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P R O C E E D I N G S

(11:34 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-1401, Hughes versus Northwestern University.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK
ON BEHALF OF THE PETITIONERS

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Wasting beneficiaries' money is imprudent. Congress enacted ERISA to impose a duty Judge Friendly famously said was the highest known to the law, a fiduciary duty. Under ERISA Section 1104, a fiduciary managing assets in a retirement plan must act with prudence, solely in the interest of beneficiaries, incur only reasonable expenses, and act with care, skill, and diligence.

The Seventh Circuit erred by announcing a new rule that immunizes ERISA fiduciaries from suit for including imprudent options so long as some of the plan options are prudent. That holding is inconsistent with ERISA's plain text, common law principles, and

1 this Court's precedents.

2 In Tibble, for example, this Court
3 held that a fiduciary has an ongoing duty to
4 monitor fund options and to remove imprudent
5 ones. Prudence requires fiduciaries to treat
6 plan assets with skill and care. Respondents
7 maintain funds in the plan with retail fees,
8 even though the exact same investment was
9 available with lower institutional fees.

10 Northwestern also failed even to put
11 its recordkeeping practices out for competitive
12 bid or to use its enormous bargaining leverage
13 to reduce fees.

14 Long after universities like Cal Tech,
15 Purdue, Pepperdine, and Loyola Marymount had
16 reformed their plans, Northwestern finally
17 negotiated for lower fees, made institutional
18 share fees available, and consolidated its
19 recordkeeping. Respondents' own actions confirm
20 the plausibility of Petitioners' complaint.

21 Now, if I could just start with the
22 plain text of the statute, words in 1104 --
23 solely in the interest of participants, for the
24 exclusive purpose of providing benefits to
25 participants, defraying reasonable expenses with

1 care, skill, prudence, and diligence under the
2 circumstances then prevailing -- those words
3 foreclose the rule announced by the Seventh
4 Circuit.

5 It is not in the sole and exclusive
6 interest of participants to have to sift through
7 imprudent funds in order to determine which ones
8 are the prudent ones. And yet, that is the
9 implication of the Seventh Circuit's rule and
10 the position that the Respondents advance here.

11 In Tibble, in ruling on the statute of
12 limitations question, the Court had to provide
13 enough content for the ongoing duty to monitor
14 imprudent funds and to remove them and, in doing
15 so, drew upon common law principles of trust
16 that required similar action to remove imprudent
17 funds.

18 So long as some options are prudent,
19 say the Respondents, the fiduciary cannot be
20 sued for the imprudent ones. But that principle
21 provides no check on a fiduciary, and it
22 provides no check on inaction or a failure to
23 act in the best interest of the participants.

24 Nor is there a limiting approach or
25 limiting principle to the Respondents' approach.

1 They say on page 25 of their brief that one
2 rotten fund would be enough to give rise to a
3 potential breach of fiduciary duty, but where do
4 you draw the line after that? The Respondents
5 don't give any type of answer to that question,
6 and there is none.

7 In our position, we pleaded here
8 plausible claims for a breach of fiduciary duty.
9 In October of 2016, Respondents' own actions
10 confirmed the plausibility of the allegations
11 that they had breached their prior -- fiduciary
12 duties prior to that time. They finally
13 consolidated their record-keeper. They finally
14 lowered fees. They finally made institutional
15 share classes available.

16 The complaint gives ample detail about
17 all of these allegations, compared to what the
18 industry norms were at the time and compared to
19 other universities who had acted six years, in
20 some instances, before Northwestern finally got
21 around to responding to the 2007 Department of
22 Labor rule change, which was seeking to bring
23 403(b) plans into accord and alignment with
24 401(k) plans.

25 Now what Northwestern failed to do as

1 a matter of prudent process was that it failed
2 to use its bargaining leverage, notwithstanding
3 the fact that its plans were in the
4 top .2 percent in size of all plans in the
5 country --

6 JUSTICE THOMAS: But aren't you just
7 disagreeing with the strategy? At some point,
8 how much difference would there have to be
9 before it doesn't matter? I mean, the -- you
10 could say there could be an egregious case in
11 which they could have made a 20 percent return
12 on investments, but you think that -- you know,
13 they -- they make a 19 percent return. You
14 disagree as to what the strategy should be.

15 I mean, so you say there's no limit
16 for them, but, you know, there's no stopping
17 point for you either.

18 MR. FREDERICK: Well, the stopping
19 point for us, Justice Thomas, is objective
20 reasonableness, which is a band, and that band
21 is one that in the industry under the statutory
22 words, the circumstances then prevailing, is
23 going to recognize a wider band.

24 But let me go back to the focus of
25 what our complaint is, which is that the very

1 same investment was being offered to
2 participants at much higher cost than they
3 should have been able to get because they were
4 entitled to get the institutional share class
5 fees.

6 It would be like if I offered a bottle
7 of water to you, Justice Thomas, and I said
8 would you like to pay \$2 for it or would you
9 like to pay \$1 for it? In this case, the
10 Northwestern fiduciary was charging the
11 beneficiaries \$2 even though the \$1 water --
12 bottle of water was available.

13 And that is imprudent, we assert at
14 the pleading stage, and we're entitled to the
15 truth of our averments, that that pleads a -- a
16 cause of action for a breach of fiduciary duty.

17 Now your hypothetical goes to,
18 obviously, a much more difficult question, and
19 that's one that is not in the case directly as
20 we have pleaded it so far, except in a couple of
21 instances, but let me try to address it there.

22 The band of reasonableness is usually
23 going to be tied to some breakdown in process
24 for prudence. Here, because Northwestern never
25 bid out its recordkeeping services, it didn't

1 use its bargaining leverage to try to lower
2 fees, it included proprietary funds that were
3 bundled to the record-keeper, we allege that
4 that led to a lower return, and that is a claim
5 for procedural imprudence, as well as a result
6 of imprudence.

7 And we think, at this stage, it is
8 enough to meet the plausibility threshold of
9 Iqbal and Twombly to survive a motion to
10 dismiss.

11 JUSTICE BREYER: On that subject, on
12 pages 101 to 116 of the appendix, you have a big
13 table.

14 MR. FREDERICK: Yes, sir.

15 JUSTICE BREYER: And the first column
16 is all the things that were cheap, and the third
17 column or fourth, third, is all the things that
18 were expensive. Same thing, you know, you have
19 a bunch of them.

20 Okay. But what I can't find in the
21 complaint, and I'm sure it's -- I'm not sure
22 whether it's there -- you say that they offered
23 the things in the first column and they were
24 much cheaper. Where do you say they did not
25 offer the things in the third column?

1 MR. FREDERICK: Well, they didn't
2 offer them in the third column. That's the
3 whole point of having the chart.

4 JUSTICE BREYER: That may be the
5 point. All I want to know is where in the
6 complaint it says they did not offer the things
7 in the third column.

8 MR. FREDERICK: We say on paragraphs,
9 I think it's 161 and 64, that they offered
10 retail class shares when the investment funds
11 were available in the institution --

12 JUSTICE BREYER: I know you say that.
13 All I want to be sure --

14 MR. FREDERICK: If you're asking --

15 JUSTICE BREYER: -- is that you said
16 you -- and they did not offer the -- the other
17 ones. I don't -- see, I'm -- I'm not familiar
18 with this.

19 MR. FREDERICK: So, Justice Breyer,
20 let me try to answer --

21 JUSTICE BREYER: Yeah.

22 MR. FREDERICK: -- the question in a
23 very clear term. The fiduciary picks --

24 JUSTICE BREYER: Yeah.

25 MR. FREDERICK: -- the fund.

1 JUSTICE BREYER: Yeah.

2 MR. FREDERICK: We're talking about a
3 mid -- let's just use an example -- a mid cap
4 stock fund. The fiduciary picks whether to
5 offer that to the participant at the retail
6 class level, which is offered by the fund
7 manager, or to ask that it be done on the
8 institutional class level.

9 JUSTICE BREYER: Well, wait. Look at
10 the words --

11 MR. FREDERICK: It's the same fund.

12 JUSTICE BREYER: -- you put in there.
13 Look at the words you put in. I'm sure I'm
14 wrong. But the words you put in are driving my
15 suspicion, because what the fund could do --
16 suppose -- let's make up a fund.

17 The fund is -- invests in space
18 shuttles. It's called the Space Shuttle Fund.
19 We have the retail version and we have the
20 wholesale version or the institution version.
21 Okay? And they could do one. We're only going
22 to let you buy the retail version, or they could
23 say we're only going to let you buy the whole --
24 the -- the institutional version, or they could
25 say buy either, we offer you both.

1 Now --

2 MR. FREDERICK: They don't do that.
3 That's what they don't do.

4 JUSTICE BREYER: And where does it say
5 they don't do it?

6 MR. FREDERICK: They don't -- the way
7 the industry works --

8 JUSTICE BREYER: I'm not asking how it
9 works. I'm asking where in the complaint --

10 MR. FREDERICK: We say --

11 JUSTICE BREYER: -- do you say what
12 you just said --

13 MR. FREDERICK: -- pages 98 --

14 JUSTICE BREYER: -- that they don't
15 offer both?

16 MR. FREDERICK: Pages 98 to 99 --

17 JUSTICE BREYER: Okay.

18 MR. FREDERICK: -- I believe we say
19 that they were available. We say that the --

20 JUSTICE BREYER: No, no, I read that
21 with some care. What you say -- and I have it
22 right in front of me -- is you first say they
23 can obtain share classes with far lower costs.
24 Okay?

25 Now you don't say whether they did.

1 You don't say -- but then, if you read further,
2 it says institutional share classes sometimes
3 have a minimum investment threshold. Uh-huh.

4 MR. FREDERICK: We say that those were
5 made --

6 JUSTICE BREYER: Yeah, yeah, yeah,
7 yeah, but you don't say -- then you say mutual
8 funds will often waive. So, when I read those
9 three sentences, I thought what you're talking
10 about is they wrongly failed to bargain.

11 MR. FREDERICK: That's correct.

12 JUSTICE BREYER: All right. If that's
13 your claim -- I have a real question. It's not
14 that I have one side or the other. But I have a
15 real question I can't answer. And it seems to
16 me that someone in your position or -- or your
17 client's, you see, of course, a fiduciary
18 shouldn't be able to go into the grocery store,
19 to take an example, and pay a thousand dollars
20 for an apple. Even if they're charging a
21 thousand, he should say something. Okay?

22 On the other hand, you can't expect a
23 person to go into the Giant grocery and get the
24 best deal on each item. So how do you allege
25 something? I mean, it's a big deal to allege

1 something. You know, they're going to have to
2 have discovery. They're going to have to settle
3 it. We all know all those problems.

