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 THE AMERICAN BENEFITS COUNCIL AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Benefits Council (the Council) is a national non-profit organization dedicated to protecting and fostering employer-sponsored benefit plans. The Council's members are primarily large, multi-state U.S. employers that sponsor benefit plans for active and retired workers and their families. The Council's membership also includes organizations that offer services to benefit plans of all sizes. Collectively, the Council's approximately 430 members directly sponsor or provide services to plans covering virtually every American who participates in an employer-sponsored benefit program. The Council and its members have participated as *amicus curiae* in cases affecting the management and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). In this Court, those cases include *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020); *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020); and *Amgen Inc. v. Harris*, 577 U.S. 308 (2016).

The Council submits this brief to help the Court understand the practical importance of the pleading standard that applies to claims for fiduciary breach. The fiduciaries of employee benefit plans have to continually make choices about the services and invest-

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[1] Counsel for *amicus* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. All parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

ments to offer plan participants. Rarely do those decisions have a single right answer, and the considerations that fiduciaries must take into account are often in competition with each other. Fiduciaries may have to balance the level and quality of service against cost; the risk of loss against the potential for return. ERISA charges fiduciaries not with making the "right" decisions, but with reaching them prudently.

In grappling with the surge of ERISA fiduciary breach cases over the past fifteen years, courts have recognized that they are not well-positioned to substitute their judgments for fiduciaries making complex discretionary decisions. Because a range of reasonable solutions may exist for any given circumstance, courts do not find fiduciary breaches simply because a different reasonable solution could have been adopted.

Courts have aligned the pleading requirements for fiduciary breach claims with the standard applied on the merits. Consistent with this Court's decisions under ERISA and under Federal Rule of Civil Procedure 8, *see Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), courts have required complaints to set forth allegations that demonstrate an imprudent process—to plead facts showing that a reasonable process could not have produced the decisions the fiduciaries made.

The pleading standard offered by petitioners and their *amici* takes a different approach, and would allow full-blown litigation to launch merely on allegations that a different reasonable decision was possible. That standard is out of step with ERISA and with

the realities of fiduciary decisionmaking. It would also constrain plan fiduciaries' ability to make the decisions they believe would best serve the interests of their individual plans, and limit their ability to adopt innovative solutions. The Council urges the Court to reiterate the pleading instructions it has already given, which align with the statute and with the standard courts apply on the merits: a plaintiff must allege facts showing that no reasonable fiduciary could have made the decision subject to challenge.

SUMMARY OF ARGUMENT

The pleading standard for ERISA fiduciary breach claims should not permit litigation over decisions a prudent fiduciary could reasonably make. The fiduciaries of a defined contribution plan must exercise their discretion in selecting plan services and investments, weighing costs and benefits against the backdrop of various unknowns as they endeavor to help plan participants reach retirement with financial security. There are many ways to pursue that goal, and ERISA's context-driven prudence standard does not require fiduciaries to follow any single route. Fiduciaries can—and should—make decisions based on the individual circumstances of their plans.

When courts review the decisions of ERISA fiduciaries, they evaluate the sufficiency of their process, not the outcomes it achieved. That's the essence of ERISA's prudence standard—and it does not ask judges to make the kinds of judgments vested in fiduciaries. As this Court explained in *Jones v. Harris Associates, L.P.*, 559 U.S. 335 (2010), courts are not well-situated to second-guess decisions about the appropri-

ate price for a basket of services. On the merits, fiduciaries who reasonably investigated their decisions are not held liable for breach simply because they could have reasonably exercised their judgment in a different way.

Complaints asserting claims of fiduciary breach typically urge an inference of breach from the results achieved by the fiduciaries. And courts, recognizing that plan participants lack complete information about the processes applied by their plan fiduciaries, have permitted plaintiffs to proceed on implication—but only if the results cannot be explained by a prudent process. It is not enough to allege that a cheaper or better-performing option was available to the fiduciaries. If a prudent fiduciary facing similar circumstances could have reasonably made the choice subject to challenge, the complaint fails at the outset. The proper analysis is context-driven at the pleading stage just as it is on the merits: It requires courts to assess allegations that a fiduciary was legally bound to prefer the choices of the plaintiff to the ones it actually made, with a focus on process, not outcomes.

