No. 19-1401

# In the Supreme Court of the United States

APRIL HUGHES, ET AL.,

*Petitioners*,

v.

NORTHWESTERN UNIVERSITY, ET AL.,

*Respondents*.

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

## BRIEF FOR RESPONDENTS


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## QUESTION PRESENTED

Whether both courts below erred in concluding that the complaint at issue failed to state a claim for breach of the duty of prudence under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104(a)(1)(B).

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## INTRODUCTION

This case arises from a series of complaints filed against many of the nation's leading universities, including Northwestern University. The complaints—based on "essentially the same allegations," Pet. 1—all claim that these universities breached their fiduciary obligations under the Employee Retirement Income Security Act (ERISA) in administering their retirement plans in the same ways. The core theory is that the plans generated excessive fees by offering participants "too many options" from which to choose. Pet. App. 28a. As alleged in the complaint here, Northwestern's decision to offer a wide range of options purportedly "depriv[ed] the Plans of their ability to qualify for lower cost share classes of certain investments," JA170 (¶ 266), and the inclusion of the multiple recordkeepers necessary to service these options led to excessive recordkeeping fees, JA167 (¶ 251).

The district court and the court of appeals properly found that petitioners' complaint failed to state a plausible claim for breach of ERISA's duty of prudence. As the district court explained, petitioners' "theory is paternalistic, but ERISA is not." Pet. App. 40a. For defined contribution plans like those at issue here—in which participants exercise control over assets in their own accounts—ERISA permits plan sponsors to offer participants a "menu that includes high-expense . . . funds, together with low-expense . . . funds." *Id.* at 41a (citation omitted). And here, the kind of low-expense funds petitioners prefer "*were and are* available to them" through Northwestern's plans; the fact that the plans also "offered additional funds that they did not want" is not actionable. *Id.* at 45a. Indeed, petitioners could avoid the fees they now

object to simply by "direct[ing] their dollars to lower-cost funds." *Id.* at 42a (citation omitted).

In this Court, petitioners double down on their paternalistic view of ERISA's duty of prudence. They assert (at 36) that participants lack the capacity to make "intelligent" investment choices from among a wide array of options. Thus, petitioners—now joined by the government—argue that it is not enough for plan administrators to provide a "'reasonable array' of options" from which participants may choose. U.S. Br. 23 (citation omitted); *see* Pet. Br. 46-47. Rather, they contend, ERISA authorizes damages actions based solely on the fact that the menu of investment options includes marginally more expensive funds *in addition to* the lower cost options they claim are required. Pet. Br. 28, 35; *see* U.S. Br. 22-23. This position is inconsistent with ERISA's emphasis on participant choice in this context and the very trust law on which petitioners rely. If adopted, it would expose nearly all fiduciaries to the threat of damages litigation (since all a plaintiff would have to allege is that a single option may have been marginally more expensive than necessary) and invite judicial micromanagement of fees.

In any event, even if ERISA imposed petitioners' paternalistic duty of prudence, petitioners' claims would still fail. To state a viable claim, petitioners must plausibly allege an "alternative action that the defendant could have taken" and that a prudent fiduciary necessarily would have taken. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). The complaint at issue fails to do so for either of their excessive-fee claims. In particular, it fails to allege that the institutional-class shares petitioners claim should have been offered were even available, because

it fails to identify the minimum investment requirements for those shares, much less allege facts showing they were met. Instead, it relies on conclusory allegations concerning "jumbo 401(k) plans"; but 401(k) plans differ in material respects from the 403(b) plans at issue here, including as to liquidity and bargaining leverage. Likewise, the complaint fails to identify a single other recordkeeper that charged the recordkeeping fees petitioners deem reasonable, and it ignores the adverse effects that consolidating to a single recordkeeper would have had on participants—which no doubt explains why most university plans have multiple recordkeepers.

ERISA's duty of prudence provides an important check on plan administration. But it must take into account the nature of the plan at issue, and is subject to the same pleading standards as other claims. The flawed complaint in this case flunks those standards.

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the addendum to this brief. Add. 1a-14a.

## STATEMENT OF THE CASE

### A. Statutory And Regulatory Background

1. Congress enacted ERISA in 1974 "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). But "Congress did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). As a result, "ERISA represents a 'careful balancing'": While Congress sought "to ensure that employees would receive the benefits they had earned," Congress also

"sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Id.* at 516-17 (alterations in original) (citations omitted).

When ERISA was enacted, most employers that provided for their employees' retirement did so through traditional defined benefit pension plans. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 469-72 (2004). In such a plan, the employee is entitled to a "fixed periodic payment" upon retirement from a "general pool of assets" maintained in investments selected by the employer. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citation omitted). The asset pool may be funded by both employer and employee contributions, but because the employee payments are fixed, the employer "bears the entire investment risk" of the plan. *Id.*; *see Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020).

In a "defined contribution plan," by contrast, the employer offers "an individual account for each participant," to which both employers and employees contribute. 29 U.S.C. § 1002(34). Unlike defined benefit plans, defined contribution plans do not assure a fixed benefit at retirement. Rather, "each [participant] is entitled to whatever assets are dedicated to his individual account," *Hughes*, 525 U.S. at 439, the value of which is determined by "the amounts contributed to that account and the investment performance of those contributions," *LaRue*, 552 U.S. at 250 n.1. Most defined contribution plans—like the ones at issue in this case—are participant-directed, allowing participants to select

the particular investments for their individual accounts from a menu of options. *See, e.g.*, United States Gen. Accounting Off., GAO/HEHS-98-28, *401(k) Pension Plans: Extent of Plans' Investments in Employer Securities and Real Property* 8-9 (1997).

2. ERISA imposes fiduciary duties on plan administrators, 29 U.S.C. § 1104(a), and subjects them to personal liability for breaching those duties, *see id.* §§ 1109(a), 1132(a)(2). At issue here is the general duty of prudence, which requires plan fiduciaries to exercise "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." *Id.* § 1104(a)(1)(B).

ERISA's fiduciary duty provisions explicitly anticipate defined contribution plans that "permit[] a participant or beneficiary to exercise control over the assets in his account," *id.* § 1104(c)(1)(A), and direct that such plans must offer a "mix of asset classes," *id.* § 1104(c)(5)(A). And ERISA provides that fiduciaries of such plans are not "liable under [ERISA] for any loss, or by reason of any breach, which results from [a] participant's or beneficiary's exercise of control." *Id.* § 1104(c)(1)(A)(ii). Thus, if an employer offers "a broad range of investments" and a "participant instructs the plan trustee to invest the full balance of his account in, *e.g.*, a single stock, the trustee is not to be liable for any loss . . . because the investment does not meet the prudent man standards." H.R. Rep. No. 93-1280, at 305-06 (1974) (Conf. Rep.).

For these kinds of participant-directed plans, therefore, the fiduciary's primary responsibility is to ensure that "participants [have] meaningful choices

about how to invest their retirement savings." *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011); *see* 29 C.F.R. § 2550.404c-1(b)(3)(i)(A), (C). And, to enable the exercise of that choice, regulations promulgated by the Department of Labor (DOL) require plan fiduciaries to satisfy extensive disclosure requirements, including concerning plan expenses. *See* 29 C.F.R. § 2550.404c-1(b)(2); *see also id.* § 2550.404a-5.

**B. Retirement Plan Options And Section 403(b) Annuity Plans**

1. Perhaps the most well-known type of retirement plan is the "401(k) plan," named for the tax-code provision enacted shortly after ERISA providing tax advantages for certain retirement plans in the for-profit sector, 26 U.S.C. § 401(k). Designed initially to supplement the fixed pensions that dominated at the time, *see LaRue*, 552 U.S. at 255, 401(k) plans have traditionally focused on equity investments, with mutual funds topping the list.

This case, by contrast, involves retirement plans organized under 26 U.S.C. § 403(b). Section 403, entitled "Taxation of employee annuities," was enacted long before ERISA and provides special tax treatment for retirement plans sponsored by educational institutions and other not-for-profit organizations. 403(b) plans are "structured differently from 401(k) plans." Advisory Council on Employee Welfare & Pension Benefit Plans, U.S. Dep't of Labor, *Current Challenges and Best Practices*

*for ERISA Compliance for 403(b) Plan Sponsors* 5 (Nov. 2011) (*Advisory Council Report*).[1]

In particular, 403(b) plans—unlike 401(k) plans—are heavily invested in annuities. An annuity is an individual contract between a participant and an issuer in which an issuer receives payments now in return for a stream of payments later—e.g., upon retirement. *See, e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995); *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 485-86 (8th Cir. 2020).

Traditionally, 403(b) plans were limited exclusively to investments in annuities and therefore functioned as collections of individual retirement accounts. *See* JA62-63 (¶¶ 76, 78). Participants "interacted directly with the [investment] providers" and selected their own investments. *Advisory Council Report* 5-6, 9. Employers also frequently added investment providers (and with them, investment options) at employees' request. *Id.* at 29-30. And while ERISA amended Section 403(b) to permit the inclusion of certain mutual funds, annuities remain the hallmark of 403(b) plans. For universities, annuities have served as a cornerstone of retirement plans since the Teachers Insurance and Annuity Association (TIAA) was founded more than a century ago. *See* Rainard B. Robbins, *College Plans for Retirement Income* 24-27 (1940).

2. In any defined contribution plan, participants will incur certain fees and expenses. These expenses must be disclosed to plan participants, *see* 29 C.F.R.

