No. 19-1401

In the Supreme Court of the United States

APRIL HUGHES, ET AL., PETITIONERS

v.

NORTHWESTERN UNIVERSITY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires fiduciaries of an employee benefit plan 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). Fiduciaries who breach their duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). The question presented is:

Whether participants in a defined-contribution ERISA plan stated a plausible claim for relief against plan fiduciaries for breach of the duty of prudence by alleging that the fiduciaries caused the participants to pay investment-management or administrative fees higher than those available for other materially identical investment products or services.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

A. Legal Background

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" 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." 29 U.S.C. 1001(b). ERISA subjects plan administrators to certain fiduciary duties derived from

the common law of trusts. See 29 U.S.C. 1104(a); *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). Most relevant here, the duty of prudence requires fiduciaries to act "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). A plan participant or beneficiary may sue on behalf of the plan to remedy a breach of fiduciary duty, 29 U.S.C. 1132(a)(2), and plan fiduciaries are personally liable for such breaches, 29 U.S.C. 1109(a).

This case involves two ERISA-governed defined-contribution plans established under 26 U.S.C. 403(b), which applies to certain tax-exempt organizations. Pet. App. 27a. In a defined-contribution plan, participants maintain individual investment accounts, the value of which "is determined by the market performance of employee and employer contributions, less expenses." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 525 (2015); see 29 U.S.C. 1002(34). The fiduciaries of defined-contribution plans like those here are responsible for assembling a menu of investment options, and plan participants then choose their investments from that menu. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan* 3, 25 (Sept. 2019), https://go.usa.gov/xAR44; see also Pet. App. 27a.

2. ERISA plan fiduciaries are also responsible for managing the fees and expenses that are paid by plan participants. See *What You Should Know About Your Retirement Plan* 27. Controlling expenses is important, because expenses "can sometimes significantly reduce

the value of an account in a defined-contribution plan." *Tibble*, 575 U.S. at 525; see Employee Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 2 (Sept. 2019), https://go.usa.gov/xAgan (explaining that a "1 percent difference in fees and expenses would reduce [an employee's] account balance at retirement by 28 percent" over a 35-year career). Two types of plan expenses are relevant here: fees for management of plan investments and fees for administrative "recordkeeping" services. See Pet. App. 30a-34a.

Management fees are charged by the investment providers whose investment options (*e.g.*, mutual funds or annuities) populate a plan's investment menu, in exchange for investing plan participants' assets according to the terms of each option. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses* 4 (Dec. 2011), https://go.usa.gov/xANPH. Management fees often take the form of an "expense ratio," *i.e.*, a percentage of the assets invested in that fund. See *ibid.* For mutual funds specifically, some investment providers offer different share classes of the same fund, including a "retail" share class available to all investors and an "institutional" share class available only to large investors, which typically carries a lower expense ratio. See Pet. App. 33a; Pension & Welfare Benefits Admin., U.S. Dep't of Labor, *Study of 401(k) Plan Fees and Expenses* § 2.4.1.3 (Apr. 13, 1998) (observing that "[i]nstitutional mutual funds typically charge lower expense ratios than do the retail funds with similar holdings and risk characteristics," which can produce substantial savings for "[v]ery large plans"), https://go.usa.gov/xANyS.

Recordkeeping fees cover the costs of tracking the individual accounts for each plan participant and provid-

ing plan and account information to participants—such as by providing a quarterly statement and website where participants can monitor their accounts. See *Understanding Retirement Plan Fees and Expenses* 3. Recordkeeping services may be provided by the same investment providers whose investment options are offered in the plan, or by a third party. See Pet. App. 31a-32a. Recordkeepers typically assess fees either on a flat, per-participant basis, or by receiving a portion of the expense ratios charged by the plan's investment options, which is known as "revenue sharing." *Id.* at 32a.

B. The Present Controversy

1. Petitioners are employees of Northwestern University who participate in the Northwestern University Retirement Plan or the Northwestern University Voluntary Savings Plan, or both. Pet. App. 27a. Respondents are Northwestern University (the Plans' administrator and designated fiduciary), the Northwestern University Retirement Investment Committee, and certain university officials with fiduciary duties. *Id.* at 27a-28a.

