No. 23-1007

IN THE
Supreme Court of the United States

CASEY CUNNINGHAM, ET AL.,
Petitioners,

v.

CORNELL UNIVERSITY, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including ERISA litigation. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that the decision below and similar decisions from sister circuits institute significant but unwarranted changes to the pleading standards applicable to ERISA claims. These changes would have the effect of undermining the statute's explicit purpose of assuring that those managing and administering these plans maintain fiduciary duties, including obligations of loyalty and prudence, to guard against prohibited transactions and poor management of the funds entrusted to their supervision and critical to employees, beneficiaries, and retirees later in life.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

ERISA authorizes a civil action "by a participant . . . for appropriate relief [for breach of fiduciary duty]." 29 U.S.C. § 1132(a)(2). It does so to advance its overriding purpose of promoting the interests of employees in their benefit plans and securing their rights by imposing essential duties and responsibilities on those the law deems to be fiduciaries.

The comprehensive protection afforded by ERISA requires that a fiduciary put aside all other considerations to act prudently and loyally to protect the plan from wasted expenditures and poor or indifferent management. Those obligations reflect a considered and explicit congressional judgment that "the continued well-being and security of millions of employees and their dependents" who benefit from employee stock ownership plans ("ESOPs") remain the fiduciaries' sole concern. *See* 29 U.S.C. § 1001(a). To enforce those duties and protect employee interests, ERISA authorizes civil actions but imposes no heightened pleading requirements.

This Court has never insisted upon specialized pleading requirements on plaintiffs in cases like this one—and should not devise new ones now in what would amount to judicial amendment of ERISA's text. The standard pleading requirements of Rule 8 provide ample protection against unwarranted litigation because it requires a sufficient factual basis for a legitimate claim.

Moreover, policy considerations of the type advanced by Respondent Cornell University below and in its Brief in Opposition provide no basis for judicial amendment of the statute to add new requirements. The assertion that the specter of increased ERISA litigation justifies the imposition of additional hurdles to curb such litigation fails for three fundamental reasons. First, the claim lacks any real-world basis. In fact, the available data indicates that private ERISA civil litigation is insubstantial and decreasing. Second, the problem that ERISA litigation addresses remains significant, as data from the Department of Labor and its efforts in this area indicate. And, finally, the importance of these funds in providing for the retirement of a significant portion of the population at a time of uncertainty about the integrity of the Social Security system cannot be overstated.

In sum, on this 50th anniversary of ERISA, the protections it provides and the remedies it enables remain as needed as ever.

ARGUMENT

I. THE PROTECTION OF EMPLOYEE BENEFIT PLANS FROM POOR OR INDIFFERENT MANAGEMENT AND CONFLICTS OF INTEREST PROVIDES THE GUIDING STAR FOR ERISA.

For thousands of years, sailors found no better guidance in determining where they were and how to get where they intended than through an understanding of the seasonal positions of constellations. In navigating federal statutes that establish a private right

of action, this Court looks to congressional intent as its guiding star. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Statutory intent . . . is determinative.").

A statute's text provides the best evidence of that congressional intent, *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), and provides a more reliable and controlling metric than "legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). That is why this Court has often said that where the text is clear, no further inquiry is necessary. *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citations omitted). That approach to statutory construction reflects the axiom that courts "presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54 (1992). Given that the Congress is the policymaker, this Court held that it "may not 'replace the actual text with speculation as to Congress' intent.'" *Castro-Huerta*, 597 U.S. at 642. (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)). The issue in this case requires this Court to issue the same admonition to those, as in this case, who seek judicial amendment of a statute.

A. Text, Structure, and Explicit Purpose Require Reading ERISA to Provide "Ready Access" to the Federal Courts.

A private right of action, as is at issue here, is the product of congressional action. *Touche Ross & Co. v.*

Redington, 442 U.S. 560, 578 (1979). In ERISA, Congress left no doubt that it created one. The statute authorizes a civil action "by a participant . . . for appropriate relief [for breach of fiduciary duty]." 29 U.S.C. § 1132(a)(2). If further clarity were necessary, the statute also declares it provides "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Although those forthright statements, as well as others, suffice to demonstrate the requisite congressional intent, the text also aligns perfectly with purposes expressed by this Court in construing the statute and with other explicit statutory language. ERISA embraces a singular overriding purpose: "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).

