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 FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND 17 OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are the American Council on Education and 17 other organizations that represent the higher education community. They routinely file *amicus* briefs in cases of interest to universities.[1]

The **American Council on Education** (ACE) is the major coordinating body for American higher education. Its more than 1,700 members are four-year, two-year, public and private colleges and universities. ACE members educate two out of every three students in accredited, degree-granting institutions in the United States.

The **American Indian Higher Education Consortium** is the unifying voice of our nation's 37 Tribal Colleges and Universities—federally recognized public institutions working to strengthen tribal nations and make a difference in the lives of American Indians and Alaska Natives.

APPA is a leader in professional development programs, credentialing, research, publications, networking, and information services for the educational facilities profession. APPA provides training, professional development, and other services to professionals from more than 1,200 institutions.

The **Association of American Universities** is a nonprofit organization, founded in 1900 to advance the international standing of United States research

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel for petitioners and respondents both consented to the filing of this brief through letters on file with the Court.

universities. Its members include 64 public and private research universities in the United States.

The **Association of Catholic Colleges and Universities** serves as the collective voice of U.S. Catholic higher education. It offers programs and services to promote the Catholic identity and the missions of its member institutions.

The **Association of Governing Boards of Universities and Colleges** is the premier membership organization that strengthens higher education governing boards and the strategic roles they serve within their organizations. It is the trusted resource for board members, chief executives, and key administrators on higher education governance and leadership.

The **Association of Jesuit Colleges and Universities** represents all 27 Jesuit institutions in the United States. It is affiliated with over 100 Jesuit institutions worldwide.

The **Association of Public and Land-grant Universities** is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. Its 197 U.S. member campuses enroll 4.1 million undergraduates and 1.2 million graduate students, and employ 1.1 million faculty and staff.

The **College and University Professional Association for Human Resources** is the voice of human resources in higher education. It represents more than 32,000 human resources professionals at nearly 2,000 colleges and universities.

The **Consortium of Universities of the Washington Metropolitan Area** was founded in 1965 to foster collaboration for higher education across the

National Capital Region. The Consortium is a nonprofit organization comprised of all 18 regionally accredited colleges and universities in the National Capital Area, as well as two affiliate members.

The **Council for Christian Colleges & Universities** is a higher education association of more than 185 Christian institutions around the world, representing 520,000 current students and over 3.6 million alumni.

The **Council of Independent Colleges** is the national organization for small and mid-sized independent colleges and universities, serving more than 650 private, nonprofit institutions and more than 75 higher education organizations.

EDUCAUSE is a nonprofit association and the foremost community of information technology leaders and professionals committed to advancing higher education. EDUCAUSE membership includes approximately 2,100 colleges, universities, and related organizations.

NASPA: Student Affairs Administrators in Higher Education is the leading voice of student affairs, driving innovation and evidence-based, student-centered practice throughout higher education, nationally and globally.

The **National Association of College and University Business Officers**, founded in 1962, is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities across the country.

The **National Association of Independent Colleges and Universities** serves as the unified national voice of private, non-profit higher education in

the United States. More than 5 million students attend 1,700 independent colleges and universities in all 50 states.

The **National Collegiate Athletic Association** is a voluntary association comprised of 1,098 colleges and universities and 102 athletic conferences. It is a member-led organization dedicated to the well-being and lifelong success of college athletes.

The **University Risk Management and Insurance Association** promotes the advancement and application of effective risk management principles and practices in institutions of higher education.

The question in this case is whether petitioners have pleaded sufficient facts to state a plausible claim for breach of fiduciary duty in administering a retirement plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. Courts have undertaken similar inquiries with great frequency in recent years, first in cases filed against fiduciaries of corporate retirement plans, and more recently in cases filed against fiduciaries of university retirement plans. Since 2016, nearly two dozen universities and their employees have been sued for allegedly causing participants to pay too much for plan administration and offering imprudent investment options. *Amici* have a strong interest in ensuring that this Court provides workable guidance for evaluating the plausibility of those claims.

The cases against universities have caused significant concern for plan fiduciaries. In the university context, fiduciary committees typically are comprised of faculty and staff volunteers who perform this role to provide an important service to their schools. Fidu-

ciary-breach lawsuits have real and substantial effects on them; it is a significant burden to be named as a defendant in a multi-million dollar lawsuit and accused of breaching duties owed to colleagues on campus.

Further, the complaints in these cases routinely overlook important features of the university retirement system and ignore the discretion ERISA affords to plan fiduciaries. The complaint here presents those problems. *Amici* therefore urge the Court to affirm the decision of the court of appeals.

SUMMARY OF ARGUMENT

In *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409 (2014), this Court recognized that lower courts should carefully scrutinize ERISA complaints to determine whether they state plausible claims. The Court described this process as "divid[ing] the plausible sheep from the meritless goats." *Id*. at 425. *Amici* represent the higher education community, which has been subjected to dozens of ERISA fiduciary-breach lawsuits in recent years. They file this brief to explain how the lawsuits have affected their members and to urge the Court to provide guidance for the lower courts to use in resolving these claims.

