No. 19-1401

IN THE
Supreme Court of the United States

APRIL HUGHES, *ET AL.*,
Petitioners,
v.
NORTHWESTERN UNIVERSITY, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Service Employees International Union (SEIU) is a labor organization of approximately two million working men and women in the United States and Canada. SEIU and its local affiliates represent thousands of workers who are participants in defined-contribution plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), and SEIU is committed to ensuring a secure and dignified retirement for all Americans. The Court's decision in this case will have a significant effect on workers' retirement plans, and SEIU believes strongly that its members and other workers should be able to hold their defined-contribution plans accountable for any imprudent management that needlessly undermines their retirement security.

SUMMARY OF ARGUMENT

The retirement security of millions of working people is—for better or worse—now tied to the success of their investments in employer-sponsored defined-contribution plans. One critical and well-known problem with such defined-contribution plans is that excessive fees can sap participants' retirement savings and are often difficult for inexperienced investors to identify. If the Seventh Circuit's decision

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

is allowed to stand, fiduciaries governed by ERISA will fail to address this problem to retirees' detriment.

Petitioners allege that the Respondent fiduciaries breached their duty of prudence under ERISA by including investment options with excessive fees in their plan menus even though lower-fee investment options were readily available. The Seventh Circuit wrongly affirmed dismissal of Petitioners' claims on the basis of that court's unsupported and unsupportable assumption that plan participants can easily identify and choose to avoid excessive-fee investments when presented in a long menu of options.

Empirical evidence is all to the contrary. Behavioral and economic studies show that plan participants presented with a large number of options experience "choice overload" and are not able to make reasoned, well-informed, and prudent choices among investments. Additional research also shows that inexperienced investors suffer from a lack of information and financial literacy that results in their predictably placing their money in high-fee investments when objectively better, low-fee options are available.

Any adequate fiduciary should be aware that including too many options and a significant number of excessive-fee choices in a long plan menu sets up plan participants to make costly mistakes. Thus, to meet ERISA's standard of prudence, plan fiduciaries must at a minimum monitor their defined-contribution plan investment menus to remove high-fee investments when lower-fee options are available and to avoid offering participants a mind-numbing list of choices. Indeed, it is difficult to imagine what

ERISA's duty of prudence means if it does not mean this.

Accordingly, the Seventh Circuit's decision below should, therefore, be reversed.

ARGUMENT

I. EMPIRICAL DATA SHOW THAT LONG PLAN MENUS WITH BOTH HIGH- AND LOW-FEE OPTIONS ARE BAD FOR PLAN PARTICIPANTS.

In its opinion below, the Seventh Circuit dismissed plaintiffs' allegations regarding excessive fees on the basis of the court's assumption that plan participants will avoid excessive fees by choosing alternative, low-fee investments from the menus presented to them. *See Divane v. Nw. Univ.*, 953 F.3d 980, 988 (7th Cir. 2020) ("Any participant could avoid what plaintiffs consider to be the problems with those products (excessive recordkeeping fees and underperformance) simply by choosing from hundreds of other options within a multi-tiered offering system."). In the Seventh Circuit's view, "[u]ltimately, defendants 'cannot be faulted for' leaving 'choice to the people who have the most interest in the outcome.'" *Id.*, at 993 (quoting *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011)).

To be sure, individual plan participants "have the most interest in the outcome," but interest without knowledge cannot be expected to result in ideal decision-making. Motivation goes only so far when relevant information is lacking, and in the case of ERISA plans, it is the trustees and their registered investment advisors, not the participants, who have the expertise and information necessary to avoid inappropriate and excessive investment options. As Professors Ayres and Curtis succinctly make the point:

> In one sense, the reduction in investor returns associated with adding a bad fund to an otherwise good plan is a consequence of choices investors make. Investors are always free to forgo investment in a bad fund so long as there are alternatives. But when employers make choices to include menu options that are clearly worse than other funds in the menu, it is a foreseeable consequence that investors in the plan will end up with worse portfolios.[2]

Or as another study concluded, "our results contribute evidence that investor choice, without more, does little to protect investors or to produce efficient investment decisions."[3]

Specifically, empirical data show that long plan menus with high- and low-fee options intermixed lead to poor outcomes in a number of ways.