The Plans allow participants to invest in mutual funds and annuity contracts selected by the fiduciaries. Pet. App. 3a-4a. Prior to October 2016, the Retirement Plan offered 242 investment options and the Voluntary Savings Plan offered 187, largely through the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA) and Fidelity Management Trust Company (Fidelity). *Id.* at 3a. By October 2016, the Plans reduced their investment offerings to about 40 options. *Id.* at 4a.

2. Petitioners filed the Amended Complaint in this case (the operative complaint) in December 2016. Pet. App. 2a n.4. As most relevant here, Counts III and V

claim that respondents breached their duty of prudence under ERISA, both before and after reducing the Plans' investment offerings in October 2016, by "paying excessive recordkeeping fees" and "offering mutual funds with excessive investment management fees." Pet. 1; see Pet. App. 34a.[1]

Count III alleges that respondents imprudently forced plan participants to pay excessive recordkeeping fees. Am. Compl. ¶¶ 246-254; see *id.* ¶¶ 140-154. Petitioners allege that respondents used multiple recordkeepers (TIAA and Fidelity), thereby failing to take advantage of economies of scale, *id.* ¶ 251, and paid recordkeeping fees through revenue-sharing as opposed to a flat per-participant fee, which increased recordkeeping fees "even though the services provided by the recordkeepers remained the same," *id.* ¶ 249. Petitioners further allege that respondents, unlike fiduciaries of "similarly situated [Section] 403(b) plan[s]," failed to monitor the Plans' recordkeeping fees to determine whether "those amounts were competitive or reasonable for the services provided," failed to "use the Plans' size" to negotiate lower recordkeeping fees, and "failed to solicit bids from competing providers." *Id.* ¶¶ 249, 251.

Count V alleges that respondents included in the Plans a number of imprudent investment options with excessive management fees and weak investment performance. Am. Compl. ¶¶ 260-273; see *id.* ¶¶ 155-165.

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[1] The Amended Complaint also claims that respondents agreed to an imprudent "bundled" services arrangement with TIAA, that respondents are liable for transactions prohibited by ERISA, 29 U.S.C. 1106(a)(1), and that certain respondents failed to monitor other fiduciaries. See Pet. App. 29a-30a, 38a, 45a-47a, 50a. Those counts are not the focus of the petition for a writ of certiorari. See Pet. 5-6 & n.1, 19-20.

Petitioners allege, among other things, that respondents offered 129 retail-class mutual funds in the Plans even though identical institutional-class mutual funds were available to the Plans based on their size, and even though those institutional-class funds differed only in their lower management fees. *Id.* ¶ 266.

3. The district court granted respondents' motion to dismiss the Amended Complaint for failure to state a claim on which relief could be granted, and denied leave to file a second amended complaint. Pet. App. 26a-58a. The court of appeals affirmed. *Id.* at 1a-25a.

a. The court of appeals found that Count III, alleging excessive recordkeeping fees, failed as a matter of law because ERISA does not require a flat-fee structure as opposed to revenue sharing; "does not require a sole recordkeeper"; and did not require respondents "to search for a recordkeeper willing to take $35 per year per participant"—the amount that petitioners alleged would have been a reasonable recordkeeping fee. Pet. App. 15a-18a. The court noted petitioners' allegations that using multiple recordkeepers and failing to solicit competitive bids "impose[d] higher costs on plan participants." *Id.* at 16a. But the court concluded that respondents had "explained it was prudent to have this arrangement so [the Plans] could continue offering" one particular TIAA investment option in which a number of plan participants were invested (the "Traditional Annuity"), given that TIAA had required the Plans, as a condition of offering the Traditional Annuity, to use TIAA as the recordkeeper for all TIAA funds in the Plans. *Ibid.*; see *id.* at 13a-14a; see also Am. Compl. ¶ 88.

The court also found that respondents had not identified an "alternative recordkeeper that would have accepted" a lower fee than the one paid by the Plans while

still providing the same level of service. Pet. App. 18a. And "[a]t any rate," the court reasoned, "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low," by choosing to "invest in various low-cost index funds." *Id.* at 18a n.10.

b. Regarding Count V, alleging that respondents offered imprudent investment funds with "'unnecessary'" management fees and inferior investment performance, the court of appeals stated that it "underst[ood]" petitioners' "clear preference for low-cost index funds," and "acknowledge[d] the industry may be trending in favor of these types of offerings." Pet. App. 19a (citation omitted). But the court found that those types of funds "*were and are* available" in the Plans. *Ibid.* (citation omitted). The court also declined to endorse "a blanket prohibition on retail share classes," *ibid.*, and it stated that "plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty," *id.* at 21a.

