19-_____

IN THE
Supreme Court of the United States

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

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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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 Third and Eighth Circuits have held that a plan participant can adequately plead a breach of fiduciary duty by claiming that the retirement plan charged excessive fees when lower-cost alternatives existed. In the decision below, the Seventh Circuit held that virtually identical pleadings are insufficient to state a claim, because it is necessary to credit the defendant's explanation for not offering lower cost options for the retirement plan before allowing a well-pleaded complaint to proceed. 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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Petitioners April Hughes, Katherine D. Lancaster, and Jasmine Walker petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

This case presents an important question regarding the requirements for pleading a violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA requires fiduciaries to manage employee retirement plans prudently. Throughout the country, fiduciaries have failed in this basic obligation, leading to widespread lawsuits alleging that fiduciaries have breached their duty of prudence by allowing excessive administrative and investment management fees to greatly diminish participants' retirement accounts in defined-contribution plans. Most courts, including the Third, Eighth, and Ninth Circuits, have held that such allegations of excessive fees state a claim for a violation of ERISA. Yet, in the decision below, the Seventh Circuit affirmed dismissal of an ERISA lawsuit alleging that plan fiduciaries acted imprudently by allowing excessive fees.

The Seventh Circuit's ruling created a circuit split that this Court should resolve. The split is especially stark with the Third Circuit's ruling in *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), *cert. denied*, No. 19-784 (U.S. Mar. 30, 2020), and the Eighth Circuit's ruling in *Davis v. Washington University in St. Louis*, 960 F.3d 478 (8th Cir. 2020). All three cases involved essentially the same allegations against fiduciaries of large university retirement plans: paying excessive recordkeeping fees by retaining multiple recordkeepers and failing to solicit competitive bids or negotiate lower fees, and offering mutual funds with excessive investment management fees (including high-cost retail-class shares of mutual

funds when lower-cost institutional-class shares of the same mutual funds were available). Yet the Seventh Circuit affirmed the dismissal of claims based on the same substantive allegations that the Third and Eighth Circuits determined to be sufficient to survive a motion to dismiss.

The Seventh Circuit erred in dismissing petitioners' well-pleaded allegations of imprudent management. The Seventh Circuit erroneously placed the burden on petitioners to negate respondents' explanations for their behavior, instead of drawing inferences in petitioners' favor at the pleading stage. Furthermore, the Seventh Circuit excused respondents' offering of many investment options with excessive fees because respondents purportedly also offered other options with low fees, ignoring this Court's holding that fiduciaries have "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015).

The question presented carries vital importance for the financial security of American workers. "Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Id.* at 1826. Many courts and commentators have acknowledged that ERISA litigation over excessive fees has led to widespread improvement in fiduciary practices and reductions in expenses for participants in defined-contribution plans. Yet if the Seventh Circuit's view takes hold, it would become virtually impossible for plan participants to plead an imprudence claim based on excessive fees. Plan participants would lack a remedy for imprudent management, and the progress brought about by ERISA litigation would halt. The Court should grant certiorari and reverse the erroneous judgment of the Seventh Circuit.

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 jurisdiction of this Court is invoked under 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 at App. 61a-83a.

STATEMENT

1. 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 fiduciary duties on administrators of retirement plans, which are "'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)). An ERISA fiduciary has a duty to act prudently, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). "A plaintiff may allege that a fiduciary

breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble*, 135 S. Ct. at 1829. ERISA empowers a plan participant or beneficiary to sue plan fiduciaries for breach of fiduciary duties, 29 U.S.C. § 1132(a)(2), and, in such an action, the fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach," *id.* § 1109(a).

The retirement plans at issue in this case are defined-contribution plans, "which provide[] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." *Id.* § 1002(34). Defined-contribution plans offered by tax-exempt employers, such as respondent Northwestern University (Northwestern), are commonly called 403(b) plans, while defined-contribution plans offered by for-profit companies are commonly known as 401(k) plans (named for the sections of the Tax Code that govern their tax treatment). While certain 403(b) plans qualify for a regulatory safe harbor from ERISA, *see* 29 C.F.R. § 2510.3-2(f), both the district court and the Seventh Circuit found – and respondents have not disputed – that the 403(b) plans at issue here were subject to ERISA and its fiduciary duties. App. 27a.

2. Petitioners are current or former employees of Northwestern who are participants in one or both of two defined-contribution plans offered by Northwestern ("the Plans"). C.A. App. 59-60 (¶¶ 19-23). Respondents are Northwestern, Northwestern's retirement investment committee, and nine individuals; each respondent is or was a fiduciary of the Plans. *Id.* at 60-62 (¶¶ 24-34).