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[2] Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1504 (2015).

[3] Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. PA. L. REV. 605, 646-47 (2014).

A. Long Plan Menus Discourage Participation.

An excessive number of options reduces overall participation in the plan, which of course reduces retirement savings to workers' detriment.

Studies show that when faced with an excessive number of options, many investors turn away altogether. For example, one 2004 study of 401(k) plan participation data found that, "[o]ther things equal, every ten funds added was associated with 1.5 percent to 2 percent drop in participation rate."[4] This participation drop is entirely predictable because too many choices can lead to cognitive overload. As one article summarizing the psychological and behavioral research behind the causes of this "choice overload" on consumer decisions explained, "[t]he human brain simply isn't designed to process and compare the sheer amount of information it is often given[,]" and "[w]ithout ways to mentally manage or weigh the

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[4] Sheena S. Iyengar, *et al.*, *How Much Choice is Too Much?: Contributions to 401(k) Retirement Plans*, in PENSION DESIGN & STRUCTURE, NEW LESSONS FROM BEHAVIORAL FINANCE (Mitchell & Utkus, Eds. 2004), at pp. 88-91, *available at* https://repository.upenn.edu/cgi/viewcontent.cgi?article=1427&context=prc_papers. *See also* Maureen Morrin, *et al.*, *Investing for Retirement: The Moderating Effect of Fund Assortment Size on the 1/N Heuristic* (Jan. 16, 2012) (Fox Sch. of Bus. Research Paper No. 14-009), at p. 30 (concluding that "[i]f fiduciaries can control which options investors consider, they can design mutual fund assortments more optimally to increase the likelihood of participation and the quality of decisions made."), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008841, *reprinted in* Vol. XLIX J. MKTG. RES. 537 (2012).

value of information, people struggle to decide and freeze."[5]

B. For Those Who Do Participate, Overwhelming Choice Encourages Poor Decisionmaking.

For those investors who are not put off from participation altogether, excessive options lead to poor decisions: Investors make more diversification errors and often end up paying higher fees.[6] A wealth

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[5] Ruth Schmidt, *Frozen: Using Behavioral Design to Overcome Decision-Making Paralysis*, Deloitte Univ. Press, at p. 4, *available at* https://www2.deloitte.com/us/en/insights/focus/behavioral-economics/overcoming-decision-making-paralysis.html. *See also* Iyengar, *et al.*, *supra* note 4, at 84 (discussing the impact of "choice overload" in various field and laboratory studies); Morrin, *et al.*, *supra* note 4, at 8 ("Choosing from a larger assortment entails making a larger number of tradeoffs, which reduces the availability of cognitive resources.").

[6] *See* Donald B. Keim & Olivia S. Mitchell, *Simplifying Choices in Defined Contribution Plan Design*, Working Paper, NAT'L BUR. ECON. RES. (Jan. 2016), at pp. 6-7, *available at* https://www.nber.org/system/files/working_papers/w21854/w21854.pdf; Shlomo Benartzi & Richard H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. ECON. PERSPECTIVES 81, 86-87 (2007). *See also* Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 13 (2006) (concluding that the "transaction cost of reading menus may lead offerees to respond perversely to more choice"); Maureen Morrin, *et al.*, *Saving for Retirement: The Effects of Fund Assortment Size and Investor Knowledge on Asset Allocation Strategies*, 42 J. CONSUMER AFFAIRS 206, 207-08, 214 (2008) (citing various research on the negative psychological effect of choosing from larger assortments and concluding that "merely changing the total

of behavioral-economics literature documents the predictable mistakes inexperienced investors make, which are exacerbated by overwhelming choice.

