No. 15-278

IN THE

Supreme Court of the United States

AMGEN INC., *et al.*,

Petitioners,

v.

STEVE HARRIS, *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Respondents offer no sound basis to deny certiorari. Flouting this Court's precedent, the Ninth Circuit committed two fundamental errors here, and its decision will have far-reaching negative effects. Summary reversal or plenary review is therefore warranted.

I. As explained in the petition and by the four dissenters from the denial of rehearing en banc, the court of appeals adopted a pleading standard for ERISA duty-of-prudence claims that is directly contrary to the standard announced in *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014), and creates severe immediate problems for fiduciaries managing company stock funds in thousands of 401(k) plans. Respondents double-down on the Ninth Circuit's error, embracing its standard. But they never respond to petitioners' explanation of how that standard conflicts with *Fifth Third*.

II. The court of appeals also erroneously held—without briefing and with essentially no analysis—that under ERISA, individuals who held company stock but neither bought nor sold it during the class period can invoke the presumption of reliance approved for securities-fraud plaintiffs in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). Respondents scarcely defend the merits of that holding. Instead, they assert that the Ninth Circuit did *not* extend *Basic* to mere holders. But if that were true, the court would have affirmed, because no named plaintiff is alleged to have bought or sold. Respondents also assert that the court's extension of *Basic* was unnecessary because reliance is not an element of their claim. If reliance were not an element, however, the court would have ruled on that basis (as respondents urged), rather than on a basis that no other court has adopted, and that respondents never requested.

ARGUMENT

I. THE NINTH CIRCUIT'S DUTY-OF-PRUDENCE HOLDING IS WRONG AND CONFLICTS WITH *FIFTH THIRD*

Respondents offer four reasons for denying review of the first question presented. None has merit.

A. In response to petitioners' argument that the Ninth Circuit disregarded *Fifth Third*'s new pleading standards, respondents assert (Opp. 10-11) that *Fifth Third* adopted no new standard. That is demonstrably wrong (although the real issue is not whether *Fifth Third*'s standards are new but whether the court of appeals disregarded them). Before *Fifth Third*, no court had held that "[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Fifth Third*, 134 S. Ct. at 2472. After *Fifth Third*, by contrast, that is the law (except, following the decision below, in the Ninth Circuit).[1]

[1] Respondents cite (Opp. 16 n.7) a district court decision that they say distinguished between two similar phrases in *Fifth Third*—"*would* not have viewed as more likely to harm the fund than to help it" and "*could* not have concluded … would do more harm than good"—and adopted the former as the standard. In reality, the court expressed skepticism that any meaningful difference existed between the two. *See In re BP p.l.c. Sec. Litig.*, 2015 WL 1781727, *16 (S.D. Tex. Mar. 4, 2015). The court did, however, duplicate the Ninth Circuit's error, adopting a pleading standard that conflicts with *Fifth Third*. *See id.* at *17. As WLF's brief explains (at 14, 16), that underscores the need for this Court's review here, notwithstanding that the case is on interlocutory appeal. *See Whitley* v. *BP, P.L.C.*, No. 15-20282 (5th Cir.). While the Fifth

The sole basis for respondents' no-new-standards argument is *Fifth Third*'s "citation to *Iqbal* and *Twombly*." Opp. 12; *see also* Pet. App. 44a-45a. This Court, however, directed lower courts to apply *Iqbal* and *Twombly* "in light of the … considerations" that the Court then announced. 134 S. Ct. at 2471. That *is* the promulgation of a new standard; respondents' contrary argument is pure semantics. Semantics cannot change the fact that plaintiffs bringing breach-of-fiduciary-duty claims under ERISA must now satisfy pleading requirements that did not exist before *Fifth Third*.

