

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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WAYNE WONG, JERIANN JALOZA,  
JENNIFER DIMEGLIO, JATANIA MOTA,  
AND AMERICANS FOR FAIR  
TREATMENT, INC.,

Plaintiffs,

-against-

NEW YORK CITY EMPLOYEES'  
RETIREMENT SYSTEM, TEACHERS'  
RETIREMENT SYSTEM OF THE CITY OF  
NEW YORK, AND BOARD OF  
EDUCATION RETIREMENT SYSTEM OF  
THE CITY OF NEW YORK,

Defendants.  
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: **COMPLAINT**

: **JURY TRIAL DEMANDED**

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Americans for Fair Treatment, Inc.*

## PRELIMINARY STATEMENT

1. The New York City Employees' Retirement System ("NYCERS"), the Teachers' Retirement System of the City of New York ("TRS"), and the Board of Education Retirement System of the City of New York ("BERS") (collectively, the "Defendants") are obligated to administer their respective Qualified Pension Plans (the "Plans") solely in the interests of the Plans' participants and beneficiaries, and for the exclusive purpose of providing retirement benefits. But instead of honoring that obligation, Defendants have breached their fiduciary duties and abused their control over plan assets by divesting the Plans of approximately four billion dollars of holdings in companies involved in the extraction of fossil fuels, in a misguided and ineffectual gesture to address climate change. This unlawful decision to elevate unrelated policy goals over the financial health of the Plans is flatly inconsistent with the Defendants' fiduciary responsibilities, and jeopardizes the retirement security of Plan participants and beneficiaries. It must be enjoined.

2. Plaintiffs—including a New York City subway train operator, a veteran New York City public school teacher, a school secretary, and an occupational therapist in a New York City elementary school who provides therapy to special needs children—along with hundreds of thousands of other active and retired New York City employees and their families, depend on the Plans as a primary source of income in retirement. To protect the retirement security of these individuals, New York law—both through the common law of trusts and section 136-1.6 of New York's regulatory standards for actuarially funded public retirement systems—imposes rigid fiduciary duties on those who administer pension funds like the Plans. Defendants' fiduciary duties are among the strictest imposed by law. Those obligations include a duty of undivided loyalty to act in the interest of fund participants and beneficiaries and a duty to act prudently in

making investment decisions. *See In re Est. of Wallens*, 9 N.Y.3d 117, 122, 877 N.E.2d 960, 962 (N.Y. 2007) (per curiam). Thus, by law, Defendants, as fiduciaries of the Plans, must manage the Plans with a singular focus on what best serves the retirement interests of participants and beneficiaries. Plan dollars are not the property of the New York City officials or trustees who manage the Plans to do with as they please, or to wield for political gain.

3. Despite these duties, on January 25, 2021 NYCERS's and TRS's Boards of Trustees voted to divest their Plans of all of their holdings in securities related to fossil fuel companies, in order to advance environmental goals unrelated to the financial health of the Plans. BERS's trustees followed suit shortly thereafter. These actions represented the culmination of a three-year pressure campaign mounted by public officials and other activists. By divesting, the Trustees chose to withdraw indiscriminately all of their investments in any publicly traded fossil fuel security, a practice which has no basis in sound investment strategy. In tandem with the divestment, the Trustees also voted to allocate more of the Plans' assets to "green" investments, even though the Trustees cited no credible evidence that such investments perform as well as, or better than, the market as a whole. No mere "ESG investing," the Trustees' politically-driven actions are an utter abandonment of fiduciary responsibilities that no responsible private sector trustee would countenance, and which cannot even be reconciled with a recent Biden Administration rule on environmental considerations in pension plan investments.

4. Despite the serious concerns presented by such wholesale divestment, by December 22, 2021, NYCERS and BERS had completely divested from companies involved in the extraction of fossil fuels—this amounted to approximately \$1.9 billion in plan assets. At the same time, TRS announced it had divested over \$1 billion from fossil fuel securities, and by early 2022 TRS had divested an additional \$1 billion. And today, Defendants continue to breach

their fiduciary duties by adhering to an investment policy that shuns investment in an entire class of assets—securities related to fossil fuel companies—based on a flawed perception that this promotes climate change mitigation, without regard for whether those assets would produce a superior return for the Plans, or for the financial impact on hardworking fund participants and beneficiaries whose retirement security Defendants have an obligation to protect.

5. In contrast to Defendants, the trustees of two other New York City pension funds *rejected* proposals to divest from fossil fuel-related holdings, specifically because doing so would conflict with their fiduciary obligations. As one of those trustees explained, “We do not see our pension fund as an object to be used to make political statements. Our job is to provide for our retirees.”

6. Plaintiffs now ask this Court to declare that Defendants have breached and continue to breach the fiduciary duties they owe to Plan participants and beneficiaries through their divestment actions, and to order Defendants to rescind their divestment policies and remediate the harm caused by those policies to Plaintiffs and other New York City municipal workers and retirees.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this proceeding pursuant to CPLR § 301.

