No. 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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

CRAIG C. MARTIN
Counsel of Record
AMANDA S. AMERT
BRIENNE M. LETOURNEAU
LARUE L. ROBINSON
WILLKIE FARR & GALLAGHER LLP
300 North LaSalle
Chicago, IL 60654
(312) 728-9000
cmartin@willkie.com

Counsel for Respondents

MARK T. STANCIL
WILLKIE FARR & GALLAGHER LLP
1875 K St., N.W.
Washington, DC 20006

JOHN L. BRENNAN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's dismissal of petitioners' first amended complaint alleging that certain aspects of some of the investment options offered under Northwestern University's employee retirement plans violated respondents' fiduciary duties of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA"), where petitioners' own complaint alleged that: (i) the plans were contractually required to include the challenged aspects in order to continue offering a prudent (and popular) investment offering and to avoid imposing substantial losses upon participants already invested in that offering; (ii) participants were not required to choose investment options including any of the objected-to aspects; and (iii) the plans provided—and participants were free to choose among—a wide mix of investments, including low-cost options that petitioners identified as prudent.

RELATED PROCEEDINGS

- *Divane v. Northwestern University*, No. 16-cv-8157, U.S. District Court for the Northern District of Illinois. Judgment entered May 25, 2018.
- *Divane v. Northwestern University et al.*, No. 18-2569, U.S. Court of Appeals for the Seventh Circuit. Judgment entered March 25, 2020.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is reported at 953 F.3d 980. The opinion of the district court (*id*. 26a–58a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2020 (*id*. 1a), and the court of appeals denied rehearing on May 11, 2020 (*id*. 59a–60a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises from petitioners' objections to certain aspects of the investment offerings included in Northwestern University's ("Northwestern") voluntary employee retirement plans. Petitioners

are Northwestern employees who chose to participate in these plans, which offered a wide variety of financial products in which participants could invest their retirement contributions. Respondents are Northwestern, the Northwestern University Retirement Investment Committee ("NURIC"), and certain university employees tasked with investment oversight and/or administration of the plans. Petitioners sued, claiming that certain cost and performance metrics associated with some of the investment options violated respondents' fiduciary duties of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court dismissed petitioners' first amended complaint for failure to state a claim and denied petitioners' motion—filed just six days before the close of discovery—to file a third complaint. The Seventh Circuit affirmed.

Petitioners mischaracterize the decision below in an attempt to conjure a "circuit split," but none exists. To the contrary, the Seventh Circuit expressly embraced the same standards applied in the cases petitioners now claim present such a conflict. Thus, there is no disagreement among the lower courts regarding the proper legal standard for evaluating a motion to dismiss or the scope or content of ERISA's duty of prudence. Rather, the petition seeks merely factbound error correction in a case that turns on whether specific claimed deficiencies about specific investment options are sufficient to state a claim under ERISA.

There is no error here anyway. The decision below was manifestly correct in concluding that petitioners had not stated a plausible claim for relief.

ERISA demands prudence not perfection; it does not subject plan administrators to lawsuits based merely on allegations that a negotiated mix of plan offerings (which included numerous options that petitioners deemed prudent) was not, by petitioners' reckoning, optimal. Even if this Court could identify a genuine legal issue lurking amidst these fact-specific allegations, the petition presents numerous vehicle problems that make it a poor candidate for review. The petition should be denied.

1. ERISA "represents a careful balancing" of Congress's dual objectives to ensure that employers offering retirement plans would not engage in self-dealing at employees' expense, while at the same time "creat[ing] a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans." *Conkright v. Frommert*, 559 U.S. 506, 516–17 (2010) (internal quotation marks, brackets, and citation omitted). Accordingly, fiduciaries must discharge their duties "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).

ERISA governs several types of tax-deferred retirement savings plans. Section 401(k) plans are offered by for-profit employers. Section 403(b) plans—at issue in this case—are available to certain tax-exempt organizations. Pet. 4. Both 401(k) and 403(b) plans typically offer a variety of investment products in which participants may choose to invest.

Unlike 401(k) plans, 403(b) plans are permitted to offer only annuity contracts or mutual funds held in custodial accounts. 26 U.S.C. § 403(a)(1), (b)(7).

2. Northwestern operates two 403(b) plans: the Retirement Plan and the Voluntary Savings Plan (the "Plans"). Am. Compl. ¶¶ 9–18. Like many 403(b) plans, the Plans historically have provided participants with a wide range of mutual funds and annuities as investment options. *Id.* ¶¶ 76, 110, 111, 113, 115. Those options are made available to the Plans through the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA") and Fidelity Management Trust Company ("Fidelity"). *Id.* ¶ 42. During the relevant timeframe (and until October 2016), Retirement Plan participants could choose from among 242 investment options, and Voluntary Savings Plan participants could choose from among 187 investment options. *Id.* ¶¶ 110, 113, 115. These choices reflected a variety of different types of investments, including "mutual funds, insurance pooled separate accounts, and insurance company fixed and variable annuity products." *Id.* ¶ 110.

Among those available investment options was a fixed annuity offered by TIAA called the Traditional Annuity. *Id.* ¶ 88. The Traditional Annuity is extremely popular among participants and has long been offered by the Plans. *Id.* ¶ 117. Northwestern's contractual relationship with TIAA had developed over decades, and was not easily changed. *See id.* ¶¶ 78–79. The Traditional Annuity imposed a 2.5% withdrawal penalty if funds invested in the annuity were moved to a different investment option. *Id.* ¶¶ 117, 132. Moreover, TIAA requires any plan

offering the Traditional Annuity (i) to also offer the CREF Stock Account as an investment option, and (ii) to retain TIAA as a recordkeeper for TIAA products. *Id.* ¶ 130.