ERISA stands as a "comprehensive and reticulated statute" that resulted from nearly a decade of congressional study of the Nation's pension plans, which, in turn, produced detailed findings. *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361–62 (1980). The congressional review of the landscape of pension plans found lax management standards and significant self-dealing that threatened the "soundness and stability" of the plans. 29 U.S.C. § 1001(a). As members of this Court have described it, Congress was "[c]oncerned that many pension plans were being corruptly or ineptly mismanaged and that American workers were losing their financial security in retirement as a result." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993) (White, J., dissenting).

To address the poor stewardship of those who managed plans, ERISA "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility." *Shaw*, 463 U.S. at 91; *see also* 29 U.S.C. § 1001(b) (stating that the statute protects participants in employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and *ready access to the Federal courts*") (emphasis added). ERISA's safeguards "insure against the possibility that the employee's expectation of the benefit would be defeated through poor management." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

ERISA not only erects mandatory responsibilities as fiduciaries for plan managers, *see* 29 U.S.C. § 1102(a), but it also extends those fiduciary obligations to all those "who exercise[] discretionary control or authority over the plan's management, administration, or assets." *Mertens*, 508 U.S. at 251; *see* 29 U.S.C. § 1002(21)(A).

Fiduciaries do not serve some vague or unstructured role in managing plans. Instead, ERISA imposes "detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Mertens*, 508 U.S. at 251−52 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142–43 (1985)); *see also* 29 U.S.C. § 1104(a).

Fiduciaries also must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries." *Id.* at § 1104(a)(1). One responsibility expressed in the statute assures that expenses for administering the plan remain reasonable. *Id.* at § 1104(a)(1)(A). To that end, fiduciaries must discharge their duties "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 like character and with like aims." *Id.* at § 1104(a)(1)(B).

As this Court observed, these fiduciary responsibilities reflect the common law of trusts and go beyond the statutory enumeration of responsibilities. *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000).[2] Thus, in addition to exercising prudence, a fiduciary must exercise loyalty. *Id.* In fact, "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties," creating a duty "'stricter than the morals of the market place.'" *Id.* at 224–25 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (Cardozo, J.)). In fact, a fiduciary's "duty of prudence trumps the instructions of a plan document, such as an instruction

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[2] The analogy to traditional common-law trusts, however, is imperfect and has limited value. *See* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. Rev. 629, 654–58 (2016). Indeed, this Court has acknowledged that "trust law does not tell the entire story" and may "offer only a starting point" for a deeper analysis. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

to invest exclusively in employer stock even if financial goals demand the contrary." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014). Thus, there is little wonder that courts have repeatedly characterized the fiduciary duty under ERISA as the "highest duty known to the law." *See LaScala v. Scrufari*, 479 F.3d 213, 221 (2d Cir. 2007) (citation omitted); *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003) (citation omitted); *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996) (citation omitted).

Congress wrote ERISA and imposed these obligations with a full understanding of the competing currents a fiduciary may face. The statute recognizes that an employer-sponsor may take certain actions, as an employer, that may not align with its fiduciary duties as a plan sponsor. In such circumstances, however, the statute requires "the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. That priority, when acting as a fiduciary, reflects "a special congressional concern about plan asset management" and maintenance of the "plan's financial integrity." *Varity Corp.*, 516 U.S. at 512.

To enforce these obligations, ERISA authorizes the Secretary of Labor, as well as any plan beneficiary, participant, or fiduciary, to bring a civil action to obtain relief from a breach of these fiduciary duties that have an adverse impact on the value of the plan. 29 U.S.C. § 1109(a); *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 (2008). As this Court noted, the thread that unites all these potential plaintiffs is "the common interest shared by all four classes

is in the financial integrity of the plan. *Russell*, 473 U.S. at 142 n.9.

ERISA treats a violation of fiduciary responsibilities assigned by 29 U.S.C. §§ 1101–1114, with utmost seriousness, rendering the fiduciary

> 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.

29 U.S.C. § 1109(a).

Moreover, ERISA expressly provides for injunctive relief to stop the improper conduct with a continuing potential to harm the integrity of the benefit plan and to remove the wrongdoers. *See* 29 U.S.C. §§ 1109, 1132(a)(2), (3). Congress could not have been clearer than the language adopted in establishing a cause of action when a fiduciary breaches its duties that an action for restitution, disgorgement, and/or equitable relief lies to remedy what remains a continuing duty. *See Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000).