1. Naïve Diversification.

One well-documented investor error is commonly known as "naïve diversification."[7] When committing this error, investors simply distribute their money according to the relative representation of funds in the plan menu.[8] These investors do not examine the various properties of different funds when making their allocation decision. Instead, they "divide their money among the available options."[9]

Because naïve diversification causes investors to divide their money among all or many investment options without regard to the options' relevant characteristics, if funds with excessive fees are included in the menu, participants presented with a menu that includes a large number of high-fee funds will predictably invest in those funds notwithstanding the availability of equally good, or better, low-fee options.[10] Indeed, Professors Fisch and

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number of funds offered in the plan" has a "large impact on the risk profile of [an individual's] investment portfolio").

[7] *See* Ayres & Curtis, *supra* note 2, at 1507; Fisch & Wilkinson-Ryan, *supra* note 3, at 623.

[8] *See* Ayres & Curtis, *supra* note 2, at 1507.

[9] Fisch & Wilkinson-Ryan, *supra* note 3, at 623.

[10] For two examples of empirical studies finding that naïve diversification caused investors to put money into investment funds that were objectively worse than other plan options *see*

Wilkinson-Ryan found that participants continued to exhibit naïve diversification and invest in high-fee funds even after being given simple and direct instructions regarding the impact of fees on investment return.[11] Their study concluded that "the inclusion of even a few poor or more costly investment choices in a plan can harm investors who are unable to identify and eliminate such funds" from their retirement portfolios.[12]

2. Alphabeticity Bias.

Investors are also susceptible to "alphabeticity bias": "the phenomena in which early alphabet options are chosen more frequently than others."[13] Research demonstrates that, when selecting from a menu of alternative funds, "individuals typically satisfice, where their search ceases after the first 'acceptable' option is found, even if continued searching could yield a better result."[14] Studies further demonstrate that "more fund choices and a more diverse offering may exacerbate the

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Fisch & Wilkinson-Ryan, *supra* note 3, at 636, *and* Ayres & Curtis, *supra* note 2, at 1502.

[11] Fisch & Wilkinson-Ryan, *supra* note 3, at 642.

[12] *Id.*, at 644.

[13] Thomas W. Doellman, *et al.*, *Alphabeticity Bias in 401(k) Investing*, Working Paper (Dec. 2018), at p. 1, *available at* https://www.napa-net.org/sites/napa-net.org/files/alphabet%20bias.pdf, *reprinted in* 54 THE FIN. REV. 623 (2019).

[14] *Id.*, at 2.

alphabeticity bias."[15] "Interestingly, this is even true for professionals employed in the financial sector."[16]

In other words, plan participants will tend to choose funds that appear near the top of a menu (whether arranged alphabetically or by some other method) rather than review the entire menu for optimal choices. As a result, participants will select higher-fee funds at the top of a menu and fail to consider better options that appear towards the bottom.[17] Once again, this behavioral trap predictably leads investors to choose objectively worse investment funds included in a defined-contribution plan menu, notwithstanding the inclusion of more prudent options.

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[15] *Id.*, at 4.

[16] *Id.*

[17] *See id.*, at 16, 27. This research finds that, given participants' tendency to choose from the top of the list, changing the order of menus can have a significant impact on investment decisions. For example, in one study, the alphabetized list of funds yielded an average expense ratio of 90 basis points for the top four equity funds in the menu. If the list were reorganized in ascending order based on expense ratio, the average expense ratio of the top four funds in the list would be only 62 basis points. *Id.*, at 36. "This difference in fees is economically significant. Assuming $5,000 annual contributions and a fixed 7% annual gross rate of return over a 30-year period, this difference in fees, all else equal, costs an investor $20,440 in investment income—a loss equivalent to over four years' worth of contributions." *Id.*

C. Investor Errors That Lead to High Fees Have a Significant Effect on Retirement Funds.

These issues are critical because "[d]efined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008).[18] Yet, the amount of retirement savings and investments held by working people remains woefully inadequate.[19] For low-wage workers in particular, who tend to have little in savings, the harm done by high fees can be extreme.

