No. 19-1401

In the Supreme Court of the United States

APRIL HUGHES, ET AL.,

Petitioners,

v.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

The United States characterizes this case as a broad-based test of "ERISA's duty of prudence." U.S. Br. 21. But at this point it is a fact-specific pleading case involving the application of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), to particular allegations in petitioners' amended complaint. This dispute implicates no circuit conflict about the rules governing ERISA fiduciaries, and turns on "context-sensitive scrutiny" of a particular complaint. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). For three principal reasons, the government's argument in favor of certiorari fails.

First, this case suffers from glaring vehicle flaws. The government tries to avoid these defects by brushing them off in three conclusory paragraphs at the end of the brief and by rewriting the question presented. But ignoring these defects cannot make them go away. Second, the government hypes a split where there is none. None of the circuits that are said to be in conflict have acknowledged any conflict, and for good reason: the courts all applied the same legal standards and simply reached different results on different complaints. And, third, the government's position is wrong on the merits—and flouts the *Iqbal* and *Twombly* standards. Its position would subject ERISA fiduciaries to costly litigation risks no matter how they manage investment vehicles, and deter fiduciaries from giving plan participants a range of different options.

According to the government (at 8), the question presented "frequently recurs." If the Court believes

that this question warrants certiorari, it should await a suitable vehicle. This petition should be denied.

ARGUMENT

I. THE UNITED STATES LARGELY IGNORES SERIOUS VEHICLE PROBLEMS

The most notable feature of the government's brief is that it all but ignores the severe vehicle defects flagged by respondents in the brief in opposition. Indeed, it tries to sweep these defects under the rug by rewriting the question presented and playing down important problems with petitioners' pleading.

The question presented by petitioners is whether "allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA." Pet. i. But the government substantially narrows the question presented, recasting it as whether petitioners "stated a plausible claim for relief . . . by alleging that [respondents] caused [petitioners] to pay investment-management or administrative fees *higher than those available for other materially identical investment products or services*." U.S. Br. i (emphasis added). The new question underscores how fact-specific this case is.

Notably, the government "takes no position" on most of the issues at stake in this case. U.S. Br. 8 n.2. Instead, it carves out two narrow slices of petitioners' claims—the allegations that respondents wrongly included certain retail-class funds in their investment lineups and that they failed to adequately monitor

recordkeeping fees in certain respects—and asserts that *those* issues warrant this Court's review. *See* U.S. Br. 8. But as discussed below, those issues do not involve any real split among the circuits. And resolution of even those narrow issues will run into deficiencies in petitioners' pleadings. Those deficiencies explain why petitioners unsuccessfully attempted to amend their complaint a second time, why the district court correctly dismissed petitioners' operative complaint, and why the Seventh Circuit unanimously affirmed.

The principal focus of the government's brief—respondents' alleged breach of fiduciary duty with respect to retail-class investment offerings—was not distinctly pleaded as a claim in the operative complaint. The government implicitly recognizes this by asserting that "part of Count V" of the operative complaint stated a plausible claim for relief by "alleging that respondents selected certain investment options instead of alternatives, offered by the same investment providers, that differed *only* in their lower costs." U.S. Br. 9, 11. That is a tortured misconstruction of Count V.

Count V did not narrowly attack respondents for "select[ing] certain investment options" instead of others "that differed *only* in their lower costs." U.S. Br. 11. Instead, Count V attempted to state a claim resting on a much broader basis: that respondents "selected and retained for years as the Plans' investment options mutual funds and insurance company variable annuities with high expenses and poor performance relative to other investment options," and failed to "prudently consolidat[e] the Plans' hundreds of investment options into a core lineup." Am. Compl. ¶¶ 264, 266. The courts below

found that this claim failed as a matter of law because ERISA plans "may generally offer a wide range of investment options and fees without breaching any fiduciary duty," and because the complaint itself pointed to "prudent explanations" for respondents' "fiduciary decisions involving alleged losses or underperformance." Pet. App. 21a.