As alleged in petitioners' Amended Complaint, the Plans paid fees for recordkeeping – meaning the service of tracking each participant's investments and providing account statements – that were roughly four to five times a reasonable fee. Specifically, the Plans paid between $3.96 million and $5 million in record-keeping fees per year, when a reasonable fee would have been approximately $1.05 million. *Id.* at 114-15 (¶¶ 148-150). Respondents could have obtained recordkeeping services for the Plans of the same quality but at a reasonable fee if they had consolidated from multiple recordkeepers (TIAA and Fidelity) to a single recordkeeper, initiated competitive bidding for recordkeeping, or negotiated with their existing recordkeepers for rebates on fees. *Id.* at 95-99, 111, 115-16 (¶¶ 98-106, 140-141, 151-152). Petitioners described how four other university retirement plans had significantly reduced recordkeeping fees through consolidation, competitive bidding, or negotiation. *Id.* at 90-95 (¶¶ 93-97).

Many of the mutual funds offered as investment options in the Plans also charged excessive investment management fees. In particular, the Plans offered 129 retail-class mutual funds when the Plans could have offered institutional-class versions of those same funds that provided the same investment as the retail-class funds with lower expenses, resulting in millions of dollars in unnecessary fees. *Id.* at 116-30 (¶¶ 155, 157-161, 164-165); *see also Tibble*, 135 S. Ct. at 1826 (institutional-class shares of a mutual fund are "effectively the same . . . mutual fund[]" as the retail-class shares of the fund, but "at [a] lower price").

3. Petitioners sued respondents in district court. In their Amended Complaint, petitioners claimed that the practices described above violated respondents'

duty of prudence under ERISA. C.A. App. 173-75, 177-85 (¶¶ 232-239, 246-254, 260-273).[1] Respondents moved to dismiss the Amended Complaint.[2]

The district court granted respondents' motion to dismiss. Despite petitioners' allegations that respondents could have obtained significantly lower recordkeeping fees, the court concluded that "it is not clear that the plan could have arranged for lower prices." App. 43a. The court dismissed petitioners' claims that the Plans offered mutual funds with excessive investment management fees, reasoning that these claims failed because the Plans also offered some low-cost mutual funds. App. 45a.[3]

4. The Seventh Circuit affirmed. Despite acknowledging petitioners' allegations that respondents' choice of recordkeepers "impose[d] higher costs on plan participants," the court concluded that petitioners failed to state a claim for breach of fiduciary duty. App. 16a. The court reasoned that "Northwestern . . . explained it was prudent" to retain TIAA and Fidelity as recordkeepers "so it could continue offering" one particular TIAA annuity. *Id.* The court faulted petitioners for failing to identify a specific recordkeeper that would have charged a lower fee than Fidelity and TIAA and

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[1] Petitioners also asserted claims for violations of ERISA's ban on prohibited transactions and for certain respondents' failure to monitor other fiduciaries. C.A. App. 175-77, 180-81, 185-89 (¶¶ 240-245, 255-259, 274-286).

[2] While the motion to dismiss was pending, the parties engaged in discovery. At the close of discovery, petitioners moved for leave to file a proposed Second Amended Complaint, which added new factual allegations supporting petitioners' claims and some additional claims. C.A. App. 464-630.

[3] The district court also denied petitioners' motion for leave to file the Second Amended Complaint. App. 50a-57a.

for purportedly "fail[ing] to explain how a hypothetical lower-cost recordkeeper would perform at the level necessary to serve the best interests of the plans' participants." App. 18a. The court credited respondents' contention that "Northwestern had 'valid reasons' for the recordkeeping arrangements they chose." App. 17a.

The Seventh Circuit also rejected petitioners' claims based on offering mutual funds with excessive investment management fees, including retail-class shares instead of institutional-class shares. The court held that the fact that the Plans offered some "low-cost" mutual funds "eliminat[ed] any claim" based on offering other mutual funds with excessive fees. App. 19a. The court concluded that the fact that "[t]he plans here offered hundreds of options" rendered "less plausible" petitioners' claim that the Plans acted imprudently by offering 129 mutual funds with retail-class shares when identical lower-cost institutional-class shares of those funds were available. App. 20a. The court determined that petitioners' allegations "do not add up to a breach of fiduciary duty" because Northwestern "provided prudent explanations for the challenged fiduciary decisions." App. 21a.[4]

[4] The Seventh Circuit also affirmed the district court's denial of leave to file the Second Amended Complaint. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE REQUIREMENTS TO PLEAD A VIOLATION OF ERISA'S DUTY OF PRUDENCE BASED ON EXCESSIVE FEES

A. The Seventh Circuit Conflicts With The Third, Eighth, And Ninth Circuits Regarding The Requirements To Plead A Violation Of ERISA's Duty Of Prudence

The Third, Eighth, and Ninth Circuits have held, in conflict with the decision below, that allegations that a defined-contribution plan paid or charged to participants excessive fees sufficed to state a claim for violation of ERISA's duty of prudence. Decisions of the Third Circuit and the Eighth Circuit have approved claims based on allegations of imprudent management of university retirement plans that are substantively identical to the allegations rejected by the Seventh Circuit.