The complaint here does not meet that standard. Petitioners contend that Northwestern's process was deficient because four other universities proceeded differently. But Northwestern's fiduciaries could not possibly know what led other university fiduciaries to make different decisions, and ERISA did not require them to follow suit in any case. The Northwestern fiduciaries' choices plausibly resulted from a prudent process, and that ends the matter.

ERISA asks fiduciaries to make decisions that are sensitive to the needs of their individual plans.

Over decades of experience, the ability of fiduciaries to craft innovative, customized solutions has enriched the ability of American workers to save for retirement. The retirement plan of today can offer features and investments that did not exist fifty years ago, from target date funds to personalized management advice, because ERISA's prudence standard permits fiduciaries to chart the course they consider best for their plans. Litigation requiring fiduciaries to elevate a narrow set of considerations over all others contravenes the statute's purpose and meaning. The decision below should be affirmed.

ARGUMENT

THE PLEADING STANDARD FOR FIDUCIARY BREACH CLAIMS SHOULD NOT PERMIT LITIGATION OVER CHOICES A PRUDENT FIDUCIARY COULD REASONABLY FAVOR

A. Prudent plan administration requires fiduciaries to make complex discretionary judgments that could result in a wide range of reasonable choices.

1. The fiduciaries of a defined contribution plan are responsible for selecting the services and service providers needed for plan recordkeeping and administration, as well as the investments to be made available to plan participants. These are complicated choices. Cost is one important factor. But so are the types of services that the plan's participant population requires, or would benefit from; the level of servicing that will help participants grow their retirement savings; and the risks that adopting or forgoing

any particular option will impose on participants. Often, these factors must be balanced against each other. For reasonable fiduciaries, the decisionmaking process is not just a matter of finding the lowest price for a fungible set of services. The services a plan needs, and their costs, may vary.

In making these choices, reasonable fiduciaries may reach different decisions. ERISA plans vary because the American workplace is highly varied. Plan participants differ in their financial needs, interests, and sophistication, as well as in their technological proficiency. As a result, different plans will have different priorities, different needs, and different opportunities. Even for similarly situated plans, there may be many different paths toward achieving the basic goal of helping participants reach retirement with financial security.

A few examples illustrate the point. Plan fiduciaries need to decide whether it is worthwhile for the plan to pay for access to a call center, where knowledgeable representatives are readily available to answer questions and address concerns. Some fiduciaries may reasonably conclude that their plan's participants would greatly value being able to speak to a human being when they need assistance. Other plan fiduciaries may conclude that their plan's typical participants would rarely use a call center, because their normal mode of communication is digital. And some fiduciaries may conclude, in consideration of their participant characteristics, that a service that can save their participants time and effort is worthwhile. All of these considerations are reasonable under the

circumstances—and may lead to different decisions, with different associated costs.

The decision whether to have a plan service provider offer financial education and guidance presents a similar range of reasonable choices. Some plan fiduciaries would reasonably deem such services to be unnecessary, in light of the financial sophistication of their participants. Other plan fiduciaries would reasonably view such services as vital to the retirement health of their participants, who may not have had the opportunity to be educated on the importance of diversification or sound asset allocation principles. And some plans may have a highly diverse participant base, further complicating the determination whether the potential benefits of offering such services outweigh the additional costs they entail.

Fiduciaries may also reasonably take different approaches to the kinds of communications and education used with their plans. Considering actual participant activity observed in their plans, some fiduciaries may perceive a need for customized communications. Plan fiduciaries concerned about a high level of loan-taking among their plan's participants may choose to have a service provider offer financial education about the potential detriment of such actions to long-term retirement savings. Fiduciaries may favor targeted, customized communications to address poor asset allocations by participants who are close to retirement. Or, in a plan where participants have deferral rates lower than the fiduciaries consider optimal, the fiduciaries may authorize targeted communications to encourage additional saving. Again, as

the fiduciaries weigh whether such services are valuable to their plans, they must also decide whether the associated fees justify the cost.

