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 FOR TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Teachers Insurance and Annuity Association of America (TIAA) was established in 1918 by the Carnegie Foundation for the Advancement of Teaching to provide guaranteed retirement income and life insurance to educators. Today, TIAA offers, among other things, annuities, mutual funds, and recordkeeping services to colleges, universities, and other not-for-profit and charitable institutions for the purpose of securing lifetime income during participating employees' retirements.

TIAA has served more than 15,000 institutional clients, including respondent Northwestern University. This case is one of more than twenty lawsuits in which plaintiffs have alleged that universities breached their fiduciary duties under ERISA by including certain investment options in their retirement plans and overpaying for certain services. Most of those cases, including this one, involve allegations regarding TIAA's investment products, services, and fees. Although TIAA is not a party to this litigation, many of petitioners' claims rest on a misguided depiction of TIAA's offerings. TIAA therefore submits this amicus brief to provide accurate context about TIAA, its distinctive mission, and the nature of the products and services it offers.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of the brief.

SUMMARY OF ARGUMENT

Since 2016, more than twenty lawsuits have been brought against universities across the country alleging that the universities breached their fiduciary duties under ERISA by maintaining certain investment options in their retirement plans and paying excessive fees for recordkeeping and other services.[2] Many of those allegations concern TIAA. Those lawsuits allege, among other things, that the universities imprudently paid too much for TIAA's products and services.

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[2] *Short* v. *Brown Univ.*, No. 17-cv-318 (D.R.I. filed July 6, 2017); *Cates* v. *Trustees of Columbia Univ. in City of N.Y.*, No. 16-cv-6524 (S.D.N.Y. filed Aug. 17, 2016); *Cunningham* v. *Cornell Univ.*, No. 16-cv-6525 (S.D.N.Y. filed Aug. 17, 2016); *Clark* v. *Duke Univ.*, No. 16-cv-1044 (M.D.N.C. filed Aug. 10, 2016); *Lucas* v. *Duke Univ.*, No. 18-cv-722 (M.D.N.C. filed Aug. 20, 2018); *Henderson* v. *Emory Univ.*, No. 16-cv-2920 (N.D. Ga. filed Aug. 11, 2016); *Wilcox* v. *Georgetown Univ.*, No. 18-cv-422 (D.D.C. filed Feb. 23, 2018); *Stanley* v. *George Washington Univ.*, No. 18-cv-878 (D.D.C. filed Apr. 13, 2018); *Kelly* v. *Johns Hopkins Univ.*, No. 16-cv-2835 (D. Md. filed Aug. 11, 2016); *Mulligan* v. *Long Island Univ.*, No. 18-cv-2885 (E.D.N.Y. filed May 15, 2018); *Tracey* v. *Massachusetts Inst. of Tech.*, No. 16-cv-11620 (D. Mass. filed Aug. 9, 2016); *Sacerdote* v. *New York Univ.*, No. 16-cv-6284 (S.D.N.Y. filed Aug. 9, 2016); *Sacerdote* v. *Retirement Plan Comm.*, No. 17-cv-8834 (S.D.N.Y. filed Nov. 13, 2017); *Nicolas* v. *Trustees of Princeton Univ.*, No. 17-cv-3695 (D.N.J. filed May 23, 2017); *Johnson* v. *Tampa Univ.*, No. 21-cv-1005 (M.D. Fla. filed April 28, 2021); *Daugherty* v. *University of Chicago*, No. 17-cv-3736 (N.D. Ill. filed May 18, 2017); *Santiago* v. *University of Miami*, No. 20-cv-21784 (S.D. Fla. filed April 29, 2020); *Sweda* v. *University of Pa.*, No. 16-cv-4329 (E.D. Pa. filed Aug. 10, 2016); *D'Amore* v. *University of Rochester*, No. 18-cv-6357 (W.D.N.Y. filed May 11, 2018); *Munro* v. *University of S. Cal.*, No. 16-cv-6191 (C.D. Cal. filed Aug. 17, 2016); *Cassell* v. *Vanderbilt Univ.*, No. 16-cv-2086 (M.D. Tenn. filed Aug. 10, 2016); *Garnick* v. *Wake Forest Univ. Baptist Med. Ctr.*, No. 21-cv-454 (M.D.N.C. filed June 4, 2021); *Davis* v. *Washington Univ. in St. Louis*, No. 17-cv-1641 (E.D. Mo. filed June 8, 2017); *Vellali* v. *Yale Univ.*, No. 16-cv-1345 (D. Conn. filed Aug. 9, 2016).