1. In *Sweda v. University of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019), *cert. denied*, No. 19-784 (U.S. Mar. 30, 2020), the Third Circuit held that plan participants stated a claim under ERISA for imprudent management of the University of Pennsylvania's ("Penn") retirement plan by alleging that the defendant fiduciaries' practices resulted in excessive recordkeeping and investment management fees. With respect to recordkeeping, the plaintiffs "alleged that the Plan paid between $ 4.5 and $ 5.5 million in annual recordkeeping fees at a time when similar plans paid $700,000 to $750,000 for the same services." *Id.* at 330. The plaintiffs alleged that the defendants "failed to solicit bids from service providers" or "to leverage the Plan's size to obtain lower fees or rebates," and that they could have obtained lower fees by "consoli-

dat[ing] services with a single provider." *Id.* at 330-31. Regarding investment management fees, the plaintiffs "alleged that despite the availability of low-cost institutional class shares, Penn selected and retained identically managed but higher cost retail class shares." *Id.* at 331. As one commentator noted, "many of the allegations" in *Sweda* were "nearly identical" to the allegations in this case. *Seventh Circuit Upholds Dismissal of 403(b) Plan Lawsuit Against Northwestern University in Apparent Split with Third Circuit*, Nat'l Law Review (Apr. 7, 2020).[5]

The Third Circuit concluded that the plaintiffs "plausibly alleged breach of fiduciary duty." 923 F.3d at 332. The plaintiffs "offered specific comparisons between returns on Plan investment options and readily available alternatives, as well as practices of similarly situated fiduciaries to show what plan administrators 'acting in a like capacity and familiar with such matters would [do] in the conduct of an enterprise of a like character and with like aims.' " *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B)) (alteration in original). In particular, the plaintiffs' allegations "that Penn frequently selected higher cost investments when identical lower-cost investments were available" supported the plaintiffs' claims of imprudence. *Id.* at 332 n.7. In dismissing the complaint, the district court had "erred by 'ignor-[ing] reasonable inferences supported by the facts alleged,' and by drawing 'inferences in [Defendants'] favor, faulting [Plaintiffs] for failing to plead facts tending to contradict those inferences.'" *Id.* at 332 (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009)) (alterations in original).

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[5] *See* https://www.natlawreview.com/article/seventh-circuit-upholds-dismissal-403b-plan-lawsuit-against-northwestern-university.

2. In *Davis v. Washington University in St. Louis*, 960 F.3d 478 (8th Cir. 2020), the Eighth Circuit reversed dismissal of breach of duty of prudence claims against fiduciaries of the Washington University ("WashU") retirement plan based on allegations of excessive recordkeeping and investment management fees. As in *Sweda* and the instant case, the plaintiffs alleged that the fiduciaries "allowed" both investment management fees and recordkeeping fees "to get out of control." *Id.* at 481-82. The court held that the plaintiffs' excessive-fee claims "clear[ed]" the "pleading hurdle" because they "allege[d] that fees were too high and that WashU should have negotiated a better deal." *Id.* at 483. The "clearest example" of alleged imprudence was "offer[ing] retail shares" for some mutual funds, even though the plan could have obtained lower-cost institutional shares of those funds. *Id.* From the allegations that WashU was a large retirement plan that offered retail-class shares, "two inferences of mismanagement are plausible": (1) the fiduciaries "did not negotiate aggressively enough" to obtain institutional-class shares, or (2) they were "asleep at the wheel" and "failed to pay close enough attention to available lower-cost alternatives." *Id.* "Either way, a 'failure of effort [or] competence' is enough to state a claim for breach of the duty of prudence." *Id.* (quoting *Braden*, 588 F.3d at 596) (alteration in original).

In two earlier cases, the Eighth Circuit also rejected dismissal of ERISA claims for imprudent management based on allegations similar to petitioners' allegations here. In *Braden*, the Eighth Circuit held that plan participants had stated a claim that plan fiduciaries violated their duty of prudence by offering retail-class mutual funds when lower-cost institutional-class shares of the same funds were available. 588 F.3d at

595-96. In *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), the court held that plan fiduciaries stated a claim for imprudent management by alleging that the plan overpaid for recordkeeping fees. *Id.* at 336.