The choices about services and service levels are innumerable: how much weight should a plan fiduciary put on a recordkeeper that has robust cybersecurity protections? A call center operation with multilanguage capabilities? A website with financial planning tools? An established provider with a record of high-quality service, or a start-up provider willing to offer discounts? Once the fiduciaries determine how to factor in each variable, they must then decide whether a higher fee charged by the service provider that has a better offering on each dimension is worth the additional cost.

Decisions about the investments to be offered to plan participants likewise present a range of reasonable choices. Fiduciaries must decide how many investments to offer, and at what points along the "efficient frontier" of risk and return. They must decide how much risk to tolerate in each option, including options designed for capital preservation and options offered as default investments. They must consider whether to offer options with innovative styles and objectives. Fiduciaries must decide whether to offer a "managed account" service that combines the plan options into a portfolio corresponding to a given participant's investment goals. They must decide what investment strategies to offer, and which managers of a given strategy appear situated to deliver strong performance going forward. They must decide whether to offer only passive investments (which have the virtue of low costs) or whether to also make actively

managed options available (which can present the opportunity to deliver excess performance and also protect against market declines). And, further complicating those decisions, not all investments are available to all plans. Separate accounts and certain share classes may be available only if the plan can meet the investment manager's asset thresholds. Some investments are available only to plans that utilize the recordkeeper that offers that option. In short, there is no single reasonable investment portfolio, but rather a broad range of reasonable options. Decisions about which options to offer require an exercise of discretion in view of a multitude of qualitative and quantitative factors, including the characteristics of the plan's participant base.

Even for similar services, cost questions are multi-dimensional. The range of fees available varies across plans, and over time. Plans may have different opportunities in the market at the time of negotiation, and different bargaining power. Some plans may be able to leverage a larger relationship with the service provider to the benefit of the plan. Plans may be negotiating in different regulatory or market environments. A fee that is reasonable today may have been unattainable at other points in time—or attainable only by plans that had maximum negotiating leverage. For any given plan service, there is no inherently "reasonable" fee—"reasonable" is what a diligent fiduciary is able to negotiate for that service for a particular plan at a particular point in time.

Holding constant the level and type of services and the bargaining power of the plan, some plans simply cost more to service than others. A company

comprising multiple constituent companies with multiple payroll feeds supported by different legacy systems will cost more to recordkeep than a plan with a simpler structure. The low bidder for the plan with the more complicated structure may not be the optimal choice for the plan or its participants. Similarly, where an incumbent service provider has provided strong service levels in administering a complex plan, a prudent fiduciary could reasonably conclude that transitioning to a new service provider may present downsides that are not justified by moderately lower fees. A plan fiduciary may reasonably decide, for example, that the potential disruption to participants may result in higher actual costs for all concerned if the low-cost bidder is not as adept at managing the complexities of the plan as the more expensive incumbent.

Adding to the complexity of cost determinations, there is necessarily imperfect information in the marketplace for plan services. No centralized catalog of plan costs and services permits plans to simply query the going price for a particular service for plans of a particular size. Indeed, if complete information about plan pricing were publicly available, plaintiffs' counsel in the instant case would not have needed to subpoena the California Institute of Technology in their lawsuit against the University of Southern California in order to compare the schools' respective arrangements, as they have done. *See* L.R. 37-2 Joint Stipulation Re: Plaintiffs' Mot. To Compel Cal. Inst. of Tech. to Respond to Subpoena, ECF No. 244-1, *Munro v. Univ. of S. Cal.*, No. 2:16-cv-06191-VAP-E (C.D. Cal. Oct. 19, 2021) (claiming need to show "what other

plans paid for similar services, particularly those that were administered by fiduciaries who engaged in prudent processes …. Plaintiffs estimate that the Caltech plan paid only the equivalent of $29 per participant for recordkeeping in 2013, *but require information from Caltech to confirm the accuracy of that estimate*." (emphasis added; citation omitted)).

Fiduciaries endeavor to round out that informational gap in various ways. Some issue requests for proposals (RFPs). Some engage consultants to aid them with benchmarking, leveraging the consultants' experience. Some draw on peer resources and published information (including information about public-sector plans) to discern whether their plans' fees are within the reasonable market range. Fiduciaries may reasonably choose among the multiple procedures available to collect comparative data, and may also reasonably account for the diminishing returns that a costlier information-gathering strategy offers.