8. Venue is proper in the Supreme Court of the State of New York for New York County pursuant to CPLR § 505(a) because Defendant TRS is a public authority with its principal office in New York County.

### **THE PARTIES**

9. Plaintiff Wayne Wong is a subway train operator in New York City employed by the New York City Transit Authority (“NYCTA”). He has worked for the NYCTA for nearly

nine years, including as a frontline worker throughout the coronavirus pandemic, helping to keep New York City's subways running even as much of the rest of the City shut down. As an NYCTA employee, Mr. Wong has accumulated over eight years of credited service toward his pension eligibility, and is a vested participant in NYCERS. Mr. Wong is 59 years old, and will be eligible to retire from the NYCTA with a pension, payable by NYCERS, in four years. He resides in Queens County, New York.

10. Plaintiff Jeriann Jaloza is a part-time English teacher at a parochial school in New York City. She formerly worked as a teacher for over 23 years in the New York City public school system, where she taught children from pre-K through the fifth grade. As a former employee of the New York City Department of Education with over 18 years of credited service to the City, Ms. Jaloza is a vested participant in TRS. Ms. Jaloza is 46 years old, and will be eligible to collect a pension payable by TRS in 16 years. Ms. Jaloza is a member of Americans for Fair Treatment, Inc. She resides in Nassau County, New York.

11. Plaintiff Jennifer DiMeglio works as an occupational therapist in a New York City elementary school. She provides therapy to special needs children. As a non-pedagogical employee of the New York City Department of Education with over 11 years of credited service to the City, Ms. DiMeglio is a vested participant in BERS. Ms. DiMeglio is 37 years old, and will be eligible to collect a pension payable by BERS in 25 years. Ms. DiMeglio is a member of Americans for Fair Treatment, Inc. She resides in Richmond County, New York.

12. Plaintiff Jatania Mota works as a school secretary employed by the New York City Department of Education. She performs a number of administrative functions to help keep the school where she works operating efficiently. Ms. Mota has over nine years of credited service to the City, and is a vested participant in TRS. She is 40 years old, and will be eligible to

collect a pension payable by TRS in 23 years. Ms. Mota is a member of Americans for Fair Treatment, Inc. She resides in New York County.

13. Plaintiff Americans for Fair Treatment, Inc. (“AFFT”) is a national non-profit organization that offers a free membership program to public sector employees to help them understand and exercise their rights in the context of a unionized workplace. AFFT’s primary purpose is to help protect its members and other government employees from abuses committed by public sector union officials. AFFT’s membership includes 14 New York City municipal employees who are vested participants in either the NYCERS, TRS, or BERS Qualified Pension Plans. AFFT is incorporated in the State of Oklahoma and is headquartered in the Commonwealth of Pennsylvania.

14. Defendant New York City Employees’ Retirement System (“NYCERS”) is a public employee retirement system that administers the NYCERS Qualified Pension Plan, a defined benefit retirement plan with over 375,000 active participants and retirees and \$77.5 billion in net assets as of June 30, 2022. It is the largest municipal public employee retirement system in the United States. Its participants consist of municipal workers employed by the City of New York and various other municipal agencies, including the NYCTA. An eleven-member Board of Trustees is responsible for managing NYCERS. *See* N.Y.C. Admin. Code § 13-103(b). The Board consists of a representative of the New York City Mayor, the New York City Comptroller, the New York City Public Advocate, the President of each of the five New York City boroughs, and one representative from each of the three employee organizations that represent, for purposes of collective bargaining on pension matters, the largest number of municipal employees who are participants of NYCERS. *See id.* Currently, the three employee organizations that have representatives on the NYCERS Board are District Council 37 of the

American Federation of State, County and Municipal Employees; the Transport Workers Union, Local 100; and the International Brotherhood of Teamsters, Local 237. NYCERS's principal office is located at 340 Jay Street, Brooklyn, New York 11201.

15. Defendant Teachers' Retirement System of the City of New York ("TRS") is a public employee retirement system that administers the TRS Qualified Pension Plan, a defined benefit retirement plan with approximately 216,000 active participants and retirees and \$64 billion in net assets as of June 30, 2022. TRS's participants consist of teachers, pedagogues, and paraprofessionals employed by the New York City Department of Education, City University of New York, and certain New York City Charter Schools that offer TRS benefits to their employees. A seven-member Board of Trustees is responsible for managing TRS. *See* N.Y.C. Admin. Code § 13-507. The Board comprises a representative of the President of the New York City Board of Education, the New York City Comptroller, two participants appointed by the New York City Mayor, and three teacher-employee representatives. *See id.* Each of the three current teacher-employee representatives on the TRS Board also serve as officers of the United Federation of Teachers. TRS's principal office is located at 55 Water Street, New York, New York 10041.

