No. 18-1271

SUPREME COURT OF THE UNITED STATES

CHARLES E. WHITE, JR., ET AL.,
Petitioners,

v.

CHEVRON CORPORATION ET AL.,
Respondents.

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

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners file this Supplemental Brief to inform the Court of a recent decision of the United States Court of Appeals for the Third Circuit: *Sweda v. University of Pennsylvania*, No. 17-3244 (3d Cir. May 2, 2019) (2019 WL 1941310).[1] *Sweda* further demonstrates how the Ninth Circuit is in conflict with other circuits and sets pleading standards that undermine ERISA's protective function.

With *Sweda*, the Third Circuit joins the Second, Fifth, and Seventh Circuits in following the ERISA pleading standards established by the Eighth Circuit in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), which allow ERISA plan participants to allege indirectly a fiduciary breach in their plan. *See* Op. 8–9, 22 (2019 WL 1941310, *3, *8); Pet. 17–23, 26–28. *Sweda* reversed the dismissal of a complaint for breach of ERISA's fiduciary duties that is similar to Petitioners' complaint. The plaintiffs in *Sweda* participated in the University of Pennsylvania's defined contribution plan and alleged their fiduciaries violated ERISA's fiduciary duties by causing the plan to incur excessive recordkeeping fees and by providing imprudent investment options, including mutual funds in retail instead of institutional share classes. Op. 17–20 (2019 WL 1941310, *6–7). Petitioners make similar allegations in their complaint. Pet. 8–11.

The Third Circuit previously had affirmed the dismissal of an ERISA fiduciary breach complaint because the plan had a mix and range of investment options. *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). Other courts, including the district court here, have interpreted that to mean that a similar mix

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[1] Slip opinion ("Op."): https://www2.ca3.uscourts.gov/opinarch/173244p.pdf

and range of investments provides a safe harbor from claims of mismanagement of a plan. In *Sweda* the Third Circuit clarified that *Renfro* does not establish such a safe harbor. Op. 15–17 (2019 WL 1941310, *6).

> We did not hold, however, that a meaningful mix and range of investment options insulates plan fiduciaries from liability for breach of fiduciary duty. Such a standard would allow a fiduciary to avoid liability by stocking a plan with hundreds of options, even if the majority were overpriced or underperforming.

Id. at 16 (2019 WL 1941310, *6).

> [I]f we were to interpret *Renfro* to bar a complaint as detailed and specific as the complaint here, we would insulate from liability every fiduciary who, although imprudent, initially selected a 'mix and range' of investment options. Neither the statute nor our precedent justifies such a rule.

Id. at 25 (2019 WL 1941310, *9). The court noted that rejection of such a safe harbor was compelled by the reasoning of *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014), in which the Court rejected a presumption of prudence as a safe harbor for fiduciaries in employee stock ownership plans. Op. 25 (2019 WL 1941310, *9).

The Seventh Circuit similarly clarified that its prior decisions, including one on which *Renfro* relied, did not establish such a safe harbor. *See* Pet. 20–21 (discussing *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670 (7th Cir. 2016), *Hecker v. Deere & Co.*, 556 F.3d 575

(7th Cir. 2009), and *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011)); *Renfro*, 671 F.3d at 326–27.

Petitioners' complaint is as detailed and specific as the *Sweda* complaint. The Ninth Circuit's dismissal of the sufficiency of such a complaint starkly conflicts with *Sweda*. The District Court's interpretation of *Renfro* to set "the spectrum that other courts have held to be reasonable as a matter of law" (Pet. App. 29) was a clear misinterpretation of *Renfro*.

The Third Circuit recognizes ERISA's "protective function" and the limited information about fiduciary conduct that is available to participants. Op. 9–10 (2019 WL 1941310, *3). In that context, *Sweda* shows, it is improper to demand that a participant directly allege how her fiduciaries mismanaged her plan. *Id.* at 22 (2019 WL 1941310, *8). Instead, a participant need only provide "circumstantial evidence from which the District Court could 'reasonably infer' that a breach occurred." *Id.* (quoting *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 718 (2d Cir. 2013)). A participant is not required to rule out all lawful explanations for her fiduciaries' conduct. *Id.* at 9 (2019 WL 1941310, *3). In contrast, the Ninth Circuit here requires petitioners to plead directly how the process by which defendants managed the plan was flawed or imprudent and to negate all possible lawful explanations for defendants' conduct. *See* Pet. 11–12.

Sweda confirms the proper pleading standards to apply to ERISA fiduciary breach actions, which have now been adopted in the Second, Third, Fifth, Seventh, and Eighth Circuits. The Ninth Circuit in this case applies more stringent standards in conflict with the other circuits. Those more stringent

standards undermine ERISA's protective function and deny "ready access to the Federal courts." Pet. 14 (quoting 29 U.S.C. § 1001(b)). *Sweda* further demonstrates the importance of issuing a writ in this case to resolve this circuit split and to set uniform pleading standards for ERISA fiduciary breach actions.

Respectfully submitted,

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May 9, 2019