Petitioners recognized that their narrower theory about retail-share classes was not clearly presented in Count V. That is why they tried to amend their complaint through the addition of a more particularized "Proposed Count VII," which specifically asserted that respondents violated their fiduciary duties by including certain retail-class investment-fund options instead of "us[ing] their bargaining power to include identical versions of the same funds at below-retail prices." Pet. App. 51a. But the district court denied petitioners' motion for leave to amend because they "could and should have added this count sooner," since "the facts underlying this count were alleged in plaintiffs' amended complaint." Pet. App. 52a. In other words, even if petitioners included *facts* in the operative complaint that could have supported this claim, they never actually stated *the claim* in their operative complaint.

The government downplays this problem by arguing that the Seventh Circuit and district court "understood petitioners' allegations about imprudent retail-class shares to be part of the case; the courts simply concluded that petitioners' theory failed as a matter of law." U.S. Br. 20-21. But the district court explicitly recognized that petitioners' narrow "retail-class" funds *claim* was not part of the case, Pet. App. 52a (refusing to "allow plaintiffs to add this count"), and the Seventh Circuit agreed. It rejected

petitioners' effort to further amend their complaint on the ground that petitioners' amendment was marked by "undue delay," since "none of the . . . new claims advance arguments that were unavailable to plaintiffs" at earlier stages in the litigation, relying as they did "on the same allegations and facts" as the operative complaint. Pet. App. 23a-24a. Petitioners chose not to challenge the Seventh Circuit's ruling affirming the denial of leave to amend to add this claim in this Court.

Because petitioners' proposed Count VII was not at issue below, the Seventh Circuit never addressed the question presented in the government's brief: whether an ERISA plaintiff states a plausible claim by pointing to "investment-management or administrative fees higher than those available for other materially identical investment products or services." U.S. Br. i. This Court will search in vain for language in the Seventh Circuit's opinion bearing on that question, because petitioners did not properly present it below.

The government's decision to alter the question presented so as to focus on issues that were not decided below points to vehicle problems with this case. Apparently, in the government's view, most aspects of the broad claims presented in petitioners' 141-page scattershot complaint do not merit this Court's review. But the courts below determined that the complaint should be dismissed by evaluating the broad claims actually presented by petitioners in that complaint, not the narrow issues the United States now raises. Rule 8 requires a "short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), so that defendants (and courts) will have "fair notice of what the plaintiff's claim is and the grounds upon which it

rests," *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This Court, too, will have to weigh the broad question presented by petitioners in light of their operative complaint. The government's attempt to dodge that problem by homing in on a question left unaddressed below does not solve the vehicle problem here.

And even as to the extremely narrow question addressed by the government, this case presents a poor vehicle because that question largely turns on a claim regarding a comparison of retail-class funds and institutional-class funds that was presented only in petitioners' second amended complaint. *See* Pet. App. 51a. The government's response to this point—that petitioners duly "compar[ed]" the cost of numerous retail-class investment fund offerings "to those of the institutional-class investment options that petitioners allege respondents could have offered instead," and then "referred to those allegations in Count V" of the operative complaint, U.S. Br. 20—misses the mark completely. The relevant reference in Count V was just half a sentence, buried in a litany of generalized assertions regarding the number, expense, and performance of the investment options offered by respondents. *See* Am. Compl. ¶ 266 ("The Plans' investment offerings included the use of mutual funds and variable annuities with retail expense ratios far in excess of other lower-cost options available to the Plans."). That kind of glancing reference hardly provides the "fair notice" that Rule 8 demands. *Dura Pharms.*, 544 U.S. at 346 (quoting *Conley*, 355 U.S. at 47).