16. Defendant Board of Education Retirement System of the City of New York ("BERS") is a public employee retirement system that administers the BERS Qualified Pension Plan, a defined benefit retirement plan with approximately 48,000 active participants and retirees and \$5.9 billion in net assets as of June 30, 2022. BERS's participants consist of non-pedagogical municipal workers employed by the New York City Department of Education, school crossing guards employed by the New York City Police Department, and certain employees of the New York City School Construction Authority. A twenty seven-member

Board of Trustees is responsible for managing BERS. The Board consists of the participants of the New York City Panel for Educational Policy, the Chancellor of the New York City Department of Education, the New York City Comptroller, and two employee representatives. BERS's principal office is located at 65 Court Street, Brooklyn, New York 11201.

### **FACTUAL ALLEGATIONS**

#### **Defendants and Their Boards of Trustees Owe Plaintiffs Fiduciary Duties**

17. As trustees of Plaintiffs' pensions, Defendants and their Boards of Trustees owe Plaintiffs a "duty of undivided and undiluted loyalty" under New York common law. *Wallens*, 9 N.Y.3d at 122 (quoting *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466, 539 N.E.2d 574, 576 (N.Y. 1989)). That requires Defendants and their trustees to "single-mindedly pursue the interests of those to whom a duty of loyalty is owed" in managing the NYCERS, TRS, and BERS Qualified Pension Plans, *Birnbaum*, 73 N.Y.2d at 466, and to do so for the "exclusive purpose" of providing benefits, *Mitzner v. Jarcho*, 44 N.Y.2d 39, 45 n.4, 374 N.E.2d 388, 391 n.4 (N.Y. 1978) (quoting 29 U.S.C. § 1104(a)(1)(A)). This is a "strict standard," *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 270, 557 N.E.2d 87, 95 (N.Y. 1990), and courts are required to enforce the duty with "[u]ncompromising rigidity" so as to not "undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (N.Y. 1928) (quotation marks omitted).

18. Defendants and the trustees who administer the Plans also owe Plaintiffs a common law duty of care in their management of the Plans. *See In re Est. of Janes*, 90 N.Y.2d 41, 49–50, 681 N.E.2d 332, 336 (N.Y. 1997). This duty requires Defendants "to exercise such diligence and such prudence in the care and management (of the fund), as in general, prudent



men of discretion and intelligence in such matters, employ in their own like affairs.” *In re Bank of N.Y.*, 35 N.Y.2d 512, 518–19, 323 N.E.2d 700, 704 (N.Y. 1974) (quotation marks omitted).

19. Defendants separately owe Plaintiffs a duty of loyalty pursuant to New York’s regulatory standards for actuarially funded public retirement systems, which provide that the “administrative heads” of public employee retirement systems in New York “are fiduciaries and as such shall act solely in the interests of the [participants] and beneficiaries of the systems they administer.” N.Y. Comp. Codes R. & Regs. tit. 11, § 136-1.6(a). Likewise, these regulations impose a duty of care, requiring fund administrators to “perform their responsibilities in a manner consistent with those of a reasonably prudent person exercising care, skill and caution.” *Id.*

20. Defendants’ fiduciary duties of loyalty and care are further reinforced by the New York Retirement and Social Security Act (“NYRSSA”). Under the NYRSSA, Defendants may make certain investments of Plan assets only if the investments are undertaken “for the exclusive benefit of the participants and beneficiaries,” and “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person 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.” N.Y. Retire. & Soc. Sec. Law § 177(9)(b).

### **Defendants’ Divestment Actions**

21. Even though, as fiduciaries, Defendants owe the “highest [duty] known to the law,” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), Defendants have willingly cooperated in a plan initiated by former Mayor Bill de Blasio, former Comptroller Scott Stringer, and other City politicians to dragoon Plan assets into an ineffectual, inappropriate campaign to

address climate change.\* The campaign to divest the Plans' fossil fuel holdings began in early 2018, with then-Mayor de Blasio "announc[ing] a two-pronged attack against the fossil-fuel industry, including a vow that city pension funds would divest about \$5 billion from companies involved in the fossil fuel business." William Neuman, *To Fight Climate Change, New York City Takes On Oil Companies*, N.Y. Times (Jan. 11, 2018), <https://www.nytimes.com/2018/01/10/nyregion/new-york-city-fossil-fuel-divestment.html>. Standing in front of a "large green sign" declaring that the City is "Leading the Fight Against Climate Change," de Blasio and then-Comptroller Stringer announced their plan to have all City pension plans fully divest fossil fuel-related assets within five years. *Id.* In presenting their plan, de Blasio and Stringer did not discuss, cite, or refer in any way to any financial analysis or study indicating that the wholesale divestment of fossil fuel holdings would be in the interest of plan participants and beneficiaries.

