as any other ERISA fiduciary. The only exception that Congress carved out for ESOP fiduciaries was an exemption from the requirement of diversification. Otherwise, ESOP fiduciaries' duty of prudence is not meaningfully different from those of other fiduciaries; there are no special requirements to plead claims against ESOP fiduciaries.

Because the content of ESOPs is also regulated by the securities laws, ESOP fiduciaries' duty of prudence must be understood in a way that does not conflict with those laws. An ESOP fiduciary cannot be forced to engage in insider trading or to make special disclosures just to ESOP participants to comply with his duty of prudence.

With these limitations in mind, the Court set forth in *Dudenhoeffer* a method for courts to test the sufficiency of prudence claims against ESOP fiduciaries that would balance the interest of protecting fiduciaries from meritless lawsuits and ensuring that those fiduciaries lived up to the high standard they owed as trustees of employees' retirement savings. Evaluation of ESOP prudence claims would necessarily be context-specific. ESOP fiduciaries' actions should not be judged from the vantage of hindsight. Yet, courts would also need to remember plaintiffs' limited access to information concerning fiduciary activity, and that these assessments were taking place at the motion-to-dismiss stage without the benefit of fact or expert discovery.

Mindful of these competing concerns, the Second Circuit in its decision below provided a thoughtful analysis of the plausibility of Respondents' allegations under the framework prescribed in *Dudenhoeffer*. The appellate court emphasized the unique facts here that led it to hold that Respondents had stated a plausible claim for relief. Fundamentally, the Second Circuit's opinion was a conservative one, heavily tied to its facts; despite what Petitioners claim, it is not a blueprint for other plaintiffs to bring meritless lawsuits that will drive ESOPs to extinction.

When one digs into the reasons Petitioners offer for faulting the Second Circuit's opinion and the approaches to duty-of-prudence claims that they propose that this Court adopt, Petitioners' evident disdain for a jurisprudential framework that denies ESOP fiduciaries special dispensation becomes manifest. By first proposing heretofore unheard-of restrictions on ESOP fiduciaries' potential liability that would eliminate inside-information claims from existence, Petitioners make their second proposal, which would limit viable prudence claims to situations where an ESOP is empty or an employer is insolvent, seem almost reasonable by comparison. Petitioners ignore Respondents' specific factual allegations and the Second Circuit's reliance on them in reaching its decision to make it appear as if this case was decided purely on generalized, decontextualized allegations that dissipate upon contact. With both of Petitioners' proposed frameworks, however, the result is ultimately the same: ESOP fiduciaries would no longer be subject to the same duty of prudence as other fiduciaries—and perhaps, for all practical purposes, would not be subject to any duty of prudence at all.

The Government's proposal in its *amicus* brief would do less violence to duty-of-prudence claims than Petitioners', but it is no less radical, seeking the reversal of *Dudenhoeffer* and writing the duty of prudence's applicability to ESOP fiduciaries right out of the statute to replace it with the obligations of the federal securities laws that were already in place.

The Court should resist Petitioners' and the Government's proposals, which cannot "be squared with the statute's text[,]" so that this Court avoids the trap of "stepping outside our role as judges and writing a new law rather than applying the one Congress adopted." *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). The Second Circuit's careful application of *Dudenhoeffer* to Respondents' allegations deserves affirmance.

ARGUMENT

I. *Dudenhoeffer* Confirmed That Congress Intended To Subject ESOP Fiduciaries To The Same Duty Of Prudence As All Other ERISA Fiduciaries

1. In *Dudenhoeffer*, this Court considered whether, when a claim for breach of the fiduciary duty of prudence is brought against an ESOP fiduciary, a plaintiff must "make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse." *Dudenhoeffer*, 573 U.S. at 412. This Court held that "no such presumption [in favor of ESOP fiduciaries] applies." *Id.* Instead, the Court confirmed that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets." *Id.*

In reaching this conclusion, this Court rejected 19 years of misguided jurisprudence in the lower courts.

The "presumption of prudence" in favor of ESOP fiduciaries was first articulated by the Third Circuit Court of Appeals in 1995; six other circuits, along with a plethora of district courts, adopted some version of it thereafter. *See Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995).[1] For a variety of policy reasons, courts determined that ESOP fiduciaries needed additional protection from duty-of-prudence claims; as was argued to this Court, "without some sort of special presumption, the threat of costly duty-of-prudence lawsuits will deter companies from offering ESOPs to their employees, contrary to the stated intent of Congress." *Dudenhoeffer*, 572 U.S. at 423. The *Moench* presumption was further justified as a necessary prophylactic in light of "the potential for conflict with the securities laws" that ESOPs, subject to the overlapping federal securities laws and ERISA statute, engender. *Id.* Unsurprisingly, these same concerns are now propounded by Petitioners and their *amici* in support of dueling proposals for a new duty-of-prudence framework that would restore a pre-*Dudenhoeffer* world in which duty-of-prudence claims against ESOP fiduciaries are virtually impossible to plead.

The Court was sympathetic to these concerns; it observed that Congress had sought to promote ESOPs

[1] *See also Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Quan v. Comput. Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Gray v. Citigroup Inc. (In re Citigroup ERISA Litig.)*, 662 F.3d 128, 137 (2d Cir. 2011); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1280 (11th Cir. 2012); *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 990 (7th Cir. 2013).

through multiple legislative efforts. *Dudenhoeffer*, 573 U.S. at 422. It further characterized the "concern" about potential conflict between ERISA and the securities laws regarding ESOPs as "a legitimate one" and discussed the importance of identifying a "mechanism for weeding out meritless claims[.]" *Id.* at 423-25.

And yet: notwithstanding all of these ostensibly compelling rationales for judicially-created scaffolding to favor ESOP fiduciary defendants at the pleading stage, this Court invalidated the *Moench* presumption because it had no basis in the ERISA statute. ERISA "makes no reference to a special 'presumption' in favor of ESOP fiduciaries. It does not require plaintiffs to allege that the employer was on the 'brink of collapse,' under 'extraordinary circumstances,' or the like." *Dudenhoeffer*, 573 U.S. at 419. What had no basis in the statute could not be created by the courts no matter how sympathetic they might be to the fiduciaries' position. Congress wanted to encourage ESOPs, but it also wanted to make sure that the fiduciaries of those ESOPs maintained the high standard of care that they had inherited from the common law of trusts.

Congress could have, in passing and later amending ERISA, adopted specific language to make clear that ESOP fiduciaries are owed special deference—that the occasion on which an ESOP fiduciary can plausibly be alleged to have breached his duty will be, in Petitioners' term, a *rara avis*. But Congress only chose to exempt ESOP fiduciaries from the requirement of diversification; in all other respects, an ESOP fiduciary's duty of prudence is the same as that of any other ERISA fiduciary, and it should be treated the same by the courts unless and until Congress changes it.

2. Because ERISA's plain language does not provide special protections for ESOP fiduciaries at the pleading stage, but simply requires them to meet the same standard of prudence as any other ERISA fiduciary, the appropriate means of "weeding out meritless claims" and ensuring that vexatious lawsuits do not lead employers to discontinue offering ESOPs is to deal with them as any other duty-of-prudence claim would be dealt with—by engaging in "careful, context-sensitive scrutiny of a complaint's allegations" at the motion-to-dismiss stage, guided by the plausibility framework of *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-63 (2007). *Dudenhoeffer*, 573 U.S. at 425.

The plaintiffs in *Dudenhoeffer* had asserted two theories of liability: that their ESOP's fiduciaries should have taken action based on the public stock price of their employer, which they alleged was declining precipitously; or, that they should have taken action "on the basis of *nonpublic* information that was available because they were Fifth Third insiders." *Dudenhoeffer*, 573 U.S. at 426, 428 (emphasis in original). Before articulating more specifically the standard that a duty-of-prudence plaintiff must satisfy within the *Iqbal/Twombly* framework, this Court held that prudence claims against ESOP fiduciaries based solely on public information were "implausible as a general rule, at least in the absence of special circumstances."