4 So what is it you should allege? I --
5 I don't want to, I think, just say: Hey, the
6 fiduciary has to go out and -- and -- and -- and
7 -- and just make the best bargain on every damn
8 thing in front of him in that -- in that grocery
9 store. On the other hand, you don't want to let
10 him get away with doing nothing either.

11 MR. FREDERICK: Justice Breyer --

12 JUSTICE BREYER: That's my real
13 question. I don't know.

14 MR. FREDERICK: -- this exact same
15 scenario was presented in Tibble, which, as
16 you'll recall, concerned --

17 JUSTICE BREYER: Yeah, yeah.

18 MR. FREDERICK: -- three funds that
19 had institutional share available.

20 JUSTICE BREYER: Yeah, but we didn't
21 answer this question in Tibble. It was a
22 question of -- it was a question --

23 MR. FREDERICK: But, on remand, what
24 happened in the courts below was that the
25 employees won the trial, that there were

1 available these institutional share classes, and
2 that was affirmed on appeal by the Ninth
3 Circuit.

4 The complaint, the whole theory of the
5 complaint is that these were available
6 institutional share class and they were not
7 being offered to the plan recipients.

8 JUSTICE ALITO: Well, the Respondents
9 say that there are thresholds that had to be
10 met. And you have subsequently determined what
11 the thresholds are for some of these funds, but
12 you didn't allege them in your complaint.

13 But your -- you -- you -- you say that
14 for purposes of pleading you didn't need to do
15 that. Is that right?

16 MR. FREDERICK: I -- I don't believe
17 we needed to do that because what we did,
18 Justice Alito, we -- we said that minimum
19 thresholds are waived. We said that jumbo plans
20 get the best deals.

21 We pleaded -- and this is at JA 99 --
22 98 to 100 -- that they're available if the
23 Respondents would have asked. On allegation at
24 JA 100, we plead that other fiduciaries had
25 obtained waivers from TIAA and Fidelity, which

1 are the two that are at issue in this case.

2 So I think, Justice Alito, the
3 question is plausibility. If the issue is how
4 much more specificity is required, I think
5 that's going far beyond Rule 8 of the Federal
6 Rules of Civil Procedure and what is plausible
7 on the basis of what's required under Twombly
8 and Iqbal.

9 JUSTICE KAGAN: Mr. Frederick, are you
10 saying that, basically, Northwestern just failed
11 to use its existing leverage, failed to bargain,
12 just was -- you know, there was a bargain right
13 in front of it, it -- and it -- it ignored it,
14 or, alternatively, there's some aspects of your
15 complaint which suggest, look, they could have
16 gotten the institutional rates if they had only
17 scrapped half their plans so that -- scrapped
18 half their funds, excuse me, so that the money
19 would have been redistributed and -- and in each
20 of those remaining funds the threshold would
21 have been met.

22 Is that part of your complaint here,
23 that -- that they should have consolidated their
24 funds in order to get the institutional rates?
25 Or are you saying, no, forget the consolidation

1 piece of this. Even with their -- the number --
2 their existing number of funds, they could have
3 gotten the institutional rate and they should
4 have?

5 MR. FREDERICK: We're saying both.
6 They could have gotten the institutional rate.
7 They were eligible for it. They -- all they had
8 to do was ask for it and get it, and they would
9 have gotten it.

10 The other universities that did the
11 same kind of thing consolidated. That was the
12 Cal Tech, Purdue, Pepperdine, Loyola Marymount
13 example which we set forth in -- in the
14 complaint about 20 pages before these
15 institutional share class.

16 And what was happening in --

17 JUSTICE KAGAN: I mean, isn't the
18 consolidation claim a harder one for you? I
19 totally get, you're saying like, my gosh, you
20 know, all they had to say was we want the
21 institutional rate and they would have gotten
22 it. That just sounds like negligence and bad
23 trust -- trustee management, whatever.

24 But, on the consolidation point, I
25 mean, there is at some -- at some point a

1 downside to having a non-diverse set of funds,
2 right? And isn't that much harder for courts to
3 figure out? Like, at what point is it like, no,
4 nobody's going to want that plan, it only has
5 three funds in it?

6 MR. FREDERICK: That's why we also
7 pleaded, Justice Kagan, that the industry norm,
8 the circumstances then prevailing, to use the
9 language of the statute, is there has been a
10 reduction in consolidation in the industry ever
11 since the Department of Labor issued its
12 regulations in 2007.

13 And that's why we plead that Cal Tech
14 reduce the number of its offerings and that the
15 average among these types of plans is about 20
16 to 40 rather than the 242 in the retirement plan
17 that were being offered by Northwestern.

18 I would acknowledge that it is a
19 harder claim to show that there's consolidation
20 that would reduce fees, but there's a lot of
21 expert testimony and expert analysis of that
22 very situation because, in some instances, they
23 were offering 16 funds that offered the exact
24 same investment mix.

25 And the circumstances now suggest that

1 consolidation will lower fees, it will provide
2 an opportunity for less recordkeeping expense,
3 it will be better for the beneficiaries, and
4 that is to be benefitting -- benefitting the
5 plan.

6 JUSTICE GORSUCH: Mr. Frederick, along
7 those lines, I -- I -- I can certainly see that
8 argument, the -- and I'm not -- I'm not talking
9 about the first argument. I'm talking about the
10 second argument now. But it does raise some
11 questions about judicial competence and
12 administration and realms of reasonable
13 judgment.

14 What guidance would you have us give?
15 Because I don't think you'd say -- want courts
16 to say 40 is a magic number and -- and -- and
17 that choice is bad. I mean, all things equal,
18 choice is usually a good thing.

19 So under what circumstances would you
20 say that restrictions of choice, which would
21 otherwise be a good thing, may not be and -- and
22 what can we say about it that would be helpful?

23 MR. FREDERICK: I think what you can
24 say, Justice Gorsuch, is that the breach of
25 fiduciary claim is an ancient claim. It is one

1 that has always looked at objective
2 reasonableness.

3 JUSTICE GORSUCH: Yes, yes, yes, yes,
4 all right.

5 MR. FREDERICK: The statute says to
6 look at circumstances then prevailing, so you
7 have to look at what's going on in the industry.
8 You also are going to be guided to some extent
9 by whether there are breakdowns in process that
10 lead to such egregious results that you might
11 infer that there had been a bad process.

12 I think those kinds of things are
13 going to help guide courts, but I would also
14 just be frank with you to say a negligence cause
15 of action is as old as the law is, and we're
16 talking about, in the breach of fiduciary duty
17 sake -- space, something akin to negligence,
18 except that it is dealing with the objective
19 reasonableness when someone is entrusted with
20 the assets of another person.

21 JUSTICE KAVANAUGH: But the problem I
22 think is -- you've referred to industry norm a
23 few times, but that's changing, I think you've
24 acknowledged, and, you know, you're trying to
25 look retrospectively at one university: Did

1 they change fast enough?

2 Well, there are a bunch of other
3 universities that did the same thing, because
4 there have been a lot of these suits, and
5 they've -- a lot of them have now settled after
6 it got past the motion to dismiss. But at what
7 point in time when -- you've named three
8 universities or maybe four that changed. Is
9 that enough to say the industry norm has
10 changed?

11 MR. FREDERICK: Actually, the
12 complaint alleges -- and I think this is on page
13 100 -- that by the time the DOL rules took
14 effect, which was a year and a half after they
15 were promulgated, so January 1, 2009, some
16 57 percent of the 403(b) plans had conformed to
17 bring their practices in line, and by 2013,
18 depending on which survey, and we cited both of
19 them in the complaint, between 80 and 90 percent
20 of the plans, the 403(b) plans, had consolidated
21 to a single record-keeper.

22 JUSTICE KAVANAUGH: So was it
23 unreasonable then to not follow that DOL
24 guidance and to provide, as Justice Gorsuch
25 says, more choice?

1 MR. FREDERICK: It wasn't a question
2 of choice. It was a question of prudence and
3 whether Northwestern had acted reasonably in
4 essentially being asleep at the switch while
5 everyone else was acting to conform their plans
6 to practice.

7 And to go to the suit point, Justice
8 Kavanaugh, if I could just point out these suits
9 were principally brought, 18 of them, of the 21
10 that have been brought, in 2016, five years ago,
11 and that was as it became completely evident
12 that there were a handful of bad fiduciaries who
13 had not complied with the DOL guidance.

14 There have only been three suits that
15 have been filed since 2016. Two of them were
16 voluntarily dismissed after they were brought
17 before the defendants answered, and the other
18 one settled for a very small amount.

19 So it's not as though -- the -- the
20 actual evidence of harm -- what we're talking
21 about here is a couple of bad outliers that were
22 way behind industry standards in conforming
23 their plans, to the detriment of thousands and
24 thousands of employees.

25 CHIEF JUSTICE ROBERTS: Mr. Frederick,

1 I -- I -- I have the same concern, I think, that
2 Justice Breyer did. I -- I'm wondering if you
3 are, as you say, going after the bad apples but
4 -- or the legal standard, you're saying --
5 asking for is that we are -- we would be better
6 and more aggressive managers of these plans and,
7 therefore, everybody else is -- is going to have
8 breached their fiduciary duty.

9 When -- when you began, you quoted
10 part of the ERISA standard, but you -- you
11 didn't begin -- you didn't go on and say, you
12 know, "the standards that a prudent man acting
13 in a like capacity and familiar with such
14 matters would use in the conduct of an
15 enterprise of like character with like aims."

16 And -- and I'm just wondering, I mean,
17 does that mean you go and look at the average,
18 or do you come back and say -- you know, like
19 soliciting bids, I mean, do you have to know for
20 record-keepers, you know, maybe people do it and
21 sometimes it looks like a good idea and so they
22 should? But I don't know that they should be
23 held to the highest -- highest standard.

24 I mean, is the fiduciary duty average,
25 or is it the highest standard?

1 MR. FREDERICK: Well, I think that the
2 fiduciary duty, if you read the other words of
3 the statute that I did quote, Mr. Chief
4 Justice -- because I don't run away from the
5 ones that you did -- for the sole and exclusive
6 benefit of protecting the fiduciary -- the --
7 the participants. And in the same manner --

8 CHIEF JUSTICE ROBERTS: Well, might
9 the --

10 MR. FREDERICK: -- it is a balancing
11 test --

12 CHIEF JUSTICE ROBERTS: -- prudent man
13 in a like capacity --

14 MR. FREDERICK: Yeah.

15 CHIEF JUSTICE ROBERTS: -- familiar
16 with all this -- it seems to me that that --
17 those are words that seem -- I don't know if you
18 want to say it's the average or that it simply
19 is, you know, the normal standards that would
20 apply, as opposed to, you know, slightly below
21 average, as opposed to egregious.