As this Court has recognized, "[e]xpenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a

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[18] *See also* George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What are the Causes and Consequences?*, CTR. FOR RET. RESEARCH AT BOSTON COLL., No. 18-8 (May 2018), at 1, *available at* https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf; Fisch & Wilkinson-Ryan, *supra* note 3, at 615 (noting that as of February 2012 the U.S. Department of Labor reported that 72 million individuals were covered by 401(k) plans).

[19] *See* BD. OF GOV. FED. RES. SYS., *Report on the Economic Well-Being of U.S. Households in 2020*, (May 25, 2021), *available at* https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-retirement.htm; Monique Morrissey, *The State of American Retirement Savings: How the Shift to 401(k)s has Increased Gaps in Retirement Preparedness Based on Income, Race, Ethnicity, Education, and Marital Status*, ECON. POLICY INST. (Dec. 10, 2019), *available at* https://www.epi.org/publication/the-state-of-american-retirement-savings/; James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. Pa. J. Bus. L. 483, 488-91 (2013).

defined-contribution plan." *Tibble v. Edison Int'l*, 575 U.S. 523, 525 (2015). These plan expenses reduce a worker's investment account by "decreasing its immediate value, and by depriving the participant of the prospective value of funds that would have continued to grow if not taken out in fees." *Sweda v. Univ. of Pa.*, 923 F.3d 320, 328 (3d Cir. 2019). Economic studies have demonstrated the paramount importance of losses due to excessive fees in defined-contribution plans, and for workers with little to spare, these losses can be devastating.[20]

D. Plan Participants Do Not Have the Information or Financial Education Needed to Avoid Common Errors.

There might be less cause for concern if most workers were sophisticated investors with the time and financial education needed to weigh their options and choose funds with appropriate fee structures. But

[20] *See* Ayres & Curtis, *supra* note 2, at 1481 ("We show that the primary problem for investors in 401(k) plans is not loss due to lack of diversification, but loss due to excessive fees."). As Professors Fisch and Wilkinson-Ryan have noted, "[s]tudies strongly suggest that, of the information available to retail investors, fund expenses are the best predictor of future returns and that lower expenses are correlated with higher returns." Fisch & Wilkinson-Ryan, *supra* note 3, at 620. *See also* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 Wm. & Mary Bus. L. Rev. 35, 62 (2015) (noting that "many investors continue to choose more expensive [funds], despite the overwhelming evidence that fees are the most important—perhaps the only—salient characteristic in that decision").

data show that financial illiteracy is "pervasive" among both highly educated and non-highly educated individuals.[21]

For example, despite the paramount importance of fees, surveys continue to find that individual investors do not understand and are ill-informed about the impact of fees on their retirement savings. A "2013 study found that 22% of 401(k) participants mistakenly believed that they paid no fees, and half of participants reported that they did not know how much they were paying in fees."[22] On top of this basic lack of information, the complexity and diversity of mutual fund fee structures makes it "difficult to calculate costs or compare different funds."[23]

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[21] *See* Annamaria Lusardi & Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence*, 52 J. ECON. LIT. 5, 10, 34 (2014) (explaining that financial literacy is the ability to answer three questions about "fundamental concepts [that] lie at the root of saving and investment decisions," which concern compound interest, inflation, and stock risk). More than a third of employees with a post-graduate education are financially illiterate, more than half of college-educated employees are financially illiterate, and more than 80% of those with only a high-school education are financially illiterate. *See id.*, at 19.

[22] Ayres & Curtis, *supra* note 2, at 1487.

[23] Fisch & Wilkinson-Ryan, *supra* note 3, at 611. For a summary of the variety of fees and fee structures an informed investor would need to consider to prudently compare investment choices, *see* U.S. Dep't of Labor, Ee. Benefits Sec. Admin., *A Look at 401(k) Plan Fees* (Sept. 2019), at 4-6, *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf.

