19-1401

IN THE

Supreme Court of the United States

APRIL HUGHES,
KATHERINE D. LANCASTER, AND JASMINE WALKER,
Petitioners,

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104, a plan fiduciary is required to meet a standard of "prudence" in administering the plan holding the participant's retirement assets in a defined-contribution plan. The question presented is:

Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA, 29 U.S.C. § 1104(a)(1)(B).

PARTIES TO THE PROCEEDINGS

Petitioners April Hughes, Katherine D. Lancaster, and Jasmine Walker were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Northwestern University, Northwestern University Retirement Investment Committee, Pamela S. Beemer, Ronald R. Braeutigam, Nimalan Chinniah, Kathleen Hagerty, Craig A. Johnson, Candy Lee, William H. McLean, Ingrid S. Stafford, and Eugene S. Sunshine were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

Laura L. Divane was a plaintiff in the district court proceedings and an appellant in the court of appeals proceedings, but is not participating in the proceedings before this Court.

Susan Bona was a plaintiff in the district court proceedings but did not participate in the court of appeals proceedings.

RELATED PROCEEDINGS

Petitioners are unaware of any other proceedings that are directly related to this case.

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INTRODUCTION

The common law long has imposed a duty on a fiduciary of a trust to act as a prudent, reasonable person in protecting the interests of the beneficiary. When Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), it used words derived from the common law like "prudence" and "diligence" to convey the principle that fiduciaries of employee retirement plans must treat beneficiary assets with the special care a reasonable person would treat her own assets. The issue in this case boils down to whether participants and beneficiaries of employee retirement plans may invoke ERISA against fiduciaries for failing to use readily available means to eliminate excessive expenses of retirement plans for the long-term benefit of beneficiaries. The pleading standard adopted by the Seventh Circuit is so draconian as to void Congress's intent to protect beneficiaries. This Court should reverse.

This case arose when petitioners, who are current and former employees of respondent Northwestern University ("Northwestern"), brought this ERISA action to obtain relief for respondents' mismanagement of their defined-contribution retirement plans (the "Plans"), which led to the erosion of their account balances through excessive fees. Petitioners identified several imprudent aspects of the Plans' management and supported their claims with detailed factual allegations.

Petitioners claimed that respondents paid several times the market rate for administrative (or "recordkeeping") services by unnecessarily hiring multiple recordkeepers and failing to check the market for a lower rate by soliciting bids. Petitioners demonstrated their claim's plausibility by identifying several similarly situated university retirement plans that had much lower fees or that successfully lowered fees.

Respondents offered participants a lineup of investment options – primarily mutual funds and annuities – that each carried investment management fees. But petitioners claimed that respondents made imprudent choices, resulting in excessive fees. Respondents offered many retail-class versions of mutual funds (which have fees charged to individual investors), even though, as large investors, they could have obtained much lower-expense ratio institutional-class versions of the very same funds. This Court recognized that such conduct supported a claim for imprudence in *Tibble v. Edison International*, 575 U.S. 523 (2015).

Respondents also offered a dizzying array of hundreds of investment options, many of them duplicative options in the same investment style. This led to higher fees – because plans can negotiate lower fees for a smaller number of funds with more money in each fund – and imposed an onerous burden on participants to select between so many options and an equally onerous burden on fiduciaries to monitor them.

Congress enacted ERISA to provide a remedy for this type of fiduciary mismanagement. Congress required fiduciaries to manage plans "with the care, skill, prudence, and diligence . . . that a prudent man" would exercise. 29 U.S.C. § 1104(a)(1)(B). ERISA incorporates the trust-law obligations to act prudently when incurring expenses so that beneficiaries do not have to pay greater expenses than reasonably would be incurred in the circumstances. Petitioners' allegations stated valid claims that respondents breached ERISA's duty of prudence by imprudently choosing investment managers and recordkeepers that charged excessive fees, and failing to monitor those expenses.

In holding otherwise, the Seventh Circuit failed to take account of the nature of the applicable fiduciary duties derived from trust law, or the governing pleading standard, which required the court to read well-pleaded facts and draw reasonable inferences in petitioners' favor. The Seventh Circuit also erred in holding that a fiduciary can satisfy its duties simply by offering a "wide range of investment options." App. 21a. ERISA requires fiduciaries to monitor "all the investments" in a plan and "remove imprudent [investments]." *Tibble*, 575 U.S. at 529. Offering a wide range of options when that range includes many options with excessive fees is imprudent.

Reversing the Seventh Circuit's erroneous judgment would further ERISA's remedial purposes. The Seventh Circuit's ruling diverged from most lower courts, which have allowed similar excessive-fee claims to advance. These lawsuits have revolutionized fiduciary practices throughout the country, spurring fiduciaries to improve plan management and lower fees. The Court should reverse and grant petitioners the opportunity to prove their well-pleaded claims that respondents managed the Plans imprudently.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 953 F.3d 980. The memorandum opinion and order of the district court (App. 26a-58a) is not reported.

JURISDICTION

The court of appeals entered its judgment on March 25, 2020, and denied a petition for rehearing on May 11, 2020 (App. 59a-60a). The petition for a writ of certiorari was filed on June 19, 2020, and was granted on July 2, 2021 (Add. 24). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are reproduced in the Addendum to this brief.

STATEMENT

A. Statutory Background

"ERISA protects employee pensions and other benefits . . . by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). Congress enacted ERISA to protect "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

ERISA imposes a fiduciary duty of prudence: "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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." *Id.* § 1104(a)(1)(B). This provision "'imposes a "prudent person" standard by which to measure fiduciaries' investment decisions and disposition of assets.'" *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985)).

A fiduciary who breaches duties under ERISA "shall be personally liable to make good to such plan" any losses or lost profits caused by a breach. 29 U.S.C. § 1109(a). ERISA confers upon plan participants and beneficiaries a private right of action for breach of fiduciary duty to obtain relief on behalf of a plan. *Id.* § 1132(a)(2).

B. Background On Defined-Contribution Plans

This case concerns defined-contribution plans, "meaning that participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015); *see also* U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan* 3 (Sept. 2020);[1] 29 U.S.C. § 1002(34) (statutory definition).

Defined-contribution plans offered by non-profit entities, such as respondent Northwestern, are called 403(b) plans because their tax treatment is governed by 26 U.S.C. § 403(b). By contrast, similar defined-contribution plans offered by for-profit companies are called 401(k) plans because their tax treatment is governed by 26 U.S.C. § 401(k). 403(b) plans are considered ERISA plans whose administrators are subject to ERISA's fiduciary duties, unless they qualify for a regulatory safe harbor. *See* 29 C.F.R. § 2510.3-2(f). It is undisputed that respondents' Plans do not qualify for the safe harbor and accordingly are governed by ERISA and its fiduciary duties. *See* Pet. 4; Opp. 3-4.

In many defined-contribution plans, including the Plans at issue here, "[p]articipants direct plan

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

contributions into one or more investment options in a lineup chosen and assembled by the plan's fiduciaries." JA48 (Am. Compl. ¶ 42); *see also Dudenhoeffer*, 573 U.S. at 412 ("Plan participants can allocate their contributions among the funds however they like"). Plan fiduciaries "have exclusive control over the particular investment alternatives available in the plan to which participants direct and allocate their plan accounts." JA51-52 (Am. Compl. ¶ 51).

403(b) plans are permitted to include annuities and pooled investment vehicles such as mutual funds in the investment lineup. 26 U.S.C. § 403(a)(1), (b)(7). Investment managers, such as TIAA-CREF ("TIAA") and Fidelity, offer such products, which typically allow a participant to invest in a mix of assets (such as stocks and bonds) chosen by the investment manager. JA52, 84 (Am. Compl. ¶¶ 52, 111).

Defined-contribution plans carry various fees and expenses, which erode the retirement savings of participants. Most fees fall into two categories: "plan administration (including recordkeeping), and investment management." JA49 (*id.* ¶ 43). Investment-management fees, assessed by the manager of each investment vehicle (such as a mutual fund), are "associated with managing plan investments." U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 3 (Sept. 2019) ("DOL, *A Look at 401(k) Plan Fees*").[2] They "are typically expressed as 'expense ratios,' the share of assets charged for managing the fund (e.g., if the fee is $1 of every $100, the expense ratio is 1 percent)." George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. for Retirement Research, *401(k) Lawsuits: What*

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

Are The Causes And Consequences? 3 (May 2018) ("Mellman & Sanzenbacher").[3] Participants "pay for them in the form of an indirect charge against [their] account[s] because they are deducted directly from [participants'] investment returns." DOL, *A Look at 401(k) Plan Fees* 3.

Plans or their participants pay administrative fees for recordkeeping. JA50-51 (Am. Compl. ¶ 48). Various vendors provide recordkeeping services, which involve tracking each participant's account balance and providing information to participants, such as through a plan website. *Id.*; *see* DOL, *A Look at 401(k) Plan Fees* 3. Some recordkeepers charge plans "a flat annual fee based on the number of participants for which the recordkeeper will be providing services, for example $30 per participant." JA55 (Am. Compl. ¶ 61). Others charge for recordkeeping "through 'indirect' revenue sharing payments from the plan's mutual funds," meaning that participants pay for recordkeeping as part of the mutual funds' expense ratios. JA57 (*id.* ¶ 65).

"Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble*, 575 U.S. at 525. For example, the U.S. Department of Labor ("DOL") has explained that a difference in fees of 1% per year can reduce an employee's account balance at retirement by 28%. *See* DOL, *A Look at 401(k) Plan Fees* 2. As of 2020, defined-contribution plans held $9.6 trillion in assets, including $1.2 trillion in 403(b) plans. *See* Investment Co. Inst., *2021 Investment Company Fact Book* 182 (2021) ("*ICI*

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[3] http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf.

Fact Book").[4] Therefore, every incremental basis point (or 0.01%) of average expenses charged to defined-contribution plan participants equates to $960 million in additional annual expenses.

C. Petitioners' Allegations

Petitioners are current or former employees of Northwestern University and participants in the Plans. JA41-42 (Am. Compl. ¶¶ 20, 22-23). As of December 31, 2015, the Retirement Plan had $2.34 billion in net assets and 21,622 participants; the Voluntary Savings Plan had $530 million in net assets and 12,293 participants. JA40-41 (*id.* ¶¶ 12, 16). Both were among the largest 0.2% of all defined-contribution plans in the United States. *Id.* Respondents are fiduciaries of the Plans: Northwestern University, Northwestern's retirement investment committee, and nine individuals who exercised authority over the Plans. JA42-45 (*id.* ¶¶ 24-34). Petitioners' claims extend at least as far back as August 17, 2010. JA152-54 (*id.* ¶ 228).

Prior to October 2016, the Retirement Plan included 242 investment options and the Voluntary Savings Plan included 187 investment options. JA84 (*id.* ¶¶ 113, 115). These options included mutual funds, insurance pooled separate accounts, and fixed and variable annuities. JA83 (*id.* ¶ 110). The Retirement Plan uses two recordkeepers, TIAA and Fidelity; the Voluntary Savings Plan also used both recordkeepers before consolidating to TIAA in 2012. JA94 (*id.* ¶ 143). Each recordkeeper offered its proprietary investment options and obtained compensation for recordkeeping through revenue sharing as part of expenses charged by those funds. JA96 (*id.* ¶¶ 149-150).

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[4] https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

Petitioners allege that the Plans' recordkeepers charged administrative fees that were approximately four to five times the amount of a reasonable fee. The Plans paid approximately $3.96 million to $5 million each year to TIAA and Fidelity in recordkeeping fees. *Id.* Based upon the Plans' size and features, petitioners allege that a reasonable recordkeeping fee would be approximately $1,050,000 in the aggregate for both Plans, or approximately $35 per participant. JA95-96 (*id.* ¶ 148). Recordkeeping services "are largely commodities," with a "highly competitive" market consisting of "numerous recordkeepers . . . who are capable of providing a high level of service and who will vigorously compete to win a recordkeeping contract for a jumbo defined contribution plan." JA50-51 (*id.* ¶¶ 48-49).

Petitioners allege that respondents could have taken, but failed to take, several steps that would have reduced the Plans' recordkeeping fees without sacrificing the quality of service. Specifically, the Plans could have consolidated to a single recordkeeper, put out a proposal for competitive bidding on recordkeeping services, or negotiated with the Plans' existing recordkeepers for rebates or fee reductions. JA93-94, 96-97 (*id.* ¶¶ 141-143, 151-152). Several similarly situated plans for large universities, including Loyola Marymount, Pepperdine, Purdue, and CalTech, successfully lowered recordkeeping fees using some combination of these methods. JA73-78 (*id.* ¶¶ 93-98). Petitioners cited publications by experts in retirement plan design explaining that 403(b) plans can achieve lower costs and greater efficiency by consolidating to a single recordkeeper and negotiating competitive pricing. JA78-82 (*id.* ¶¶ 99-101, 104-108).

Petitioners allege that many of the Plans' investment offerings charged excessive investment fees. As one example, the Plans included 129 retail-class versions of mutual funds, where the Plans could have obtained identical lower-cost institutional-class versions of the same funds that are available only to larger investors such as the Plans. The institutional-class versions had the same underlying investments and asset allocations, but "differ[ed] only in cost." JA117 (*id.* ¶ 164). The Plans also offered other high-cost investment vehicles with expenses 10-20 times greater than comparable alternatives and that consistently underperformed those cheaper alternatives. JA138-43, 145-49 (*id.* ¶¶ 199-204, 210-213). Respondents did not analyze the prudence of expensive investment vehicles and recordkeeping services provided by TIAA; rather, respondents included these products and services because they were part of a bundle offered by TIAA. JA70, 87, 133-34 (*id.* ¶¶ 88, 130, 187). One of the products in TIAA's bundle was TIAA's Traditional Annuity, a fixed annuity contract with investment features similar to fixed annuities or stable value funds offered by many other providers. JA71 (*id.* ¶ 89).

Petitioners also allege that the Plans imprudently offered too many options. Before 2016, the hundreds of options offered by the Plans included many duplicative options in the same investment style. JA121-22 (*id.* ¶¶ 175-176). Offering duplicative options increased expenses (by reducing the Plans' ability to bargain for lower expenses over a smaller lineup) and made it difficult for participants to make sound investment decisions. JA117-21, 125 (*id.* ¶¶ 166-167, 169, 172-173, 181). In October 2016, after petitioners filed their Complaint but before petitioners filed their Amended Complaint, respondents redesigned the Plans to reduce the number of options to 32. JA86 (*id.* ¶ 123). Respondents explained that the changes were designed to "allow for informed decisions" and would "reduce administration fees" and "increase participant returns" by providing "access to lower cost share classes when available." JA151 (*id.* ¶¶ 221-222) (brackets omitted).

Throughout the Amended Complaint, petitioners allege that respondents breached their fiduciary duties not only in imprudently selecting investment options and service providers, but also in imprudently monitoring the Plans and failing to remedy imprudent features of the Plans. *E.g.*, JA37-40, 87-88, 97-98, 126, 144-45, 166-67, 171-72 (*id.* ¶¶ 8, 131, 152, 154, 183, 206-208, 249, 267).

D. Proceedings In Lower Courts

1. After filing their initial Complaint on August 17, 2016, petitioners filed their Amended Complaint on December 15, 2016. Petitioners asserted claims on behalf of the Plans under 29 U.S.C. § 1132(a)(2) and alternatively sought to represent a class of participants and beneficiaries of the Plans. JA152-54 (Am. Compl. ¶¶ 227-228). Count I claimed that respondents breached their fiduciary duties by accepting a bundle of services from TIAA that included allegedly imprudent and overly expensive investment options and recordkeeping services. JA162-64 (*id.* ¶¶ 232-239). Count III claimed that respondents breached their fiduciary duties by failing to monitor and control recordkeeping expenses prudently, resulting in excessive fees. JA165-68 (*id.* ¶¶ 246-254). Count V claimed several categories of fiduciary breaches, generally relating to investment fees. Petitioners alleged that respondents imprudently selected and retained retail-class versions of mutual funds rather than identical lower-cost institutional-class versions, retained hundreds of investment options (including many duplicative options) leading to higher fees, and included other imprudent investment options that underperformed and had excessive fees. JA169-73 (*id.* ¶¶ 260-273).[5]

Respondents moved to dismiss the Amended Complaint. Dist. Ct. ECF No. 58. Discovery proceeded while that motion was pending. Near the end of discovery, on April 24, 2018, petitioners moved for leave to file a proposed Second Amended Complaint, containing some additional allegations and claims reflecting information learned in discovery. *Id.*, ECF Nos. 129, 130; *see infra* pp. 38-41.[6]

2. The district court granted respondents' motion to dismiss the Amended Complaint and denied petitioners' motion for leave to file a Second Amended Complaint.

The district court rejected Count I, concluding that "offer[ing] the TIAA-CREF Traditional Annuity" was a "valid reason[] to use TIAA-CREF as record keeper for its products and to keep the CREF Stock Account as an *option* for plan participants." App. 39a.

The district court dismissed Count III, concluding that it does "not violate ERISA to use revenue-sharing for plan expenses." App. 42a. The court also held that respondents were not "required to try to find a record-

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[5] Counts II, IV, and VI claimed that the fiduciary breaches alleged in Counts I, III, and V respectively resulted in prohibited transactions in violation of 29 U.S.C. § 1106. JA164-65, 168-69, 173-74 (Am. Compl. ¶¶ 240-245, 255-259, 274-278). Count VII claimed that certain respondents imprudently failed to monitor other fiduciaries. JA174-76 (*id.* ¶¶ 279-286).