22. Pension plan managers expressed initial hesitation, with the Trustees of both the New York City Police Pension Fund ("NYCPPF") and the New York City Fire Pension Fund ("NYCFPF") raising immediate concerns that divestment was not consistent with their fiduciary duties. Representatives of the New York City municipal workers also expressed opposition, with the president of the New York City Subway Surface Supervisors Association union urging that efforts to address climate change "should not be funded on the backs of our members and the city members that belong to NYCERS." The trustees of NYCERS, TRS, and BERS also "expressed wariness" about the politicians' proposal. Danielle Muoio, *Divesting from Big Oil a*

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\* Although *Donovan* involved the Employee Retirement Income Security Act ("ERISA") rather than common law claims, it is well established that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility" when it enacted ERISA, meaning that ERISA caselaw is persuasive authority on the nature and scope of fiduciary duties at common law. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985).

*Tough Sell—Even in the Bluest Cities and States*, Politico (Mar. 7, 2018),

<https://www.politico.com/states/new-york/albany/story/2018/03/07/divesting-from-big-oil-a-tough-sell-even-in-the-bluest-cities-and-states-303119>.

23. But on January 25, 2021, in compliance with the Mayor’s announcement, the NYCERS and TRS Boards of Trustees capitulated and voted to divest their respective plans of all securities related to fossil fuel companies. The BERS Board of Trustees voted to divest from fossil fuels shortly thereafter.

24. The votes of the Trustees occurred in closed-door sessions and the vote tallies and the investment analyses, if any, on which the Trustees relied were never made public. But statements by Mayor de Blasio and plan Trustees following the votes make abundantly clear that in the Trustees’ deliberations, the financial interests of Plaintiffs and other plan participants and beneficiaries had taken a backseat to the Trustees’ new goal to address climate change—if they had been considered at all.

25. For instance, de Blasio said of the decision to divest: “Our first-in-the-nation divestment is literally putting money where our mouth is when it comes to climate change.” Likewise, Comptroller Stringer proclaimed that “climate change is the fight of our lives, and we must face it head on with everything we’ve got.” And another NYCERS Trustee said, “I’m proud to cast my vote for a more sustainable portfolio and healthier planet. Divesting from fossil fuels is a move that has been a long time coming, and it is a reflection of our pension trustees’ collective commitment to environmental responsibility.”

26. Most telling of all, though, were the statements by trustees of the police and firefighter funds who attended the same meeting as the NYCERS and TRS trustees; heard the same presentations; and recognized the divestment proposals for the improperly-motivated

fiduciary breach they were. “Every pension fund trustee has a fiduciary responsibility to act in the best interest of the fund beneficiaries for the exclusive purpose of providing benefits,” said Patrick Lynch, a trustee of the NYCPPF, in explaining that plan’s refusal to take the divestment actions days after the meeting in which the other funds voted to divest. “[T]he money in the pension fund does not belong to us, nor to the comptroller, nor to the mayor. It belongs to the active and retired police officers who have worked and sacrificed to earn their pensions. Our views on any social or political issue cannot enter into the equation. The same is true for the elected officials who sit on the board.”

27. Andrew Ansbro, a trustee of the NYCFPF, rejected the divestment push by the Mayor and Comptroller for identical reasons—and called it out for what it was: “[W]e have not entertained that idea of divesting from fossil fuels. And it is not something we will entertain. We do not see our pension fund as an object to be used to make political statements. Our job is to provide for our retirees.” Ansbro’s statement also came less than a week after the divestment votes.

28. The other Plans, however, carried on undaunted. Just two months later, the NYCERS, TRS, and BERS Trustees voted to double their Plans’ investments in “climate change solutions.” Leaving no doubt about the motivation, de Blasio heralded “[t]his multi-billion investment in green tech and divestment from fossil fuels” as “a winning combination for our planet, our city and our pensioners,” while NYCERS Trustee Henry Garrido added: “New York City must be a global leader on climate change. We made a commitment to put our money where our mouth is and did just that.”

29. The Trustees further burnished their environmental *bona fides* in October 2021 by committing to net zero greenhouse gas emissions in the Plans’ investment portfolios by 2040. If

the political impetus for the action weren't clear enough, Mayor de Blasio was there to claim credit: "I urged our pension funds to move to net zero greenhouse gas emissions by 2040 and to increase investments in climate change solutions to \$50 billion by 2035. Today's vote by the trustees will help the pension system meet these goals and ensure we have a livable planet for future generations to come."

30. Two months later, Comptroller Stringer announced that NYCERS and BERS had fully divested approximately \$1.8 billion and \$100 million, respectively, in securities related to fossil fuel companies—completing their divestments more than a year sooner than the five-year target de Blasio had set. Stringer also announced that TRS had divested more than \$1 billion of holdings in fossil fuel companies, and would divest an additional \$1 billion of fossil fuel securities by the first quarter of 2022. TRS has since confirmed that it has completed its divestment. In total, 260 different companies were the target of Defendants' divestment action.