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[1] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/current-challenges-and-best-practices-for-erisa-compliance-for-403b-plan-sponsors.pdf.

§ 2550.404c-1(b)(2)(ii)(A); *id.* § 2550.404a-5(c)(2)-(3), (h)(5)(ii)(C), ensuring that "individual investors" can "factor[] expenses optimally into their investment choices," 75 Fed. Reg. 64,910, 64,930 (Oct. 20, 2010). Two kinds of fees are at issue in this case: investment management fees and recordkeeping fees.

Investment management fees are charged by the investment providers and are expressed as an "expense ratio," i.e., a percentage of the assets under management. Pet. App. 30a-31a. The expense ratio for any particular investment option is largely driven by the degree of management involved—passively managed investments (such as index funds) carry lower expense ratios than actively managed investments. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 669-70 (7th Cir. 2011) (Easterbrook, C.J.).

For mutual funds, some providers offer different share classes of the same fund—a "retail" share class available to all investors at an expense ratio set by market competition, and "institutional" share classes with lower expense ratios available only to investors that satisfy certain investment minimums. For example, Vanguard offers two institutional share classes for the "Vanguard Small Cap Index" mentioned by petitioners. Pet. Br. 45 n.20. And the particular class identified by petitioners—"Vanguard Small Cap Index (Inst[itutional] Pl[us]) (VSCPX)," JA112—has, for more than a decade, had a plan-wide investment minimum of $100 million.[2] A retirement plan would not meet that minimum unless its

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[2] Vanguard Grp., Vanguard Small-Cap Index Fund: Summary Prospectus (Form 497K), at 5 (Dec. 13, 2010), https://www.sec.gov/Archives/edgar/data/36405/000093247110003598/ussmall-capindexfundinstspi8.htm.

individual participants collectively elected to invest $100 million in that particular fund.

Recordkeeping fees cover administrative expenses for, among other things, tracking individual investments, providing plan and account information, and offering investment advice and educational programming to participants. Pet. App. 4a-5a. Recordkeeping services may be provided by the investment providers themselves, or by third parties. Recordkeeping fees are frequently tethered to the particular investment options selected by participants. Under the commonly used "revenue sharing" model, recordkeeping fees are included as part of each investment option's expense ratio and paid by the investment provider to the recordkeeper. *Id.* at 31a-32a, 41a.

### C. Northwestern's 403(b) Retirement Plans

Northwestern University is one of the nation's leading not-for-profit institutions of higher education. *See* JA42 (¶ 24). It operates two 403(b) plans: the Retirement Plan and the Voluntary Savings Plan (together, the Plans). Pet. App. 1a.

Like most 403(b) plans, the Plans historically have provided participants with a wide range of options, including annuity products. *Id.* at 3a. Individual participants can choose how to invest their account funds from among the options made available to the Plans through two investment providers: TIAA, which offers several proprietary annuity products, and Fidelity Investments, which offers primarily mutual funds. *Id.* at 2a-4a. Until October 2016, Retirement Plan participants could choose from among 242 investment options, and Voluntary Plan participants could choose from among 187 investment

options. *Id.* at 3a. TIAA served as recordkeeper for its own products, while Fidelity served as recordkeeper for other products. *Id.* at 4a, 16a. Both TIAA and Fidelity employed a revenue sharing model under which recordkeeping fees were part of the expense ratios of each option. *Id.* at 32a.

TIAA has long offered a fixed annuity called the Traditional Annuity. *Id.* at 4a. It is a popular annuity among higher education 403(b) plans, since faculty can easily port it from one school to another. *See Davis*, 960 F.3d at 486. As of the end of 2009, more than one-third of the Plans' assets were invested in the Traditional Annuity. *See* D. Ct. Doc. 59-7, at 11-12 (Jan. 17, 2017); D. Ct. Doc. 59-8, at 11-12 (Jan. 17, 2017). TIAA imposes a 2.5% penalty if funds are withdrawn sooner than 120 days after the termination of employment. Pet. App. 4a. TIAA also requires any plan offering its Traditional Annuity to use TIAA as a recordkeeper for TIAA products. JA70 (¶ 88).

In 2009, IRS regulations placed new and more exacting requirements on 403(b) plans. *Advisory Council Report* 6; *see* 72 Fed. Reg. 41,128 (July 26, 2007) (effective Jan. 1, 2009). Following the 2009 IRS regulations, Northwestern undertook an extensive, multi-year review of the Plans helmed by a newly established Northwestern University Retirement Investment Committee (NURIC), an entity tasked with enhancing oversight of the Plans and undertaking the fiduciary responsibilities for administration of the Plans' assets. *See* JA44 (¶ 31). Upon its formation, NURIC embarked upon a comprehensive study, guided by outside legal counsel and multiple consultants, of the Plans' diverse constituencies. This process, unsurprisingly, took

time. Altering investment lineups or recordkeeper arrangements not only requires careful communication with plan participants, but requires navigating individual contractual arrangements and expectations. After this review, NURIC oversaw the rollout of a new investment menu in 2016. *See* Pet. App. 3a-4a.

Currently, the Plans' offerings consist of 40 options available through TIAA and Fidelity, including the TIAA Traditional Annuity, and a brokerage window offering participants access to a broad range of other funds. *Id.* at 4a; JA86-88 (¶¶ 123-28, 132). NURIC retained both TIAA and Fidelity as recordkeepers. *See* JA246 (¶ 161).[3]

**D. Proceedings Below**

1. Petitioners, current or former employees of Northwestern and participants in the Plans, filed this suit against respondents in August 2016—just months before Northwestern rolled out its new menu. Pet. App. 1a-2a & n.4. This suit was among a dozen virtually identical suits filed by petitioners' counsel against large universities across the country. *See* Anne Tergesen, *Suits Target University Retirement Plans*, Wall St. J. (Aug. 19, 2016), https://on.wsj.com/3mEjN8q. The complaints in each case largely recycled the same set of allegations, "[m]ost" of which "are not specific to the defendants and the plans" at issue. Pet. App. 28a.

[3] Although petitioners reassert in their brief (as they initially alleged in their complaint) that NURIC consolidated to a single recordkeeper for the Voluntary Savings Plan in 2012, Pet. Br. 8 (citing JA94 (¶ 143)), that allegation is incorrect, as petitioners have acknowledged, *see* JA246 (¶ 161).

Petitioners filed an Amended Complaint (or FAC) in December 2016, claiming that respondents breached their fiduciary duties under ERISA in several respects. JA34-178. Petitioners have abandoned most of those claims and advance only two in this Court. In Count III of the FAC (JA165-68), petitioners alleged that respondents breached their fiduciary duties by overpaying for recordkeeping fees. According to petitioners, "a reasonable recordkeeping fee for the Plans" would be a flat fee of "$35 per participant." JA95-96 (¶ 148). Petitioners also alleged that respondents should have consolidated to a single recordkeeper. JA166-67 (¶¶ 249-51).

In Count V of the FAC (JA169-73), petitioners asserted that respondents breached their duty of prudence with respect to the Plans' investment options. Petitioners alleged that the "high number of investment options cause[d] participant confusion and inaction" and that, by "retain[ing] multiple investment options in each asset class and investment style until October 2016," petitioners "depriv[ed] the Plans of their ability to qualify for lower cost share classes of certain investments." JA170-71 (¶ 266). Petitioners also included a chart in the FAC listing certain funds for which the Plans purportedly offered participants retail-class shares instead of institutional-class shares at some unidentified point in time. JA100-116 (¶ 161).

Respondents moved to dismiss the FAC and to stay discovery pending that motion. The district court nevertheless allowed discovery to proceed. D. Ct. Doc. 67 (Feb. 15, 2017). Six days before the close of discovery, and while respondents' motion to dismiss was still pending, petitioners sought leave to file a proposed Second Amended Complaint (SAC), alleging

four additional counts. *See* Pet. App. 50a; JA179-351. In a newly added Count VII—entitled "Defendants' Use of Retail Share Classes"—petitioners claimed respondents breached their fiduciary duty by offering retail-class shares instead of lower-cost institutional-class shares for certain mutual funds. JA340-42. This claim was based on the premise that respondents could have, and so purportedly were required to, switch to these share classes "immediately." JA341 (¶ 344).

2. The district court granted respondents' motion to dismiss the FAC and denied petitioners' motion for leave to file the proposed SAC. Pet. App. 26a-58a.

As to Count III, the district court held that defendants were not "required to try to find a record-keeper willing to take $35/participant/year" and that, based on the revenue sharing arrangement used, "participants had options to keep the expense ratios (and, thus, record-keeping expenses) low." *Id.* at 41a-44a. And as to Count V, the court held that petitioners could not complain that "the range of investment options was too broad" or that "the fees charged by some funds were too high" because the "types of low-cost index funds" desired by petitioners "*were and are* available to them." *Id.* at 44a-45a.

The district court also denied petitioners' effort to add the new counts in the proposed SAC—including Count VII—on the ground that the amendment was untimely, abandoned, and futile. *Id.* at 51a-52a.[4]

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[4] After the district court granted respondents' motion to dismiss, petitioners attempted to file yet another proposed SAC in connection with a request that the court alter or amend its judgment. That request was also denied. JA452-54.

3. The Seventh Circuit affirmed. *Id.* at 1a-25a. "Construing the facts and allegations in [petitioners'] favor," the court concluded that "the amended complaint fails to plausibly allege a breach of fiduciary duty under ERISA." *Id.* at 11a-22a.