B. Respondents next contend that the Ninth Circuit applied *Fifth Third*'s standard. But their own description of the decision below shows the opposite: Respondents say (Opp. 12-13) that the court "found that it was plausible for Petitioners to have removed the Amgen Stock Fund from the Plans," that "[t]he Ninth Circuit also found … that it was plausible that such action would not have had an appreciable negative impact on Amgen's stock share price," and that "[t]he Ninth Circuit also found that it was plausible for the fiduciaries to have disclosed the nonpublic information." Opp. 13. All that is indeed the essence of the court's analysis—and it is irreconcilable with *Fifth Third*. As the petition explained (at 18), "[w]hat a court in hindsight deems 'quite plausible[]' … is not the standard; again, *Fifth Third* requires plausible allegations that 'a prudent fiduciary in the defendant's position could not have concluded' that a proposed alternative action would have done 'more harm than good,' 134 S. Ct. at

Circuit could reverse the district court, that would not undo the decision below, but simply create a circuit conflict. Given the harm the Ninth Circuit's ruling would cause, this Court should not wait for such a conflict.

2473." Respondents nowhere explain how the Ninth Circuit's standard is consistent with *Fifth Third*. (Nor, notably, do they dispute that the operative complaint does not satisfy *Fifth Third*. *See* Pet. 20.)

Respondents instead argue (Opp. 15-16) that *Fifth Third* cannot mean what it says because then it would be "virtually impossible to bring an ERISA claim based on nonpublic information." That is not correct. Duty-of-prudence claims remain viable if the plaintiff can plausibly allege losses that resulted from fiduciary conduct falling outside the bounds of reasonable judgment, i.e., can plausibly allege that the fiduciary could have avoided the losses by taking steps that no prudent fiduciary, at the time, would have rejected. *Fifth Third* thus imposes a heavy but not insurmountable pleading burden. *See In re Lehman Bros. Sec. & ERISA Litig.*, 2015 WL 4139978, *3 (S.D.N.Y. July 10, 2015) (*Fifth Third* "sharply constrained—without necessarily eliminating—ERISA claims based on nonpublic information.").

This burden was heavy by design, and grounded in this Court's recognition that fiduciaries are easy targets for even-meritless ERISA claims. Faced with often-imperfect information—and thus frequently put "between a rock and a hard place," *Fifth Third*, 134 S. Ct. at 2470—fiduciaries inevitably make some choices that are reasonable at the time but that later events show were not the best. To address the resulting "acute risk of liability," Pet. App. 11a (Kozinski, J., dissenting from denial of rehearing en banc), and hence to ensure that fiduciaries' choices continue to be driven by fiduciaries' judgment about beneficiaries' best interest rather than by a desire to avoid being sued, *Fifth Third* instructed courts to defer to fiduciaries' reasonable judgment calls, and allow duty-of-prudence claims only when plaintiffs plausibly allege that a fiduciary acted unreasonably. The Ninth Circuit's rule, by contrast, takes away the room for fiduciary judgment. Respondents never explain why that makes sense, i.e., why fiduciaries should be liable for decisions that were within the bounds of reasonable judgment at the time but later turned out not to be optimal.

Finally, in response to petitioners' argument (Pet. 19) that the Ninth Circuit did not follow *Fifth Third*'s instruction to consider the interplay between ERISA and the securities laws, respondents say only (Opp. 14-15) that the decision below does not impose disclosure obligations under ERISA greater than those the securities laws impose. That both ignores many of petitioners' points and is simply wrong—as respondents' brief shows. Respondents later quote the Ninth Circuit's statement that "'[a] fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.'" Opp. 19 n.8 (quoting Pet. App. 46a). That obligation often *will* be greater than the disclosure obligations imposed by the securities laws, which "do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1321 (2011). The Ninth Circuit's disregard of this additional aspect of *Fifth Third* reinforces the need for review.[2]

[2] Respondents cite (Opp. 14 n.5) the government's amicus brief in *Fifth Third* for the proposition that a fiduciary's prompt public disclosure of inside information "serves to *limit* damages." In fact, the brief acknowledged that prompt disclosure "*would decrease* the value of the assets already held by the plan," and merely speculated that "a similar or greater drop *might* well occur if correction of the misrepresentations were delayed." U.S. Amicus Br. 28-29, *Fifth Third*, No. 12-751 (U.S. Mar. 5, 2014) (emphases added).