31. Defendants continue to this day to prioritize climate goals over the retirement security of Plaintiffs and other plan participants and beneficiaries. This is manifested in Defendants' decision to divest—and stay divested—of fossil fuel securities, and in their commitment to "net zero" greenhouse gas portfolios by 2040, all of which mean Defendants continue to make investment decisions based on environmental objectives—including by declining to re-invest in the assets from which they divested, or to acquire new fossil fuel-related securities—even if those assets would be lucrative investments or would help diversify the Plans and thereby protect them in periods of market volatility.

32. The new City Comptroller Brad Lander is likewise continuing the strategy of using that office to advance an environmental agenda at the expense of retirement security. Lander ran for the position vowing to "make the office a hub for focusing the attention & action

of New Yorkers on the climate crisis,” and that, “as fiduciary for the [New York City] pension funds, I’ll complete responsible divestment from fossil fuels, join alliances of shareholders to compel bold climate action by publicly traded corporations . . . & provide investment for the transition to clean energy.” True to form, in April 2022 Lander announced that the three New York City pension systems had increased their investments in “climate solutions” to more than \$7 billion. “[B]old climate action,” he said, “requires both keeping fossil fuels in the ground and investing in the renewable energy and resiliency infrastructure we need for a just transition.” In September 2022 Lander sent a letter to BlackRock, the Funds’ largest asset manager, threatening to terminate the Funds’ relationship if BlackRock did not adopt more aggressive practices toward the fossil fuel industry. The Funds, he boasted, have “already taken significant steps to confront the climate crisis head on,” including “divest[ing] from companies that own fossil fuel reserves that threaten our global climate.” For Lander and the Trustees, the pension Plans are a tool to promote their climate agenda at the expense of Plan participants’ financial interests.

33. More climate-motivated actions were taken at one of NYCERS’s recent Investment Meetings, on February 15, 2023, where NYCERS Trustees voted to adopt the Fund’s Net Zero Implementation Plan—an action that shows just how completely the Trustees have allowed non-pecuniary, climate-related objectives to become the lodestar in their management of Plan assets. The presentation of the Implementation Plan that the Trustees reviewed at their meeting states that NYCERS’s goal—which should be simply and solely to maximize the Fund’s financial performance—is to “decarbonize the market, not just our portfolio, and keep fossil fuels in the ground.” Among other things, the Implementation Plan indicates, Fund Trustees may take actions “to exclude . . . from our portfolio” otherwise capable “investment managers of any asset class or publicly-traded companies” that “fail to comply with the parameters to align

with science-based pathways to maintain global warming to 1.5 degrees Celsius.” In other words, the Trustees may eliminate an otherwise strong investment manager if it is not advancing the Trustees’ climate objectives. Additionally, to achieve the aggressive goal of net zero emissions in the Fund portfolio by 2040, the Implementation Plan requires NYCERS to assess the carbon footprint of *all* its holdings. The Implementation Plan includes scattered claims that NYCERS will take these actions “consistent with its fiduciary duties”—those claims pay lip service to a duty the Trustees assuredly owe, but which they have pushed aside in their campaign to be “a global leader on climate change.”

34. On April 4, 2023, TRS followed suit and adopted its own Net Zero Implementation Plan. Like NYCERS’s plan, the TRS plan focuses the Fund’s investment strategy on decarbonization of the market, including by “exclud[ing] investments in the production, exploration, or extraction of fossil fuels,” which, the Implementation Plan notes, is “[c]onsistent with the [Plan’s] approved fossil-fuel divestment resolution.” The following day, the Comptroller’s office announced both Plans’ adoption of their Net Zero Implementation Plans with the fanfare characteristic of past announcements of climate-related actions. Comptroller Lander asserted that the actions created a “roadmap toward decarbonization across our investment portfolio and the global economy.” Trustee Garrido added that “District Council 37 strongly supports NYCERS’ [decision] . . . to take actionable, science-based steps to address the global climate crisis.” Notably absent was any mention of how the Net Zero Implementation Plans put Plan participants’ retirement interests first.

**Other City Pension Funds, and Funds Across the Country, Have Rejected Wholesale Divestment as an Ineffectual, Inappropriate Breach of Fiduciary Duties**

35. Divestment is a strategy whereby an investor sells off its investments in certain industries—*e.g.*, fossil fuel-related stocks—in an attempt to drive down stock prices and thereby

pressure companies in those industries to change their practices. The harms generated by wholesale divestment are well recognized by public pension managers across the country.