The complaint here alleges that respondents breached their fiduciary duties in administering Northwestern University's retirement plans. The plans are defined-contribution, participant-directed plans, meaning that participants in the plans choose from a range of options in deciding how to invest the money in their individual accounts.

Amici recognize that ERISA imposes fiduciary duties on plan sponsors and administrators, and that fi-

duciaries therefore must ensure that plans incur reasonable expenses and offer a reasonable lineup of investment options. Universities—and the individual personnel who administer the plans—expend considerable time and resources to fulfill those duties. They must have the flexibility to administer the plans based upon the particular needs and preferences of the plan participants, without constant second-guessing.

To state a claim for breach of the duty of prudence, a plaintiff must plead specific facts that plausibly suggest that similar fiduciaries could not have made a similar decision after following a prudent process. The complaint here fails to do that. It does not provide the basic factual content to suggest that no reasonable fiduciary could have taken the same actions that respondents took here.

Petitioners claim that respondents could have spent less money on recordkeeping. But university plans (including those here) have long offered TIAA annuity investments as a key option for ensuring a guaranteed income stream. TIAA annuity investments required TIAA recordkeeping, and so respondents could not have significantly reduced recordkeeping fees without making dramatic changes to the plans. Petitioners also claim that respondents should have offered lower-cost versions of certain investment funds. However, petitioners do not allege facts suggesting that lower-cost investments were available, or that the plan would have been better off if it included those investments. Finally, petitioners claim that the plans included too many investment options, but ERISA gives fiduciaries latitude to tailor plans to the varying preferences of all participants; respondents

were not required to construct a plan to satisfy *petitioners'* particular preferences.

This case gives the Court the opportunity to provide needed guidance for the motion-to-dismiss stage in ERISA fiduciary-breach cases. The Court should reaffirm that a plaintiff claiming imprudence must allege an available alternative course for like fiduciaries under like circumstances; that the allegations must account for the entire plan context; that many different courses of action can be prudent; and that prudence cannot be judged in hindsight. Providing additional clarity on these points will help courts screen out meritless litigation, will avoid unnecessarily burdening the employees who agree to serve as fiduciaries, and will ensure that fiduciaries have the flexibility needed to administer plans in participants' best interests.

ARGUMENT

This case concerns what facts a plaintiff must allege to state a claim that an ERISA fiduciary failed to act prudently in administering a retirement plan. In *Twombly* and *Iqbal*, the Court directed district courts to carefully review complaints at the motion-to-dismiss stage to ensure that plaintiffs have pleaded facts that make unlawful conduct not only possible, but plausible. As the Court recognized in *Dudenhoeffer*, that principle applies with special force in the ERISA context, where plan fiduciaries, subject to a general duty of prudence, have broad discretion to choose from a wide variety of options. The complaint in this case falls woefully short when analyzed using those principles.

I. ERISA Fiduciary-Breach Claims Require Careful, Context-Sensitive Scrutiny

A. ERISA Rejects A "One-Size-Fits-All" Standard For Fiduciaries

Congress enacted ERISA to create a system that is not "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010) (alteration in original). The statute is designed to "assur[e] a predictable set of liabilities" for fiduciaries. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002).

One of the ways Congress accomplished its goal was by giving fiduciaries discretion to manage retirement plans, subject to a duty of prudence. Like the trust-law standard on which ERISA is based, the prudence standard is a "flexible" one, *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008), and it gives fiduciaries room to make decisions based on their particular circumstances, see *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011); *Fine* v. *Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). As the Restatement of Trusts explains, it is "impossible to lay down a hard-and-fast rule as to what is a prudent investment, since much may depend upon the time and place of the administration of the trust, and much may depend upon the character of the particular trust." Restatement (Second) of Trusts § 227 cmt. e (1959).

ERISA's duty of prudence requires fiduciaries to 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). This duty is measured using a reasonable person standard, asking what an objectively prudent person could do in similar circumstances. *Usenko* v. *MEMC LLC*, 926 F.3d 468, 473 (8th Cir. 2019). Whether a fiduciary's decision is objectively reasonable depends on the circumstances the fiduciary faces—in the words of the statute, it is viewed "under the circumstances then prevailing." 29 U.S.C. 1104(a)(1)(B).

Prudence "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 716 (2d Cir. 2013); see *Renfro*, 671 F.3d at 322; *Donovan* v. *Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983). A fiduciary satisfies the duty of prudence when he or she "[h]as given appropriate consideration to" the relevant "facts and circumstances," including the role of the investment in the plan's overall "investment portfolio," and then acts accordingly. 29 C.F.R. 2550.404a-1(b)(1)(i). To state a claim for breach of that duty, therefore, plaintiffs must allege facts that reasonably suggest that a fiduciary failed to give appropriate consideration to the relevant factors—not just that the fiduciary reached a decision with which plaintiffs disagree.

B. Plaintiffs Must Plead Context-Specific Facts That Raise A Plausible Inference Of Imprudence

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), the Court explained how courts should evaluate complaints at the motion-to-dismiss stage. The Court

made clear that a plaintiff must plead "[f]actual allegations" that are "enough to raise a right to relief above the speculative level." 550 U.S. at 555. That is, a plaintiff must plead facts showing that liability is not just possible, but plausible. *Ibid.*; see *Iqbal*, 556 U.S. at 678 ("[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotation marks omitted)). Pleading facts "merely consistent with" liability is not enough. *Twombly*, 550 U.S. at 557.