C. Respondents next argue that the petition should be denied for thee prudential reasons. First, respondents declare (Opp. 16) that the court of appeals did "*precisely*" what it was supposed to do after this Court vacated and remanded the case for further consideration in light of *Fifth Third*. That is a merits point rather than a prudential concern, but more importantly it is wrong for the reasons just given, namely that the Ninth Circuit either ignored or missed the point of *Fifth Third*. Second, respondents say (Opp. 17) that the decision below does not conflict with other appellate courts' rulings. But such a conflict is not the only ground for certiorari; another is that a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). That is the situation here, and certiorari is warranted both to prevent other courts from repeating the Ninth Circuit's error and to correct the law in that circuit—and thus avoid putting fiduciaries in the untenable situation that the Ninth Circuit's decision creates for them. Third, respondents contend (Opp. 17) that even if the court of appeals "incorrectly applied or ignored" *Fifth Third*, that is not a reason to grant review. The court's error, however, is not a one-time misapplication to the facts here; the court stated a general rule that would nullify *Fifth Third* in all similar cases in the Ninth Circuit (and any other circuit that follows it).

D. Attempting to downplay the effect of the Ninth Circuit's decision, respondents assert that it would merely "mak[e] fiduciaries liable under ERISA." Opp. 17 (capitalization altered). That is a reason to *grant* review: As Judge Kozinski explained, the scope of ERISA fiduciaries' liability is "a matter of exceptional importance" because there are "thousands of companies and millions of employees who participate in stock-ownership plans." Pet. App. 18a (dissent from denial of rehearing en banc).

Echoing that observation, petitioners and their amici discussed at length the various negative consequences of the Ninth Circuit's decision—including inviting a flood of lawsuits alleging in hindsight that fiduciaries could have made a better choice, and the resulting likelihood that companies will be discouraged from offering ESOP plans at all. *See* Pet. 20-22; Chamber-PhRMA Br. 14-16; WLF Br. 16-22; ABC Br. 9-10, 14, 17-18. Respondents' only answer (Opp. 18) is that Congress should address those problems. But the Ninth Circuit disregarded *this Court's* precedent. Remedying such defiance is a job for this Court, not Congress.

Finally, respondents assert (Opp. 18) that the Ninth Circuit's "holding … is narrower than [p]etitioners claim," applying only to ERISA fiduciaries "who are *also alleged violators of the federal securities laws*." That is not a reason to deny review even if true, because it is far from trivial to hold—given the number of ERISA fiduciaries and the importance of what they do—that allegations of a securities-law violation deprive fiduciaries of protection for their judgments under ERISA (which imposes different obligations). Indeed, as the petition explained (at 19-20), allowing fiduciaries to be sued under ERISA based on alleged securities-law violations eviscerates the limitations Congress imposed on securities-fraud claims under the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995)—so that under the decision below it is easier to recover for securities-related losses from an ERISA fiduciary than from a corporate insider with disclosure obligations under the securities laws. Respondents ignore that point.

In any event, respondents' assertion about the scope of the decision below is highly debatable. The Ninth Circuit's "quite plausible" standard does not on its face contain the limitation respondents suggest. And in applying that standard here, the court addressed not only what "fiduciaries *with* disclosure obligations" under the securities law must do to avoid ERISA liability, but also what "fiduciaries *without* [such] obligations" must do. Pet. App. 42a (emphases added). Finally, although Judge Fletcher's concurrence in the denial of rehearing en banc embraced the limitation that respondents propose, *see id.* at 4a, the panel opinion notably did not.[3]

II. THE NINTH CIRCUIT IMPROPERLY EXTENDED *BASIC INC.* V. *LEVINSON* TO ERISA PLAINTIFFS WHO NEITHER BOUGHT NOR SOLD STOCK

The Ninth Circuit also erred in holding that the presumption of reliance approved for securities-fraud plaintiffs in *Basic* applies to ERISA claims. *See* Pet. 22-26. Respondents' arguments for denying review of that holding lack merit.

A. Respondents first argue (Opp. 20) that certiorari is unwarranted because no other appellate court has applied *Basic* in the ERISA context, or even explicitly considered doing so. But that fact—which just highlights how flawed the decision below is—will not cabin the damage the Ninth Circuit has done. That circuit is the nation's largest, home to nearly one-fifth of the country's population. As petitioners and their amici explained, similar claims will therefore likely become common (and more generally the Ninth Circuit will become a magnet for ERISA cases) even if other courts

[3] Respondents repeatedly (Opp. 15) cite the concurrence as though it were part of the court's decision

do not follow the Ninth Circuit's lead. Pet. 25-26; Chamber-PhRMA Br. 18-19; ABC Br. 18-19. These circumstances warrant the Court's attention.[4]

B. Respondents next assert (Opp. 21 & n.9) that the Ninth Circuit's extension of *Basic* was unnecessary because reliance is not (they say) an element of their breach-of-fiduciary-duty claim. That argument fails.