The court rejected petitioners' argument based on *Sweda* v. *University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020), that "a meaningful mix and range of investment options [does not] insulate[] plan fiduciaries from liability for breach of fiduciary duty." Pet. App. 20a (quoting 923 F.3d at 330) (brackets in original). The court concluded that the Third Circuit in *Sweda* had merely "declined to find a 'bright-line rule that providing a range of investment options satisfies a fiduciary's duty.'" *Ibid.* (quoting 923 F.3d at 330). The court stated that "[t]he Third Circuit's approach is sound and not inconsistent with our own." *Id.* at 20a-21a.

c. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 60a.

DISCUSSION

Petitioners' Amended Complaint states at least two plausible claims for breach of ERISA's duty of prudence, and the court of appeals' decision reaching the opposite conclusion is incorrect in certain important respects. Taking petitioners' factual allegations as true at the pleading stage, petitioners have shown that respondents caused the Plans' participants to pay excess investment-management and administrative fees when respondents could have obtained the same investment opportunities or services at a lower cost. Specifically, within Count V, petitioners allege that respondents selected retail-class investment funds for inclusion in the Plans even though identical institutional-class investment funds with lower management fees were available to the Plans based on their size. In Count III, petitioners allege that respondents failed to use any of several available methods to monitor and reduce the Plans' cost of recordkeeping services.[2]

The decision below warrants this Court's review. The court of appeals' reasoning conflicts with decisions of the Third and Eighth Circuits, both of which have held that essentially the same factual allegations and legal claims at issue here stated plausible claims for breach of ERISA's duty of prudence. Moreover, the question of what ERISA requires of plan fiduciaries to control expenses is important to millions of employees throughout the Nation whose retirement assets are invested in ERISA-governed plans. And that question frequently recurs.

The petition for a writ of certiorari should be granted.

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[2] The United States takes no position on petitioners' remaining allegations and claims.

A. The Court Of Appeals' Decision Is Incorrect In Certain Important Respects

At least two of the claims for relief in the Amended Complaint state a plausible claim for breach of ERISA's duty of prudence. The court of appeals' reasons for affirming the dismissal of those claims are not persuasive.

1. Petitioners plausibly allege that respondents imprudently offered higher-cost investment funds when identical lower-cost funds were available

a. Petitioners state a plausible claim for relief in part of Count V by alleging that respondents selected investment options for the Plans "with far higher costs than were and are available for the Plans based on their size." Am. Compl. ¶ 161. In particular, petitioners allege that respondents included in the Plans more than 100 retail-class mutual funds with higher management fees when they "knew or should have known that investment providers would have allowed the Plans to provide lower-cost share classes to participants if [respondents] had asked." *Id.* ¶¶ 160-161. Petitioners further allege that "fiduciaries of other defined contribution plans have successfully negotiated" with TIAA and Fidelity to obtain "less expensive institutional share classes." *Id.* ¶ 159. And petitioners emphasize that these institutional-class funds—which are available only to "[j]umbo investors like the Plans"—carry a "significantly [lower cost], but [are] otherwise identical": they have "identical portfolio managers, underlying investments, and asset allocations." *Id.* ¶¶ 157, 161, 164.

If petitioners succeed in proving those allegations, then respondents breached ERISA's duty of prudence by offering higher-cost investments to the Plans' participants when respondents could have offered the same investment opportunities at a lower cost. An ERISA

fiduciary acts imprudently "by failing to properly monitor investments and remove imprudent ones." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 525 (2015); see *Davis* v. *Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (finding that plaintiffs "clear[ed] th[e] pleading hurdle" by alleging, among other things, that the defendants offered retail-class shares rather than available institutional-class shares); *Sweda* v. *University of Pa.*, 923 F.3d 320, 332 & n.7 (3d Cir. 2019) (finding that plaintiffs "plausibly allege[d] that [the defendant] breached its fiduciary duty" by, among other things, "frequently selec[ting] higher cost investments when identical lower-cost investments were available"), cert. denied, 140 S. Ct. 2565 (2020).