The Court made clear that assessing plausibility is an inherently "context-specific" inquiry. *Iqbal*, 556 U.S. at 678-679. To decide whether a claim is plausible, judges should consider the factual allegations in the complaint, relevant legal principles, and the historical setting within which the claim arises. *Twombly*, 550 U.S. at 564-567. The court should focus on the well-pleaded facts, and disregard legal conclusions. *Iqbal*, 556 U.S. at 678. The court also should consider "obvious alternative explanation[s]," especially where "the complaint itself gives reasons to believe" that the challenged conduct is consistent with legal action. *Twombly*, 550 U.S. at 567-568.

In *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409 (2014), the Court applied *Twombly* and *Iqbal* to an ERISA fiduciary-breach claim. The plaintiffs had alleged that an employer breached its fiduciary duties in investing in the company's own stock for its retirement plan. *Id*. at 412. The Court rejected the view that investment in a company's own stock is presumptively prudent. *Id*. at 418-419.

The Court reiterated that plausibility depends on context: "Because the content of the duty of prudence

turns on 'the circumstances * * * prevailing' at the time the fiduciary acts, [29 U.S.C.] 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." *Dudenhoeffer*, 573 U.S. at 425. The Court then articulated principles for courts to use in assessing the plausibility of fiduciary-breach claims. As particularly relevant here, the Court explained that a plaintiff alleging that a fiduciary acted imprudently must identify an "alternative action" a fiduciary plausibly would have taken under the circumstances. *Id.* at 428. A plaintiff also must plausibly allege that a prudent fiduciary in the same circumstances "would not have viewed" the alternative to the challenged action as "more likely to harm the [plan] than to help it." *Ibid.*; see *Amgen Inc.* v. *Harris*, 577 U.S. 308, 311 (2016) (per curiam).

The Court recognized that several courses of action can be prudent, and that a plaintiff must plead facts demonstrating that it is reasonable to think that comparable fiduciaries in the same circumstances could not have agreed with the defendant. *Dudenhoeffer*, 573 U.S. at 425. Assessing whether a complaint meets this standard requires "careful, context-sensitive scrutiny of a complaint's allegations." *Ibid.*

II. The Complaint Here Does Not Plead Plausible ERISA Fiduciary-Breach Claims

The complaint in this case spans hundreds of paragraphs and includes many different theories of imprudence, several of which contain multiple sub-parts. JA 34-179. It is typical of those that have been filed against universities in recent years. In many of those cases, although the complaints included a wide variety of allegations, the plaintiffs abandoned some

claims and narrowed others over the course of the litigation. Most of those cases have culminated in settlement or in judgments in the defendants' favor.[2]

Petitioners focus on three ways that respondents supposedly failed to act prudently: by using multiple recordkeepers for Northwestern University's retirement plans, by failing to offer institutional-class shares of certain funds, and by including too many investment options. Each of petitioners' claims fails to plead the facts necessary to raise a plausible inference of liability.

A. The Complaint Does Not Plead A Plausible Recordkeeping Claim

Petitioners' first theory of imprudence focuses on the amounts paid for plan recordkeeping. "Recordkeeping" refers to a variety of administrative services plans require to track contributions, investment allocations, and manage distributions. Pet. App. 4a-5a.

Petitioners' recordkeeping allegations do not account for the unique considerations that apply to a plan that offers TIAA annuities. Petitioners claim that the fees the plans paid for recordkeeping were too

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[2] In *Sacerdote* v. *New York University*, for example, the Second Circuit affirmed a judgment for defendants on recordkeeping and investment claims. Although the court permitted a share-class claim to proceed, it emphasized that discovery "may turn out to be minimal * * * before the claim is dispensed with." 9 F.4th 95, 111 (2d Cir. 2021). In *Cunningham* v. *Cornell University*, the court granted the defendants' motions for summary judgment in large part, with the exception of a partial share-class claim that settled for $225,000 to avoid the expense of trial. No. 16-cv-6525, 2019 WL 4735876 (S.D.N.Y. Sept. 27, 2019) (summary judgment order); 2020 WL 8212936 (S.D.N.Y. Dec. 22, 2020) (final approval and judgment, appeal filed Jan. 19, 2021).

high, and that a prudent fiduciary would have consolidated recordkeepers, obtained competitive bids, and negotiated with existing service providers to save money. Pet. Br. 32-35. This is just speculation. Petitioners point to no similarly situated plans that paid lower recordkeeping fees than the Northwestern University plans; instead, they point to *differently* situated plans that allegedly paid less. And petitioners' own allegations show that it is unlikely that respondents could have reduced recordkeeping fees significantly without making substantial changes to the plans.

1. University plans are unique because of their historical focus on annuity investments

A key feature of many university retirement plans is that they have significant investments in annuity options. An annuity effectively is an insurance policy. "Under a classic fixed annuity, the purchaser pays a sum certain and, in exchange, the issuer makes periodic payments throughout, but not beyond, the life of the purchaser." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins.*, 513 U.S. 251, 262 (1995). A variable annuity is similar, except the value of the lifetime income stream changes based on the performance of the underlying investments. *SEC* v. *Variable Annuity Life Ins.*, 359 U.S. 65, 69-70 (1959). The plans here offered fixed and variable annuity options from TIAA. JA 83-85 (¶¶ 110-118).