3. The Ninth Circuit has held that plan participants can bring ERISA claims for imprudent management based on the offering and maintenance in a plan of retail-class shares of mutual funds. In *Tibble v. Edison International*, 729 F.3d 1110 (9th Cir. 2013), the Ninth Circuit affirmed the trial court's finding after a bench trial that plan fiduciaries had violated their duty of prudence by offering retail-class shares of three mutual funds without investigating the availability of lower-cost institutional-class shares of those funds. *Id.* at 1137-39. The Ninth Circuit originally held that the plaintiffs' claims were time-barred relating to three retail-class mutual funds that were added to the plan outside of the limitations period, *id.* at 1119-20, but this Court vacated that ruling, remanding to the Ninth Circuit to consider a claim that the fiduciaries had breached their duty within the limitations period by imprudently retaining those funds, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1827-29 (2015). On remand, the Ninth Circuit held that plaintiffs were entitled to proceed to trial on that claim. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (en banc).[6]

4. In conflict with the Third, Eighth, and Ninth Circuits, the Seventh Circuit below held that petitioners' allegations that the Plans paid and charged participants excessive recordkeeping and investment management fees (including unnecessary fees on retail-class mutual funds when institutional-class

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

versions of those funds were available) failed to state a claim for violation of ERISA's duty of prudence.

With respect to recordkeeping fees, petitioners' allegations – that the Plans paid excessive fees due to their failure to consolidate to a single recordkeeper, solicit competitive bidding, or negotiate reductions in fees – were virtually identical to the allegations held sufficient in *Sweda* and *Davis*. *Compare* C.A. App. 90-100, 111, 114-16 (¶¶ 93-108, 140-141, 148-152), *with Sweda*, 923 F.3d at 330-31; *and Davis*, 960 F.3d at 481-82.[7] *Sweda*, *Davis*, and *Tibble* each approved claims based on excessive investment management fees centered on the same conduct alleged by petitioners: offering retail-class shares of mutual funds when lower-cost institutional-class shares of the same funds were available. *Compare* C.A. App. 116-30 (¶¶ 155, 157-161, 164-165), *with Sweda*, 923 F.3d at 331; *Davis*, 960 F.3d at 482-83; *Tibble*, 729 F.3d at 1137-39; *and Tibble*, 843 F.3d at 1197-98. Accordingly, petitioners' claims that were dismissed by the Seventh Circuit would have survived in the Third, Eighth, and Ninth Circuits.

The Seventh Circuit's reasoning for its decision conflicted with the reasoning of those courts. The Seventh Circuit reasoned that petitioners' recordkeeping-fee claim failed because it credited Northwestern's "expla[nation]" that its existing recordkeeping arrangements were "prudent" so that "it could continue offering" a specific annuity fund. App. 16a. But, as the Third Circuit explained (quoting the Eighth Circuit),

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[7] *See also* Am. Compl. ¶¶ 40-41, 59-74, 114-119, *Sweda v. University of Pennsylvania Inv. Comm.*, No. 2:16-cv-04329-GEKP, Dkt. #27 (E.D. Pa. Nov. 21, 2016); Consol. Class Action Compl. ¶¶ 38-39, 48-55, 61-63, *Davis v. Washington Univ. in St. Louis*, No. 4:17-cv-01641-RLW, Dkt. #24 (E.D. Mo. Aug. 21, 2017).

"'[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party.'" *Sweda*, 923 F.3d at 326 (quoting *Braden*, 588 F.3d at 597). *Davis* likewise explained that a defendant's explanation that could give rise to an inference of prudent behavior is insufficient to support a motion to dismiss when "mismanagement is another plausible inference." 960 F.3d at 483. *Davis* concluded that the plaintiffs' allegations of excessive fees (which were virtually identical to petitioners' allegations) gave rise to plausible inferences of an imprudent "'failure of effort [or] competence.'" *Id.* (quoting *Braden*, 588 F.3d at 596) (alteration in original).

The Seventh Circuit rejected petitioners' claims that many of the mutual funds offered had excessive investment management fees (including higher-cost retail-class shares), concluding that the fact that the Plans offered some low-cost funds "eliminat[ed] any claim" based on the funds with excessive fees. App. 19a. But, in *Sweda*, the Third Circuit rejected the argument that offering "a meaningful mix and range of investment options insulates plan fiduciaries from liability" because "[s]uch 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." 923 F.3d at 330;[8] *see also Tussey*, 746 F.3d at 335-36 (rejecting argument that "offer[ing] a wide 'range of investment options from

[8] To be sure, the Seventh Circuit purported to find *Sweda*'s "approach . . . sound and not inconsistent with our own," App. 20a-21a, but the Seventh Circuit offered no explanation for the fact that it reached an opposite result from *Sweda* on virtually identical allegations.

which participants could select low-price funds bars the claim of unreasonable recordkeeping fees'") (citation omitted). In *Tibble*, the Ninth Circuit allowed the plaintiffs to go forward with claims that offering three retail-class mutual funds was imprudent, even though the plan offered other funds with expenses as low as 0.03%. 843 F.3d at 1198 & n.4; *cf. also Davis*, 960 F.3d at 484 ("It is no defense to simply offer a reasonable array of options that includes some good ones, and then shift the responsibility to plan participants to find them.") (citations and alteration omitted).

