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

REPLY BRIEF FOR PETITIONERS

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When Congress imposed a fiduciary duty of prudence on retirement plan administrators derived from trust law, it intended to confer upon plan participants a remedy for harms caused by imprudent plan management. Failure to act reasonably to control expenses always has been a fiduciary breach under trust law and ERISA. Excessive-fee litigation has enhanced the financial security of tens of millions of Americans by improving the management of defined-contribution plans. ERISA is working exactly as intended.

Respondents' main response is to complain that objectively reasonable prudence is "paternalistic." Yet there is nothing "paternalistic" about Congress enacting a law to recognize suits against Plan fiduciaries for incurring excessive fees, failing to eliminate unnecessary recordkeepers, or structuring plans that unreasonably confuse plan participants. ERISA's text, the common law of trusts, and this Court's precedents all support reversal of the Seventh Circuit's atextual heightened pleading standards.

ARGUMENT

I. RESPONDENTS ARE SUBJECT TO A DUTY OF PRUDENCE DERIVED FROM TRUST LAW

This Court frequently has held that ERISA's "'standard of care'" – or duty of prudence – is a "'strict standard[] of trustee conduct derived from the common law of trusts.'" *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014) (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985)) (ellipsis omitted). The Court has instructed courts to "look to the law of trusts" to determine an ERISA fiduciary's obligations for maintaining investment lineups of defined-contribution plans. *Tibble v. Edison Int'l*, 575 U.S. 523, 528-29 (2015). *See* Pet. Br. 19-20. Under trust law, the fiduciary duty of prudence encompasses the following relevant obligations: (1) to act prudently when incurring expenses, so as to incur only reasonable expenses, *id.* at 22-26; (2) to act prudently when delegating investment functions, *id.* at 26-27; and (3) to monitor investments prudently and remove imprudent investments, *id.* at 27-28.

Respondents do not dispute petitioners' explication of trust law. Rather, they erroneously argue (at 20) that trust-law principles are wholly inapplicable to defined-contribution plans in which participants select investment options, and fiduciaries of such plans need offer only "a meaningful array of options." Respondents' watered-down conception of ERISA's duty of prudence finds no support in text or precedent.

A. ERISA's Text Applies The Same Duty Of Prudence, Derived From Trust Law, To All Fiduciaries

ERISA imposes a single duty of prudence applicable to *all* "fiduciar[ies] . . . discharg[ing] [their] duties with respect to a plan." 29 U.S.C. § 1104(a)(1). ERISA unambiguously defines "plan" to include both defined-contribution and defined-benefit plans. *See id.* § 1002(3), (34), (35).[1] In setting forth ERISA's uniform duty of prudence, Congress used language directly drawn from trust law. Pet. Br. 20-21. Respondents do not dispute that trust-law principles apply to defined-benefit plans. ERISA provides no textual basis for holding fiduciaries of defined-contribution plans to a

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[1] ERISA's text provides no indication that Congress sought to hold 403(b) fiduciaries to a lesser standard than 401(k) fiduciaries. Pet. 4; App. 27a.

lesser standard. Indeed, in rejecting a fiduciary's argument to apply a lower standard to employee stock ownership plans – a type of defined-contribution plan – this Court held that it "follows from the pertinent provisions of ERISA" that "the same standard of prudence applies to all ERISA fiduciaries." *Dudenhoeffer*, 573 U.S. at 418-19.

Section 404(c), which provides a limited defense to ERISA liability for losses resulting from a participant's investment choices under certain circumstances, does not justify imposing a different standard for the underlying fiduciary duty. To begin with, "section 404(c) is not applicable" here because it "is an affirmative defense that is not appropriate for consideration on a motion to dismiss when, as here, the plaintiffs did not raise it in the complaint." *Pfeil v. State St. Bank & Tr. Co.*, 671 F.3d 585, 598 (6th Cir. 2012), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409; *see also id.* at 599 (collecting cases).

In any event, "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007). That conclusion follows from the statute's text. "Section 404(c) speaks of 'any breach, which results from' a participant's exercise of control. 'Result from' means '[t]o arise as a consequence, effect, or outcome of some action.'" *Tibble v. Edison Int'l*, 729 F.3d 1110, 1123 (9th Cir. 2013), *vacated on other grounds by Tibble*, 575 U.S. 523. Thus, "'the selection of the particular funds to include and retain as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot 'result[] from') a participant's decision to invest in any particular option.'" *Id.* (quoting Sec'y of Labor Amicus Br. 21, *Tibble*, 2011 WL 2178417) (brackets in original).