[6] After the district court granted judgment to respondents, petitioners filed a motion to alter the judgment and attached a second version of the proposed Second Amended Complaint, with slightly different allegations. Dist. Ct. ECF Nos. 167, 169.

keeper willing to take $35/participant/year." App. 43a. The court rejected petitioners' claims because seven of the hundreds of investment options in the Plans had expense ratios of 0.1% or lower, which the court held were, "as a matter of law, low." App. 44a.

The district court rejected Count V, based on excessive investment-management fees and imprudent offering of too many duplicative options. The court reasoned that petitioners' "clear preference for low-cost index funds" was "becoming conventional wisdom," but held that petitioners could not bring a claim because "those types of low-cost index funds *were and are* available to them." App. 45a. The court also dismissed petitioners' remaining claims. App. 45a-50a.

The district court denied petitioners' motion for leave to amend, concluding that petitioners added new claims too late and that their new claims failed for the same reasons that the court rejected the Amended Complaint. App. 51a-57a.

3. The Seventh Circuit affirmed. In dismissing Count I, the court rejected petitioners' argument that it was imprudent to accept TIAA's bundle because it "ignores the benefit of using TIAA as a recordkeeper," which was "continued access to the popular Traditional Annuity." App. 13a. The court characterized the Traditional Annuity as an "attractive offering[]" with "favorable terms" and held that "it was prudent for Northwestern to accept conditions that would ensure the Traditional Annuity remained available to participants." App. 13a-14a.

In dismissing Count III, the Seventh Circuit concluded that ERISA did not "require[]" plans to pay for recordkeeping through "a flat-fee structure," rather than revenue sharing. App. 15a. The court rejected petitioners' claims that respondents could have and should have lowered fees by soliciting competitive bids for recordkeeping, because respondents "explained it was prudent to have this arrangement so it could continue offering the Traditional Annuity among its offerings." App. 16a. The court "disagree[d] . . . that Northwestern was required to seek a sole recordkeeper to satisfy its fiduciary duties, finding Northwestern's decision to maintain two recordkeepers prudent." *Id.* The court also faulted petitioners for failing to identify an "alternative recordkeeper" that would have accepted a lower recordkeeping fee than the Plans paid to Fidelity and TIAA. App. 18a.

The Seventh Circuit rejected Count V because the Plans offered some low-cost index funds, finding that the presence of such funds "eliminat[ed] any claim that plan participants were forced to stomach an unappetizing menu." App. 19a. The court held that "plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty." App. 21a. It accepted what it called respondents' "prudent explanations for the challenged fiduciary decisions involving alleged losses or underperformance." *Id.* The court also rejected petitioners' claims based on retail-class funds with excessive fees, holding that there was no "blanket prohibition on retail share classes." App. 19a. The court concluded that respondents "'cannot be faulted for'" offering choices to participants "'who have the most interest in the outcome.'" App. 23a (quoting *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011)).

The Seventh Circuit affirmed the denial of leave to file a Second Amended Complaint and affirmed dismissal of petitioners' remaining claims. App. 21a-24a.

SUMMARY OF ARGUMENT

I.A. ERISA's text requires that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). ERISA's fiduciary duties generally are "'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)). In *Tibble*, this Court looked to trust law (as explicated in the Restatements of Trusts, treatises, and case law) to determine the contours of ERISA's fiduciary duty to monitor investments in defined-contribution plans. 575 U.S. at 528-30. It should do the same here.

B. ERISA's duty of prudence is derived from trust law, which requires a trustee "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Restatement (Second) of Trusts § 174 (1959) ("Second Restatement"). This "prudent person" standard encompasses several subsidiary obligations relevant here.

1. ERISA incorporates the common-law trust duty to act prudently when incurring expenses, so as to incur only expenses that are reasonable and not excessive. *See* Second Restatement § 188 cmt. f (trustee has "a duty not to incur a greater expense than is reasonable under the circumstances"); Restatement (Third) of Trusts § 88 cmt. a (2007) ("Third Restatement") ("Implicit in a trustee's fiduciary duties is a duty to be cost-conscious."). Courts applying this common-law duty have scrutinized trust expenses closely and have not hesitated to disallow unnecessary or excessive expenses. *See, e.g.*, *Wall v. Boston Safe Deposit & Tr.*

Co., 150 N.E. 220, 222 (Mass. 1926) (disallowing charge of real estate broker fee that was "more than the usual commission"). In the context of selecting investment managers and other investment service providers, a trustee must "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Third Restatement § 90 cmt. m.

2. Trustees must act prudently when delegating trust functions, such as investment management or administrative services. *See* Third Restatement § 80(2). "The duty to minimize costs . . . applies to delegation as well as to other aspects of fiduciary investing." Uniform Prudent Investor Act § 9 cmt. ("UPIA"). A fiduciary must therefore consider costs when selecting service providers, while also monitoring expenses paid to service providers to ensure that they are not excessive.

3. ERISA and trust law impose "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529. This duty requires a fiduciary to "'systematic[ally] conside[r] all the investments'" and, "if an investment is determined to be imprudent," to "'dispose of it within a reasonable time.'" *Id.* at 529-30 (quoting George T. Bogert et al., *The Law of Trusts & Trustees* §§ 684, 685 (3d ed. 2009)) (brackets in *Tibble*). Imprudent retention of even a few imprudent options in a larger lineup is a fiduciary breach. *See id.* at 530-31.

II. Taking petitioners' well-pleaded factual allegations as true and drawing reasonable inferences in their favor, *see Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011), petitioners pleaded sufficient facts to state claims that respondents breached ERISA's duty of prudence.

A. Petitioners stated a valid claim by alleging that respondents offered higher-cost retail versions of mutual funds when lower-cost institutional versions of the same funds were available. "Wasting beneficiaries' money is imprudent." UPIA § 7 cmt. Petitioners plausibly alleged that respondents wasted petitioners' money by forgoing alternatives that differed from the offered funds only in lower cost. That is precisely the type of fiduciary breach this Court allowed plaintiffs to pursue in *Tibble*. 575 U.S. at 530-31.

B. Petitioners plausibly alleged that respondents imprudently incurred excessive recordkeeping fees. Petitioners alleged that the Plans paid several times a reasonable rate and that petitioners could have taken several concrete steps – which other comparable university plans had successfully executed – to reduce fees, including consolidating to a single recordkeeper, soliciting competitive bidding, and negotiating lower fees.

C. Petitioners imprudently offered too many duplicative investment options, which increased expenses (because plans can bargain for lower fees on a smaller lineup) and confused participants. Respondents admitted the imprudence of the original plan design when it streamlined the Plans to reduce the number of options from hundreds to 32 after this lawsuit was filed, and acknowledged that doing so was necessary to enable informed decisionmaking and reduce expenses.

D. Discovery revealed damning evidence of respondents' imprudence. Respondents ignored advice from their consultants that expenses were too high and that they should reduce expenses through the very steps urged by petitioners. Respondents conceded at deposition that they could have reduced expenses but failed to monitor them. And respondents did nothing when they learned that TIAA was exploiting participants' confidential information to market lucrative investment products, a practice that recently was condemned by the Securities and Exchange Commission and the New York Attorney General, resulting in a TIAA subsidiary paying a $97 million fine. This evidence confirms that the inferences of imprudence articulated in the Amended Complaint were plausible.

III. The Seventh Circuit erred in dismissing petitioners' claims. First, the court failed to consider whether respondents breached ERISA's fiduciary obligation to manage expenses prudently. Instead, it knocked down a straw-man argument that ERISA imposed bright-line rules regarding plan design (an argument petitioners do not make). Second, the court inverted the applicable pleading standard by reading allegations and drawing inferences in respondents' favor, an approach that contravenes well-settled rules. Third, the court wrongly held that offering a wide range of options immunized respondents from a claim that some of the options were imprudent. This Court already has held that a fiduciary must monitor all investments in a plan and that retention of even a few imprudent investment options can constitute a breach. *See Tibble*, 575 U.S. at 529-30.

IV. Upholding the legal sufficiency of well-pleaded excessive-fee claims serves ERISA's purpose of "protect[ing] . . . the interests" of participants and beneficiaries and "providing for appropriate remedies." 29 U.S.C. § 1001(b). Private ERISA litigation "has significantly improved" defined-contribution plans and "dramatically brought down fees." *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020). Rejecting even detailed complaints such as petitioners' complaint would halt that progress.

ARGUMENT

I. ERISA IMPOSES FIDUCIARY DUTIES DERIVED FROM THE COMMON LAW OF TRUSTS TO SELECT AND MONITOR INVESTMENTS PRUDENTLY AND TO INCUR ONLY REASONABLE EXPENSES

A. ERISA's Duties Are Derived From The Common Law Of Trusts

The legal standard at issue stems from ERISA's imposition of fiduciary duties to protect plan participants and beneficiaries. The statute provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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 Court has "often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015) (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (ERISA's "fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts'") (quoting H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649) (brackets in *Bruch*). Although ERISA does not incorporate all aspects of trust law wholesale, that is in significant part because "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). ERISA's fiduciary duties generally track common-law trust duties except when "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.*

In *Tibble*, for example, this Court held that ERISA's duty of prudence incorporated an obligation, derived from the common law of trusts, to monitor prudently investment options in a defined-contribution plan and remove imprudent investment options. 575 U.S. at 528-30.[7] There is "no reason why" the Court "should not" look to the law of trusts to "determin[e] the contours" of the applicable fiduciary duties in this case, which also involves the duty of prudence as applied to defined-contribution plans. *Id.* at 528-29.