Annuities have been central to retirement planning in higher education for over a century. In 1918, the Carnegie Foundation founded the Teachers Insurance and Annuity Association, now known as TIAA, which offered annuity options designed specifically for

educators and higher education retirement plans. In 1942, Congress bestowed tax-preferred status to contributions by charitable organizations toward their employees' annuities. Pub. L. No. 753, Ch. 619, § 162, 56 Stat. 798, 862 (1942). In 1958, Congress enacted Section 403(b), defining the amounts that could be contributed to so-called "tax-sheltered annuities." Pub. L. No. 85-866, § 23, 72 Stat. 1606, 1620-21 (1958) (codified at 26 U.S.C. § 403(b)). Indeed, it was not until 1974 that Congress permitted 403(b) plans to offer investments *other* than annuities. Pub. L. No. 93-406, § 1022(e), 88 Stat. 829, 1072 (1974).

Annuities have proven very popular with university employees. Generations of faculty and staff have used annuities to ensure a safe, stable retirement, and many more employees continue to rely on these options today. In contrast to corporate 401(k) plans, where the use of annuities is comparatively rare, as of 2017, over two-thirds of 403(b) retirement plans offer annuities as investment options, and annuities comprised about 40% of the assets of large 403(b) plans.[3]

Plans that offer annuities are more complex to recordkeep than plans that offer other investment lineups. In particular, as petitioners admit, plans that offer the TIAA Traditional Annuity—like the plans here—*had* to use TIAA to recordkeep those assets. JA 78 (¶235). That makes it difficult for those

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[3] BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans, 2017 at 2 (Jan. 2021) (ICI Profile), https://perma.cc/K978-NDMS; Plan Sponsor Council of Am., 2017 403(b) Plan Survey tbl.58 (2017), available at *Sacerdote* v. *N.Y. Univ.*, No. 16-cv-06284, Doc. 134-5 (S.D.N.Y. Jan. 10, 2018); Deloitte, Defined Contribution Benchmarking Study 20 (2017), https://perma.cc/45NS-RDH7.

plan fiduciaries to use a single recordkeeper other than TIAA or to cut recordkeeping costs.

2. *Petitioners' recordkeeping claim does not plausibly allege a fiduciary breach*

Petitioners assert that a prudent fiduciary would have selected a single recordkeeper for the plans because a single recordkeeper is cheaper than multiple recordkeepers. Pet. Br. 32. That ignores the fact that plans that offer TIAA annuities often used multiple recordkeepers to provide both TIAA annuities and other investments; at the time relevant to the complaint, no single vendor could provide recordkeeping for all of those investment options. The complaint itself acknowledges this reality because all of the examples it offers of universities that consolidated to a single recordkeeper did so by making "dramatic overhauls" of their plans, JA 73 (¶ 92), eliminating TIAA annuities or other investment options.

The allegations in the complaint show how respondents would have had to radically transform the plan to use only one recordkeeper. Petitioners identify a handful of schools that allegedly lowered recordkeeping costs by consolidating recordkeepers at the time of this lawsuit. Yet of the schools petitioners describe, only Caltech was able to keep its TIAA annuities while consolidating to a single recordkeeper (TIAA), and that came at a cost—the plan had to give up its Fidelity mutual funds. JA 77 (¶ 97).

Nothing in ERISA requires a fiduciary to eliminate desired investments just to try to bring down recordkeeping costs. Pet. App. 16a. As one court put it, allegations that "the Plans could be transformed from what they are to something else" do not state a claim for breach of the duty of prudence. *Wilcox* v.

Georgetown Univ., No. 18-cv-422, 2019 WL 132281, at *12-13 (D.D.C. Jan. 8, 2019). That is consistent with the law of trusts, which recognizes that "[v]aried approaches to the prudent investment of trust funds" are "permitted by the law." Restatement (Third) of Trusts § 90 cmt. f (2007).

Further, even if plan fiduciaries wanted to eliminate TIAA annuities, it would not be easy and would not necessarily save costs. Until recently, many annuities were structured as individual contracts between the participant and the annuity provider. That makes it more difficult for fiduciaries to make changes to the plans; plan fiduciaries cannot simply replace a TIAA annuity option with a different investment option because the TIAA annuity is held by the participant, rather than the plan itself. *Sacerdote* v. *New York Univ.*, 328 F. Supp. 3d 273, 302-304 (S.D.N.Y. 2018). In the mid-2000s, TIAA started offering annuities through group contracts controlled by the plan sponsor, *ibid.*, but university plans continue to hold substantial legacy assets. If plan fiduciaries remove TIAA annuities as available investment options going forward, they still would have recordkeeping costs for the plan's legacy investments, and those costs often are higher than for plans that still offer TIAA annuity options.[4]

Petitioners also allege that respondents "could have" tried to lower rates by soliciting bids from other