Moreover, Congress delegated authority to the Department of Labor ("DOL") to issue regulations implementing Section 404(c). *See* 29 U.S.C. § 1104(c)(1)(A). DOL's regulations provide that Section 404(c) "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." 29 C.F.R. § 2550.404c-1(d)(2)(iv). In promulgating that regulation, DOL stated: "a fiduciary breach or an investment loss in connection with the plan's selection or monitoring of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control." 75 Fed. Reg. 64,910, 64,927 (Oct. 20, 2010). DOL reiterated that view in this case: "[f]iduciaries are . . . liable, notwithstanding Section 1104(c), for any losses attributable to the imprudent selection or monitoring of the funds on a plan's investment menu." U.S. Br. 24. All but one circuit to address the question correctly have concluded that Section 404(c) does not insulate a fiduciary from liability for imprudent selection or monitoring of a plan's investment options. *See Tibble*, 729 F.3d at 1121-25; *Pfeil*, 671 F.3d at 599-601; *Howell v. Motorola, Inc.*, 633 F.3d 552, 567-68 (7th Cir. 2011); *DiFelice*, 497 F.3d at 418 n.3.[2]

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[2] Respondents cite (at 20) *Hecker v. Deere & Co.*, 556 F.3d 575, 587 (7th Cir. 2009), but, in its order denying rehearing, the panel clarified that "it refrained from making any definitive pronouncement" on the safe harbor's applicability. *Hecker v. Deere & Co.*,

The division of responsibility under ERISA is clear: plan fiduciaries are charged with selecting and maintaining a prudent investment lineup; if they do so, and meet the Section 404(c) requirements, then they are not liable for losses caused by a participant's choices within that lineup. But the safe harbor highlights the importance of fiduciaries prudently constructing and maintaining the investment lineup in the first instance.

B. This Court's Precedents Establish The Applicability Of Trust-Law Principles

This Court has not differentiated between types of plans in holding that ERISA's duty of prudence is "'derived from the common law of trusts.'" *Dudenhoeffer*, 573 U.S. at 416 (quoting *Central States*, 472 U.S. at 570). Rather, the Court has applied trust-law principles to defined-contribution plans, *see id.* at 412, 422; *Tibble*, 575 U.S. at 525, 528-30, and defined-benefit plans, *see*, *e.g.*, *Central States*, 472 U.S. at 570-72.

In *Tibble*, this Court held that courts should "look to the law of trusts" to determine whether a fiduciary complied with its duty of prudence in maintaining the investment lineup of a defined-contribution plan. 575 U.S. at 528-29. This Court concluded that "the Ninth

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569 F.3d 708, 710 (7th Cir. 2009). The Seventh Circuit later held "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and . . . the safe harbor is not available for such acts." *Howell*, 633 F.3d at 567. Respondents also cite *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 310-11 (5th Cir. 2007), but *Langbecker* predates the applicable DOL regulation and has been criticized by other circuits. *See Tibble*, 729 F.3d at 1123 ("we disagree" with *Langbecker*); *Pfeil*, 671 F.3d at 600-01 (same); *DeFelice*, 497 F.3d at 418 n.3 (favorably citing *Langbecker* dissent).

Circuit erred" in judging the plaintiffs' claims for imprudent retention of investment options as untimely because "[t]he Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment." *Id.* at 528. The Court drew on traditional trust-law sources to conclude that, "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 530. The Court held that breach of this trust-derived duty constituted an ERISA violation: "A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.*

Respondents misread *Tibble* in arguing (at 23-24) that it concerned only timeliness and not the nature of the underlying duty. Indeed, this Court grounded the Ninth Circuit's error on timeliness on its failure to "consider[] the nature of the fiduciary duty." 575 U.S. at 528. Although the Court did not address on the merits "the scope of [the plan's] fiduciary duty in this case," *id.* at 531, it instructed the Ninth Circuit to consult trust law to answer that question, *see id.* ("We remand for the Ninth Circuit to consider petitioners' claims . . . , recognizing the importance of analogous trust law."); *id.* at 528 (directing Ninth Circuit to "consider[] trust-law principles").

Respondents ask the Court to hold that courts should *not* "consider[] trust-law principles," *id.*, when assessing duty-of-prudence claims concerning defined-contribution plans and to rule that defined-contribution fiduciaries do *not* "breach[] the duty of prudence by failing to properly monitor investments and remove imprudent ones," *id.* at 530, so long as the plan includes "a meaningful array of options," Resp.

Br. 20. The Court could not so hold without overturning its unanimous ruling in *Tibble*.