Finally, while the Third and Eighth Circuits held that a plaintiff states a claim if the allegations raise a plausible inference that the fiduciary "'process was flawed,'" *Davis*, 960 F.3d at 482-83 (quoting *Braden*, 588 F.3d at 596); *accord Sweda*, 923 F.3d at 329 ("a court assesses a fiduciary's performance by looking at process rather than results"), the Seventh Circuit did not consider respondents' fiduciary process and instead held that, "[w]hen claiming an ERISA violation, the plaintiff must plausibly allege action that was objectively unreasonable," App. 12a.

B. Other Lower Federal Courts Have Reached Disparate Conclusions Regarding Claims Challenging Imprudent Management Of 403(b) Retirement Plans

In recent years, litigants have filed more than two dozen ERISA lawsuits against fiduciaries of 403(b) plans (mostly university retirement plans), alleging imprudent management. Because many plans engage in similar practices, many of these lawsuits contain similar allegations. This case, *Sweda*, and *Davis* are the only appellate decisions addressing the substance of these 403(b) lawsuits, but there are many such district court decisions. District courts across the

country have reached disparate results on claims that plans paid excessive recordkeeping fees[9] and claims that plans imprudently offered retail-share classes of mutual funds,[10] although the vast majority of decisions

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[9] *Compare Disselkamp v. Norton Healthcare, Inc.*, 2019 WL 3536038, at *9-10 (W.D. Ky. Aug. 2, 2019) (denying motion to dismiss claim for excessive recordkeeping fees); *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 799-800 (D. Minn. 2018) (same); *Short v. Brown Univ.*, 320 F. Supp. 3d 363, 370-71 (D.R.I. 2018) (same); *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 684-85 (D. Conn. 2018) (same); *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1064-66 (M.D. Tenn. 2018) (same); *Tracey v. Massachusetts Inst. of Tech.*, 2017 WL 4478239, at *3 (D. Mass. Oct. 4, 2017) (same); *Cunningham v. Cornell Univ.*, 2017 WL 4358769, at *6 (S.D.N.Y. Sept. 29, 2017) (same); Memorandum to Counsel at 2, *Kelly v. Johns Hopkins Univ.*, No. 1:16-cv-02835-GLR, Dkt. #45 (D. Md. Sept. 28, 2017) (same); *Nicolas v. Trustees of Princeton Univ.*, 2017 WL 4455897, at *4 (D.N.J. Sept. 25, 2017) (same); *Daugherty v. University of Chicago*, 2017 WL 4227942, at *7 (N.D. Ill. Sept. 22, 2017) (same); *Cates v. Trustees of Columbia Univ.*, 2017 WL 3724296, at *2 (S.D.N.Y. Aug. 28, 2017) (same); *Sacerdote v. New York Univ.*, 2017 WL 3701482, at *8-10 (S.D.N.Y. Aug. 25, 2017) (same); *Clark v. Duke Univ.*, 2017 WL 4477002, at *2 (M.D.N.C. May 11, 2017) (same); *and Henderson v. Emory Univ.*, 252 F. Supp. 3d 1344, 1352-53 (N.D. Ga. 2017) (same), *with Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *11-13 (D.D.C. Jan. 8, 2019) (dismissing claim for excessive recordkeeping fees); *and Johnson v. Providence Health & Servs.*, 2018 WL 1427421, at *7-8 (W.D. Wash. Mar. 22, 2018) (same). In *Sacerdote*, the court rejected a claim for excessive record-keeping fees after trial. 328 F. Supp. 3d 273, 293-307 (S.D.N.Y. 2018), *appeal pending*, No. 18-2707 (2d Cir.).