B. Trust Law Imposes A Duty, Incorporated Into ERISA, To Act Prudently When Selecting And Monitoring Investments, Incurring Expenses, And Delegating Investment Functions

As this Court has recognized, ERISA's "standard of care" (or prudence) is "derived from the common law of trusts." *Central States*, 472 U.S. at 570. The statutory language of § 1104(a)(1)(B) closely tracks the duty of prudence articulated in the Second Restatement of Trusts: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."

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[7] In discerning applicable trust-law principles, this Court looks to the Restatements of Trusts, treatises, common-law cases, and statutes concerning trustees' investment management. *See*, *e.g.*, *Tibble*, 575 U.S. at 529-30; *Varity*, 516 U.S. at 504, 506; *Central States*, 472 U.S. at 570-72.

Restatement (Second) of Trusts § 174 (1959) ("Second Restatement"); *accord* Restatement (First) of Trusts § 174 (1935) ("First Restatement") (same). This "prudent man" or "prudent person" standard has a long pedigree in American common law, as reflected in 19th century jurisprudence and treatises.[8]

"[T]he duty of prudence[] encompasses a number of duties relating to the management and investment of the trust property." George T. Bogert et al., *The Law of Trusts & Trustees* § 541 (3d ed. 2009) ("Bogert"). Of those duties, three are particularly relevant here: (1) the duty to act prudently when incurring expenses, so as to incur only reasonable expenses, (2) the duty to act prudently when delegating investment functions to vendors, such as investment managers, and (3) the duty to monitor investments prudently and remove imprudent investments.

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[8] *See, e.g.*, *Harvard Coll. v. Amory*, 26 Mass. 446, 461 (1830) ("[A trustee] is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1268b, at 522-23 (12th ed. 1877) ("[T]he duty of the trustee undoubtedly is to perform [his service], according to his best ability, with such care and diligence as men, fit to be intrusted with such matters, may fairly be expected to put forth in their own business of equal importance."); 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1070, at 642 (1882) ("Pomeroy") ("The principle is well settled that trustees are bound to exercise care and prudence in the execution of their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs.").

1. Plan fiduciaries have a duty to act prudently when incurring expenses, so as to incur only reasonable expenses

Under trust law, and under ERISA, the fiduciary duty of prudence includes an obligation to act prudently when incurring only expenses that are reasonable under the circumstances and not excessive.

The Second Restatement provides that "[t]he trustee can properly incur expenses which are necessary or appropriate to carry out the purposes of the trust," Second Restatement § 188, but cautions that "he is under a duty to exercise such care and skill as a man of ordinary prudence would exercise in incurring the expense," and thus has "a duty not to incur a greater expense than is reasonable under the circumstances," *id.* § 188 cmt. f. *Accord* First Restatement § 188 & cmt. f. Leading treatises likewise recognize this duty and articulate it as requiring that expenses are "reasonably necessary," not "excessive," and not "greater . . . than is reasonable."[9]

In applying this common-law duty, courts regularly have disallowed expenses charged to the trust estate

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[9] *See* Bogert § 801 ("payment for expenses must be reasonably necessary to facilitate administration of the trust" and "must not be excessive in amount"); 3 *Scott and Ascher on Trusts* § 18.1.2.6, at 1445 (6th ed. 2021) ("When incurring expenses on behalf of the trust, the trustee has a duty to act prudently. 'Implicit in a trustee's fiduciary duties is a duty to be cost-conscious.' If a trustee incurs a greater expense than is reasonable, the trustee cannot charge the trust estate with the excess.") (quoting Restatement (Third) of Trusts § 88 cmt. a (2007) ("Third Restatement")) (footnotes omitted); 2 Pomeroy § 1085, at 665 (trustee is entitled to reimbursement and a lien for "all reasonable expenses in carrying out the directions of the trust, and . . . all expenses reasonably necessary for the security, protection, and preservation of the trust property," but "for moneys improperly paid there is no lien").

that were not reasonably necessary to serve the trust's objectives. For example, courts have held that a trustee cannot charge to the trust a broker's fee incurred in selling real estate where employing a broker was unnecessary because the trustee was or should have been aware of the interested buyer. *See In re Hill's Estate*, 82 A. 338, 339 (N.J. Prerog. Ct. 1912) (applying duty to administer estate "without unnecessary expense"); *In re Duffy's Will*, 298 N.W. 849, 851 (Iowa 1941) (per curiam) (disallowing expense not "necessary . . . for the proper management of the trust").

Even where the trustee properly incurred an expense, common-law courts traditionally scrutinized whether the amount was excessive, by measuring the expense against market rates and the value provided. For example, in *Wall v. Boston Safe Deposit & Trust Co.*, 150 N.E. 220 (Mass. 1926), the court held that a trustee could not charge the trust with a real estate broker's commission nearly twice the market rate. The court reasoned that, while "a trustee shall be allowed his reasonable expenses incurred in the execution of his trust," the facts were not "sufficient to justify the finding that the trustee was warranted in paying the broker more than the usual commission." *Id.* at 222; *see also Van Gorden v. Lunt*, 13 N.W.2d 341, 345 (Iowa 1944) (disallowing portion of attorneys' fees charged to trust for litigation because "[e]xpenses, including attorney fees, chargeable to a trust must be reasonable").

In recent decades, with the proliferation of mutual funds and similar pooled investment vehicles, the focus of the duty to incur only reasonable expenses has turned to mutual fund expenses and other fees charged by investment service providers. In 1992, the Third Restatement articulated the "prudent investor rule," which it described as "an extension and clarification of the traditional, so-called 'prudent man rule' originally articulated [in *Harvard College v. Amory*]." Third Restatement § 90 cmt. a. The prudent-investor rule requires a trustee to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship," *id.* § 90(c)(3), because "[i]mplicit in a trustee's fiduciary duties is a duty to be cost-conscious," *id.* § 88 cmt. a. "[T]rustees have a duty to avoid fees, transaction costs, and other expenses that are not justified by needs and realistic objectives of the trust's investment program." *Id.* Ch. 17 Intro. Note. As the Third Restatement explained, the "continuing emergence of modern investment products, not only with significantly varied characteristics but also with similar products being offered with significantly differing costs," requires "increased emphasis" on "the duty to avoid unwarranted costs." *Id.* A trustee must therefore "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." *Id.* § 90 cmt. m.

The duty to be cost-conscious in selecting investment products and service providers is also baked into state statutory law, reflecting its broad acceptance. In 1994, the Uniform Law Commission incorporated the prudent-investor rule into the Uniform Prudent Investor Act ("UPIA"), which 44 States and two other jurisdictions have enacted. *See* UPIA Prefatory Note; *id.* §§ 1, 2.[10] The UPIA provides that, "[i]n investing and managing trust assets, a trustee may only incur

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[10] *See also* Uniform Law Comm'n, Prudent Investor Act, https://www.uniformlaws.org/committees/community-home?CommunityKey=58f87d0a-3617-4635-a2af-9a4d02d119c9 (last visited Aug. 24, 2021).

costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee." *Id.* § 7. As the Commission explained: "Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs." *Id.* § 7 cmt.

Although the Third Restatement's prudent-investor rule and the UPIA postdate ERISA, they apply traditional principles of prudent investing and cost-consciousness that date back centuries. *See* Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 Iowa L. Rev. 1151, 1155 (1992) (prudent-investor rule "return[s], with modest reformulation, to the essence of the *Harvard College* dictum"); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 653-54 (1996) ("There is nothing novel about the trustee's duty to minimize costs in every facet of trust administration."). This Court has cited the prudent-investor rule and the UPIA in explicating an ERISA fiduciary's duties to manage defined-contribution plans prudently. *See Tibble*, 575 U.S. at 529.

DOL's longstanding view is that ERISA imposes duties to "minimize costs," incur "'only costs that are reasonable in amount,'" and "'make careful overall cost comparisons.'" Brief for the United States as Amicus Curiae Supporting Pet'rs at 12-13, *Tibble v. Edison Int'l*, No. 13-550, 2014 WL 6984131 (U.S. Dec. 9, 2014) (quoting Third Restatement § 90(c)(3) & cmt. m); *see Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) (placing "some weight" on agency's views set forth in United States *amicus* brief joined by agency counsel). DOL's view, expressed in a variety of forums, that ERISA obligates fiduciaries to monitor expenses prudently to ensure that a plan incurs only reasonable expenses is consistent and longstanding.[11]

2. Plan fiduciaries have a duty to act prudently when delegating investment functions to vendors, such as investment managers

In a 403(b) plan, fiduciaries do not directly select individual stocks and bonds for participants. Rather, they select mutual funds and other investment vehicles to include in the plan lineup, thereby delegating important investment functions to the investment managers that offer those products. Fiduciaries also delegate administrative functions to recordkeepers.