As to Count III, the court explained that petitioners "identified no alternative recordkeeper that would have accepted . . . any fee lower than what was paid to Fidelity and TIAA." *Id.* at 18a. The court added that, under the revenue sharing model used by the Plans, "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low." *Id.* at 18a n.10. The court also held that switching to a "sole recordkeeper" was "undermin[ed]" by petitioners' "own allegations." *Id.* at 16a-17a. Using only Fidelity would have forced the Plans to drop the popular TIAA Traditional Annuity and triggered the 2.5% surrender charge. *Id.* at 16a. And, the court continued, the "[FAC] contains no allegation that plan participants would have been better off with TIAA as the sole recordkeeper." *Id.*

As to Count V, the court concluded that petitioners' allegations also "do not add up to a breach of fiduciary duty." *Id.* at 19a-21a. As the court observed, the types of "low-cost index funds" petitioners wanted "'*were and are* available to them.'" *Id.* at 19a (citation omitted). That fact "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu." *Id.* The court also rejected petitioners' suggestion that the court adopt "a blanket prohibition on retail share classes," explaining that the inclusion of such funds must be considered "'against the backdrop of the mix and range of available investment options'" as a whole, rather than in isolation. *Id.* at 19a-20a (citation

omitted). And here, the court noted, the Plans "offered hundreds of options," "making a claim of imprudence less plausible." *Id.* at 20a.

Finally, the Seventh Circuit affirmed the denial of petitioners' motion for leave to add the "new claims" in the proposed SAC. *Id.* at 23a. As the court noted, petitioners "did not even attempt" to challenge the finding that these claims were untimely. *Id.*

## SUMMARY OF ARGUMENT

The court of appeals and district court both correctly concluded that petitioners' Amended Complaint fails to state a claim for breach of ERISA's duty of prudence. The Court should affirm.

I. ERISA's duty of prudence is context specific and, therefore, must take into account the nature of the underlying plans. This case involves participant-directed defined contribution plans. Under ERISA, fiduciaries of such plans are charged with providing participants a diverse menu of options and information to assist participants in their own investment choices. Where a fiduciary offers a wide range of options and discloses the information necessary to choose among those options (including as to expenses), the duty of prudence is not breached simply because of marginal cost differences among certain investment options that are otherwise sound. Participants who wish may limit their expenses through the exercise of investment choice. In arguing otherwise, petitioners and the government ignore the text of ERISA and rely on trust law principles governing the situation in which fiduciaries make decisions *for* their beneficiaries.

II. In any event, even accepting that paternalistic conception of the duty of prudence, the Amended

Complaint fails to state a plausible claim that respondents breached that duty. To state a duty-of-prudence claim under ERISA, the complaint must allege plausible facts supporting a reasonable inference that the fiduciary failed to take an alternative action that (1) was actually available and (2) a prudent fiduciary could not have concluded would do more harm than good. The claims at issue fail to meet each of those requirements.

A. *Count III*: Petitioners failed to plausibly allege that respondents breached their duty of prudence with respect to recordkeeping fees. Petitioners failed to identify a single alternative recordkeeper that would have accepted the allegedly reasonable flat fee of "$35 per participant." Instead, petitioners claim that respondents should have consolidated to a single recordkeeper. But petitioners admit that this was not an available alternative because no single recordkeeper could service the full menu of options offered by the Plans, including the sought-after TIAA Traditional Annuity. As a result, the thrust of petitioners' argument is that respondents should have radically restructured the Plans by jettisoning popular investment options to accommodate a single recordkeeper. ERISA requires no such thing.

B. *Count V*: Petitioners' claim that respondents breached their duty of prudence with respect to investment management fees fares no better. As pleaded in the FAC, this claim was based on the premise that the plans offered participants too many investment options, which allegedly caused confusion and prevented the Plans from qualifying for lower-cost institutional-class shares. But, as discussed, ERISA encourages administrators to offer different investment options, along with the information

necessary to choose among those options (which respondents have never challenged). While petitioners briefly reprise their "too many options" claim here, the government does not join it; instead, it admits (at 23) that "[t]here is nothing inherently wrong with a wide mix of options."

Petitioners and the government instead focus on a revamped version of Count V: that respondents breached their duty of prudence by failing to offer more low-cost institutional-class shares of certain funds on the ground that those shares were available to the Plans. This claim also fails. As petitioners acknowledge, institutional-class shares are available only when certain minimum investment thresholds are met. Yet petitioners' complaint does not identify those requirements for the funds at issue, much less plausibly allege that they would have been met. And petitioners' conclusory and speculative allegation that the Plans could evade these requirements because some "jumbo 401(k) plans" did so is insufficient. University 403(b) plans, whose investments tend to be concentrated in illiquid annuity contracts, are materially different than 401(k) plans, which are comprised almost exclusively of mutual funds.

Moreover, this claim comes too late. Petitioners tried to add this claim in their proposed SAC. But both courts below found that this amendment was untimely—and petitioners made a strategic decision not to challenge that ruling in seeking certiorari. There is no reason to excuse that default.

C. Petitioners cannot make up for the deficiencies in their complaint by resorting to non-pleaded "evidence" obtained in discovery. Indeed, both courts below refused to allow petitioners to inject this

material into the case, and it amounts to a one-sided distortion of deposition excerpts.

III. Allowing these flawed claims past the pleading threshold would have devastating consequences for ERISA plans. Petitioners' broad conception of the duty of prudence will subject fiduciaries to endless lawsuits claiming not that the fiduciaries failed to follow industry norms but that they failed to buck those norms and act as "revolution[aries]." Pet. Br. 3. Such claims, and the resulting exposure to massive discovery costs and personal liability, will only discourage employers from offering participants the range of choices that ERISA encourages, if not discourage them from offering retirement plans altogether. And it will thrust courts into the role of investment managers, having to audit the fees associated with each and every investment option offered in a retirement plan. Nothing in ERISA supports that perverse result.

The judgment should be affirmed.

## ARGUMENT

### I. PETITIONERS AND THE GOVERNMENT MISCHARACTERIZE THE NATURE OF THE DUTY OF PRUDENCE UNDER ERISA FOR PARTICIPANT-DIRECTED PLANS

Petitioners and the government argue that, although the Plans' participants are responsible for selecting their own investments, ERISA authorizes a damages action for breach of the duty of prudence based on marginal costs differences in isolated investment options, regardless of their place in the menu of available options. That argument ignores the context-specific inquiry demanded by ERISA's text and is based solely on trust law developed for the

different situation in which trustees make investment decisions *for* their beneficiaries. It should be rejected by this Court.

A. Under ERISA, a fiduciary must "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This duty serves as an important safeguard of participants' retirement benefits, but it is not a straightjacket. Rather, fiduciaries have a significant amount of discretion and flexibility in deciding how to prudently administer an ERISA plan. *See, e.g.*, *Caterino v. Barry*, 8 F.3d 878, 883 (1st Cir. 1993) (Breyer, C.J.) ("[W]here, as here, there is no claim of trustee self-dealing or the like, we do not simply substitute our judgment for that of the trustees. We review the trustees' decision at a distance.").

Moreover, as the text of Section 1104(a)(1)(B) makes clear, "the content of the duty of prudence" in any given case is necessarily "context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). ERISA explicitly links the duty of prudence to the particular role of the fiduciary ("a prudent man acting in a like capacity"), and the nature of the plan ("an enterprise of a like character and with like aims"). 29 U.S.C. § 1104(a)(1)(B).

Context is crucial here. This case involves a defined contribution plan in which participants direct their *own* investments. Such participant-directed plans are "designed to offer participants meaningful choices about how to invest their retirement savings." *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir.

2011). Participants in such plans are in the driver's seat, and the fiduciary's primary obligation in this context is ensuring that participants have the tools "to make their own choices." *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011) (Easterbrook, C.J.). That means providing participants with a "variety of investment options" that carry diverse "risk profiles, investment strategies, and associated fees," *Renfro*, 671 F.3d at 327, along with the information necessary to understand and choose among those options, *see Loomis*, 658 F.3d at 671; *see also* Employee Benefits Sec. Admin., U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan* 25-26 (Sept. 2020).[5] And the fiduciary should monitor the plan lineup to ensure that a meaningful array of options, including as to cost, remains available. *See Tibble v. Edison Int'l*, 575 U.S. 523, 530-31 (2015).

ERISA's unique treatment of participant-directed plans is underscored by the affirmative defense provided in Section 1104(c). As Judge Wood explained for the Seventh Circuit, Section 1104(c) explicitly "modifies" the ordinary role of the plan fiduciary when, as here, the plan "provide[s] for individual accounts and allow[s] a participant or beneficiary 'to exercise control over the assets in his account.'" *Hecker v. Deere & Co.*, 556 F.3d 575, 587 (7th Cir. 2009) (quoting 29 U.S.C. § 1104(c)(1)(A)); *see Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299, 310-11 (5th Cir. 2007); 29 C.F.R. § 2550.404c-1(b)(3)(i)(A) (encouraging fiduciaries to give individual account holders "a broad range of

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[5] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf.

investment alternatives"). In that instance, the participant, not the fiduciary, is responsible for the "results [of the] participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii).