The notice pleading system is rightly set up so that a plaintiff cannot list 100 pages of allegations in a

complaint in case it later needs to tease out *some* claim to salvage the case as it proceeds on appeal—and, indeed, before this Court—particularly where, as here, the district court and court of appeals have rejected the plaintiffs' attempt to amend their complaint through the proper channel to add that very claim, and the plaintiffs have elected not to challenge that ruling in this Court. The United States would never stand for this sort of pleading regime in cases in which it were a defendant itself.

The operative complaint's failure to present the claim that petitioners and the government now want to address is obvious because petitioners later sought to present this claim in their proposed second amended complaint—a complaint found to be untimely in a ruling that petitioners do not challenge here. Pet. App. 23a, 52a. That glaring vehicle defect alone should doom the petition. And the government's transparent effort to sweep it under the rug just underscores that it has no answer for it.

II. THERE IS NO CIRCUIT CONFLICT WARRANTING THIS COURT'S REVIEW

The government's assertion that the "decision below conflicts with decisions of the Third and Eighth Circuits" is also suspect. U.S. Br. 17. None of the courts implicated in the alleged split have acknowledged it. To the contrary, the decisions at issue referred to each other favorably and found footing in the same authorities. *See Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 481 (8th Cir. 2020) (noting the decision below and the Third Circuit's decision in *Sweda v. Univ. of Pa.*, 923 F.3d 320 (2019)); Pet. App. 21a (describing the "Third Circuit's approach" in *Sweda* as "sound and not inconsistent

with our own"); *see also, e.g.*, Pet. App. 21a (relying on *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009)); *Davis*, 960 F.3d at 484, 486 (citing *Hecker*); *Sweda*, 923 F.3d at 331 n.6, 339 (citing *Hecker*). That is the opposite of a conflict.

Indeed, these courts all apply the same rule of law. They agree that a retirement plan's offering of a "meaningful mix and range of investment options [does not] insulate[ ] plan fiduciaries from liability for breach of fiduciary duty." Pet. App. 20a (quoting *Sweda*, 923 F.3d at 330); *see also Davis*, 960 F.3d at 484 ("It is no defense to simply offer a 'reasonable array' of options that includes some good ones") (citing *Tussey v. ABB, Inc.*, 746 F.3d 327, 335-36 (8th Cir. 2014)). And they agree that any "breach claim must be examined against the backdrop of the mix and range of available investment options." Pet. App. 20a (quoting *Sweda*, 923 F.3d at 330); *Davis*, 960 F.3d at 484 (noting that plaintiffs must "provide a sound basis for comparison" of the investment options selected by the fiduciary) (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018)).

The government faults the Seventh Circuit's decision below for disregarding the principle set out by "the [Third] Circuit in *Sweda*" that "a meaningful mix and range of investment options" does not, on its own, protect against liability under ERISA. U.S. Br. 19 (quoting *Sweda*, 923 F.3d at 330). But the Seventh Circuit expressly quoted that exact language from *Sweda*, Pet. App. 20a, recognizing that *Sweda* instructed district courts to consider the range of available investment options "in the context of the fiduciary's overall performance," *id.*, and with a view to whether the fiduciary "act[ed] prudently according to current practices," *id.* (quoting *Sweda*, 923 F.3d at

330). The Seventh Circuit correctly determined that here, in view of the relevant "options" and of petitioners' other allegations regarding respondents' "reasons" for selecting those options, the complaint failed to state "a breach of fiduciary duty." Pet. App. 21a. The decision below clearly explained why its approach was in accordance with the reasoning in *Sweda*. Pet. App. 20a-21a.