ERISA incorporates the trust-law duty to act prudently when delegating such functions. "Prudence . . . requires the trustee to exercise reasonable care, skill, and caution in the selection and retention of agents." Third Restatement § 80 cmt. d(2); *see also id.* § 80(2) ("the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill

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[11] *See*, *e.g.*, DOL Advisory Opinion, *Douglas O. Kant*, 1997 WL 1824017, at *2 (Nov. 26, 1997) ("plan fiduciaries have an obligation to prudently select look-through investment vehicles" and "must consider, among other things, any costs or fees associated with the investments"); DOL Advisory Opinion, *Stephen M. Saxon*, 2013 WL 3546834, at *4 (July 3, 2013) ("plan fiduciaries must obtain sufficient information to assure that any service providers to the plan . . . are paid no more than reasonable compensation"); DOL, *A Look at 401(k) Plan Fees* 2 (employers "must consider the fees and expenses paid by [a] plan" and "[e]nsure that fees paid to service providers and other plan expenses are reasonable in light of the level and quality of services provided"); DOL, *Meeting Your Fiduciary Responsibilities* 2 (Sept. 2020) (fiduciary responsibilities include "[p]aying only reasonable plan expenses"), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf.

would act in similar circumstances" when delegating and supervising agents); UPIA § 9(a) ("[t]he trustee shall exercise reasonable care, skill, and caution" in "selecting an agent" and in "periodically reviewing the agent's actions in order to monitor the agent's performance").

"The duty to minimize costs . . . applies to delegation as well as to other aspects of fiduciary investing." UPIA § 9 cmt. A trustee making delegation decisions "must balance the projected benefits against the likely costs" and "must take costs into account." *Id.*

Like a trustee, an ERISA fiduciary must act prudently when delegating investment and administrative functions to agents, including when selecting or retaining investment managers to manage funds in a plan lineup. In *Tibble*, this Court applied the general duty of prudence to the delegation function, holding that participants could pursue a claim for violation of the "continuing duty to monitor investments and remove imprudent ones" based on allegations that fiduciaries imprudently retained investment managers that charged excessive expenses on mutual fund offerings. 575 U.S. at 530.

3. Plan fiduciaries have a duty to monitor investments prudently and remove imprudent investments

ERISA incorporates trust law's "continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 530; *see also id.* at 529-30 (collecting trust-law authorities setting forth this duty).[12] Under ERISA, "[a] plaintiff may allege that a

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[12] *See*, *e.g.*, Third Restatement § 90 cmt. b ("[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments,

fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 530.

ERISA's duty of prudence requires consideration of every investment and can be violated by imprudent selection or retention of a single imprudent investment. As this Court explained, a "trustee must 'systematic[ally] conside[r] *all the investments of the trust* at regular intervals' to ensure that they are appropriate." *Id.* at 529 (quoting Bogert § 684) (emphasis added; brackets in *Tibble*); *see also id.* at 530 ("if *an investment* is determined to be imprudent, the trustee 'must *dispose of it* within a reasonable time'") (quoting Bogert § 685) (emphases added). DOL agrees that, "[u]nder the law of trusts, which informs ERISA's fiduciary standards, fiduciaries are not excused from their obligations not to offer imprudent investments with unreasonably high fees on the ground that they offered other prudent investments." U.S. Cert. Br. 11-12.

In *Tibble*, for example, this Court held that participants could state an ERISA claim for imprudent retention of three mutual funds with excessive expenses in a defined-contribution plan whose lineup included dozens of options. *Tibble*, 575 U.S. at 530-31. Implicit in *Tibble*'s holding is the conclusion that the presence of some purportedly prudent investment options in a plan would not excuse the selection or retention of other imprudent options as a matter of law.

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courses of action, and strategies involved."); UPIA § 2 cmt. ("'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."); Bogert § 684 ("A trustee also owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship.").

II. PETITIONERS PLEADED VIOLATIONS OF RESPONDENTS' FIDUCIARY DUTIES

Petitioners validly pleaded that respondents violated their fiduciary duties. A complaint survives a motion to dismiss when plaintiffs' factual allegations "'allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (brackets in *Matrixx*). At the pleading stage, a court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). "[A]ll reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 417 (3d ed. 2004). Applying these standards, the Amended Complaint easily surpasses the pleading hurdle: petitioners' well-pleaded factual allegations – taken as true – state plausible claims that respondents breached ERISA's duty of prudence by making (or failing to make) decisions that resulted in erosion of participants' retirement savings by excessive fees.

A. Respondents Imprudently Selected And Retained Retail-Class Mutual Funds With Unnecessary Fees

Petitioners stated a valid claim that respondents breached their fiduciary duties by offering 129 retail-class mutual funds when lower-cost institutional-class versions of the same funds were available. JA100-16 (Am. Compl. ¶ 161). Crucially, the institutional-class funds provided "the *exact same mutual funds*" as the corresponding retail-class versions, with "identical portfolio managers, underlying investments, and asset allocations," but they "differ[ed] only in cost." JA100-17 (*id.* ¶¶ 161, 164). Because of the Plans' large size, the institutional-class funds "were readily available to the Plans" and would have been provided "if [respondents] had asked." JA99-100 (*id.* ¶¶ 158, 160). But respondents' "use of the higher-cost share classes instead of the available lower-cost versions caused the Plans' participants to lose millions of dollars of their retirement savings due to wholly unnecessary fees." JA117 (*id.* ¶ 165). As in *Tibble*, respondents offered "higher priced retail-class mutual funds . . . when materially identical lower priced institutional-class mutual funds were available" that provided "effectively the same . . . mutual funds at [a] lower price." 575 U.S. at 525-26; *see* JA100-16 (Am. Compl. ¶ 161).

These allegations, taken as true, could hardly state a clearer claim for breach of the "duty to be cost-conscious," Third Restatement § 88 cmt. a, and to avoid incurring "a greater expense than is reasonable under the circumstances," Second Restatement § 188 cmt. f. Because alternatives were available providing the same investment at a lower cost, the retail-class expenses cannot be justified by any of the funds' investment features. Assume, for example, that the TIAA-CREF Small-Cap Blend Index was a prudent investment option to include in the Plans. Taking petitioners' allegations as true, it was imprudent to offer the retail-class version (TRBIX), with 0.35% expense ratio, rather than the institutional-class version (TISBX), with 0.10% expense ratio, less than one-third the retail rate. *See* JA100, 103 (Am. Compl. ¶ 161). Doing so accomplished nothing but depriving participants of $2.50 out of each $1,000 they invested in the fund each year.

Fiduciaries must "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Third Restatement § 90 cmt. m. Respondents' retention of more than 100 retail-class funds that were not just "similar," but *identical* to their institutional-class counterparts save for the higher expenses, supports the inference that respondents failed to make careful cost comparisons. "Wasting beneficiaries' money is imprudent." UPIA § 7 cmt. Petitioners plausibly alleged that respondents wasted beneficiaries' money by offering retail-class funds with unnecessary fees.[13]

Moreover, dismissal of this claim cannot be squared with *Tibble*. In *Tibble*, this Court allowed plaintiffs to pursue a claim for imprudent retention of *three* retail-class mutual funds. 575 U.S. at 526, 530-31.[14] Here, petitioners alleged the same conduct on a far greater scale. It is unsurprising that, except for the Seventh Circuit, every other court of appeals to address claims for imprudent selection or retention of retail-class shares (rather than identical institutional-class shares) since this Court's *Tibble* decision has allowed such claims to go forward. *See Sacerdote v. New York Univ.*, --- F.4th ---, 2021 WL 3610355, at *5-8 (2d Cir. Aug. 16, 2021); *Davis v. Washington Univ. in St.*

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[13] To the extent respondents contend that they could not have obtained lower-cost share classes of certain funds, such a contention presents a factual dispute to be resolved at a later stage. Petitioners alleged that the Plans are among the largest 0.2% defined-contribution plans in the country and that such large investors are able to obtain lower-cost institutional share classes, even if they do not meet minimum investment thresholds. JA40-41, 99-100 (Am. Compl. ¶¶ 12, 16, 157-160). At the pleading stage, this Court must credit those factual allegations.

[14] Plaintiffs subsequently prevailed at trial. *Tibble v. Edison Int'l*, 2017 WL 3523737 (C.D. Cal. Aug. 16, 2017).

Louis, 960 F.3d 478, 483 (8th Cir. 2020); *Sweda v. University of Pennsylvania*, 923 F.3d 320, 331 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565 (2020); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (en banc).

