No. 21-724

In The
Supreme Court of the United States

NEW YORK UNIVERSITY,

Petitioner,

v.

DR. ALAN SACERDOTE, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly found a plausible breach of ERISA's fiduciary duty of prudence based on petitioner New York University's use of higher-cost retail-class shares of 63 mutual funds in its employees' retirement plans instead of lower-cost—but otherwise identical—institutional-class shares of the same funds that were available to the plans.

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INTRODUCTION

Although petitioner New York University ("NYU") now asserts that its petition should be held for *Hughes v. Northwestern University*, No. 19-1401, NYU took the exact opposite position in the proceedings below. After respondents ("Plaintiffs") moved for a stay and notified the Second Circuit that the forthcoming *Hughes* decision could have a bearing on the proper resolution of their appeal, NYU opposed the stay and insisted that *Hughes* involved materially different facts and was thus irrelevant. The Second Circuit denied Plaintiffs' request for a stay. It proceeded to decide the appeal and, without mentioning *Hughes*, reversed the Rule 12(b)(6) dismissal of Plaintiffs' mutual fund "share-class claim." Pet. App. 10a–28a.

Having previously objected to the Second Circuit waiting for this Court's guidance in *Hughes* while asserting that *Hughes* is irrelevant, NYU chose to waive the relief it now seeks from this Court. NYU cannot now, "simply because [its] interests have changed," pull an about-face, and argue that the Second Circuit should be compelled to revisit its decision because *Hughes* is directly on point. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Indeed, if the *Hughes* opinion ultimately supports Plaintiffs, NYU would surely flip-flop yet again and revert to the argument that *Hughes* is distinguishable and not controlling. The Court should prevent NYU from continuing to play "fast and loose with the courts" by promptly denying the petition. *Id.* at 750.

NYU's waiver and estoppel aside, a hold is unnecessary. After the Second Circuit issued its mandate, the district court granted NYU's motion for

a stay of further proceedings until this Court issues an opinion in *Hughes*. D. Ct. Doc. 405 at 2.[1] Thus, denying the petition will not prejudice NYU because it will not be forced to proceed in the district court before *Hughes* is decided, after which NYU can present any *Hughes*-related arguments to the district court in the first instance. Holding the petition would be inefficient and unnecessarily delay resolving this 2016 case.

For these reasons, discussed further below, the petition should be denied.

STATEMENT

I. Statutory background

To protect workers' retirement security, ERISA imposes upon plan fiduciaries "strict standards of trustee conduct . . . derived from the common law of trusts." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014). Fiduciaries must act "solely in the interest of the participants" and "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." 29 U.S.C. §1104(a)(1)(B). Because trust law principles define the contours of ERISA's duty of prudence, *Tibble v. Edison Int'l*, 575 U.S. 523, 528–29 (2015), ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones

[1] "D. Ct. Doc. ___" refers to the ECF document number in S.D.N.Y. No. 16-6284. "C.A. Doc. ___" refers to the ECF document number in Second Circuit No. 18-2707.

under trust law," *id.* at 530, as well as an obligation to avoid unnecessary expenses, because "[w]asting beneficiaries' money is imprudent." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc).

Congress authorized any plan participant to bring a civil action to recover "any losses to the plan resulting from" a breach of fiduciary duty and appropriate equitable relief. 29 U.S.C. § 1109(a), §1132(a)(2). That is the same authority granted to fiduciaries and the Secretary of Labor. 29 U.S.C. §1132(a)(2). Thus, "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties," and the Secretary "depends in part on private litigation to ensure compliance with the statute." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597–98 & n.8 (8th Cir. 2009).

II. Factual background

This case concerns two individual-account defined contribution retirement plans ("Plans") that NYU maintains for its employees; one for main campus faculty and staff ("Faculty Plan") and the other for NYU Medical School employees ("Medical Plan"). Pet. App. 4a; see 29 U.S.C. §1002(2)(A), §1002(34). Participants' retirement benefits in a defined contribution plan "are limited to the value of their own individual investment accounts," meaning excessive fees can "significantly reduce the value" of retirement savings. *Tibble*, 575 U.S. at 525.

Plaintiffs-Respondents are six NYU and NYU School of Medicine professors who participate in the Plans. Pet. App. 4a. They represent a certified 24,000-member class of all of the Plans' participants since

August 2010. *Id.*; see *Sacerdote v. New York Univ.*, No. 16-6284, 2018 WL 840364, at *3, *7–8 (S.D.N.Y. Feb. 13, 2018) (granting class certification).

