No. 17-3244

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JENNIFER SWEDA et al.,
Plaintiffs-Appellants,

v.

THE UNIVERSITY OF PENNSYLVANIA et al.,
Defendants-Appellees.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
No. 2:16-cv-04329-GEKP

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND OTHER HIGHER EDUCATION ASSOCIATIONS IN SUPPORT OF PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the *amici* is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of eight organizations that represent the interests of institutions of higher education.[1]

The **American Council on Education** (ACE) is the major coordinating body for American higher education. Its approximately 1,800 institutional and association members reflect the extraordinary breadth and contributions of degree-granting institutions in the United States. Believing that a strong higher education system is the cornerstone of a democratic society, ACE participates as *amicus curiae* on occasions where a case presents issues of substantial importance to higher education in the United States.

The **American Association of State Colleges and Universities** (AASCU) includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student popula-

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amici*, *amici*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief. This brief is accompanied by a motion for leave to file pursuant to Fed. R. App. P. 29(b)(3).

tions, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

The **Association of American Universities** (AAU) is a non-profit organization, founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 62 public and private research universities.

The **Association of Community College Trustees** (ACCT) is a non-profit educational organization of governing boards, representing more than 6,500 elected and appointed trustees who govern over 1,100 community, technical, and junior colleges in the United States.

The **Association of Public and Land-grant Universities** (APLU) is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of 236 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic

success, advancing scientific research, and expanding engagement. Annually, its 194 U.S. member campuses enroll 4 million undergraduates and 1.2 million graduate students, award 1.1 million degrees, employ 1 million faculty and staff, and conduct $40.7 billion in university-based research.

The **College and University Professional Association for Human Resources** (CUPA-HR), the voice of human resources in higher education, represents more than 23,000 human-resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.

The **Council of Independent Colleges** (CIC) represents 684 private, nonprofit liberal arts colleges and universities and 83 state councils and other higher education organizations.

The **National Association of Independent Colleges and Universities** (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has more than 1,000 members nationwide.

ARGUMENT

The University of Pennsylvania's petition for rehearing details the legal shortcomings of the panel's opinion. This brief is filed to underscore the importance of determining the correct pleading standard in breach of fiduciary duty class actions under ERISA. There has been a proliferation of such lawsuits in recent years, filed against institutions of higher education and corporate defendants. If generic allegations that could be asserted against *any* plan fiduciary—like the allegations here—are sufficient to survive a motion to dismiss, then defendant universities will bear substantial litigation costs, qualified individuals will be deterred from agreeing to serve as fiduciaries, and plan participants will be made worse off.

I. Plaintiffs' Approach Would Have Harmful Consequences for University Retirement Plans And Their Fiduciaries.

A. Meritless Fiduciary-Breach Lawsuits Impose Significant Costs On Universities.

In assessing the legal issues presented here, the Court should be mindful of the practical consequences. There has been an undeniable swell of ERISA class-action litigation in recent years. Since 2016, "[n]early 20 universities have been sued under [ERISA] over the fees paid in their Section 403(b) qualified employee benefit defined contribu-

tion plans." Seyfarth Shaw LLP, *ERISA University Excessive Fee Cases Take Another Hit* (Oct. 10, 2018), goo.gl/FkyhuZ. The trend in corporate cases is similar; in 2016 and 2017 alone, plaintiffs brought more than 100 challenges to 401(k) plans, which was a substantial increase over prior years. George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?* 1-2 & fig. 1 (Ctr. for Ret. Res., Issue Br. 18-8, 2018), goo.gl/jvPAuy. This trend is expected to continue. *See* John Manganaro, *Retirement Plan ERISA Litigation Trends Still Heating Up*, PLANSPONSOR (Nov. 15, 2018), goo.gl/746KXK.

The number of copycat cases that have been filed indicates that Plaintiffs did not file this lawsuit because the University of Pennsylvania is an outlier; they filed this lawsuit because the University of Pennsylvania acted in accordance with industry norms. Given that, additional similar lawsuits could no doubt be filed against a large number of institutions of higher education, and they almost assuredly will be filed if the plaintiffs' bar is given a green light to bring them.