Rarely is there a single correct decision about any of these choices. Rather, ERISA fiduciaries are routinely called upon to make discretionary judgments that require them to balance multiple and even competing considerations about plan services and investments.

2. ERISA's prudence standard reflects this reality. It demands a context-specific inquiry: fiduciaries must approach decisions with the care, skill, and diligence that a prudent fiduciary in similar circumstances would bring. This standard does not require them to reach any particular result. And it does not judge fiduciaries through the lens of hindsight.

Critically, ERISA does not require fiduciaries to elevate cost above all other considerations. A plan fiduciary may reasonably decide to pay more for more services, or for a better quality of service. The services used by plans vary widely, as discussed, and the fact that Plan X incurred higher fees than Plan Y on a per-participant basis for "administrative services" demonstrates precisely nothing about the relative prudence of the two plans' fiduciary committees. Those administrative services may be materially different, and Plan X and Plan Y may have had different market opportunities in negotiating them. As the Second Circuit noted in *Young v. General Motors*, 325 F. App'x 31 (2d Cir. 2009), an ERISA breach of fiduciary duty complaint cannot proceed if it "fail[s] to allege that the fees were excessive relative 'to the services rendered.'" *Id.* at 33 (quoting *Gartenberg v. Merrill Lynch Asset Mgmt*, 694 F.2d 923, 928 (2d Cir. 1982)).

That only stands to reason: a fee that is reasonable relative to the services rendered is indicative of a prudent process, which is precisely what ERISA requires. It is obviously not a breach of fiduciary duty to agree to pay more for more services—fiduciaries may reasonably conclude that the additional service (whether it's a fully-staffed help desk, or financial education, or individualized investment advice) will help plan participants save more in the long term. But it is also not a breach of duty to pay fees diligently negotiated at arm's length, even if it is ascertainable with comprehensive market information and in hindsight that some plans were able to procure a better deal for those services. *See* Resp. Br. at 26-28.

ERISA's prudence standard examines process, not results.[2]

Fiduciaries acting with the utmost prudence will therefore often have plans with different costs. Even similarly situated fiduciaries can prudently reach a range of decisions—and not all fiduciaries are similarly situated. Fiduciaries are all trying to reach the same general goal of helping their plan participants save for retirement, but pursuing that goal requires a complex balancing of costs and benefits. The decision about what basket of products and services to offer—and what a fair price for those products and services is—will be context-dependent, and requires the fiduciaries to exercise judgment. ERISA's process-based prudence standard affords fiduciaries that discretion.

B. Courts review discretionary fiduciary judgments deferentially.

When reviewing fiduciary decisions, courts do not step into the fiduciaries' shoes. Courts are not well-positioned to make those judgments in the first instance. Instead, consistent with trust law precedents, and as in the analogous context of the Investment

[2] Outcomes may matter to causation: an objectively prudent decision reached using a deficient process may mean the imprudence caused no harm to the plan. "Even if a [fiduciary] failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994) (citing *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring)).

Company Act of 1940 (the '40 Act), courts evaluating claims of fiduciary breach under ERISA accord deference to fiduciary judgments rendered using a prudent process.

1. a. "Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989). Generally speaking, "judicial review of the decisions of an ERISA trustee as of other trustees is deferential unless there is a conflict of interest." *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006). Fiduciary decisions "that involve[] a balancing of competing interests under conditions of uncertainty require[] an exercise of discretion," and ERISA does not seat fiduciaries "on a razor's edge" in exercising that discretion. *Id.* at 733; *see also Nichols v. Eaton*, 91 U.S. 716, 724 (1875) ("When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act." (quoted in *Firestone*)); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 120 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) ("Ensuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do.").[3]

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[3] A conflict may require closer scrutiny of the process—although, as this Court recognized in *Glenn*, "[t]rust law continues to apply a deferential standard

b. Courts rendering judgment on ERISA fiduciary breach claims after trial have taken care to avoid substituting their own judgment for that of the fiduciaries.[4] On fully developed records, they have consistently rejected liability based on reasonable alternative actions the fiduciaries could have taken, so long as the fiduciaries appropriately investigated their decisions and acted loyally.