B. ERISA Authorizes a Cause of Action for When a Fiduciary Engages in Dealings with a Party in Interest.

Among its means of protecting against the dissipation of funds in benefit plans, "ERISA prohibits fiduciaries from involving the plan and its assets in certain kinds of business deals." *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996). These prohibitions, found in Section 406 of ERISA, are codified at 29 U.S.C. § 1106. Congress enacted this section "to bar *categorically* a transaction that [is] *likely* to injure the pension plan," *C.I.R. v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993) (emphasis added), and to "prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries." *Reich v. Compton*, 57 F.3d 270, 275 (3d Cir. 1995) (Alito, J.).

Section 406 provides that a fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect ... furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). In those circumstances, "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA." *Spink*, 517 U.S. at 889 n.3 (approvingly quoting *Spink v. Lockheed Corp.*, 60 F.3d 616, 623 (9th Cir. 1995)). As a remedy, "[p]rofessional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary; must disgorge assets and profits obtained through participation as parties-

in-interest in transactions prohibited by [29 U.S.C. § 1106].” *Mertens*, 508 U.S. 248, 262 (1993). Equitable relief is also available. 29 U.S.C. § 1132(a)(3); *see also CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011) (embracing categories of relief “*typically* available in equity”) (citations omitted; emphasis in orig.). Petitioners have made allegations invoking ERISA’s protections against the Cornell University contracting with a party in interest to furnish services, when other service providers would offer lower costs to the plan.

II. ERISA DOES NOT IMPOSE A HEIGHTENED PLEADING STANDARD ON A PLAINTIFF.

Nothing in ERISA’s text suggests that Congress imposed a heightened pleading standard on plaintiffs who bring a civil action to protect the integrity of their benefit plan from fiduciary nonfeasance or malfeasance.

A. This Court Established That the Usual Pleading Rules Apply to ERISA.

ERISA does not textually impose a heightened pleading standard on a plaintiff in cases involving a breach of fiduciary obligations. In *Dudenhoeffer*, this Court tested the operative complaint at issue utilizing the garden-variety plausibility standard found in Rule 8. 573 U.S. at 427. It held that the complaint in that case wanting under that standard. *Id.* Significantly, it did not find all such similar allegations implausible even if the complaint at issue was. Instead, *Dudenhoeffer* suggested that it may be possible for a plaintiff to “plausibly allege imprudence on the basis of publicly

available information," so long as the plaintiff pleaded more information that would show that the basis for the fiduciary's reliance was imprudent. *Id.* at 427.

Dudenhoeffer's position on pleading was reiterated more recently in *Hughes v. Northwestern University*, 595 U.S. 170 (2022). There, the plaintiffs alleged that the fiduciary "failed to monitor and control the fees they paid for recordkeeping, resulting in unreasonably high costs to plan participants." *Id.* at 174. A second fiduciary lapse identified in the complaint contended that some investments offered "carried higher fees than those charged by otherwise identical 'institutional' share classes of the same investments, which are available to certain large investors." *Id.* In addition, the complaint alleged that the fiduciary offered "too many investment options," which "caused participant confusion and poor investment decisions." *Id.*

In emphasizing the proper way to entertain a motion to dismiss in an ERISA case, this Court held that courts must "apply[] the pleading standard discussed in *Ashcroft v. Iqbal*, and *Bell Atlantic Corp. v. Twombly*." *Id.* at 177 (citations omitted). That standard does not employ the particularized pleading requirement found in Rule 9.

Still, the *Twombly*/*Iqbal* standard is hardly toothless. To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide sufficient plausible averments to show the pleader is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard requires a plaintiff to show at the pleading stage

that success on the merits is more than a "sheer possibility." *Id.*; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true."). A plaintiff meets that challenge by providing "some further factual enhancement" to take a claim of fiduciary duty violation from the realm of "possibility" to "plausibility." *Id.* at 557.

Even so, the plausibility standard should not be confused with probability or certainty. Plausibility "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" that supports the allegation. *Id.* at 556. In fact, "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.'" *Id.* (citation omitted).