36. For instance, the California State Teachers' Retirement System ("CalSTRS")—the second-largest pension plan in the United States—has rejected calls for fossil fuel divestment from its \$248 billion portfolio. As CalSTRS explained in a 2019 report, "Divestment from fossil fuel companies fails to address the myriad issues that contribute to climate change," but can have "a lasting negative impact on the health of the Teachers' Retirement Fund, while also severely limiting our ability to shape corporate behavior for long-term sustainable growth." *CalSTRS' Perspective on Fossil Fuel Divestment*, CalSTRS (Dec. 31, 2019), <https://www.calstrs.com/calstrs-perspective-on-fossil-fuel-divestment>. CalSTRS also recognizes that divestment has no material impact on the companies targeted for divestment. As its CIO Chris Ailman has explained: "We can tilt our portfolio in or out of particular areas, but it's not going to materially change that area." The same point has been made by the executive director of the Maine Public Employee Retirement System, Sandy Matheson: "[J]ust selling does nothing to address climate change, as ownership of the funds are just being transferred to someone else. That's true, both in the private and public markets. Selling fossil fuel stocks doesn't change the demand or use of fossil fuels in the same way that selling Apple doesn't change the use or increase in sales of iPhones." Tim Quinson, *The Case Against Fossil Fuel Divestment*, Bloomberg (July 7, 2021), <https://www.bloomberg.com/news/articles/2021-07-07/pension-fund-director-makes-a-case-against-fossil-fuel-divestment-green-insight>.

37. For these and other reasons, public pension fund managers across the country have rejected calls to divest their energy holdings, explaining that doing so would violate fiduciary duties owed to pensioners and their beneficiaries. For instance, the Seattle City



Employees' Retirement System Board of Administration rejected a proposal to divest \$2.5 billion in fossil-fuel investments, despite pressure from the Mayor, the City Council, and environmental activists. Lynda V. Mapes, *Seattle Employees Pension Fund Won't Divest from Fossil Fuels*, Seattle Times (July 13, 2017), <https://www.seattletimes.com/seattle-news/environment/seattle-employees-pension-fund-wont-divest-from-fossil-fuels/>. Michael Monaco, a lawyer for the Seattle board, emphasized that its decision turned on its “paramount fiduciary duties” and “legal limits the board faces to taking any action that compromises financial return to pursue environmental, social or governance goals.” *Id.*

38. The Colorado Public Employees' Retirement Association (“PERA”) has explained similarly: “[D]ivestment is costly and limits PERA’s ability to effectively seek the best risk-adjusted returns to secure the retirement benefits of public servants. For these reasons, PERA will oppose divestment efforts unless such opposition is inconsistent with its fiduciary duty.” *Colorado PERA Board of Trustees’ Statement on Divestment*, Colorado PERA (Jan. 18, 2019), <https://www.copera.org/investments/divestment>.

39. The New York State Comptroller, Thomas DiNapoli, once saw it similarly (before he flip-flopped and voiced support for playing politics with pensions). “You can’t lose sight of the fact that while we certainly want companies to do the right thing on climate change, at the end of the day we have to produce returns that support retirement benefits of 1.1 million New Yorkers,” DiNapoli said in 2019, explaining why wholesale divestment was inconsistent with his fiduciary duties.

40. Most telling of all, of course, is the witness of the other New York City plan trustees who were in the room where it happened—and refused to go along. The trustees of the police and firefighter funds attended the same closed-door meeting as the other plan trustees;

heard the same presentations; and recognized, and said, that the interests of plan participants and beneficiaries *were not* served by the divestment actions. The divestment strategy which they rejected, and which the other trustees approved, was driven by “social” and “political” “issue[s],” the police and firefighter trustees said shortly after attending the meeting; the wholesale divestment approved by the other Plans used retirees’ pensions as “an object to . . . make a political statement,” and was neither “in the best interest of the fund beneficiaries,” nor “for the exclusive purpose of providing benefits.”

41. The blunderbuss divestments by the Plans also conflict with the standards for fiduciary conduct laid out in a new Biden Administration rule regarding ESG investing by private pension plans. “[T]he duties of prudence and loyalty,” the U.S. Department of Labor said in issuing the rule, require “fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan.” *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73822, 73827 (Dec. 1, 2022). Fiduciaries must act “for the exclusive purpose of providing benefits to participants and beneficiaries.” *Id.* at 73822. While the Biden Administration rule—which is regarded as favorable toward ESG-investing—does not apply to governmental plans like Defendants here, it illustrates how far the Plans strayed from widely-recognized standards of retirement plan management in their zealous pursuit of a policy agenda. No responsible private plan fiduciary would have behaved like the politically-motivated trustees here.

### Impact of the Divestment Actions on Plan Participants and Beneficiaries

42. Defendants' decision to pursue an environmental agenda instead of safeguarding the retirement security of plan participants and beneficiaries has had, and will continue to have, a detrimental impact on the financial health of the Plans and their ability to pay the pension benefits they owe Plaintiffs and other municipal workers and retirees.