That is not to say that an ERISA plaintiff could state a claim for relief by alleging merely that alternative investment funds with lower management fees than those included in a plan were available in the marketplace. See, *e.g.*, *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 n.7 (8th Cir. 2009) (observing that a "bare allegation that cheaper alternative investments exist in the marketplace," on its own, likely does not state a claim). Fiduciaries should not consider costs *alone* when establishing an investment menu for plan participants, see *ibid.*; rather, prudent fiduciaries must consider all relevant factors when selecting the plan's investments. See *id.* at 596-597 (A fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility."). And courts evaluating imprudence claims likewise should consider all relevant factors in determining whether the plaintiff has plausibly alleged that the fiduciary acted unreasonably. "Because the content of the

duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, [29 U.S.C.] § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014).

In this case, though, petitioners have stated a claim for relief by alleging that respondents selected certain investment options instead of alternatives, offered by the same investment providers, that differed *only* in their lower costs. Am. Compl. ¶¶ 55, 161. Petitioners also allege that these lower-cost alternatives were available to the Plans because of their "jumbo" size. See *id.* ¶¶ 12, 16, 158-160. If petitioners prove their allegations that respondents had the opportunity to offer those identical lower-cost institutional-class investments for the Plans, then there is no apparent justification for respondents' failure to do so.

b. The court of appeals erred in concluding that Count V fails to state a claim for relief. The court reasoned that ERISA fiduciaries "may generally offer a wide range of investment options and fees without breaching any fiduciary duty." Pet. App. 21a. Here, the court stated, "the types of funds [petitioners] wanted (low-cost index funds) '*were and are* available to them,' eliminating any claim that plan participants were forced to stomach an unappetizing menu." *Id.* at 19a (citation omitted). Petitioners "simply object that numerous additional funds were offered as well" at a higher cost. *Ibid.*

The court's reasoning was unsound. Under the law of trusts, which informs ERISA's fiduciary standards, fiduciaries are not excused from their obligations not to offer imprudent investments with unreasonably high

fees on the ground that they offered other prudent investments. See, *e.g.*, *Davis*, 960 F.3d at 484 ("It is no defense to simply offer a 'reasonable array' of options that includes some good ones, and then 'shift' the responsibility to plan participants to find them.") (brackets and citations omitted). This Court in *Tibble* explained that, "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." 575 U.S. at 529. And the Court made clear that this duty applies to *each* of the trust's investments: "the trustee must 'systematic[ally] conside[r] *all* the investments of the trust at regular intervals' to ensure that they are appropriate." *Ibid.* (quoting Amy Morris Hess et al., *The Law of Trusts and Trustees* § 684, at 147-148 (3d ed. 2009)) (emphasis added; brackets in original).

The judgment and diligence required of a fiduciary in deciding to offer any particular investment fund must include consideration of costs, among other factors, because a trustee must "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." Restatement (Third) of Trusts § 90(c)(3), at 293 (2007) (Third Restatement); see *id.* § 90 cmt. b, at 295 ("[C]ost-conscious management is fundamental to prudence in the investment function."). "Trustees, like other prudent investors, prefer (and, as fiduciaries, ordinarily have a duty to seek) the lowest level of risk and cost for a particular level of expected return." *Id.* § 90 cmt. f(1), at 308. For mutual funds specifically, trustees should pay "special attention" to "sales charges, compensation, and other costs" and should "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." *Id.* § 90 cmt. m, at 332.

The general trust-law duty to control costs is embodied in ERISA's requirement that fiduciaries "defray[] *reasonable* expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A) (emphasis added). And the Department of Labor has consistently reminded ERISA fiduciaries both to carefully evaluate fees when initially selecting investment options for a plan, and then to monitor fees "to determine whether they continue to be reasonable." Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities* 5 (Sept. 2017), https://go.usa.gov/xARbV. In short, "[w]asting beneficiaries' money is imprudent." *Tibble* v. *Edison Int'l*, 843 F.3d 1187, 1198 (9th Cir. 2016) (en banc) (quoting Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act § 7 cmt. (1995)).