Each fund available to plan participants carries its own expense ratio—here, a percentage of assets under management—that pays for investment management, recordkeeping, and other fees associated with managing the Plans and participants' investments. *Id.* ¶¶ 53–54, 120–121. Expense ratios vary depending on the nature of the fund and certain other factors:

> [L]ow-expense funds tend to be passively managed (index funds, for example, which do not make any independent investment choices but simply track a designated portfolio such as the Standard & Poor's 500 index) and have features that discourage turnover . . . . [H]igh-expense funds tend to be actively managed (that is, the fund's investment advisers try to find and buy underpriced securities while selling ones that the advisers think are overvalued) and to allow rapid turnover both in the funds' holdings and the participants' investments.

Loomis v. Exelon Corp., 658 F.3d 667, 669–70 (7th Cir. 2011). Petitioners alleged that the expense ratios of funds offered by the Plans ranged from .05% to 1.89%. Pet. App. 33a (citing Am. Compl. ¶ 161).

TIAA and Fidelity each served as recordkeeper for their respective funds. Am. Compl. ¶¶ 109, 111. Recordkeepers track participants' investment

elections and allocations; issue account statements and other participant communications; create and support online portals and call centers for participants; and, typically, offer investment advice and educational programming to participants. *Id.* ¶¶ 48–49.

Northwestern established NURIC in 2011 to enhance its oversight of the Plans, and delegated to NURIC authority and fiduciary responsibility for oversight of the investment of the Plans' assets. *See id.* ¶ 131. NURIC oversaw the rollout of a new investment menu in 2016. *Id.* ¶ 123. When the amended complaint was filed, the Plans' offerings consisted of "about 40 options" available through TIAA and Fidelity, including the TIAA Traditional Annuity and the CREF Stock Account, in addition to a self-directed brokerage window offering participants access to thousands of mutual funds outside of the Plans' core investment options. Pet. App. 4a; Am. Compl. ¶¶ 123–128, 132–133.

3. Petitioners filed their initial complaint on August 17, 2016. Pet. App. 2a n.4. Petitioners filed an amended complaint (the operative complaint here) on December 15, 2016, asserting seven counts under 29 U.S.C. § 1132(a)(2). *Id.* Specifically, petitioners alleged that respondents breached their fiduciary duties by "allowing TIAA to mandate the inclusion" of the CREF Stock Account in the Plans, and "to require that it provide recordkeeping for its proprietary options" (Count 1, Am. Compl. ¶¶ 232–239); overpaying for recordkeeping services (Count 3, *id.* ¶¶ 246–254); and offering investment options that were too numerous, charged excessive fees, and "underperformed" (Count 5, *id.* ¶¶ 260–273).

Petitioners recast these same factual allegations as alleged prohibited transactions under ERISA (Count 2, *id.* ¶¶ 240–245; Count 4, *id.* ¶¶ 255–259; Count 6, *id.* ¶¶ 274–278). Finally, petitioners claimed that certain respondents breached their duty to monitor other fiduciaries (Count 7, *id.* ¶¶ 279–286).

Respondents moved to dismiss, and the parties continued to engage in discovery during the pendency of respondents' motion. Pet. 6 n.2. Shortly before the district court ruled on the motion to dismiss—and just six days before the close of the parties' year-plus discovery period—petitioners sought leave to file a second amended complaint. Pet. App. 9a.

The district court granted the motion to dismiss all of petitioners' claims. *Id.* 36a–50a. Rejecting petitioners' theory that respondents breached their fiduciary duties by offering the CREF Stock Account and by allowing TIAA to serve as recordkeeper for its own funds, the district court noted that "any plan participant could avoid what plaintiffs consider to be the problems with those products . . . simply by choosing other options." *Id.* 38a–39a. The court further concluded, based on petitioners' "own allegations," that the Plans "had valid reasons to use TIAA-CREF as record keeper for its products and to keep the CREF Stock Account as an *option* for plan participants." *Id.* 39a. The district court also rejected petitioners' claims based on excessive recordkeeping fees. Relying on Seventh Circuit precedent, the court held that "there is nothing wrong, for ERISA purposes, with the fact that the plan participants paid the record-keeper expenses via . . . expense ratios" set as a percentage of assets,

nor were defendants required to try to "find a record-keeper willing to take $35/participant/year," the rate that petitioners alleged was reasonable. *Id.* 43a (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)). The district court rejected petitioners' allegations that the Plans' investment options were too broad and included options with higher costs. The district court acknowledged petitioners' "clear preference for low-cost index funds," but noted that petitioners' own complaint "allege[d] that those types of low-cost index funds *were and are* available to them." *Id.* 45a. The district court dismissed petitioners' claims that the alleged "breaches of fiduciary duty . . . also constitute transactions prohibited by ERISA" because, among other reasons, petitioners "plead[ed] the ingredients of the defense, i.e., that the fees paid were reasonable, as a matter of law." *Id.* 45a–49a. Finally, the district court dismissed petitioners' failure-to-monitor claim as abandoned because petitioners failed to respond to respondents' arguments. *Id.* 50a.

The district court also denied petitioners' motion for leave to file a second amended complaint because petitioners' proposed additional counts and allegations were untimely, futile, and abandoned. *Id.* 50a–57a. With respect to the first of petitioners' proposed additional counts—alleging that respondents should have offered investment options at below-retail prices—the district court found that petitioners "could and should have added this count sooner, if not as part of its amended complaint"; that this proposed count "would be futile, because it fails to state a claim for the same reasons" petitioners' existing claims failed; and that petitioners "did not respond to defendants' argument as to this claim, so

it is deemed abandoned." *Id.* 52a. Regarding petitioners' proposed counts based on allegations that respondents improperly allowed TIAA to access and use participant data, the district court ruled that the claims were futile, because petitioners' underlying theories of liability failed as a matter of law. *Id.* 53a–54a. And with respect to petitioners' proposed count based on allegations that NURIC violated its Investment Policy Statement, the court found the claim to be both futile and untimely, as petitioners had knowledge of the relevant allegations for at least eight months. *Id.* 55a–57a.