For example, in *Wildman v. American Century Services, LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019), the court's trial ruling rejected claims that the fiduciary defendants acted imprudently by failing to offer index and stable value funds because "the issue is whether the [fiduciary] Defendants considered these options and came to a reasoned decision for omitting them." *Id.* at 704. Having determined that the fiduciaries gave "appropriate consideration" to whether to include those funds before deciding against, the imprudence claim was rejected "[a]lthough one could argue the benefits" of including them. *Id.* at 705. Similarly, in *Ellis v. Fidelity Management Trust Company*, 883 F.3d 1 (1st Cir. 2018), the court granted the fiduciary defendant's motion for summary judgment, declining to permit plaintiffs to prove at trial that their preferred course of action was superior to the reasonable actions taken by the fiduciary, "particularly

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of review to the discretionary decisionmaking of a conflicted trustee," even as it requires the review judge to consider the conflict "when determining whether the trustee, substantively or procedurally, has abused his discretion." 554 U.S. at 115.

[4] ERISA fiduciary breach claims, sounding in equity, are tried to the bench.

given that [the fiduciary] had introduced a wealth of undisputed evidence supporting the conclusion that it engaged in an evaluative process prior to making the [contested] decisions." *Id.* at 11. And in *Reetz v. Lowe's Cos.*, No. 5:18-cv-00075-KDB-DCK, 2021 WL __ (W.D.N.C. Oct. 12, 2021), the court ruled post-trial in favor of the fiduciary defendant finding, *inter alia*, that the defendant's process for developing and selecting the challenged fund "was reasonable for a longer term investment and in line with industry standards." ECF No. 262, at 67.

In short, when fiduciaries meet their obligations of diligence and investigation, courts do not intervene to second-guess their decisions. After all, if Congress had intended for the judiciary to render decisions for ERISA plans, there would have been no need to require the appointment of fiduciaries in the first place.

2. This Court's approach to reviewing decisions about fees under the '40 Act is instructive. The '40 Act, like ERISA, allows suits challenging the fiduciaries' decisions regarding fees. However, as this Court recognized in *Jones v. Harris Associates, LP*, 559 U.S. 335, 353 (2010), "courts are not well suited" to determining what a reasonable fee is. "Judicial price-setting does not accompany fiduciary duties." *Id.* at 352 (quotation omitted). As then-Chief Judge Breyer noted in *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), "how is a judge or jury to determine a 'fair price?'"

Because of the judiciary's institutional lack of fitness for rate-setting responsibilities, Congress has vested both the '40 Act and ERISA with alternative mechanisms for ensuring that fees are not excessive.

Both statutes place determination of the appropriate fees in the hands of named fiduciaries who are bound by a duty of loyalty and a duty of prudence to follow a sound process, subject to regulatory oversight. *See, e.g.*, *Dudenhoeffer*, 573 U.S. at 419; *Jones*, 559 U.S. at 351. Moreover, for an ERISA plan, plan fiduciaries not only are accountable to their co-fiduciaries but also are usually plan participants themselves, meaning, as a practical matter, they have to live with their choices when it comes to their own retirement savings.

Critically, the statutory mechanism that puts these decisions in the hands of fiduciaries bound by duties of loyalty means that the courts are not obliged to—and should not—attempt to make "precise calculations" that the judiciary is "professionally untrained to make" about what the correct fee should have been. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997) (quoted in *Jones*, 559 U.S. at 353). Rather, courts should give "considerable weight" to the decisions reached by fiduciary committees "even if a court might weigh the factors differently." *Jones*, 559 U.S. at 351. The alternative–a judicial determination of what fees should have been incurred by a plan, synthesizing complex determinations of what services should have been selected for that plan and what the plan's needs and opportunities were—is plainly unworkable. *See supra* at 5-11.

To be sure, ERISA fiduciaries merit deference by engaging in a robust decision-making process and acting in accordance with their duty of loyalty, disregarding any conflicting interests of the plan sponsor. This too mirrors the manner in which independent trustees of mutual funds earn their deference: they must

have a "robust" process, and they must be independent of the mutual fund adviser. *Jones*, 559 U.S. at 351; *accord Metro. Life Ins. v. Glenn,* 554 U.S. at 115 (fiduciary's conflict of interest must be taken into account in review of the fiduciary's decision, although deference is still accorded).