Thus, as the Seventh Circuit has held, a fiduciary's responsibility in this context is not "paternalistic"; rather, it is to ensure that participants have a "wide range of options" from which participants may "make their *own* choices." *Loomis*, 658 F.3d at 670, 673 (emphasis added). And, where, as here, the fiduciary offers a "sufficient mix of investments for their participants" that includes low-cost options desired by the plaintiff, "[t]he fact that it is possible that some funds might have had even lower [expense] ratios is beside the point." *Hecker*, 556 F.3d at 586.[6]

B. Petitioners and the government do not attempt to tether their understanding of the duty of prudence to the statute, nor do they acknowledge the specific context of participant-directed defined contribution plans. Instead, they rest their case on general trust law principles and this Court's decision in *Tibble*. This sweeping importation of trust law is misguided.

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[6] The government cites a DOL regulation to argue that, "notwithstanding Section 1104(c)," a fiduciary may be liable for "losses attributable to the imprudent selection or monitoring of the funds on a plan's investment menu." U.S. Br. 24 (citing 29 C.F.R. § 2550.404c-1(d)(2)(iv)). To the extent this regulation permits liability for losses that result from "the participants' investment decisions," that regulation (which originated in a footnote in the Federal Register) "does not reasonably interpret § [1104(c)]." *Langbecker*, 476 F.3d at 310-11; *see Hecker*, 556 F.3d at 589. In any event, the point for present purposes is simply that Section 1104(c) shows that participant-directed plans and employer-directed plans should not be conflated for purposes of the duty of prudence.

1. To be sure, ERISA's duty of prudence generally "derive[s] from the common law of trusts." *Tibble*, 575 U.S. at 528 (citation omitted); *see* Restatement (Second) of Trusts § 174 (1959). This Court has made clear, however, that "trust law informs but does not control the interpretation of ERISA," especially when plan participants are "not similarly situated to the beneficiaries of a private trust." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020); *see also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

In defending their paternalistic duty of prudence, petitioners and the government rely on trust law principles governing the classic trust relationship—in which the trustee has the power to make investment decisions and "is not subject to the control of . . . the beneficiaries." Restatement (Third) of Trusts § 5 cmt. e, at 52 (2003); *see, e.g.*, *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2223-24 (2019). In that context, it may make sense to require a more rigorous analysis of each individual investment in isolation, including as to cost. *See* Restatement (Second) of Trusts § 227 cmt. *o*, at 535.

But Northwestern's Plans are defined contribution plans that give participants responsibility for selecting their *own* investments from a menu of options. "The trust-law analogy" used by petitioners and the government "therefore does not fit" this context. *Thole*, 140 S. Ct. at 1620; *see In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 n.24 (3d Cir. 1996) (finding no "common law trust principle that is analogous" in this context). If anything, the closest analog in trust law would be "a beneficiary who in advance approves an investment[] or the retention or change of an investment"—and in that circumstance,

the beneficiary "cannot thereafter complain of the trustee's action," even if the investment might "otherwise be nonlegal." Amy M. Hess, George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 941 (3d ed. 2019) (Bogert); *see id.* § 688; *In re Macfarlane's Estate*, 177 A. 12, 15 (Pa. 1935). But at the very least, any application of trust law must account for the unique character of participant-directed plans, which place the responsibility of choice on plan participants.

2. Nothing in *Tibble* compels a different understanding. *Cf.* Pet. Br. 28, 45-46; U.S. Br. 22.

The question in *Tibble* was whether, in addition to a fiduciary's "initial selection" of an investment, a fiduciary's "*retention* of an investment" can be "an 'action' or 'omission' that triggers" ERISA's six-year limitations period. 575 U.S. at 525, 530 (emphasis added) (quoting 29 U.S.C. § 1113). The Court answered that question in the affirmative, explaining that trustees under trust law have a "continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 529-30. Thus, "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Id.* at 530.

But in resolving that timing question, *Tibble* did not, as petitioners claim (at 15), "determine the contours of ERISA's fiduciary duty to monitor investments in defined-contribution plans." The Court said precisely the opposite: "We express no view on the scope of respondents' fiduciary duty in this case." *Tibble*, 575 U.S. at 531.[7] And the Court

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[7] That issue was not even joined in *Tibble*. "The parties [in *Tibble*] *agree*[*d*] that the duty of prudence involves a continuing duty to monitor investments and remove imprudent

certainly did not hold—"[i]mplicit[ly]" or otherwise—that this duty necessarily subjects fiduciaries of participant-directed plans to liability anytime a plan participant claims to have identified a "single imprudent investment" option among a menu of available "prudent investment options." Pet. Br. 28.

The government's assertion (at 22) that *Tibble* "made clear [how] this monitoring duty applies" is particularly striking given its own representations at oral argument in *Tibble*. There, the government told this Court that the "[o]nly" question presented was whether the "claim for ongoing monitoring" was "timely," and that the question of "what does the monitoring duty entail" was "not briefed in any kind of extensive way . . . because [it was] not the question on which the Court granted cert." Transcript of Oral Arg. 17, *Tibble*, 575 U.S. 523 (No. 13-550). The government therefore can hardly argue today that *Tibble* resolved the scope of the duty at issue here.

C. Under a proper understanding of the duty of prudence in this context, petitioners' claims fail. Petitioners challenge the marginal differences in investment management and recordkeeping fees for certain options. But petitioners do not and cannot dispute that the kinds of low-cost options they desired, with lower expense ratios, "'*were and are* available'" to participants in the Plans at issue here. Pet. App. 19a (citation omitted). Accordingly, petitioners' claims boil down to the flawed premise that, even though the Plans offered the very kinds of

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ones under trust law." 575 U.S. at 530 (emphasis added). Needless to say, this Court is "not bound to follow . . . dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

low-cost funds they desired and deemed prudent, respondents are liable for breach of duty because "numerous additional funds were offered as well." *Id.*

That claim erroneously overlooks petitioners' own choice among the diverse menu of investment options assembled and invites second-guessing of literally every investment in a plan based on small cost differences. In rare cases, a single investment option may be so rotten that it would call into question the prudence of the fiduciary as a general matter. But here, the investments at issue are widely held and generally sound; the only complaint is that they could have possibly been slightly less expensive. As the Seventh Circuit has concluded, where, as here, the fiduciary has assembled "a sufficient range of options so that the participants have control over the risk of loss," ERISA does not permit a plaintiff to overlook the choices that he or she made, and sue based on marginal costs differences of individual options in isolation. *Hecker*, 556 F.3d at 589.

Fiduciaries of participant-directed plans are, of course, still subject to suit for claims of mismanagement, such as conflicts of interest. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (allowing breach-of-duty claim to go forward where the plan allegedly included only "a relatively limited menu of funds" that were "chosen to benefit the trustee at the expense of the participants"). And a fiduciary may be subject to a breach-of-duty claim for offering "*only* retail class shares"—and no lower cost institutional shares from which to choose. *Id.* at 595 (emphasis added). But where, as here, the plan provides participants with a wide array of investment vehicles—including the kind of low-cost options that petitioners demand—

ERISA does not authorize a damages action based on a participant's post hoc claim that a single particular investment option could have been marginally cheaper.

## II. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS FAILED TO PLAUSIBLY ALLEGE A BREACH OF ERISA'S DUTY OF PRUDENCE

Even if this Court adopts petitioners' and the government's paternalistic conception of the duty of prudence, the courts below still correctly concluded that petitioners' allegations fail to state a claim.

### A. ERISA Requires Plausible Allegations Of Comparatively Imprudent Behavior

The motion to dismiss is an especially "important mechanism for weeding out meritless [breach-of-duty] claims." *Fifth Third*, 573 U.S. at 425. To survive one, a complaint must (1) "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citation omitted); and (2) state "a plausible claim for relief" by alleging "sufficient factual matter" that "permit[s] the court to infer more than the mere possibility of misconduct," *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "[A] complaint [that] pleads facts that are 'merely consistent with' a defendant's liability" will not do. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). Nor will factual allegations for which there is an "'obvious alternative explanation'" that is "lawful." *Id.* at 682 (quoting *Twombly*, 550 U.S. at 567).

Those pleading standards are fully applicable to ERISA claims. *See Fifth Third*, 573 U.S. at 425. Applying them "begin[s]" with "the elements a

plaintiff must plead to state a claim" for breach of duty. *Iqbal*, 556 U.S. at 675. First, the complaint "must plausibly allege an alternative action that the defendant could have taken"—i.e., an alternative action that was actually *available* to the fiduciary. *Fifth Third*, 573 U.S. at 428. Second, the complaint must "'plausibly allege[]' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Amgen Inc. v. Harris*, 577 U.S. 308, 311 (2016) (per curiam) (quoting *Fifth Third*, 573 U.S. at 430).

These elements "appl[y] to all ERISA fiduciaries," *Fifth Third*, 573 U.S. at 418-19, and they underscore that a fiduciary's prudence cannot be determined in a vacuum. Instead, ERISA requires a comparative assessment of how "a prudent fiduciary in the same position" would have acted. *Amgen*, 577 U.S. at 311. That is also true under ordinary trust law: "A court will not examine the conduct of the trustee and determine in each case whether the trustee acted reasonably, but rather compare the actions taken with the external standard of the ordinarily prudent and skillful person." Bogert § 541. Thus, to state a claim of imprudence, a plaintiff must at least "provide a sound basis for comparison—a meaningful benchmark." *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020) (citation omitted).