The Seventh Circuit affirmed. *Id.* 1a–25a. Addressing petitioners' objections to respondents' use of TIAA as a recordkeeper and inclusion of the CREF Stock Account among the Plans' investment options, the court held that petitioners' "allegations . . . depict valid reasons for" these decisions and noted that participants were free to "avoid what plaintiffs consider to be the problems with those products . . . simply by choosing from hundreds of other options within a multi-tiered offering system." *Id.* 13a–15a. The court held that petitioners' criticism of the Plans' recordkeeping arrangement—specifically, the use of a revenue sharing fee model and the retention of multiple recordkeepers—did not state a plausible claim for relief because, as a matter of law, "ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all." *Id.* 15a–18a. In response to allegations that respondents "provid[ed] investment options that were too numerous, too expensive, or underperforming," the court noted that respondents made petitioners' preferred investment options available, "eliminating any claim that plan participants were forced to

stomach an unappetizing menu." *Id.* 19a. The court acknowledged petitioners' reliance on *Sweda v. University of Pennsylvania*, in which the Third Circuit sustained claims for breach of fiduciary duty under ERISA. 923 F.3d 320 (3d Cir. 2019). The Seventh Circuit stated that "the Third Circuit's approach is sound and not inconsistent with our own," and observed that *Sweda* "reiterated that . . . any 'breach claim must be examined against the backdrop of the mix and range of available investment options.'" Pet. App. 20a–21a (quoting *Sweda*, 923 F.3d at 330). The Seventh Circuit further held that petitioners failed to state a claim that the respondents engaged in a prohibited transaction under ERISA, *id.* 21a–23a, and affirmed the district court's denial of petitioners' motion to file a second amended complaint, *id.* 23a–25a.

The court of appeals denied rehearing.

REASONS FOR DENYING THE PETITION

The petition provides no basis to review the decision below. The lower courts are not divided regarding the appropriate legal standard for evaluating a fiduciary duty claim under ERISA, and the Seventh Circuit properly applied it here. Even if petitioners were correct in identifying an actual conflict, review would not be warranted in this case for numerous reasons.

I. THE LOWER COURTS ARE NOT DIVIDED ON THE PROPER STANDARD FOR EVALUATING FIDUCIARY DUTY CLAIMS UNDER ERISA.

Petitioners' asserted circuit split rests on a mischaracterization of the Seventh Circuit's reasoning and a similarly distorted reading of *Sweda* and *Davis v. Washington University in St. Louis*, 960 F.3d 478 (8th Cir. 2020). Indeed, the decision below expressly recognized the appropriate standard for evaluating respondents' motion to dismiss—even expressly *embracing* authority petitioners claim is conflicting. Petitioners seek classic factbound error correction unworthy of this Court's review.

A. The starting point of petitioners' asserted conflict is the notion that the court of appeals misunderstood ERISA's fiduciary duty standard. That is wrong. ERISA requires a fiduciary to "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The decision below acknowledged as much. Pet. App. 12a.

While not actually disputing this standard, petitioners criticize the Seventh Circuit's holding that "[w]hen claiming an ERISA violation, the plaintiff must plausibly allege action that was objectively unreasonable." Pet. 14 (quoting Pet. App. 12a). Petitioners fail to mention, however, that the Seventh Circuit's statement relied directly on *Amgen*

Inc. v. Harris, 136 S. Ct. 758 (2016). Pet. App. 12a. In *Amgen*, this Court explained that a plaintiff must "plausibly allege[] that a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good." 136 S. Ct. at 760 (internal quotation marks omitted). The Seventh Circuit's explication of the fiduciary standard here was thus fully consistent with both ERISA's text and *Amgen*.

Petitioners' conflict claim also relies on the assertion that the Seventh Circuit held "that offering 'a meaningful mix and range of investment options insulates plan fiduciaries from liability.'" Pet. 13 (quoting *Sweda*, 923 F.3d at 330). But the Seventh Circuit held no such thing. To the contrary, the Seventh Circuit expressly acknowledged that its approach was consistent with the above-quoted language from *Sweda*, in which the Third Circuit "determined [that] it need not look only at the available range of offerings but would consider that range in the context of the fiduciary's overall performance." Pet. 20a. As set forth below, the Seventh Circuit applied this standard and determined—correctly—that petitioners' allegations regarding the "backdrop of the mix and range of available investment options" in the Plans undermined petitioners' claims. *Id.* (quoting *Sweda*, 923 F.3d at 330).

B. Petitioners also attempt to buttress their conflict claim by asserting that the decision below incorrectly applied the standard applicable on a motion to dismiss. More particularly, petitioners contend that the court of appeals "credit[ed] the defendant's explanation . . . before allowing a well-

pleaded complaint to proceed," Pet. i, and "placed the burden on petitioners to negate respondents' explanations for their behavior, instead of drawing inferences in petitioners' favor at the pleading stage," *id.* at 2. Not so.

For starters, the Seventh Circuit expressly recognized its duty to "accept all well-pleaded facts as true, and [to] draw reasonable inferences in plaintiff's favor." Pet. App. 11a (quoting *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020)). The decision below also relied upon *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007), which require a plaintiff to allege facts supporting a plausible claim for relief rather than "the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679; *see* Pet. App. 12a (quoting same).

Petitioners' real quarrel is that the lower courts followed those duties to the letter. The court of appeals recognized that it should decline to "accept as true statements of law or unsupported conclusory factual allegations." Pet. App. 11a (quoting *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013), and citing *Iqbal*, 556 U.S. at 680–81). And, as particularly relevant here, the court likewise refused to "ignore any facts alleged in the complaint that undermine the plaintiff's claim." Pet. App. 11a (quoting *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007)). Those requirements, which petitioners do not dispute, bely any claim that the decision below charted new territory.