22 I mean, it's the same concern that I
23 think Justice Breyer had. If you said -- said
24 to somebody, you know, I want you to go out and
25 fill this car with gas, you know, if he came to

1 the intersection and one company, A, was however
2 many, you know, dollars a gallon and somebody
3 else was a lot less, you'd expect him to go to
4 the one that's a lot less. I don't know if
5 you'd expect him to drive, you know, another 10
6 miles and go to the Acme gas company or -- or
7 whatever.

8 MR. FREDERICK: It -- it's a band of
9 objective reasonableness, Mr. Chief Justice, and
10 that's why offering things out for bid,
11 requesting proposals, seeing what the market is
12 offering, that -- those are prudent practices by
13 fiduciaries, and Northwestern didn't do any of
14 that.

15 JUSTICE BREYER: Well -- well -- well,
16 that's -- the people who wrote this complaint
17 are very good, and they would have put in --
18 that's my assumption. They would have put in to
19 a fine degree everything that they could think
20 of that would help them.

21 And that's why I asked the first
22 question. The closest that it comes to saying
23 what you said is where it says on page 100 --
24 that I could find, see, I'll go look at it
25 again, and I -- I will look -- we'll really look

1 through it -- the closest -- I couldn't find any
2 language which said column three, they didn't
3 have them, okay? But I bet they didn't. Why
4 didn't he say it?

5 Or I found on page 100, were
6 available. Ahh. You mean were available to
7 them? Why didn't you say "to them" --

8 MR. FREDERICK: It's the --

9 JUSTICE BREYER: -- or just available
10 in the market? And then I looked at page 99,
11 and 99 makes the other argument. They should
12 have bargained.

13 All right. Now, if I'm really reading
14 this with such a nit-picking view that I just
15 did, which may come out of Twombly or Iqbal or,
16 you know, I don't know where, but if that were
17 the situation and you should read it like a real
18 nit-picker, then I can find something lacking.

19 And if I read it not like a
20 nit-picker, it says what you said. So I'm
21 slightly stuck. And -- and -- and -- and I --
22 and I -- and I -- and that's why I'm -- and I
23 don't even know. I know the apple, if it says a
24 thousand dollars for an apple here and right
25 over there it says a dollar, I mean, my God, of

1 course. But -- but if -- if -- if it's like a
2 huge department store and time is limited and so
3 forth, well, you can't expect them to do
4 everything. So that's where I'm stuck.

5 MR. FREDERICK: Well, let me try to
6 unstick you in this way. The second-to-last
7 sentence on page JE 100 says: The following
8 table sets forth each higher-cost mutual fund
9 share class that was included in the plans
10 during the proposed class period for which a
11 significantly lower cost but otherwise identical
12 share class of the same mutual fund was
13 available.

14 JUSTICE BREYER: Well --

15 MR. FREDERICK: I think that unsticks
16 you. But I would secondly point out that we're
17 at the pleading stage, and you're supposed to
18 draw the plausible inferences in favor of the
19 plaintiff.

20 And I would third point out the whole
21 idea of moving to rules and -- and this kind of
22 notice pleading was that everybody was on notice
23 from the district court on that this was the
24 claim that we were asserting. That was how they
25 argued it in the district court. But what they

1 did was they asked the district court and the
2 court of appeals to adopt this anomalous rule
3 that doesn't exist anywhere else, which is that
4 if you have some prudent options, that
5 inoculates you as a matter of law from a claim
6 that you have imprudent options.

7 JUSTICE SOTOMAYOR: Mr. Frederick --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. FREDERICK: That's what we're
11 asking you to reverse.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?

15 JUSTICE THOMAS: No.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: I -- I understand your
18 argument about institutional and -- and retail
19 and about consolidating recordkeeping and
20 management. But to the extent your claim is
21 that the fund -- that -- that the offering --
22 the list of offerings was bloated and included
23 some -- let's say it includes -- let's say a
24 portfolio includes some options that are popular
25 and well -- they're well-known, they're popular,

1 but they have high fees. What -- what is a
2 court supposed to do with a claim like that?

3 MR. FREDERICK: I think you're
4 supposed to say that we plausibly allege a
5 breach of fiduciary duty. Now go back to try to
6 prove that or --

7 JUSTICE ALITO: But what is the
8 standard for determining whether a -- whether
9 the offerings -- the list of offerings are
10 bloated and whether it's a breach of fiduciary
11 duty to include in it something that a lot of
12 investors want, that a lot of inventors like,
13 it's a popular fund, but an expert might say
14 this is unwise because the -- the fees are too
15 high and it doesn't comply with -- with modern
16 portfolio theory?

17 MR. FREDERICK: I think that if we get
18 to the merits, which is, I think, where your
19 question is going, Justice Alito, if I may, and
20 we're not at the merits now, we're just at the
21 pleading stage, but if we get to the merits, the
22 standard is going to be whether, in light of the
23 prevailing then circumstances, did the fiduciary
24 here breach the fiduciary duty by not -- not
25 acting reasonably with respect to expenses and

1 consolidating those funds where there was
2 duplication? We offer -- we offer a lot of
3 allegations of lots of duplication where there
4 is not a benefit to the beneficiary, other than
5 confusing that person by having too many options
6 that are basically all the same, and it's like
7 looking for the needle in the haystack.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: Mr. Frederick, I
11 think that your strongest argument is with
12 respect to the institutional shares because,
13 you're right, we have to read that plausibly.
14 And you say others have offered institutional
15 shares without the minimum, and they could have
16 done this. You have to prove it, but assuming
17 that's plausible.

18 The second, which I have a problem
19 with, is your recordkeeping fees because I think
20 that your obligation there would be that you
21 have to allege what that market rate is on the
22 open market, and I don't see where you do that.
23 I mean, you -- I don't see -- you say it's \$35,
24 but you don't give examples of where people have
25 negotiated to that price, that that somehow is

1 the market rate.

2 They did renegotiate and they got it
3 down to \$42, so you're halfway there, okay? But
4 I don't know how -- in a complaint, how you
5 could plausibly allege a price unless you allege
6 why that's the market rate.

7 MR. FREDERICK: So, Justice Sotomayor,
8 the price is a proxy for the imprudence in the
9 result of a failed process. We allege at pages
10 73 to 77 of the joint appendix that four other
11 universities consolidated their record-keepers
12 and thereby lowered their recordkeeping fees.

13 JUSTICE SOTOMAYOR: That's so hard
14 because consolidating -- there is so much going
15 on with one or two record-keepers. I don't know
16 how you ever could allege that having one as
17 opposed to two is imprudent --

18 MR. FREDERICK: We --

19 JUSTICE SOTOMAYOR: -- because I'm
20 assuming that there is value to having two
21 because you don't want to get rid of TIAA
22 because of its institutional situation. So, if
23 I reject that argument that having one or two is
24 the classic fiduciary right, don't you -- or --
25 or choice, how do you get to your second stage,

1 that having two would still have gotten you a
2 lower price? Where do you allege that in your
3 complaint?

4 MR. FREDERICK: We allege that one of
5 the universities that now escapes me went from
6 seven to two to one record-keeper. We allege
7 that 90 percent of the 403(b) plans by 2013 had
8 moved to one record-keeper. They had done that
9 to reduce the fees. We allege that there were
10 more fees being paid by four to five times than
11 was prudent.

12 JUSTICE SOTOMAYOR: So, if I reject
13 your basic premise that choices between one and
14 two are imprudent, because I just don't see how
15 you could allege enough to destroy prudence,
16 because there are still people with two, there
17 are still people with -- and two doesn't seem
18 outrageous to me, how do you get to what your
19 market price is?

20 MR. FREDERICK: Well, they never had a
21 process to determine whether or not even those
22 two were offering market rates. That's --

23 JUSTICE SOTOMAYOR: The process has to
24 lead to losses.

25 MR. FREDERICK: Correct. And the

1 losses --

2 JUSTICE SOTOMAYOR: So I'm getting to
3 what's the loss. How have you alleged the loss
4 here?

5 MR. FREDERICK: We alleged the loss
6 that they were paying 4 to 5 million dollars a
7 year when a reasonable fee would have been
8 approximately a million. That's at JA 96.

9 JUSTICE SOTOMAYOR: For two?

10 MR. FREDERICK: Correct. The -- the
11 -- even -- even the having two might be prudent
12 had they ever gone to Fidelity and TIAA and
13 said, we are one of the very largest plans; we
14 want you to reduce your fees.

15 They finally did that in 2016, and
16 they got a rebate. We allege that other
17 universities in 2008 and '9 and '10 had done the
18 same thing to get fee rebates on their
19 recordkeeping expenses.

20 It is plausible to suppose that a plan
21 that was even bigger than those university plans
22 also could get a rebate for recordkeeping
23 expenses that were unnecessary.

24 JUSTICE SOTOMAYOR: Did they negotiate
25 for a reduction in fee? You talk about 2016.

1 Did they reduce the rate as well?

2 MR. FREDERICK: They did. And that
3 was part of our allegation, that it was seven
4 years after all these other universities had
5 done the same thing and gotten savings of
6 millions of dollars a year for their retirees.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: So just to clarify
9 that, am I right in saying that your complaint
10 says that their recordkeeping fees were too
11 high, even if you put aside the issue of
12 consolidation? In other words, even if you say
13 there's -- we're -- we're not saying that they
14 had to have one or that they had to have two or
15 that they had to have any number. It's just
16 they were too high. The complaint says that?

17 MR. FREDERICK: Yes. We --

18 JUSTICE KAGAN: And it also says, am I
19 right, that they should have consolidated, and
20 that was one way but only one way to reduce the
21 recordkeeping fees? Am I right?

22 MR. FREDERICK: That's correct.

23 JUSTICE KAGAN: Okay. Thank you. And
24 in -- in a way, that makes it very similar, it's
25 very parallel, to the investment fees --

1 MR. FREDERICK: That's --

2 JUSTICE KAGAN: -- right? Because the
3 consolidation thing, it's one way but only one
4 way of solving a problem that you think exists
5 even regardless of consolidation? Am I right?

6 MR. FREDERICK: That's correct. And
7 that's why I would point to the process. Where
8 all these other universities were putting these
9 out for competitive bid, Northwestern was not
10 doing that. Northwestern was relying on its,
11 you know, favored record-keeper that had an
12 economic incentive to keep it tied in, and it
13 didn't try to get the best rate that even those
14 record-keepers were providing.

15 JUSTICE KAGAN: Right. So -- and, I
16 mean, one -- one kind of allegation is, fine,
17 you want to use TIAA and Fidelity, that's fine,
18 but go back to TIAA and Fidelity and say: I
19 don't know if you're giving us the best rate
20 here. We're going to ask you to do better.

21 MR. FREDERICK: That's correct.

22 JUSTICE KAGAN: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: So I -- I understand

1 the institutional share point. I understand, I
2 think, the cost point. I'm still stuck on the
3 duplicative investment point.