NYU, through an internal committee of senior NYU officers, is responsible for administering the Plans, including determining the investment options for participants and negotiating the terms on which a recordkeeper is engaged to maintain participants' accounts. Pet. App. 4a–5a; 29 U.S.C. § 1102(a); 29 U.S.C. § 1002(21)(A).

III. Procedural background

A. The district court's partial Rule 12(b)(6) dismissal and trial decision

Plaintiffs brought suit on August 9, 2016 (D. Ct. Doc. 1) and filed the operative Amended Complaint on November 9, 2016 (D. Ct. Doc. 39). They contend that NYU breached its fiduciary duties regarding the Plans' fees and investments, resulting in losses to the Plans and participants' accounts due to excessive costs and performance losses. Pet. App. 6a.

NYU moved to dismiss the Amended Complaint under Rule 12(b)(6). D. Ct. Doc. 44. In so doing, NYU asserted that the complaint's allegations were "nearly identical" to those in *Hughes* (formerly *Divane*). D. Ct. Doc. 45, Mem. at 1 & n.1 (Dec. 12, 2016).

The district court granted in part and denied in part NYU's motion to dismiss. Pet. App. 157a. Relevant here, the district court denied the motion to dismiss Count III, concerning allegedly excessive recordkeeping fees, and Count V, to the extent it pertained to alleged imprudence in failing to remove

two persistently underperforming investments. Pet. App. 174a–180a. The court dismissed the portion of Count V alleging that NYU imprudently provided retail-class shares of 63 mutual funds instead of lower-cost institutional shares of the same funds, relying on a ground never argued by NYU and appearing nowhere in the record: retail-class shares "presumably … offer higher liquidity than institutional" shares. Pet. App. 180a–182a (citing *Loomis v. Exelon Corp.*, 658 F.3d 667, 672 (7th Cir. 2011)).[2]

Plaintiffs sought reconsideration of the share-class claim dismissal, pointing out that the district court's belief about a difference in liquidity was clearly wrong. D. Ct. Doc. 82 at 1–2. The district court acknowledged that "[u]pon further reflection," it had misread the cases upon which it relied. Pet. App. 149a n.1, 152a n.3. It nevertheless declined to modify the dismissal, relying on yet another ground never argued by NYU: a plausible breach of fiduciary duty requires allegations "not just that the inclusion of any specific investment was imprudent," but that the imprudent funds were "so prevalent that an *entire Plan was tainted*." Pet. App. 149a, 153a–155a (emphasis added). The court did not explain how many imprudent investments would taint a plan, if 63 were not enough.

The district court later entered judgment for NYU after a bench trial on the remaining claims, concluding that Plaintiffs had not met their burden of

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[2] The Seventh Circuit also heavily relied upon *Loomis* in dismissing the *Hughes* complaint. *Divane v. Nw. Univ.*, 953 F.3d 980, 986, 989–90, 992–93 (7th Cir. 2020), *cert. granted sub nom. Hughes v. Nw. Univ.*, 141 S. Ct. 2882 (2021).

proving that "NYU failed to engage in a prudent process" in how it monitored recordkeeping fees and certain investment options, or that the Plans suffered losses. Pet. App. 63a–64a, 74a.

B. On appeal, NYU waived a potential stay pending a decision in *Hughes*

Plaintiffs appealed, among other issues, the trial judgment for NYU and the Rule 12(b)(6) dismissal of the share-class claim.

While the appeal was under submission, the United States recommended that this Court grant certiorari in *Hughes*, asserting that the Seventh Circuit had "incorrect[ly]" dismissed allegations that plan fiduciaries imprudently provided numerous retail-class shares instead of available institutional-class shares of plan mutual funds. Br. for the United States as Amicus Curiae 1, 8–13, *Hughes v. Nw. Univ.*, No. 19-1401 (May 25, 2021).

Plaintiffs then submitted a FRAP 28(j) letter and moved to hold the appeal in abeyance pending resolution of *Hughes*, on the ground that the merits decision may affect the proper disposition of Plaintiffs' appeal, particularly the share-class issue. C.A. Doc. 225-1 (May 26, 2021); Doc. 227, Motion at 1, 3–4 (May 27, 2021). Plaintiffs asserted that awaiting this Court's guidance would benefit the parties and serve judicial efficiency. Doc. 227, Motion at 2, 6.