Respondents incorrectly assert that trust-law principles "'do[] not fit'" the context of defined-contribution plans with an investment lineup. Resp. Br. 22 (quoting *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020)). Each of the relevant trust-law obligations comfortably fits this context. *First*, the obligation to keep expenses reasonable has special importance to defined-contribution plans. A defined-contribution plan is like a "private trust" because "every penny of gain or loss is at the beneficiaries' risk." *Thole*, 140 S. Ct. at 1619-20.

Second, the obligation to act prudently when delegating investment functions fits the defined-contribution context because the act of designing a menu of mutual funds and annuities managed by third-party providers (and selecting recordkeepers to administer a plan) is an act of delegation. *See* Restatement (Third) of Trusts § 90 cmt. m (2007) ("costs" of "using mutual funds and other pooling arrangements . . . require special attention by a trustee").

Third, this Court already has held in *Tibble* that the trustee's obligation "to monitor investments and remove imprudent ones" applies to the defined-contribution fiduciary's monitoring and selection of options in a plan menu. 575 U.S. at 530.

C. Respondents' Proposed Atextual Revision Of ERISA Produces Counter-Textual Results

Respondents essentially propose that the Court adopt a large-menu defense to ERISA, such that, if a plan offers a "diverse menu of investment options" including some options "deemed prudent," fiduciaries cannot be liable if other options (even most options) are overly expensive or otherwise imprudent. Resp.

Br. 24-25. This large-menu defense is found nowhere in ERISA's text, violating "a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)).

Even if this Court had authority to revise ERISA as respondents suggest, the large-menu defense is misguided policy. If adopted, respondents' view would lead fiduciaries to include as many options as possible, because the presence of at least some prudent options would immunize them from liability. But as leading investment-law scholars have explained, "this approach would create an incentive to make menus worse" because "fiduciaries would be encouraged to offer bloated menus and be affirmatively discouraged from pruning poor options." Scholars Br. 5.

Empirical scholarship shows that "[c]ompiling scores or even hundreds of funds is unnecessary and may harm investors, particularly when excessively costly funds are among those offered." *Id.* at 21. "[I]f the menu contains inappropriate options, some employees will choose them," *id.* at 14, and "long menus . . . impose cognitive costs" by "overwhelm[ing]" investors to the point that some will fail to participate in defined-contribution plans, *id.* at 23. "Empirical studies of retirement plans . . . show that employees are best served by concise, carefully constructed menus that exclude excessively expensive and under-performing fund options." *Id.* at 5-6. The menus here are "aberrant" in including "more than 240" options, when "a typical retirement plan menu includes about twenty to thirty options." *Id.* at 10.

Respondents' standard would encourage fiduciaries to deviate from the concise menus that other fiduciaries "acting in a like capacity and familiar with such matters" have constructed, 29 U.S.C. § 1104(a)(1)(B), the opposite of what ERISA's text instructs. *See also* SEIU Br. 3-15 (describing scholarship showing that concise menus serve participants better than overlong menus); AARP Br. 5-6 (where a plan "offers so many options – over 200, here – . . . the plan cannot effectively monitor all options, and inexpert employees will likely be too overwhelmed and confused to differentiate among products and make beneficial choices"). Moreover, as an experienced fiduciary consultant explains, because "retirement plan fiduciaries generally and routinely evaluate, select, and monitor each fund in a defined contribution plan," recognizing ERISA's fiduciary obligation to do so "is likely to have little impact on prevailing practice and to impose little new burden on plan fiduciaries." Halpern Br. 4.

II. PETITIONERS PLEADED VALID ERISA CLAIMS

A. Respondents Misstate The Applicable Pleading Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint with sufficient factual allegations to support "the reasonable inference that the defendant is liable for the misconduct alleged" meets that standard. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A court "must accept as true all of [plaintiffs'] factual allegations," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), and draw "all reasonable inferences . . . in favor of the pleader," 5B Charles Alan

Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 417 (3d ed. 2004). Accordingly, an ERISA excessive-fee complaint passes muster if it contains sufficient factual allegations to support the reasonable inference that a fiduciary failed to act prudently to incur only reasonable expenses or failed to monitor the plan prudently to remove overly expensive investment options.

Respondents seek to displace the Rule 8 standard by inserting additional pleading requirements. First, they argue that a complaint "'must plausibly allege an alternative action that the defendant could have taken'" and "'that a prudent fiduciary in the same position "could not have concluded" that the alternative action "would do more harm than good."'" Resp. Br. 27 (quoting *Dudenhoeffer*, 573 U.S. at 428, and *Amgen Inc. v. Harris*, 577 U.S. 308, 311 (2016) (per curiam)).