Scholars have also found that, even with better fee disclosure, many plan participants lack an understanding of or training in foundational investment concepts, and that financial illiteracy prevents them from acting prudently based on the information they do have.[24] Studies have found, for example, that very few people understand and correctly apply the principles of compounding, which are of course necessary to appreciate the significance that even a small fee difference can have on retirement savings.[25]

Compare this data to the list of recommended steps for a participant choosing among plan options. According to the Department of Labor, an investor seeking to avoid common errors should review, among other documents, investment fund prospectuses and financial statements, business

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[24] *See* Fisch & Wilkinson-Ryan, *supra* note 3, at 624-26 (discussing basic financial literacy concepts often not understood by common investors). *See also* Russell, *supra* note 20, at 62 (noting that "80 percent of subjects fail to minimize fees *even after* experimenters gave them a simplified one-page fee disclosure") (emphasis in original). "[P]eople—even financially literate people—simply do not understand the role fees play in returns, and instead focus on other, irrelevant information." *Id.*, at 63.

[25] *See* Fisch & Wilkinson-Ryan, *supra* note 3, at 625 (citing study concluding that "fewer than twenty percent [of study participants] could correctly calculate a simple compound interest problem"); *see also id.*, at 643 ("Mutual fund fees are presented in fractions of a percent, and investors may assume that the real cost of such fees is negligible."). *See also* Lusardi & Mitchell, *supra* note 21, at 19 (providing chart demonstrating high rates of financial illiteracy among both highly and non-highly educated individuals).

sections of newspapers, and business and financial websites and publications.[26] Then, participants should work their way through a ten-point checklist to understand and compare the fees of plan investment options.[27]

This may all be good advice, but a single prospectus may be 800 pages long. *See* JA 118 (Am. Compl. ¶ 167). The idea that an ordinary worker can be expected to wade through a single, incomprehensible prospectus, let alone the notion that they should compare prospectuses of more than 240 funds, *see* JA 83 (Am. Compl. ¶ 110), is unreasonable in the extreme.

E. When Fiduciaries Prudently Streamline Their Defined-Contribution Plan Menus, Participants Are Demonstrably Better Off.

Not surprisingly, given the empirical data already discussed, studies show that where fiduciaries prudently streamline their defined-contribution plan menus, participants do much better. For example, one study analyzed the impact on plan participants of streamlining a plan menu from 90 to 51 investment choices.[28] The study concluded that, as a result of the

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[26] U.S. Dep't of Labor, Ee. Benefits Sec. Admin., *supra* note 23, at 6-7.

[27] *Id.*, at 8-9.

[28] Keim & Mitchell, *supra* note 6, at 6-7.

streamlining, participants who moved out of the eliminated funds could realize "potential accumulated savings . . . over a 20-year period of $20.2M, or more than $9,400 per participant."[29]

Another study found that every additional 10 options added to a plan resulted in a 2.87 percent increase in the probability that a participant would not invest any assets into equity funds and further found that the increased number of options could make participants less likely to select options they do not understand well even if those options would be in their best interest.[30] The study concluded that "smaller choice sets tend to be better *on average* than larger choice sets since the smaller choice sets include only the more select options."[31]

The Seventh Circuit's assumption that fiduciaries meet their obligations by offering more choices cannot be squared with this data.

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[29] *Id.*, at 2.

[30] Sheena S. Iyengar & Emir Kamenica, *Choice Proliferation, Simplicity Seeking, and Asset Allocation* (Apr. 2008), Working Paper, at p. 3, *available at* https://pluto.mscc.huji.ac.il/~mshayo/public_html/Kamenica2_simplicitySeeking.pdf.

[31] *Id.*, at 4 (emphasis in original).

II. GIVEN THIS EMPIRICAL RESEARCH ON INVESTOR BEHAVIOR, ERISA FIDUCIARIES BREACH THEIR DUTY OF PRUDENCE BY INCLUDING HIGH-FEE INVESTMENTS IN PLAN MENUS WHEN LOWER-FEE ALTERNATIVES ARE READILY AVAILABLE.