When, as here, the plaintiff is asserting fiduciary imprudence based on excessive fees, that comparative assessment has at least two components. First, the plaintiff must identify a benchmark against which to measure the fees. To support a reasonable inference that fees are excessive, the "complaint cannot simply make a bare allegation that [fees] are too high." *Id.* Even the government recognizes that a "bare

allegation that cheaper alternative investments exist" is not sufficient to state a claim. U.S. Br. 20 (citation omitted). Rather, as petitioners' own authority demonstrates, a plaintiff must compare the charged fee with the prevailing market rate for similarly situated products or services. *See Wall v. Boston Safe Deposit & Trust Co.*, 150 N.E. 220, 222 (Mass. 1926) (considering "the usual commission charged for similar services by other brokers in [the] community"); *see also, e.g.*, *Stanton v. Embrey*, 93 U.S. (3 Otto) 548, 557 (1876) (stating that a "reasonabl[e]" fee is "the price usually charged and received for similar services by other persons of the same profession"); *cf.* U.S. Br. (I) ("materially identical" products or services).

Second, the plaintiff must plausibly allege facts comparing the defendant's conduct against the conduct of other similarly situated fiduciaries. That is because, even under basic trust law principles, the reasonableness inquiry requires a comparison of "the actions taken with the external standard of the ordinarily prudent and skillful person." Bogert § 541; *see* Restatement (Third) of Trusts § 90 cmt. e, at 305 (2007) (inquiry into reasonableness considers whether challenged "investment or strategy is widely used by trustees in comparable trust situations"). Thus, for a court to draw an inference of imprudence under ERISA, the complaint should identify other similarly situated fiduciaries who, at the time, were "acting in a like capacity" under similar "circumstances" and selected the allegedly more "prudent" alternative. 29 U.S.C. § 1104(a)(1)(B).

That is a tall order for petitioners, since the gist of their counsel's litigation campaign is that the nation's leading universities were *all* acting imprudently.

**B. Petitioners' Recordkeeping Claim Fails**

In Count III of the FAC, petitioners asserted that respondents breached their duty of prudence by causing the Plans' participants to incur excessive recordkeeping fees. JA166-67. That claim fails.

1. This claim ostensibly rests on the allegation that a "reasonable" fee "would be approximately $1,050,000 in the aggregate for both Plans combined (or a flat fee based on $35 per participant)." JA95-96 (¶ 148); Pet. Br. 32. But that is precisely the sort of "'naked assertion[]' devoid of further factual enhancement" that cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Indeed, the FAC essentially plucks that number out of thin air, vaguely gesturing at "the Plans' features" and "the recordkeeping market" without any factual enhancement. JA95 (¶ 148); *cf., e.g.*, *Wilcox v. Georgetown Univ.*, No. 18-cv-422, 2019 WL 132281, at *12 (D.D.C. Jan. 8, 2019) ("Plaintiffs provide no factual support at all for their assertion that the Plans should pay only $35/year per participant in recordkeeping fees.").

The FAC also offers no basis to conclude that a "$35 per participant" fee was an *available* alternative. Indeed, petitioners admit that they failed to allege even one "specific recordkeeper that would have serviced the Plans at a lower price." Pet. Br. 34; *see also* Pet. App. 18a. Petitioners cannot plausibly claim that respondents "'pa[id] more than' the 'usual commission charged for similar services by other' vendors," Pet. Br. 33 (quoting *Wall*, 150 N.E. at 222), without so much as identifying a single comparable vendor that would have actually accepted what

petitioners deem to be a reasonable fee for the Plans. Count III fails for these reasons alone.

2. Petitioners and the government largely ignore the actual recordkeeping fees incurred and argue instead that Northwestern's recordkeeping-fee *practices* did not comport with "recommendations" by "industry experts." Pet. Br. 32-35; *see* U.S. Br. 28-29, 34. But without plausible allegations that the fees were actually excessive, abstract objections to a fiduciary's *practices* do not state a damages claim for breach of duty. *See, e.g.*, *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). And, in any event, the arguments fail on their own terms.

a. Petitioners' main claim is that respondents breached their duty of prudence by failing to "consolidat[e]" the two recordkeeping entities—TIAA and Fidelity—"to a single recordkeeper." Pet. Br. 32. This claim fails for several reasons.

i. Petitioners failed to allege plausibly that consolidating to one recordkeeper was an *available* alternative. Under petitioners' own allegations, no single recordkeeper could service the Plans' full menu of options. Dropping TIAA as recordkeeper would have eliminated the popular TIAA Traditional Annuity from the menu. JA70 (¶ 88). And dropping Fidelity as recordkeeper would have compromised the Plans' ability to offer the Fidelity options on the menu. *See* JA77 (¶ 97) (alleging that CalTech gave up "over 100 Fidelity mutual fund options" in consolidating to TIAA as sole recordkeeper). Thus, the retention of two recordkeepers creates no "inference" that respondents were "[o]verpaying for a necessary service," Pet. Br. 33, given that both

recordkeepers were necessary to fully service the Plans' lineups.

In reality, petitioners are claiming that respondents were imprudent for failing to transform the Plans' lineups so that they could be serviced by a single recordkeeper. *See* Pet. Br. 43-44. That claim, however, is divorced from petitioners' theory of liability. The question is whether the fees for the Plans' lineup were excessive, not whether fees for a materially different lineup might have been cheaper.[8]

ii. Petitioners also failed to "'plausibly allege[]' that a prudent fiduciary in the same position 'could not have concluded'" that consolidating to one recordkeeper "'would do more harm than good.'" *Amgen*, 577 U.S. at 311 (citation omitted).

Petitioners' own complaint admits that "the multiple-recordkeeper model had been *common* in the higher-education marketplace." JA78 (¶ 100) (emphasis added); *see also, e.g.*, D. Ct. Doc. 59-14, at 3 (Jan. 17, 2017) (article cited at JA80 (¶ 104)) ("The most prevalent model by far in the public-education sector, and in many 501(c)(3) organizations, is the multi-recordkeeper platform."); D. Ct. Doc. 59-13, at 5 (Jan. 17, 2017) (article cited at JA80-81 (¶ 105)) ("The traditional 403(b) plan has historically been implemented through a multi-provider recordkeeper platform . . . ."). Indeed, the fact that similar claims have been brought against many other universities

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[8] Similarly, no one would think that, under trust law, a trustee would be required to restructure an entire trust simply to obtain, for instance, marginally cheaper accountant expenses. *Cf., e.g.*, *Hagedorn v. Arens*, 150 A. 4, 8 (N.J. Ch. 1930).

itself shows that Northwestern's use of multiple recordkeepers was hardly atypical.[9]

Petitioners' complaint thus confirms that "under the circumstances then prevailing," respondents' decision to retain two recordkeepers was fully consistent with the industry norms of "enterprise[s] of a like character." 29 U.S.C. § 1104(a)(1)(B). And while petitioners allege that a handful of other universities transitioned to a single recordkeeper (and altered plan offerings), that simply shows that different universities can reach different conclusions based on their own circumstances. It does not somehow oblige other, differently situated universities to follow suit on pain of a damages claim under ERISA. *See Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'" (citation omitted)). At a minimum, a complaint would need to allege facts showing that the universities were similarly situated—which are lacking here.

Moreover, there was ample reason for a prudent fiduciary to conclude that switching to one recordkeeper would do more harm than good. Dropping TIAA as a recordkeeper would have

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[9] The "2013 study" referenced by the government (at 28) does not create a plausible inference to the contrary. It represents a telephone survey of selected 403(b) plans—most of which were in the *healthcare* sector, which lacks the historical recordkeeping arrangements in the university context—and its results were limited to participants "in the survey." LIMRA Retirement Research, *403(b) Plan Sponsor Research* 1-2 (2013), https://www.limra.com/siteassets/newsroom/fact-tank/fact-sheets/trends-in-403b-plans--healthcare-and-higher-education-sectors-2013.

required eliminating the TIAA Traditional Annuity. JA70 (¶ 88). Yet, as noted, the TIAA Traditional Annuity is highly popular among university employees. *See supra* at 10. Petitioners do not seriously dispute that point but instead argue (at 43) that whether the Traditional Annuity was "so beneficial" to retain TIAA as a recordkeeper "is a factual question." But that is not the question here, because courts do not assess a fiduciary's decisionmaking in a vacuum. *See supra* at 27-28. Rather, the question is whether a prudent fiduciary in respondents' position could conclude that dropping the TIAA Traditional Annuity would do more harm than good. *See Fifth Third*, 573 U.S. at 430. The answer is clearly yes.

That conclusion is underscored by petitioners' own allegation that requiring participants who had invested in the TIAA Traditional Annuity to switch to a non-TIAA recordkeeper would have triggered "severe . . . penalties for withdrawal," including a "2.5% penalty." JA85, 88 (¶¶ 117, 132). And while petitioners now attempt (at 44 n.19) to run away from this allegation, the FAC plainly alleges that "[p]articipants who wish to withdraw their savings without this 2.5% penalty can *only* do so by spreading their withdrawal over a ten-year period." JA88 (¶ 132) (emphasis altered); *see also* JA162-63 (¶ 235) (Traditional Annuity "had to be included and could not be removed from the [P]lan[s]").