Courts have already recognized the extensive parallels between ERISA and the '40 Act. The Second Circuit correctly concluded that "the standard for excessive fee claims articulated in the context of the ['40 Act] [is] useful for reviewing plaintiffs' claim that excessive fees violate[] ERISA." *Young*, 325 F. App'x at 33.[5] Absent deference to the decisions of loyal fiduciaries, courts would have to "set sail on a sea of doubt." *U.S. v. Addyston Pipe & Steel Co*., 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (quoted in *Concord*, 915 F.2d at 25). The protections of the process-based prudence standard ensure they do not have to do so.

[5] The United States argues that the Second Circuit erred in *Young* because mutual fund trustees have less leverage over fees than ERISA fiduciaries do. Br. of the United States at 30 n.3. That argument would seemingly commend *more* scrutiny of mutual fund trustees, not less. In any event, the '40 Act, like ERISA, relies on process requirements, not judicial rate-setting, to ensure that fees are not excessive—inviting a parallel standard of review.

C. The pleading standard must align with the merits standard for these claims.

1. Petitioners advocate for a pleading standard that is fundamentally misaligned with the standard that courts apply on the merits.

a. Because ERISA does not hinge fiduciary liability on the outcomes of the fiduciaries' decisionmaking process, courts have recognized that plaintiffs do not plausibly allege a fiduciary breach by identifying an alternative decision that could also have been reasonable—whether it is a different fund with lower fees; or a different service arrangement; or a different array of investment options. Across a range of circumstances, applying "careful, context-sensitive scrutiny," *Dudenhoeffer*, 573 U.S. at 425, courts have recognized that plaintiffs must come forward with allegations of a fiduciary decision that cannot be explained by a prudent process. *See id.* at 429-30 (holding that a plausible allegation of breach must allege facts showing that no prudent fiduciary could have made the same decision); *accord Amgen Inc. v. Harris*, 577 U.S. 308, 311 (2016).[6]

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[6] *See also, e.g.*, *Barchock v. CVS Health Corp.*, 886 F.3d 43, 53 (1st Cir. 2018) ("[W]e see no reason to accept the plaintiffs' implicit assertion that … a decision to take the path less traveled is for that reason imprudent."); *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 718 (2d Cir. 2013) ("[I]f the complaint relies on circumstantial factual allegations to show a breach of fiduciary duties under ERISA, those allegations

This pleading standard is faithful to the Court's directions in *Iqbal* and *Twombly*, which do not permit allegations that are merely consistent with wrongdoing. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" (quotation omitted)); *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 557 (2007) ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [wrongdoing] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"). A plaintiff does not satisfy federal pleading requirements by identifying conduct that is "just as much in line with a wide swath

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must give rise to a reasonable inference that the defendant committed the alleged misconduct …." (citations omitted; cleaned up)); *Davis v. Wash. U. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020) ("For an investment-by-investment challenge …, a complaint cannot simply make a bare allegation that costs are too high, or returns are too low…. [I]t is not imprudent to provide options with differing features from which to choose, regardless of whether some perform better than others"); *White v. Chevron Corp.*, 752 F. App'x 453, 455 (9th Cir. 2018) (allegations that the defendant "could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund" did not make it "more plausible than not that any breach of a fiduciary duty had occurred").

of rational" behavior as it is with wrongdoing. *Twombly*, 550 U.S. at 554.

Courts appreciate that plan participants do not have full access to the fiduciary committee's process, and must therefore frequently rely on inferences from the outcome of the fiduciary process. But a plaintiff does not plausibly allege a fiduciary breach by showing that the fiduciaries made a decision that could have resulted from a prudent fiduciary process. The fact that other fiduciaries—or, with hindsight, the court—might have reached a different decision facing the same choice does not create a plausible inference that the process was defective, so long as the decision was one that a reasonable fiduciary could have made.