Although a judge "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506, 508 n.1 (2002), that limitation does not apply to conclusory assertions, including legal conclusions. *Iqbal*, 556 U.S. at 678. It remains important, however, to keep in mind that a plaintiff remains entitled to all "reasonable inferences" drawn from "well-pleaded factual allegations." *Id.* at 678–79. Moreover, because a complaint challenged under Rule 12(b)(6) should be "construed generously," courts may use briefing on the motion to dismiss "to clarify allegations in her complaint whose meaning is unclear." *Pegram*, 530 U.S. at 230 n.10.

In the end, the complaint must meet the requirements of Rule 8, which "marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era." *Iqbal*, 556 U.S. at 678. What the Second Circuit required conflicted with the approach established in *Twombly/Iqbal*.

B. Petitioners Met Their Pleading Burden.

Petitioners here amply satisfied Rule 8's standards. As the Second Circuit described the Complaint, Petitioners pleaded that "a reasonable recordkeeping fee for the Plans would have been $1,050,000 in the aggregate for both Plans combined," utilizing "a flat fee based on $35 per participant." Pet. App. 25a (quoting Complaint at A. 111). The pleading further alleged that the plans paid significantly larger fees, amounting to between $2.9 and $3.4 million for one plan and between $1.8 and $2.2 million for the other, *Id.* at 26a (quoting Complaint at A. 111–12), which added up to a minimum of $4.7 million in the aggregate, or more than four times as much ($3.65 million more than what a "reasonable fee" would have been). Rather than translate into a charge of $35 per participant, the fees paid ranged from $115 to $200 per participant. *Id.* (quoting A. 111–12).

The district court in this case rewrote ERISA to add requirements that have no textual support. It held that, to make a claim about a prohibited transaction involving a party in interest, plaintiffs must show "some evidence of self-dealing or other disloyal conduct." Pet. App. 109a. The requirement, invented out of whole cloth, was doubly wrong. First, it departed

from ERISA's text, which makes clear that self-dealing or disloyal conduct is not a prerequisite for a Section 406 violation, but that fiduciary duties ineptly discharged creates liability because it threatens the "plan's financial integrity." *Varity Corp.*, 516 U.S. at 512. Thus, as this Court observed in *Hughes*, fiduciaries have a continuing duty to ensure that recordkeeping fees are not too expensive. 595 U.S. at 177. The district court's requirement of evidence of scienter demonstrating improper purpose is not part of the legislative scheme.

Second, the district court conflated evidentiary requirements with the pleading standards. This Court has previously scored courts that make the same error. *See Swierkiewicz*, 534 U.S. at 510 (holding it improper to require evidentiary standards be met in a pleading).

The Second Circuit adopted a somewhat different but no less unwarranted approach. It held that

> to plead a violation of § 1106(a)(1)(C), a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the "furnishing of . . . services . . . between the plan and a party in interest" *where that transaction was unnecessary or involved unreasonable compensation.*

Pet. App. 18a–19a.

Although the Second Circuit stated that "[o]ur reading flows directly from the text and structure of

the statute," *id.* at 19a, it created a safe-harbor for presumptively reasonable compensation without basis, allowing the exception to swallow the rule. It explicitly eschewed one teaching of this Court that a fee "so disproportionately large that it bears no reasonable relationship to the services rendered" raises an inference that it was not "the product of arm's length bargaining," *Id.* at 22a (citing *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010)), by finding that "routine payments made to service providers" cannot be analyzed that way.

The error in the court below is twofold. First, it requires pleading elements that would support an accusation of bad faith. *Id.* Yet, as already discussed, an inept or indifferent fiduciary fails to monitor costs on an ongoing basis, switching recordkeeping providers when it harms the financial integrity of the plan. Secondly, it attributes a presumption of prudence to the fiduciary absent a showing of bad faith.

That stance is palpably wrong. ERISA requires fiduciaries to discharge their duties "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). This fiduciary duty of prudence governs the conduct of fiduciaries. *Hughes*, 595 U.S. at 172. It is hardly prudent to award a recordkeeping contract without understanding the marketplace for such services. So when the fiduciary imposes needlessly expensive costs for a service that should plausibly be less expensive, the complaint states a

cause of action. Certainly, a pleaded difference of more than $3.65 million—which represents more than three times what the Petitioners claim are reasonable costs—fits that rubric of being unreasonable, plausible, and needlessly expensive even without knowing any special requirements Cornell may have had.