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[4] *E.g.*, Pepperdine University Retirement Plan Committee Minutes (Sept. 27, 2013), available at *Vellali* v. *Yale Univ.*, No. 16-cv-01345, Doc. 281-91 (D. Conn. Dec. 4, 2020) (noting that the plan's recordkeeping costs for frozen TIAA annuities would be lower if the plan allowed new investments); JA 74 (¶ 94) (describing Pepperdine's 2009 plan consolidation project).

recordkeepers. Pet. Br. 33. But soliciting bids is time consuming and wasteful when no other recordkeepers can service the plan as currently constituted. Since no one other than TIAA could recordkeep the plan's TIAA annuity investments, spending participant money on soliciting bids from other recordkeepers for those investments would not be prudent. *E.g.*, *Acosta* v. *Chimes D.C.*, *Inc.*, No. 15-cv-3315, 2019 WL 931710, at *7, *19 (D. Md. Feb. 26, 2019) (defendants acted prudently when "given the few choices available, * * * they believed that sending out a formal RFP did not make practical sense").

In short, allegations that a few universities reduced recordkeeping costs by transforming their plans do not plausibly suggest that every *other* university that reached a different conclusion was imprudent. After weighing all of the relevant considerations, plan fiduciaries may choose to consolidate recordkeepers, eliminate annuities, and streamline their plans, or they may choose not to do that. ERISA gives them flexibility to make the best decisions for their institutions and participants; it does not require a school to follow another school's course merely to lower administrative costs.

B. The Complaint Does Not Plead A Plausible Share-Class Claim

Petitioners' second theory focuses on the fees charged by certain mutual fund options on the plans' investment menu. Investors who purchase mutual funds pay fees to the fund provider as disclosed in the prospectus; providers sometimes offer different "share classes" of a fund that charge different levels of fees. JA 99 (¶ 156). Petitioners argue that it is imprudent

to offer higher-cost "retail" shares of mutual funds because lower-cost "institutional" shares of the fund will save participants money. Pet. Br. 29-32.[5]

1. The complaint does not allege facts showing that lower-cost shares were available

Petitioners allege that because the plans were large, lower-cost share classes must have been "readily available." Pet. Br. 30. But alleging that lower-cost versions of investments exist in the market is insufficient to show that respondents breached their duty of prudence by not obtaining them for these plans. Without facts demonstrating that the investments were available to these specific plans, petitioners cannot show that a prudent fiduciary in respondents' position would have chosen those investments.

Petitioners do not plead the necessary facts. Indeed, although petitioners offer a long list of funds supposedly offered as lower-cost share classes, their complaint does not identify *any* similarly situated schools that offered the lower-cost versions of these funds during the period in question. JA 100-117 (¶¶ 161-165). Institutional-class shares are not always available; many, for example, require large minimum investments. JA99 (¶ 158); Resp. Br. 37-38. Because petitioners do not allege facts to show that

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[5] Petitioners rely on *Tibble* v. *Edison International*, 575 U.S. 523 (2015), but that case does not hold that offering retail-class shares is *per se* imprudent. The Ninth Circuit rejected the plaintiffs' "broadside against retail-class mutual funds." *Tibble* v. *Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013). This Court then "express[ed] no view" on the prudence requirement, instead only addressing an issue regarding the statute of limitations. 575 U.S. at 530-531.

these investments actually were available to these respondents, their claim of imprudence fails at the outset.

2. The complaint fails to plausibly allege that lower-cost shares would have benefitted the plan

Plans pay for recordkeeping and other administrative services in a variety of ways. Some pay for these services directly, through fixed payments assessed against individual accounts. Others pay these fees indirectly through revenue sharing, using fees assessed on the plan's individual investment options. Still others use a combination of those methods. JA 55-56 (¶¶ 60-61). As respondents note, the structure used to compensate recordkeepers has implications for what types of share classes a plan will offer. Resp. Br. 42. And petitioners themselves acknowledge that retail shares cost more than institutional shares because retail shares include a fee "attributable to revenue sharing"—*i.e.*, a portion of the higher fee for a retail share goes to the recordkeeper under the revenue sharing arrangement. JA 53 (¶ 56).

The plans here paid recordkeeping fees through revenue sharing. JA 94-95 (¶ 144). The practice of revenue sharing "violates no statute or regulation," *Hecker* v. *Deere & Co.*, 556 F.3d 575, 585 (7th Cir. 2009), and petitioners do not challenge the decision to pay for recordkeeping through revenue sharing, conceding that it is "not a *per se* violation of ERISA." JA 57 (¶ 65). Plan fiduciaries may choose to use revenue sharing to pay asset-based recordkeeping fees for a variety of reasons. For example, it benefits participants with low account balances, because for them, a direct per-participant recordkeeping fee would represent a

much larger percentage of assets than an asset-based fee.

Because retail shares are used to pay for recordkeeping in a plan with revenue sharing, the use of those shares, without more, is not imprudent. Institutional shares generate less revenue than retail shares because their fees are lower. If the fees do not reach a minimum amount for recordkeeping, the plan will have to "make up the shortfall through additional direct payments." JA 57-58 (¶ 66).[6] For that reason, in a plan that uses investment revenue to pay its service provider, participants "will not receive a sustained benefit" from a decrease in investment fees. JA 57-58 (¶ 66). In that circumstance, lower-cost share classes do not necessarily lower total plan costs; instead, they may simply change *how* the plan costs are collected.

