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

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BRIEF OF *AMICUS CURIAE* COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Committee on Investment of Employee Benefit Assets Inc. (CIEBA) is a group of over 100 of the country's leading Chief Investment Officers who collectively manage over $2 trillion in assets, split almost evenly between defined-benefit and defined-contribution plans. As such, CIEBA members are responsible for managing a substantial portion of the assets held in the

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[1] Petitioners' counsel of record and respondents' counsel of record have filed blanket consents to all amicus briefs. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

private-sector retirement system and have a direct interest in its effective regulation.

Advocating for sound regulation of the nation's private-sector retirement system is one of CIEBA's core missions. Its members—and the approximately 17 million plan participants and beneficiaries they serve—stand to lose if the type of litigation tactic Petitioners attempt here is allowed to succeed. Virtually every plan would face the very real prospect of perpetual litigation if that were to occur. CIEBA recognizes the need for regulation of ERISA plans, but it is well-positioned to opine on the real-world consequences of the kind of lawsuit-driven harassment Petitioners urge the Court to endorse. With its wealth of real-world experience, CIEBA speaks with authority on these matters and can demonstrate why the careful ERISA pleading standard that Congress intended better serves the interests of all.

SUMMARY OF ARGUMENT

Careful pleading-stage scrutiny is critical for ERISA claims. Defendants face enormous settlement pressure once an ERISA class action survives a motion to dismiss, meaning that juncture is often the make-or-break moment in the case. For this and other reasons, the Court has emphasized the need for a searching motion-to-dismiss framework in the ERISA context—with respect to both standing and the merits. Recent precedents have done much to erect a fair, clear pleading standard that separates potentially valid claims from nuisance suits. But more work is needed to finish the job. This case presents the Court with an opportunity to clarify how existing pleading requirements apply to the newly dominant strain of ERISA claims—those alleging that plan investment options charge excessive fees to participants. This Court's ERISA case law—and cases from analogous fee-challenge contexts—provide valuable guidance for this endeavor. In setting forth a straightforward screening rule for the 12(b)(6) stage, this Court will advance ERISA's noble aims while also ensuring that abusive, meritless claims meet a swift end before they can do any additional harm—harm that ultimately raises costs for plan participants and employers alike.

ARGUMENT

I. THE COURT SHOULD REINFORCE THAT ERISA'S CAREFUL PLEADING REQUIREMENTS—WITH RESPECT TO BOTH STANDING AND THE MERITS—APPLY TO EXCESSIVE-FEE CHALLENGES TO DEFINED-CONTRIBUTION PLANS

This Court has identified "the motion to dismiss for failure to state a claim" as an "important mechanism for weeding out meritless [ERISA] claims." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014). Courts must undertake "careful, context-sensitive scrutiny of a complaint's allegations" to "divide the plausible sheep from the meritless goats." *Ibid.*

A. The Court should further elaborate on the pleading-stage scrutiny that governs ERISA cases. It did so in one respect in *Thole* v. *U. S. Bank N.A.*, 140 S. Ct. 1615 (2020), which focused on an ERISA plaintiff's need to demonstrate Article III standing. The plaintiffs in *Thole* lacked standing because their defined-benefit plan would pay them the same amount regardless of whether they prevailed on their ERISA claims:

> Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to lose this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny

> less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit.

Id. at 1619.

The same standing defect can manifest for plaintiffs in defined-contribution plans. To be sure, it may be more straightforward in some cases for a plaintiff in a defined-contribution plan to tie a breach of fiduciary duty to an actual injury. But that jurisdictional work must nonetheless be done. For example, if the alleged breach consists of the inclusion of one or more allegedly imprudent investment options, then a plaintiff must plead (and eventually prove) that he invested his funds in those options. Participants who steer clear of the allegedly imprudent investment options suffer no concrete harm. None of those plan participants would have Article III standing to bring an ERISA claim for that breach of fiduciary duty.

Further narrowing the class of potential plaintiffs, a proper plaintiff not only must hold the alleged imprudent investment, but also must suffer actual monetary harm because of it. A plaintiff who profits because the allegedly imprudent investment option happens to have a good run lacks standing to sue. Indeed, the plaintiff must plausibly allege that he would have invested in a *better-performing* option had the allegedly imprudent option been omitted.