43. The energy companies shunned by Defendants have, during the same period the Plans were divesting, delivered exceptional returns for their shareholders, with many of these stocks outperforming the S&P 500 index by orders of magnitude throughout 2022. Energy stocks in general are surging and generating substantial returns for investors—but not for the Plans or their participants and beneficiaries. In 2022, the S&P 500 energy sector rose 58 percent, and was the only segment of the S&P 500 index that did not experience a loss for the year. As one market analyst put it, “[o]il and gas companies have . . . been the standout performer of 2022.” Joe Toppe, *S&P Energy Sector's Record 2022 Performance 'Built on Downfall of Others'*, Fox Bus. (Dec. 30, 2022). Private sector asset managers have predicted that energy investments—driven by strong performances from oil and gas companies—will continue to provide strong returns in 2023 and beyond. “The case for prolonged outperformance is now in place for the energy sector,” in the words of one report. Lu Wang, *JPMorgan Strategist Who Nailed Energy Surge Sees More Gains*, Bloomberg (Oct. 7, 2021), <https://www.bloomberg.com/news/articles/2021-10-07/jpmorgan-strategist-who-nailed-energy-surge-says-rally-not-over>.

44. The energy sector's record-breaking performance in 2022 came on the heels of a strong year for oil and gas in 2021, when the S&P 500 energy sector increased 48%, again outpacing the broader S&P 500 index. As an October 2021 *Wall Street Journal* article reported,

“those who avoided the sector also avoided its 19% surge in the past month.” Amrith Ramkumar, *Energy-Stock Surge Leaves Climate-Focused Investors Behind*, Wall St. J. (Oct. 24, 2021), <https://www.wsj.com/articles/energy-stock-surge-leaves-climate-focused-investors-behind-11635000659>. The Plans were among those that missed out on the “surge.”

45. Defendants’ actions in selling off high-performing securities, and prioritizing lower-yield investments, is especially troubling given the Plans’ chronic and severe underfunding. By its own accounting, as of 2020 NYCERS had sufficient assets to cover only 78.1 percent of its accrued liabilities—an underfunding ratio below the 80 percent threshold at which large, private sector pension plans are considered to be at risk of default under the Pension Protection Act of 2006, and well below the 100 percent funding ratio that the Government Finance Officers Association says is the mark of a healthy, well-run pension plan. TRS is scarcely better, with assets sufficient to cover only 80.4 percent of its accrued liabilities. BERS, while stronger at 94.1 percent, still falls below the 100 percent funding recommended by the Government Finance Officers Association.

46. Defendants’ underfunding ultimately puts New York City taxpayers on the hook. The Comptroller’s 2023 Budget projections predict that the City will have to expend “\$861 million in FY 2024, \$1.97 billion in FY 2025, \$3.02 billion in FY 2026, and **\$4.07 billion in FY 2027** to fund the additional costs to the pension systems due to the FY 2022 combined investment loss of 8.65 percent.” Those estimates represent a substantial increase from the projections just two years earlier, when the Comptroller estimated that the City’s contributions to the pension systems for FY 2024 would be \$200 million. Meantime, the City’s own finances are under significant and growing strain. *See* Office of the N.Y. State Comptroller, *Review of the*

*Financial Plan of the City of New York* (Feb. 2023),

<https://www.osc.state.ny.us/files/reports/osdc/pdf/report-16-2023.pdf>.

## COUNT I

### (New York Common Law – Breach of Fiduciary Duties)

47. Plaintiffs incorporate the preceding paragraphs by reference.

48. New York common law imposes on Defendants strict fiduciary duties of loyalty and care. An investment action taken by a fiduciary is inconsistent with these duties if it is based on any consideration other than “the interests of the participants and beneficiaries.” *Donovan*, 680 F.2d at 271; *see also City Bank Farmers Tr. Co. v. Cannon*, 291 N.Y. 125, 131, 51 N.E.2d 674, 675 (N.Y. 1943) (“The standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate.”).

49. Defendants’ duty of undivided loyalty thus bars them from “exercising or failing to exercise a power . . . to further some interest of [their] own or a person other than” plan participants and beneficiaries. *Mercury Bay Boating Club*, 76 N.Y.2d at 283–84 (emphasis omitted) (quoting Restatement (Second) of Trusts § 187 cmt. g); *see also Birnbaum*, 73 N.Y.2d at 466 (“[The duty of loyalty] is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty.” (quotation marks omitted)).

50. Defendants’ duty of care also requires them to make investment decisions consistent with “such diligence and such prudence . . . as in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs.” *In re Bank of N.Y.*, 35 N.Y.2d at 518–19. The test for whether a trustee has discharged his duty of care is “one of conduct

rather than performance” of the fund. *In re Bankers Tr. Co.*, 219 A.D.2d 266, 273, 636 N.Y.S.2d 741, 745 (N.Y. App. Div. 1995).