[10] *Compare Lutz v. Kaleida Health*, 2019 WL 3556935, at *5-6 (W.D.N.Y. Aug. 5, 2019) (denying motion to dismiss claim for offering retail-class mutual funds when lower-cost institutional-class shares of the mutual funds were available); *Disselkamp*, 2019 WL 3536038, at *3-5 (same); *Larson*, 350 F. Supp. 3d at 799 (same); *Vellali*, 308 F. Supp. 3d at 686 (same); *Johnson*, 2018 WL 1427421, at *5-6 (same); *Cassell*, 285 F. Supp. 3d at 1066-67 (same); *Cunningham*, 2017 WL 4358769, at *8 (same); *Clark*,

have allowed such claims to go forward (in conflict with the Seventh Circuit). Most of these district court decisions are in circuits where there is not yet an appellate decision addressing the substance of ERISA claims against 403(b) plan fiduciaries. The ongoing conflict among district courts provides another reason for this Court to resolve the question presented now before parties engage in additional litigation that will be affected by this Court's ultimate determination.

C. Courts And Commentators Have Acknowledged The Split Among Lower Courts

After the Seventh Circuit's decision below, one commentator explained: "The Seventh Circuit's ruling in *Divane* appears to create a circuit split with the Third Circuit's ruling in *Sweda*. Although the Seventh Circuit purported to agree with the framework applied by the Third Circuit, the fact remains that many of the allegations in the case against the University of Pennsylvania that were allowed to proceed were nearly identical to those asserted against Northwestern and dismissed." *Seventh Circuit Upholds Dismissal of 403(b) Plan Lawsuit Against Northwestern University in Apparent Split with Third Circuit*, Nat'l Law Review (Apr. 7, 2020).[11] In Penn's supplemental brief in support of its certiorari petition in *Sweda*, Penn explained that "[t]he allegations in the *Divane* complaint . . . are materially identical to

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2017 WL 4477002, at *2 (same); *and Henderson*, 252 F. Supp. 3d at 1349-50 (same), *with Kelly*, Dkt. #45, at 2 (dismissing claim for offering retail-class mutual funds when lower-cost institutional-class shares of the mutual funds were available); *Cates*, 2017 WL 3724296, at *2 (same); *and Sacerdote*, 2017 WL 3701482, at *11 (same).

[11] *See* https://www.natlawreview.com/article/seventh-circuit-upholds-dismissal-403b-plan-lawsuit-against-northwestern-university.

the allegations that the Third Circuit permitted to proceed," concluding that "the reasoning of the two decisions is irreconcilable." Suppl. Br. for Pet'rs 1, 4, *University of Pennsylvania v. Sweda*, No. 19-784 (U.S. Mar. 26. 2020), 2020 WL 1479914.

Another commentator remarked that *Sweda* was "a decision that, on similar allegations" as in *Divane*, "had come out the other way." Catalina J. Vergara, *Back to School: Latest Developments in the University Cases*, ERISA Litig. Reporter (May 2020). That commentator opined that, "[w]hether in *Divane* or otherwise, the pleading question will need to be resolved at some point by the [Supreme] Court." *Id.*

Following the *Davis* decision, another commentator noted that WashU, Penn, and respondent Northwestern had been some of "a few to prevail" in 403(b) university litigation, before appellate decisions reversed the dismissals of claims against WashU and Penn. Nevin E. Adams, *Appellate Court Calls for Another Look at a 403(b) Suit*, Nat'l Ass'n of Plan Advisors (May 27, 2020).[12] Another commentator characterized the Eighth Circuit in *Davis* as "the latest federal appeals court to address litigation challenging the management of university retirement plans," noting that Northwestern prevailed on its appeal in the Seventh Circuit, while WashU and Penn did not in the Eighth and Third Circuits. Julie Steinberg, *Washington University Workers Get Retirement Plan Suit Revived*, Bloomberg Law (May 22, 2020).[13] In the *Davis* opinion, the Eighth Circuit acknowledged that this case was part of the same "series of actions" as

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[12] *See* https://www.napa-net.org/news-info/daily-news/appellate-court-calls-another-look-403b-suit.

[13] *See* https://news.bloomberglaw.com/employee-benefits/washington-university-workers-get-retirement-plan-suit-revived.

Sweda and *Divane*, which reached conflicting results. 960 F.3d at 481.

In sum, the circuit split regarding excessive-fee claims under ERISA is clear and widely acknowledged. The time is ripe for this Court to provide clarity to this area of law.