Indeed, what petitioners deride as the improper acceptance of "respondents' explanations" is, in fact,

drawn directly from their complaint. For example, in evaluating whether petitioners stated a claim based on TIAA's requirements to include the CREF Stock Account as an investment option and to make TIAA the recordkeeper for TIAA funds, the court of appeals noted that "[p]laintiffs' own allegations . . . contradict this claim." *Id.* 13a. Petitioners alleged that the Traditional Annuity was a popular choice among plan participants, and petitioners did not allege that offering the Traditional Annuity was imprudent. *Id.* And petitioners alleged that inclusion of the CREF Stock Account and using TIAA as recordkeeper were *required* by TIAA as a condition of offering the Traditional Annuity. *Id.* 4a. Petitioners did not claim that any participant was required to select the Stock Account option or any fund for which TIAA would be the recordkeeper. The complaint itself thus exposed the flaw in petitioners' theory.

The decision below is rife with similar examples. *See, e.g.*, *id.* at 13a ("Assuming plaintiffs' allegations are true, they fail to show an ERISA violation."); 13a–14a ("The allegations instead depict valid reasons for the plans to use TIAA as a recordkeeper and to keep the Stock Account as an *option* for participants."); 18a–19a n.10 ("Based on plaintiffs' allegations . . . [t]he available investment options . . . reflect expense ratios that are low, and fees that are reasonable as a matter of law.") (internal quotation marks omitted). The petition either ignores these repeated statements or dismisses them as mere window-dressing. Perhaps most revealing is petitioners' statement that "[t]he Seventh Circuit rejected petitioners' claims because it credited respondents' purportedly 'prudent explanations for the challenged fiduciary decisions.'" Pet. 20 (quoting

Pet. App. 21a). Petitioners are eager to attack the court of appeals' reference to "prudent explanations," but petitioners conspicuously omit the next sentence from the Seventh Circuit's opinion: "Plaintiffs pleaded the same prudent reasons in their amended complaint." Pet. App. 21a.

Petitioners likewise distort the Seventh Circuit's evaluation of their claims based on the Plans' use of a revenue sharing fee arrangement for recordkeeping and the retention of multiple recordkeepers. The Seventh Circuit did not "credit" respondents' contrary allegations or "[r]equir[e petitioners] to rule out every possible lawful explanation." Pet. 13 (internal quotation marks omitted). Rather, the Seventh Circuit identified such "lawful explanation[s]" among the facts petitioners alleged in the amended complaint.

A central focus of the amended complaint was the Plans' use of an "asset-based revenue sharing" fee arrangement for recordkeeping, rather than a "flat per-participant fee." Am. Compl. ¶ 249. As a matter of law, however, a revenue sharing fee arrangement "violates no statute or regulation." *Hecker*, 556 F.3d at 585. The Seventh Circuit has also recognized that, while "[a] flat-fee structure might be beneficial for participants with the largest balances," it may in fact lead to higher fees "for younger employees and others with small investment balances." *Loomis*, 658 F.3d at 672. The petition does not acknowledge *Hecker* and *Loomis*, on which the decision below repeatedly relied, much less claim that those cases are part of the purported conflict. *See also* Pet. App. 42a (district court explaining that "Plaintiffs seem to recognize that a per capita charge (instead of an

expense ratio) tends to discourage and punish small investors, because plaintiffs allege that a per capita fee can, once calculated, be divided by the plans among the participants based on the amount each participant has invested") (citing Am. Compl. ¶ 64).

The same is true of respondents' arguments based on the retention of multiple recordkeepers. As detailed above, petitioners' own allegations described why respondents retained TIAA-CREF as a recordkeeper—because "[i]f Northwestern removed TIAA and hired a third-party recordkeeper, participants would have lost access to the Traditional Annuity and any funds invested in the annuity would have been subject to the 2.5% surrender charge." *Id.* 16a. Moreover, petitioners nowhere alleged that respondents should have removed Fidelity as a recordkeeper and retained only TIAA-CREF. *Id.* In fact, as the decision below observed, the amended complaint does not even "include Fidelity's recordkeeping costs, and it fails to allege that those costs are the reason for higher fees." *Id.* 16a–17a.

The court of appeals deemed the remainder of petitioners' objections deficient as a matter of law. That conclusion was, yet again, based on facts alleged in (or missing from) the complaint. The court of appeals did not plow new legal ground. Petitioners' objection to the cost of certain investment options failed because, as the amended complaint acknowledged, "[p]articipants could invest in various low-cost index funds with expense ratios ranging between .05% and .1%." *Id.* 18a n.10 (citing Am. Compl. ¶¶ 161, 176). Like the plaintiffs in *Hecker* and *Loomis*, petitioners do not and cannot

deny that "the types of funds [they] wanted (low-cost index funds) *were and are* available to them." *Id.* 19a (internal quotation marks and citations omitted); *see also id.* 14a ("That plaintiffs prefer low-cost index funds to the Stock Account does not make its inclusion in the plans a fiduciary breach.").[1]

The Seventh Circuit applied similar reasoning in disposing of petitioners' allegations that the plans' investment options were too numerous or that the investments underperformed, and petitioners point to no contrary authority. Regarding the number of investment options, it held that "plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty." *Id.* 21a (citing *Loomis*, 658 F.3d at 673–74; *Hecker*, 556 F.3d at 586). As for "the plans' alleged underperformance," the court relied on cases holding that "'the ultimate outcome of an investment is not proof of imprudence.'" *Id.* (quoting *DeBruyne v. Equitable Life Assurance Soc'y of the United States*, 920 F.2d 457, 465 (7th Cir. 1990)). Petitioners do not point to any authority challenging these settled principles of law. To the contrary, the petition appears to abandon these theories altogether.