Perhaps even more tellingly erroneous is the framework adopted by the Second Circuit. By finding recordkeeping fees per se reasonable absent an allegation of bad faith, the court accorded fiduciaries a presumption of prudence. Yet, this Court emphatically rejected that position: "the law does not create a special presumption favoring ESOP fiduciaries." *Dudenhoeffer*, 573 U.S. at 418. In fact, this Court emphasized that ERISA "makes no reference to a special 'presumption' in favor of ESOP fiduciaries" and "does not require plaintiffs to allege that the employer was on the 'brink of collapse,' under 'extraordinary circumstances,' or the like." *Id.* at 419. By the same token, demonstrating the unreasonableness of recordkeeping fees does not require overcoming a presumption in favor of ESOP fiduciaries by alleging bad faith.

Although it is true that Section 1108(b)(2)(B) indicates that there are certain requirements that must be met for compensation to be reasonable, the only provision that elaborates on what is reasonable exempts errors or omissions made when "acting in good faith and with reasonable diligence." 29 U.S.C. § 1108(b)(2)(B)(vii). The text provides no definition of reasonable. Yet, it is not an unfamiliar term.

As Justice Scalia once explained, "[r]easonable is reasonable," and not part of a calculation about improper motive. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 133 (2008) (Scalia, J., dissenting). It has play in the joints so that reasonable minds could disagree about what the "best" or "right" answer is so that liability should not attach to a decision within that range of choices. *Id*.

Here, a choice that is more than four times as expensive in the millions cannot be within the range of reasonable choices. It should easily survive a motion to dismiss.

Moreover, requiring plaintiffs to prove *in the pleading* that another recordkeeper charging lower fees would not have provided inferior service, as the Second Circuit did here, Pet. App. 26a, would apply an evidentiary metric that plaintiffs are ill-positioned to allege and which would not be obvious to outsiders. *Cf. Swierkiewicz*, 534 U.S. at 510. It would also impose a heightened pleading standard, rather than the plausibility requirement discussed in *Twombly* and *Iqbal*. Plausibility is satisfied at the pleadings stage when plaintiffs alleged, as they did here, that Cornell's failure to obtain comparable recordkeeping services at a substantially lesser rate was outside the range of reasonable actions that the university could undertake as a fiduciary. *Cf. Hughes v. Nw. Univ.*, 63 F.4th 615, 633 (7th Cir. 2023) (on remand from this Court). Certainly, Petitioners' allegations provide "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" that supports the allegation. *Twombly*, 550 U.S. at 556.

In fact, this Court's decision in *Hughes* signaled the appropriateness of the pleading at issue here. It reaffirmed a continuing duty to monitor service fees. 595 U.S. at 177. On remand, the Seventh Circuit correctly read the decision to hold that "fiduciaries who fail to monitor the reasonableness of plan fees and fail to take action to mitigate excessive fees—such as by adjusting fee arrangements, soliciting bids, consolidating recordkeepers, negotiating for rebates with existing recordkeepers, or other means—may violate their duty of prudence." *Hughes*, 63 F.4th at 626. Where, as here, those fees go to a "categorically" prohibited party in interest and a continuing and systematic review of those fees is required, a cognizable claim is made out on the basis of Cornell's failure to seek comparable services at lower costs. After all, what may have been reasonable initially, may no longer be reasonable at a later date, a context-specific inquiry. *See Dudenhoeffer*, 573 U.S. at 425.

C. Congress Knows How to Impose Heightened Pleading Standards When a Statutory Cause of Action Imposes One and Its Choice Should Not Be Supplanted on the Basis of Policy Arguments.

In contrast to the absence of textual support in ERISA for heightened pleading requirements, other statutes demonstrate that Congress knows how to do so when it wants to impose pleading requirements. *See, e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78u-4, 78u-5). The PSLRA explicitly requires a complaint to specify all alleged misleading statements and

"state with particularity" facts supporting any claim made on the basis of information and belief. 15 U.S.C. § 78u-4(b)(1). It thus adopts a heightened pleading standard that at least some circuit courts have likened to pleading fraud under the standard adopted in Rule 9(b). *See, e.g.*, *City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.*, 70 F.4th 668, 680 (3d Cir. 2023).