II. THE SEVENTH CIRCUIT ERRED

The Seventh Circuit erred in rejecting claims based on petitioners' well-pleaded allegations that respondents' imprudent practices resulted in excessive fees that greatly diminished petitioners' retirement accounts. ERISA's fiduciary duties are "'derived from the common law of trusts.'" *Tibble*, 135 S. Ct. at 1828 (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)). Under trust law, as under ERISA, fiduciaries have an obligation to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." Restatement (Third) of Trusts § 90(c)(3) (2007); *see also* 29 U.S.C. § 1104(a)(1)(A)(ii) (fiduciaries must act with purpose of "defraying reasonable expenses of administering the plan"). Controlling expenses is vital because "[e]xpenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble*, 135 S. Ct. at 1826. For example, the U.S. Department of Labor has calculated that a "1 percent difference in fees and expenses would reduce [an employee's] account balance at retirement by 28 percent" over a 35-year career. Emp. Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 2 (Sept. 2019).[14]

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

In alleging that the Plans paid and charged to participants fees that were far in excess of what the Plans could have obtained without sacrificing the quality of the Plans' services or investments, petitioners plausibly alleged that respondents violated their duty of prudence under ERISA. For example, petitioners alleged that the Plans paid millions of dollars more per year in recordkeeping fees than was reasonable. C.A. App. 114 (¶¶ 148-149). These allegations were not conclusory. Rather, petitioners alleged specific actions that respondents could have taken to lower fees without sacrificing the quality of recordkeeping services (e.g., consolidating to a single recordkeeper, soliciting competitive bidding for recordkeeping services, negotiating with their recordkeepers for fee reductions), *id.* at 95-100, 111, 115-16 (¶¶ 98-108, 140-141, 151-152), and petitioners pointed to four other university retirement plans that had successfully reduced recordkeeping fees by taking such actions, *id.* at 90-95 (¶¶ 93-97).

Petitioners also alleged that respondents offered 129 retail-class mutual funds when they could have obtained the same investment at a lower expense ratio with institutional-class shares. *Id.* at 116-30 (¶¶ 155, 157-161, 164-165). As the Eighth Circuit correctly reasoned, such allegations of excessive fees state an ERISA claim because they raise the plausible inferences that the fiduciaries either "did not negotiate aggressively enough" to obtain lower fees or were "asleep at the wheel . . . . Either way, a 'failure of effort [or] competence' is enough to state a claim for breach of the duty of prudence." *Davis*, 960 F.3d at 483 (quoting

Braden, 588 F.3d at 596) (alteration in original); *see also Sweda*, 923 F.3d at 332 & n.7.[15]

The Seventh Circuit's reasoning for rejecting petitioners' claims was unpersuasive. The Seventh Circuit rejected petitioners' claims because it credited respondents' purportedly "prudent explanations for the challenged fiduciary decisions." App. 21a; *see also* App. 16a ("Northwestern . . . explained it was prudent" to maintain multiple recordkeepers). In so doing, the Seventh Circuit flipped the applicable pleading standard on its head. On a motion to dismiss, well-pleaded factual allegations are "accepted as true," and a court cannot dismiss a case "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Petitioners were entitled to have reasonable inferences from well-pleaded factual allegations drawn in their favor and were not required

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[15] If there were any doubt about whether the Amended Complaint sufficiently alleged a breach of fiduciary duty, the proposed Second Amended Complaint removed all doubt by adding even more detailed and specific allegations of respondents' imprudence. For example, the proposed Second Amended Complaint alleges that respondents were advised by an investment consultant that it would be prudent to consolidate to a single recordkeeper to achieve cost savings. C.A. App. 517-518 (¶ 120). Respondents conceded in deposition testimony that consolidating recordkeepers would have achieved cost savings and that there were numerous alternative recordkeepers equally capable of providing a high level of service that would have responded to a request for proposal by competing on price, but respondents made no attempt to monitor recordkeeping fees or obtain competitive bids. *Id.* at 518, 530-31, 536 (¶¶ 121, 157, 174). Yet in affirming denial of petitioners' motion for leave to amend, the Seventh Circuit erroneously rejected the sufficiency of the allegations in the Second Amended Complaint. App. 23a-24a.

to negate inferences in respondents' favor. *See Sweda*, 923 F.3d at 326; *Davis*, 960 F.3d at 483.

Second, the Seventh Circuit held that the fact that the Plans offered some low-cost mutual funds "eliminat[ed] any claim" based on respondents' offering of other funds with excessive fees, including 129 retail-class mutual funds. App. 19a. Such an argument cannot survive this Court's holding that under ERISA, as under trust law, "the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones." *Tibble*, 135 S. Ct. at 1829. As the Third, Eighth, and Ninth Circuits have held, *see supra* pp. 12-14, offering some prudent investment options in no way excuses a fiduciary's failure to remove imprudent options.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS A RECURRING ISSUE OF NATIONAL IMPORTANCE

This Court noted in 2008 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 more true 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* George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. for Retirement Research, *401(k) Lawsuits: What Are The Causes And Consequences?* 2 & fig. 2 (May 2018) ("Mellman & Sanzenbacher").[16]

Unfortunately, imprudent management of defined-contribution plans – both 401(k) and 403(b) plans – has been widespread, leading to frequent litigation.