[1] Although the petition refers repeatedly to "claims based on offering . . . retail-class shares instead of institutional-class shares," Pet. 7, the amended complaint did not include a claim for relief based specifically on these allegations, *see* Am. Compl. ¶¶ 232–286. Petitioners attempted to assert such a claim in its proposed second amended complaint, Prop. Sec. Am. Compl. ¶¶ 337–347. The petition does not challenge the court of appeals' affirmance of the district court's denial of leave to amend.

C. All that is left of petitioners' asserted conflict is the contention that the decision below should have come out the same way as the Third Circuit's decision in *Sweda* and the Eighth Circuit's decision in *Davis*. But that is a quintessential request for factbound error correction, which this Court does not indulge. Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The Seventh Circuit deliberately applied precisely the same standard that is regularly applied by the Third and Eighth Circuits, including in *Sweda* and *Davis*. That the application of this standard to different facts pleaded in different complaints has resulted in different outcomes is inevitable, not remarkable.

The decision below does not conflict with the Third Circuit's decision in *Sweda*. Indeed, the Seventh Circuit responded to petitioners' reliance on that case by affirming that "[t]he Third Circuit's approach is sound and not inconsistent with our own." Pet. App. 20a–21a. Nothing petitioners say changes that assessment.

As *Sweda* explained, the Third Circuit "established [its] pleading standard for breach of fiduciary duty under ERISA" in *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011). *Sweda*, 923 F.3d at 329 (citing same). The plaintiffs in *Renfro* alleged that the fees on certain investment options were "excessive in comparison to the services rendered, both as compared to other mutual funds and to other types of investments [the defendant] could have selected for inclusion in the plan." 671 F.3d at 326.

The plaintiffs took specific issue with, among other things, the defendant's use of a revenue-sharing fee arrangement and the inclusion of "retail mutual funds in the range of investment options." *Id.* at 319, 326. Affirming dismissal of the plaintiffs' claims for breach of fiduciary duty under ERISA, the Third Circuit in turn agreed with the Seventh Circuit's decision in *Hecker* and held that, "[i]n light of the reasonable mix and range of investment options in the [defendant's] plan, plaintiffs' factual allegations about [the defendant's] conduct do not plausibly support their claims." *Id.* at 327. The Seventh Circuit's dismissal of claims premised on similar allegations here is fully consistent with the Third Circuit's approach in *Renfro*. Tellingly, the petition omits any reference to *Renfro* or, for that matter, any Third Circuit decision other than *Sweda*.

As petitioners would have it, the fact that the ERISA plaintiffs prevailed in *Sweda* must mean that it is irreconcilable with the decision below. That is wrong. As the Seventh Circuit explained, "*Sweda* declined to find a 'bright-line rule that providing a range of investment options satisfies a fiduciary's duty' because '[p]ractices change over time, and bright-line rules would hinder courts' evaluation of fiduciaries' performance against contemporary industry practices.'" Pet. App. 20a (quoting *Sweda*, 923 F.3d at 330) (alterations in original). Petitioners do not and cannot argue that the Seventh Circuit sought to implement such a "bright-line" rule. Likewise, petitioners do not and cannot argue that *Sweda precludes* a court from *considering* the "range of investment options" when evaluating a motion to dismiss. To the contrary, the Third Circuit reaffirmed "that a fiduciary breach claim must be

examined against the backdrop of the mix and range of available investment options." *Sweda*, 923 F.3d at 330 (citing *Renfro*, 671 F.3d at 327). That is what the Seventh Circuit did here.

Different outcomes do not evince "a circuit split," as petitioners suggest. Pet. 1. Rather, it is inevitable that the same standard will lead to different results in different cases, particularly where courts "employ a holistic approach, considering all of [the] well-pleaded factual allegations including the range of investment options alongside other germane factors such as reasonableness of fees, selection and retention of investment options, and practices of similarly situated fiduciaries, to determine whether [] allegations plausibly demonstrate entitlement to relief." *Sweda*, 923 F.3d at 331.

For similar reasons, the decision below does not represent a departure from the Eighth Circuit's approach in *Davis*. For starters, *Davis* had not yet been decided when the Seventh Circuit ruled. In any event, the Seventh Circuit expressly invoked the Eighth Circuit's standard set forth in *Braden v. Wal-Mart Stores, Inc.* Pet. App. 19a–20a (citing *Braden*, 588 F.3d 585 (8th Cir. 2009)). *Davis*, in turn, reaffirmed and relied heavily on *Braden*. *See Davis*, 960 F.3d at 482 (citing *Braden* for the standard for the duty of prudence under ERISA).

Petitioners are therefore left to argue that *Braden* "rejected dismissal of ERISA claims for imprudent management based on allegations similar to petitioners' allegations here." Pet. 10. But as the decision below noted (Pet. App. 20a), *Braden* involved a plan that "include[d] a relatively limited

menu of funds"—ten—that "were chosen to benefit the trustee at the expense of the participants." *Braden*, 588 F.3d at 596; *see also id.* at 596 n.6 (noting that the "range of investment options" in *Braden* was "far narrower" than in *Hecker*, making the claim in *Braden* "more plausible"); *Loomis*, 658 F.3d at 671 (distinguishing *Braden* on this basis). Petitioners here made no such allegations. In fact, they alleged just the opposite—that defendants offered *too many* fund options. Am. Compl. ¶ 109. Moreover, in *Braden*, the Eighth Circuit echoed the Seventh Circuit's statement in *Hecker* that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Braden*, 588 F.3d at 596 n.7 (quoting *Hecker*, 556 F.3d at 586). The Eighth Circuit later reiterated this principle in *Meiners v. Wells Fargo & Company*, in which the court affirmed dismissal of claims that a plan's funds were underperforming and too expensive. 898 F.3d 820, 823 (8th Cir. 2018) (noting that the plaintiff's "argument expands application of *Braden* in exactly the way we warned against"). Thus, *Braden* and its progeny are consistent with the Seventh Circuit's approach in this case.