This pleading standard also aligns with the substantive ERISA prudence standard. The statute recognizes that fiduciaries facing the same problem may reasonably reach different decisions. Provided the fiduciaries land within the spectrum of reasonableness, their decisions are entitled to deference. A complaint that relies on inferences based on the outcome of the fiduciary process must therefore demonstrate that this outcome was one that would be explicable only as a result of a deficient process. It is not enough to allege an outcome that *could* have resulted from an imprudent process, and leave the rest to discovery, as petitioners and their *amici* urge. That standard is harmful as a practical matter, as discussed below. But it is also legally wrong—inconsistent with this Court's pleading precedents, and inconsistent with ERISA itself.

b. Three implications follow from these basic principles. *First*, it makes no sense to permit litigation to proceed on the mere allegation that cheaper alternatives were available. This point is not controversial: the United States agrees. Br. of the United States at 20 ("That is not to say that an ERISA plaintiff could state a claim for relief by alleging merely that alternative investment funds with lower fees than those included in a plan were available in the marketplace. A 'bare allegation that cheaper alternative investments exist,' on its own, likely does not state a claim for relief."). The existence of a less expensive recordkeeping service or a cheaper fund does not satisfy the federal pleading requirements in the context of an ERISA fiduciary breach claim. Nor should it: given the diversity of plan needs and priorities discussed above, a complaint that is premised at bottom on the availability of less expensive products or services must allege in non-conclusory fashion that the *same* services were available to *these fiduciaries* for less, and that the fiduciaries could not have had prudent reasons for the selection that they made (for example, because an investment option offered revenue sharing that could be applied to reduce the plan's recordkeeping expenses). *See Young*, 325 F. App'x at 33 (ERISA breach of fiduciary duty complaint properly dismissed where plaintiffs failed to allege that the fees were excessive relative to the services rendered). And such a pleading must include non-conclusory allegations that these same products or services were in fact available to the fiduciaries of the subject plan—not simply that they were available to some plans in some circumstances. As explained, not

all products and services (and pricing) are available to all plans. *See supra* at 9.

Second, where a complaint seeks to allege a process deficiency by relying on the outcome rather than on allegations about the process itself, the complaint does not state a claim by simply expressing disagreement with the outcome, or identifying—with the benefit of hindsight—a different choice that allegedly would have been better. The complaint must either contain a non-conclusory disloyalty claim, which itself provides reason to question the sufficiency of the fiduciaries' process; or it must offer non-conclusory allegations that the outcome was outside the bounds of reasonableness, meaning a choice that no prudent fiduciary could have favored at the time of decision. A claim against a fiduciary whose loyalty is not plausibly contested should fail if the fiduciary's decisions, judged with substantial deference, were within reasonable bounds, considered in light of the complex balancing that plan fiduciaries are required to engage in, the wide range of appropriate plan choices, and the diversity of plan needs and opportunities. The courts do not sit as rate regulators to determine the "correct" price for a basket of services, or as super-fiduciaries to strike the right balance for a retirement plan. A complaint that asks the court to assume that mantle does not state a claim. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011) ("[W]e hold the range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees—are highly relevant and readily ascertainable facts against which

the plausibility of claims challenging the overall composition of a plan's mix and range of investment options should be measured.").

Finally, a court's "careful, context-sensitive" analysis when sorting the "plausible sheep from the meritless goats," *Dudenhoeffer*, 573 U.S. at 425, must account for the practical realities of fiduciary decisionmaking. Fiduciaries will usually lack complete information about the arrangements that other plans have struck and the processes other plans have utilized, even if they enlist outside assistance to help identify and evaluate potential strategies and market options. Petitioners here accuse Northwestern of breaching its duties because *four* universities engaged in different processes and made different choices. There is no reason to assume Northwestern was aware of the approaches taken by those other universities. Counsel here had to *subpoena* one of those four universities in order to compare its arrangement to another university defendant's. *See supra* at 10-11. And even if Northwestern by happenstance had known what one or more of these institutions had done, there is no basis to infer imprudence simply because Northwestern did not follow a path chosen by those four institutions, out of all the approaches pursued by the thousands of colleges and universities in the United States. Courts must apply common sense to claims that a better alternative action was available to the fiduciaries. *See, e.g.*, *Iqbal*, 556 U.S. at 663-64.