Here, Petitioners must demonstrate standing for their bevy of ERISA complaints. They must show that the choice to collect recordkeeping fees via expense ratios, the inclusion of retail-class funds, and the allegedly overly wide array of investment options caused them actual harm. Yet Petitioners' complaint lacks plausible allegations of particularized harm from any of those alleged breaches. And it is by no means obvious that the alleged breaches harmed them.

Taking each alleged breach in turn, Petitioners may have benefited from the collection of recordkeeping fees via expense ratios instead of through a flat fee. Perhaps they have relatively low balances in their accounts, such that the small fraction taken for recordkeeping expenses would be less than the proposed flat fee. Spelling that out in more concrete terms, if .05% of an expense ratio went to recordkeeping expenses, then a participant would need a balance of $70,000 to come out ahead vis-à-vis Petitioners' proposed $35 flat fee. Even if Petitioners have high balances, the particular investment options they chose may have allocated a lower portion of the expense ratio to recordkeeping expenses, such that they would still be paying less than they would under a flat-fee system. And all of that is without considering the second-order effects of switching to a flat-fee arrangement, which could include, *inter alia*, having to drop TIAA-CREF and force a host of participants—perhaps including Petitioners—to pay the steep surrender charge for their TIAA Traditional holdings. See Resp. Br. 14, 32-33. On net, those effects may well wipe out any marginal gains that Petitioners may otherwise achieve from their preferred approach to recordkeeping fees, such that Petitioners actually benefited from this alleged breach of fiduciary duty.

It is much the same regarding the inclusion of retail-class funds and too many investment options. Petitioners suffered no harm from the former unless, at minimum, they invested their funds in those retail-class options. After all, no matter how high the fees may be on a particular investment option, a plaintiff is not harmed unless he invested his funds in that option. Beyond ownership, a plaintiff must also plausibly allege that he would have been better off if the retail-class options—and any attendant benefits tied to them—had been omitted from the plan.

As for the alleged dizzying array of investment options, that causal chain is more attenuated. Petitioners must first plead and prove that the overly diverse menu of choices confused them. As a matter of course, employers aim to eliminate any risk of confusion by spending significant time and resources explaining broad investment menus through investment education and advice programs designed to help participants understand the available investment options. So, contrary to Petitioners' assumption, it is far from a given that a plan's broad menu would in fact confuse participants.

In addition, Petitioners must also show that the confusion caused them to make suboptimal investment choices. Then, on top of that, Petitioners must demonstrate that those suboptimal choices caused them actual monetary harm—*i.e.*, that absent the alleged confusion they would have selected investments that in fact performed better.

These are not mere niceties, but constitutional requirements. "There is no ERISA exception to Article III." *Thole*, 140 S. Ct. at 1622. An ERISA plaintiff "must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Id.* at 1618. Because Petitioners have not met this foundational requirement, their claims must be dismissed.

B. Turning from standing to the merits, this Court's decision in *Jones* v. *Harris Associates L.P.*, 559 U.S. 335 (2010), provides important guidance for how courts should evaluate excessive-fee ERISA claims at the pleading stage. Arising in the analogous context of a breach-of-fiduciary-duty claim under the Investment Company Act of 1940, *Jones* held that "to face liability * * * an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." 559 U.S. at 346. That standard makes sense for pleading a breach of ERISA's fiduciary duty in the fee context as well.

Indeed, ERISA—including its fiduciary duty—shares a common foundation in trust law with the Investment Company Act of 1940. The "arm's length bargaining" and "disproportionately large" concepts from *Jones* would helpfully define how the ERISA fiduciary standard applies to challenges to excessive fees.

Importing those concepts would ensure that "all relevant circumstances [are] taken into account" in this inherently context-specific inquiry. *Id.* at 347; see *Dudenhoeffer*, 573 U.S. at 425 (stating that ERISA requires a "careful, context-sensitive scrutiny of a complaint's allegations"). The "arm's length bargaining" idea focuses the analysis on where the rubber meets the road in terms of being a prudent fiduciary. Did the ERISA fiduciary negotiate a fee structure that is within the conceivable realm of arm's length bargaining? If so, then there is no imprudence and thus no claim. If not, then the plaintiff must plausibly plead that and explain why it is the case. One way—and perhaps the best way—of doing so is to demonstrate that the fees are so "disproportionately large" relative "to the services rendered" that they could not have been the product of arm's length bargaining.

