19-1401

IN THE
Supreme Court of the United States

APRIL HUGHES,
KATHERINE D. LANCASTER, AND JASMINE WALKER,
Petitioners,

v.

NORTHWESTERN UNIVERSITY, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ....*passim*

The United States is correct. The Seventh Circuit erroneously dismissed petitioners' claims for breaches of ERISA's duty of prudence in conflict with other circuits. This case presents the right vehicle for this Court to address a recurring question regarding the scope of ERISA's fiduciary duties that is important to the financial security of millions of employees. None of respondents' supplemental arguments justifies denying review.

1. Much of respondents' supplemental brief focuses on respondents' assertion that the Amended Complaint did not claim that respondents violated their fiduciary duties by offering retail share classes where institutional share classes of the same funds were available. Although respondents (at 7) now call this a "glaring vehicle defect," their brief in opposition appropriately omitted it as a vehicle defect. *See* BIO 32.[1]

The Amended Complaint clearly pleaded a claim that respondents violated their fiduciary duties by offering retail share classes, rather than identical but lower-cost institutional share classes of the same funds, and supported that claim with detailed factual allegations. The Amended Complaint contained a 15-page section headed: "Defendant[s] caused the Plans to pay wholly unnecessary and excessive fees by using higher-cost share classes of mutual funds instead of identical versions of the same funds in lower-cost share classes." C.A. App. 116-30 (¶¶ 155-165). Petitioners alleged that, because "the only difference between the various share classes is fees, . . . absent some compelling reason to opt for the higher-

[1] Respondents discussed this issue in a footnote in their opposition in the section arguing against the existence of a circuit split. *See* BIO 17 n.1; Reply 2 n.1 (responding to that footnote).

cost version, prudent fiduciaries will select the lowest-cost share class available to the plan." *Id.* at 116-17 (¶ 155).

Because of the Plans' large size, respondents could have obtained lower-cost institutional-class versions of the same funds by asking for them. *Id.* at 117-18 (¶¶ 157-160). Nonetheless, respondents "select[ed] and continu[ed] to offer far higher-cost share classes even though lower-cost share classes of the *exact same mutual funds* were available." *Id.* at 118 (¶ 161). The Amended Complaint contained an 11-page table listing each retail-class mutual fund offered by the Plans and the available lower-cost institutional-class version. *Id.* at 119-29. In choosing the higher-cost retail share classes, respondents "failed to" act "prudently" and "caused the Plans' participants to lose millions of dollars of their retirement savings due to wholly unnecessary fees." *Id.* at 129-30 (¶¶ 164-165).

Count V of the Amended Complaint asserted a legal claim for breach of ERISA's fiduciary duties based on these factual allegations. After incorporating the earlier factual allegations, *id.* at 181 (¶ 260), Count V alleged that "Defendants are responsible for selecting prudent investment options, ensuring that those options charge only reasonable fees," *id.* (¶ 261). ERISA's fiduciary duties required respondents "to independently assess whether each option was a prudent choice for the Plans," *id.* (¶ 262), and respondents accordingly had "to consider all relevant factors under the circumstances, including without limitation alternative investments that were available to the Plans," *id.* at 181-82 (¶ 263). Nonetheless, "[t]he 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. These lower-cost options included lower-cost share class mutual funds with the identical investment manager and investments . . . . This was a breach of fiduciary duties." *Id.* at 183 (¶ 266).[2]

All parties and the courts below understood that Count V included a claim for imprudent offering of retail share classes. In their motion-to-dismiss briefing, respondents argued that Count V failed to state a claim because alleging "that a plan offered retail-class funds is insufficient to state a claim for a breach of the duty of prudence." MTD Br. 18 (Dist. Ct. Dkt. No. 59); *see also* MTD Reply Br. 10-11 (Dist. Ct. Dkt. No. 70) (arguing that a claim that "defendants should have arranged for access to wholesale or institutional investment vehicles" was insufficient) (internal quotation marks omitted). Petitioners responded that "[p]roviding higher-cost shares instead of available lower-cost shares of the same fund is a breach of" the duty of prudence. C.A. App. 216; *see also id.* at 216-19. The district court understood that, in Count V, petitioners "allege[d] that the fees charged by some funds were too high," in part because "they were retail funds with retail fees." App. 44a; *see also* App. 33a ("The charging of higher retail expense ratios instead of institutional-rate expense ratios is also a major theme in plaintiffs' complaint."). But the district court rejected this claim, holding that "[i]t does not matter" that respondents offered funds with "retail expenses." App. 45a.

On appeal, petitioners argued that "[t]he use of higher cost retail shares of mutual funds when lower cost institutional shares are available itself is a recognized breach of ERISA's duty of prudence. . . .

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[2] Count V set forth the retail share class claim across several paragraphs, not "just half a sentence" as respondents wrongly assert (at 6).

This aspect of the claims in Count V of the amended complaint . . . on its own stated a claim of fiduciary breach and should not have been dismissed." Appellants C.A. Br. 31-32. Although respondents argued (as they do here) that the Amended Complaint did not include a claim based on retail share classes, *see* Appellees C.A. Br. 25, petitioners refuted that argument in reply, *see* Appellants C.A. Reply Br. 8-10.