4 As a first -- I guess the most -- most
5 basic question is you allege that plaintiffs are
6 confused by having too many options. Do -- do
7 you allege that your clients are actually
8 confused? I didn't see -- and maybe I missed
9 it. It's a long complaint. Justice Breyer is
10 right, it's got a lot of paragraphs. It's well
11 done. Do we -- is there an allegation that
12 these plaintiffs are confused? And is that
13 something that we should take cognizance of or
14 care about given that choice would, other things
15 equal, normally be a good thing?

16 MR. FREDERICK: I think that you can
17 plausibly read the complaint to say that our
18 client, the immediate three that are before you,
19 were confused by having all of the options,
20 although the words are not directly put in the
21 description of the participants.

22 JUSTICE GORSUCH: Okay. Let -- let --
23 let --

24 MR. FREDERICK: I would say --

25 JUSTICE GORSUCH: -- let's -- let's

1 say reading *Twiqbal*, if I might, reasonably but
2 not too parsimoniously, we find that -- that
3 there isn't sufficient allegations with respect
4 to your -- the three named plaintiffs. What
5 would be the upshot of that?

6 MR. FREDERICK: No change because the
7 statute provides a cause of action on behalf of
8 the plan that participants or the Secretary can
9 bring an action on behalf of the plan.

10 It is plausible here, Justice Gorsuch,
11 because, in 2016, the Respondents consolidated
12 from 242 plans to 32 mutual fund options.
13 Again, we say their own actions plausibly
14 confirm the correctness of our complaint.

15 The question really is one of timing.
16 Their defense will have to be we couldn't have
17 done it before now. We're going to be arguing
18 they could have done it much earlier. And
19 that's where the battle ground on -- on facts
20 will be done if you permit this complaint to go
21 forward.

22 JUSTICE BREYER: If we do that, I
23 mean, that's, again, a dilemma. Look -- and, to
24 me, it's a dilemma. Maybe it isn't to anybody
25 else.

1 But -- but these funds, I mean,
2 they're enormously complicated and they have
3 hundreds of sub-funds and so forth. So it's the
4 easiest thing in the world if they have a lot of
5 choices. You say you had too many choices. And
6 if they have only a few choices, you say you had
7 too few choices. And so whatever they do,
8 you're going to say this was wrong. And then
9 what we'll be launching into is the -- you know
10 the arguments and so forth.

11 MR. FREDERICK: Right.

12 JUSTICE BREYER: Okay. So -- so what
13 -- what do we do? You don't want them to -- you
14 -- you don't want them to behave imprudently.
15 We're -- we're at a -- at the same time, you
16 don't want a -- a -- a group of plaintiffs to be
17 able to say whatever they do, we're going to
18 call it imprudently and there we go, ha-ha.
19 Nobody wants that.

20 So -- so what is it that we say that
21 -- that prevents those two evils, which are
22 opposite?

23 MR. FREDERICK: Well, I think, number
24 one, you rely on facts and you rely on the
25 development of facts in the ordinary process.

1 When you're at the pleading stage, you read the
2 complaint plausibly to assume the truth.

3 JUSTICE BREYER: I would have said
4 that before Twombly and Iqbal.

5 MR. FREDERICK: Well, after Twombly
6 and Iqbal, I think that the two standards in
7 Iqbal is, is there a context in which to view?
8 We give you the context in spades by talking
9 about all the other universities, and we have
10 lots of industry experts who are quoted in the
11 complaint.

12 We meet the Twombly standard because
13 there wasn't an obvious alternative where they
14 failed even to ask as a matter of process to get
15 lower fees.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: To pick up on
19 Justice Kagan's points about the parallelism, I
20 think the retort to your position would be both
21 claims really depend on some consolidation
22 because I think they say that in the first -- on
23 Count V, that absent consolidation, you haven't
24 sufficiently alleged that there actually -- that
25 there was available -- that it was available,

1 that you haven't met the minimum -- there
2 haven't been sufficient allegations that the
3 minimum investment requirements were met or that
4 you could get a waive -- waiver or that they
5 could get a waiver. And so I think, absent the
6 consolidation, they're saying there's not enough
7 there to show they could have achieved this,
8 which makes it all depend on consolidation.

9 So too on the recordkeeping. I think
10 it's -- if you want to keep TIAA and you look at
11 their amicus brief, you would have to drop
12 Fidelity, I guess. And so I -- I just want to
13 get your reaction to that. Maybe that's not the
14 right way to look at it.

15 MR. FREDERICK: Well, paragraph 159,
16 Justice Kavanaugh, does not talk about
17 consolidation, but it does talk about
18 negotiating other fiduciaries who negotiated
19 with Fidelity and TIAA-CREF to get the
20 institutional class shares. That is a plausible
21 allegation in light of all of the other detail
22 in the complaint. So I don't think that one
23 rests solely on consolidation.

24 The recordkeeping allegations about
25 the other universities -- and this is at pages

1 73 to 82, roughly, of the joint appendix -- go
2 into the detail of what those other universities
3 did as a matter of process, and I think that
4 they plausibly suggest that Northwestern could
5 have done the same thing and thereby reduced
6 their recordkeeping expenses.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Huston.

11 ORAL ARGUMENT OF MICHAEL R. HUSTON
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONERS

14 MR. HUSTON: Mr. Chief Justice, and
15 may it please the Court:

16 The text of ERISA requires the
17 administrators of a defined contribution plan to
18 act with "care, skill, prudence, and diligence"
19 when they perform their fiduciary duty to select
20 the investment funds and record-keepers for the
21 plan.

22 Mr. Frederick has ably explained why
23 the allegations in this complaint, assuming them
24 to be true at this stage, show that Respondents
25 here acted imprudently by wasting plan

1 participants' retirement savings.

2 I'd like to focus this morning on the
3 rule of law adopted by the Seventh Circuit and
4 advocated by Respondents. They assert that
5 ERISA fiduciaries cannot be sued for offering
6 imprudent funds with excessive fees so long as
7 the fiduciaries offered some prudent funds with
8 reasonable fees.

9 That rule is wrong for at least four
10 reasons. It flouts ERISA's text. It is -- it
11 has no support in the common law of trusts, from
12 which ERISA's text derived. It is inconsistent
13 with this Court's precedents, especially Tibble
14 and Dudenhoeffer. And it would effectively
15 immunize fiduciaries for broad swaths of
16 imprudent management just because the
17 fiduciaries performed their jobs adequately in
18 at least a few instances.

19 For all of those reasons, the judgment
20 of the court of appeals should be reversed.

21 I'd like to just begin with the
22 statutory text. As was discussed in the last
23 argument, the statutory standard requires
24 careful, skillful, prudent, diligent management.
25 These are the benchmarks that Congress

1 incorporated drawing on trust law, the -- the
2 wide body of trust law, in order to determine
3 what constitutes prudent management.

4 And when, as here, the complaint
5 alleges that trustees have the opportunity to
6 obtain a better rate, a lower cost, the
7 Restatement of Trusts and all of the major trust
8 law treatises on which this Court has previously
9 relied in its ERISA jurisprudence make clear
10 that trustees have an obligation to make careful
11 cost comparisons among alternatives that are
12 being selected for the plan. It --

13 JUSTICE THOMAS: If -- if a trustee or
14 administrator followed that advice to the
15 detriment of its returns or performance, would
16 that administrator then be considered imprudent?

17 MR. HUSTON: Well, Justice Thomas, a
18 claim of imprudence does not focus principally
19 on the returns. It's not sufficient to state a
20 claim to say that --

21 JUSTICE THOMAS: So then why should it
22 focus principally on the expenses?

23 MR. HUSTON: Well, it focuses on
24 process, but expenses are an important part of
25 prudent management, Your Honor, absolutely. The

1 Respondent makes -- the Restatement makes that
2 clear. All of the trust treatises say that.

3 And that's because the amount of
4 expenses that you pay as a member of a plan can
5 pretty significantly affect the ultimate balance
6 at retirement in light of compounding. So,
7 absolutely, it's true that fiduciaries, prudent
8 fiduciaries, have an obligation to pay careful
9 attention to costs.

10 And I think it --

11 CHIEF JUSTICE ROBERTS: Mr. Huston, is
12 -- is that the only factor? I mean, let's say
13 -- I mean, the mutual fund plans, they advertise
14 a lot on television, and it doesn't say just we
15 have the lowest cost. You know, they've got
16 different characters and, you know, try -- I
17 mean, what -- what if people in the fund say,
18 you know, I really like, whatever -- the gecko's
19 not funds, right? That's just insurance?

20 MR. HUSTON: Let's pick Fidelity.

21 CHIEF JUSTICE ROBERTS: They say I
22 like that guy --

23 MR. HUSTON: Yeah, I know.

24 CHIEF JUSTICE ROBERTS: -- or I like
25 the guy for E.F. Hutton who used to be on --

1 MR. HUSTON: Sure.

2 CHIEF JUSTICE ROBERTS: -- I want to
3 invest in those funds. I mean, is that -- are
4 you supposed to say no, you can't?

5 MR. HUSTON: No, Your Honor. You -- I
6 think that the situation that you're
7 hypothesizing is one where fiduciaries are
8 comparing apples and oranges. They're trying to
9 decide, should we invest in the Vanguard small
10 cap index fund or the Fidelity bond fund? That
11 is not anything like the allegations that we're
12 talking about here.

13 The allegations in this complaint are
14 that the funds are identical. The only
15 difference between the share cost --

16 CHIEF JUSTICE ROBERTS: That's one of
17 the --

18 MR. HUSTON: -- is the cost.

19 CHIEF JUSTICE ROBERTS: -- it's one of
20 the sets of allegations. One thing Mr.
21 Frederick emphasized that I'd like to get the
22 government's view on it is that one reason you
23 know these people were bad is because they fixed
24 something. In other words, their own actions
25 show that they were doing something wrong.

1 Is that a factor that we should
2 consider, or is the -- the incentive -- would we
3 be creating an incentive not to fix things if we
4 said you're in trouble because you fixed them?

5 MR. HUSTON: Well, Your Honor, I think
6 the fiduciaries have a fiduciary duty to fix
7 things if they have an opportunity to do so.
8 The fact that the complaint alleges, as Your
9 Honor notes, that these fiduciaries went out in
10 2016 and took some of the very steps that
11 Petitioners allege they were required to take --
12 and, specifically, they consolidated the plan
13 lineup in order to gain access to institutional
14 class shares, and, as Mr. Frederick said, they
15 obtained rebates from their existing
16 record-keepers and lower costs -- the fact that
17 they did it, I would say, at the pleading stage,
18 supports the plausibility of Petitioners'
19 allegation that they could have done it sooner.

20 It's not dispositive by any means, but
21 it's one piece of evidence that the trier of
22 fact will need to consider in response to the
23 defense asserted by my friend, Mr. Garre, that
24 these -- these opportunities really weren't
25 available to the plan.