51. Defendants’ divestment from fossil fuel-related securities violated their fiduciary duties of loyalty and care to Plaintiffs. The nature of the divestment, as well as the statements made and the course of action taken by Defendants’ Trustees in executing their climate change-focused divestment initiatives, demonstrate that Defendants are not “single-mindedly” and “solely” acting in the retirement interests of their participants and beneficiaries. *Birnbaum*, 73 N.Y.2d at 466; *In re Heller*, 6 N.Y.3d 649, 655, 849 N.E.2d 262, 266 (N.Y. 2006) (quoting Restatement (Second) of Trusts § 170(1)). Instead, Defendants are subordinating those interests to the unrelated policy goals of addressing climate change—in the words of the firefighter fund trustee, the NYCERS, TRS, and BERS funds were “used to make political statements,” in actions the police fund trustee recognized were not “for the exclusive purpose of providing benefits,” nor “in the best interest of fund beneficiaries.”

52. The other climate-related actions that Defendants have taken since voting to divest, including committing to achieving net-zero emissions in their portfolios and threatening to terminate their largest asset manager unless the manager acts more aggressively in service of Defendants’ climate goals, have only deepened Defendants’ breach of their duties. Further, Defendants’ actions, juxtaposed against the decisions of other public pension funds, including the NYCPPF and the NYCFPF, show that Defendants are not making investment decisions based on a prudent assessment of which investments will produce lucrative returns, but are rather imprudently and disloyally allowing non-pecuniary considerations to dictate how they invest pension dollars.

53. As a result of Defendants' breach of their fiduciary duties, Plaintiffs have suffered harm and are suffering ongoing harm, necessitating relief, including monetary damages in an amount to be determined at trial.

54. Plaintiffs are informed and believe, and thereon allege, that unless restrained and prohibited by an order of the Court, Defendants will continue to breach fiduciary duties owed to Plaintiffs through their ongoing divestment actions, further destabilizing the financial integrity of the Plans. Plaintiffs also have no just and adequate remedy at law, and will suffer grave and irreparable harm as a result of Defendants' breaches of fiduciary duties through their ongoing divestment actions unless Defendants are enjoined and restrained from this unlawful conduct. Plaintiffs are therefore entitled to injunctive relief as set forth herein.

## COUNT II

### **(New York Insurance Regulations – Breach of Fiduciary Duties)**

55. Plaintiffs incorporate the preceding paragraphs by reference.

56. Like New York common law, section 136-1.6 of New York's regulatory standards for actuarially funded public retirement systems imposes on Defendants stringent duties of loyalty and care. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 136-1.6. Defendants breached those duties by subordinating the retirement security of Plan participants to the Trustees' pursuit of a "green" climate agenda.

57. As a result of Defendants' breach of their fiduciary duties, Plaintiffs have suffered harm, and are suffering ongoing injuries, necessitating relief, including monetary damages in an amount to be determined at trial.

58. Plaintiffs are informed and believe, and thereon allege, that unless restrained and prohibited by an order of the Court, Defendants will continue to breach their fiduciary duties

owed to Plaintiffs through their ongoing divestment actions. Plaintiffs also have no just and adequate remedy at law, and will suffer grave and irreparable harm as a result of Defendants' breaches of fiduciary duties through their ongoing divestment actions unless Defendants are enjoined and restrained from this unlawful conduct. Plaintiffs are therefore entitled to injunctive relief as set forth herein.

### **COUNT III**

#### **(N.Y. C.P.L.R. § 3001 – Declaratory Relief)**

59. Plaintiffs incorporate the preceding paragraphs by reference.

60. An actual and justiciable controversy has arisen, and now exists, between Plaintiffs and Defendants with regard to whether Defendants' divestment from fossil fuel-related securities breaches the fiduciary duties they owe to Plaintiffs under New York common law and New York's regulatory standards for actuarially funded public retirement systems.

61. Declaratory relief is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

#### **PRAYER FOR RELIEF**

Plaintiff respectfully requests that the Court grant the following relief:

1. Money damages in an amount to be determined at trial;
2. An order requiring Defendants to redress and make whole the NYCERS, TRS, and BERS Qualified Pension Plans for losses caused by the divestment actions;
3. A declaration that Defendants' divestment actions as described herein violate the fiduciary duties of loyalty and care imposed on Defendants by New York common law and New York's regulatory standards for actuarially funded public retirement systems;



4. Injunctive or other equitable relief compelling Defendants to desist from their breaches of their fiduciary duties, including by (a) ceasing their ongoing divestment actions, and (b) making decisions going forward regarding fossil fuel-related and all other potential investments based exclusively on relevant risk-return factors and not subordinating the interests of participants and beneficiaries to objectives unrelated to the provision of benefits under the plans;
5. Appoint a monitor to assure compliance with the injunctive relief set forth above;
6. Appoint an independent fiduciary to make a report within 90 days on what fossil fuel-related investments, if any, should be added to Defendants' portfolios to replace those that were divested; and
7. Plaintiffs' costs and attorneys' fees incurred in bringing this suit, and such other and further relief as the Court deems just and proper.

Dated: May 11, 2023  
New York, New York

Respectfully submitted,  
GIBSON, DUNN & CRUTCHER LLP

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