Meanwhile, the FAC "contains no allegation that plan participants would have been better off with TIAA as the sole recordkeeper." Pet. App. 16a. That is presumably because retaining only TIAA (and dropping Fidelity) would have forced all plan participants to pay recordkeeping fees at the rates

charged by TIAA, which in petitioners' telling are higher than Fidelity's rates. *See* JA163 (¶ 236). So petitioners now demand that respondents should have obtained "rebates or fee reductions from TIAA." Pet. Br. 44. But the chain of possibilities required to get to that end fails to rise "above the speculative level." *Twombly*, 550 U.S. at 555. Petitioners allege that one university—CalTech—negotiated rebates after eliminating Fidelity mutual fund options and switching to TIAA as recordkeeper. *See* JA77 (¶ 97). But the FAC does not include any allegations about the features of CalTech's plans or how they are similar to Northwestern's, if at all, such that this observation could support any inference that Northwestern could have—let alone should have—accomplished the same thing. And, again, an allegation that *one* actor did something different can hardly support a claim that a defendant breached its fiduciary duty by not doing the same.[10]

b. Petitioners seem to have abandoned their challenge to the revenue-sharing aspect of the recordkeeping fee arrangements, only fleetingly mentioning it once. Pet. Br. 32. Revenue-sharing arrangements, which are common, enabled plan participants to *reduce* recordkeeping fees through

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[10] To the extent petitioners suggest that TIAA's renegotiated fees for Northwestern's Plans in 2015 show imprudence for "earlier" periods, Pet. Br. 39, that is precisely the sort of hindsight inference that ERISA and trust law prohibit. *See* 29 U.S.C. § 1104(a)(1)(B) (conduct considered "under the circumstances then prevailing"); Restatement (Third) of Trusts § 77 cmt. a, at 82 (trustee's conduct "is to be judged on the basis of circumstances at the time of that conduct, not with the benefit of hindsight or by taking account of developments that occur after the time of the action or decision").

their individual investment choices, while a flat-fee arrangement may have *increased* recordkeeping expenses for participants with lower account balances. *See* Pet. App. 15a, 18a n.10; *id.* at 43a-44a; *see also Loomis*, 658 F.3d at 672-73. Petitioners also failed to allege that any other university in similar circumstances used a flat-fee arrangement.

### C. Petitioners' Investment Options Claim Fails

Count V of the FAC alleges that respondents breached their fiduciary duty with respect to the Plans' investment options. JA169-73. The grounds for this claim have evolved over the course of this litigation. But this claim fails in all its forms.

1. As pleaded, Count V alleged that the sheer number of options was unlawful because it generated confusion among plan participants. JA170-71 (¶ 266). Although petitioners continue to press a version of this "decision paralysis" claim in this Court (Pet. Br. 35-37), the government notably does not support them. And for good reason—this claim is misguided.

For starters, petitioners do not allege that *they* personally were paralyzed or otherwise confused by the number of options, nor do they allege that confusion by other participants personally harmed them (or even identify any participant who was actually confused). *See* JA37-40 (¶ 8). Because "[petitioners] themselves have no concrete stake" in a participant-confusion ruling, "they lack Article III standing" to assert this argument. *Thole*, 140 S. Ct. at 1619; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press.").

In any event, conclusory allegations of confusion untethered to the Plans' participants are insufficient to state a claim. As discussed, ERISA *encourages* investment options. *See* 29 U.S.C. § 1104(c)(5)(A); *see supra* at 19-21. DOL has also emphasized that fiduciaries should give participants "a broad range of investment alternatives." 29 C.F.R. § 2550.404c-1(b)(3)(i)(A). Indeed, some courts have suggested that offering too *few* options signifies imprudence. *See, e.g.*, *Braden*, 588 F.3d at 596 n.6. ERISA does not put fiduciaries in the untenable position of facing liability for failing to assemble a Goldilocks-level number of options that is not too high but not too low.

2. Petitioners also alleged in Count V that the number of investment options "depriv[ed] the Plans of their ability to qualify for lower cost share classes of certain investments." JA170 (¶ 266). This claim fails for the same reason. ERISA encourages plan administrators to give participants an array of investment options. To the extent that the number of options deprived a plan of its ability to meet investment minimums needed to qualify for lower-cost institutional-class shares, that is a lawful effect of ERISA's policy of encouraging options. In other words, as initially framed, Count V itself pleaded petitioners out of their claim that respondents breached their duty of prudence by failing to offer institutional-class shares for certain funds.

Tellingly, although this theory served as the foundation for petitioners' institutional share class challenge in Count V (JA170), petitioners have all but abandoned it. Petitioners only briefly suggest that the number of options caused the Plans to "los[e] the opportunity 'to command lower-cost investments.'" Pet. Br. 35 (quoting JA119 (¶ 169)). And the

government does not join petitioners on this point, likely because it rests on the flawed position that offering *too many* options violates ERISA.

3. In this Court, petitioners and the government focus on a different version of this claim. Rather than alleging that the number of options *prevented* the plans from qualifying for institutional-class shares—as Count V does, *see* JA170 (¶ 266)—petitioners argue that the Plans qualified for such institutional-class shares and that respondents breached their duty of prudence by failing to switch to them. Pet. Br. 29-32; U.S. Br. 18-27. This claim fails as well.

a. First, petitioners failed to plausibly allege that the identified institutional-class shares were an available alternative. The FAC admits that institutional shares have threshold requirements, including certain investment minimums. JA99 (¶ 158). And while the FAC lists a litany of funds for which institutional-class shares were allegedly available to the Plans at some undefined point in time, JA100-16, the FAC does not even identify the applicable (and publicly available) investment minimums for the institutional-class versions, much less allege facts showing that, if true, those minimums would have been met here.

Indeed, the Plans' annual Form 5500 documents introduced by petitioners—which specify the amounts invested in each investment option—show otherwise. *See* D. Ct. Docs. 66-5, 66-6 (Feb. 13, 2017). For example, in 2010, institutional-class shares of the Vanguard Small Cap Index fund (VSCPX) had an investment minimum of $100 million. *See supra* at 8 & n.2. But participants in Northwestern's Plans collectively invested only $870,044 and $475,707 in

that fund. D. Ct. Doc. 66-5, at 9; D. Ct. Doc. 66-6, at 8.

Petitioners surmise that "investment providers" would have waived the requirements "if [respondents] had asked." JA100 (¶ 160). But the complaint does not support that speculative and conclusory pronouncement with any allegations specific to the Plans or the funds at issue. The most petitioners allege is that investment minimums are "often waive[d]" "[f]or large *401(k)* plans," and that "investment advisors representing large *401(k)* plans" can "call mutual funds [to] request waivers." JA99 (¶ 158) (emphasis added) (citation omitted). But, even assuming the truth of those generic allegations, the Plans at issue here are not 401(k) plans; they are 403(b) plans. And that distinction—largely dismissed by petitioners' complaint—is crucial.

Whereas many 401(k) plans offer a fairly limited number of investment options (usually concentrated heavily in mutual funds), 403(b) plans typically offer a broad assortment of both individual annuity contracts and mutual funds. That different makeup and structure directly impacts liquidity. And Northwestern's Plans are a case in point: A large proportion of the Plans' assets (over one-third) were tied up in the TIAA Traditional Annuity, and those assets were essentially illiquid—participants invested in annuities cannot simply switch to mutual funds, and Northwestern, which is not a party to the individual annuity contracts, cannot force participants to do so. *See supra* at 7, 10. These factors—more diffuse asset allocation and significantly lower liquidity—give 403(b) plan fiduciaries far less bargaining leverage than 401(k)

plans for purposes of securing waivers of investment minimums. *See Loomis*, 658 F.3d at 672-73.

Tellingly, the FAC does not identify a single university 403(b) plan that has obtained waivers of any minimum requirements for institutional-class shares generally, let alone for all of the allegedly imprudent retail-class funds at issue here. Instead, petitioners vaguely allege that "fiduciar[ies] of other defined contribution plans" have obtained waivers for "TIAA-CREF and Fidelity mutual fund options." JA100 (¶ 159). But that is not sufficient, as it is devoid of any facts that would offer a sound basis for meaningful comparison. *See supra* at 27-28. The FAC fails to allege *which* funds were subject to waivers, *what* the requirements were for those funds, and *why* Northwestern was in a similar position as to any other university that obtained waivers. Especially given the number of universities sued by petitioners' counsel for also failing to obtain institutional-class shares, an unadorned assertion that waivers are "routine," JA100 (¶ 159), is not plausible.

Minimums requirements are, obviously, still requirements. A claim based on the premise that existing requirements would have been waived must at a minimum include allegations explaining why that is so. At the least, that requires identifying the actual requirements, and alleging facts showing they could be met. Just as a bald allegation that "Emily" was admitted as an undergraduate student at Northwestern would not support a reasonable inference that "Ethan" would have been admitted as well (without any allegations showing that the two were similarly situated as to the admission requirements), a conclusory allegation that other plans have obtained waivers is not sufficient to

support a reasonable inference that waivers would have been obtained by Northwestern here.