The plans' use of revenue sharing provides an "obvious alternative explanation," *Twombly*, 550 U.S. at 567, for the use of retail-share classes here. Petitioners want the Court to infer that respondents acted imprudently by not choosing institutional-class shares. But without further factual allegations showing that lower-cost shares were available and would benefit participants, that is not a reasonable inference to draw. This alternative explanation undercuts the

[6] See also, *e.g.*, T. Rowe Price, *401(k) Fees and Fiduciary Responsibility What Plan Sponsors Need to Know* 6 (Nov. 2011), https://perma.cc/U9JF-UGD9 ("[S]ponsors need to understand that shifting assets to lower-cost vehicles may reduce the third-party payments from fund managers used to cover plan administrative costs. This could lead to higher fixed dollar fees and/or a decrease in plan services.").

speculative inference that respondents did not have a prudent process for addressing share classes.

C. The Complaint Does Not Plead A Plausible Too-Many-Options Claim

Petitioners' last theory contends that the plans' investment menu was too large—that participants had too much choice. As respondents note, this theory is related to petitioners' second theory about share classes; petitioners contend that using too many options violates ERISA because it prevented the plans from qualifying for institutional share classes. Resp. Br. 36-37.

Petitioners' "too much choice" theory ignores the broad discretion afforded to fiduciaries to select investment options that best serve their participant population; indeed, ERISA encourages giving participants many choices. Further, petitioners do not plead any plausible harm from having a wide variety of options.

1. The claim ignores the broad discretion ERISA affords to fiduciaries

Investment professionals and fiduciaries may debate the optimal size of a plan's investment menu, and fiduciaries can and do reach different conclusions on that question. However, nothing in ERISA requires a fiduciary to pick a particular number of investment options. ERISA encourages choice by providing that fiduciaries shall not be liable for "any loss" that "results from" a participant or beneficiary's "exercise of control" over their own account. 29 U.S.C. 1104(c)(1)(A)(ii). ERISA also encourages providing a broad range of investment options: It requires fiduciaries to diversify plan investments to minimize the risk of large losses unless doing so would be clearly

imprudent. 29 U.S.C. 1104(a)(1)(C). In promulgating regulations under these provisions, the Department of Labor sought to give plan sponsors "broad latitude" and did want to "limit the flexibility in plan design intended by the regulation." Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46906, 46919 (Oct. 13, 1991).

Many participants want choice. It is common for 403(b) plans to include a wide variety of investment choices; large 403(b) plans average over 75 options and over 35 "core" options (defined as those holding at least 0.5 percent of plan assets) in their investment menus. ICI Profile 26-27 Exs. 2.1 & 2.2. Also, 403(b) plans commonly offer multiple types of investments options in a given asset class. *Id*. at 31 Ex. 2.6. In short, choice "is the centerpiece of what ERISA envisions for defined-contribution plans." *Tibble*, 729 F.3d at 1134-35. A fiduciary that "le[aves] choice to the people who have the most interest in the outcome * * * cannot be faulted" for doing so. *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 673-674 (7th Cir. 2011).

2. The complaint fails to plausibly allege that petitioners were harmed

Petitioners' claim also fails because they do not allege any concrete way in which they have been personally harmed by a menu that included too many funds.

Petitioners first suggest that offering many funds means that a plan may be unable to offer lower-cost investments that could be available if the plan invested its assets in fewer funds. Pet. Br. 35. This claim is nothing but speculation. Besides, ERISA does

not require a plan to offer the investments a particular plaintiff desires. Just as a prudent fiduciary need not eliminate TIAA annuities valued by some participants to save on recordkeeping costs, a prudent fiduciary also need not eliminate investments that some participants prefer so that others can obtain a slightly cheaper share class for particular investments. That is especially true when, as here, participants could select low-cost share classes elsewhere on the investment menu. See Pet. App. 19a.

Petitioners also suggest that having too many funds could create "participant confusion." Pet. Br. 36. But they do not allege that they actually were confused or that they could not obtain the investments they wanted. Nor do petitioners allege that respondents failed to give participants the information they need to make reasonable decisions about asset allocation. See *Loomis*, 658 F.3d at 671 ("Both Exelon and the funds distribute literature and hold seminars for the participants, educating them about how the funds differ and how to identify the low-expense vehicles.").

III. Providing Additional Guidance On Fiduciary-Breach Claims Will Benefit Lower Courts And Fiduciaries And Serve ERISA's Purposes

A. The Court Should Offer Further Guidance For Assessing Fiduciary-Breach Claims

The claims in this case are typical of those raised in the many other ERISA cases against universities. An analysis of petitioners' claims reveals several principles that can help guide courts in separating plausible claims from implausible ones.

1. A plaintiff must allege an available alternative course of action

First, a plaintiff claiming that a fiduciary acted imprudently by following a certain course must allege facts sufficient to show an "alternative action the defendant could have taken." *Dudenhoeffer*, 573 U.S. at 428. For example, if the plaintiff claims that a fiduciary acted imprudently by selecting a given investment, as a starting point the plaintiff must provide a valid comparator that is materially similar and that the fiduciary could have chosen instead to satisfy the plan's aims. *Meiners* v. *Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018).

