No. 21-

IN THE

# Supreme Court of the United States

NEW YORK UNIVERSITY,

*Petitioner*,

*v.*

DR. ALAN SACERDOTE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the bare allegation that New York University ("NYU") offered retail-class shares of certain mutual funds rather than lower-cost institutional-class shares of the same mutual funds in its employee retirement plans states a claim that NYU breached its fiduciary duty of prudence under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1104(a)(1)(B).

## PARTIES TO THE PROCEEDING

Petitioner NYU was defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondents Dr. Alan Sacerdote, Dr. Hubert Samuels, Mark Crispin Miller, Marie E. Monaco, Dr. Shulamith Lala Straussner, James B. Brown, individually and as representatives of a class of participants and beneficiaries on behalf of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration, were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Patrick Lamson-Hall, individually and as a representative of a class of participants and beneficiaries on behalf of the NYU School of Medicine Retirement Plan for Members of the Faculty, Professional Research Staff and Administration and the New York University Retirement Plan for Members of the Faculty, Professional Research Staff and Administration, was plaintiff in the district court proceedings but did not participate in the court of appeals proceedings.

The Trustees of Columbia University in the City of New York participated as intervenor in the district court proceedings but did not participate in the court of appeals proceedings.

## CORPORATE DISCLOSURE STATEMENT

NYU has no parent corporation and no publicly held corporation owns 10% or more of its stock.

## RELATED PROCEEDINGS

*Sacerdote* v. *New York University*, No. 18-2707 (2d Cir.) (opinion and judgment issued August 16, 2021).

*Sacerdote* v. *New York University*, No. 1:16-cv-06284 (S.D.N.Y.) (final judgment issued July 31, 2018).

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New York University respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## INTRODUCTION

The court of appeals held that a plaintiff states a claim of imprudence under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a)(1)(B), simply by alleging that an employer offered retail-class shares of mutual funds rather than the lower-cost institutional-class shares of the same mutual funds. That holding directly conflicts with the decision reached by the Seventh Circuit in *Divane* v. *Northwestern University*, 953 F.3d 980 (7th Cir.

2020)—a decision this Court has already decided to review, *see Hughes* v. *Northwestern University*, No. 19-1401 (U.S). *Hughes* will be argued on December 6, 2021.

This Court's disposition of the question presented in *Hughes* will substantially affect, and indeed likely determine, whether the court of appeals' decision here was correct. Accordingly, the Court should follow its usual practice and hold this petition pending its decision in *Hughes*, so that it may then grant certiorari, vacate the judgment below, and remand for further proceedings in light of its decision.

## OPINIONS BELOW

The opinion of the Second Circuit (App. 1a-61a) is published at 9 F.4th 95. One relevant opinion of the District Court for the Southern District of New York (App. 65a-146a) is published at 328 F.Supp.3d 273. The other two relevant opinions of the district court (App. 147a-156a, 157a-192a) are unpublished but available at 2017 WL 3701482 and 2017 WL 4736740.

## JURISDICTION

The court of appeals entered judgment on August 16, 2021. *See* App. 1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1104(a), entitled "Prudent man standard of care," provides:

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

terest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

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

29 U.S.C. §1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

## STATEMENT

### A. Factual Background

This case involves two retirement plans that NYU sponsors: one for employees of the University ("Faculty Plan") and one for employees of the School of Medicine ("Medical Plan"). App.66a-App.67a. The Plans have been in effect since 1952, App.82a; this case concerns Plan activity between August 2010 and the present, App.69a.

The Plans designate NYU's Retirement Plan Committee ("Retirement Committee" or "Committee") as the "Plan Administrator." Court of Appeals Appendix ("C.A.App.") 118, C.A.App.123, C.A.App.128; App.85a. The Plans are defined-contribution, participant-directed retirement plans organized under 26 U.S.C. §403(b). The Plans "offer[] diverse investment options": about 100 annuities and mutual funds under

the Faculty Plan and about 80 under the Medical Plan. App.82a-App.83a.

Like all retirement plans, the Plans require recordkeeping services, including calculating and maintaining account balances and investment performance and preparing and delivering enrollment materials, notices, and other materials to new and existing participants. App.83a. Many retirement plans use multiple recordkeepers, App.97a n.45, App.114a-App.115a n.63, and that was true of the Plans for some time, too. Initially, both Plans used TIAA and Vanguard as recordkeepers (for investment options each respectively provided) and the Medical Plan also used Prudential. App.84a-App.85a.