Before filing the motion, Plaintiffs sought NYU's consent to the stay. See 2d Cir. L.R. 27.1(b). NYU opposed the stay. C.A. Doc. 227, "Motion Information Statement." In responding to the Rule 28(j) letter, NYU disputed that the government's *Hughes* brief

"support[ed] Plaintiffs' arguments for reversal of the Rule 12(b)(6) dismissal of their share-class claim." C.A. Doc. 229 (May 28, 2021). NYU asserted that the share-class claim in *Hughes* was unlike the purported "per se challenge" in this case. *Id.* According to NYU, a critical distinction was that the *Hughes* defendants had "no apparent justification" for using the higher-cost funds. *Id.* Thus, NYU effectively urged the Second Circuit to ignore *Hughes*. The court then denied the motion to stay. C.A. Doc. 233 (June 2, 2021).

Plaintiffs later submitted another FRAP 28(j) letter noting that certiorari in *Hughes* had since been granted after the Second Circuit denied the stay. C.A. Doc. 234 (July 19, 2021). Plaintiffs reiterated that the forthcoming "decision in *Hughes* may control," among other issues, "whether Plaintiffs' similar share-class allegations state a plausible claim for relief." *Id.* Once again, NYU disputed that *Hughes* would have any potential bearing on the outcome. C.A. Doc. 236 (July 20, 2021). Regardless of any "similarities," NYU insisted that *Hughes* was "materially distinguish[able]" and, therefore, the decision in *Hughes* would necessarily be irrelevant to the issues before the Second Circuit. *Id.*

C. The Second Circuit reverses dismissal of the share-class claim

The Second Circuit affirmed the district court's trial findings that Plaintiffs had not proven a breach of fiduciary duty regarding recordkeeping fees. Pet. App. 38a–39a. Although the district court found that Plaintiffs were correct that consolidating from two recordkeepers to one for the Faculty Plan (as NYU had

done in 2013 for the Medical Plan) would have reduced recordkeeping fees, "a resource-intensive change of the computer systems" at the main campus prevented NYU from reasonably doing so before the project was completed. Pet. App. 40a–41a.

The court reversed the Rule 12(b)(6) dismissal of Plaintiffs' share-class claim, rejecting NYU's contention that affirmance of the trial decision rendered dismissal harmless. Pet. App. 10a–28a. Plaintiffs' allegations setting forth specific cost differentials "for the dozens of mutual funds as to each of which, they claim, NYU should have offered lower-cost institutional shares instead of higher-cost retail shares"—information that the fiduciaries could have discovered simply by reviewing fund prospectuses—raised a reasonable inference of a flawed fiduciary process. Pet. App. 16a–17a. The district court's reasoning, that the benefit of (supposedly) greater liquidity could be a prudent reason to use retail funds, "invert[ed]" the applicable pleading standard by drawing inferences in favor of NYU. Pet. App. 17a–18a. The district court further erred in denying reconsideration based on a mistaken belief that ERISA "preclude[s] critical assessment of individual funds." Pet. App. 18a–19a. "Fiduciaries cannot shield themselves from liability … simply because the alleged imprudence inheres in fewer than all of the fund options." Pet. App. 19a. And the volume of retail-class funds (63 funds out of 84 and 103 total options) was large enough to suggest that the Plans were tainted in their entirety. Pet. App. 19a–20a.

The court rejected NYU's position that dismissal of the share-class claim was harmless in light of the trial decision on Plaintiffs' recordkeeping-fee claims. Pet.

App. 20a–28a. Even though the fee differential between the retail and institutional shares provided a source of funds used to pay the Plans' recordkeepers (a practice known as "revenue sharing"), the district court's trial findings that NYU did not breach its duty in deciding to use an uncapped, percentage-of-assets pricing model instead of a flat per-participant pricing model was not akin to a finding "that the revenue-sharing costs themselves were prudent." Pet. App. 21a–23a. And because the district court's "no-loss" trial findings were "perplex[ing]" and "puzzl[ing]" in certain respects, that flawed analysis did not establish that the Plans suffered *no* loss from excessive recordkeeping costs or that "each of the retail-class shares selected was necessary to pay the recordkeeping costs and none of them resulted in lost opportunity costs." Pet. App. 23a–28a.