Id. at 426.[2] That left only claims based on inside information—that fiduciaries knew ESOP stock was materially overvalued—to comprise the "plausible sheep" that the Court held needed to be separated from "the meritless goats." *Id.* at 425. For those nonpublic information claims, the Court directed that the lower courts use the following guidance to determine whether a plausible claim was stated under *Iqbal* and *Twombly*:

> 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. Within this rubric, the Court delineated "three points [to] inform the requisite analysis." *Id.*

First, a plaintiff's proposed alternative action could not impel a fiduciary to violate the law—specifically, the securities laws' prohibition on insider trading. Thus, a fiduciary is not obliged to sell materially overvalued stock on behalf of the ESOP, or to stop

---

[2] The Court did "not consider whether a plaintiff could nonetheless allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information . . . that would make reliance on the market's valuation imprudent.' " *Dudenhoeffer*, 573 U.S. at 427 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 273 (2014)).

making purchases without stopping sales, because doing so would be illegal insider trading. *Id.* Second, where an ESOP fiduciary is alleged to have breached her duty of prudence "for failing to decide, on the basis of inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued," courts should consider whether either of those alternative actions "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.*

Notably, in support of these first two considerations, the Court cited provisions of ERISA stating that nothing in ERISA's delineation of fiduciary duties "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law[.]" *Dudenhoeffer*, 573 U.S. at 429 (quoting 29 U.S.C. § 1144(d) (additional citations omitted)). This makes sense, of course—it would be a strange outcome indeed if ERISA's duty of prudence required fiduciaries to break or otherwise contravene the securities laws. But presumably this has always been true; after all, ERISA's limitation that its provisions should not be construed to invalidate or supersede any other law or regulation has been there since the statute's inception. ESOP fiduciaries are not any more obliged to violate the law than would be any other ERISA fiduciary. The *Dudenhoeffer* plaintiffs had alleged that the defendant fiduciaries should have sold Fifth Third's overvalued stock; the Court simply confirmed that such an action is never appropriate. *Id.* at 428-29. Similarly, if refraining from making additional stock purchases or making a public disclosure were done in a way inconsistent with the securities laws, it could not support a plausible prudence claim. So, for example, a plaintiff alleging that an ESOP fiduciary should have made a corrective disclosure just to employees has not stated a plausible claim, because such a limited disclosure would violate Regulation FD of the Exchange Act. *See* 17 CFR 243.100, 101.

These first two considerations confirm a basic tenet of ERISA—that it does not require fiduciaries to violate or act inconsistently with other laws. But they do not, in and of themselves, say anything about what factual allegations might give rise to a plausible duty-of-prudence claim.[3] A plaintiff must plead an alternative action that an ESOP fiduciary should have taken that would not violate or impair another law, particularly the securities laws; that requirement constitutes a floor, but not a ceiling, of ERISA duty-of-prudence pleading.[4] Put another way, this principle would still apply even if the Court had upheld the *Moench*

[3] This is not to downplay the import of these considerations; considering the Sixth Circuit's decision in *Dudenhoeffer*, this critical principle plainly needed confirming.

[4] Indeed, remove this analysis from the ESOP context, and it would not change a bit; it would be just as unfair to require an ERISA fiduciary overseeing, say, a mutual fund complex to take an action or make a disclosure that is inconsistent with the securities laws—or with any other laws, for that matter.

presumption; it is never okay to force an ERISA fiduciary to act inconsistently with non-ERISA law.

3. In setting forth its third point to "inform the requisite analysis," then, the Court weighed in on what standard factual allegations against an ESOP fiduciary have to satisfy under *Iqbal* and *Twombly*:

> [L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

Dudenhoeffer, 573 U.S. at 429-30. This is the "more harm than good" standard that seems to have caused a fair amount of consternation and confusion among the parties to this case. Nevertheless, it should not be a source of confusion, because the Court's language follows directly from the holding that makes up the gravamen of *Dudenhoeffer*—namely, that ESOP fiduciaries are subject to the same duty of prudence as any other ERISA fiduciary because that is what Congress mandated in ERISA; therefore, claims against ESOP fiduciaries should be evaluated for their plausibility within the same *Iqbal/Twombly* framework as claims would be against any other ERISA fiduciary. All ERISA fiduciaries are required to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing *benefits* to participants and their beneficiaries . . . " 29 U.S.C. § 1104(a)(1) (emphasis added). Implicit in that charge of providing benefits is the avoidance of harm; any ERISA fiduciary's actions must be evaluated in terms of her efforts to provide benefits, and, thus, avoid harm, based on what she knew at the time.[5] Accordingly, courts should not carve out special protections for ESOP fiduciaries, because ERISA does not provide for them. It should not be "impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances." *Id.* at 425.

Applying the "more harm than good" standard should be accomplished against this backdrop. As the Court stated in *Dudenhoeffer*, this plausibility evaluation on a motion under Federal Rule 12(b)(6) should enable courts to "readily divide the plausible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. at 425. This point bears emphasizing: there are supposed to be "plausible sheep" among the cases filed. The "more harm than good" standard ought not, properly applied, to reduce *every* duty-of-prudence claim filed to "meritless goat" status absent extremely unusual

[5] "Read in the context of ERISA as a whole, the term 'benefits' . . . must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries." *Dudenhoeffer*, 573 U.S. at 421 (citation omitted) (emphasis in original).

circumstances. If the outcome of *Dudenhoeffer* is that only one duty-of-prudence claim in a thousand can be successfully pleaded against ESOP fiduciaries, then this Court's holding that ESOP fiduciaries deserve no special deference, and Congress's determination that ESOP fiduciaries owe duties equal to those of other ERISA fiduciaries, is nullified. This is just a pleading standard, after all—"a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

4. The Court confirmed this understanding in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016) (per curiam). In that case, the Ninth Circuit Court of Appeals considered its pre-*Dudenhoeffer* opinion regarding the plausibility of a duty-of-prudence claim in light of *Dudenhoeffer* and held that the plaintiffs in that case had plausibly alleged an alternative action—removing the ESOP from the list of plan investment options—that would not "'cause undue harm to plan participants.'" *Amgen*, 136 S. Ct. at 760 (quoting *Harris v. Amgen Inc.*, 788 F.3d 916, 937-38 (9th Cir. 2015) (internal brackets omitted)).

This Court found, however, that the Ninth Circuit had failed to determine whether a prudent fiduciary "'could not have concluded' that the alternative action 'would do more harm than good.'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 573 U.S. at 429-30). The basis for that determination has to come from the complaint itself, and the *Amgen* plaintiffs' complaint—

drafted many years before "more harm than good" was announced—did not contain the necessary factual allegations to support that determination. *Id.*

Nevertheless, the Court did not say that such a complaint was virtually impossible to conceive of or that trying to craft such a complaint was a fool's errand because a plausible duty-of-prudence claim against an ESOP fiduciary is a *rara avis*: "The Ninth Circuit's proposition that removing the Amgen Common Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied *Fifth Third*'s standards *may be true*." *Amgen*, 136 S. Ct. at 760 (emphasis added). The Court, "[h]aving examined the complaint," found that it did not contain "sufficient facts and allegations" to put flesh on the bones of the Ninth Circuit's "proposition." *Id.* That the *Amgen* plaintiffs' complaint did not contain those supporting factual allegations is hardly surprising; the proposed alternative action of removing the ESOP from the list of investment options is mentioned in cursory fashion in a single paragraph repeated twice in the nearly-400-paragraph complaint. *See* Pet. App. 13a-14a n.2. But the Court did not say that this deficiency was impossible to correct; the case was remanded and it was left "to the District Court in the first instance whether the stockholders may amend [their complaint] in order to adequately plead a claim for breach of the duty of prudence guided by the standards provided in *Fifth Third*" because, after all, the plaintiffs were "the masters of their complaint." *Amgen*, 136 S. Ct. at 760.

Thus, with *Dudenhoeffer* and *Amgen*, this Court reified several principles based on its reading of the plain language of ERISA:

(1) Duty-of-prudence claims alleging that ESOP fiduciaries had inside information showing that ESOP stock was materially overvalued *are* possible.

(2) Not only are such claims possible, but they should not necessarily be more difficult to plead than duty-of-prudence claims against any other ERISA fiduciaries because, save for the former's exemption from the diversification requirement, the duties owed by the two types of fiduciaries *are the same*.

(3) The "more harm than good" test, which asks what a hypothetical *prudent* fiduciary could do under similar circumstances, puts the ERISA duty of prudence within the *Iqbal*/*Twombly* plausibility framework.

(4) The facts supporting a plausible claim have to be pleaded; courts cannot do the work of plaintiffs for them.