In the decision below, the Seventh Circuit properly dismissed one such lawsuit, holding that petitioners had failed to state a claim. That decision was correct. An ERISA claim for breach of fiduciary duty must be evaluated in light of what an objectively prudent fiduciary presented with the same circumstances would do. Here, a proper understanding of the context of 403(b) plans—their history, purpose, and operation, and important differences from the 401(k) context—shows that petitioners have failed to plausibly allege imprudence in Northwestern's management of its retirement plans. As the amended complaint itself acknowledges, the practices challenged here are common, sensible, and beneficial in light of the purposes and functions of a 403(b) plan and the annuities such a plan makes available to give educators a portable income stream for life.

Allowing claims like petitioners' to go forward would "unlock the doors of discovery" to claims that are all too easy to make. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). This increases the risk of *in terrorem* settlements—as evidenced by the fact that a number of universities have already settled the claims against them—despite the fact that the claims have no merit. The Court should affirm the Seventh Circuit's decision.

ARGUMENT

I. THE HISTORY, PURPOSE, AND OPERATION OF 403(b) PLANS PROVIDE IMPORTANT CONTEXT FOR EVALUATING THE PLAUSIBILITY OF PETITIONERS' ALLEGATIONS

ERISA class actions impose immense economic and reputational costs on fiduciaries who choose to administer employee retirement plans. But the statute was not meant to generate "litigation expenses" that "unduly discourage employers from offering [such] plans."

Conkright v. *Frommert*, 559 U.S. 506, 517 (2010) (quotation marks omitted). This Court has thus identified the motion to dismiss as an "important mechanism for weeding out meritless [ERISA] claims." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425 (2014).

To state a claim for relief, a complaint must allege facts that "raise a right to relief above the speculative level." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). This requires allegations "plausibly suggesting (not merely consistent with)" wrongful action. *Id.* at 557. A complaint cannot state a claim where the factual allegations are subject to an "obvious alternative explanation." *Id.* at 567. Moreover, when the complaint asserts a breach of fiduciary duty, the plausibility of any inference of imprudence must be evaluated in light of what "a prudent fiduciary in the same position" would have done. *Amgen Inc.* v. *Harris*, 577 U.S. 308, 311 (2016). And "[b]ecause the content of the duty of prudence turns on the circumstances … prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Dudenhoeffer*, 573 U.S. at 425 (quotation marks and citation omitted).

Here, several aspects of the history, purpose, and operation of 403(b) plans and the annuities they offer provide necessary context to evaluate the prudence of the challenged conduct.

A. TIAA's Annuities Were Established To Provide Educators With Portable Income Streams For Life

In the early 1900s, Andrew Carnegie "became concerned about the cause of the [college] teacher" and donated ten million dollars to fund "retir[ement] pensions for the teachers of Universities, Colleges, and Technical

Schools in our country." Greenough, *College Retirement and Insurance Plans* 8-9, 12 (1948). Prior to Carnegie's involvement, pension plans were available at only a few institutions, and "a professor could look forward to a pension only if he remained at a particular institution until retirement." *Id.* at 8. Carnegie's plan provided the "distinct advance" of "permitt[ing] free interchange of professors among the institutions that it covered without loss of pension expectations." *Id.* at 9.

Carnegie's gift, though liberal, was insufficient to address the need for professor retirement assistance. Greenough at 10. The pensions provided "were without charge to the college or to the professor," and their funding was unsustainable. *Id.* Once this became clear, the Carnegie Foundation for Teachers conducted studies that "led to the conclusion that a system whereby the college and its staff members would join in contributing toward individual annuity policies wholly owned by staff members" would best redress the shortcomings of the initial approach. *Id.* at 9-10, 12, 14.

Accordingly, the Foundation established TIAA as a not-for-profit insurance company. Greenough at 10; Saxon & Powell, *Preparing Educational and Nonprofit Employees for Retirement: 403(b) Plans and ERISA Fiduciaries*, 127 J. Taxation 53, 54 (2017). TIAA developed annuity contracts with "fundamental provisions specially designed for college retirement plans." Greenough at 14, 17. In developing these contracts, "[e]mphasis was upon developing a contract that would advance the cause of education as a whole." *Id.* at 14.

TIAA offered tax-sheltered annuities to teachers at institutions of higher education. Saxon & Powell, 127 J. Taxation at 54-55. These annuities operated "much like a defined benefit plan," providing a guaranteed stream

of income a retiree could not outlive. *Id.* at 56. "Under a classic fixed annuity, the purchaser pays a sum certain and, in exchange, the issuer makes periodic payments throughout … the life of the purchaser." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). TIAA's expenses were paid through the Foundation, "in the hope that [TIAA] w[ould] be able to furnish insurance and annuity policies at rates lower than the rates of the private companies." Linton, *The Carnegie Foundation Plan of Insurance and Annuities for College Teachers* 3 (1918). Consistent with that mission, TIAA has operated without profit for the past 100 years, adapting to market and regulatory changes to ensure that plan participants enjoy a healthy retirement income.

TIAA's classic fixed annuity offering, TIAA Traditional, has been one of the safest investment options for a century, providing guaranteed principal with a contractually specified minimum interest rate, as well as guaranteed lifetime income if a participant chooses to annuitize upon retirement. The General Account of TIAA backs TIAA Traditional's guarantees and TIAA's claims-paying ability. *See* TIAA, *TIAA Traditional Annuity: Adding safety and stability to retirement portfolios* 1 nn.3, 4 (2021) ("TIAA Traditional"), https://tinyurl.com/ym96x5zb.

TIAA Traditional guarantees the principal and a contractually specified minimum interest rate to participants, irrespective of broader economic circumstances. TIAA Traditional at 1-2. TIAA Traditional also provides an opportunity for participants to receive additional amounts, which the TIAA Board of Trustees may declare on a year-by-year basis, in effect yielding an interest rate higher than the minimum guarantee. *Id.* at 2. TIAA has consistently provided such additional

amounts every year since 1948—in times of war, financial disruption, recession, and political turmoil. *Id.* Unlike typical stock insurance companies, moreover, TIAA pays out unneeded contingency reserves to plan participants at the time of retirement and when the participant is receiving annuity income after retirement, consistent with its mission to operate without profit. *Id.* at 3.

The guaranteed minimum interest rate and additional amounts make up the "crediting rate"—*i.e.*, the rate at which TIAA Traditional credits interest to a participant's account. TIAA Traditional at 2. From 1991 through 2020, the crediting rate for TIAA Traditional in Retirement Annuity and Group Retirement Annuity contracts has ranged from a low of 3.94% in 2010 to a high of 8.93% in 1991. *Id.* at 3. It has never gone below 3%, the contractually specified minimum interest rate for those contracts. *Id.*

The novelty and importance of TIAA's annuities "cannot be overemphasized": "When TIAA's flexible, fully vested, transferable, noncashable contract was introduced in 1918, it was unique in many of its provisions." Greenough at 14-15. Contemporaneous sources described TIAA's approach as "an ideal form of policy with which to provide against the two contingencies of life"—*i.e.*, the risk that a wage-earner will die young, leaving his or her family without any income, and the risk that the wage-earner will outlive his or her savings. Linton at 4, 7.

The tax treatment of these annuities was later codified in 1958 through the enactment of Section 403(b). Saxon & Powell, 127 J. Taxation at 55. Entitled "[t]axation of employee annuities," Section 403 expressly contemplated a continued emphasis on annuities in

403(b) plans. 26 U.S.C. § 403. Indeed, at that time, annuities were "the only available form of investment" in 403(b) plans. Saxon & Powell, 127 J. Taxation at 56.

B. 403(b) Plans Differ From 401(k) Plans In Important Respects

"From the outset," TIAA's annuities "were intended primarily as vehicles for income replacement, rather than wealth accumulation." Saxon & Powell, 127 J. Taxation at 55. This stands in stark contrast to 401(k) plans, which rarely offered annuities and were "designed to be a *savings* plan to supplement defined benefit plans." *Id.* at 56. In 401(k) plans, employees may invest in "a wide variety of investment vehicles such as (but not exclusive to) stocks, bonds, guaranteed investment contracts (GICs), cash-equivalents, or a diversified portfolio of these and other investments." Employee Benefits Research Inst., *Fast Facts—History of 401(k) Plans: An Update* (Nov. 2018), https://tinyurl.com/c2yyjpxt.

Additionally, with TIAA's annuities, "all significant contractual rights were held by the employee rather than the employer." Saxon & Powell, 127 J. Taxation at 55. This approach ensured the portability of the employee's retirement benefit—allowing professors to seamlessly move between institutions. *Id.*

While annuities provide certain benefits, they also "add some cost and recordkeeping complexity to 403(b) plans." Saxon & Powell, 127 J. Taxation at 59. Because each plan participant holds his or her own annuity contract, the recordkeeper must determine account values, minimum guarantees, and any additional returns individually for each annuitant rather than simply execute a pro rata allocation of plan assets as in the 401(k) con-

text. Tax laws and state insurance regulation of annuity products also complicate the recordkeeping of 403(b) plans. *Id.* at 59, 60-61. "Lifetime income products are more complex and require more education for participants to make sure they fully understand how they work." *Id.* at 59; *see also id.* at 61-62 (detailing further complications of recordkeeping 403(b) plans). TIAA is thus uniquely suited to serve as the recordkeeper for its annuity products because TIAA can best guide its participants through the distinct features of its offerings to help participants better plan for retirement.

TIAA's recordkeeping encompasses a wide array of services that plan participants find valuable. In addition to maintaining records of each plan participant's and beneficiary's account balances, TIAA provides reports and communications to participants that include information on returns and investment performance personalized to each participant's account. TIAA also provides fund-level allocation advice at no additional cost to help participants plan for retirement—a service of exceptional value to participants who may have difficulty finding similar services elsewhere at a reasonable cost. TIAA employs trained consultants who use an independent third-party advice tool to offer retirement strategies that provide lifetime income to participants. The consultants provide objective guidance, personalized to each participant's career stage and retirement income goals. TIAA makes those services available and accessible in various ways, including over the telephone, online, and through one-on-one, in-person meetings. TIAA also offers financial education seminars that help participants stay informed about their investment decisions.

All of these services advance TIAA's overall strategy to ensure lifetime income. TIAA surveys indicate

that participants who received financial advice were significantly more confident in their retirement plan than those who did not and thus more likely to develop a plan to generate steady retirement income. TIAA, *TIAA 2016 Advice Matters Survey Executive Summary* 5 (Sept. 29, 2016), https://tinyurl.com/3dkeaaka; *see also* TIAA, *TIAA-CREF Advice Matters Survey Executive Summary* 4 (Oct. 20, 2015), https://tinyurl.com/rjjhj5c5.

High-quality recordkeeping services also fill a critical need. The U.S. Department of Labor, "along with the Treasury Department and other stakeholders," has "identified the need for lifetime income as an important public policy issue and … supported initiatives that could lead to broader use of lifetime income options." Letter from Louis J. Campagna, U.S. Dep't of Labor, to Christopher Spence, TIAA (Dec. 22, 2016), https://tinyurl.com/9wxpthwm. And the demand for financial advisors is projected to grow, as baby boomers approach retirement and as individual retirement accounts continue to replace traditional pension plans. U.S. Dep't of Labor, *Occupational Outlook Handbook: Personal Financial Advisors*, https://tinyurl.com/um8lxk9 (modified Sept. 8, 2021).

TIAA's services help bridge those gaps for its participants. TIAA's products have performed strongly, and participants contributing to annuities have the option of converting earnings into lifetime income. TIAA's counseling services ensure that participants are aware of investment options that lead to retirement security.

C. ERISA's Enactment Altered 403(b) Plans In Certain Ways But Left Key Features Intact

Enacted in 1974, ERISA aimed to replace a patchwork of state regulation of employee benefit plans with "uniform standards of primary conduct." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002); *see also Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004). These uniform standards led to changes in 403(b) plans, including two particularly relevant here.

Most significantly, amendments to Section 403(b)(7) for the first time authorized 403(b) plans to offer mutual funds. Saxon & Powell, 127 J. Taxation at 56-57. Even with this addition, however, "annuities remained an important and common investment option for 403(b) plan participants." *Id.* at 57; *see also id.* at 59.

When the plan sponsor broadens its investment options to include funds from other fund families, there is often a separate recordkeeper for those funds. Although fund families sometimes coordinate to allow recordkeeping across families, this is not always possible. For instance, TIAA and Fidelity currently do not offer recordkeeping services for the other's funds.

Guidance issued following the passage of ERISA also expressly "discouraged employers from limiting the number of vendors, investment options, or recordkeepers under their 403(b) plans." Saxon & Powell, 127 J. Taxation at 60. Employers who chose to consolidate to a single recordkeeper could find themselves outside a statutory safe harbor. *Id.* As a result, many 403(b) plan sponsors have retained multiple recordkeepers into the present day. *Id.* at 61; *see also, e.g.*, *Sacerdote* v. *New York Univ.*, 9 F.4th 95, 119 (2d Cir. 2021).

II. THE CHALLENGED CONDUCT WAS NOT IMPRUDENT

The manner in which 403(b) plans developed and operate provides important context for evaluating the plausibility of petitioners' allegations of imprudence. In that context, the challenged practices in fact are common, sensible, and beneficial. The cost of recordkeeping in 403(b) plans reflects the complexity and high-touch nature of the recordkeeping service that is required for annuities. Similarly, plan fiduciaries must take that context into account in selecting recordkeepers and deciding how to compensate them. Northwestern's administration of its plans took account of that context and did not depart from what a prudent fiduciary in like circumstances would have done.

A. The Recordkeeping Costs Were Not Imprudent

The amended complaint alleges that Northwestern overpaid for recordkeeping services and should have paid only a flat "$35 [fee] per participant." JA 95-96.

The plausibility of this claim, however, turns on what "a prudent fiduciary in the same position" would have done. *Amgen*, 577 U.S. at 311. If petitioners cannot show that a fiduciary even *could have* negotiated $35 fees, they certainly cannot show that a prudent fiduciary *would have* done so, as *Amgen* requires. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 720 (2d Cir. 2013) (plaintiffs must "allege facts, accepted as true, showing that a prudent fiduciary in like circumstances would have acted differently"). Petitioners have not done so. Their bare assertion that the Northwestern plans should have paid $35 per participant, without any allegations showing that such a rate would have been plausible, "'stops

short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557).

As the court of appeals explained, "[petitioners] have identified no alternative recordkeeper that would have accepted such a low fee or any fee lower than what was paid to Fidelity and TIAA. And plaintiffs have failed to explain how a hypothetical lower-cost recordkeeper would perform at the level necessary to serve the best interests of the plans' participants." Pet. App. 18a. Absent any allegations making petitioners' preferred rate plausible, a conclusory statement that the plans should have paid a given rate for recordkeeping does not support an inference that a prudent fiduciary would have demanded that rate.

That is especially true in the 403(b) context. *See Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). The reasonableness of fees must be evaluated in light of the services provided. And as discussed above, recordkeeping for 403(b) plans is more complex and thus more expensive than for 401(k) plans. *See supra* p. 8-9.

Moreover, where "fiduciaries have good reasons for preferring a more expensive recordkeeper," such reasons can "make the fee reasonable." *George* v. *Kraft Foods Global, Inc.*, 641 F.3d 786, 799 n.11 (7th Cir. 2011). Contrary to petitioners' apparent assumption, recordkeeping is not a commodity service that can be performed equally well by any firm for any investment. In particular, Northwestern had ample reasons to maintain TIAA as a recordkeeper. TIAA provides services that are critical both to ensure the successful

administration of the plans—particularly with respect to TIAA's core annuity products—and to help participants understand how they can maximize their benefit from TIAA's products. "Lifetime income products," such as TIAA's annuities, "are more complex and require more education for participants to make sure they fully understand how they work." Saxon & Powell, 127 J. Taxation at 53, 59.

As the provider of the relevant investment options, TIAA is uniquely positioned to provide recordkeeping services that effectively guide participants. Indeed, one court observed in a lawsuit similar to this one that the plaintiffs had cited "no example of any non-TIAA entity performing recordkeeping for TIAA annuities, which, of course, are based on decades worth of investment." *Wilcox* v. *Georgetown Univ.*, 2019 WL 132281, at *12 (D.D.C. Jan. 8, 2019).

TIAA thus provides valuable high-touch services to help plan participants achieve the important goal of retirement security. And it does so without accruing profits for itself and, with respect to TIAA Traditional, while crediting excess returns back to plan participants. *Supra* pp. 6-7. Petitioners have not alleged that Northwestern imprudently maintained TIAA as a recordkeeper despite TIAA's valuable services. In that context, the amount of TIAA's fees does not support an inference of imprudence. Were it otherwise, ERISA plaintiffs could "unlock the doors of discovery" simply by choosing an arbitrary rate and alleging that a plan should have paid the lower amount. *Iqbal*, 556 U.S. at 678.

B. Retaining TIAA's Services Without Consolidating To One Recordkeeper Was Not Imprudent

Petitioners also argue that the plans should have consolidated to a single recordkeeper, rather than "contract[ing] with two separate recordkeepers (TIAA-CREF and Fidelity)." JA 93-94.

Again, this argument fails to take account of important context. As discussed above, ERISA authorized 403(b) plans to offer mutual funds for the first time, and with that authorization, plans were encouraged to retain multiple recordkeepers corresponding to different fund families. That history helps define what a prudent fiduciary would have done in this case—as does the conduct of Northwestern's peers. *See Dudenhoeffer*, 573 U.S. at 425 ("[T]he content of the duty of prudence turns on the circumstances … prevailing at the time the fiduciary acts." (quotation marks omitted)). As evidenced by the slew of lawsuits challenging the same conduct, retaining multiple recordkeepers is a practice that dominates the market for 403(b) plans in higher education. *See* Resp. Br. 31-32. Indeed, the amended complaint itself acknowledges that "the multiple-recordkeeper model had been common in the higher-education marketplace." JA78.

Moreover, no other vendor is currently able to offer recordkeeping services for TIAA's annuities. *Sacerdote* v. *New York Univ.*, 328 F. Supp. 3d 273, 295 (S.D.N.Y. 2018) ("[L]iterally no other vendor had ever recordkept TIAA annuities."), *aff'd*, 9 F.4th 95 (2d Cir. 2021). And TIAA does not currently offer recordkeeping services for Fidelity funds. Thus, Northwestern could not have consolidated recordkeepers without dropping either TIAA's annuities and other offerings or

Fidelity's mutual funds from the plans' menu of active investment options open for contributions. *See* Pet. App. 16a ("If Northwestern removed TIAA and hired a third-party recordkeeper, participants would have lost access to the Traditional Annuity."). And even if Northwestern had opted to remove TIAA's annuities and other offerings from the options available for future investment, it still would have had to continue compensating TIAA as recordkeeper until the last dollar was paid out on existing TIAA Traditional contracts in which plan participants already held assets. That is because many TIAA annuities are individually owned by plan participants, so Northwestern could not force participants to liquidate their TIAA Traditional holdings (and any liquidation would have been subject to a 2.5% surrender charge). *See supra* p. 8; Resp. Br. 38; Pet. App. 4a, 16a.

Given these realities, it was far from imprudent for Northwestern to retain both recordkeepers. Declining to consolidate recordkeepers is consistent not only with fiduciary duty, but also with the reasoned decision to retain both TIAA's annuities and Fidelity's mutual funds. And as this Court has explained, "[w]here 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.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Put another way: "Where there are two possible explanations, only one of which can be true and only one of which results in liability, plaintiff cannot offer allegations that are merely consistent with its favored explanation but are also consistent with the alternative explanation." *White* v. *Chevron Corp.*, 752 F. App'x 453, 454 (9th Cir. 2018) (quotation marks and brackets omitted). "Something more is needed, such as

facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiff's allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* at 454-455 (citation and ellipsis omitted). The amended complaint lacks that "something more."

C. Offering Retail-Class Shares Rather Than Institutional-Class Shares Was Not Imprudent

Petitioners repeatedly fault Northwestern for failing to provide institutional-class funds, providing instead the "corresponding retail-class versions," which petitioners claim "differ[] only in cost." Pet. Br. 29-30 (quotation marks omitted). But as the amended complaint itself acknowledges and the 403(b) context confirms, there are good reasons for plan sponsors to offer retail-class shares.

As the amended complaint recognizes, there are "two primary methods for defined contribution plans to pay for recordkeeping and administrative services." JA 55. Under a "direct" payment arrangement, the plan pays "a flat annual fee based on the number of participants." *Id.* Under an "indirect" payment arrangement, the investment manager passes to the recordkeeper a portion of the expense ratio received from the plan participants. JA 57. The Northwestern plans used the latter, *i.e.*, the revenue-sharing model. JA 95.

The amended complaint also establishes why the plans' choice to pay recordkeeping fees through revenue sharing justified the provision of retail-class shares—namely, because that is how indirect payment for recordkeeping is accomplished, and it does not alter the amount of the fee the plans pay for recordkeeping services. In particular, as the amended complaint alleges, some investment products offer two share

classes: institutional and retail. Retail shares have higher fees "expressed as a percentage of assets under management, or 'expense ratio[s].'" JA 52. Under a revenue-sharing arrangement, the amended complaint alleges, this "difference in fees between … [the] retail and institutional share classes" is shared with the recordkeeper to pay the recordkeeping fee. JA 53. Indeed, the amended complaint alleges this was how the plans worked: The investment products offered by the plans used "internal revenue sharing … from using higher-cost share classes … as opposed to the institutional classes" to pay for recordkeeping. JA 95. The plans' use of retail shares was part and parcel of its revenue-sharing arrangement: The marginal expense for the retail shares above the expense ratio for the corresponding institutional shares produced revenue that is shared with the recordkeeper to pay recordkeeping fees.

It is thus misleading to assert, as petitioners repeatedly do, that retail-class and institutional-class shares "differ[ed] only in cost." Pet. Br. 30 (quotation marks omitted); *see also id.* ("[Offering retail-class versions] accomplished nothing but depriving participants of $2.50 out of each $1,000 they invested."). Retail shares differ from institutional shares in a significant respect: They help pay for recordkeeping fees, whereas institutional shares do not. *See Sacerdote*, 9 F.4th at 124 (Menashi, J., dissenting in part); Resp. Br. 42. Had the plans elected to provide institutional shares, they would have been forced to pay the same recordkeeping fees directly.

The plans' choice to offer retail-class shares is thus synonymous with the plans' decision to pay recordkeeping fees indirectly via revenue sharing—which petitioners acknowledge is "not a per se violation of

ERISA." JA 57. Indeed, asset-based fees are a "common and 'acceptable' investment industry practice[] that frequently inure[s] to the benefit of ERISA plans." *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *see* U.S. Dep't of Labor, Advisory Opinion No. 2013-03A, 2013 WL 3546834, at *3-4 (July 3, 2013) (approving asset-based fees as a means of paying administrative fees, provided that fiduciaries understand the formula through which fees are calculated and ensure that fees paid are reasonable in light of the services provided). And there is a good reason for that: Because per-participant fees apply to every participant equally, they disproportionately disadvantage lower-income, lower-investment individuals, who tend to be younger participants. *See Loomis* v. *Exelon Corp.*, 658 F.3d 667, 672-673 (7th Cir. 2011); Fidelity Investments, *America's retirement score: In fair shape—but fixable* 7 (2016), https://tinyurl.com/tv6lxl2. For example, a recordkeeping fee of $75 a year is disproportionately higher for a participant with a $1,000 initial balance than a participant with a $100,000 initial balance. To avoid that result, plans commonly opt instead to compensate the recordkeeper via fees calculated as a percentage of assets under management (paid through the provision of retail-class shares).

Given the pervasiveness of the practice, under *Twombly*, petitioners were required to plead facts showing that Northwestern's decision to follow that well-established practice was imprudent, and they failed to do so. A "natural explanation"—paying recordkeeping fees—provides an "obvious alternative explanation" for Northwestern's decision to provide retail-class shares. *Twombly*, 550 U.S. at 567-568. Petitioners have not shown that "a prudent fiduciary in like circumstances would have acted differently." *St.*

Vincent, 712 F.3d at 720. "[G]iven more likely explanations" for the provision of retail-class shares, the amended complaint "do[es] not plausibly establish" fiduciary breach. *Iqbal*, 556 U.S. at 681.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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