1 JUSTICE BREYER: Then -- then is this
2 -- I assume what I'm about to say is false. It
3 is not true that the Seventh Circuit said, if
4 you offer a small retail space shuttle fund,
5 that's good enough if you also offer a large
6 space shuttle fund.

7 They said, if you don't offer that
8 large space shuttle institutional fund, that's
9 okay because you also offered the -- sorry, the
10 large institutional farm fertilizer fund, all
11 right? Is that what they said, the latter?

12 MR. HUSTON: Well, Your Honor, I think
13 the fact --

14 JUSTICE BREYER: In other words, you
15 offered some other fund, large institutional
16 fund, that had nothing to do with what we're
17 talking about, which is they should have offered
18 the identical -- so it's the latter, they said,
19 right?

20 MR. HUSTON: The Seventh Circuit said
21 that because the fiduciaries had the opportunity
22 -- I'm sorry, the participants --

23 JUSTICE BREYER: Yeah.

24 MR. HUSTON: -- had the opportunity to
25 invest in some other low-cost funds that --

1 JUSTICE BREYER: But not other in the
2 same type --

3 MR. HUSTON: Exactly.

4 JUSTICE BREYER: -- totally? Okay. I
5 got that.

6 MR. HUSTON: Exactly. Other,
7 different --

8 JUSTICE BREYER: Then -- then the
9 argument would have to be, which you'll say is a
10 defense, look, if we're going to -- if we're
11 going to offer X, we've got to do something
12 because we only have a certain amount of money,
13 how about all the other things we offer?

14 And -- and there was a judgment for us
15 to decide how to do that or something like that.
16 But that's a defense. Is that the point?

17 MR. HUSTON: It is the point and with
18 -- and I would just add one thing, Your Honor.

19 JUSTICE BREYER: Okay. I got it.

20 MR. HUSTON: When the fiduciaries made
21 the decision that particular kinds of mutual
22 funds were good options to offer to their plan
23 participants, they said we've looked, we think
24 Fidelity's small cap mid-value fund is the one
25 that we want, that's one that we want to offer

1 to our participants in the plan, the obligation
2 on the fiduciaries was to offer that specific
3 investment at the lowest price that they could
4 get it.

5 And the core allegation in this
6 complaint is that the fiduciaries failed to do
7 that, and if they prove that allegation, there's
8 simply no prudent explanation --

9 JUSTICE KAGAN: So the way that you
10 say it, Mr. Huston, the complaint really is they
11 didn't negotiate hard enough, they didn't put
12 things out for competitive bids, they just --
13 they were paying, you know, too much for the
14 only thing that anybody wanted.

15 But there's another set of this --
16 allegations in this complaint, which are more
17 along the lines of they offered too many funds
18 and they had too many record-keepers. And if
19 they had only consolidated, whether the funds or
20 the record-keepers, they could have gotten lower
21 prices.

22 And as for me, that's the one that
23 seems a little bit more, I don't know, I have to
24 think about that.

25 MR. HUSTON: Sure.

1 JUSTICE KAGAN: So what do you think
2 about that?

3 MR. HUSTON: Your -- Your Honor, let
4 me just start with offering the duplicative
5 funds. I think, if you look at, for example, JA
6 102 and JA 106, you will see that before the
7 plan consolidated their lineup, they offered
8 funds that are very, very similar to each other.

9 So just to take one concrete example,
10 life cycle funds, right? These are funds that
11 are offered to participants based on the target
12 date of their retirement, and they automatically
13 balance themselves.

14 And so you pick a fund, like, if you
15 want to retire in 2050, you pick the 2050 life
16 cycle fund.

17 The plans offered both the Fidelity
18 2050 fund and the TIIA 2050 retirement fund. A
19 participant's only going to pick one or the
20 other in the normal course. Those are very,
21 very similar.

22 JUSTICE KAGAN: Yeah. Do you think
23 that that's possibly because the people who are
24 participants in these plans, people roam around
25 among different universities, and they

1 actually -- some people, like: I'm used to
2 dealing with Fidelity. And other people are:
3 I'm used to dealing with TIAA. And that there's
4 a value to the plan and having variety for the
5 sake of variety?

6 MR. HUSTON: If I might make just two
7 points about that, Your Honor.

8 The first is that I think that is a
9 defense that the Respondents are going to have
10 the opportunity to present at trial. They're
11 going to be able to say: Look, there's a
12 sensible explanation for everything we did. We
13 picked two funds that seemed duplicative
14 because, actually, the people in our funds
15 really like having access to both. We're at the
16 pleading stage, and the inferences have to be
17 drawn in the Respondents' favor.

18 And then the other thing I would say
19 in response to that is that might be a defense,
20 but it might not be a defense if the difference
21 between consolidating from two life cycle 2050
22 funds down to one life cycle 2050 fund is you
23 can massively reduce the fees by getting access
24 to the institutional class first.

25 JUSTICE GORSUCH: Mr. Huston, the

1 government seemed to take a position in its
2 brief, as I recall, and correct me if I'm wrong,
3 please, on -- on the -- on what I'll call the
4 retail and institutional question and on the
5 recordkeeping question, but it didn't take a
6 position on the duplicative fund question.

7 Your answers to Justice Kagan seem to
8 suggest a position, but I'm just curious what's
9 going on there?

10 MR. HUSTON: Sure, Your Honor. We --
11 you're correct that we have not taken a position
12 on the allegation, the theory of liability in
13 the amended complaint that there were too many
14 funds in the plan and that that led to
15 participant confusion.

16 All I'm saying is that when the
17 question is -- we certainly have taken a
18 position, as Your Honor notes, that these -- it
19 was imprudent to offer retail class shares once
20 --

21 JUSTICE GORSUCH: Yeah, yeah, yeah.
22 I've got -- I've got that, yeah.

23 MR. HUSTON: I think a factual
24 allegation that's in the complaint that supports
25 the plausibility of that claim in which --

1 JUSTICE GORSUCH: Forget about that
2 claim. I'm not interested in that claim for the
3 moment. I'm just focused on the duplicative --
4 purely duplicative choices claim. Do you think
5 that there is a sufficient basis that these
6 plaintiffs were confused to support injury for
7 purposes of Article III?

8 MR. HUSTON: Your Honor, we haven't
9 taken a position on that claim. The claim
10 about -- that there were too many funds and that
11 it caused confusion is not -- we have not -- the
12 government has not taken a position on that.

13 JUSTICE GORSUCH: Do you think we
14 should be cautious about that claim given that
15 choice for the reasons Justice Kagan and you
16 explored a moment ago is often a consumer good?

17 MR. HUSTON: Choice can be a good,
18 Your Honor. It's not a good in and of itself.
19 I -- I think it always depends, as this Court
20 said in Dudenhoeffer, on the facts and
21 circumstances. And so we need to know, in order
22 to answer the question thoughtfully, I think I
23 need to know both what is the value of the
24 choice that's being pursued, why is more choice
25 better, and what is the cost of the choice?

1 If the cost of the choice is we're
2 talking about 20, 40, 80, 100 percent increase
3 in the cost of the fees, all of a sudden maybe
4 it's not prudent. So --

5 JUSTICE GORSUCH: Thank you.

6 MR. HUSTON: -- I think that -- I
7 think that just gets back to the need to
8 scrutinize -- to look carefully at the
9 allegations in this complaint and to recall
10 we're, of course, at the pleading stage, where
11 all of the inferences have to be taken in
12 Respondents' favor.

13 JUSTICE KAVANAUGH: What do we --

14 JUSTICE ALITO: How often do these
15 cases get beyond the pleading stage?

16 MR. HUSTON: Well, there are a number
17 of courts, Your Honor, that, of course, have --
18 that gave rise to the circuit split in this case
19 that denied motions to dismiss, similar types of
20 claims, and allowed them to proceed. The claim
21 in Tibble that tried to --

22 JUSTICE KAVANAUGH: And those settled,
23 though. I mean, isn't the -- the concern in the
24 amicus briefs, and I don't know how to deal with
25 this, is that these class action complaints are

1 such that the game is to get past pleading
2 stage.

3 We've heard from Mr. Frederick and you
4 the phrase "pleading stage" multiple times.
5 This is just the pleading stage, don't worry
6 about it, it can all be worked out at trial. It
7 doesn't happen in the real world. What do we do
8 about that?

9 MR. HUSTON: Respectfully, Justice
10 Kavanaugh, I don't think that's quite right that
11 it doesn't happen in the real world. It came in
12 --

13 JUSTICE KAVANAUGH: That's a -- it
14 doesn't happen often because there's huge
15 pressure to settle, which has happened in many
16 of these university 403(b) cases over the last
17 few years. And I'm not saying which way that
18 cuts, but I'm just saying the "just the pleading
19 stage" thing, which we've heard over and over
20 again, kind of --

21 MR. HUSTON: There --

22 JUSTICE KAVANAUGH: -- forces us not
23 to deal with the reality of what's going on.

24 MR. HUSTON: Justice Kavanaugh, there
25 have been cases that have settled. There have

1 been cases like Tibble and Sacerdote against New
2 York University that went to trial.

3 I think the important point for
4 purposes of this Court is that the Court was
5 confronted with almost exactly the same argument
6 in Dudenhoefffer.

7 The fiduciaries in Dudenhoefffer came
8 in and said unless you really tighten up the
9 pleading standard, it's going to be way too easy
10 to bring imprudence lawsuits. It's going to be
11 too expensive to do this kind of management, and
12 plans are going to stop offering 401(k)s.

13 The Court confronted that allegation
14 and said, no, we are not going to adopt any
15 special rule or assumptions favoring the
16 prudence or the fiduciaries. Instead, we're
17 going to look carefully at the allegations in
18 the complaint.

19 JUSTICE KAVANAUGH: And some of the
20 amicus briefs also say that being a fiduciary
21 now is -- is really a difficult task for the
22 person individually. They'll have individual
23 problems in the wake of doing that and that the
24 fiduciary insurance market is problematic now.

25 I mean, I think your answer's going to

1 be, you know, that's not really before us, but
2 should we think about that at all, or is that --
3 you know, where -- where does that play -- play
4 out in all this? Is that up for Congress to
5 think about or --

6 MR. HUSTON: Well, of course, it's
7 always up for Congress, Your Honor.

8 JUSTICE KAVANAUGH: Right.

9 MR. HUSTON: But I think -- I don't
10 think the Court can amend or should amend the
11 Twombly and Iqbal framework for analyzing the
12 plausibility of an allegation in the complaint
13 based on concerns about that there's too many of
14 these lawsuits.

15 Again, I think that's exactly what the
16 Court was asked to do in Dudenhoeffer and
17 declined to do. I also think the story in the
18 real world is more complicated than Respondent
19 and some of its amici suggest.