2. Petitioners plausibly allege that respondents imprudently failed to use any of several methods to reduce recordkeeping fees

a. Petitioners also state a plausible claim for relief in Count III by alleging that respondents caused the Plans' participants to pay excessive recordkeeping fees. Petitioners allege that the Plans paid between $3.96 and $5 million combined per year in recordkeeping fees during the relevant period, whereas if respondents had acted prudently, "a reasonable recordkeeping fee for the Plans would be approximately $1,050,000" combined per year. Am. Compl. ¶¶ 148-149.

Petitioners allege that respondents incurred unnecessary fees by failing to "adequately monitor the amount of the revenue sharing received by the Plans' recordkeepers, determine if those amounts were competitive or reasonable for the services provided to the Plans, or use the Plans' size to reduce fees or obtain sufficient rebates." *Id.* ¶ 249. Specifically, petitioners allege that

respondents could have "demanded 'plan pricing' rebates from [TIAA] based on the Plans' economies of scale," *id.* ¶ 152, as, for example, the fiduciaries for the employee-benefit plans at the California Institute of Technology had done by "negotiat[ing] over $15 million in revenue sharing rebates from [TIAA]" between 2013 and 2015, *id.* ¶ 97 (emphasis omitted). By contrast, petitioners allege, respondents negotiated only a "modest" revenue credit from TIAA and Fidelity in or around 2016. *Id.* ¶¶ 216-219 (citation omitted). Petitioners further allege that respondents "failed to conduct a competitive bidding process for the Plans' recordkeeping services," *id.* ¶ 151, and failed to assess whether the plans could have achieved savings by consolidating recordkeepers, *id.* ¶¶ 142-143, even though fiduciaries of other university plans used those strategies, *id.* ¶¶ 91-96, 141, and even though "the market for defined contribution recordkeeping services is highly competitive" and "market rates for recordkeeping services have declined in recent years," *id.* ¶¶ 140-141.

Considering those allegations together and taking them as true at the pleading stage, the Amended Complaint plausibly states a claim that respondents acted imprudently because a reasonable plan fiduciary would have monitored the recordkeeping fees paid by the Plans' participants, determined whether those fees were competitive, and attempted to reduce them without experiencing diminished services. See *Sweda*, 923 F.3d at 332; *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 336 (8th Cir.), cert. denied, 574 U.S. 991 (2014). Petitioners did not merely present a conclusory assertion that the Plans' recordkeeping fees were too high; they substantiated their claim with specific factual allegations about

market conditions, prevailing practices, and strategies used by fiduciaries of comparable Section 403(b) plans.

b. The court of appeals' reasons for finding that Count III fails to state a claim for relief were flawed.

The court first stated that "ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all," and there was "nothing wrong" necessarily with respondents paying recordkeeping fees through revenue sharing as opposed to a flat-fee structure. Pet. App. 17a-18a; see *id.* at 15a ("a flat-fee structure is [not] required by ERISA"); *id.* at 16a (respondents were not "required to seek a sole recordkeeper"). Those observations are correct, but they do not refute petitioners' claims. The Amended Complaint states a claim for relief by alleging that petitioners failed to monitor the Plans' recordkeeping costs and employ strategies used by similar plans' fiduciaries to reduce those costs, not by alleging that paying multiple recordkeepers or revenue sharing was imprudent per se.

Next the court of appeals concluded that petitioners had failed to show that a flat-fee recordkeeping arrangement "would even benefit [the Plans'] participants," reasoning that such an arrangement "may have the opposite effect of increasing administrative costs." Pet. App. 15a. The court also stated that petitioners had "identified no alternative recordkeeper that would have accepted * * * any fee lower than what was paid" by the Plans. *Id.* at 18a. That reasoning fails to take petitioners' factual allegations as true at the pleading stage and draw reasonable inferences in petitioners' favor. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). It also ignores petitioners' allegations that fiduciaries of com-

parable Section 403(b) plans succeeded in using various strategies to reduce their plans' recordkeeping fees.

The court of appeals additionally stated that, even assuming the truth of petitioners' allegation that multiple-recordkeeper arrangements "impose higher costs on plan participants," respondents had "explained it was prudent to have this arrangement so [they] could continue offering the Traditional Annuity among" the Plans' investment offerings. Pet. App. 16a. But respondents' desire to preserve one particular investment option in the Plans would not justify their alleged failure even to consider whether the Plans' recordkeeping costs were reasonable, such as by soliciting competitive bids and comparing the potential advantages of a switch against the disadvantages from eliminating the Traditional Annuity. See Third Restatement § 90 cmt. d, at 299 (trustees must "obtain[ ] relevant information about . . . the nature and characteristics of available investment alternatives"). Nor does respondents' defense explain why they did not negotiate with TIAA for lower recordkeeping fees, as comparable plans' fiduciaries allegedly had done. See Am. Compl. ¶ 97.