Petitioners argue that merely alleging that the Plans were "able to obtain lower-cost institutional share classes" amounts to a "factual allegation[]" that "this Court must credit." Pet. Br. 31 n.13. Not so. This is a core element of petitioners' claim—whether the alternative action was actually available—and petitioners' conclusory allegation of availability is "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The operative complaint here is devoid of allegations showing that the minimum requirements for institutional-class shares would have been satisfied or waived.

b. Even if petitioners had sufficiently pleaded the availability of institutional-class shares generally, petitioners failed to plausibly allege that respondents "acted imprudently." *Fifth Third*, 573 U.S. at 425.

i. The premise of this claim is that it was automatically imprudent for respondents to fail to switch to institutional-class shares as soon as they became available, because of marginally lower expense ratios. JA340-42. But as Judge Wood observed in *Hecker*, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund," particularly where the cost of retail-class shares is set through market competition. 556 F.3d at 586. Retail-class investments have always been common in defined contribution plans, and certainly were during the time period relevant to this suit. *See, e.g.*, Investment Company Institute Research Perspective, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses* 9 (July

2020)[11] (reporting that, prior to 2016, more mutual fund investments were retail-class than institutional-class); *see also Green v. Crapo*, 62 N.E. 956, 958 (Mass. 1902) (Holmes, C.J.) (prudence judged by "how things looked" at the time of decision).

Even today, the decision to offer retail- or institutional-class shares is rarely a binary choice. Often, retail-class shares are the only way to offer a fund, at least to start with, because only a small number of participants may want the fund. Only when a sufficient number of participants individually choose to invest in a particular fund might it qualify for institutional share status. This is a highly fluid situation. And, notably, DOL itself has informed participants that "retail" class funds may "charge higher fees" and advised participants to "[l]et your employer know your preference," thus emphasizing the importance of participant choice in this context. Employee Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 8 (Sept. 2019).[12]

Petitioners' amici analogize the inclusion of retail-class funds on the menu of options to "contaminated oysters" at a seafood buffet. Halpern Amicus Br. 8. But retail-class shares are not "contaminated" in any sense. Although funds offered through institutional-class shares may, when available, be marginally cheaper, such funds "*were and are* available" to plan participants. Pet. App. 45a. Just because a "wholesale" box of cereal at Costco may be less expensive does not mean that the "retail" box

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[11] https://www.ici.org/system/files/attachments/pdf/per26-05.pdf.

[12] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf.

available at Giant is somehow flawed. And a menu that gives participants the option to select funds with institutional-class fees is not imprudent simply because it *also* includes funds with retail-class fees.

Petitioners and the government also err in claiming that institutional-class shares are "identical" to retail-class shares, except for cost. Pet. Br. 29-30; U.S. Br. 24. Institutional-class shares have minimum investment requirements that retail-class shares do not, *see supra* at 8-9, and retail-class shares may also facilitate revenue sharing, *see Sacerdote v. New York Univ.*, 9 F.4th 95, 124 (2d Cir. 2021) (Menashi, J., dissenting in part). All this helps explain why DOL itself has treated the decision between retail-class and institutional-class shares as a matter of participant "preference," not court oversight. *A Look at 401(k) Plan Fees*, *supra*, at 7-8.

ii. In any event, petitioners' own complaint shows that respondents did not act imprudently as to the inclusion of retail-class shares. The allegations show that respondents *did* switch to institutional-class shares for many funds—well before this suit was filed. For several of the funds that respondents allegedly "selected and continue to retain" in retail-class form, JA100-16 (¶ 161), petitioners also alleged that the institutional-class versions were among "the Plans' investment options" by 2014, JA126-33 (¶ 184). For example, petitioner Walker allegedly "invested in the higher-cost share classes of Fidelity Freedom 2020 and TIAA-CREF Lifecycle 2035." JA39 (¶ 8.d). The institutional-class versions of those funds are called "Fidelity Freedom K 2020" and "TIAA-CREF Lifecycle 2035 (Inst)." JA102, 106. According to the FAC, the Plans offered institutional-class shares for both of those funds. JA128, 132.

That is also confirmed by the Plans' investment lineups referenced throughout the complaint and thus properly considered in determining the plausibility of petitioners' claim. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). These lineups make clear that respondents switched to institutional-class shares for many of the funds identified in the FAC years before petitioners filed suit. *See* C.A. Suppl. App. 117-134 (2012 menu); *id.* at 141-55 (2013 menu); *id.* at 163-77 (2014 menu). That includes the very "example" petitioners now feature in their brief—the "TIAA-CREF Small-Cap Blend Index." Pet. Br. 30. Northwestern has offered the institutional-class version of that fund—"TIAA-CREF Small-Cap Blend Index Fund Institutional"—since at least 2012. C.A. Suppl. App. 127. So too for the two funds noted above in which petitioner Walker allegedly invested. *Id.* at 117.

All this shows that respondents' process for monitoring the Plans *was* prudent. The Court should reject petitioners' attempt to allege fiduciary imprudence by mining outdated plan lineups and pointing to the alleged inclusion of a retail-class fund at some (unidentified) point in time, especially without any allegations that would show that institutional-class shares were actually available for particular funds at that point in time.

c. Petitioners' new version of this claim fails for an even more fundamental reason—it comes too late. Because a defendant is entitled to fair notice of what the "*claim*" is, *Twombly*, 550 U.S. at 555 (emphasis added), the framing of a claim for relief matters. Otherwise, claims would become chameleons that change from one stage of litigation to the next. Here, the grounds for petitioners' claim have fundamentally

changed: While Count V alleged that the number of options prevented the Plans from qualifying for institutional-class shares, petitioners now frame their argument in terms of respondents' failure to switch to institutional-class shares, regardless of other options. Petitioners sought leave to add this "new claim[]" in their SAC. Pet. App. 23a. But that request was denied. *Id.* at 23a-24a, 51a-52a. And, for their own strategic reasons, they admittedly declined to seek certiorari on that issue. Pet. Br. 41.

Notably, in trying to salvage this claim, neither petitioners nor the government actually cite any allegations in *Count V itself*, except its generic reference to earlier allegations. Instead, petitioners (at 29-32) and the government (at 26) mine the complaint for background allegations referring to retail- and institutional-class shares. But the operative complaint is "massive: 287 paragraphs over 141 pages." Pet. App. 2a. Such "[u]nnecessary prolixity" is inherently problematic, as it "places an unjustified burden on the district judge and the party who must respond to it because they are forced to ferret out the relevant material from a mass of verbiage." 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1281 (4th ed. 2021). That makes the content of the *claim for relief* all the more important. Yet, here, as noted, the claim changed dramatically from Count V of the FAC (JA169-73) to Count VII of the SAC (JA340-42).

This alone is reason to reject petitioners' arguments based on the failure to switch to more institutional-class shares. Indeed, this glaring procedural irregularity is reason to dismiss the writ of certiorari as improvidently granted and await a case that properly presents this claim.

### D. Petitioners' Attempt To Rely On Their Rejected Pleading Underscores The Deficiency Of The Claims At Issue

Petitioners double down (at 38-41) on this procedural irregularity by urging the Court to consider "[i]nformation [r]evealed [i]n [d]iscovery" that they included for the first time "in their proposed [SAC]," which was rejected. This is procedurally improper and ultimately unavailing.

1. The only question before the Court is "whether the complaint in its [operative] form 'has plausibly alleged'" a breach of duty by respondents. *Amgen*, 577 U.S. at 311 (citation omitted). And, to state the obvious, the plausible "facts and allegations supporting" a plaintiff's claims must "appear in the [operative] complaint" itself. *Id.* The discovery material on which petitioners rely is outside the FAC—the only complaint before the Court. It should not be considered, especially given the district court's and the Seventh Circuit's explicit refusal to allow petitioners to inject this material into this case (Pet. App. 23a, 52a)—a ruling petitioners strategically chose not to challenge in this Court. Pet. Br. 41; *cf.*, *e.g.*, *Lawrence v. Florida*, 549 U.S. 327, 330 n.1 (2007) (refusing to consider additional factual assertions when the petitioner "did not seek certiorari on the question whether these facts entitle him to [relief]").

2. In any event, this supposedly "damning evidence" (Pet. Br. 38) boils down to a one-sided distortion of cherry-picked deposition testimony. Given the irrelevancy of this evidence to the question before the Court, we do not attempt a point-by-point rebuttal but offer only a few examples of the liberties petitioners take in presenting this evidence:

- Petitioners argue (at 39) that "respondents did not know the amount of recordkeeping fees paid by the Plans or attempt to monitor these fees." But in two of the cited deposition snippets, the witnesses merely explained that they were not "personally" focused on fees, not that the entire investment committee was unaware. D. Ct. Doc. 130, Ex. 5, at 112; *see* JA397-98. And in the other snippet, the witness was asked about the Plans "pre-NURIC"—that is, *before* he even owed any fiduciary duties to the Plans as a member of the investment committee. JA386.
- Petitioners argue (at 38) that "respondents conceded" that "evaluating hundreds of funds on a fund-by-fund basis was unmanageable." But at the cited portions of the relevant deposition, the witness repeatedly stated that she did *not* "agree with" that characterization. D. Ct. Doc. 130, Ex. 8, at 110-12 (Apr. 24, 2018).
- Petitioners argue (at 39) that the person responsible for recordkeeping contracts "did not know who the Plans' recordkeepers were." But when asked the names of the Plans' "vendors," the witness, who had been retired for four years, replied "Fidelity and TIAA-CREF." C.A. Suppl. App. 108-09.

3. In short, petitioners' reliance on information outside the FAC gets them no further than the deficient allegations in the complaint itself. There are of course innumerable ways of pleading fiduciary duty claims. But the complaint here simply fails to pass muster. In a sense, that is not surprising, given that it is a product of a generic attempt to go after a dozen universities at once. But there is no reason to

embrace petitioners' desperate attempts to save this flawed complaint with non-pleaded material.