B. Respondents Imprudently Incurred Excessive Recordkeeping Fees

Petitioners pleaded a plausible claim that respondents breached their fiduciary duties by maintaining recordkeeping arrangements that resulted in participants paying unreasonable and excessive administrative fees. The Plans paid approximately $4-5 million in recordkeeping fees per year, when a reasonable recordkeeping fee would have been approximately $1.05 million, or approximately $35 per participant. JA95-96 (Am. Compl. ¶¶ 148-150). Recordkeeping fees were so high because they were assessed as a percentage of plan assets through revenue-sharing payments; thus, when growth in the Plans' assets outpaced the growth in the number of participants, recordkeeping fees increased even though the services provided did not increase at the same rate. JA57-58, 89-92 (*id.* ¶¶ 65-66, 135).

Petitioners alleged that respondents could have, and a prudent fiduciary would have, taken several steps to reduce fees: consolidating to a single recordkeeper, soliciting competitive bids from other recordkeepers, and negotiating with existing recordkeepers for rebates or fee reductions. JA93-94, 96-97 (*id.* ¶¶ 141-143, 151-152). These steps would not have reduced the quality of service because the recordkeeping market is "highly competitive" with "numerous recordkeepers in the marketplace who are equally capable of providing a high level of service" that will "vigorously compete for business by offering the best price." JA93 (*id.* ¶ 140). Industry literature recognizes that consolidating to a single recordkeeper not only reduces fees, but also improves the quality of service in many ways. *See* JA80-82 (*id.* ¶¶ 104, 106, 108) (citing publications recognizing benefits of consolidation, including allowing fiduciaries to "negotiate lower, transparent investment fees," providing "a more manageable number of institutional-quality investment options to choose from," making it easier "for employers to monitor available choices and provide ongoing oversight," and making "[t]he plan participant experience . . . better" because "employees are benefiting from less confusion as a result of fewer vendors in the mix").

Taken as true, these allegations support the inference that respondents breached their "duty not to incur a greater expense than is reasonable under the circumstances," Second Restatement § 188 cmt. f, by wrongly incurring expenses that were not "reasonably necessary to facilitate administration" of the Plans and were "excessive in amount," Bogert § 801. Overpaying for a necessary service long has been considered a breach of fiduciary duty. *See Wall*, 150 N.E. at 222 ("a trustee would not, in the exercise of the sound judgment which the performance of his trust requires, be justified in paying more than" the "usual commission charged for similar services by other" vendors).

Petitioners backed their claim with "well-pleaded facts" that support "the reasonable inference" that respondents acted imprudently. *Iqbal*, 556 U.S. at 678-79. Petitioners cited specific examples of other university plans that successfully reduced recordkeeping fees. Loyola Marymount, Pepperdine, and Purdue did so by soliciting competitive bidding and consolidating to a single recordkeeper. JA73-77 (Am. Compl. ¶¶ 93-96). CalTech's plan was structured similarly to the Plans at issue here: it employed TIAA and

Fidelity and offered more than 100 mutual funds. JA77 (*id.* ¶ 97). CalTech consolidated to TIAA as sole recordkeeper and negotiated $15 million in rebates from TIAA. *Id.* These actions by similarly situated fiduciaries demonstrate that a prudent person "acting in a like capacity . . . in the conduct of an enterprise of a like character" would have taken steps to reduce fees. 29 U.S.C. § 1104(a)(1)(B). Beyond those specific examples, many industry experts have published recommendations that 403(b) plans consolidate recordkeepers and solicit bidding to lower fees. JA78-82 (Am. Compl. ¶¶ 98-101, 104-108).

Particularly telling is petitioners' allegation that respondents never solicited bids from alternative recordkeepers. JA96 (*id.* ¶ 151). Industry experts recommend soliciting bids for recordkeeping periodically, such as every three to five years. JA59 (*id.* ¶ 69). To be sure, at the merits stage, respondents can argue that they had prudent reasons for their recordkeeping decisions. But their actions are difficult to defend when they paid substantially higher than market rates and never solicited bids from other vendors to provide comparable services at a lower price. At a minimum, petitioners alleged sufficient facts, taken as true, to support a claim that respondents acted imprudently.

To the extent respondents fault petitioners for not identifying a specific recordkeeper that would have serviced the Plans at a lower price, they seek to impose upon petitioners a pleading burden higher than that set by Rule 8(a)(2). Petitioners alleged that "[t]here are numerous recordkeepers in the marketplace who are capable of providing a high level of service and who will vigorously compete to win a recordkeeping contract for a jumbo defined contribution plan," JA51 (*id.* ¶ 49); that several similarly situated university plans reduced fees by consolidating and/or soliciting competitive bidding for recordkeeping, JA73-77 (*id.* ¶¶ 93-97); and that numerous industry experts advise that plans with multiple recordkeepers can reduce fees by taking these steps, JA78-82 (*id.* ¶¶ 98-108); but that respondents failed to solicit competitive bids from alternative recordkeepers, JA96-97 (*id.* ¶ 151). These factual allegations, "accepted as true, . . . allow[] the court to draw the reasonable inference" that respondents could have obtained lower recordkeeping fees had they acted prudently. *Iqbal*, 556 U.S. at 678.

C. Respondents Imprudently Offered Many Duplicative Investment Options, Leading To Higher Fees, Participant Confusion, And Fiduciary Inability To Monitor

Petitioners stated a claim that respondents imprudently offered many duplicative investment options, leading to higher expenses and participant confusion. The multitude of options available before October 2016 – 242 in one Plan and 187 in the other, JA84 (Am. Compl. ¶¶ 113, 115) – included duplicative options in each investment style, JA121-22 (*id.* ¶¶ 175-176) (for example, 15 mid-cap domestic equity and 14 large-cap domestic blend investments), such that offering so many options did not provide beneficiaries with real choice commensurate with the number of offerings.

Petitioners allege that this design caused two significant harms. First, the Plans incurred higher expenses because they lost the opportunity "to command lower-cost investments" "[b]y consolidating duplicative investments of the same investment style into a single investment option." JA119 (*id.* ¶ 169); *see also* JA117, 125 (*id.* ¶¶ 166, 181).[15] Second, offering so many options increased participant confusion. JA118, 120-21 (*id.* ¶¶ 167, 173). The Amended Complaint cited leading economic and industry research that too many options can lead to "decision paralysis" and impede employee decisionmaking, *id.* ¶¶ 167, 172-173, but that is also just common sense. Almost no employee has the time or financial sophistication to wade through hundreds of investment options, each with hundreds of pages of supporting information, JA118 (*id.* ¶ 167), to devise an intelligent investment strategy. Moreover, it is incredibly difficult, if not impossible, for plan fiduciaries to exercise their obligation to monitor each investment option prudently when there are hundreds of options. *Id.*

Petitioners' allegations, taken as true, support the inference that the Plans' design fell short of ERISA's prudent-person standard. By alleging that the retention of duplicative funds unnecessarily increased plan expenses, petitioners plausibly alleged that respondents breached their "duty to be cost-conscious," Third Restatement § 88 cmt. a, and to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship," *id.* § 90(c)(3). Respondents also failed to give "appropriate consideration" to "the role the investment or investment course of action plays in . . . the plan's

[15] The Plans included actively managed options with expense ratios of 10 or even 20 times higher than passively managed index funds in the same investment style. JA124, 140, 146 (Am. Compl. ¶¶ 177, 201, 211). Some of those options consistently underperformed benchmark indices or comparable lower-cost alternatives. JA138-44, 146-49 (*id.* ¶¶ 198-205, 212-213). *See Sweda*, 923 F.3d at 331-32 (holding that allegations that fiduciary imprudently "retained expensive underperformers over better performing, cheaper alternatives" stated valid claim).

investment portfolio." 29 C.F.R. § 2550.404a-1(b)(1)(i)-(ii). For example, respondents included several index funds in the same category that were "virtually interchangeable." JA124-25 (Am. Compl. ¶¶ 179-181). These allegations support the inference that, had respondents prudently reviewed the investment lineup, they would have found no role for such duplication other than to increase expenses and confuse participants. *See Sweda*, 923 F.3d at 331-32 (holding that participants stated plausible ERISA claim by alleging that "the options Penn selected and retained were imprudently costly" and "were duplicative thereby decreasing the value of actively managed funds, reducing the Plan's leverage, and confusing participants").

Respondents have admitted the flaws in the Plans' design. When respondents reviewed the Plans' structure in 2016, they concluded that a severe redesign was necessary, streamlining the investment lineup to 32 options. Respondents made these reforms only after this lawsuit was filed. Respondents explained that the changes were designed to "allow for informed decisions" and would "reduce administration fees" and "increase participant returns" by providing "access to lower cost share classes when available." JA151 (Am. Compl. ¶¶ 221-222) (brackets omitted). That was tantamount to an acknowledgment that the previous design impeded informed decisionmaking, increased fees, and decreased returns. Respondents' actions and admissions support the inference that, had they conducted a prudent review earlier, they would have removed unnecessarily duplicative options from the Plans.