As importantly, applying *Jones's* approach here would ensure courts stay within the bounds of their institutional competence. "[C]ourts are not well suited to make * * * precise calculations" regarding the optimal fee structure. *Jones*, 559 U.S. at 353. That is no less true for investment-management and recordkeeping fees in the ERISA context than it was in *Jones*. If anything, it is more so given the complexities added by the long-term service contracts that pervade this space. That feature of this unique market complicates switching providers and belies the facile comparisons among available fee structures that plaintiffs often make. The "disproportionately large" standard prevents opportunistic plaintiffs from bringing a multi-million-dollar federal case whenever a new mutual fund arrives that shaves off a few basis points in expenses. And it allows courts to do what they do best and police the outer boundaries without Monday-morning quarterbacking the fee selections of ERISA fiduciaries that arise from a highly competitive market.

II. MEANINGFUL PLEADING-STAGE SCRUTINY PROTECTS ERISA FIDUCIARIES AND PARTICIPANTS FROM NEGATIVE CONSEQUENCES

Meaningful pleading-stage scrutiny of ERISA claims is important not only as a jurisprudential matter, but also to avoid the real-world harms of runaway ERISA litigation. The past few years have seen a precipitous rise in ERISA class actions. Last year, ERISA class actions increased by 80% over the previous year, setting an all-time high. Golumbic, et al., 2020 ERISA Litigation Trends Hint At What's Ahead This Year, Law360 (Jan. 3, 2021).[2] Many of those involve the same type of excessive-fee claims that Petitioners bring here. Due to the amounts at issue and the burdens of discovery, these cases are often effectively over after the motion-to-

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[2] https://www.law360.com/articles/1339301/2020-erisa-litigation-trends-hint-at-what-s-ahead-this-year.

dismiss stage. Either the case will be dismissed and the defendant will prevail or the claims will survive pleading-stage scrutiny and the defendants will be forced to settle.

In this regard, ERISA class actions share much in common with securities class actions. This Court has repeatedly recognized that securities litigation often devolves to a level of "vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). In particular, the threat of "vexatious discovery requests" and sky-high damages awards make denial of a motion to dismiss so close to a death knell that an "extortionate settlement[]" almost inevitably follows in even weak cases. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006).

Those same structural features plague ERISA class actions. After a failed motion to dismiss, an ERISA defendant "has every incentive to settle quickly to avoid (1) expensive discovery and further motion practice, (2) potential individual liability for named fiduciaries, and (3) the prospect of damages calculations, after lengthy litigation, with interest-inflated liability totals." *Sweda* v. *Univ. of Pa.*, 923 F.3d 320, 340-341 (3d Cir. 2019) (Roth, J. concurring in part and dissenting in part). And "[t]his pressure to settle increases with the size of the plan, regardless of the merits of the case." *Id.* at 341. The concept of post-motion-to-dismiss practice is little more than a legal fiction for these cases—cases brought against employers who are voluntarily offering plans for the benefit of their employees.

The prospect of an easy payday enabled by the lenient pleading standards applied by some lower courts have fueled the boom in ERISA class actions. The consequences are already being felt. Insurers that in the past had offered liability coverage to plan fiduciaries with no or only a nominal retention (the equivalent of a deductible) are now demanding a retention of as a high as $15 million. Wille, Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market, Bloomberg Law (Oct. 18, 2021).[3] In other words, plans must now self-insure for millions of dollars in liability exposure that had previously been covered by their insurance. This increased burden to insure a plan inevitably leads an employer to reassess whether it can continue to afford the level of future contributions to participant accounts, or whether it should continue to offer a plan at all to employees in the future.

ERISA was intended to ensure the fair and prudent administration of employee retirement plans. It was not intended to empower federal judges to second-guess the fee selections of fiduciaries in a competitive market. Nor was it designed to facilitate an enormous wealth transfer from plan fiduciaries to the plaintiffs' bar, with no benefit to plan participants. Meritorious claims should prevail, but the type of cookie-cutter nuisance lawsuits that have become so prevalent must meet a swift end. Strong, clear pleading standards are the way to separate the wheat from the chaff and achieve that result. This Court has already set the proper course. It should now take the next step to address this latest species of abusive ERISA litigation.

CONCLUSION

The judgment of the court below should be affirmed.

[3] https://news.bloomberglaw.com/employee-benefits/spike-in-401k-lawsuits-scrambles-fiduciary-insurance-market.

Respectfully submitted.

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