(5) An ESOP fiduciary's obligations under ERISA, just like those of any other fiduciary under ERISA, must not contravene the securities laws (or any other laws or regulations).

That these principles arise from the language of ERISA itself—which is the best reflection of Congress's intent in delineating the scope of potential liability for ESOP fiduciaries—shows why the Second Circuit's decision in this case is not some outlier or example of judicial misapprehension, but demonstrates a careful and faithful adherence to this Court's jurisprudence and to ERISA. It also shows why the two rather contradictory proposals promulgated by Petitioners, as well as the novel approach that the Government recommends in its *amicus* brief, ultimately would invalidate this Court's holdings in *Dudenhoeffer* and *Amgen*, and, more fundamentally, the obligations enshrined in ERISA itself.

II. The Second Circuit Narrowly Applied *Dudenhoeffer*'s Pleading Standard

The appellate court, in assessing the plausibility of Respondents' factual allegations, followed this Court's directive in *Dudenhoeffer* with admirable fidelity. Unlike the Ninth Circuit in *Amgen*, the Second Circuit did not alter the language of the "more harm than good" pleading standard in evaluating Respondents' claims. Even though the parties had asked the appellate court to weigh in on whether *Dudenhoeffer* had set forth a more or less demanding pleading standard than had existed during the *Moench* era, the Second Circuit resisted these entreaties and applied what it called "the more restrictive" understanding of the standard previously adopted by the Fifth and Sixth Circuits in *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016), and *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 865 (6th Cir. 2017), respectively. Pet. App. 13a-14a.

After examining Respondents' factual allegations as a whole and drawing all reasonable inferences in Respondents' favor, the Second Circuit determined that Respondents' allegations "plausibly establish that a prudent fiduciary in the Plan defendants' position could not have concluded that corrective disclosure would do more harm than good." Pet. App. 15a.

1. The appellate court reached its conclusion relying on five factors in Respondents' allegations. First, it concurred with the district court, which had held that Respondents "plausibly alleged a GAAP violation" by IBM regarding the value of its Microelectronics business, which caused IBM's stock price to trade at an artificially inflated level, and Respondents had plausibly alleged Petitioners' knowledge of that inflation by virtue of their senior positions in the company and significant involvement in IBM's efforts to secure a buyer for Microelectronics. Pet. App. 15a. Petitioners do not contest this finding.

Second, the appellate court found that Respondents had plausibly alleged that corrective disclosure regarding the true value of Microelectronics "could have been included within IBM's quarterly SEC filings and disclosed to the ESOP's beneficiaries at the same time in the Plan defendants' fiduciary capacity." Pet. App. 16a. Because Petitioners included both the Chief Financial Officer and the General Counsel of IBM, Respondents had alleged that they " 'were uniquely situated to [effectuate corrective disclosure] inasmuch as they had primary responsibility for the public disclosures' " that IBM was required to make under the securities laws. Pet. App. 16a (quoting J.A. 144). A disclosure accomplished through the mechanism of the securities laws would, Respondents had alleged, be the least disruptive way to correct the artificial inflation of IBM's stock price. As the district court had suggested, "'an unusual disclosure outside the securities laws' normal reporting regime could spook the market, causing a more significant drop in price than if the disclosure were made through the customary procedures.'" Pet. App. 16a (quoting Pet. App. 37a).

Third, the court relied on Respondents' allegations "that the defendants' failure promptly to disclose the value of IBM's microelectronics division 'hurt management's credibility and the long-term prospects of IBM as an investment' because the eventual disclosure of a prolonged fraud causes 'reputational damage' that 'increases the longer the fraud goes on.'" Pet. App. 16a (quoting J.A. 139-40). The longer a public company's artificially inflated stock goes uncorrected, the greater the risk that, when the correction finally occurs, the resultant damage to the company's reputation for trustworthiness will retard the stock price's recovery. J.A. 104-05, 139-40. Thus, prolonging the period of a stock's artificial inflation can damage not just the plan participants who *buy* ESOP shares at inflated prices, but it can damage plan participants who are *holders* as well, because, in the long term, the value of their holdings will remain lower for longer. J.A. 105, 143.

The Second Circuit did not disregard these allegations despite the district court's contention—echoed by Petitioners—that they were too "general" to be persuasive. Pet. App. 17a (quoting Pet. App. 34a). Nor was the Second Circuit dissuaded from considering these allegations even though similar, even identical allegations about long-term reputational damage had been made in other duty-of-prudence cases (even, heaven forfend, by the *same lawyer*), pointing out that "the possibility of similar allegations in other ERISA cases does not undermine their plausibility here (or, for that matter, elsewhere), nor does it mean that the district court should not have considered them." Pet. App. 17a. Rather, these allegations, like all other factual allegations in Respondents' complaint, should have been accepted "as true." Pet. App. 17a-18a.

These particular allegations, however, are also not sufficient on their own, as the Second Circuit made clear. They have to be considered in concert with Respondents' other, more specific factual allegations. Pet. App. 18a ("While these economic analyses will usually not be enough on their own to plead a duty-of-prudence violation, they may be considered as part of the overall picture.").

This is why Petitioners' insistence on characterizing all of Respondents' allegations as "generalized," and their hyperbolic prediction that the Second Circuit's opinion will inexorably cause the "evisceration" of *Dudenhoeffer*, is mistaken. Some of Respondents' allegations, particularly those regarding the increase in long-term risk caused by a prolonged period of artificial inflation, are not unique to this case. But plenty of other allegations that Respondents made *are* unique to this case—which the Second Circuit identified in its opinion and which Petitioners, unsurprisingly, have ignored: "[T]here are a number of other determinations that must be made in a fact-specific way before these [generalized] allegations come into play: whether there was an ongoing act of concealment, for instance, and whether that concealment was known by the fiduciaries such that further investigation would not be needed and disclosure would not be premature." Pet. App. 18a. Generalized allegations, standing alone, cannot carry the day; but the appellate court did not rely exclusively on generalized allegations by Respondents in finding that the "more harm than good" standard was satisfied, no matter how strenuously Petitioners protest to the contrary.

Fourth, the appellate court cited Respondents' allegation that IBM's stock traded in an efficient market, meaning "that a prudent fiduciary need not fear an irrational overreaction to the disclosure of fraud." Pet. App. 18a-19a.

Finally, the court below was persuaded by an allegation that it regarded as "particularly important." Respondents alleged that "the defendants allegedly knew that disclosure of the truth regarding IBM's microelectronics business was inevitable, because IBM was likely to sell the business and would be unable to hide its overvaluation from the public at that point." Pet. App. 19a (citing J.A. 141-42). Once IBM had begun soliciting potential purchasers, those purchasers were likely to conduct due diligence of Microelectronics. "[A] prudent fiduciary would have known that a potential purchaser's due diligence would likely result in discovery of the business's problems in any event." Pet. App. 20a. As Respondents alleged:

> IBM had spent almost two years actively seeking a buyer for the Microelectronics business. It was more likely than not that the segment would be sold, which defendants knew (or should have known). When Microelectronics was finally sold, the truth about its near-worthless assets and ongoing massive losses would likely have to be disclosed to the public. In other words, IBM's misrepresentations about Microelectronics were a ticking time bomb. Eventually, that bomb would go off and the truth would have to be disclosed, bringing the artificial inflation of IBM's stock to a painful end.

J.A. 141. Thus, the choice for a prudent fiduciary under these specific circumstances was not, as it is "[i]n the normal case," a choice between disclosure or non-disclosure; rather, the choice was between "the benefits and costs of earlier disclosure" compared "to those of later disclosure—non-disclosure is no longer a realistic point of comparison." Pet. App. 19a.

That is what Respondents, and the Second Circuit, meant by "inevitable" disclosure. *Pace* Petitioners, this is not a generalized allegation of inevitability that can be made in any of the "mine-run" of ESOP duty-of-prudence cases. Petitioners' Br. 55. "Inevitability" is not a shibboleth granting automatic access to plausibility for any duty-of-prudence claim; a plaintiff must have the specific facts to back up that claim of inevitability or the case will rightly founder.