This Court takes Congress at its word (or its text). When the statutory language, as here, gives no hint of pleading requirements, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citations omitted)).

Policy arguments about the consequences of not requiring greater particularity cannot supersede the statutory text to require something that Congress did not choose to express in the statute's language, even when it is possible, unlike in this instance, that some extratextual intent can somehow be gleaned from other sources. *See Castro-Huerta*, 597 U.S. at 642. Instead, policy arguments about limiting a category of litigation belong in a different venue than this one, for such arguments are "properly addressed to Congress, not this Court," because "[i]t is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018).

This Court correctly rejected pleas like those advanced by Cornell here in *Swierkiewicz*, 534 U.S. 506.

The Court, in the context of Title VII and the Age Discrimination Act, denied that a complaint had to contain specific facts sufficient to establish a prima facie case of discrimination under the burden-shifting regime of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). It reasoned that requiring greater "particularity" in Title VII complaints would "would 'too narrowly constric[t] the role of the pleadings." *Swierkiewicz*, 534 U.S. at 511 (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). This Court also noted that requiring a heightened pleading standard would improperly import evidentiary standards into the pleading. *Id.* at 510.

Instead, this Court held, "the ordinary rules for assessing the sufficiency of a complaint apply." *Id.* at 511. This Court further explained that what constitutes a prima facie case "can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Id.* at 512 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). The complexity and individualistic nature of discrimination claims require "flexible evidentiary standards" and "should not be transposed into a rigid pleading standard." *Id.* Instead, the Court held that "Rule 8(a)'s simplified pleading standard applies." *Id.* at 513.

The same should apply to these claims, as *Dudenhoeffer* and *Hughes* make plain because ERISA disputes can be "exceedingly complicated." *Conkright v. Frommert*, 559 U.S. 506, 509 (2010). Employers have a clear choice. They need not offer employee benefit plans, nor is the scope of such plans dictated by law. *Spink*, 517 U.S. at 887. However, once an employer undertakes to provide such a plan, they must act as

fiduciaries with the loyalty and prudence that puts the interests of their covered employees, beneficiaries, and retirees first.

III. POLICY ARGUMENTS PROVIDE NO BASIS TO DEPART FROM THE CONGRESSIONAL DESIGN OF ERISA.

Cornell's plea that this Court retrofit ERISA to reduce the litigation it authorizes mirrors a similar entreaty rejected in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985), with respect to the RICO statute. There, this Court spurned the Second Circuit's atextual attempt to confine the reach of civil RICO for the same reason Respondents argue here: to avoid a proliferation of civil litigation under the statute. *Compare id.* at 488–90 *with* BIO 15. In *Sedima*, the Second Circuit had expressed distress at range of complaints grounded in civil RICO. 473 U.S. at 499. This Court reacted to that characterization by holding that plaintiffs' uses of RICO were consistent with the congressional design, which established the "breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud." *Id.* at 500.

A. The Department of Labor Continues to Identify Significant Numbers of Fiduciary Violations.

Data demonstrates that the need for ERISA protections for employee benefit plans remains acute. The Employee Benefits Security Administration (EBSA) in the Department of Labor serves as the governmental unit "primarily responsible for ensuring that employer-sponsored retirement plans and group health

plans comply with [ERISA].” Letter from Tranchau (Kris) T. Nguyen, Ed., Workforce, and Income Sec. Issues Director, GAO, to Rep. Robert C. “Bobby” Scott & Rep. Frederica S. Wilson, at 1 (Oct. 24, 2023), https://www.gao.gov/assets/d24105667.pdf [hereinafter, “GAO Letter”]. It issues annual reports detailing its own investigations, settlements of fiduciary violations, and referrals to civil litigation on behalf of the Department of Labor.