Having reversed dismissal of the share-class claim, the Second Circuit remanded for further proceedings. Pet. App. 3a. But given that the parties had already conducted discovery on the tried claims, the court recognized that the share-class claim may be resolved after "minimal" additional discovery. Pet. App. 23a.

No party sought rehearing. The Second Circuit issued its mandate on September 7, 2021. C.A. Doc. 248-1. The district court has since granted an unopposed stay of further proceedings pending resolution of *Hughes* or NYU's petition, if granted. D. Ct. Doc. 405 at 2 (Nov. 23, 2021).

REASONS FOR DENYING THE PETITION

Principles of waiver and estoppel preclude the relief NYU seeks, which is wholly unnecessary in any event.

This Court has cautioned that its "GVR power should be exercised sparingly." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (per curiam). As the Court explained, "[r]espect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket all counsel against undisciplined GVR'ing." *Id.* at 174. Because "[j]udicial efficiency and finality are important values," the "GVR power should not be exercised for 'mere convenience.'" *Stutson v. United States*, 516 U.S. 193, 197 (1996) (per curiam) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942)).

Although NYU now wishes to have the Second Circuit decide Plaintiffs' appeal with the benefit of this Court's opinion in *Hughes*, it opposed nearly identical relief below. Plaintiffs moved to hold their appeal in abeyance until *Hughes* was decided, asserting that a stay would serve judicial efficiency by ensuring that the Second Circuit would not have to revisit its decision in the event of any inconsistency with *Hughes*. C.A. Doc. 227, Motion at 2, 6. Had NYU joined or consented to Plaintiffs' motion, the Second Circuit may well have granted the stay. Instead, NYU opposed Plaintiffs' motion and asserted that *Hughes* would have no bearing on the proper resolution of the appeal because the claims were materially distinguishable. C.A. Doc. 227, Mot. Info. Statement; Doc. 229; Doc. 236. Having objected below to a post-*Hughes* decision by the Second Circuit, NYU waived the very relief that it now requests in the petition. Granting the relief that NYU seeks would require the court of appeals to decide the same issue a second time, a waste of resources that may have been avoided had NYU agreed to a stay below.

For similar reasons, estoppel principles favor denying the petition. The doctrine of judicial estoppel "protect[s] the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749–50. Although certain factors may be informative, a court's discretion in using the doctrine to prevent "improper use of judicial machinery" is not subject to "inflexible prerequisites or an exhaustive formula." *Id.* at 750–51.

Here, the record is clear that NYU has repeatedly and deliberately changed positions according to the exigencies of the moment. When the case was initially filed in 2016 and it was in NYU's interests to cast aspersions, NYU portrayed the allegations as "nearly identical" to other cases including *Hughes*. D. Ct. Doc. 45, Mem. at 1 & n.1. After the government filed its *Hughes* amicus brief explaining why those allegations are legally sufficient and this Court granted certiorari, NYU changed course by describing *Hughes* as "materially distinguish[able]" and inapposite. C.A. App. Doc. 229; Doc. 236. Now that the Second Circuit has ruled that the share-class claim must proceed, NYU seeks to avoid that result by reverting to its 2016 position, repeatedly asserting that this case and *Hughes* are "nearly identical." Petition at 8, 9, 11, 12. If this Court's opinion in *Hughes* supports the Second Circuit's ruling, NYU can be expected to shift directions yet again, renewing its effort to distinguish *Hughes*. The Court should exercise its discretion to disallow such tactics by denying the petition.

Moreover, the interlocutory posture and status of the district court proceedings make a hold unnecessary. In addition to remanding the share-class

claim, the Second Circuit also remanded claims for equitable relief against two members of NYU's fiduciary committee as to whom the district court had erroneously denied leave to add as parties. Pet. App. 28a–35a. Those claims undisputedly will proceed regardless of *Hughes* and regardless of the disposition of the share-class issue. The district court, however, has entered a stay until *Hughes* is decided. Thus, NYU already has a forum to present any *Hughes*-related arguments and will not be prejudiced if its petition is denied. It would be more efficient for the lower courts to address all remaining claims together in the first instance rather than a piecemeal approach.

Finally, if the Court were to hold the petition, the petition should be denied to the extent the *Hughes* opinion supports the decision below (*i.e.*, if the Court in *Hughes* vacates or reverses the Seventh Circuit).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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