ERISA fiduciaries must discharge their "duties with respect to a plan solely in the interest of the participants and beneficiaries," and with the "exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). In carrying out those duties, ERISA fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Consistent with the traditional requirements of trust law, this Court has held that fiduciaries have "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529.

A defined-contribution plan fiduciary acting with the prudence and diligence of a person "familiar with such matters" would be aware that most plan participants cannot monitor investments and recognize imprudently costly funds. Participants do not have the trustees' regular access to investment advisors nor the knowledge trustees' obtain in regular meetings with those advisors. Properly informed fiduciaries would also be aware of the substantial research showing the detrimental effect on participants' retirement savings of including an overwhelming number of choices in a plan menu. And properly informed fiduciaries would know that, according to widely available research, plan participants will continue to put money into inappropriate high-fee investments even when lower-cost options are available.

Given all the relevant research and data available, fiduciaries fail to meet ERISA's standard when they nonetheless fail to design usable plans and instead pack their investment menus with an overwhelming number of options, including ones with high fees. Fiduciaries who act in this way either lack the competence or diligence that ERISA requires (or lack both). "Either way, a 'failure of effort or competence' is enough to state a claim for breach of the duty of prudence." *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (brackets omitted, quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009)).

Indeed, legal scholars have concluded that an ERISA fiduciary whose strategy is merely to offer a long menu of high- and low-fee funds mixed together does not meet the statute's standard of prudence, as Professors Ayres and Curtis summarized: "[t]aken together, our data suggest that the focus on providing extensive, diversified menus (due to the large menu defense) and the difficulty in making out fee-based claims do a disservice to plan investors and leave many investors, especially in smaller plans, vulnerable."[32] They explained that:

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[32] Ayres & Curtis, *supra* note 2, at 1495.

> Allowing companies to escape liability for imprudently including high-cost options in plans by appealing to the availability of a brokerage window or other low-cost options ignores the evidence that investors will tend to hold those high-cost options even when it is disadvantageous to do so. The inclusion of good options alongside the bad options is better than offering only bad options, but it does not neutralize the predictable impact of the low-quality choices.[33]

Ayres and Curtis then concluded that "[o]nly a legal standard that asks plan sponsors to justify the inclusion of each fund in the plan menu is sufficient to address the problem of [excessive-fee] choices: what prudent fiduciary would add funds that are inferior to already available choices?"[34] Any lesser standard for fiduciaries, such as that applied by the Seventh Circuit, is incompatible with a fiduciary's "continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529.

The failure to eliminate retirement fund options that are duplicative of or comparable to less expensive options available to plan trustees should suffice to state a claim for the breach of fiduciary duty. Only through discovery could a participant refute assertions by trustees that their decision-

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[33] *Id.*, at 1508.

[34] *Id.*, at 1509; *see also* Kwak, *supra* note 19, at 534-35 (arguing that ERISA fiduciary law must call on defined-contribution plan fiduciaries to explain the inclusion of high-fee, actively managed funds where low-cost alternatives are readily available).

making process in selecting a higher-cost option was prudent. Any other conclusion is incompatible with the fiduciary duties imposed by ERISA and ignores the vast field of research in behavioral studies and economics demonstrating that plan participants, as a whole, are worse off when presented with poor investment options notwithstanding the theory that they *could* select better options.

CONCLUSION

The Seventh Circuit was wrong to conclude that defined-contribution plan fiduciaries fulfill their duty of prudence by offering a long menu of options without evaluating the choices and removing imprudent, high-fee investments. Empirical studies, of which a prudent fiduciary "familiar with such matters," 29 U.S.C. § 1104(a)(1)(B), should be aware, demonstrate that participants presented with a long, diversified plan menu will inevitably make imprudent choices that can easily be avoided by plan fiduciaries exercising a reasonable degree of prudence. This Court should, therefore, reverse the judgment of the Court of Appeals.

Respectfully submitted,

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