Petitioners' reliance on *Tussey v. ABB, Inc.* is similarly misplaced. 746 F.3d 327 (8th Cir. 2014). There, the Eighth Circuit held that plaintiffs stated a claim for breach of fiduciary duty, despite the defendants' offering a range of investment options, due to "significant allegations of wrongdoing, including allegations that [the defendant] used revenue sharing to benefit [the defendant] and Fidelity at the Plan's expense." *Id.* at 336. In so holding, the court specifically distinguished those facts from *Hecker* and *Loomis*. *Id.* Petitioners

cannot point to any analogous "significant allegations" in the amended complaint.

Davis did not depart from this line of Eighth Circuit cases. To the contrary, like the Seventh Circuit here, *Davis* held that inclusion of the CREF Stock Account among a range of investment options did not form the basis of a plausible claim for breach of fiduciary duty under ERISA. 960 F.3d at 485–86. The Eighth Circuit explained—again echoing the decision below—that "it is not imprudent to provide options with differing features from which to choose, regardless of whether some perform better than others." *Id.* (citing *Renfro*, 671 F.3d at 327). The court further noted that ERISA fiduciaries "are not required to pick 'the *best* performing fund'" or "the *lowest*-cost fund." *Id.* at 486 (citing *Meiners*, 898 F.3d at 823). What is more, the court in *Davis* was aware of the Seventh Circuit's recent decision in this case, citing it, along with *Sweda*, as "one in a series of actions filed against some of the nation's largest universities for alleged mismanagement of their section 403(b) retirement-savings plans." *Id.* at 481. Just as the Seventh Circuit rejected the notion that its decision conflicted with *Sweda* or *Braden*, the court in *Davis* gave no indication that it disagreed with the Seventh Circuit's analysis in this case.

The Eighth Circuit ultimately held, however, that allegations regarding the defendant's failure to negotiate a better fee arrangement were sufficient to survive a motion to dismiss. *Id.* at 483. As in *Sweda*, this outcome is attributable not to any blanket refusal to consider the range of investment options in a plan or some different legal rule, but rather to the application of the same pleading

standard to "the 'totality of the specific allegations in [each] case.'" *Id.* at 484 (noting that "there is no one-size-fits-all approach") (quoting *Braden*, 588 F.3d at 595–96).

Finally, petitioners suggest briefly that the decision below conflicts with the Ninth Circuit's decision in *Tibble v. Edison International*, 843 F.3d 1187 (9th Cir. 2016). Wrong again. *Tibble* did not involve application of the *Twombly* standard. Rather, *Tibble* assessed whether the lower court should re-try claims for breach of fiduciary duty that the plaintiffs "were precluded from presenting [due to] the district court's erroneous interpretation of the limitations statute." *Id.* at 1192–93, 1198 (internal quotation marks omitted). In remanding these claims for a new trial, the Ninth Circuit made the generic statement that "a trustee cannot ignore the power the trust wields to obtain favorable investment products." *Id.* This statement is not inconsistent with the standard the Seventh Circuit applied or the conclusions it reached, and *Tibble* did not even address the "mix and range" of other available investment options. *Id.*

II. THE SEVENTH CIRCUIT'S DECISION IS CORRECT.

Contrary to petitioners' contention, the Seventh Circuit correctly concluded that petitioners failed to state a plausible claim for relief.[2] There is ample evidence among petitioners' own allegations that undermine, rather than support, petitioners' claims.

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[2] The petition does not challenge the Seventh Circuit's decision affirming dismissal of petitioners' claims for violations of ERISA's ban on prohibited transactions and for certain respondents' alleged failure to monitor other fiduciaries.

A. Count 1 alleged that respondents breached their fiduciary duties "[b]y allowing TIAA-CREF to mandate the inclusion" of the CREF Stock Account in the Plans, and "to require that it provide recordkeeping for its proprietary options." Am. Compl. ¶ 235. Petitioners' own allegations defeat this claim.

As petitioners alleged, many plan participants chose to invest in the Traditional Annuity, which was an "attractive offering" to 403(b) plan participants, Pet. App. 13a, but which had "severe restrictions and penalties for withdrawal," "includ[ing] a 2.5% surrender charge," Am. Compl. ¶¶ 117, 132. Moreover, as petitioners' complaint acknowledged, TIAA required that the Plans offer other TIAA funds (including the CREF Stock Account) and use TIAA as the recordkeeper for those products. *Id.* ¶¶ 117, 130. In light of these allegations, respondents' decision to continue offering that investment option along with other TIAA investments was clearly prudent. Participants (including petitioners) were free to choose other investments, including low-cost index funds and funds offered by Fidelity. *Id.* ¶¶ 161, 176.

According to petitioners, respondents should have allowed participants invested in the Traditional Annuity to lose 2.5% of their money (and eliminated that investment as an option going forward), even though petitioners already had access to the very investment options *they* believed were superior. No law supports such a claim, and common sense forecloses it.

B. Count 3 alleged that respondents overpaid for recordkeeping services. Specifically, petitioners

alleged that respondents were required to solicit bids for a flat per-participant recordkeeping fee, and were imprudent in contracting with two recordkeepers instead of one. *Id.* ¶¶ 249, 251. Again, petitioners' own allegations contradict their claims and contravene settled law.