20 Certainly, fiduciaries are
21 indemnified, they get insurance, and they get
22 advice from the Department of Labor and others
23 about how a reasonable fiduciary acts.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Breyer?

3 Justice Kagan?

4 Justice Kavanaugh?

5 Thank you, counsel.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE RESPONDENTS

9 MR. GARRE: Thank you, Mr. Chief

10 Justice, and may it please the Court:

11 This case is one of a barrage of
12 damages actions filed against leading
13 universities across the country, in Petitioners'
14 own words, to revolutionize fiduciary practices
15 not through prospective changes to ERISA or its
16 regulations but through the blunt threat of
17 damages actions for past conduct.

18 For three overriding reasons, this
19 Court should affirm the judgment of both courts
20 below that the amended complaint at issue fails
21 to state a claim under ERISA.

22 First, Petitioners' claims are based
23 on a flawed conception of the duty of prudence
24 which overlooks the role that Congress left for
25 participant choice in this context and would

1 strip fiduciaries of the leeway they have always
2 had to consider tradeoffs in addition to cost,
3 such as the impact that minimum investment
4 requirements for institutional class shares
5 would have on providing investment options
6 generally.

7 Second, even if this Court adopts
8 Petitioners' paternalistic conception of the
9 duty of prudence, the amended complaint in this
10 case still fails to state a claim under this
11 Court's pleading precedents. In particular, the
12 complaint fails to allege facts from which there
13 could be a reasonable inference that the
14 alternative fees and services that they claim
15 should have been provided were actually
16 available to the plans. In the absence of those
17 allegations, the complaint can't possibly cross
18 the plausibility threshold established by Iqbal
19 and Twombly.

20 And, third, allowing the cookie-cutter
21 claims in this Court -- in this case to proceed
22 not only would subject retirement plans to
23 endless damages litigation but would thrust the
24 federal courts into the role of micromanaging
25 those plans. And, ultimately, it's the

1 employees and the retirees who would be the real
2 losers as plans shed options, scale back
3 services, and perhaps even fold up altogether in
4 the wake of skyrocketing insurance premiums.

5 I welcome the Court's questions. And
6 if I could, maybe I would begin with Justice
7 Kagan's --

8 JUSTICE THOMAS: Mr. Garre, for --
9 sorry to distract you. You don't seem to spend
10 much time on the Seventh Circuit's focus on the
11 large menu defense. Could you comment on that a
12 bit?

13 MR. GARRE: Well, Your Honor, we think
14 that ERISA itself encourages plans to provide a
15 diverse menu of investment options, and we think
16 that the notion that there's some kind of
17 administrable line of whether a plan is too
18 diverse or not diverse enough is essentially a
19 Goldilocks rule that the courts could never
20 administer.

21 I mean, there's been a lot of
22 discussion here this morning about the "too many
23 options" aspect of their claim. And, you know,
24 with respect to my friend, that was the premise
25 of their claim on the institutional versus

1 retail class shares, and you can see that in
2 Count V of the complaint on page 170 of the
3 joint appendix, which specifically says that the
4 number of options deprived the plans of the
5 ability to qualify for low-cost investments.

6 And that's true in this respect: The
7 more options you have, the more difficult it's
8 going to be to qualify for minimum investment
9 requirements. And that was the premise of their
10 claim in Count V.

11 And they've shifted, Your Honor, to
12 the claim that they subsequently tried to make
13 in Count VII of their second amended complaint,
14 which was not allowed and is not before this
15 Court. And I -- and I think that that infects
16 their argument before the Court today.

17 But going back to the "too many
18 option" claims, I think it is a problem in their
19 position, and -- and -- and, importantly, it's
20 not one that the United States supported in
21 their brief, this notion that there could be too
22 many options, because it simply is an
23 unadministrable line.

24 JUSTICE KAGAN: Well, the United
25 States didn't support it as an independent

1 claim, but as I understand the United States'
2 argument, they're perfectly fine with
3 considering that in -- in addressing whether
4 there were too -- you know, whether the -- the
5 investment fees were too high or whether the
6 management fees -- whether the recordkeeping
7 fees were too high.

8 MR. GARRE: I mean, with respect, I'm
9 not really sure what that means. I mean,
10 they're not supporting that as a standalone
11 argument, but yet they're somehow suggesting
12 that that, you know, brings down the case.

13 I mean, I think the theory was based
14 on there being too many options. Options are
15 good things. Employees want options. As you
16 yourself rightfully said, employees come to
17 universities, they bring options. Employee --
18 we have economics professors who are asking for
19 obscure options. That's a good thing.

20 The question is whether the plans
21 adequately notified participants so that they
22 can choose among those options, including with
23 respect to costs.

24 JUSTICE KAGAN: Suppose there were a
25 complaint -- let's just talk about

1 recordkeeping, for example. Suppose there were
2 a complaint that said the fees that they were
3 paying were -- were much higher than comparative
4 plans have paid, and this was because they never
5 went back to their record-keepers and used their
6 bargaining power and really, you know, stomped
7 on the table and got lower prices and they never
8 put out the recordkeeping function for bids and
9 they never did a bunch of things that can lead
10 to lower recordkeeping fees.

11 That's sufficient, isn't it?

12 MR. GARRE: I think that's much
13 closer, and -- and I don't know the exact
14 complaint. I mean, theoretically, it would be,
15 but there's two problems with the complaint
16 here. On record-keepers, the only way that they
17 get to that number is shedding either the TIAA,
18 which offers popular annuities, and incurring a
19 --

20 JUSTICE KAGAN: Well, I guess what I'm
21 suggesting, in my complaint, it's sort of
22 independent --

23 MR. GARRE: Right.

24 JUSTICE KAGAN: -- of whether you have
25 one or two. It's just that they didn't go back

1 to those two and say: How are you doing on --
2 on fees there? Can you come up with a lower
3 price? Because you're giving lower prices to
4 some of our competitors.

5 MR. GARRE: Well, I mean, first of
6 all, the notion that you can plead yourself into
7 federal court and a million dollars of costs of
8 discovery just by saying you should have asked
9 for a one-of-a-kind deal or a waiver from those
10 requirements, I mean, requirements exist for a
11 reason, Your Honor. I mean, we give it --

12 JUSTICE KAGAN: But why can't you go
13 into federal court saying all our competitors
14 are paying -- all your competitors are paying
15 far lower fees than you are for the exact same
16 service?

17 MR. GARRE: Sure. And that gets
18 closer to -- to stating a claim, Your Honor,
19 because, in that instance, you would actually
20 provide a benchmark. You'd provide examples.
21 They didn't provide those in this case.

22 JUSTICE KAGAN: You didn't do standard
23 things that you should do in order to decrease
24 your fees. You didn't put it out for
25 competitive bidding. You didn't go back and say

1 we're demanding lower fees. You didn't do any
2 of those. You just let it just accumulate over
3 the course of years such that you were paying
4 far more fees than you, you know, would have had
5 to if you had been paying attention.

6 MR. GARRE: Right. And I think that
7 complaint hasn't been stated here, Your Honor.

8 First, you'd have to look at whether
9 or not that's truly an available alternative. I
10 mean, they fluctuate as between you're talking
11 about one record-keeper or multiple
12 record-keepers. In this case, the only way --
13 way to get to one record-keeper is to shed
14 popular investment options or incur a serious
15 surrender charge.

16 With respect, their claim is that we
17 should have charged a \$35-per-participant fee.
18 That number is plucked out of thin air.

19 I mean, I would encourage you to read
20 Judge Collyer's decision in the Georgetown case,
21 which says that there are no facts supporting
22 that claim, \$35, which is the same number they
23 plucked out of the air in that case. There's no
24 other university that they point to. The
25 closest that they point to is the one example,

1 the Cal Tech example. Cal Tech itself had to
2 shed many popular mutual funds by Fidelity.

3 There's no requirement that a plan has
4 to drastically overhaul and incur surrender
5 charges in order to satisfy --

6 JUSTICE BREYER: All right. That --
7 that -- I see that if that -- if that's all
8 right. I'd like to go back to the first one --

9 MR. GARRE: Yes.

10 JUSTICE BREYER: -- which I asked
11 about. He gave some pretty good answers. I
12 mean, we look at page 101 to 116, and I count
13 129 instances where you had investment fund X,
14 small and, right next to it, institutional fund
15 X prime, big, and you saved money.

16 And what do they say about that table?
17 They say that table sets forth each higher-cost
18 mutual fund share class that was included in --
19 included in the plans during the proposed class
20 period for which a significantly lower cost but
21 otherwise identical share class of the same
22 mutual fund was available. And I think it's
23 fair to read that word "available," meaning
24 available to the defendant. All right?

25 Why doesn't that allege, hey, it says

1 -- and then the page before, I mean, they have
2 -- the sentence before, exact same mutual fund.
3 That's the allegation, exact same mutual fund.

4 And then we go to the page before
5 that, and they have two more generalized
6 instances where other similar defendants did
7 bargain and -- well, okay. Well, how doesn't
8 that state a claim?

9 MR. GARRE: Your Honor, they don't
10 provide any factual content to support a
11 reasonable inference that those funds were
12 actually available. They don't identify the
13 minimum requirements.

14 JUSTICE BREYER: Wait, wait, wait.
15 You -- you -- you have to say it's called --
16 let's call it Calvert New Vision Small Cap I,
17 CVSMX, and then they give the cost, and then
18 they give the access, all right? And they do
19 that 129 times.

20 MR. GARRE: And you --

21 JUSTICE BREYER: And then they say it
22 was available. I mean, you know, that's like
23 saying, hey, you've just said that Granny Smith
24 apples are too expensive, but you didn't say
25 they were available. I mean, really? At some

1 point, when you're in the business of selling
2 share funds and they're saying was available,
3 that's good enough, isn't it?

4 MR. GARRE: It's not, Your Honor --

5 JUSTICE BREYER: Not? Why not?

6 MR. GARRE: -- not under the pleading
7 standards. And if I could explain, I mean, take
8 the example that Petitioners have focused on,
9 the Vanguard small cap fund. We -- we cite this
10 at page 37 of our brief. That had an investment
11 minimum of \$100 million. And if you look at the
12 plan documents, one of the plans had \$800,000 in
13 that fund, another plan had 300 --

14 JUSTICE BREYER: Well, that would be a
15 defense, wouldn't it?

16 MR. GARRE: No, it --

17 JUSTICE BREYER: The defense would be
18 it wasn't available.

19 MR. GARRE: With respect, the question
20 is whether or not the conduct is equally
21 consistent with lawful behavior. And if the
22 minimum requirements haven't been met, then a
23 plan that has both institutional class shares
24 and retail class shares is perfectly consistent
25 with lawful conduct, and there's no basis to

1 infer just by the virtue of retail class shares
2 that they have somehow acted imprudently. It's
3 just as equally plausible that we simply hadn't
4 met -- met the minimum requirements for those
5 shares, Your Honor.