In this case, petitioners allege that respondents should have included certain institutional-class shares for certain investments, yet they do not even allege that those investments were available to Northwestern (or to any similarly situated university). In other cases, plaintiffs have claimed that universities should have offered investment A as an option rather than investment B. *E.g.*, *Davis* v. *Washington Univ. in St. Louis*, 960 F.3d 478, 483-486 (8th Cir. 2020). To plead a claim like that, the plaintiffs would need to allege facts to show that the two investments are similar in relevant respects. "Comparing apples and oranges is not a way to show that one is better or worse than the other." *Ibid.* The point is that plaintiffs cannot build a fiduciary-breach case based on hypotheticals; they need actual valid comparators.

2. A claim of imprudence must be assessed in the context of the plan as a whole

Second, a claim of imprudence should be judged in light of the plan as a whole, including the constraints on fiduciaries. That is what it means to give "context-

sensitive scrutiny" to a complaint's allegations. *Dudenhoeffer*, 573 U.S. at 425. The ultimate question is whether a reasonable fiduciary, in the same position as the defendant, could have made the same decisions. *Id.* at 430. As part of that inquiry, plaintiffs have to account for *all* aspects of the plan, not just the costs of a single investment option. There are "simply too many relevant considerations for a fiduciary" for a "bright-line approach to prudence to be tenable." *Tibble*, 729 F.3d at 1135.

For example, for the recordkeeping claim in this case, petitioners ignore the fact that the plans as constituted required two recordkeepers, because only TIAA could recordkeep TIAA annuities. A court evaluating a complaint with that kind of allegation should account for the overall plan design and plan constraints, because they are part of "the circumstances then prevailing." 29 U.S.C. 1104(a)(1)(B).

3. Many courses of action can be prudent

Third, there can be a variety of prudent courses of conduct in a given situation. Retirement plans offer a variety of investment options and services, are responsive to a various constituencies, and compensate service providers using different compensation structures. In all of these domains, ERISA does not impose a "duty to take any particular course of action if another approach seems preferable." *Chao* v. *Merino*, 452 F.3d 174, 182 (2d Cir. 2006).

Here, for example, petitioners argue that the plan provided too many investment options. Nothing in ERISA requires a fiduciary to choose an investment menu with twenty options as opposed to some other number; ERISA gives fiduciaries the discretion to determine what options would best serve the needs of

plan participants and beneficiaries. Even if petitioners would prefer to have fewer options, fiduciaries must take "impartial account" of the interests of all participants, not just a handful. *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996). It is the fiduciaries' job to weigh all of the competing considerations and make a decision.

4. Prudence is not assessed in hindsight

Fourth, and finally, prudence is not assessed in hindsight. See *Dudenhoeffer*, 573 U.S. at 425 (prudence turns on the circumstances prevailing "at the time the fiduciary acts"); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011) (courts should "judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight" (internal quotation marks omitted)).

Here, petitioners allege that respondents later made changes to reduce the number of investment options or lower recordkeeping fees. See Pet. Br. 37, 39. But the fact that respondents later made changes does not show that they acted imprudently at the time they made their decisions. As petitioners note, recordkeeping fees across all plans "have declined significantly in recent years" due to a variety of factors. JA 58 (¶ 68). That respondents could not negotiate those lower rates earlier, at a time when the market was meaningfully different, does not make their initial action imprudent.

Similarly, plaintiffs often allege that fiduciaries acted imprudently by choosing funds that ultimately failed to perform well. Petitioners included those types of allegations in the complaint here, JA 133-150 (¶¶ 185-215), but have since abandoned them. The

fact that one fund ultimately did not perform as well as another does not show the initial choice was imprudent. A plan administrator is not expected to be "prescien[t]," *St. Vincent*, 712 F.3d at 716, or outperform the market in choosing plan investments. *Dudenhoeffer*, 573 U.S. at 426-427.

B. Providing Additional Guidance On Fiduciary-Breach Claims Will Preserve ERISA's Careful Balance

As this Court recognized in *Dudenhoeffer*, motions to dismiss serve the "important task" of ensuring that litigation does not upset ERISA's "careful balancing" between protecting participants and beneficiaries and encouraging the creation of retirement plans. 573 U.S. at 424-425. Offering guidance on the pleading standard that applies to fiduciary-breach claims will further this goal in several ways.

1. Clarifying the pleading standard will reduce meritless lawsuits

Clarifying the pleading standard will reduce litigation costs and avoid wasteful litigation. As the *Twombly* Court explained, the plausibility requirement "avoid[s] the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence." 550 U.S. at 559 (internal quotation marks omitted). Encouraging district courts to undertake a rigorous plausibility inquiry will ensure that a plaintiff with "a largely groundless claim" cannot force the district court and the parties to waste time and money on discovery or force a settlement. *Id.* at 557-558.

