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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Petitioner New York University ("NYU") requested that the Court hold the petition pending a decision in *Hughes v. Northwestern University*, No. 19-1401, and then grant the petition, vacate the judgment below, and remand for further consideration ("GVR"). Pet. at 2. The Court decided *Hughes* on January 24, 2022. *Hughes v. Northwestern University*, 564 U.S. ___, 2022 WL 199351 (2022). The opinion confirms that NYU's petition should be denied because the Second Circuit correctly reversed the Rule 12(b)(6) dismissal of respondents' "share-class" claim. *See* Pet. App. 10a–28a. A GVR order is not appropriate because there is no "reasonable probability" that the Second Circuit would now reach a different result based on *Hughes* "if given the opportunity for further consideration." *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam).

In *Hughes*, the Court vacated dismissal of a claim that NYU describes as "nearly identical" to the share-class claim addressed by the Second Circuit in this case. Pet. at 11–12. The Seventh Circuit relied on flawed reasoning in finding that the presence of some low-cost options in a defined contribution plan's investment lineup compelled dismissal of claims that plan fiduciaries imprudently failed "to provide cheaper and otherwise-identical" share classes of other plan options. *Hughes*, slip op. at 1–2, 4–5. That reasoning failed to take into account Northwestern's "duty to monitor *all* plan investments and remove *any* imprudent ones." *Id.* at 2 (citing *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015)) (emphasis added). The Seventh Circuit's "exclusive focus on investor choice" erroneously elided the fiduciary's duty to independently "determine which investments may be prudently included in the plan's menu of options" and "to remove an imprudent investment from the plan within a reasonable time." *Id.* at 5–6 (citing *Tibble*, 575 U.S. at 529–30). The Court thus remanded for the

Seventh Circuit to "reevaluate the allegations as a whole" under the correct standard, giving "due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.* at 6.

The Second Circuit's decision in this case is wholly consistent with *Hughes*. In contrast to the Seventh Circuit, the Second Circuit explicitly rejected the notion that a wide range of choices establishes a liability "shield" or precludes "critical assessment of individual funds." Pet. App. 19a & n.51. The court recognized that *Tibble* informs the prudence standard applicable to respondents' share-class claim. Pet. App. 15a & n.38. The court also rejected the district court's reliance on the Seventh Circuit opinions which formed the foundation of the lower court decisions in *Hughes*.[1] Given the "context-specific" plausibility inquiry, the fact that the overall range of fees was similar to the range upheld in those cases did not negate the possibility that NYU "acted imprudently by including a *particular* fund." Pet. App. 18a (emphasis added).

Finally, the Second Circuit gave due regard to NYU's contention that it made a reasonable fiduciary judgment to use higher-cost share classes because the fee differential provided a source of funds to pay the plans' recordkeepers. Pet. App. 20a–21a. After due consideration, however, the Second Circuit concluded that NYU's purported justification did not preclude

[1] *See* Pet. App. 11a & n.18, 15a (rejecting reliance on "cost ranges" approved in *Loomis v. Exelon Corp.*, 658 F.3d 667, 669 (7th Cir. 2011), and *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)); *cf. Divane v. Nw. Univ.*, 953 F.3d 980, 990 (7th Cir. 2020), *vacated and remanded sub nom. Hughes v. Nw. Univ.*, No. 19-1401, 2022 WL 199351 (U.S. Jan. 24, 2022) (relying on "decisions in *Loomis* and *Hecker*" to affirm dismissal); *id.* at 992 ("We concluded in *Hecker* and *Loomis* that plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty.").

relief as a matter of law on the current record. Pet. App. 20a–28a.

In sum, because the decision below is consistent with the principles set forth in *Hughes*, there is no reasonable probability that the Second Circuit would reach a different result if this Court were to remand the share-class claim for further consideration in light of *Hughes*. *Cf. Lords Landing*, 520 U.S. at 896. A GVR order, therefore, is not appropriate, and the petition should be denied.

Respectfully submitted,

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