Like other defined-contribution plans, the Plans pay their recordkeeping fees via "revenue sharing." App.84a. As is typical, the investment products offered by the Plans had an "expense ratio" expressing the product's cost to the investor as a percentage of its assets (in basis points, "bps"). Court of Appeals Appellee's Special Appendix ("C.A.A.S.App.") 23; App.120a-App.121a; C.A.App.57-58, C.A.App.64-C.A.App.71. Under the revenue-sharing arrangement, the investment manager transfers a portion of the expense ratio to the recordkeeper. App.84a; C.A.A.S.App.23; C.A.App.20-C.A.App.21, C.A.App.27. Many of the products offered by the Plans are available in at least two share classes: institutional and retail (or "Admiral" and "Investor," in Vanguard's parlance). C.A.A.S.App.24; C.A.App.21. Retail shares have higher expense ratios, and the difference is revenue shared with the recordkeeper. C.A.A.S.App.40-C.A.A.S.App.42; C.A.A.S.App.24; C.A.A.S.App.58; C.A.App.21, C.A.App.58.[1] For exam-

[1] Vanguard called this practice "recordkeeping offset" rather than "revenue sharing." C.A.A.S.App.25.

ple, if a product's expense ratio is 100 bps for the retail class and 75 bps for the institutional class, then the retail shares transfer 25 bps to the recordkeeper, whereas the institutional shares transfer 0 bps. C.A.A.S.App.41-C.A.A.S.App.42; *see* C.A.App.21, C.A.App.52, C.A.App.55, C.A.App.58.

The Plans thus have relied on retail shares of investment products as the mechanism to accomplish the revenue sharing for paying recordkeeping fees. C.A.A.S.App.24, C.A.A.S.App.30. Vanguard agreed that as long as the Plans offered retail shares of certain funds, Vanguard would deem the retail expense ratios sufficient to cover its recordkeeping fees. C.A.A.S.App.24. And if the aggregate revenue sharing from the TIAA products fell below TIAA's "required revenue rate"—the Plans' overall recordkeeping fee for the TIAA products—the Plans were "obligated to pay for the difference." C.A.A.S.App.23-C.A.A.S.App.24. Accordingly, as the Committee understood, any consideration of whether to switch a given product to a share class with a lower expense ratio had to account for the fact that the lower expense ratio would not contribute to the recordkeeping fees through the revenue-sharing arrangement. C.A.A.S.App.30. For example, in 2013 the Committee asked Vanguard to offer lower-cost share classes where available; Vanguard said that if it did, it would have to impose a per-participant fee to offset the lost revenue for recordkeeping. C.A.A.S.App.59; C.A.A.S.App.25-C.A.A.S.App.26. The Committee rejected that proposal as unfair to participants with lower account balances. C.A.A.S.App.59; C.A.A.S.App.11; App.121a.

### B. District Court Proceedings

Plaintiffs are a certified class of participants and beneficiaries of the Plans from August 2010 to the present. App.68a-App.69a. They alleged that NYU's administration of the Plans violated the Employment Retirement Income Security Act ("ERISA") in various ways. *See, e.g.*, App.50a-App.51a & n.2. As relevant here, plaintiffs claimed NYU breached its ERISA duties merely (1) by offering retail shares of investment products where institutional shares of the same products were available ("share-class claim"), App.178a, and (2) by using a revenue-sharing arrangement to pay recordkeeping fees ("revenue-sharing claim"), App.94a-App.95a.

Plaintiffs' suit is one of roughly twenty lawsuits brought across the country alleging that universities breached their fiduciary duties under ERISA by, among other things, paying excessive fees for recordkeeping and other services.[2] Most of these suits were