Petitioners come tantalizingly close to conceding this point in their opening brief, acknowledging that Respondents here "alleged distinct *reasons* why the disclosure here was inevitable—namely, the impending sale of Microelectronics." Petitioners' Br. 52 (citing Pet. App. 19a) (emphasis in original). "But it will always be possible (especially in retrospect)," Petitioners argue, "to allege some case-specific details for *why* the disclosure that actually occurred was inevitable all along." *Id.* (emphasis in original). That may be true, but distinguishing between unsupported, conclusory allegations and plausible allegations buttressed by "case-specific details" is exactly what courts do on a motion to dismiss. *Iqbal*, 556 U.S. at 678-79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Just because other plaintiffs *can* invoke the talisman of inevitability does not mean that the mere act of doing so will have "nudged their claims across the line from conceivable to plausible[.]" *Twombly*, 550 U.S. at 570.[6]

---

[6] About Petitioners' shameless attempt—without citation of any allegation in the complaint or of judicially-noticeable *facts*—to dispute the fact of whether the sale of Microelectronics really was inevitable, the less said, the better. Suffice it to say that a defendant's dispute of the facts alleged in the complaint should not be credited at the pleading stage. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 751 n.2 (2017) ("Because this case comes to us on

2. The Second Circuit's opinion in this case was narrowly tailored; it cannot be freely applied to any duty-of-prudence claim that makes allegations concerning reputational risk and inevitability of disclosure *in haec verba*. Petitioners make much of the fact that counsel for Respondents, on behalf of other clients, used some of the same language in other duty-of-prudence cases that were found by the Fifth and Sixth Circuits not to have satisfied the "more harm than good" standard. Petitioners' Br. 52 (referencing *Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018), and *Graham v. Fearon*, 721 F. App'x 419 (6th Cir. 2018)). Yet, a review of the allegations made in each of those cases, and of the decisions of those courts, shows that the underlying *facts* alleged in those cases are significantly different from those of this case, notwithstanding the similarity of some of the economic principles applied to those facts.

The plaintiff in *Martone* alleged that the stock of his employer, Whole Foods, was artificially inflated by Whole Foods' concealment from the public of a program in its two largest markets, California and New York, of "systemic, illegal overcharging of its customers by regularly misstating the weight of pre-packaged food on which prices were based." *Martone*, 902 F.3d at 521 (internal quotation marks and brackets omitted). When investigators in New York announced preliminary findings of misconduct against Whole Foods, it was alleged, the truth emerged about Whole Foods'

review of a motion to dismiss [plaintiff's] suit, we accept as true all facts pleaded in her complaint.").

scheme and the artificial inflation ended. The defendant fiduciaries should have disclosed the scheme sooner, because the disclosure was inevitable. *Id.* at 526.

The Fifth Circuit, however, was not persuaded that the plaintiff had plausibly alleged this inevitability, finding "that a prudent fiduciary could have believed that [disclosure] would do more harm to the fund than good because [disclosure] would result in a public disclosure depressing the stock price . . . before a full investigation [of the underlying misconduct] had concluded." *Id.* at 526-27 (internal quotation marks omitted). Disclosure was not inevitable; a prudent fiduciary could well have concluded that the New York regulator's announcement was preliminary, that Whole Foods' participation in a scheme to overcharge customers was not clearly established, and that at a minimum further investigation was required before any action should be taken. Disclosure of Whole Foods' possible misconduct when the plaintiff had not plausibly alleged facts showing that the ESOP fiduciaries knew about it, let alone that it constituted a company-wide "scheme," could have been premature and caused an unnecessary diminution in the value of the stock held in the ESOP. Under the "more harm than good" test, those underlying facts fell short despite their being cloaked in references to "inevitability."

The claim in *Graham* was also found to be deficient under "more harm than good," but on different grounds than doomed *Martone*. The plaintiffs in *Graham* alleged that the stock price of their employer, Eaton, was trading at artificially inflated levels because the company, following its acquisition of another company, was misleading the public about its ability to spin off its vehicle business without incurring severe tax consequences. *Graham*, 721 F. App'x at 431-32. The Sixth Circuit held, however, that, even taking all of the plaintiffs' allegations as true, Eaton's executives had "repeatedly stated that Eaton had no plans to spin off its vehicle business, so a reasonably prudent fiduciary may have determined that disclosing the tax consequences of such unplanned actions would do more harm than good." *Id.* at 437. That Eaton may also have made ambiguous statements suggesting that it could spin off the business without a negative tax consequence if it wanted to do so did not matter, because Eaton had been clear that it did not intend to do so. Thus, despite the plaintiffs' references to the "inevitable" disclosure of the truth about Eaton's ability to do a tax-penalty-free spin-off, the plaintiffs had not plausibly alleged that a false statement had even been made, and thus they had not established that Eaton's stock was artificially inflated. A prudent fiduciary could hardly be blamed for electing not to make a disclosure of a fact the non-disclosure of which may not even have affected Eaton's stock price. *Id.*

Rather than demonstrating the dangers of identical invocations of "inevitability" in ERISA duty-of-prudence cases, *Martone* and *Graham*, particularly when compared to the appellate court's opinion below, demonstrate that clearing the "more harm than good" bar does not turn on the deployment of buzzwords, but on the case-specific factual details that either support or undercut the claims made. In *Martone* and *Graham*, a clear-eyed assessment of the underlying factual allegations led the courts to conclude that disclosure was not inevitable, and a hypothetical prudent fiduciary, therefore, could have concluded that making a disclosure based on those facts would be premature and would do more harm than good to the ESOP. In the case at hand, the same kind of assessment led to the opposite conclusion *because the underlying, specific factual allegations were different*. Nothing about these contrasting results suggests that "more harm than good" is unworkable; it is a rigorous but not insurmountable standard that demands a strong factual foundation before a plaintiff's claim of "inevitability" will be credited.

3. The Second Circuit has confirmed that the plausibility of inevitable disclosure in this case was tied to its specific facts. In *O'Day v. Chatila*, Nos. 18-2621-cv(L), 18-2632-cv(CON), 2019 U.S. App. LEXIS 17199 (2d Cir. June 7, 2019), the Second Circuit issued a summary order affirming the dismissal of a duty-of-prudence claim brought against ESOP fiduciaries in which the plaintiffs tried to argue that disclosure in their case, like in the instant case, was "inevitable" and therefore sufficient to plead a plausible claim. The plaintiffs in that case had not alleged specific facts to support their contention that "disclosure of SunEdison's financial problems" was inevitable and that "an earlier disclosure[,]" therefore, "might have caused less damage than a later disclosure." *Id.* at *3. Just conclusorily characterizing disclosure as "inevitable" does not

work; the Second Circuit held that the allegations in *O'Day* resembled more those made in *Rinehart v. Lehman Bros. Holdings, Inc.*, 817 F.3d 56 (2d Cir. 2016). *Id.* at *4.

As the Second Circuit observed in its decision in this case, allegations that, when "considered in combination[,]" were sufficient to state a plausible claim under *Dudenhoeffer* may not travel well. Pet. App. 15a. Even if disclosure is plausibly inevitable, a court "would also have to assess whether the circumstances would nevertheless have made immediate disclosure particularly dangerous, such that the generalized economic analyses put forward here would not apply." Pet. App. 18a (citing *Rinehart*, 817 F.3d at 68). The only other court so far to tackle an attempt by a duty-of-prudence plaintiff to prevail on allegations of "inevitability" likewise found the Second Circuit's opinion in this case inapposite. *See Fentress v. Exxon Mobil Corp.*, No. 4:16-CV-3484, 2019 U.S. Dist. LEXIS 16934, at *13 (S.D. Tex. Feb. 4, 2019) ("The inevitability of the disclosure in *Jander* also differentiates the instant case, because there was no major triggering event that made Exxon's eventual disclosure inevitable."). At the very least, the plaints of Petitioners and their *amici* that the appellate court's ruling in this case will lead to a flood of meritless litigation and *in terrorem* settlements seem hopelessly overblown.

4. This Court in *Dudenhoeffer* prescribed that lower courts, in applying the "more harm than good" test, engage in "careful, context-sensitive scrutiny of a complaint's allegations." *Dudenhoeffer*, 573 U.S. at 425.

That is precisely what the Second Circuit did here. The court below found that, in light of all of the factual allegations made by Respondents—general and specific—a prudent fiduciary could not help but conclude that disclosing the truth about the value of Microelectronics, through regular securities laws reporting, would not do more harm than good to ESOP participants because of the ongoing damage being done to participants buying IBM stock at inflated prices and the increased risk of damage to participants holding IBM stock if the concealment of the truth were prolonged and a more sluggish price recovery resulted. The Second Circuit's opinion confirms that "more harm than good" is the correct means under *Iqbal* and *Twombly* of enforcing the duty of prudence Congress imposed on ESOP fiduciaries in ERISA.