The Seventh Circuit understood that, in Count V, "Plaintiffs further alleged Northwestern breached its fiduciary duties by providing investment options that were . . . too expensive . . . . As alleged, some of these options were retail funds with retails [sic] fees." App. 19a. Respondents' assertion (at 5) that the Seventh Circuit never addressed this claim is false. The Seventh Circuit rejected it, concluding that there was no "blanket prohibition on retail share classes," and respondents' offering of some "low-cost" funds "eliminat[ed] any claim" based on offering retail share classes. App. 19a.

It is true that Count V encompassed additional conduct that also allegedly violated respondents' fiduciary duties, such as selecting and retaining funds that underperformed or had other unnecessary fees. C.A. App. 182 (¶¶ 264-265). But the Seventh Circuit's opinion refutes respondents' argument that the Amended Complaint did not include a retail share class claim because it was not separated into a distinct count, as it was in Count VII of the proposed Second Amended Complaint. As the Seventh Circuit reasoned, the Second Amended Complaint "separat[ed] out the claims that had previously been included in the amended complaint as Count V," but asserted "essentially the same claims separated into different counts." App. 23a, 24a.

The fact that the operative complaint included the retail share class claim in a count that also encompassed other allegations provides no obstacle to this Court's review.[3]

2. Respondents fail to refute the existence of a circuit split. Respondents do not and cannot dispute that the Seventh Circuit reached an opposite result from the Third Circuit and the Eighth Circuit by dismissing claims based on excessive recordkeeping fees and excessive investment management fees, which the Third Circuit and the Eighth Circuit allowed to go forward based on virtually identical allegations. *See* Pet. 8-12; Reply 1-3; U.S. Br. 17-18.

Respondents erroneously contend that, at most, the decision below was an "alleged 'misapplication of a properly stated rule of law.'" Resp. Supp. Br. 9 (quoting Sup. Ct. R. 10).[4] As the United States correctly explained (at 19), "the decision below reflects more than just a different outcome than in *Sweda* [*v. University of Pennsylvania*, 923 F.3d 320 (3d Cir.

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[3] Respondents' supplemental brief raises no vehicle issues regarding any claim other than the retail share class claim.

[4] Respondents make no attempt to harmonize the decision below with the Ninth Circuit's *Tibble* decisions, which blessed fiduciary duty claims based on offering several retail class funds instead of institutional-class funds as part of a broad range of investment options. *See Tibble v. Edison Int'l*, 729 F.3d 1110, 1137-39 (9th Cir. 2013), *vacated and remanded on other grounds*, 575 U.S. 523 (2015); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (en banc); *see also* U.S. Br. 18 n.3 (noting that the decision below is "in tension" with the *Tibble* decisions). The Ninth Circuit's 2016 *Tibble* decision came after this Court remanded to the Ninth Circuit to consider the claim that fiduciaries "acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available." *Tibble*, 575 U.S. at 525-26.

2019), *cert. denied*, 140 S. Ct. 2565 (2020),] and *Davis* [*v. Washington University in St. Louis*, 960 F.3d 478 (8th Cir. 2020)]; it reflects a different (and incorrect) understanding of the substantive obligations that ERISA imposes on plan fiduciaries." *Sweda* and *Davis* rejected the reasoning adopted below that offering a range of investments including some options with low fees insulates fiduciaries from liability for offering other options with excessive fees. *See Sweda*, 923 F.3d at 330; *Davis*, 960 F.3d at 484; *see also* Pet. 12-14; Reply 3-4.[5] That split regarding "the question of what ERISA requires of plan fiduciaries to control expenses," U.S. Br. 8, warrants review.

3. Respondents' merits argument mischaracterizes petitioners' claims. Petitioners do not claim that it is "mandatory" for fiduciaries to offer only "low-cost index funds." Resp. Supp. Br. 10. Rather, petitioners pleaded detailed facts showing that respondents offered many investment options with excessive fees (including fees for retail share classes where lower-cost institutional-class versions of the same fund were available), and above-market recordkeeping fees that respondents could have reduced substantially by taking steps that other university pension plans have

[5] The fact that the decision below, *Sweda*, and *Davis* all cited *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), is of no moment. *Sweda* distinguished *Hecker*, *see Sweda*, 923 F.3d at 331 n.6, and also cited *Hecker* in its analysis of prohibited-transaction claims, which are not at issue in this petition, *see id.* at 339. *Davis* cited *Hecker* as support for the proposition that a fiduciary cannot "simply offer a reasonable array of options that includes some good ones and then shift the responsibility to plan participants to find them." *Davis*, 960 F.3d at 484 (internal quotation marks, citation, and brackets omitted). The decision below blessed precisely that behavior, holding that a plan offering some "low-cost" options "eliminat[ed] any claim" that other options were imprudent. App. 19a.

taken. *See* Pet. 4-5, 19-20; Reply 8-9; U.S. Br. 4-6, 9-11, 13-15. While respondents dispute the accuracy of petitioners' well-pleaded factual allegations and offer possible explanations for their actions (at 11), such arguments cannot carry the day at the pleading stage. Petitioners have stated a claim so long as they "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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