In the New York University case, for example, after the parties had spent millions of dollars on discovery, the plaintiffs' recordkeeping expert admitted that

his claimed cost savings were illusionary, and the court later granted judgment to the defendants on the recordkeeping claim. The court asked the expert, "[A]re you aware of any instance where a single record keeper, other than the place where a fixed annuity started, offered and provided a per-participant fee for managing the entirety of the investment relationship that included another entity's fixed annuity?" Trial Tr. at 906, *Sacerdote* v. *N.Y. Univ.*, No. 1:16-cv-6284, Doc. 332 (S.D.N.Y. Apr. 19, 2018). The expert was not aware of any such case, prompting the court to remark that the plaintiffs' allegations were based only on "a hypothetical fee" that never happened "in the history of time." *Ibid.*

The significant costs that defendants incur in litigation impacts universities directly and indirectly, through legal fees, insurance costs, and more. Universities have finite resources, and their resource constraints have become even more acute during the COVID-19 pandemic. See Paul N. Friga, *How Much Has Covid Cost Colleges? $183 Billion*, Chron. Higher Educ. (Feb. 5, 2021), https://perma.cc/MS6R-F4Y8. They are seldom in a position to pass on these expenses, which means that students, faculty, researchers, and staff all are worse off when meritless lawsuits proceed to discovery.

2. Clarifying the pleading standard will encourage service by committed volunteers

Clarifying the pleading standard will encourage qualified individuals to serve as fiduciaries. This Court recognized in *Iqbal* that discovery is not only extraordinarily expensive, but it diverts the parties' attention and resources. 556 U.S. at 685 (explaining

that "it is counterproductive" to the "the formulation of sound and responsible policies" to require "the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed").

That is certainly true in the university context. University fiduciary committees are staffed by volunteer faculty, administrators, and benefits personnel. *E.g.*, JA 44 (¶ 32). Those individuals work closely with, and often are, plan participants. They endeavor to discharge their duties in good faith and full compliance with the law. When plaintiffs bring lawsuits challenging their decisions, those individuals can easily find themselves as named defendants in class action litigation, where they face millions of dollars in potential liability. "Even though indemnification agreements exist for these individual members, as long as they are party to the suit they will be required to disclose this litigation in personal financial transactions." *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 341 (3d Cir. 2019) (Roth, J., dissenting in part). Subjecting these individuals to multi-year lawsuits significantly affects their lives, especially when they have been accused of breaching their fiduciary duties to other colleagues on campus.

These are not hypothetical risks. Petitioners here named nine individuals who helped to oversee the plans. Pet. Br. 8. And plaintiffs in other university cases have named a dozen or so individuals as well.[7] In the lawsuit brought against Cornell University, the plaintiffs sought to add almost thirty individuals as defendants, prompting the district court to ask why

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[7] See, *e.g.*, Second Am. Compl., *Tracey* v. *Mass. Inst. of Tech.*, No. 16-cv-11620, Doc. 98 (D. Mass. Mar. 1, 2018).

that made sense, especially when the individuals "served on a committee at their employer's request," and adding them as defendants "has the tremendous power to harass these individuals because they will be required to list the lawsuit on every auto, mortgage or student financial aid application they file." Mem. and Order at 1, *Cunningham* v. *Cornell Univ.*, No. 1:16-cv-06525, Doc. 122 (S.D.N.Y. Jan. 19, 2018).

Unpredictable fiduciary liability will discourage thoughtful individuals from agreeing to service on university committees, undermining the good governance that petitioners claim to pursue. Service by members of the university community is vital to ensure that all stakeholders have adequate representation and that plans remain focused on the evolving needs of participants.

3. Clarifying the pleading standard will ensure that fiduciaries make decisions based on participants' interests

Finally, clarifying the pleading standard will serve the interests of the participants petitioners seek to represent. University plan fiduciaries take their legal obligations seriously. Effective in 2009, new IRS regulations placed "greater responsibility on the 403(b) plan sponsor to maintain the plan." Adv. Council on Employee Welfare & Pension Benefit Plans, *Current Challenges & Best Practices for ERISA Compliance for 403(b) Plan Sponsors* 9 (Nov. 2011), https://perma.cc/73EB-T5QG; see also JA 72-73 (¶¶ 90-91). In keeping with those obligations, university fiduciaries regularly review investment lineups, recordkeeping and other arrangements, and retain outside consultants where appropriate, to ensure that

their retirement plans offer a cost-effective mix of services and investment options for their circumstances.

Changes to university plans should be driven by fiduciaries' careful assessments of what is best for plan participants and beneficiaries, not the opinions of plaintiffs who disagree with a fiduciary's assessments. For example, participants in university plans are familiar with and trust annuities as a means to achieve a stable retirement income. Many participants depend on them and value their unique lifetime income guarantee. Exposing fiduciaries to liability because they decided to offer or retain these products will jeopardize the ability of plans to offer those desirable investments.

Likewise, many participants enjoy having a range of investment options, with the opportunity to select options from different providers, investment strategies, and fee levels according to each participant's individual investment philosophy and needs. Even as fiduciaries consider whether to streamline their core plan offerings, they may choose to offer options that permit participants to invest in thousands of mutual funds or individual securities. 29 C.F.R. 2550.404a-5(c)(1)(i)(F); *Hecker*, 556 F.3d at 578; JA86-87 (¶ 128). ERISA permits plan fiduciaries to make these choices according to the interests and needs of their participant base.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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