Although a few district courts have agreed with respondents that reliance is not an element of their breach-of-fiduciary duty claim, every circuit to address the question has rejected it, as have other district courts. *See* Pet. 22 (citing cases); Chamber-PhRMA Br. 16 (same); *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1140, 1143 (C.D. Cal. 2009); *Martino-Catt* v. *E.I. duPont Nemours & Co.*, 317 F. Supp. 2d 914, 927 (S.D. Iowa 2004). Respondents' efforts to distinguish the appellate cases petitioners cited are unavailing. For example, respondents contend that in *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 579 F.3d 220 (3d Cir. 2009), reliance had to be proved only because "the misrepresentations were made … in individual face-to-face meetings." Opp. 21 n.9. There is no language in the opinion supporting that argument; the Third Circuit enumerated the elements of a breach-of-fiduciary-duty claim—and later specifically discussed the reliance element—without any hint of the limitation respondents urge. *See* 579 F.3d at 228, 229. Similarly, in *Bell* v. *Pfizer, Inc.*, 626 F.3d 66 (2d Cir. 2010), the court stated unambiguously that "where a plaintiff asserts a breach of fiduciary duty claim based on a material misrepresentation or omission, the plaintiff must establish detrimental reliance," *id.* at 75. Re-

---

[4] Respondents again wrongly suggest (Opp. 20) that a circuit conflict is the only ground for certiorari. *See, e.g.*, S. Ct. R. 10(a).

spondents argue (Opp. 21 n.9) that in *Bell* "the misinformation concerned an employee stock option plan which was not governed by ERISA." That does not change the fact that the Second Circuit's decision was based on its conclusion that reliance *is* an element of breach-of-fiduciary-duty claims under ERISA. The state of the law is simply not as respondents portray it.

Respondents also ignore what the Ninth Circuit actually did on this point. It rejected respondents' assertion that "plaintiffs need not plead individual detrimental reliance to maintain an ERISA claim for omissions or misrepresentations." Appellants' C.A. Br. 43 (emphasis omitted). Instead, the court held that respondents could *show* reliance, borrowing a theory from *Basic* that is inapt for ERISA cases.

C. Respondents further argue (Opp. 22) that the Ninth Circuit's extension of *Basic* was correct. Their argument, however, consists merely of recounting some of *Basic*'s reasoning and then asserting that it applies equally here. That does not answer petitioners' explanation of why *Basic*'s presumption is in fact significantly more dubious in the ESOP-ERISA context, given the special considerations that lead employees to invest in company stock. *See* Pet. 25; *see also* Chamber-PhRMA Br. 17-18; ABC Br. 18-19.

Respondents' own argument also underscores the Ninth Circuit's error in extending *Basic* not just to ERISA cases but to mere holders of company stock. Respondents contend that *Basic*'s rationale applies here because no "ERISA plan participant[] would save for retirement by knowingly buying company stock at a manipulated, artificially inflated price." Opp. 22. But that provides no basis to allow those who did not "buy[] company stock" to invoke the *Basic* presumption.

D. Finally, respondents assert (Opp. 22-23) that the Ninth Circuit did *not* extend *Basic*'s presumption to ERISA plaintiffs who merely held stock. That is incorrect. The court of appeals reversed the dismissal of Count III of respondents' complaint, which rested in relevant part on respondents' failure to plead reliance, Pet. App. 104a-105a. If the Ninth Circuit had extended *Basic* only to buyers and sellers, it would have affirmed—because as the petition explained (at 24), the operative complaint alleges only that each plaintiff "held" Amgen stock during the class period. The decision below therefore does constitute an unjustified expansion of *Basic*, which in the securities context does not apply to holders.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed. Alternatively, the petition should be granted and the case set for briefing and argument.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
LOUIS R. COHEN
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

DECEMBER 2015