As discussed above, TIAA required that it be retained as recordkeeper for its own investment products, and it was plainly prudent to keep the TIAA Traditional Annuity as an investment option rather than trigger a hefty 2.5% fee. *See supra* at 24. As the Seventh Circuit recognized, petitioners nowhere alleged that participants would have been better off with TIAA as the sole recordkeeper than by retaining Fidelity as recordkeeper for its own products. Pet. App. 16a–17a. And petitioners point to no authority holding that ERISA requires plans to use only one recordkeeper. *Contra Renfro*, 671 F.3d at 319 (upholding as prudent plans that used multiple recordkeepers).

Petitioners' conclusory allegation that defendants should have been able to negotiate a per capita recordkeeping fee of $35 per year per participant cannot save this claim. Am. Compl. ¶ 148. Petitioners did not identify an alternative recordkeeper that would have accepted such a low fee, nor did they allege that a hypothetical lower-cost provider would perform at the level necessary to serve the best interest of the Plans' participants. The cheapest is not always the best. *See Hecker*, 556 F.3d at 586 ("the cheapest possible fund . . . might, of course, be plagued by other problems"); *see also Davis*, 960 F.3d at 486 ("[F]iduciaries are not . . . required to pick the *lowest*-cost fund."). In any event,

a flat per capita fee is not necessarily better for plan participants. As the Seventh Circuit explained in *Loomis*, "[a] flat-fee structure might be beneficial for participants with the largest balances, but" for participants with smaller balances, it "could work out to more, per dollar under management," than an asset-based fee. 658 F.3d at 672–73; *see also Hecker*, 556 F.3d at 585 (holding that asset-based fees "violate[] no statute or regulation").

C. Count 5 alleged that respondents offered investment options that were too numerous, charged excessive fees, and "underperformed." Am. Compl. ¶¶ 266–267. Each of these theories is meritless.

1. "[A] fiduciary breach claim must be examined against the backdrop of the mix and range of available investment options." *Sweda*, 923 F.3d at 330 (citing *Renfro*, 671 F.3d at 327). In *Loomis*, the Seventh Circuit held that offering a range of options with expense ratios between "0.07% to just over 1%" is "an acceptable array of investment options" as a matter of law. 658 F.3d at 670 (citing *Hecker*, 556 F.3d at 586). The range of expense ratios offered in the Plans here—from .05% to 1.89%, Pet. App. 33a (citing Am. Compl. ¶¶ 161, 176)—is not materially different (particularly in light of the inclusion of the popular higher-fee annuity products). Therefore, any participant who preferred a fund with low expenses could choose one through the Plans, and petitioners cannot allege that they "were forced to stomach an unappetizing menu," regardless of their preference. *Id.* 19a. ERISA rejects that "paternalistic approach," and contains no rule "forbid[ding] plan sponsors to allow participants to make their own choices." *Id.* 14a–15a.

That leaves "the argument that flopped in *Hecker*," and again in *Loomis*: "that [a fiduciary] should have offered only 'wholesale' or 'institutional' funds," and "zero" retail funds. *Loomis*, 658 F.3d at 671. In addition to its deficiency as a matter of law, this claim was not presented as part of any claim in the amended complaint, notwithstanding petitioners' repeated reference to this argument in the petition, *see* Pet. 5, 7, 9, 11–13, 19, 21. Although petitioners' complaint referenced institutional and retail funds, petitioners did not clearly base a claim on these allegations. *See* Am. Compl. ¶¶ 232–286. The only reference is in half a sentence amidst Count 5's allegations spanning five pages. *Id.* ¶ 266 (alleging that "[t]he Plans' investment offerings included the use of mutual funds and variable annuities with retail expense ratios far in excess of other lower-cost options available to the Plans"). Perhaps recognizing this deficiency, petitioners attempted to present such a claim in their proposed second amended complaint, Prop. Sec. Am. Compl. ¶¶ 337–347, but the district court denied petitioners leave to amend, Pet. App. 51a–52a. The petition does not challenge that denial.

2. Finally, the Seventh Circuit correctly affirmed dismissal of petitioners' claims based on the alleged underperformance of certain funds. "[I]nvestment losses are not proof that [a fiduciary] violated his duty of care," *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006), and "the ultimate outcome of an investment is not proof of imprudence," Pet. App. 21a (quoting *DeBruyne*, 920 F.2d at 465). For that reason, "an allegation that an investment's price dropped, even precipitously, does not alone suffice to state a claim under ERISA." *Pension Benefit Guar.*

Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 721 (2d Cir. 2013).

Rather, to plead a fiduciary breach claim based on underperformance, plaintiffs must "allege facts sufficient to raise a plausible inference that the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence, or that a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative." *Id.* at 719. The amended complaint lacks any well-pleaded allegations meeting that standard.

Nor can petitioners point to any well-pleaded allegation that defendants' *process* for selecting the challenged funds was imprudent. *Jenkins*, 444 F.3d at 925; *see also Barchock v. CVS Health Corp*, 886 F.3d 43, 45 (1st Cir. 2018). Instead, petitioners cited only a list of funds that purportedly underperformed, followed by conclusory assertions that a prudent review process would have resulted in their removal. But hindsight analysis of the funds' performance is irrelevant. *Renfro*, 671 F.3d at 322; *Morgan Stanley*, 712 F.3d at 718. Likewise, as this Court explained in *Iqbal*, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 556 U.S. at 678.

Moreover, petitioners' other allegations in the amended complaint establish that respondents had a diligent process for reviewing the Plans' offerings. Beginning in 2009, when new regulations required employers, for the first time, to take a hands-on role in administering these plans—including managing

their investment offerings—Northwestern engaged in a complex, expert-guided review process, which included the formation of NURIC to provide additional oversight. That process ultimately led to an overhaul of the Plans. *See* Am. Compl. ¶¶ 123–128, 221–222. Respondents introduced a tiered structure consisting of "about 40 options" available through TIAA and Fidelity, in addition to a brokerage window offering participants access to thousands of other investment options. Pet. 4a; Am. Compl. ¶¶ 123–128, 132–133. Petitioners acknowledged that, through these changes, respondents "removed hundreds" of funds which petitioners deemed "unnecessary." Am. Compl. ¶ 226. Moreover, respondents successfully negotiated revenue credits from TIAA and Fidelity. These credits were distributed to participants during the second quarter of 2016. *Id.* ¶¶ 216–218.