6 And if I could dispel the notion that
7 these two types of shares are identical, the
8 retail class shares and the institutional class
9 shares. They're not in two respects.

10 One, the institutional class shares
11 carry minimum investment requirements. In order
12 to -- to meet those requirements, as I think has
13 been acknowledged already, you'd have to
14 aggregate funds and lose investment options, and
15 that's a real cost in the plans.

16 And, two, the reason why institutional
17 class shares are -- are marginally more
18 expensive is because important -- a portion of
19 those funds go to defraying administrative
20 expenses for the plan as a whole, which is a
21 particular benefit to smaller account holders,
22 who otherwise would have to pay higher fees.
23 That's an additional cost.

24 And those are both reasons why a
25 prudent fiduciary would have a plan that allowed

1 a mix of retail and institutional class shares,
2 particularly if we hadn't met the minimum
3 investment requirements for retail -- for
4 institutional class shares.

5 And that there's no basis to include
6 from the presence of that plan and the
7 allegations in the complaint that -- that --
8 that the -- the plan here was -- was somehow
9 plausibly imprudent. It's equally --

10 JUSTICE SOTOMAYOR: Counsel, I think
11 you're still defending the Seventh Circuit's
12 rule, which is you can't have an imprudent
13 selection. You can't make it because, if this
14 is imprudent, there's another different kind of
15 institutional share that's not. Is that your
16 position as well?

17 MR. GARRE: As well, but that's an
18 alternative position.

19 JUSTICE SOTOMAYOR: But let's put --
20 now let's get to this allegation.

21 MR. GARRE: Sure.

22 JUSTICE SOTOMAYOR: Eight hundred
23 thousand seems very close to a million to me.
24 And I know that when people are -- as an
25 individual, when I'm close to a minimum, the

1 first thing I ask is, won't you waive the
2 minimum for me?

3 And what they claim is that for
4 institutions as large as this one, Northwestern,
5 that if they had asked for the waiver, they
6 would have gotten it, and they showed how many
7 other people had asked for waivers and gotten
8 them.

9 Why isn't that a plausible enough
10 allegation to put you in to prove it at trial?

11 MR. GARRE: Sure. First, it was 100
12 million, not a million, Justice Sotomayor, in
13 the example on page 37.

14 JUSTICE SOTOMAYOR: That's one.

15 MR. GARRE: So that's, you know, far
16 apart.

17 JUSTICE SOTOMAYOR: But still -- the
18 point is still --

19 MR. GARRE: But -- but, with respect
20 to the allegations, and it's on pages 99 to 100
21 of the complaint, and this is the crux of their
22 complaint, forget about the minimum
23 requirements, you should have just asked for a
24 waiver. They point to the fact that so-called
25 large jumbo 401(k) plans have gotten waivers.

1 But 401(k) plans differ from 403(b)
2 plans in significant respects. Number one, the
3 403(b) plans have a lot of investment annuities,
4 which are individual contracts that limit the
5 liquidity of the plan. And, number two, 403(b)
6 plans, for historical reasons, have always had
7 more options, which, again, is --

8 JUSTICE KAGAN: Well, that sounds like
9 a possible defense. But how could it possibly
10 be that a judge could throw out a pleading
11 because you say 401(k) plans are different from
12 403(b) plans? I mean, that's to be decided,
13 isn't it?

14 MR. GARRE: Your Honor, there's still
15 the question of whether these allegations are
16 sufficient -- are non-speculative. And if you
17 look at 99 and 100, they're purely speculative.
18 They just --

19 JUSTICE BREYER: Speculative to list
20 129? I mean, you gave an example of where, to
21 get to one of these big funds, you have to have
22 100 million. Oh, all right, that leaves 128
23 others.

24 And -- and -- and what they allege is
25 that it was available. All right. There are

1 129 kinds of apples. One of them has worms.
2 All right? But there are 128 others. And --
3 but do you have to say more?

4 MR. GARRE: I absolutely think you do.

5 JUSTICE BREYER: Why? Why? What do
6 you say?

7 MR. GARRE: If you go back to Iqbal
8 and Twombly, what this Court said is you have to
9 allege the factual content sufficient to support
10 a reasonable inference. If you don't identify
11 the minimum requirements, if you don't attempt
12 to explain how those requirements are met
13 through allegations, then you haven't raised a
14 plausible inference.

15 It's simply not plausible to say just
16 that this institutional fund was available when
17 we don't know if it had a 100 million dollar
18 investment requirement, 50 million, 200 million.
19 We don't know at all because they didn't allege
20 it. And, again, I mean, the --

21 CHIEF JUSTICE ROBERTS: Counsel, if
22 everything was going so well and you were doing
23 everything right, why did you change?

24 MR. GARRE: Because, Your Honor, two
25 reasons. One, the regulatory changes in 2009,

1 which came into effect, and that did require
2 plans in the 403(b) university space to begin
3 managing plans differently, and that's -- that
4 was a rule change.

5 And the other is, frankly, the interim
6 effect of damages litigation. But I think, as
7 Your Honor indicated and Justice Kavanaugh
8 indicated, there is no basis to hold the plan
9 somehow accountable for the fact that it changed
10 the way it operates in this new regulatory
11 environment.

12 And that kind of role would prevent
13 plans from taking prudent steps going forward
14 and taking into account rule changes. I don't
15 think that that can be the rule that would be a
16 basis for harmful damages litigation.

17 And I think you have to look at the
18 flip side of this. If this kind of claim is
19 okay, funds were available, you should have
20 asked for a lower fee, then any claim is okay.
21 And then once you get past the pleading stage
22 for expensive discovery, the threat of
23 settlement demands, I mean, you can look at what
24 it is doing to the insurance premium market.

25 Premiums have skyrocketed. And the

1 market is in serious state. And we have cited
2 articles just as recently as the fall on that.
3 These would have disastrous consequences for
4 plans.

5 This Court has never thought of the
6 duty of prudence in this kind of micromanaging
7 assets. I mean, these sorts of claims are
8 really relatively new in the last five to ten
9 years, but once the Court goes down the path of
10 saying it's sufficient for any plan participant
11 to identify a single investment, and that's the
12 United States in the Petitioners' rule, and
13 claim that you could have gotten that investment
14 cheaper or you could have asked for a waiver or
15 one-of-a-kind deal, and that that's sufficient
16 in a class action to get to discovery and a
17 threat of damages, I mean, that would be
18 terrible for the retirement plans and for the
19 participants in those plans.

20 And that has never been the law.

21 JUSTICE SOTOMAYOR: But why? It's a
22 fine balance, I agree with you. It's a fine
23 balance between litigation and not, but some of
24 this litigation has ended up being to the
25 benefit of the retirees because the universities

1 were not doing basic steps, like just asking for
2 price reductions, like just asking for waivers.

3 And when they did, the -- they got
4 them. And so I -- I -- I don't know, counsel,
5 that we can say a rule as broad as the Seventh
6 Circuit has without harming the beneficiaries.

7 We may not have a rule as wide as the
8 Petitioner wants, but there has to be a happier
9 medium than what you're advocating.

10 MR. GARRE: Sure. And, Your Honor --

11 JUSTICE SOTOMAYOR: And what the
12 Seventh Circuit had.

13 MR. GARRE: -- to be clear, I mean, I
14 think that on the pleading standards, this Court
15 could make clear that this claim is not
16 sufficient, but the claim that comes --

17 JUSTICE SOTOMAYOR: It is hard to do
18 it on this one, at least with respect to the
19 investment institutional and -- and -- and maybe
20 with respect to price. I'd have to go back to
21 the complaint more carefully, but at least my
22 law clerk did and told me that there was no
23 allegation, and so you might be right that
24 keeping two fiduciaries would have reduced the
25 price and to what level, but --

1 MR. GARRE: They, themselves, plead at
2 -- at page 78 of the Joint Appendix that use of
3 multiple recordkeepers was common. But, Your
4 Honor, on this complaint --

5 JUSTICE SOTOMAYOR: I agree with you.
6 I agree with you. What I am saying is I don't
7 know if they gave an allegation that staying
8 with that model, which I think is likely
9 reasonable.

10 MR. HUSTON: This complaint, Your
11 Honor, as the district court recognized here, is
12 massive in size but short on specifics as to
13 Northwestern and the plans at issue. And that's
14 because it was drafted as a part of an omnibus
15 effort to go after 20 universities at once,
16 which itself is inconsistent with the notion
17 that they were somehow acting in an aberrant way
18 that would breach a fiduciary duty.

19 But the problem with this complaint,
20 Your Honor, is it doesn't plead facts which
21 would allow reasonable inference that the
22 alternative fees and services they claim should
23 have been provided were even available to the
24 plan.

25 And under this Court's decision in

1 Fifth Third and a basic application of Twombly
2 and Iqbal, that is not sufficient to state a
3 plausible claim.

4 And if it's enough to get around that,
5 just by having a standalone allegation, you
6 should have asked for a waiver. Then that is
7 going to drive a hole through Iqbal and Twombly
8 that is going to infect not just ERISA
9 jurisprudence but civil jurisprudence generally.

10 This Court has always said, and it
11 said in Iqbal and Twombly, again, that
12 speculative allegations are sufficient. You've
13 got to have the factual content from which you
14 can make a reasonable inference.

15 Here you have a plan that had
16 institutional class shares and retail class
17 shares. If you looked at the plan, the most
18 reasonable inference is that the plan was
19 prudently exercising choice based on whether
20 minimum requirements were met, and -- and in
21 light of the fact that retail class shares would
22 help defray administrative expenses of the plan,
23 which is exactly, by the way, what ERISA says.
24 It looks to the administrative expenses of the
25 plan.

1 There's certainly -- we certainly
2 agree that cost is one consideration, but it has
3 to be taken into account along with other
4 tradeoffs. And that's what's missing from their
5 theory.

6 And Judge Wood said in the Hecker case
7 there is no rule that we always scrutinize and
8 scour the market for the cheapest available
9 option. If -- if that's the rule that the Court
10 adopts, which is effectively what it would be
11 doing if it allows this claim to go forward,
12 then the federal courts really are going to have
13 to take over the management of these plans,
14 selection of assets, fine-tuning services,
15 deciding whether or not something, at a given
16 point in time, should have asked for a waiver or
17 whether negotiation was sufficient.

18 I mean, there's really no end to the
19 way in which federal courts would be dragged
20 into overseeing this and managing investment
21 plans, which the Court has never done.