D. Information Revealed In Discovery Confirms That Dismissal Was Improper

In many cases, the trial court's grant of a motion to dismiss leaves uncertain whether discovery would have revealed evidence of misconduct. Here, the Court need not speculate. Discovery, which proceeded while respondents' motion to dismiss was pending, revealed damning evidence substantiating petitioners' claims, which petitioners included in their proposed Second Amended Complaint, Dist. Ct. ECF No. 130, Ex. 1 ("Proposed SAC V1"). For example, Northwestern's consultants advised respondents as early as 2011 that their existing practices were imprudent and urged them to reform the Plans in the very ways that petitioners contend would have been prudent, including reducing the number of investment options, consolidating to a single recordkeeper, and negotiating with existing recordkeepers to receive rebates or reduce fees. JA214-15, 232-33, 280-81 (Proposed SAC V1 ¶¶ 90, 120, 203, 205); JA447-49 (Dist. Ct. ECF No. 169, Proposed SAC V2 ¶¶ 171, 177); *see also* Proposed SAC V1 ¶¶ 202, 204.[16] Yet respondents failed to act on their consultants' recommendations for years. JA282 (Proposed SAC V1 ¶ 206).

Several of the individual respondents and respondents' employees conceded key facts at depositions showing that their behavior was imprudent. For example, respondents conceded that:

- evaluating hundreds of funds on a fund-by-fund basis was unmanageable and led to participant

[16] Proposed SAC V1 is reproduced in the Joint Appendix except for paragraphs 202, 204, and 245, which discuss advice provided by respondents' counsel and which were sealed in the lower courts. Those paragraphs are available at ECF No. 130 of the district court docket.

confusion, and moving to a smaller number of options would have reduced administrative costs, JA214, 237-38, 314 (Proposed SAC V1 ¶¶ 89, 142-143, 273); JA369-71 (Beemer Dep. Tr. 314:5-315:20); Dist. Ct. ECF No. 130, Ex. 8, Fish Dep. Tr. 64:4-23, 112:12-113:15;

- the Plans could have reduced costs by consolidating to a single recordkeeper, JA233 (Proposed SAC V1 ¶ 121); JA362-63 (Beemer Dep. Tr. 232:18-233:16); JA400 (McLean Dep. Tr. 172:5-20);
- respondents did not know the amount of recordkeeping fees paid by the Plans or attempt to monitor these fees, JA250-51 (Proposed SAC V1 ¶ 174); JA386, 397-99 (McLean Dep. Tr. 30:16-20, 104:17-19, 105:8-9); Dist. Ct. ECF No. 130, Ex. 5, Stafford Dep. Tr. 111:23-112:8; and
- the individual responsible for executing the Plans' recordkeeping contracts did not know who the Plans' recordkeepers were or that the Plans had multiple recordkeepers, JA446 (Proposed SAC V2 ¶ 162).

In 2015, respondents sought bids for recordkeeping for the first time. Although the bidding process was flawed in that it sought bids only from incumbent recordkeepers TIAA and Fidelity, even this flawed bidding process spurred TIAA to slash its fees drastically, from at least \$150 per participant per year to \$42 per participant, nearly identical to the \$35 per participant per year amount that petitioners alleged was reasonable. JA447-48 (Proposed SAC V2 ¶¶ 172-176). These facts confirm that respondents could have reduced the Plans' recordkeeping fees far earlier had they sought competitive bids.

Finally, petitioners learned after filing the Amended Complaint that TIAA abused its position as recordkeeper to obtain participants' confidential information and to use that confidential information to market lucrative investment products to participants outside the Plans. JA315-17 (Proposed SAC V1 ¶¶ 277-279, 281). Although respondents conceded at deposition that they were aware of this practice, they did nothing to prevent it. JA317-18 (*id.* ¶ 283). In connection with this misconduct, TIAA recently agreed to pay $97 million to settle state and federal charges of defrauding customers and violating securities laws. *See* Press Release, Securities & Exchange Comm'n, SEC Announces $97 Million Enforcement Action Against TIAA Subsidiary for Violations in Retirement Rollover Recommendations (July 13, 2021).[17] Respondents had a fiduciary duty to "act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents." Third Restatement § 90(c)(2). Respondents breached this duty by allowing TIAA to prey on participants by exploiting their confidential information.

TIAA's marketing of lucrative investment products to participants underscores that respondents failed to monitor and control TIAA's recordkeeping fees in a prudent manner. A prudent fiduciary must take into account all income a vendor derives from its services in determining whether its fees are reasonable. *See* DOL Advisory Opinion, *Stephen M. Saxon*, 2013 WL 3546834, at *3 ("[T]he responsible plan fiduciaries must assure that the compensation the plan pays directly or indirectly to Principal for services is reasonable, taking into account the services provided to the plan as well as all fees or compensation received by Principal in connection with the investment of plan assets, including any revenue sharing."). Regardless,

[17] https://www.sec.gov/news/press-release/2021-123.

respondents should have stopped TIAA's exploitation of participants' confidential information for its sales of non-Plan investment products. And yet, at a bare minimum, if they were going to permit TIAA to engage in that practice at all, respondents should have taken into account the income TIAA derived from that activity and demanded that TIAA lower its recordkeeping fees in turn.

Petitioners acknowledge that they did not petition for a writ of certiorari on the question whether the lower courts should have allowed them to file their proposed Second Amended Complaint. But the fact that petitioners substantiated their claims in discovery removes any doubt that the inferences of imprudence supported by the allegations of the operative Amended Complaint were plausible. Yet if this Court adopts the Seventh Circuit's onerous pleading standard, even meritorious claims like petitioners' claims never will advance past the pleading stage. Put another way, petitioners showed that the fiduciary breaches alleged actually occurred, yet the lower courts dismissed as implausible petitioners' claims alleging they occurred.

III. THE SEVENTH CIRCUIT'S REASONS FOR AFFIRMING DISMISSAL WERE ERRONEOUS

In dismissing claims similar to those that most other courts have blessed, *see* Pet. 8-11, 14-16, the Seventh Circuit misconstrued ERISA and the applicable pleading standard. Three overarching errors infected the Seventh Circuit's analysis. First, like the Ninth Circuit in *Tibble*, the Seventh Circuit failed to "consider[] the nature of the fiduciary duty" or "the role of the fiduciary's duty of prudence under trust law." *Tibble*, 575 U.S. at 527-28. Second, the Seventh Circuit failed to apply the applicable pleading standard, under which the court "[a]ssum[es] the complaint's allegations to be true" and "draw[s] . . . reasonable inference[s]" in plaintiffs' favor. *Matrixx*, 563 U.S. at 45-46 (quoting *Iqbal*, 556 U.S. at 678). Third, the Seventh Circuit misinterpreted ERISA to immunize fiduciaries where a plan offers a wide range of investment options, even if many of those options were imprudent.

A. The Seventh Circuit Failed To Consider The Proper Fiduciary Duty That Respondents Owed To Petitioners

The Seventh Circuit rejected petitioners' claims on the basis that ERISA did not impose blanket requirements that all plans adopt certain features that petitioners contended would have been prudent for the Plans. *E.g.*, App. 15a (flat-fee recordkeeping structure not "required by ERISA"); App. 17a ("ERISA does not require a sole recordkeeper"); App. 19a-20a (rejecting "blanket prohibition on retail share classes"). That judicial approach misunderstands the ERISA prudent-person standard.

ERISA may not impose bright-line rules, but it does impose a context-specific "prudent person" standard, *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014), which obligates fiduciaries "to properly monitor investments," *Tibble*, 575 U.S. at 530, and avoid incurring "greater expense than is reasonable under the circumstances," Second Restatement § 188 cmt. f. *See supra* Part I. The Seventh Circuit failed to analyze whether petitioners alleged facts showing that respondents breached those obligations.

For example, by rejecting a bright-line rule (which petitioners never advocated) that ERISA requires all plans to use a single recordkeeper under a flat-fee structure, the Seventh Circuit avoided the real issue: whether respondents violated their duty to be "cost-conscious," Third Restatement § 88 cmt. a, by paying multiple recordkeepers several times a reasonable rate, without checking to see whether a lower price was available. Likewise, in rejecting a blanket ban on retail share classes, the Seventh Circuit avoided the question whether the Plans breached their duty to "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio," *id.* § 90 cmt. m, by offering retail classes of specific funds where *lower-cost institutional-class versions of those same funds* were available. Had the Seventh Circuit considered petitioners' factual allegations in light of the applicable fiduciary duties, the conclusion would have been inescapable that petitioners had stated valid claims.

B. The Seventh Circuit Failed To Apply The Applicable Pleading Standard And Assume The Truth Of Petitioners' Allegations

The Seventh Circuit additionally erred by inverting the applicable pleading standard, reading petitioners' allegations in respondents' favor and drawing inferences in favor of respondents, rather than petitioners. For example, the court accepted respondents' "expla[nation]" that "it was prudent" to use TIAA as a recordkeeper and offer TIAA's investment products "so it could continue offering the Traditional Annuity among its offerings." App. 16a. But whether the Traditional Annuity was so beneficial, or beneficial at all, as to justify petitioners having to pay allegedly excessive investment management and recordkeeping fees to TIAA is a factual question that cannot be resolved on a motion to dismiss. *See Davis*, 960 F.3d at 483 ("plausible inference" of prudent behavior does not justify motion to dismiss where "mismanagement is another plausible inference").