In FY 2023, the most recent data available, the agency recovered $1.435 billion in direct payment to plans, participants, and beneficiaries. EBSA, Fact Sheet: EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results (last visited Nov. 19, 2024). The numbers reflect agency oversight of a variety of plans, including 765,000 private pension plans. *Id.* ERISA-covered private sector pension and welfare plans hold about $12.8 trillion in assets covering 153 million workers, retirees, and dependents. *Id.*

During FY 2023, EBSA closed 731 civil investigations, resolving 69 percent of them with favorable results that restored funds to the plans. *Id.* The vast majority of these efforts result in recoveries through enforcement actions, voluntary fiduciary corrections, and recoveries through an informal complaint process. In FY 2023, only 50 matters were incapable of resolution out of court and were referred to the Solicitor of Labor to pursue through litigation. *Id.* The data from FY 2022 was nearly identical to FY 2022. EBSA, Fact

Sheet: EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2022 (last visited Nov. 19, 2024) (reporting a recovery of over $ 1.4 billion, 66 percent of 907 civil investigations closed favorably, and 55 investigations referred for litigation in FY 2022).

Although the numbers remained largely constant between the two years, FY 2023 and 2022 marked reductions in what the EBSA found the year before, when it recovered more than $2.4 billion, closed 1,072 civil investigations with a 69-percent favorable recovery rate, and referred 70 cases to litigation. ESBA, Fact Sheet: EBSA Restores Over $2.4 Billion to Employee Benefit Plans, Participants and Beneficiaries, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2021.pdf (last visited Nov. 19, 2024).

The volume of serious ERISA violations investigated by the ESBA demonstrates an ongoing need for enforcement of ERISA's guarantees. Thus, the problem that ERISA was designed to address requires that the statute not be encumbered by artificial restraints imposed by the courts and far afield from the congressional design.

B. Private ERISA Litigation Provides a Needed Supplement to Government Action But It Is Not Growing.

It is well understood that agency actions represent a limited picture of the issues that exist within their

regulated field. This is certainly true of oversight on the stewardship of employee benefit plans. Agency resources are uniformly limited. For that reason, regulatory regimes often rely on private litigation to supplement the government's efforts.

For example, the Food and Drug Administration "engages in more than 40,000 enforcement actions annually, ranging from verifying voluntary corrections to issuing Warning Letters and initiating litigation," FDA Enforcement Manual, ¶ 141 Recent Enforcement Trends, 2019 WL 1747799 (Oct. 2024 Supp.). Even so, the FDA "traditionally regarded" state tort lawsuits as necessary and complementary in achieving its drug safety goals. *See Wyeth v. Levine*, 555 U.S. 555, 578 (2009). Similarly, in the field of securities litigation, this "Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to [federal government] criminal prosecutions and civil enforcement actions." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007).

The ESBA struggles to maintain the oversight assigned to it. The Government Accountability Office found that from 2013 to 2021 period appropriations for the ESBA remained unchanged and actually declined when accounting for inflation. GAO Letter, at 4–5. At the same time, the agency was assigned new responsibilities through legislated acts, further straining its ability to employ its limited funding for enforcement. Plainly, like the FDA and the SEC, it counts on private litigation efforts to supplement its ability to enforce the law.

Still, ERISA litigation is hardly ballooning or overwhelming. According to an article in Law360 by lawyers who represent defendants in ERISA litigation, 2023 saw the lowest number of new ERISA class actions filed since 2018 with just over 100 new actions. William Delany, Lars Golumbic, & Samuel Levin, *ERISA Litigation Faces New Frontiers in 2024*, Law360 (Jan. 17, 2024), https://www.groom.com/wp-content/uploads/2024/01/Law360-ERISA-Litigation-Faces-New-Frontiers-In-2024-1.pdf. On the other hand, "an all-time record of more than 200 new class actions were filed in 2020." *Id.* These are not numbers that should sound alarms.

Another law firm that represents ERISA defendants put the numbers even lower by excluding litigation over health care plans and focusing solely on ERISA-governed retirement plans. Goodwin Procter examined new ERISA filings from 2019 to 2023. It found that 33 new cases were filed in 2019. *ERISA Litigation Update*, Goodwin Procter (Jan. 18, 2024), https://www.goodwinlaw.com/en/insights/newsletters/2024/01/newsletters-erisa-litigation-update-q4 (detailing the notable trends in ERISA litigation concerning retirement plans in 2023). The following year, the highest number of filings were found (110 in all). *Id.* The number dropped to 56 in 2021, reached 88 in 2022, and diminished by 50 percent to 44 new filings in 2023. *Id.* The bulk of those 2023 filings (28 in total), were filed against plans with more than $1 billion in assets. *Id.*

