No. 19-784

In The
Supreme Court of the United States

UNIVERSITY OF PENNSYLVANIA, et al.,

Petitioners,

v.

JENNIFER SWEDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

BRIAN T. ORTELERE
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONERS

In accordance with Rule 15.8 of this Court, petitioners respectfully submit this supplemental brief to notify the Court of the Seventh Circuit's recent decision in *Divane* v. *Northwestern University*, — F.3d —, 2020 WL 1444966 (Mar. 25, 2020). *Divane* reinforces the circuit conflict over the pleading standard for fiduciary breach claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*

Relying on the pleading standards announced in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), the Seventh Circuit unanimously affirmed dismissal of a complaint targeting Northwestern University's employee retirement plan, stressing that there were "prudent explanations for the challenged fiduciary decisions." *Divane*, 2020 WL 1444966, at *5, *8. The allegations in the *Divane* complaint, which was filed by the same law firm that is prosecuting this case, are materially identical to the allegations that the Third Circuit permitted to proceed. This Court's review is needed now, even more than before.

1. As petitioners explained (Pet. 19, 23-25), the Seventh Circuit's adherence to *Twombly* has long led it to reject respondents' excessive-fees arguments. See *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 672 (7th Cir. 2011); *Hecker* v. *Deere & Co.*, 556 F.3d 575, 580-581, 586 (7th Cir. 2009). *Divane* faithfully applied *Loomis* and *Hecker* to reject those arguments yet again.

For instance, respondents insist a prudent fiduciary would adopt a flat fee for plan recordkeeping expenses, at an annual market-rate "average of $35 per participant." Br. in Opp. 6. The *Divane* plaintiffs advanced the same flat-fee, "$35 per year per participant" allegations. 2020 WL 1444966, at *7. But the Seventh Circuit found such allegations insufficient under *Loomis* and *Hecker*. *Ibid.*

Respondents also fault petitioners for not "soliciting competitive bids" from potential recordkeeping providers. Br. in Opp. 11; Pet. App. 19a-20a. The *Divane* plaintiffs made, and the court of appeals rejected, the same charge that "Northwestern should have solicited competitive bids." 2020 WL 1444966, at *7.

In addition, respondents contend that petitioners acted imprudently in offering investment options in retail share classes, options that charged "layers of unnecessary fees," and options that could have been cheaper had petitioners negotiated for a better deal. Br. in Opp. 11-12; Pet. App. 19a-21a. The *Divane* plaintiffs unsuccessfully made all the same contentions about the options in the Northwestern plan: "some of these options were retail funds with retail[] fees, some had 'unnecessary' layers of fees, and some could have been cheaper but Northwestern failed to negotiate better fees." 2020 WL 1444966, at *8.

2. Apart from the excessive-fees allegations, the *Divane* decision also rejected indistinguishable underperformance allegations.

Like respondents, the *Divane* plaintiffs contended that it was imprudent to include the CREF Stock Account as a plan investment option. See *Divane*, 2020 WL 1444966, at *6; Br. in Opp. 6-7; Pet. App. 21a. As petitioners explained (Pet. 26-27), however, courts other than the Third Circuit here would have "entertained petitioners' arguments that a prudent fiduciary may have decided to retain [the CREF Stock Account and another TIAA-CREF option] because they are bundled with the popular TIAA Traditional Annuity."

Divane proves petitioners right. The Seventh Circuit held that there were "valid reasons for the plans * * * to keep the [CREF] Stock Account as an *option* for participants." *Divane*, 2020 WL 1444966, at *6. Just as here, the face of the complaint reveals that the university plans had "to offer participants the Stock Account if the plans offered the Traditional Annuity," and "it was prudent for Northwestern to accept conditions that would ensure the Traditional Annuity remained available to participants." *Ibid.*

More broadly, the Seventh Circuit rejected the plaintiffs' underperformance theory because "Northwestern provide[d] the plans with a wide range of investment options" and "also provided prudent explanations for the challenged fiduciary decisions involving alleged losses or underperformance." *Divane*, 2020 WL 1444966, at *8. But the Third Circuit reversed the district court, and rebuked petitioners, for emphasizing the plan's "range of investment

options" and the "lawful alternative explanations" for the challenged decisions. Pet. App. 9a, 26a-27a.

This divergence is unsurprising given the Third Circuit's erroneous and idiosyncratic limitation of *Twombly*. Compare Pet. App. 8a-9a, with *Divane*, 2020 WL 1444966, at *5. The Third Circuit chastised the district court for considering whether the challenged decisions reflected a "rational and competitive business strategy." Pet. App. 8a (citation omitted). But the Seventh Circuit took the district court's approach: it ruled against the *Divane* plaintiffs because they "criticize[d] what may be a rational decision for a business to make." 2020 WL 1444966, at *6.

3. To be sure, the Seventh Circuit stated that one aspect of its approach—considering the plan's range of investment options in the light of other allegations in the complaint—was shared by the Third Circuit's ruling here. *Divane*, 2020 WL 1444966, at *8. But it did not endorse the entirety of the Third Circuit's ruling. Nor did it identify any meaningful differences between the two cases. As the foregoing discussion shows, the reasoning of the two decisions is irreconcilable.

As a result of the two rulings, the same attorneys can file effectively the same class action claims based on the same alleged conduct, but the outcome of a threshold dispositive motion will change based on where the university defendant is located. It is hard to imagine a case that more strongly calls out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN T. ORTELERE
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103

CHRISTOPHER J. BORAN
MATTHEW A. RUSSELL
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

MARCH 2020