## III. ALLOWING PETITIONERS' CLAIMS TO PROCEED WOULD UNDERMINE THE PROPER WORKINGS OF ERISA PLANS

Allowing the flawed complaint at issue to proceed will subject ERISA fiduciaries to an avalanche of damages claims that will not only discourage employers from offering ERISA plans but harm participants by discouraging innovations and drastically reducing investment options.

1. Allegations that a fiduciary breached its duty because of marginal cost differences in isolated investments are easy to make and costly to litigate. Indeed, hundreds of suits raising such claims have been filed in recent years against some of the biggest retirement plans in the country, most of them relying on cut-and-paste allegations. And since the Third Circuit's divided decision in *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020), permitted similar allegations to proceed beyond a motion to dismiss, the number of excessive-fee cases has skyrocketed. *See, e.g.*, Jacklyn Wille, *Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*, Bloomberg Law (Oct. 18, 2021)[13] (reporting approximately 140 cases filed in 2020 and 2021, as compared to only 20 in 2019). This sudden change has "wreaked havoc on the market for fiduciary liability insurance." *Id.*

As here, the complaints usually rest on conclusory, hindsight assertions about how employers might have

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[13] https://news.bloomberglaw.com/securities-law/spike-in-401k-lawsuits-scrambles-fiduciary-insurance-market.

done things differently to reduce marginal costs. And because these theories all boil down to allegations about marginal differences in expenses or negotiation strategies, the possible claims are endless—fiduciaries are sued for offering "too many" options or "too few" options, *Loomis,* 658 F.3d at 669; for offering one option rather than another option, *Davis*, 960 F.3d at 484-85; for selecting one service provider rather than another, Pet. App. 13a; and so on.

Although the cost differentials at issue are small, the alleged plan-wide damages are sky-high—often "tens of millions of dollars" or more for large plans. *Sweda*, 923 F.3d at 341 (Roth, J., concurring in part and dissenting in part). Thus, when these claims are allowed to proceed beyond a motion to dismiss, their merits become irrelevant; the sheer prospect of "expensive discovery" and "interest-inflated liability totals" create an enormous "pressure to settle." *Id.* at 340-41. And absent settlement, the federal courts are enlisted as plan auditors, scrutinizing every fiduciary decision to determine whether its downstream effects could have been slightly cheaper.

2. Allowing such claims to proceed with the kind of conclusory allegations presented in this case would run roughshod over ERISA's design. Far from "assuring a predictable set of liabilities, under uniform standards of primary conduct," *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted), permitting these allegations to unlock the doors of discovery will set the stage for endless litigation, leaving employers and ERISA fiduciaries at the mercy of whatever "revolution[ary]" theory of liability a plaintiff can conjure, Pet. Br. 3. Indeed, if so many of the nation's leading universities—among the most sophisticated and well-counseled institutions in the

world—can be so easily dragged into protracted litigation based on common university plan management practices, what hope is there for the run-of-the-mill employer?

These concerns present especially troubling implications for the basic operation of ERISA plans, since employers have no obligation to offer such plans, and Congress sought to avoid a system in which exposure to litigation would discourage individuals from serving as fiduciaries or, even worse, "discourage employers from offering [ERISA] plans" at all. *Conkright*, 559 U.S. at 517 (citation omitted); *see Sweda*, 923 F.3d at 341, 343 (Roth, J., concurring in part and dissenting in part). A litigation environment that imposes excessive costs on ERISA plans, and an in terrorem effect on plan administrators, harms the very people ERISA seeks to help—plan participants.

Inevitably, plan fiduciaries will just gravitate to sanitized lists of established investment alternatives. And a participant's ability to chart the direction of his or her own retirement savings, and to break away from the investment decisions of the crowd, will be significantly weakened. Petitioners—who surmise (at 36) that most people cannot make "intelligent" investment decisions from among many different alternatives—welcome this loss of individual control. But Congress took a different view on the merits of individual decision-making when it chose to allow for participant-directed retirement accounts. *See supra* at 19-21. Efforts to "revolutionize[] fiduciary practices," Pet. Br. 3, should be accomplished through ERISA's robust forward-looking regulatory framework, not retrospective private damages litigation and settlement extortion.

And, ultimately, such a regime will thrust the federal courts into the role of rate-setters and investment pickers—tasks "courts are not well suited" to undertake. *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 352-53 (2010). Under petitioners' and the government's approach, plaintiffs can endlessly quibble with fiduciaries over isolated investment options based on the possibility of marginal cost differentials. Instead of leaving to participants the ability to choose what investments are best for them after adequate disclosures, courts will be commandeered into making those decisions for participants. Congress never intended such a regime.

3. The solution to this problem is adherence to the context-specific fiduciary duty established by ERISA and the faithful application of existing pleading standards. The district court below properly looked to the particular context of this case in determining that petitioners' complaint failed to state a plausible claim for relief. Since that decision was issued, petitioners have continued to mine their omnibus complaint for new ways of framing respondents' alleged imprudence. But the district court was correct to dismiss petitioners' complaint, and the Seventh Circuit was correct to affirm that judgment. Any different conclusion based on the flawed complaint at issue would unleash damages litigation that would cripple ERISA plans.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# ADDENDUM

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**26 U.S.C. § 403**

## § 403. Taxation of employee annuities

* * *

### (b) Taxability of beneficiary under annuity purchased by section 501(c)(3) organization or public school

#### (1) General rule

If—

(A) an annuity contract is purchased—

(i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a),

(ii) for an employee (other than an employee described in clause (i)), who performs services for an educational organization described in section 170(b)(1 (A)(ii), by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing, or

(iii) for the minister described in section 414(e)(5)(A) by the minister or by an employer,

(B) such annuity contract is not subject to subsection (a),

(C) the employee's rights under the contract are nonforfeitable, except for failure to pay future premiums,

(D) except in the case of a contract purchased by a church, such contract is purchased under a plan which meets the nondiscrimination requirements of paragraph (12), and

(E) in the case of a contract purchased under a salary reduction agreement, the contract meets the requirements of section 401(a)(30),

then contributions and other additions by such employer for such annuity contract shall be excluded from the gross income of the employee for the taxable year to the extent that the aggregate of such contributions and additions (when expressed as an annual addition (within the meaning of section 415(c)(2))) does not exceed the applicable limit under section 415. The amount actually distributed to any distributee under such contract shall be taxable to the distributee (in the year in which so distributed) under section 72 (relating to annuities). For purposes of applying the rules of this subsection to contributions and other additions by an employer for a taxable year, amounts transferred to a contract described in this paragraph by reason of a rollover contribution described in paragraph (8) of this subsection or section 408(d)(3)(A)(ii) shall not be considered contributed by such employer.

**(2) Special rule for health and long-term care insurance**

To the extent provided in section 402(l), paragraph (1) shall not apply to the amount distributed under the contract which is otherwise includible in gross income under this subsection.

**(3) Includible compensation**

For purposes of this subsection, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in paragraph (1)(A), and which is includible in gross income

(computed without regard to section 911) for the most recent period (ending not later than the close of the taxable year) which under paragraph (4) may be counted as one year of service, and which precedes the taxable year by no more than five years. Such term does not include any amount contributed by the employer for any annuity contract to which this subsection applies. Such term includes—

(A) any elective deferral (as defined in section 402(g)(3)), and

(B) any amount which is contributed or deferred by the employer at the election of the employee and which is not includible in the gross income of the employee by reason of section 125, 132(f)(4), or 457.

**(4) Years of service**

In determining the number of years of service for purposes of this subsection, there shall be included—

(A) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and

(B) a fraction of a year (determined in accordance with regulations prescribed by the Secretary) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization.

In no case shall the number of years of service be less than one.

**(5) Application to more than one annuity contract**

If for any taxable year of the employee this subsection applies to 2 or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

* * *

**(7) Custodial accounts for regulated investment company stock**

**(A) Amounts paid treated as contributions**

For purposes of this title, amounts paid by an employer described in paragraph (1)(A) to a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as amounts contributed by him for an annuity contract for his employee if the amounts are to be invested in regulated investment company stock to be held in that custodial account, and under the custodial account—

(i) no such amounts may be paid or made available to any distributee (unless such amount is a distribution to which section 72(t)(2)(G) applies) before—

(I) the employee dies,

(II) the employee attains age 59½,

(III) the employee has a severance from employment,

(IV) the employee becomes disabled (within the meaning of section 72(m)(7)),

(V) in the case of contributions made pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)),

the employee encounters financial hardship, or

(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in section 401(a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the contract, and

(ii) in the case of amounts described in clause (i)(VI), such amounts will be distributed only in the form of a qualified distribution (as defined in section 401(a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in section 401(a)(38)(B)(iv)).

**(B) Account treated as plan**

For purposes of this title, a custodial account which satisfies the requirements of section 401(f)(2) shall be treated as an organization described in section 401(a) solely for purposes of subchapter F and subtitle F with respect to amounts received by it (and income from investment thereof).

**(C) Regulated investment company**

For purposes of this paragraph, the term "regulated investment company" means a domestic corporation which is a regulated investment company within the meaning of section 851(a).

* * *

## 29 U.S.C. § 1002

### § 1002. Definitions

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * *

**29 U.S.C. § 1104**

**§ 1104. Fiduciary duties.**

**(a) Prudent man standard of care**

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying

employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

**(c) Control over assets by participant or beneficiary**

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of Title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of

designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

* * *

## 29 U.S.C. § 1109

### § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

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## 29 U.S.C. § 1132

### § 1132. Civil enforcement

#### (a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *