

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-1401

APRIL HUGHES, ET AL., PETITIONERS

v.

NORTHWESTERN UNIVERSITY, ET AL.

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

MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE
IN ORAL ARGUMENT AS AMICUS CURIAE, FOR DIVIDED ARGUMENT,
AND FOR ENLARGMENT OF TIME FOR ARGUMENT

Pursuant to Rule 28 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in the oral argument in this case as an amicus curiae supporting petitioner; that the time allowed for oral argument be enlarged to 65 minutes; and that the United States be allowed 15 minutes of argument time. Petitioners and respondents have both consented to this motion, and petitioners have agreed to cede ten minutes of their argument time to the United States. Accordingly, if this motion were granted, the argument time would be divided as follows: 20 minutes for petitioners, 15 minutes for the United States, and 30 minutes for respondents.

This case concerns the scope of the fiduciary duties imposed on employee-benefit plan fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. Specifically, the case concerns whether petitioners -- participants in two defined-contribution ERISA plans -- stated a claim for relief against those plans' fiduciaries (respondents) for breach of ERISA's duty of prudence, 29 U.S.C. 1104(a)(1)(B), by plausibly alleging that the fiduciaries caused the plans to pay investment-management or administrative fees higher than those available for other materially identical investment products or services. Petitioners allege that respondents allowed plan participants to invest in retail-class investment funds even though identical institutional-class investment funds with lower fees were available to the plans based on their size. Petitioners further allege that respondents failed to monitor the costs paid by the plans for administrative services and use various methods to reduce those costs. The court of appeals held that petitioners' allegations failed to state a plausible claim for relief under ERISA.

The United States has filed a brief as amicus curiae in support of petitioners, arguing that the court of appeals erred in concluding that petitioners' factual allegations, if proven, would

not show a violation of ERISA's duty of prudence. The United States' brief urges this Court to reverse the judgment of the court of appeals and remand for appropriate further proceedings.

The United States has a substantial interest in this case. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case. The Secretary of Labor has primary authority for administering ERISA. And the Department of Labor has consistently advised ERISA fiduciaries of their obligations to limit the fees and other costs paid by plan participants, in recognition of the fact that even small differences in costs can significantly reduce the value of employees' investment accounts at retirement.

The government has previously presented oral argument in other cases addressing the scope of ERISA's fiduciary duties and the statute's other protections for plan participants and beneficiaries. See, e.g., Retirement Plans Comm. of IBM v. Jander, 140 S. Ct. 592 (2020); Tibble v. Edison Int'l, 575 U.S. 523 (2015); Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008); Varity Corp. v. Howe, 516 U.S. 489 (1996). The government's participation in oral argument in this case will provide the federal perspective on, among other things, the

requirements that the duty of prudence imposes on ERISA plan fiduciaries to limit costs, and the types of factual allegations and legal contentions that state a plausible claim for relief for breach of the duty of prudence. The government therefore believes that participation by the United States will be of material assistance to the Court.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record

OCTOBER 2021