Last, the court of appeals stated that "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low." Pet. App. 18a n.10. But that simply repeats the same error discussed above by wrongly suggesting that fiduciaries can avoid liability for offering imprudent investments with unreasonably high fees by also offering prudent investments with reasonable fees. See pp. 11-13, *supra*. Petitioners have alleged that a prudent fiduciary would have pursued multiple strategies to lower plan participants' overall recordkeeping costs without sacrificing the quality of services. It is no defense to respondents'

alleged imprudent failure to take those steps that they offered some prudent, low-fee options. ERISA fiduciaries may not shift onto plan participants the burden of identifying and rejecting investments with imprudent fees.

B. The Court Of Appeals' Decision Warrants Review

The decision below creates a conflict among the courts of appeals about the requirements that ERISA imposes on plan fiduciaries to limit fees. That question, which frequently recurs, is important to millions of Americans who are invested in ERISA-governed defined-contribution plans. See Pet. 14-16 & nn.9-10. This Court's review is warranted.

1. The decision below conflicts with decisions of the Third and Eighth Circuits, both of which have held that very similar complaints—alleging that defendants offered retail-class investment shares instead of available institutional-class shares, and paid excessive recordkeeping fees in universities' Section 403(b) plans—stated claims for relief under ERISA. See *Sweda*, 923 F.3d at 332 & n.7; *Davis*, 960 F.3d at 483-484.

The Third Circuit concluded that the plaintiffs' complaint had satisfied federal pleading requirements by alleging (among other things) that the defendant fiduciaries "paid excessive administrative fees, failed to solicit bids from service providers, failed to monitor revenue sharing, failed to leverage the Plan's size to obtain lower fees and rebates," and "selected higher cost investments when identical lower-cost investments were available." *Sweda*, 923 F.3d at 330, 332 n.7. The Eighth Circuit similarly held that the plaintiffs had stated a claim by alleging that the defendants "fail[ed] to replace" the retail-class investments they offered "with their lower-cost counterparts." *Davis*, 960 F.3d at 483.

See *Tussey*, 746 F.3d at 336 (8th Cir.) (affirming judgment for plaintiffs finding that defendants breached their fiduciary duties by failing to monitor recordkeeping costs, determine whether those costs were competitive, or leverage the plan's size to reduce costs). The reasoning of those courts is irreconcilable with the Seventh Circuit's decision below.[3]

2. Respondents deny that any conflict exists, arguing that the decision below "expressly embraced the same standards applied in the cases" relied on by petitioners. Br. in Opp. 2. That is incorrect. Although the Seventh Circuit below stated that "[t]he Third Circuit's approach [in *Sweda*] is sound and not inconsistent with our own," Pet. App. 20a-21a; see Br. in Opp. 12, 18, that statement reflects a misunderstanding about *Sweda*'s reasoning, and it does not explain how the courts reached different outcomes when considering very similar complaints.

Respondents have not identified any relevant differences between the factual allegations or legal claims in this case and those in *Sweda* and *Davis* that would justify the divergent results. Respondents invoke the Seventh Circuit's conclusion that it was reasonable for them to decline to abandon the Traditional Annuity. Br.

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[3] As petitioners observe (Pet. 11), the court of appeals' decision below is also in tension with the Ninth Circuit's decision in *Tibble* v. *Edison International*, 729 F.3d 1110 (2013), vacated on other grounds, 575 U.S. 523 (2015), which affirmed a district court's finding after a bench trial that ERISA fiduciaries had violated the duty of prudence by failing to investigate the availability of lower-cost, institutional-class shares of the mutual funds they offered. See *id.* at 1137-1139. See also *Tibble*, 843 F.3d at 1197-1198 (allowing a new trial on claims, previously dismissed as time barred, alleging that fiduciaries imprudently offered investments in a more expensive share class when less expensive shares were available).

in Opp. 14, 16. But for the reasons explained above, that defense would not excuse respondents' alleged failures to evaluate the reasonableness of the Plans' record-keeping costs or negotiate lower recordkeeping fees, as comparable plans allegedly had done. See p. 16, *supra*. Respondents' desire to retain the Traditional Annuity also has no bearing on their failure to offer the lower-cost institutional-class mutual funds that were allegedly available to the Plans.