III. Petitioners' Proposed Frameworks For Evaluating Duty-of-Prudence Claims Contravene *Dudenhoeffer* And The Plain Language Of ERISA

In their opening brief, Petitioners offer two reasons why Respondents' complaint should have been dismissed: (1) because Petitioners had no obligation "to use nonpublic corporate information, which they learned in their role as company officers, to make investment-related decisions in their separate role as ESOP fiduciaries"; and (2) because all of Respondents' "[g]eneralized allegations that disclosure is inevitable and thus disclose sooner-rather-than-later is always prudent simply will not suffice[,]" particularly when, as here, IBM's ESOP "was a net seller of company stock during the relevant period." Petitioners' Br. 22, 45. Neither reason, nor the arguments Petitioners advance in support of them, is consonant with this Court's holding in *Dudenhoeffer* or with the duty of prudence enunciated in Section 1104(a) of ERISA.

A. Petitioners' proposal that ERISA fiduciaries are not required to use information learned in their corporate capacity in their fiduciary decision-making has no basis in the law

1. The first third of the Argument section of Petitioners' brief is devoted to pressing an argument—that ERISA fiduciaries who are also corporate insiders are not required to use knowledge gained in their corporate capacity in making fiduciary decisions—which Petitioners did not raise before the district or appellate court. Typically, this Court "do[es] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001). Nor is this issue "fairly included" in the question set forth in the petition for certiorari as Rule 14.1(a) requires. *See Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992) (declining to opine on legal issue beyond the scope of the question presented). Because this is "a court of final review and not of first view[,]" the entirety of Petitioners' argument set forth at pages 22 through 33 of their brief need not be considered. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (quoting *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234

(2015) (internal quotation marks omitted)); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("mindful that we are a court of review, not of first view[,]" declining to consider newly-raised argument (citations omitted)).

2. If the Court does decide to consider Petitioners' brand-new argument, however, it should swiftly be rejected.[7] If, as Petitioners contend, an ERISA fiduciary who is also a corporate executive cannot be required to use information that she has learned in her corporate capacity to make decisions in her fiduciary capacity, then there is no need for *Dudenhoeffer*'s "more harm than good" analysis, because there could not be a claim based on an ESOP fiduciary's failure to act on the basis of inside information about the value of company stock.

The *Dudenhoeffer* plaintiffs had alleged that the fiduciaries of Fifth Third's ESOP "had inside information that the market was overvaluing Fifth Third and that they could have used this information to prevent losses to the fund by . . . publicly disclosing the inside information so that the market would correct the stock price downward, with the result that the ESOP could continue to buy Fifth Third stock without paying an inflated price for it." *Dudenhoeffer*, 573 U.S. at 428. If Petitioners are right, then the fiduciaries of the Fifth Third ESOP had no obligation to consider

---

[7] The Government agrees, arguing, correctly, that Petitioners' proposal is "plainly inconsistent" with *Dudenhoeffer* and *Amgen*. Gov't Br. 28.

"the inside information" that they had in deciding whether to make a corrective disclosure—or to take any other fiduciary action, for that matter. And, if the Fifth Third fiduciaries had no obligation to consider inside information, then they need not have worried whether any action they would have taken based on that information would conflict with the securities laws, or would do more harm than good to ESOP participants—they could always be secure in whatever decision they made so long as it was not based on inside information. In this scenario, all of the effort in *Dudenhoeffer* to articulate a method for evaluating the plausibility of duty-of-prudence claims based on inside information was a waste of time.

3. Indeed, little about Petitioners' position stands up under scrutiny. Petitioners argue that ERISA fiduciaries should not have to act based on information acquired in their corporate capacities because doing so would privilege the interests of plan participants over those of the corporation to which those corporate officers owe their own set of fiduciary duties. As discussed above, however, and as noted in this Court's *Dudenhoeffer* opinion, ERISA states at Section 1144(d) that its provisions should be read not to contravene any other law or regulation. Thus, any action an ERISA fiduciary should take to comply with his duty of prudence cannot run afoul of the securities laws or any other laws relating to corporate governance or practice. A fiduciary in possession of inside information about the overvaluation of ESOP stock could not use that information to make a corrective disclosure exclusively

to plan participants; that would contradict the securities laws. By the same token, a fiduciary could not be required to disclose inside information about an upcoming merger if she is subject to confidentiality restrictions regarding the transaction. But these results obtain because of ERISA's plain language confirming that it cannot be applied in contravention of other legal obligations; Petitioners' contrived rule is, to be generous, superfluous.

Likewise, ERISA states that the standard of prudence is based on "the circumstances then prevailing"—there is no language specifying different standards for fiduciaries depending on how many roles they have. 29 U.S.C. § 1104(a)(1)(B).

Petitioners also do not explain just how, as a practical matter, an ERISA fiduciary who is also a corporate insider is supposed to mentally segregate information he has learned in his corporate capacity from his fiduciary decision-making. Walls between different components of, for example, a complex financial institution can be enforced so that conflicts of interest are avoided, but it is another matter entirely to propose that a similar kind of wall could be effectively maintained within a human being's private mental sphere. A fiduciary may be permitted to wear two hats, but she still only has one head.

4. Much of Petitioners' argument seems to rest on a misunderstanding of *Pegram v. Herdrich*, 530 U.S. 211 (2000). *See* Petitioners' Br. 23-25. This Court confirmed in that case that a fiduciary can wear two hats,

but she must "wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. When a person is making fiduciary decisions or taking fiduciary actions, she is wearing her fiduciary hat and can be liable under ERISA for those decisions and actions; when she is serving in her corporate capacity, she is wearing her corporate hat, and she cannot be held liable as a fiduciary for actions taken in her corporate capacity. *Id.* at 226. But what matters for the purpose of determining whether ERISA liability arises is in what capacity the *action* at issue was taken. What information was relied on by the actor gets no mention in *Pegram*. Indeed, there does not appear to be any court in the country that has endorsed Petitioners' proposed rule for ERISA fiduciaries.

Here, none of Respondents' allegations of Petitioners' wrongdoing rests on actions taken in Petitioners' corporate capacity. In fact, Respondents pleaded their complaint quite carefully to avoid that possibility. For example, Respondents' complaint alleges that, on certain occasions, Petitioner Schroeter, the Chief Financial Officer of IBM, made public statements that contributed to the artificial inflation of IBM's stock, and, thus, the imprudence of IBM's ESOP. J.A. 124-25. These statements, however, are not any part of the basis for Petitioner Schroeter's alleged liability under ERISA. J.A. 134-35. Rather, it is Petitioner Schroeter's failure to try to effectuate a corrective disclosure regarding Microelectronics that is the basis for his alleged breach of his duty of prudence. J.A. 134-35, 155-57. *Pegram* precludes Petitioner Schroeter's ERISA liability for public statements made in his corporate capacity. But his decision not to act to protect the ESOP from the harm caused by the stock's artificial inflation was, as the Government trenchantly observed in its *amicus* brief, "an indisputably fiduciary decision." Gov't Br. 29-30.[8]

Petitioners are correct to point out that ERISA, in a deviation from the common law of trusts from which the statute was derived, "expressly authorized company officers to serve as plan fiduciaries." Petitioners' Br. 23. Petitioners assert that this authorization favors their proposed rule, but it more compellingly militates against it. A senior corporate officer's inside knowledge of his company is arguably what makes him a better ERISA fiduciary, and particularly an ESOP fiduciary, because he is more likely than a remote functionary to know when the company stock has become imprudent. Petitioners' rule would erase that advantage, because such a fiduciary would no longer be able to act on that heightened knowledge.

---

[8] Nor does Respondents' allegation that Petitioners should have made their disclosure through the securities laws contradict this view. As the Second Circuit explained, Petitioners should have, in their fiduciary capacities, recognized the need for disclosure to protect Plan participants; then they should have tried to use financial reporting under the securities laws to accomplish this disclosure because it would be the least disruptive way to do so. Pet. App. 16a. The action for which Petitioners face liability is their decision not to make any disclosure, and that was a fiduciary decision.