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[2] *Short* v. *Brown University*, No. 17-cv-318 (D.R.I. filed July 6, 2017); *Cates* v. *Trustees of Columbia University in City of New York*, No. 16-cv6524 (S.D.N.Y. filed Aug. 17, 2016); *Cunningham* v. *Cornell University*, No. 16-cv-6525 (S.D.N.Y. filed Aug. 17, 2016); *Clark* v. *Duke University*, No. 16-cv-1044 (M.D.N.C. filed Aug. 10, 2016); *Henderson* v. *Emory University*, No. 16-cv-2920 (N.D. Ga. filed Aug. 11, 2016); *Wilcox* v. *Georgetown University*, No. 18-cv-422 (D.D.C. filed Feb. 23, 2018); *Stanley* v. *George Washington University*, No. 18-cv-878 (D.D.C. filed Apr. 13, 2018); *Kelly* v. *Johns Hopkins University*, No. 16-cv-2835 (D. Md. filed Aug. 11, 2016); *Tracey* v. *Mass. Institute of Technology*, No. 16-cv-11620 (D. Mass. filed Aug. 9, 2016); *Divane* v. *Northwestern University*, No. 16-c-8157 (N.D. Ill. filed Aug. 17, 2016); *Sweda* v. *University of Pennsylvania*, No. 16-cv-4329 (E.D. Pa. filed Aug. 10, 2016); *Nicolas* v. *Trustees of Princeton University*, No. 17-cv-3695 (D.N.J. filed May 23, 2017); *Daugherty* v. *University of Chicago*, No. 17-cv-3736 (N.D. Ill. filed May 18, 2017); *D'Amore* v. *University of Roch-*

brought by the plaintiffs' counsel in this case. Consequently, many of the complaints are nearly identical. *Compare, e.g.*, C.A.App.1-C.A.App.117 *with* Complaint, *Divane* v. *Northwestern University*, No. 16-c-8157 (N.D. Ill. Aug. 17, 2016).

In this case, the district court dismissed the share-class claim because "the inclusion of retail options does not, on its own, suggest imprudence," App. 182a, and then denied plaintiffs' motion to reconsider that dismissal, App. 148a-App.155a. The court denied the motion to dismiss with respect to the revenue-sharing claim (and plaintiffs' other claims), which proceeded to trial.

Over an eight-day bench trial, live testimony was heard from seventeen witnesses (another three witnesses' testimony was received solely through deposition designation), including six current or former Committee members, representatives from TIAA, Vanguard, and NYU's outside investment adviser, and several experts. App.69a-App.73a. More than six hundred documents were received into evidence. App.73a.

After trial, the court issued a lengthy opinion explaining the basis for rejecting plaintiffs' remaining claims. App.65a-App.146a. As relevant, the court rejected the revenue-sharing claim because NYU's use of the revenue-sharing arrangement for recordkeeping fees was not imprudent. App.119a-App.122a. The court found that revenue-sharing arrangements were "common," App.120a, and that NYU had "du[ly] con-

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*ester*, No. 18-cv-6357 (W.D.N.Y. filed May 11, 2018); *Munro* v. *University of Southern California*, No. 16- cv-6191 (C.D. Cal. filed Aug. 17, 2016); *Cassell* v. *Vanderbilt University*, No. 16-cv-2086 (M.D. Tenn. filed Aug. 10, 2016); *Davis* v. *Washington University in St. Louis*, No. 17-cv-1641 (E.D. Mo. filed June 8, 2017); *Vellali* v. *Yale University*, No. 16-cv-1345 (D. Conn. filed Aug. 9, 2016).

sider[ed] … the appropriate pros and cons" in rejecting plaintiffs' favored alternative—"a flat per-participant model"—including that the flat fee would not be "fair" to participants with "relatively small account balances" and was not available with TIAA, App.121a-App.122a; C.A.A.S.App.13-C.A.A.S.App.14.

### C. Court Of Appeals Proceedings

Plaintiffs appealed on several grounds. As relevant here, plaintiffs challenged the district court's dismissal of their share-class claim on the pleadings, but not its rejection of their revenue-sharing claim after trial. NYU argued that the dismissal was sound. Alternatively, NYU argued that plaintiffs' unappealed loss at trial on their revenue-sharing claim rendered harmless any error in the dismissal of plaintiffs' share-class claim.

While this case was pending in the court of appeals, a petition for certiorari was filed in *Divane* v. *Northwestern University*, No. 18-2569 (7th Cir.), one of the nearly identical suits brought against universities by plaintiffs' counsel. *See Hughes* v. *Northwestern*, No. 19-1401 (U.S.). In *Divane*—styled *Hughes* in this Court—the Seventh Circuit had affirmed dismissal on the pleadings of a claim that, like plaintiffs' share-class claim here, alleged that an ERISA fiduciary acted imprudently simply by not offering available lower-cost share classes to plan participants. The *Hughes* certiorari petition identified this case as one of the "many" others also involving "claims that plans imprudently offered retail-share classes of mutual funds." Pet. 15 & n.10, *Hughes* (July 19, 2020).