The government also argues that there is a genuine split here because the complaint in this case is "similar" to the complaints in *Sweda* and *Davis*, notwithstanding the "divergent results" in those cases. U.S. Br. 17-18. As explained above, however, the rule of law stated in each of these decisions was identical, and this Court typically does not grant certiorari to review the alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, the United States' argument proves too much. *Davis*, for example, affirmed dismissal of a claim that closely resembled Count V of the operative complaint here, which asserted—with reference to the same investment vehicles—that the investment options selected by retirement-plan managers were imprudent. *Compare Davis*, 960 F.3d at 484-87 (affirming dismissal of claim that investments in TIAA Real Estate Account and CREF Stock Account were imprudent), *with* Am. Compl. ¶¶ 268-269 (Count V setting out allegations that CREF Stock Account and TIAA Real Estate Account were imprudent investments). The intractability of this sort of fact-intensive, cross-circuit analysis highlights why certiorari is reserved for cases in which courts actually disagree about governing legal standards.

III. THE UNITED STATES IS WRONG ON THE MERITS

Finally, the government's sheepish argument that the decision below is wrong in "certain" respects is ineffectual. U.S. Br. 9 (heading). Here again, the argument quickly devolves into a case-specific application of settled pleading rules to the particular allegations in this case—hardly the sort of inquiry that warrants this Court's scarce resources.

In any event, both courts below got it right. Faced with a blunderbuss complaint generally accusing respondents of having offered a mix of investment options that petitioners did not like, the courts below properly determined that "it would be beyond the court's role to seize ERISA for the purpose of guaranteeing individual litigants their own preferred investment options." Pet. App. 15a. Addressing the question actually presented by petitioners, an assertion that a "retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services," Pet. i, does not on its own state a claim for relief under ERISA.

The marketplace for investment products and services is varied, as are individual investors' preferences. Petitioners have expressed a "clear preference for low-cost index funds," Pet. App. 19a, but ERISA does not make that preference mandatory; retirement-plan managers should be free to offer a wide mix of investment options, including relatively higher-cost options, as Northwestern did here. Resolution of the question presented in petitioners' favor would deprive individual ERISA plan participants of the opportunity to make investments

that are consistent with their own preferences. ERISA hardly makes it illegal to give plan participants *options*.

Moreover, the United States overlooks that the institutional share classes petitioners identified have certain minimum investment requirements. The complaint vaguely alleges that "jumbo" *401(k)* managers have obtained waivers from such requirements. Am. Compl. ¶¶ 157-158. But it is conspicuously devoid of allegations that a similarly-situated university 403(b) plan, as opposed to a 401(k) plan (which, unlike 403(b) plans, typically do not have significant plan assets concentrated in annuity contracts with withdrawal penalties), has ever obtained such a waiver.

Furthermore, allowing these claims to proceed beyond the motion-to-dismiss stage would threaten to put ERISA fiduciaries in an impossible position. Petitioners alleged, for instance, that respondents should have dropped TIAA from its position as record keeper because of TIAA's onerous recordkeeping fees. *See* Pet. App. 38a; U.S. Br. 16. But if respondents had dropped TIAA from its position as record keeper, numerous plan participants would have suffered a significant penalty fee, *see* Pet. App. 39a, and that decision *also* could have given rise to an ERISA claim regarding excessive fees. This is exactly the kind of double bind that ERISA is meant to avoid. *See Conkright v. Frommert,* 559 U.S. 506, 520-21 (2010).

In addition, the government's position here overlooks the pleading standards that the government itself has urged the Court to follow in prior cases. In *Iqbal,* for example, the government stressed that "factually neutral allegations . . . that are fully consistent with lawful behavior" are

"inadequate to defeat a motion to dismiss." Br. for the Petitioners, *Ashcroft v. Iqbal*, No. 07-1015, at 33 (Aug. 29, 2008) (citation and internal quotation marks omitted). And as the courts below rightly concluded, petitioners' own allegations suggested that respondents had "valid reasons" for selecting the relevant investment options. Pet. App. 13a, 39a.

Ultimately, however, the biggest red flag on the merits is the one that the government tries to paper over: that petitioners unsuccessfully tried to amend their complaint to add a new Count VII. That proposed claim—which contains several additional paragraphs absent from the operative complaint—illustrates better than anything what is lacking in the operative complaint.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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