Plan fiduciaries do not breach their duties by failing to adopt the procedures of the most innovative plans. At the same time, plans would not have the

freedom to innovate at all if litigation could attach from any decision veering from the mean. Similarly, the failure to engage in any particular process, *e.g.*, an RFP, does not state a claim where there are other well-recognized ways to obtain competitive fees, *e.g.*, retention of a consultant. Just as fiduciaries are not required to "scour the market" to identify the least expensive funds and services, *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (not least because the cheapest options may be "plagued by other problems"), fiduciaries are not required to adopt onerous fiduciary procedures over effective alternatives, under threat of being accused of lack of diligence.

In this way, the pleading standard does and should align with the standard applied on the merits. A prudent fiduciary process can result in multiple outcomes. Simply identifying an outcome that, in retrospect, is different from outcomes attained by some other fiduciaries is not sufficient to permit a court to infer imprudence if the outcome achieved by the defendant fiduciaries is also consistent with prudent considerations. A pleading that offers only that should be dismissed.

2. The interests of plans and their participants are compromised when litigation constrains fiduciary discretion.

Petitioners' pleading standard would compel fiduciaries to make decisions based on cost alone at the expense of other important considerations. Permitting litigation to proceed simply because cheaper options were available would put pressure on fiduciaries to adopt the lowest-cost services regardless of quality,

and to sacrifice services that they reasonably believe will benefit plan participants.

That standard would also limit innovation in retirement plans. New types of funds that offer additional benefits for higher expenses could not be made available, even if there were substantial interest in them among plan participants.[7] And new plan services that would address specific issues faced by specific plans (e.g., educational programing) may simply go by the wayside under threat of litigation if the costs of those services would nudge a plan's total costs above a plaintiff-preferred maximum.

The coercion imposed by litigation cannot be overstated. Plan sponsors face intense pressure to settle when cases survive the motion to dismiss, particularly when the plaintiffs assert stratospheric damages theories, as they virtually always do. These cases are also incredibly costly to defend. *See PBGC ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan,* 712 F.3d at 719 ("[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries . . ."); "*Spike in 401(k) Lawsuits Scrambles Fiduciary Insurance Market*," Benefits and Executive Comp, Oct 18, 2021 ("[T]his litigation is very, very expensive . . . and if the motion to dismiss

[7] Actively managed funds are one example, as portfolio managers develop new ways to protect investors against downside risk. Funds pursuing goals expected to advance long-term returns—like funds that prioritize companies with plans in place for climate change—are another.

fails . . . once you get into discovery it becomes very, very expensive, even for smaller plans.").

The insurance market has responded to the spike in ERISA class actions by making affordable coverage more difficult to obtain. Deductibles (or "retentions") for fiduciary policies that formerly were fairly modest are now seven figures. Premiums have increased with the volume of cases. *See id.* Insurers are now recommending that plan sponsors enhance their chances of obtaining fiduciary liability coverage by taking steps that many plan fiduciaries have avoided, such as charging plan costs to all participants as a flat per-person fee (which imposes a greater proportional fee burden on lower-paid employees, who may be discouraged from participating in the plan at all) and limiting the default investment alternative to a passive fund (a decision which likely will be second-guessed in a down market, if comparable actively-managed funds perform better). *See, e.g.*, "Experts Offer Suggestions to Mitigate Risk of Fee Lawsuits," Pensions and Investments, Oct. 4, 2021.

With limitations on fiduciary coverage and increased exposure to suit, it is also becoming more difficult for employers to induce employees—who accept the risk of personal liability when they agree to serve as fiduciaries—to assume fiduciary roles at all. Companies increasingly elect to avoid being dragged into litigation by outsourcing their fiduciary functions to independent professionals—but that only adds to the costs borne by the plans, and limits the resources available for contributions to retirement savings.

Any well-run company has a budget for benefits. Additional costs for higher insurance premiums, defense costs, or reserves for anticipated litigation will come out of that budget. Litigation that causes a company to reduce its matching contributions or to shift the plan's recordkeeping costs from the employer to the plan (as ERISA permits employers to do) may not be experienced by plan participants as an unmitigated benefit. Nothing in ERISA requires this outcome, and when every single employer-sponsored plan is vulnerable to costly litigation—as all now are—the law has strayed far from the statute's goal of encouraging employers to create and invest in employer-sponsored retirement plans. *See, e.g.*, *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) ("ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." (quotation omitted)).

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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