After this Court called for the views of the Solicitor General in *Hughes*, plaintiffs here moved the court of

appeals to stay the case pending this Court's resolution of *Hughes*, arguing that "[t]he question presented in the *Hughes* petition is substantially the same as the first question presented here"—i.e., whether the complaint stated a valid share-class claim—and therefore "any merits decision in *Hughes* may have a significant impact on the proper resolution of this appeal." C.A. Dkt. 227, at 3-4. The court of appeals denied the motion to stay without explanation. C.A. Dkt. 233.

This Court subsequently granted certiorari in *Hughes*. Thereupon, plaintiffs here again argued (now in a letter of supplemental authority under Federal Rule of Appellate Procedure 28(j)) that "*Hughes* may govern [the court of appeals'] decisions as to whether Plaintiffs' similar share-class allegations state a plausible claim for relief." C.A. Dkt. 234, at 1. Plaintiffs noted that some of the allegations in their complaint "appear verbatim in [the] *Divane*" complaint. *Id.*

The court of appeals then issued its decision, reversing the district court's dismissal of plaintiffs' share-class claim. The court concluded that "plaintiffs have sufficiently alleged that NYU acted imprudently in offering the number of retail-class shares identified in the complaint" and that the error was not rendered harmless by the trial decision on the revenue-sharing claim. App.16a-17a, App.20a. The court therefore vacated the judgment below in relevant part and remanded for proceedings. Judge Menashi dissented, concluding that the district court's trial findings on the revenue-sharing claim "foreclosed" the share-class claim. App.48a.

## REASONS FOR GRANTING THE PETITION

This petition presents the same question as *Hughes* v. *Northwestern*, No. 19-1401 (U.S.): whether a com-

plaint alleging that an ERISA fiduciary offered higher-fee retail shares when lower-fee institutional fees were available (even when the purpose for doing so, to pay fees through revenue sharing, is also alleged) states a claim for breach of the duty of prudence under ERISA. Therefore, this Court should hold this petition for its upcoming decision in *Hughes*.

This case and *Hughes* v. *Northwestern*, No. 19-1401 (U.S.) present the same legal question: whether a complaint states a claim for imprudence under ERISA by alleging merely that an employer provided mutual funds only in retail share classes when lower-cost institutional share classes of the same mutual funds were available. As plaintiffs have repeatedly argued, *see supra* pp.9-10, the relevant portions of the complaints here and in *Hughes* are nearly identical. *Compare, e.g.*, C.A.App.21 ("The only difference is that the retail shares charge significantly higher fees, resulting in retail class investors receiving lower returns. The share classes are otherwise identical in all respects.") *with Hughes* JA53 ("The only difference is that the retail shares charge significantly higher fees, resulting in retail class investors receiving lower returns. The share classes are otherwise identical in all respects."). Notably, the certiorari petition in *Hughes* identified this case as also involving a claim that "plans imprudently offered retail-share classes of mutual funds." Pet. 15 & n.10, *Hughes*. The similarity between the share-class claims asserted here and in *Hughes* is not coincidental: the same lawyers brought both cases.

That NYU presented an alternative ground to affirm the dismissal of plaintiffs' share-class claim—that the trial decision on the revenue-sharing claim foreclosed relief on the share-class claim—does not affect the merit of this certiorari petition. The court of ap-

peals rejected that alternative ground. Consequently, reversal on the question presented will result in reversal of the decision below and affirmance of the dismissal of the share-class claim. Thus, if the Court concludes that the *Hughes* plaintiffs failed to state a claim, as it should, then it will follow that plaintiffs' nearly identical allegations will also have failed to state a claim.

Accordingly, the Court should hold this petition pending its decision in *Hughes*, so that it may then use its standard practice of granting certiorari, vacating the judgment below, and remanding the case for reconsideration in light of its decision. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996).

## CONCLUSION

The petition for certiorari should be held pending this Court's decision in *Hughes*.

Respectfully submitted.

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