Moreover, the decision below reflects more than just a different outcome than in *Sweda* and *Davis*; it reflects a different (and incorrect) understanding of the substantive obligations that ERISA imposes on plan fiduciaries. The Seventh Circuit reasoned that, because petitioners had access in the Plans to the low-cost investment options that they preferred, they could not object to respondents' decision to offer other investment vehicles that allegedly carried unreasonably high management or recordkeeping fees. See Pet. App. 18a n.10, 19a. But the Eighth Circuit in *Sweda* correctly rejected that reasoning, explaining that offering "a meaningful mix and range of investment options [does not] insulate[] plan fiduciaries from liability for breach of fiduciary duty" when the fiduciaries could have offered lower-cost options. 923 F.3d at 330; see *id.* at 332 n.7; see also *Davis*, 960 F.3d at 484 (holding that fiduciaries may not shift onto plan participants the responsibility to identify and remove imprudent investments); *Tussey*, 746 F.3d at 335-336 (rejecting defendants' contention that a "wide 'range of investment options from which participants could select low-priced funds bars the claim of unreasonable recordkeeping fees' ").

Respondents attempt to minimize the split by claiming that this case is actually more similar to other cases

where the Third and Eighth Circuits found that ERISA complaints failed to state a claim for relief. Br. in Opp. 18-21 (discussing *Renfro* v. *Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011), and *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018)). Those comparisons are inapt. The allegations and legal theories in petitioners' Amended Complaint are most similar to those in *Sweda* and *Davis* (and to a somewhat lesser extent, in *Tussey*). The reasoning in the latter decisions demonstrates that, if petitioners' complaint had been filed in the Third or Eighth Circuit, Counts III and V would have survived respondents' motion to dismiss.

3. Respondents offer no sound basis for denying review of the important and recurring questions raised by the petition for a writ of certiorari.

a. Respondents contend that petitioners' argument based on allegedly offering imprudent retail-class shares "was not presented as part of any claim in the amended complaint." Br. in Opp. 27; see *id.* at 17 n.1. Respondents are incorrect. Petitioners devoted several pages in their Amended Complaint to that specific theory of imprudence, describing in detail the retail-class investment funds that respondents selected for the Plans and comparing their costs to those of the institutional-class investment options that petitioners allege respondents could have offered instead. See Am. Compl. ¶¶ 155-165. Petitioners then referred to those allegations in Count V of the Amended Complaint. See *id.* ¶ 266.

Respondents' contention that petitioners' theory of liability based on failing to offer institutional-class shares was missing from the Amended Complaint is further refuted by the fact that both the court of appeals and the district court understood petitioners' allegations about imprudent retail-class shares to be part of

the case; the courts simply concluded that petitioners' theory failed as a matter of law. See Pet. App. 19a (discussing petitioners' allegation that some investment funds in the Plans "could have been cheaper but [respondents] failed to negotiate better fees"); *ibid.* (discussing petitioners' allegations concerning "retail funds with retail[] fees"); *id.* at 33a ("The charging of higher retail expense ratios instead of institutional-rate expense ratios is also a major theme in [petitioners'] complaint."). Respondents emphasize that the lower courts rejected a proposed second amended complaint that would have re-organized petitioners' claims by placing the retail-class share allegations in their own count. Br. in Opp. 17 n.1, 27, 31-32. But that decision is of no moment to the question presented here. The court of appeals determined that the proposed second amended complaint "rel[ied] on the same allegations and facts," and presented "essentially the same claims separated into different counts." Pet. App. 23a-24a.

b. Finally, respondents contend that this case "is painfully narrow and factbound," especially in light of "the evolving nature of the Plans." Br. in Opp. 30, 32. But resolving the question presented would establish general principles of application for ERISA's duty of prudence that would have implications beyond this particular case. The case presents an opportunity for this Court to clarify that ERISA requires fiduciaries to work actively to limit a plan's expenses and remove imprudent investments, and that fiduciaries will not be excused from those responsibilities on the ground that they selected some (or even many) other prudent investments for a plan.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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