"[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing

and costly inquiries and document requests about its methods and knowledge at the relevant times." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). For example, the defendants in one fiduciary-breach case spent $42 million to take the case to trial. *See Tussey v. ABB Inc.*, No. 2:06-cv-04305, 2015 WL 8485265, at *6 (W.D. Mo. Dec. 9, 2015).

Not-for-profit institutions are particularly susceptible to the risks of outsized legal fees. That dynamic has prompted plaintiffs to make wild allegations that they cannot prove, in hopes of extracting a settlement—a tactic that has already yielded some success for the plaintiffs' bar. *Compare, e.g.*, *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 279, 317 (S.D.N.Y. 2018) (rejecting claim for $358 million in fiduciary-breach damages on the merits), *with* Jacklyn Wille, *Vanderbilt Inks $14.5M Settlement in Retirement Plan Class Suit*, Bloomberg, Apr. 23, 2019, https://news.bloomberglaw.com/employee-benefits/vanderbilt-inks-14-5m-settlement-in-retirement-plan-class-suit. At a time when the rising costs of higher education are an issue of national concern, and when colleges and universities face increased pressure to reduce costs, permit-

ting plaintiffs to extort large settlements from university defendants makes little sense.

B. Plaintiffs' Approach Would Disincentivize Qualified Individuals From Serving As Fiduciaries.

It is not just the *universities* sued in these cases that have been placed in legal jeopardy. This action was filed against the University of Pennsylvania and its current Vice President of Human Resources, Jack Heuer. R.27, ¶ 24. The copycat lawsuits that have been filed against other institutions of higher education have targeted individual faculty and staff members—sometimes more than a *dozen* of them—serving voluntarily on their university's fiduciary committee.[2] Under ERISA, co-defendants are, generally speaking, individually liable for damages. That means that faculty members volunteering to serve on university committees to represent the interests of their cohort are being subjected to claims for hundreds of millions of dollars.

To be sure, such fiduciaries may be covered by insurance or indemnity agreements. But the practical and emotional burdens on faculty or staff members accused of breaching fiduciary duties owed to cam-

[2] *See, e.g.*, Second Amended Complaint, *Tracey v. Mass. Inst. of Tech.*, No. 1:16-cv-11620-NMG (D. Mass. filed Mar. 1, 2018), ECF No. 98; Amended Complaint, *Sacerdote v. N.Y. Univ. School of Med.*, No. 1:17-cv-08834-KBF (S.D.N.Y. filed Jan. 10, 2018), ECF No. 105.

pus colleagues and retirees are real. Indeed, when the plaintiffs suing Cornell University sought to add 29 individual defendants to their case, the presiding judge issued a remarkable order:

> Plaintiffs shall address why they need to name 29 additional individuals as defendants other than (a) they think they can; and (b) the assertion of multi-million dollar claims against these individuals who served on a committee at their employer's request has the tremendous power to harass these individuals because they will be required to list the lawsuit on every auto, mortgage or student financial aid application they file.[3]

Those concerns underscore an important consideration for this Court. The standard for surviving a motion to dismiss will dictate the frequency with which these lawsuits are filed, which will, in turn, dictate the willingness of qualified individuals to serve as fiduciaries. A system of freewheeling litigation—in which even standard industry practices can be challenged through years of onerous litigation—is anathema to the recruitment of a sound fiduciary committee. Permitting costly litigation without subjecting plaintiffs to their proper pleading burden is a recipe for undermining the interests of the plan participants who claim to be asking the courts for assistance.

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[3] Memorandum and Order at 1, *Cunningham v. Cornell Univ.*, No. 1:16-cv-06525-PKC (S.D.N.Y. Jan. 19, 2018), ECF No. 122.

II. The Pleading Standard Approved By The Panel Falls Short Of What ERISA Requires.

The plaintiffs in the wave of lawsuits against university 403(b) plan fiduciaries—including Plaintiffs here—have not satisfied the applicable pleading burden. These actions mostly allege fiduciary breach. A fiduciary breaches its duties when it fails to employ "the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). This standard "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results." *St. Vincent*, 712 F.3d at 716 (quotation marks and alteration omitted). Moreover, by referencing similarly situated fiduciaries, ERISA creates a contextual standard; as applied to universities, the standard requires 403(b) fiduciaries to measure themselves by the conduct of fiduciaries to *similar* plans, not to measure themselves by the conduct of the cohort of 401(k) fiduciaries overseeing different types of plans.