When compared to the numbers of enforcement actions the ESBA has undertaken on a yearly basis, the

ERISA filing numbers hardly indicate a growing or uncontainable trend. Moreover, Cornell's assertion that "there has been a dramatic rise in the number of ERISA lawsuits over recordkeeping fees in recent years," BIO 15, appears to be based on questionable information. In its only citation of authority for its claim of growing litigation, Cornell relies on Daniel Aronowitz, Exposing Excessive Fee Litigation Against America's Defined Contribution Plans 3 (Dec. 2020), https://perma.cc/S65H-K9TW. The publication cited, however, is not a dispassionate examination of the issue, nor does it show how it arrived at its conclusion. Instead, it is the product of an underwriting company that insures fiduciary liability, Euclid Specialty. *Id.* at 22.[3] Its author, Daniel Aronowitz, is the "managing principal and owner of Euclid Specialty." *Id.*[4] The cited passage, the very first sentence of the publication's introduction, decries "copy-cat lawsuits" with "90 filed in 2020 alone" over "investment options that are commonplace and longstanding." *Id.* at 3. Still, the publication focuses its ire on the amounts that insurers have paid in settlements and attorney fees. *Id.* at 11. Nothing in this so-called "white paper" supports the assertion of a "dramatic rise" in fee lawsuits. The clos-

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[3] Euclid Specialty, which published the document cited by Cornell, was part of Euclid Fiduciary, which is now rebranded as Encore Fiduciary after its sale to the Specialty Program Group. *See The Story Behind the Rebranding: Euclid Fiduciary is Now Encore Fiduciary*, Encore Fiduciary, https://encorefiduciary.com/euclid-is-now-encore/ (last visited Nov. 26, 2024).

[4] Aronowitz is now president of Encore Fiduciary. *Meet the Encore Fiduciary Team*, Encore Fiduciary, https://encorefiduciary.com/meet-the-team/ (last visited Nov. 26, 2024).

est it comes to anything along those lines is a statement, not cited by Cornell, that "[e]xcessive fee filings have become *frequent in the last several months"* of 2020 while also admitting that "we do not pretend to have perfect statistics." *Id*.

Still, the thrust of the paper is to complain about excessive fee litigation of the kind this Court held appropriate in *Hughes*, two years after Euclid's paper was written. Its complaint suggests that the cases are improper because of the *settlements and attorney fees it has paid* to plaintiffs' counsel as an insurer, *id.*, while also defending its clients' recordkeeping fees. *Id.* at 7–8. It concludes with two recommendations: (1) plan sponsors should "engage in risk management to reduce plan recordkeeping and investment fees, id. at 20; and (2) the Department of Labor should "provide clarity and uniform guidance for plan sponsors" on "the appropriate level of fees based on plan size and participant count." *Id.* at 21. It is thus a position or lobbying document and not a study that should invite the type of judicial activism that Cornell seeks. Indeed, when a far more careful study of punitive damages was partly funded by Exxon, this Court "decline[d] to rely on it." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008).

Exxon Shipping also points out another problem with these types of public-relations campaigns designed to move the law without empirical basis. After a steady drumbeat of claims convinced members of this Court that punitive damage were skyrocketing, *see, e.g.*, *Browning-Ferris Indust.. v. Kelco Disposal,*

Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing."), the Court was presented with careful empirical data years later in *Exxon Shipping*, where this Court found that "the most recent studies tend to undercut much of [the criticism of punitive damages' size]." 554 U.S. at 497. Instead, the data "show[ed] an overall restraint," that the "discretion to award punitive damages has not mass-produced runaway awards," and that there was no marked increase in punitive damages being awarded over the past several decades. *Id*. at 497–99.

This Court's experience with ill-conceived assertions about runaway litigation should encourage caution, particularly where it is employed, as here, to invite judicial amendment of a statute. In the end, Cornell University does not ask this Court to construe the ERISA to find fault with Petitioners' complaint, but to add new and unarticulated requirements to achieve that result. Its advocacy for application of a heightened pleading statute is entirely atextual and amounts to a policy argument more "properly addressed to Congress, not this Court," because "[i]t is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *Iancu*, 584 U.S. at 368. This Court should reject that invitation to legislate.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit in this case.

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