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

Plaintiffs filed more than 100 lawsuits related to 401(k) plans in 2016 and 2017 alone. *See id.* at 1-2 & fig. 1. The most common claim asserted in recent 401(k) litigation has been that the plans charge excessive fees. *See id.* at 4 & fig. 3. In addition, more than two dozen lawsuits have been filed in recent years related to management of 403(b) plans, alleging excessive fees. *See* Michael A. Webb, Cammack Retirement, *403(b) Retirement Plan Fee Litigation: April 2020 Update* (Apr. 28, 2020).[17] Most of those lawsuits involve claims of excessive recordkeeping and/or investment management fees. *See supra* pp. 14-16 & nn.9-10. A few of these cases have settled, but most are still pending, either in the trial courts or on appeal. *See* Webb, *supra*.

ERISA litigation has had a significant positive impact on management of defined-contribution plans. Settlements of these cases have brought to participants "powerful affirmative relief designed to reduce fees and improve investment offerings," *Beesley v. International Paper Co.*, 2014 WL 375432, at *1 (S.D. Ill. Jan. 31, 2014), in the form of "fundamental changes to the overall operation, administration, and management of the Plans, which will result in potential savings of additional tens of millions of dollars for participants and retirees in the coming years alone," *Gordan v. Massachusetts Mut. Life Ins. Co.*, 2016 WL 11272044, at *2 (D. Mass. Nov. 3, 2016), resulting in "employees and retirees" being "provided with state-of-the-art retirement plans with fiduciary best practices assured," *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *1 (M.D.N.C. Sept. 29, 2016).

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[17] *See* https://cammackretirement.com/knowledge-center/insights/403b-retirement-plan-fee-litigation-april-2020-update.

The benefits of this litigation have extended beyond the plaintiffs to millions of employees and retirees throughout the country with defined-contribution plans. As one court recently noted, 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).[18] Researchers have reported that "the greater scrutiny by plaintiff attorneys in 401(k) litigation" has contributed to "increasing fee transparency," providing the "clear benefit of . . . lower fees." Mellman & Sanzenbacher at 5. Specifically, average mutual fund investment

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[18] *See also Kruger*, 2016 WL 6769066, at *5 ("AARP specifically notes" that lawsuits have "contribut[ed] to the 'dramatic reductions in fees paid by 401(k) plan participants throughout the United States, through heightened awareness and scrutiny of fees, self-dealing, and imprudent investment options in 401(k) plans'") (citation omitted); *Spano v. Boeing Co.*, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (lawsuits have "significantly improved 401(k) plans across the country" because they "have 'educated plan administrators, the Department of Labor, the courts and retirement plan participants about the importance of monitoring recordkeeping fees'") (quoting *Tussey v. ABB, Inc.*, 2015 WL 8485265, at *2 (W.D. Mo. Dec. 9, 2015), *vacated and remanded on other grounds*, 850 F.3d 951 (8th Cir. 2017)); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) (ERISA litigation "has had a 'humongous' impact over the entire 401(k) industry, which has benefited employees and retirees throughout the country by bringing sweeping changes to fiduciary practices"); *Will v. General Dynamics Corp.*, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) ("[T]hese cases, collectively, have brought sweeping changes to fiduciary practices within 401(k) plans and have changed the 401(k) industry for the benefit of employees and retirees throughout the country.").

fees as a percentage of mutual fund assets for 401(k) participants have declined from more than 0.80% in 2003 to 0.48% in 2016. *See id.* at 5 & fig. 5.

The Seventh Circuit's ruling threatens to arrest this progress. As one court explained, "[n]o matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. . . . If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Braden*, 588 F.3d at 598. By rejecting as insufficient even petitioners' highly detailed allegations, the Seventh Circuit set the pleading standard so high as to make it virtually impossible for participants of defined-contribution plans to plead a claim for imprudent management. If allowed to take hold, that ruling would result in higher fees and significant losses to the retirement savings of American workers. Further, if not resolved by this Court, the circuit split will lead to disparate results in similar cases. Whether participants can pursue a legal remedy based on well-pleaded allegations of fiduciary mismanagement will depend on where in the country they reside.

This case presents an excellent vehicle for this Court to resolve the circuit split regarding the requirements for pleading an ERISA violation based on excessive fees in a defined-contribution plan. Because this case arises on a motion to dismiss, it presents the pure legal question of the sufficiency of petitioners' allegations. The similarity of petitioners' allegations to those deemed sufficient in *Sweda* and *Davis*, *see supra* p. 12, illustrates the circuit split in sharp relief. Finally, because the Seventh Circuit affirmed in full

the district court's dismissal (as opposed to the Eighth Circuit in *Davis*, which reversed the district court's dismissal in relevant part), no concern exists over the Court taking a case in an interlocutory posture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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