Despite the nature of the legal standard, many plaintiffs have brought fiduciary-breach claims not because fiduciaries have genuinely failed to heed industry customs but because a plan's investments, when viewed through the lens of hindsight, ended up underperforming other

investments. The plaintiffs' theory in these cases is that the fiduciaries breached their duties because if they had chosen different investments, they would have made more money for the plan. *See*, *e.g.*, *Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *10-11 (D.D.C. Jan. 8, 2019).

If plaintiffs' only obligation is to allege that different investment choices could have yielded greater returns, then plaintiffs' lawyers will have an endless supply of potential lawsuits. Such is the nature of the lawsuits brought against university defendants.

Seventeen lawsuits have been brought against universities alleging that fiduciaries acted imprudently in permitting plan participants to invest in two specific, common investment funds. The plaintiffs simply allege that the funds did not perform as well as other funds the plaintiffs chose as benchmarks. But the "benchmark" funds are not comparable to the challenged investments—both because they do not have the same investment objectives and because they do not offer the insurance guarantees of the annuities that are commonplace in higher education retirement plans.

Notably, the Plaintiffs in this case do not allege that the University of Pennsylvania's 403(b) plan was dissimilar from other higher-

education plans; rather, they compare the investment options offered in the University of Pennsylvania's 403(b) plan to the investments offered by the "average defined contribution" plan. Pltfs.' Panel Br. 10. But a typical 403(b) plan for higher-education employees will bear little resemblance to the "average defined contribution" plan. Likewise, Plaintiffs assert that the recordkeeping arrangement employed by the University of Pennsylvania deviates from the market "[f]or large defined contribution plans." *Id.* at 14.

Statements such as these answer questions not posed by ERISA. If forced to confront the 403(b) market in which the University of Pennsylvania's plan actually operates, Plaintiffs could not make these sweeping statements. For example, Plaintiffs' challenge to the use of two recordkeepers—TIAA handled the plan participants' annuities and Vanguard oversaw the plan participants' investments in mutual funds—is a challenge to a practice that dominates the market for 403(b) retirement plans in higher education. Indeed, one of the documents cited by Plaintiffs in their complaint effectively demonstrates that they are trying to use ERISA's liability for fiduciary duty to impose liability on fiduciaries who acted in a manner entirely consistent with industry

norms: When Purdue University took steps to consolidate its record-keepers less than ten years ago, it concluded that "[n]o higher education institution of Purdue's size and level of assets has implemented a single service provider/open architecture structure of this kind." James S. Almond, *403(b) Plan Redesign—Making A Good Retirement Plan Better*, goo.gl/Js7hC1. That report scarcely supports a claim that every other educational institution was imprudent.

In sum, if the sorts of apples-to-oranges allegations presented in Plaintiffs' complaint suffice to survive a motion to dismiss, then only prescience can save a fiduciary from bearing the costs of litigation. That is not what Congress intended when it enacted ERISA. The proper prophylaxis in these circumstances is to apply the pleading standards dictated by the Supreme Court, and to permit discovery only if the plaintiffs can plausibly allege that the fiduciaries' conduct is inconsistent with the conduct of reasonable individuals in like circumstances. "ERISA protects plan participants' reasonable expectations *in the context of the market that exists*." *Rosen v. Prudential Ret. Ins. & Annuity Co.*, 2016 WL 7494320, at *17 (D. Conn. Dec. 30, 2016) (emphasis added). It thus offers no relief to plaintiffs who "seek to transform the

market itself." *Id.* As in other cases, ERISA class actions should be permitted to proceed to discovery only if a violation of the law is *plausible* when the defendant's conduct is compared with that of like-situated fiduciaries.

CONCLUSION

The petition for rehearing should be granted.

Dated: June 6, 2019

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CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for *amici curiae*, certify that I am a member in good standing of the Bar of this Court.

I further certify, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 2,317 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook font. As permitted by Fed. R. App. P. 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate. The text of the electronic brief is identical to the text of the paper copies, and the electronic brief has been scanned by Microsoft System Center Endpoint Protection engine version 1.1.16000.6, with antivirus version 1.295.168.0, which did not detect a virus.

Dated: June 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

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