3. Petitioners appear to have abandoned their argument that the Plans included too many options. But even if it were still alive, that argument fails as a matter of law. As the decision below recognized, "[p]lans may generally offer a wide range of investment options and fees without breaching any fiduciary duty." Pet. App. 21a (citing *Loomis*, 658 F.3d at 673–74; *Hecker*, 556 F.3d at 586). A fiduciary who "has left choice to the people who have the most interest in the outcome . . . cannot be faulted for doing [so]." *Loomis*, 658 F.3d at 673–74. *See also Hecker*, 556 F.3d at 586 (no breach of fiduciary duty where 401(k) plan participants could choose to invest in 26 investment options and more than 2,500 mutual funds through a brokerage window); *accord Renfro*, 671 F.3d at 327–28 (no breach of fiduciary duty where 401(k) plan offered 73 investment

options).

III. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW.

A. For the reasons stated above, the decision below does not evince a conflict among the lower courts. But even if the Court agrees with petitioner that "[t]he time is ripe for this Court to provide clarity to this area of law," Pet. 18, this case does not present a good opportunity for the Court to do so. That is so for five main reasons.

First, the lower courts that petitioners claim make up the circuit conflict are entirely unaware of their purported disagreement. To the contrary, as we have explained, the decision below expressly invokes authority from the Third and Eighth Circuits and disclaims any departure from those jurisdictions. Were the court to accept petitioners' invitation to analyze the admixture of benefits and burdens that state a claim for breach of fiduciary duty under ERISA, it would lack the benefit of the lower courts' insight into the supposed methodological conflict. Rather than wade into such waters (which the lower courts agree are calm), this Court should at least wait for some recognizable current to emerge.

Second, and relatedly, the decision below is painfully narrow and factbound. Not every decision of this Court is destined for the casebooks, but scarce resources ought not be diverted to what amounts largely to a referendum on whether ERISA fiduciaries should be permitted to agree to TIAA's contractual conditions for offering the TIAA Traditional Annuity. Petitioners observe that there is "frequent litigation" regarding the management of

401(k) and 403(b) plans, *id*. 21, but that serves only to underscore the narrowness of the question actually presented here. The decision below is one of many decisions, including *Renfro*, *Meiners*, *Loomis*, and *Hecker*, in which courts have dismissed claims that retirement plan managers breached their fiduciary duties. In many other cases, including *Sweda* and *Davis*, courts have allowed such claims to proceed under the same standards applied to different complaints. Against this backdrop, petitioners' contention that the dismissal of their claims "threatens to arrest [the] progress" made by a nationwide trend of ERISA litigation is myopic at best.

Third, this Court recently denied the certiorari petition in *Sweda*. *Univ. of Pa. v. Sweda*, 140 S. Ct. 2565 (2020). In a supplemental brief in support of the petition, the plan administrators in *Sweda* argued, as petitioners do now, that the Seventh Circuit's decision in this case "reinforces the circuit conflict over the pleading standard for fiduciary breach claims under" ERISA. Suppl. Br. for Pet'rs 1, *Univ. of Pa. v. Sweda*, No. 19-784, 2020 WL 1479914 (U.S. Mar. 26, 2020). This purported "conflict" did not satisfy this Court's criteria for plenary review in March. Nothing has changed since.

Fourth, petitioners tacitly acknowledged the shortcomings of the operative complaint when they sought leave to file a second amended complaint during the pendency of respondents' motion to dismiss. Pet. 6 n.2. Petitioners' inability to remedy this deficiency resulted in significant part from petitioners' own delay. Pet. App. 6a (explaining that petitioners' "additional counts were based on

information available to [them] before discovery"). And as the Seventh Circuit noted, petitioners "did not even attempt in their [appellate] brief to explain the undue delay." *Id.* 23a. Likely recognizing that their failed attempt to remedy deficiencies in their complaint renders the case a poor vehicle for this Court's review, petitioners bury their references to the second amended complaint among footnotes in the petition. Pet. 6–7 nn.2–3, *id.* 20 n.15. If this Court wishes to address the application of the *Twombly* standard in the ERISA context, it should await a case in which the plaintiffs made all available allegations on a timely basis.

Fifth, and in any event, the allegations in the amended complaint are weakened further by the evolving nature of the Plans. Consistent with their fiduciary duties to monitor the Plans' investment options, respondents have continued to improve upon the Plans. As the decision below noted, in October 2016 Northwestern "streamlined its investment offerings to about 40 options to enable simpler decision-making by participants, reduce administrative expenses, increase participant returns, and provide access to lower cost shares when available." Pet. App. 4a (internal quotation marks omitted). As petitioners acknowledged in the amended complaint, these changes removed "hundreds" of funds about which petitioners complained. Am. Compl. ¶ 226. Any decision here would be of limited utility, particularly if the Plans change further.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

MARK T. STANCIL
WILLKIE FARR & GALLAGHER LLP
1875 K St, N.W.
Washington, DC 20006

JOHN L. BRENNAN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

CRAIG C. MARTIN
Counsel of Record
AMANDA S. AMERT
BRIENNE M. LETOURNEAU
LARUE L. ROBINSON
WILLKIE FARR & GALLAGHER LLP
300 North LaSalle
Chicago, IL 60654
(312) 728-9000
cmartin@willkie.com

Counsel for Respondents