5. Petitioners also argue that their rule must be enforced because ESOP fiduciaries will otherwise face liability for "prudently sell[ing] undervalued corporate shares without disclosing the information to the market[.]" Petitioners' Br. 31. They aver thus: "There is certainly no basis for having one rule for positive nonpublic information and a different rule for negative nonpublic information." *Id.* Perhaps, under the right circumstances, an ESOP fiduciary could be required to disclose the undervaluation of company stock to comply with her duty of prudence. But this is all rather speculative; none of these claims are supposed to be evaluated in the abstract. The great benefit of a "context-sensitive" approach like the one articulated in *Dudenhoeffer* is its flexibility to account for the many varieties of situations in which an ESOP fiduciary might need to decide whether to take an action—like making a public disclosure—or do nothing. Petitioners argue that "if the only options open to insider fiduciaries are to stop trading or prematurely disclose in good times and bad, then it will be practically impossible to have corporate insiders serve as ESOP fiduciaries." Petitioners' Br. 31-32. This argument is a straw man at best; no one has advocated for the constant disclosure by ESOP fiduciaries that Petitioners posit. More fundamentally, Petitioners seem dissatisfied with the case-by-case approach to prudence claims that "more than good" entails, even though that approach is perfectly consistent with how prudence claims against other ERISA fiduciaries are evaluated. *See, e.g.*, *Sweda v. Univ. of Pa.*, 923 F.3d 320, 329 (3d Cir. 2019) ("allegations concerning fiduciary conduct . . . are inherently

factual questions" (internal quotation marks and brackets omitted)); *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 727 (2d Cir. 2013) (a "complaint alleging a breach of fiduciary duties under ERISA" must be evaluated under a "context-specific" analysis); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (holding that a court evaluating a breach of fiduciary duty claim must conduct a "careful and holistic evaluation of an ERISA complaint's factual allegations"). Plaintiffs have brought claims against ESOP fiduciaries based on inside information for decades, yet Petitioners' apocalyptic scenario has never come to pass. Petitioners cannot point to anything unique to this case that, if it is affirmed, will suddenly render courts incapable of avoiding the chaos Petitioners predict.

The practical repercussions of Petitioners' rule, however, if it were adopted by this Court, are staggering. The Court has already held that prudence claims against ESOP fiduciaries based on public information are implausible. If ERISA fiduciaries also cannot be held liable based on their failure to act on nonpublic information, then prudence claims against ESOP fiduciaries are effectively a dead letter. As a practical matter, ESOP fiduciaries would enjoy virtual immunity from liability with respect to the duty of prudence. Such an outcome would vitiate Congress's intent as expressed in its refusal to excuse ESOP fiduciaries from the duty of prudence (with the exception of the diversification requirement). Petitioners' argument cannot be reconciled with *Dudenhoeffer* or 29 U.S.C. § 1104(a)(1)(B).

B. Petitioners' proposal of maximum deference for ESOP fiduciaries would invalidate *Dudenhoeffer* and Congressional intent in ERISA

1. Petitioners make a number of flawed arguments when they finally get to their discussion of the Question Presented. They devote a great deal of space to arguing that the Second Circuit was mistaken in suggesting that there might be a more lenient way to apply the "more harm than good" standard—that a court might ask what "an average prudent fiduciary" would do rather than what *any* (or every) prudent fiduciary would do. Petitioners' Br. 34-42. Much of Petitioners' argument is academic, because, as they acknowledge, the Second Circuit did not ultimately apply an "average prudent fiduciary" standard, but rather applied the more "restrictive" standard for which Petitioners have advocated.

Still, the tussle over how strict *Dudenhoeffer*'s pleading standard is meant to be—whether a hypothetical prudent fiduciary "would" or "could" reach the same conclusion as the fiduciary-defendant—seems to be somewhat of a tempest in a teapot.

It is true that *Dudenhoeffer* first states that a plaintiff must plead 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[,]" then states that a plaintiff must plead an alternative action "that a prudent fiduciary in the defendant's position *could* not have concluded . . . would do more harm than good[.]" While this Court has in other circumstances suggested that the difference between "would" and "could" when applied to the propriety of conduct is significant, *see Knight v. Comm'r*, 552 U.S. 181, 187-88, 192 (2008), these two formulations on their face seem to be getting at the same articulation of what constitutes a plausible prudence claim. Both formulations focus on the conclusions reached by a hypothetical prudent fiduciary. Considering that all of these formulations are meant to guide a court's analysis of the prudence of a fiduciary's actions, the inclusion of the prudent modifier in the hypothetical standard could almost be seen as question-begging: a fiduciary's action is prudent if a hypothetical fiduciary could or would consider it prudent.

Instead of immersing the courts in this semantic ouroboros by trying to quantify the degree of restrictiveness in *Dudenhoeffer*'s articulations of the duty of prudence, it makes more sense to see these formulations for what they really are: a sensible attempt by this Court to provide guidance for applying the plausibility framework of *Iqbal* and *Twombly* to duty-of-prudence claims against ESOP fiduciaries—because those fiduciaries must meet the same standard of prudence as every other ERISA fiduciary per Congress's intent.

The standard cannot be what *any* fiduciary could possibly imagine, because then no duty-of-prudence claim could ever lie, and ESOP fiduciaries, *contra*

ERISA's plain language, would not be subject to the same duty of prudence as every other ERISA fiduciary; they would have immunity. Instead, the standard is what a hypothetical *prudent* fiduciary could imagine. It is not an easy standard to satisfy; ERISA fiduciaries are generally given a fair amount of deference by the courts regardless of the type of investment they are overseeing, particularly with respect to the rule that their actions not be judged with the benefit of hindsight. But there is no basis in the statute or this Court's decision in *Dudenhoeffer* to hold that an elevated pleading standard, unique to ESOP fiduciaries, has been enunciated. As ERISA says, a prudent fiduciary's goal is to benefit plan participants, not harm them, so if a hypothetical prudent fiduciary would or could or should view an alternative action as more likely to cause harm, then it is not plausible that failing to take that action breaches the duty of prudence.

Petitioners are not really interested in the true meaning of conditional auxiliary verbs, however; their discussion of why a purportedly "stricter" understanding of "more harm than good" should be used is just the set-up for their contention that plausible prudence claims against ESOP fiduciaries should be almost impossible to plead. They would be happy to have this Court to embrace the understanding of "more harm than good" that the Fifth Circuit promoted in *Whitley*: if a proposed alternative action would cause a drop in the price of the stock, that is enough to doom the claim; the possibility of a stock-price drop, *by itself*, is enough for a hypothetical prudent fiduciary to conclude that the action would do more harm than good. *Whitley*, 838 F.3d at 529 ("In fact, it seems that a prudent fiduciary could very easily conclude that such actions would do more harm than good."). Of course, such a standard would make duty-of-prudence claims against ESOP fiduciaries harder to plead than it was in the days of the *Moench* presumption; it is virtually impossible to conceive of a solution to the problem of artificially inflated stock that does not involve lowering the stock price. *See Basic v. Levinson*, 485 U.S. 224, 246-47 (1988).

2. Petitioners repeatedly insist that Respondents' allegations were exclusively generic; as already discussed in this brief, this is a blatant mischaracterization of Respondents' complaint and the appellate court's opinion. Respondents have not simply alleged "that sooner-is-always-better when it comes to disclosure" and left it at that. Petitioners' Br. 44. In this case, when the specific factual circumstances surrounding IBM's desired sale of Microelectronics made the disclosure of the true value of that business segment all but inevitable, Petitioners' choice was between disclosure sooner or disclosure later. Under those specific circumstances, Petitioners risked greater harm to plan participants by choosing the later option, because the disclosure was almost certainly going to happen, and IBM's delay in revealing the truth increased the likelihood of a harsher correction and a protracted recovery for the stock, thereby increasing the harm to *all* plan participants.

But the increased risk from a later disclosure is only plausible because of the specific factual foundation supporting it—that is, the specific facts about IBM's impending sale of Microelectronics. In the context of an ongoing investigation into possible consumer overcharging (*Martone*), or a company's ambiguous representations regarding its potential tax liabilities when it has promised not to take an action that would trigger those liabilities (*Graham*), the increased risk caused by later disclosure is not enough to make the claim plausible because the hypothetical prudent fiduciary does not know precisely what to disclose or whether disclosure really is inevitable. Different factual underpinnings—different *contexts*—lead to different conclusions by a hypothetical prudent fiduciary.

Petitioners seem to think that the fact these allegations about increased reputational risk and the preference for earlier disclosure over later disclosure appear in multiple complaints brought by clients represented by the undersigned strengthens their argument that Respondents' allegations are too generalized to pass muster. *See* Petitioners' Br. 21, 45, 48-49. If anything, however, this fact cuts the other way by providing proof positive that these allegations, standing alone, did not in *any* of these cases determine whether a plausible claim was pleaded. Rather, in each decision where counsel for Respondents represented the putative class, the court in question assessed the plausibility of the specific facts that purported to support these allegations. Where those specific facts were found wanting, the cases were dismissed. In this case, the unique circumstances of IBM's efforts to sell its Microelectronics business segment made the allegations plausible. The "more harm than good" standard is demanding; it should not be impossible.

3. That is exactly the outcome that Petitioners seek, however. Although they claim that their application of the *Dudenhoeffer* standard "is not an impossible threshold[,]" the only example they can offer of a situation "where all prudent fiduciaries would agree that earlier disclosure is better than later" is one in which "a new ESOP had not yet begun to purchase company stock and so a drop in the stock price could not harm existing participants." Petitioners' Br. 55.

At oral argument before the Second Circuit, counsel for Petitioners proposed a different scenario in which a duty-of-prudence claim could plausibly be pleaded against an ESOP fiduciary, as reflected in this question-and-answer:

> Q: Under what circumstances would someone prevail under *Dudenhoeffer*? In other words, your adversary says that what you're proposing—under what you propose, no one would prevail. And you have a response to that—could you give it to me?
>
> A: Yeah, okay. ***Let's take the case of a company that's teetering on the brink of insolvency.*** And while they are teetering on the brink of insolvency, the company decides to set up an ESOP, charge fiduciaries with managing that ESOP, and they know that because it's a new ESOP all it's going to be doing, and all it's going to be doing for its relatively young employees is buying shares. There are

> no shares to sell, there are no shares in the ESOP whose value could be diminished by any disclosure or anything like that. That seems to me a case where a court could say there is a breach of the duty of prudence. Why at that moment were you opening up an ESOP for your employees? That is a breach of the duty of prudence. You could have given them a hundred Fidelity funds they could have bought into, but you had to give them an ESOP in that circumstance. So that's an example, Your Honor, I think of where the *Dudenhoeffer* case law would permit a claim to go forward based on an ESOP—based on employee participation in an ESOP. That's one example.[9]

These are remarkable admissions: the only situations of which Petitioners can conceive where earlier corrective disclosure is appropriate are ones in which the ESOP holds no stock or the company is "teetering on the brink of insolvency." This Court made clear in *Dudenhoeffer* that ERISA "does not require plaintiffs to allege that the employer was on the 'brink of collapse,' under 'extraordinary circumstances,' or the like." *Dudenhoeffer*, 573 U.S. at 419. Apparently, Petitioners disagree.

If "ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are[,]" then

[9] Oral Argument at 33:09, *Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018) (No. 17-3518), *available at* http://www.ca2.uscourts.gov/decisions/isysquery/dee05aaa-c5e3-4120-ac21-96d7fc894556/255/doc/17-3518.mp3 (emphasis added).

claims against them should not be plausible only if the ESOP is empty of stock or if the company is insolvent or some other far-flung fact pattern. By positing these scenarios as the only viable sources of claims against ESOP fiduciaries, Petitioners have revealed their true goal: to restore a pre-*Dudenhoeffer* jurisprudence in which the pleading standard as applied by the courts "makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious[.]" *Dudenhoeffer*, 573 U.S. at 425. This is *Moench* by other means and would necessitate this Court's overturning its unanimous decision issued only five years ago.

4. Petitioners proffer two other reasons for reversing the lower court's decision in this case. Petitioners are eager to note when it suits them that ERISA "expressly precludes courts from engaging in hindsight to determine" whether a fiduciary's actions were, in fact, demonstrated to be prudent. Petitioners' Br. 37. Here, however, Petitioners want their actions to be judged prudent in hindsight because, as Petitioners tirelessly remind the Court, IBM's ESOP turned out to be a "net seller" during the relevant time period. *Id.* at 3, 16, 19, 45, 48, 50-53, 55. Thus, not disclosing the truth was *ipso facto* prudent.

But Petitioners' calculus omits the possible harm to ESOP *holders*, by far the largest group in almost any ESOP. As Respondents alleged, delayed disclosure increased the risk of harm to plan participant holders by increasing the likelihood of a more severe correction and a slower and more sluggish stock-price recovery once the truth about Microelectronics had emerged.

J.A. 105, 143. If Respondents had not alleged sufficient facts to show that later disclosure of the truth about Microelectronics was inevitable, then the increased risk of harm to holders would not matter—as it did not matter in *Martone* or *Graham*. But those facts were plausibly alleged; Petitioners had every reason to know that, given IBM's efforts to sell Microelectronics, the true value of the business was going to be revealed. Under those circumstances, no prudent fiduciary would ignore the known fact of increased risk of harm to holders because of the unknown tally of suffering buyers versus benefitting sellers.

The duty of prudence turns on what a fiduciary knew and did at the time, not on the outcomes of her decisions. Indeed, many duty-of-prudence claims against ESOP fiduciaries have been dismissed even though the plans in those cases were *net buyers* of inflated stock. *See Martone*, 902 F.3d at 527 ("[N]o fiduciary could have known with certainty that the Plan would be a net purchaser over the course of the Class Period."); *In re Target Corp. Sec. Litig.*, 275 F. Supp. 3d 1063, 1088 (D. Minn. 2017) ("[R]eliance on the single fact that the Fund turned out to be a net purchaser for four months of the ERISA Class Period to show fiduciary imprudence and the viability of an alternative action constitutes pleading imprudence by hindsight, which is insufficient."); *Forte v. U.S. Pension Committee*, No. 15-CV-4936 (PKC), 2016 WL 5922653, at *5 (S.D.N.Y. Sept. 30, 2016) (dismissing duty-of-prudence claim despite allegations that "purchasers, who were harmed, outnumbered the sellers, who benefitted, by more than two to one"); *accord In re Wells Fargo ERISA 401(k) Litig.*, Case No. 16-CV-3405 (PJS/BRT), 2017 U.S. Dist. LEXIS 154535, at *15-16 (D. Minn. Sept. 21, 2017) (citations omitted). A hypothetical prudent fiduciary could not have known whether IBM's ESOP was buying or selling more shares of stock during the period of the stock's artificial inflation.

Even if the IBM plan's eventual status as a net seller were relevant, however, it would not be the end of the story. If hindsight facts are relevant to the "more harm than good" standard, then the fact that, two years after IBM finally admitted the worthlessness of Microelectronics, IBM's stock price was still trading at or below the price it declined to on the day the truth emerged is equally relevant. J.A. 104. Two years of losses without any recovery constitutes an enormous harm to all the participants in IBM's ESOP—harm that could have been avoided, or at least mitigated, if Petitioners had accomplished an earlier disclosure of the truth.

Consciously allowing IBM's misrepresentation of Microelectronics to go uncorrected, moreover, brought Petitioners dangerously close to at least passive participation in that misrepresentation. Surely Petitioners' duty of loyalty—with which "lying is inconsistent," *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (quoting *Peoria Union Stock Yards Co. v. Penn. Mut. Life Ins. Co.*, 698 F.3d 320, 326 (7th Cir. 1983) (internal quotation marks omitted))—should have tipped the scales in favor of disclosure and against inaction. J.A. 142.

5. Petitioners' final argument against the Second Circuit's decision is that its affirmance will "create an obvious end-run around the strict standards that Congress has enacted to rein in abusive securities litigation." Petitioners' Br. 58 (citation omitted). This seemingly perennial concern of ERISA fiduciaries was cited in *Dudenhoeffer* as a reason for preserving the *Moench* presumption. *See* Reply Brief for Petitioners, *Fifth Third Bancorp, et al. v. Dudenhoeffer, et al.*, No. 12-751 (2014) at 17 (abolishing the *Moench* presumption "would also enable an end-run around Congress's carefully calibrated rules for securities litigation" (citation omitted)). Petitioners seem troubled because the parallel securities class action that was filed regarding IBM's Microelectronics disclosures was dismissed as insufficient under the Private Securities Litigation Reform Act ("PSLRA"). *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. IBM*, 205 F. Supp. 3d 527 (S.D.N.Y. 2016). That dismissal, unlike the one in this case, was not appealed, so it remains unknown whether the Second Circuit would have reversed that decision as well or let it stand.

Nevertheless, the possibility that an ERISA action could state a plausible claim while a securities action based on similar underlying facts is dismissed worries Petitioners, who claim that the Second Circuit's decision here has "invited plaintiffs to reframe every unsuccessful securities fraud class action as an ERISA duty-of-prudence case." Petitioners' Br. 59. That an ERISA action succeeded where a securities action failed is not such a perverse outcome, however. Respondents' prudence claim and the *Insulators* plaintiffs' fraud claims are governed by different laws with different pleading requirements. The *Insulators* plaintiffs had to plead scienter under the exacting standard of the PSLRA; their failure to meet that standard is why their claims were dismissed. *Insulators*, 205 F. Supp. 3d at 535-38. On the other hand, the *Insulators* plaintiffs did not need to plead that the corrective disclosure required by the securities laws satisfied the "more harm than good" standard, because that standard only applies to ERISA claims. The securities laws and ERISA both have pleading standards that are difficult in some ways and easier in others.

It is not the responsibility of the courts to situate these differing pleading standards in congruence so that parallel actions always have the same results. Congress chose to allow ESOPs under ERISA knowing that the stock that would be held by those ESOPs was already governed by the federal securities laws. Congress chose to allow ERISA plan participants to bring claims for breach of the duty of prudence over their ESOP investments knowing that those participants would also be eligible to bring claims under the securities laws. Nowhere in ERISA did Congress limit the right of ERISA plaintiffs to bring prudence claims against ESOP fiduciaries by stating that those claims should also satisfy the pleading requirements of the PSLRA. As the Second Circuit summarized the issue, "Congress has chosen different structures to handle different claims; it is not [the courts'] role to tie together what Congress has chosen to keep separate." Pet. App. 23a.

Petitioners' proposed frameworks for assessing duty-of-prudence claims against ESOPs contradict this Court's holding in *Dudenhoeffer* and ERISA itself. None of their arguments should persuade this Court to reverse itself or to overturn the Second Circuit's careful adherence to the "more harm than good" standard in this case.

IV. The Government's Proposed Framework Abandons ERISA's Duty Of Prudence For ESOP Fiduciaries

In its *amicus* brief, the Government argues that, while Petitioners and Respondents, along with the district and appellate courts, offer competing theories of how *Dudenhoeffer*'s "more harm than good" standard should be applied to the allegations in this case, all "appear to expect a fiduciary to make an ad hoc prediction about whether a public disclosure would do more harm than good in a particular case." Gov't Br. 12. Concerned that this standard is too "indeterminate," the Government essentially asks the Court to discard the "more harm than good" standard and limn the duty-of-prudence pleading standard according to the parameters of the federal securities laws. *Id.* at 27-28.

1. The Government proposes that courts evaluate the plausibility of duty-of-prudence claims against ESOP fiduciaries by focusing on whether the federal securities laws would require disclosure of the inside

information alleged to be the cause of the stock's artificial inflation.[10] If the securities laws would necessitate disclosure, then a claim under Section 1104 of ERISA for breach of the duty of prudence is plausibly pleaded; if a claim under the securities laws cannot be pleaded, then it would be inconsistent with those laws to hold that disclosure might nevertheless be required under ERISA. Gov't Br. 18-24. Further, only ESOP fiduciaries who actually have disclosure obligations under the securities laws should be obliged to make disclosures, because "[a]n individual on whom the securities laws do not impose such a duty may be less likely to have the familiarity with both the facts and the law to accurately determine what those obligations are." *Id.* at 21 (citing *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 760-61 (7th Cir. 2007)). An ESOP fiduciary without disclosure obligations under the securities laws might only be obliged "to urge a co-fiduciary or other responsible corporate officers to make a required disclosure, to utilize internal company reporting mechanisms, or to report possible violations to the SEC . . . or the Department of Labor[.]" *Id.* at 23.

The Government's proposal is certainly better than anything put forward by Petitioners; at least the Government agrees that artificially inflated stock

[10] The Government's proposal does not actually solve the problem of competing interests among plan participants, but rather elides the issue altogether. It also bears mentioning that the Government, like Petitioners, ignores the economic interest of plan participants in not seeing the value of their ESOP holdings unnecessarily depressed by their employer's delayed admission of the truth.

could render an ESOP imprudent, and a "plausible sheep" alleging claims against ESOP fiduciaries is not supposed to be a *rara avis*. Nevertheless, even though the Government does not quite admit it, its proposal constitutes an abrogation of *Dudenhoeffer*'s key holding that the duty of prudence for ESOP fiduciaries is equal to the duty owed by other ERISA fiduciaries.

As the Government concedes, if the requirements of the federal securities laws delineate the appropriateness of fiduciary action, then "[i]n all but extraordinary cases," determining whether disclosure under the securities laws is required will answer the plausibility question without the need for any cost-benefit analysis. Gov't Br. 22. There is no need for a "context-sensitive scrutiny" of the ESOP fiduciary's knowledge and actions as would be done with allegations against any other ERISA fiduciary; the focus is exclusively on obligations under the securities laws.

The first two points discussed in *Dudenhoeffer*—that ESOP fiduciaries cannot be required to engage in insider trading, and that adherence to the duty of prudence cannot oblige a fiduciary to take action inconsistent with the securities laws—were true before *Dudenhoeffer* was decided. ERISA states that its duties must not interfere with other legal or regulatory requirements, and the rule that a fiduciary does not have to break the law to fulfill his fiduciary duty dates back to the common law of trusts from which ERISA descended. *See Dudenhoeffer*, 573 U.S. at 428-29. Put another way, these principles exist independently of *Dudenhoeffer*'s central holding that ESOP fiduciaries are bound by the same duty of prudence as all other ERISA fiduciaries; only the "more harm than good" standard reflects and seeks to implement this holding.

Thus, by asking the Court to write "more harm than good" out of the law, the Government is implicitly asking the Court to write out of the law the holding that engendered "more harm than good." Replacing ERISA's duty of prudence with the requirements of the federal securities laws for ESOP fiduciaries means that ESOP fiduciaries would be subject to a different standard of prudence than other fiduciaries; in fact, they would be subject to a different legal regime altogether.

2. The Government's proposal not only contravenes *Dudenhoeffer* and its holding that the plain language of ERISA subjects ESOP fiduciaries to the same duty of prudence as other fiduciaries; it also offends this Court's longstanding treatment of overlapping statutory schemes. Time and again "this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

Here, ERISA's duty of prudence required Petitioners to make a corrective disclosure to fix the artificial inflation of IBM's stock. Whether the securities laws independently required disclosure is somewhat of an open question. The court in *Insulators* did find that IBM's stock was artificially inflated by IBM's misrepresentation of the value of Microelectronics, but it also found that a claim for securities fraud was not adequately pleaded because there was no scienter sufficient for the PSLRA. *Insulators*, 205 F. Supp. 3d at 533-36.

In either case, it is not such a strange outcome that a claim could be pleaded under ERISA but not the securities laws. The duty owed by a corporation and its officers to its shareholders not to commit fraud is a duty that exists "even among strangers." *Varity*, 516 U.S. at 506. The duty that ESOP fiduciaries owe plan participants under ERISA is, as Judge Friendly put it many years ago, "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Sometimes an ESOP fiduciary might be called upon to do more than would a garden-variety corporate officer.

The Government even admits that "it would not violate the securities laws to make a full and fair public disclosure of" inside information as Respondents allege Petitioners should have done. Gov't Br. 20. Thus, ERISA's duty of prudence and the federal securities laws are not in conflict with each other, so there is no reason to read one as superseding the other. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 103 (2014) ("Where two statutes are complementary, it would show disregard for the congressional design to hold that Congress intended one federal statute nonetheless to preclude the operation of the other.")

This Court confirmed in *Dudenhoeffer* that an independent duty of prudence applies to ESOP fiduciaries—except for the requirement of diversification—as surely as it does for any other ERISA fiduciary. The Government's attempt to simplify prudence pleading by abandoning this independent duty in favor of the already-extant duties of the securities laws should not be endorsed by this Court.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

SAMUEL E. BONDEROFF
Counsel of Record
JACOB H. ZAMANSKY
JAMES OSTASZEWSKI
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, NY 10004
(212) 742-1414
samuel@zamansky.com