Those *Dudenhoeffer* requirements apply only to claims in the highly specific context of fiduciaries of employee stock ownership plans acting on inside information. *Dudenhoeffer* held those requirements are necessary "[t]o state a claim for breach of the duty of prudence on the basis of inside information," because making investment decisions based on inside information could violate securities laws. 573 U.S. at 428-29; *see also Allen v. Wells Fargo & Co.*, 967 F.3d 767, 772 (8th Cir. 2020) (Supreme Court "established a demanding pleading standard" for claims based on "inside information" because of the "unique conflict between securities laws and the[] duty of prudence" presented by such claims), *cert. denied*, 141 S. Ct. 2594 (2021). But that "pleading standard for breach of fiduciary duty involving insider information and employer stocks" is not "controlling" in other contexts.

Tatum v. RJR Pension Inv. Comm., 855 F.3d 553, 560 n.4 (4th Cir. 2017); *see also* DOL Amicus Br. 7-11, *Tatum*, 2016 WL 4751078 (*Dudenhoeffer* presents "a pleading requirement specific to a narrow category of cases (those involving inside information)").

Second, respondents argue (at 27-28) that complaints alleging fiduciary imprudence based on excessive fees must offer specific comparisons; for example, contrasting respondents' conduct against that "of other similarly situated fiduciaries." Respondents' *amici* go further, arguing that even an "apples to apples" comparison is insufficient for apples of different types. Euclid Br. 5. Those contentions go far beyond Rule 8's requirement of a "short and plain statement." They also depart from ERISA's text, which requires fiduciaries to act "with the care, skill, prudence, and diligence . . . that a prudent man . . . would use." 29 U.S.C. § 1104(a)(1)(B). By using an "objective prudent person standard," *Fink v. National Sav. & Tr. Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985), based on diligence that a prudent person *would use*, rather than a historical standard based on efforts that others *have used*, Congress eschewed any mechanical requirement for specific comparisons to prove a claim, let alone to plead one. *See*, *e.g.*, *Tibble*, 575 U.S. at 530 (not requiring comparison against similarly situated fiduciaries for claim that fiduciary "fail[ed] to properly monitor investments and remove imprudent ones").

The heightened pleading standard that respondents erroneously advocate would not help them because petitioners met that standard. Petitioners alleged specific alternative actions that would have lowered expenses (e.g., consolidating recordkeepers, negotiating lower recordkeeping fees, streamlining the investment lineup, switching to lower-cost institutional funds, JA96-117 (Am. Compl. ¶¶ 151-152, 155-165)); identified cheaper comparator investments, JA101-16; and alleged that other fiduciaries have successfully taken such action, JA73-77 (*id.* ¶¶ 93-97).

Respondents' *amicus* Euclid acknowledged in a white paper cited in its brief (at 6 n.2) that respondents "may not ultimately prevail" even under a heightened pleading standard. Euclid White Paper 4.[3] Because "most [other defined-contribution plans] are better structured and have much lower fee profiles," *id.* at 3, Euclid acknowledged "the Amended Complaint lays out a worrisome fact pattern that is hard to defend," *id.* at 5. Euclid's conclusion that the Amended Complaint presents "one of the worst possible fact scenarios," *id.* at 11, underscores that this Court could rule for respondents only if it adopts a pleading standard so onerous as to eliminate virtually all ERISA liability for excessive fees.

B. Petitioners Plausibly Alleged That Respondents Imprudently Failed To Control Recordkeeping Fees

Petitioners pleaded a plausible claim that respondents breached their fiduciary duties by imprudently causing the Plans to pay excessive recordkeeping fees. Pet. Br. 32. The Plans paid four to five times a reasonable amount for recordkeeping services. JA95-96 (Am. Compl. ¶¶ 148-150). Recordkeeping costs were so high because the Plans "maintain[ed] a costly and ineffective multiple recordkeeping structure" and paid through "uncapped revenue sharing," which spiraled out of control as the Plans' asset base surged. JA94 (*id.* ¶ 143); *see* Euclid White Paper 12 ("[a]sset-based

[3] https://perma.cc/H48B-L6JJ.

recordkeeping is . . . problematic for high-asset participant accounts").[4]

Those excessive fees resulted from an imprudent process: respondents failed (1) "to adequately monitor the amount of the revenue sharing received by the Plans' recordkeepers"; and (2) to "determine if those amounts were competitive or reasonable for the services provided to the Plans." JA166 (Am. Compl. ¶ 249). Further, respondents failed to take several available steps that could have reduced fees: consolidating to a single recordkeeper, soliciting competitive bids for recordkeeping, or negotiating fee reductions. JA93-94, 96-97 (*id.* ¶¶ 141-143, 151-152). Respondents' actions differed from typical fiduciary practice. More than 90% of 403(b) plans use a single recordkeeper, JA79 (*id.* ¶ 102),[5] and petitioners identified several similarly situated university 403(b) plans that reduced fees through recordkeeper consolidation and competitive bidding, JA73-77 (*id.* ¶¶ 93-97). These allegations stated a plausible claim that respondents breached the prudent-person standard. Pet. Br. 33-34.

Respondents fault petitioners (at 29-30) for not identifying the prices that specific alternative vendors would have offered for recordkeeping services. Neither ERISA's text nor Rule 8 requires it; plaintiffs cannot be expected to have that information at the pleading stage. Moreover, respondents' imprudent

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[4] Contrary to respondents' suggestion (at 34), petitioners alleged and have maintained that respondents' use of uncapped revenue sharing was imprudent. Petitioners argued (at 32) that "[r]ecordkeeping fees were so high because" of revenue sharing.

[5] Respondents attempt (at 32 n.9) to discredit this statistic by claiming it surveyed mostly healthcare 403(b) plans. But the same duty of prudence "applies to all ERISA fiduciaries." *Dudenhoeffer*, 573 U.S at 418-19.

failure to seek competitive bids or otherwise test the market makes it impossible to know precisely what prices other vendors would have offered. Respondents' imprudence should not serve as a defense to liability. The fact that TIAA slashed its recordkeeping rates from $150 per participant to $42 per participant in 2015 (even as respondents conducted a flawed bidding process that included only the Plans' incumbent recordkeepers) shows that $35 per participant (or at least something close to it) was reasonable. JA447-48 (Dist. Ct. ECF No. 169, Proposed SAC V2 ¶¶ 173-176).

Respondents also erroneously contend (at 30-31) that petitioners failed to allege plausibly that recordkeeper consolidation was an available alternative. Petitioners cited multiple, concrete examples of other similarly situated university plans that successfully reduced recordkeeping fees through this measure, JA73-77 (Am. Compl. ¶¶ 93-97), and alleged that more than 90% of 403(b) plans use a single recordkeeper, JA79 (*id.* ¶ 102). Respondents counter (at 30) that consolidating to a single recordkeeper would compromise the Plans' ability to offer the "full menu of options." They note (at 30) that CalTech "eliminated over 100 Fidelity mutual fund options" when consolidating to a single recordkeeper. JA77 (Am. Compl. ¶ 97). But that response highlights the problem with respondents' breaches of duty: petitioners plausibly alleged that maintaining hundreds of duplicative options was itself imprudent and harmful. *See infra* Part II.D. To the extent consolidating recordkeepers would involve streamlining the investment lineup, that action would be an added benefit, not a legal obstacle to a claim. Petitioners alleged that CalTech *chose* to eliminate funds to "select[] a core set of investment options," JA77 (Am. Compl. ¶ 97), not that CalTech was forced to do so.

Respondents' assertion (at 32) that petitioners failed to allege that other university plans were similarly situated is baseless. All were 403(b) plans of prominent universities; all consolidated from multiple recordkeepers to a single recordkeeper; and Pepperdine, Purdue, and CalTech even initially retained the *same* recordkeepers as the Plans. JA73-77, 94 (Am. Compl. ¶¶ 93-97, 143).

Finally, respondents invert the applicable pleading standard in asking the Court to conclude (at 32-33), in respondents' favor, that TIAA's investment offerings (such as the Traditional Annuity) were so desirable that they justified paying above-market recordkeeping fees. Petitioners alleged that "[t]here is no shortage of high-quality, low-cost alternatives to TIAA-CREF's products in the defined contribution plan market," including stable value funds or other fixed annuities as alternatives to the TIAA Traditional Annuity. JA71 (Am. Compl. ¶ 89).[6] Moreover, even if one assumes that TIAA's services were somehow uniquely desirable, respondents could have retained TIAA and negotiated lower fees, as CalTech did. JA77 (*id.* ¶ 97).

C. Petitioners Stated A Valid Claim Based On Imprudent Selection Of Retail-Class Funds

Petitioners plausibly alleged that respondents breached their fiduciary duties by offering 129 retail-class mutual funds when they could have obtained

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[6] Contrary to respondents' assertion (at 33), petitioners did not allege that participants would have paid a 2.5% fee if the Plans removed TIAA as recordkeeper. Petitioners merely alleged that TIAA imposed a "surrender charge if a participant withdraws his or her investment in a single lump sum within 120 days of termination of employment." JA88 (Am. Compl. ¶ 132).

the *same investment* at a lower price through institutional-class versions of the same funds. Pet. Br. 29-30. Respondents seek to excuse their failure to act prudently by describing the difference in fees between these classes as "marginal." *E.g.*, Resp. Br. 24, 26. But many of the differences were quite large, *see* JA102 (131.58% difference in costs between share classes of TIAA-CREF Lifecycle 2030), and even small fee differences significantly can reduce an account's value over time, *see* DOL, *A Look at 401(k) Plan Fees* 2 (Sept. 2019).[7] Because "[w]asting beneficiaries' money is imprudent," UPIA § 7 cmt., saddling participants with wholly unnecessary retail-class fees violates a fiduciary's "duty to be cost-conscious," Third Restatement § 88 cmt. a; *see* Pet. Br. 30-31.

Respondents argue (at 37-38) that petitioners' claim fails because certain institutional-class funds have investment minimums. But publicly available information shows that some of the institutional-class funds had no minimum[8] and,

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[7] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf.

[8] For example, in 2010, the lower-cost "K" shares of Fidelity's Contrafund and Magellan funds had "no purchase minimum" and were expressly "generally . . . available only to employer-sponsored retirement plans (including profit sharing, 401(k), 403(b), 457(b), and similar plans)." Fidelity Contrafund Summary Prospectus (Sept. 29, 2010), https://www.sec.gov/Archives/edgar/data/0000024238/000003534110000036/main.htm; *accord* Fidelity Magellan Fund Summary Prospectus (Sept. 29, 2010) ("no purchase minimum" and available to "403(b)" plans), https://www.sec.gov/Archives/edgar/data/0000061397/000003534110000033/main.htm.

for others, the Plans exceeded the minimum threshold.[9]

Petitioners also plausibly alleged that, had respondents asked, they could have obtained institutional-class shares even of funds where they did not meet an investment minimum. As of 2015, the Retirement Plan had $2.34 billion in assets and the Voluntary Savings Plan held $530 million, making the Plans among the largest defined-contribution plans in the United States by total assets (the top 0.04% and 0.2%, respectively). JA40-41 (Am. Compl. ¶¶ 12, 16). Due to their "[j]umbo" size, the Plans wielded "massive bargaining power" to obtain share classes with lower costs than retail mutual fund shares. JA98-99 (*id.* ¶¶ 155, 157). Petitioners alleged that minimum investment requirements are "routine[ly]" waived for large institutional investors – such as the Plans. JA99-100 (*id.* ¶¶ 158-159). Reciting from the trial court's findings in *Tibble v. Edison International*, 2010 WL 2757153, at *9 (C.D. Cal. July 8, 2010) (subsequent history omitted), petitioners observed that "[f]or large 401(k) plans with over a billion dollars in total assets . . . mutual funds will often waive an investment minimum for institutional share classes." JA99-100 (Am. Compl. ¶ 158). Notably, that court found that "plans as small as $50 million in total assets" obtained such waivers. *Tibble*, 2010 WL 2757153, at *9.

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[9] For example, as of December 31, 2010, the Retirement Plan had $7,678,320 in the "Retirement" TIAA-CREF Mid-Cap Value fund (TRVRX) with 74 bps, *see* Dist. Ct. ECF No. 66-5, at 8-9, well above the $2 million minimum investment for institutional-class shares, *see* TIAA-CREF Mid-Cap Value Fund Summary Prospectus (Feb. 1, 2010), https://www.sec.gov/Archives/edgar/data/0001084380/000093041310000464/c59921_497k.htm.

Respondents' main response (at 38) is that the proffered examples of investment requirement waivers involve 401(k) plans rather than 403(b) plans. Respondents assert (at 17, 38) that 403(b) plans are differently situated because they invest in annuities as well as mutual funds. In fact, "[m]utual funds [a]re the most common investment vehicle in large ERISA 403(b) plans," encompassing 60% of assets of such plans. Investment Co. Inst., *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans, 2017*, at 2 (Jan. 2021).[10] That percentage basically tracks the 59% of overall defined-contribution assets invested in mutual funds. *See* Investment Co. Inst., *2021 Investment Company Fact Book* 44 (2021).[11] And respondents' Plans held hundreds of millions of dollars in mutual funds, well above the $50 million that the district court found was sufficient to obtain waivers in *Tibble*. *See* Dist. Ct. ECF No. 66-5, at 2-9; Dist. Ct. ECF No. 66-6, at 2-9. Petitioners' well-pleaded allegations that respondents could have obtained waivers of investment minimums are entitled to the presumption of truth at this stage.

Respondents' remaining arguments regarding retail-class shares fare no better. *First*, respondents contend (at 42) that retail-class funds "facilitate revenue sharing" to fund recordkeeping, but petitioners allege that the amount of revenue-sharing record-keeping payments was excessive. Even respondents' *amicus* acknowledges that, given respondents' "likely egregious" revenue-sharing amounts, "[t]here does not appear to be any justification for the higher cost retail share classes used by the Northwestern plan." Euclid White Paper 12-13.

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[10] https://perma.cc/K978-NDMS.

[11] https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

Second, respondents acknowledge (at 42-43) they switched from retail-class to institutional-class in *some* funds during the class period. That concession supports the plausibility of petitioners' allegation that institutional-class funds were available to the Plans; it does not excuse the unnecessary fees incurred by respondents' failure to switch earlier or to switch other retail-class funds to institutional-class versions.

Finally, respondents incorrectly argue (at 43-44) that the first Amended Complaint did not include this claim. As petitioners and the United States previously explained, the Amended Complaint contained lengthy allegations regarding imprudent selection of retail-class funds, JA98-117 (Am. Compl. ¶¶ 155-165); and Count V alleged that respondents "breach[ed]" their "fiduciary duties" by selecting "mutual funds . . . with retail expense ratios" rather than "lower-cost share class mutual funds with the identical investment manager and investments," JA171 (*id.* ¶ 266); *see* Cert. Reply 2 n.1; U.S. Cert. Br. 20; Pet. Supp. Br. 1-3. All parties and the lower courts understood that Count V included the retail-class-share claim. *See* U.S. Cert. Br. 20-21; Pet. Supp. Br. 3-5. Respondents made the same vehicle argument at the petition stage, *see* Resp. Supp. Br. 2-7, and this Court correctly rejected it by granting certiorari.

D. Petitioners Stated A Valid Claim Based On Respondents' Imprudent Retention Of Hundreds Of Duplicative Options

Petitioners plausibly alleged that respondents' imprudently structured Plans confused participants and increased costs by including hundreds of options. Pet. Br. 35-36. Petitioners alleged that, because many of the options were duplicative, the large quantity was not justified by the benefits of additional choice. *Id.* at

35. Fiduciaries typically offered many fewer options. *See* JA118-19 (Am. Compl. ¶ 168) (alleging "defined contribution plans in 2014 had on average 15 investment options").

Respondents err in asserting (at 35) that petitioners cannot bring a claim based on the Plans' confusing structure because they did not allege they were confused. The Amended Complaint alleged that the "overwhelming number" of options placed a "monumental burden" on petitioners "in selecting options in which to invest." JA118 (Am. Compl. ¶ 167). To evaluate so many options would require "read[ing] many thousands of pages of materials," which was "a virtually impossible burden." *Id.* And respondents admitted in 2016 that reducing the number of options was necessary to "allow for informed decisions." JA151 (*id.* ¶ 221). Petitioners plausibly alleged the Plans' structure impeded an informed evaluation of all options.

Respondents do not dispute that petitioners plausibly alleged that the Plans' inclusion of hundreds of duplicative options prevented the Plans from qualifying for lower-cost share classes, thereby incurring higher fees. Indeed, respondents admitted in 2016 that streamlining to 40 options would "reduce administration fees" by providing "access to lower cost share classes." *Id.* (¶ 222) (brackets omitted). Respondents incorrectly argue (at 36) that higher fees are "a lawful effect of ERISA's policy of encouraging options." Although fiduciaries should maintain options sufficient to enable participants to diversify their investments, *see* 29 U.S.C. § 1104(a)(1)(C), nothing in ERISA requires or encourages plans to include hundreds of duplicative options. As leading investment scholars explain, "a retirement plan menu need not provide a lengthy list of funds in order for plan participants to achieve diversification." Scholars Br. 22. Rather, "[i]ncreasing the number of funds in the plan d[oes] not meaningfully increase the ability of investors to diversify risk once the menu include[s] a dozen funds." *Id.* Respondents' own supporting *amicus* explains that "most plans have 20-40 investment options, not hundreds," and that including a diverse array of 20-30 options "reduces any alleged participant confusion and fully leverages the size of the plan for lower fees." Euclid White Paper 11.

Respondents mischaracterize petitioners' position (at 36) as seeking a requirement that plans contain a "Goldilocks-level" number of options. Although Plans typically offer 15-40 options,[12] a reasonably prudent plan does not mandate a specific number. But here, where petitioners plausibly alleged that respondents so substantially deviated from typical fiduciary practice by including hundreds of duplicative options and harmed participants, petitioners have stated a claim.

E. The Court Need Not Disregard Information That Refutes Respondents' Arguments

The operative complaint contains sufficient allegations to warrant reversing the decision below. Respondents liberally cite extra-pleading materials in asking the Court to reject petitioners' well-pleaded allegations (contrary to the established pleading standards), while also arguing (at 45-47) that the Court must disregard information revealed in discovery and pleaded in the proposed Second Amended Complaint. Respondents' preference for internet research to litigation discovery stems from a straight-

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[12] *See* JA118-19 (Am. Compl. ¶ 168) (average of 15 options); Scholars Br. 22; Euclid White Paper 11.

forward truth: information revealed in discovery refutes many of respondents' arguments.

For example, respondents seek to excuse (at 10-11) the fact that they did not reform the Plans until 2016, because the review "process . . . took time." But respondents were advised in 2011 and 2012 that maintaining multiple recordkeepers and duplicative funds led to unnecessary fees. *See* JA214-15, 232-33, 280-81 (Dist. Ct. ECF No. 130, Ex. 1, Proposed SAC V1 ¶¶ 90, 120, 203, 205); JA447-49 (Proposed SAC V2 ¶¶ 171, 177); *see also* Proposed SAC V1 ¶¶ 202, 204. Respondents have no explanation for the additional four to five years of delay. Respondents also dismiss as implausible (at 29) petitioners' allegation that $35 per participant was a reasonable recordkeeping fee. Yet TIAA slashed its rates to $42 per participant in response to a flawed bidding process, JA448 (Proposed SAC V2 ¶ 176), which confirms that fees in the neighborhood of $35 per participant were reasonably attainable. Finally, respondents and TIAA rely on extra-pleading materials to assert that TIAA's services were of uniquely high quality, justifying higher fees. Resp. Br. 7, 10; TIAA Br. 4-10. Those arguments are undermined by TIAA's unlawful exploitation of participants' confidential information to sell lucrative investment products. Pet. Br. 29-41; JA315-18 (Proposed SAC V1 ¶¶ 277-283).

III. RESPONDENTS' POLICY ARGUMENTS ARE MISGUIDED

No policy concerns justify the atextual limitations on ERISA sought by respondents. Respondents speculate (at 49-50) that ERISA litigation will "cripple ERISA plans" and "discourage employers from offering ERISA plans" (brackets omitted), but all evidence is to the contrary.

Most courts have allowed excessive-fee lawsuits like this one to advance (Pet. 8-11, 14-16), yet none of the horribles prophesied by respondents has occurred. Neither petitioners nor their *amici* cite a single employer that has been "crippled" by ERISA litigation or has decided not to offer a defined-contribution plan for fear of litigation. Rather, DOL data shows that usage of defined-contribution plans has surged since excessive-fee lawsuits involving 401(k) plans began in 2006 and since university 403(b) lawsuits began in 2016.

	2005	2015	2019
Defined-Contribution Plans	631,481	648,252	686,809
Defined-Contribution Participants (millions)	75.481	97.572	109.096
Defined-Contribution Assets ($ trillions)	2.808	5.292	7.433
Defined-Contribution Contributions ($ billions)	248.788	434.606	570.211[13]

Respondents' warning (at 48-49) that every employer could be "dragged into protracted litigation" is overblown. Respondents' supporting *amici* assert that roughly 60 excessive-fee lawsuits were filed annually over the last five years, *see* Euclid Br. 6, which equates

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[13] DOL, Emp. Benefits Sec. Admin., *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2019*, tbls. E1, E4, E10, E13 (Sept. 2021), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

to just 0.0087% of the 686,809 defined-contribution plans nationwide.

Moreover, respondents' suggestion (at 49) that fiduciaries have been coerced into "in terrorem" settlements lacks merit. Respondents do not dispute petitioners' showing (at 48-49) that excessive-fee lawsuits have contributed to dramatically lower investment fees in defined-contribution plans nationwide. Indeed, courts approving such settlements have attributed nearly $2.8 billion "in annual savings for American workers and retirees" to excessive-fee litigation and DOL's fee-disclosure regulations. *Cates v. Trustees of Columbia Univ.*, 2021 WL 4847890, at *6 (S.D.N.Y. Oct. 18, 2021).[14] The significant improvements in plan administration spurred by these lawsuits validate the merit of those claims.

CONCLUSION

The court of appeals' judgment should be reversed.

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[14] *See also Kelly v. Johns Hopkins Univ.*, 2020 WL 434473, at *6 (D. Md. Jan. 28, 2020) (noting reduction in recordkeeping fees of $18 million from settlement); *Clark v. Duke Univ.*, 2019 WL 2588029, at *3 (M.D.N.C. June 24, 2019) (settlement "provide[s] . . . $27 million in value to the class from future recordkeeping fee savings and other fee reimbursements").

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