Worse still, the Seventh Circuit construed petitioners' allegations in respondents' favor and invented facts favorable to respondents that were not alleged, including that the Traditional Annuity was an "attractive offering[]" with "favorable terms," App. 14a,[18] and that the Plans' holdings of the Traditional Annuity would be subject to a 2.5% surrender charge if respondents removed the offering, *id.*[19] Moreover, petitioners alleged that the Plans could have lowered fees, even while retaining TIAA as a recordkeeper, by consolidating to TIAA as sole recordkeeper and negotiating rebates or fee reductions from TIAA, as CalTech successfully did with its similarly designed plan. JA77, 93-94, 96-97 (Am. Compl. ¶¶ 97, 141-143, 151-152). In concluding that petitioners failed to allege "that plan participants would have been better off with TIAA as the sole recordkeeper," App. 16a, the Seventh Circuit failed to take petitioners' factual allegations as true and make reasonable inferences in their favor, as required. *See Matrixx*, 563 U.S. at 45-46.

The Seventh Circuit ultimately accepted respondents' so-called "prudent explanations for the challenged fiduciary decisions" and made a "finding" that respondents' behavior was "prudent." App. 16a, 21a. But it is not a court's function on a motion to dismiss to make

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[18] Petitioners alleged that other fixed annuities and stable value funds offered "high-quality, low-cost alternatives" to the Traditional Annuity. JA71 (Am. Compl. ¶ 89).

[19] Petitioners alleged that TIAA imposed a surrender charge in the narrow circumstance in which "a participant withdraws his or her investment in a single lump sum within 120 days of termination of employment." JA88 (Am. Compl. ¶ 132). Petitioners did not allege that the charge would apply if the Plans ceased offering TIAA products, nor is that a fair inference from petitioners' allegations.

factual findings in defendants' favor or credit defendants' proffered inferences over plausible inferences in plaintiffs' favor. Even if it somehow "str[uck]" the Seventh Circuit "that actual proof" of petitioners' claims was "improbable," dismissal of petitioners' "well-pleaded complaint" was improper. *Twombly*, 550 U.S. at 556.

C. The Seventh Circuit Misinterpreted ERISA To Immunize Fiduciaries For Offering Many Options

The Seventh Circuit erred in concluding that offering a wide range of options, including a few supposedly prudent options, immunized respondents from ERISA liability. *See* App. 21a ("[P]lans may generally offer a wide range of investment options and fees without breaching any fiduciary duty."); App. 19a (inclusion of a few "low-cost index funds" "eliminat[ed] any claim" based on the inclusion of other imprudent options).[20]

The Seventh Circuit's reasoning is inconsistent with ERISA's text. A fiduciary exercising "care, skill, prudence, and diligence," 29 U.S.C. § 1104(a)(1)(B), would not conclude that it is prudent to offer many bad investment options on the basis that the lineup includes a few good options, and expect employees (most of whom lack financial sophistication) to find the good options, like the proverbial needle in a haystack. Rather, prudent fiduciaries would examine each option in a plan to verify its suitability. This

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[20] The Seventh Circuit disregarded that even the supposedly "low-cost index funds" had unnecessary fees. App. 18a n.10. For example, respondents offered a retail-class version of the Vanguard Small Cap Index (VSISX) with 0.10% expense ratio when it could have offered an institutional-class version (VSCPX) with 0.06% expense ratio. JA100, 112 (Am. Compl. ¶ 161).

Court already concluded as much in *Tibble*, holding that participants could bring a claim for imprudent retention of three funds with excessive fees, based on the duty, derived from trust law, to "'systematic[ally] conside[r] all the investments of the trust at regular intervals'" and to "remove imprudent [investments]." 575 U.S. at 529-30 (quoting Bogert § 684) (first and second sets of brackets in *Tibble*). DOL agrees that the fiduciary duty to remove imprudent investments, derived from trust law, "applies to *each* of the trust's investments." U.S. Cert. Br. 12.

In addition, as a matter of logic, offering a wide range of choices does not remedy the harm caused by offering retail-class versions of funds rather than institutional-class versions of those same funds. That is because "the choice was simply between higher- or lower-cost shares of the same fund." *Sacerdote*, 2021 WL 3610355, at *7. Where "there was a binary choice between the retail shares and the institutional shares," it follows that, "had the funds not included the former, they would have included the latter, to some extent." *Id.* Petitioners Hughes and Walker invested in higher-cost share classes of several funds where lower-cost versions were available. JA39 (Am. Compl. ¶ 8.d). Regardless of the number of choices available, participants were harmed by respondents' failure to obtain lower-cost versions of the specific investments they chose.

In characterizing choice as an unabashed virtue, the Seventh Circuit disregarded petitioners' well-pleaded allegations that offering too many duplicative choices caused harm. *See* JA117-21 (*id.* ¶¶ 166-173). Indeed, respondents admitted that streamlining the Plans from hundreds of options to a more manageable 32 was necessary to "allow for informed decisions" and "reduce administration fees." JA151 (*id.* ¶¶ 221-222) (brackets omitted). The Seventh Circuit's conclusion that a "wide range of investment options" is a get-out-of-ERISA-free card, App. 21a, perversely incentivizes fiduciaries to overload plans with confusing and unnecessarily large lineups.

IV. ALLOWING WELL-PLEADED ERISA CLAIMS TO ADVANCE SERVES ERISA'S REMEDIAL PURPOSES

A holding from this Court that permits petitioners to pursue their well-pleaded claims of fiduciary breach would advance ERISA's remedial purposes. Congress enacted ERISA "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). In enacting ERISA, Congress declared that its "policy" is "to protect . . . the interests" of plan participants and beneficiaries "by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Experience has proven that private ERISA litigation challenging excessive fees has played a vital role in protecting participants and beneficiaries of defined-contribution plans. In 2008, this Court noted that "[d]efined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008). That observation is even truer today. As of 2016, 73% of workers with an employee retirement plan had only a defined-contribution plan, and another 10% had both a defined-contribution plan and a defined-benefit plan. *See* Mellman & Sanzenbacher 2 & fig. 2.

Increased prevalence of defined-contribution plans has enhanced the importance of prudence in controlling expenses. "Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble*, 575 U.S. at 525; *see also* DOL, *A Look at 401(k) Plan Fees* 2 (explaining that a 1% difference in annual fees and expenses can reduce an employee's retirement balance by 28%). Private litigation "on behalf of participants in large 401(k) and 403(b) plans has significantly improved these plans, brought to light fiduciary misconduct that has detrimentally impacted the retirement savings of American workers, and dramatically brought down fees in defined contribution plans." *Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *2 (D. Md. Jan. 28, 2020).

Settlements in such cases have provided monetary relief to the plans and prospective structural improvements to plan administration, ensuring that "employees and retirees will be provided with state-of-the-art retirement plans with fiduciary best practices assured." *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *1, *3 (M.D.N.C. Sept. 29, 2016).[21] Researchers have found that the "greater scrutiny" of ERISA excessive-fee litigation has provided the "clear benefit of . . . lower fees," with average mutual fund investment fees for 401(k) participants declining from 0.80% in 2003 to 0.48% in 2016. Mellman & Sanzenbacher 5 & fig. 5. Given the total of $9.6 trillion in assets in defined-contribution plans, *see ICI Fact Book* 182, a 0.32%

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[21] *See also*, *e.g.*, *Clark v. Duke Univ.*, 2019 WL 2588029, at *2-3 (M.D.N.C. June 24, 2019); *Gordan v. Massachusetts Mut. Life Ins. Co.*, 2016 WL 11272044, at *2 (D. Mass. Nov. 3, 2016); *Beesley v. International Paper Co.*, 2014 WL 375432, at *1 (S.D. Ill. Jan. 31, 2014).

reduction in average annual fees equates to an annual benefit to participants of $30.7 billion.

Private ERISA litigation is necessary to maintain and continue this progress. DOL "depends in part on private litigation to ensure compliance with [ERISA]" and "has expressed concern over the erection of 'unnecessarily high pleading standards' in ERISA cases." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009) (quoting Brief of the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant Braden and Requesting Reversal at 2, *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798 (8th Cir. Mar. 16, 2009)).

If this Court were to hold that even petitioners' detailed complaint was insufficient to state a claim, it would become extremely difficult for ERISA participants to bring a lawsuit for imprudence in incurring excessive fees. The Court should not hamstring these meritorious lawsuits, which have proven successful in reforming fiduciary practices and enhancing the retirement security of millions of Americans, by adopting an unduly restrictive interpretation of ERISA that is divorced from its text, purposes, and common-law antecedents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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