22 I mean, the Court in the Jones versus
23 Harris Associates case under the Investment
24 Company Act took a much more prudent approach
25 when -- when it said that if we're going to get

1 into this question of cost differences, they're
2 going to have to show that the cost difference
3 was so disproportionately large that one couldn't
4 get to that, one couldn't look at that and say
5 it was the result of an arms-length negotiation.

6 And so if you're going to factor into
7 cost here, I think that exact standard would
8 apply. The standard in that case came from
9 Congress's reference to fiduciary, which the
10 government in that case argued was a basis to
11 import the common law of trusts.

12 My friend right here argued that case
13 for the plaintiff in that case. He prevailed,
14 but he recognized that really what you were
15 talking about is whether there was a fair or
16 reasonable fee, but in that context the question
17 of whether a fee was fair or reasonable was
18 whether or not it was so disproportionately
19 large that you couldn't say it was an
20 arms-length fee.

21 The same standard would make sense to
22 apply in this context, but it wouldn't -- it
23 wouldn't allow Petitioner to -- a plaintiff to
24 proceed in this kind of case, either with
25 respect to the institutional class share claim

1 or the recordkeeping claim, where you're talking
2 about marginal differences in costs, where you
3 failed to plead facts, which would show that the
4 alternative fee or service was even available to
5 the plan.

6 And when you couldn't say that a
7 prudent fiduciary in the same circumstances
8 could not have concluded that pursuing that fee
9 or service, even if available, would do more
10 harm than good, which is the other thing that --

11 JUSTICE BREYER: Well, why -- why?
12 Look, he says that -- say you have \$50 million
13 invested in the expensive one in the chart. And
14 they said you could take that 50 million and
15 buy -- and their word in their complaint is
16 "identical" -- identical fund at the lower
17 price.

18 Now, that's what they allege. And
19 perhaps because you say no, you need \$100
20 million, you need a big outlay, well, then
21 they're not identical, okay? But they say
22 identical.

23 And so what are we supposed to do
24 about that?

25 MR. GARRE: Well, Your Honor, I mean,

1 first of all, you have to look at the complaint.

2 I'm sure my friend is going to get up here --

3 JUSTICE BREYER: I looked at the --

4 MR. GARRE: -- and tell you, oh, we --

5 JUSTICE BREYER: -- pages that you
6 mentioned, which are the pages that do claim
7 this allegation, which is about 98 through 116.

8 MR. GARRE: Right.

9 JUSTICE BREYER: All right? So what
10 else do you want me to look at?

11 MR. GARRE: Well --

12 JUSTICE BREYER: They do contain the
13 word "identical" and that's also italicized.

14 MR. GARRE: Right. I -- I would look
15 at and you will find not a mention of the
16 minimum requirements for each of those shares,
17 nor any attempt to establish -- plead facts
18 which show that they were met.

19 I would look at the fact that this
20 claim, which is Count V, is premised on the
21 argument that the number of options deprive them
22 of the ability to qualify for low class shares,
23 which explicitly recognizes that the minimum
24 requirements weren't met, Your Honor.

25 And that's in the complaint. It's

1 paragraph 266, page 170.

2 And I would look at the -- the
3 deficiency of other allegations. If you want to
4 look at the recordkeeping claim, Your Honor,
5 they allege, in their complaint at page 78, that
6 the use of multiple record keepers was common.
7 I mean the fact is -- is that when you're
8 dealing with organizations over time using their
9 services, it's not particularly common just to
10 call out of the blue and say, you know what, I
11 want a really lower fee. And these were
12 prudently managed services, and over time, over
13 a reasonable period of time, they eventually did
14 negotiate a lower fee. But you can't hold that
15 against them.

16 And I would say too that the specific
17 references my friend is referring to on that
18 come from the second amended complaint, a
19 complaint that the district court and Seventh
20 Circuit didn't allow, and that they declined to
21 petition for cert on to this Court. So I think
22 it's inappropriate for him to rely on that.

23 I mean, really the fact is is that
24 their claims in this case continue to evolve.
25 They rely on discovery out of the record. They

1 -- they rely on the second amended complaint.
2 But the only complaint before this Court is the
3 amended complaint. And that complaint is simply
4 deficient. And if this Court allows that
5 complaint to go forward, then it really has
6 provided no limit whatsoever, because if -- if I
7 hear you correctly, Justice Breyer, it's enough
8 to say in the abstract a share is identical, a
9 share is available, and that's it, you're off to
10 the races with discovery and settlement demands
11 and the like.

12 And that really would -- would pose,
13 as the amicus briefs tell you in far better
14 detail than I could, an intolerable burden on
15 the plans. It would be to the detriment of plan
16 participants.

17 Ultimately, the costs of litigation,
18 the costs of insurance, of premiums, themselves
19 are going to be factored into the mix of
20 administrative expenses that participants have
21 to play. And, ultimately, as you limit options
22 and scale back services, as a ruling by this
23 Court in favor of Petitioners would require
24 plans to do, you're harming participants as
25 well.

1 JUSTICE KAGAN: Mr. Garre, as -- as I
2 understand what the Seventh Circuit ruled in
3 this case, the Seventh Circuit ruled that
4 fiduciaries can avoid liability for offering
5 imprudent investments with unreasonably high
6 fees if they also offer prudent investments with
7 reasonable fees. That's the essence of the
8 Seventh Circuit's judgment. Are you defending
9 that or not?

10 MR. GARRE: I would disagree with that
11 characterization. I -- what -- what I would
12 defend, though, is --

13 JUSTICE KAGAN: Okay. If -- if -- if
14 the Seventh Circuit said that, would you agree
15 with it or not?

16 MR. GARRE: I wouldn't because I don't
17 think -- I think the question is whether when a
18 plan offers generally sound, diversified
19 investments and adequately informs employees
20 about the aspects of those investments,
21 including cost, is it a breach of the fiduciary
22 duty? And I would say no.

23 And I would point you to the
24 Department of Labor's own materials. And look
25 at the --

1 JUSTICE KAGAN: I think I'm -- I'm
2 losing track --

3 MR. GARRE: Okay.

4 JUSTICE KAGAN: -- of your answer to my
5 question. I basically said, are you defending a
6 position that says you can insulate yourself
7 from a suit that says you're acting imprudently,
8 you, the fiduciary, by saying no, some of the
9 investments that we offer in our plan are
10 prudent and they have reasonable fees and so you
11 can't attack us for having unreasonable
12 investments with unreasonable fees?

13 MR. GARRE: Right. And if -- if --
14 one of the amicus briefs uses the example of a
15 contaminated oyster. If the question was you've
16 got a contaminated oyster but you've got good
17 oysters too, so that was prudent, I wouldn't
18 defend that. But if you've got an oyster from
19 the Chesapeake and an oyster from one of my
20 favorite places, Apalachicola, then -- and --
21 and one is slightly more expensive than the
22 other, then I would defend that.

23 I would say Congress left to the
24 participants the choice there. And the --

25 JUSTICE KAGAN: Well, sure --

1 MR. GARRE: -- Department of Labor
2 would agree with you.

3 JUSTICE KAGAN: -- and all you're
4 saying -- let's -- you take an index fund and a
5 managed fund. The managed fund is going to have
6 higher funds than an indexed fund, and it's not
7 unreasonable for a fiduciary to have both --

8 MR. GARRE: Right.

9 JUSTICE KAGAN: -- the managed fund
10 with higher fees and the indexed fund with lower
11 fees.

12 MR. GARRE: Right.

13 JUSTICE KAGAN: But suppose the
14 fiduciary had five index funds and one of them
15 had low fees and the others were all gouging
16 people.

17 MR. GARRE: Right.

18 JUSTICE KAGAN: Would it be reasonable
19 for the fiduciary to retain the others?

20 MR. GARRE: No. It's never reasonable
21 to provide funds that gouge. Here, if you
22 looked at the retail class shares and the
23 institutional class shares in isolation, there
24 would be no argument that they were unreasonable
25 in any respect, with respect to cost or anything

1 else.

2 The argument is that the -- the shares
3 were identical, and so, therefore, it was
4 imprudent to offer both. As I mentioned before,
5 they were not identical, Your Honor. The
6 institutional class shares carry investment
7 minimums that impact the number of options, and
8 so that's an added cost. They also helped --
9 the retail class shares also helped to defray
10 administrative expenses for the plan as a whole,
11 in particular, lower cost account -- lower
12 account holders. That's another cost. So they
13 weren't identical.

14 But -- but, on your hypothetical, Your
15 Honor, you could never gouge. But the -- the --
16 the institutional class shares, the retail class
17 shares, there's nothing about gouging. They
18 wouldn't even argue that --

19 JUSTICE KAGAN: Well, I feel like
20 you're putting too much weight on the word that
21 I used. You know, it's easy to say, well, no,
22 you can never gouge. The point is that you're
23 not insulated from making bad decisions in your
24 -- in your plan by the fact that you've made
25 some good decisions in your plan, are you?

1 MR. GARRE: No, but you'd have to look
2 at it holistically, Your Honor.

3 JUSTICE KAGAN: Because, if I think
4 that that's what the Seventh Circuit said,
5 that's got to be wrong, right?

6 MR. GARRE: Well, with the caveats
7 I've just given. I mean, I -- I don't -- I'm
8 acknowledging that there's certainly -- choice
9 is not always a defense. I think you'd have to
10 take into account that -- you know, what
11 Congress said in 1104(c), that where the claim
12 is it comes from the exercise of participants'
13 control. I mean, that's what Congress said, and
14 that really does answer your hypothetical.

15 But this case is far easier than your
16 hypothetical, Your Honor. And if you want to
17 write an opinion that -- that holds out the
18 hypothetical, whether you call it gouging or
19 something else, then that's fine, but that's not
20 this case because we're talking about marginal
21 price differences. And they no longer argue
22 that we didn't notify -- they're not arguing
23 that we didn't notify them adequately to make
24 those choices.

25 JUSTICE ALITO: But I think that the

1 hypotheticals make it a little bit too simple.
2 Suppose the choice is between brand name sodium
3 chloride or non-brand name sodium chloride.
4 There are people who want the brand name sodium
5 chloride. Is it -- would it be imprudent to
6 offer that choice?

7 MR. GARRE: No. And -- and, you know,
8 there's some people who just don't want to
9 change either, Your Honor. I mean, not
10 everyone -- if you put a Walmart right next to
11 the Giant, not everybody's going to go shopping
12 at the Walmart just because, you know, the
13 cereal might be, you know, a penny or two less
14 expensive. There's some people who don't want
15 change, and change involves costs in itself.

16 But -- but I think you're right, Your
17 Honor. I mean, that -- that is quite different,
18 allowing participant choice in that context.
19 And, again, I would go -- I would point you to
20 the -- look at 401(k) fees document by the
21 Department of Labor, where they specifically
22 tell participants, you know, there are expenses
23 associated with different fund options, you
24 should read your statements carefully and you
25 should look at those expenses in deciding

1 whether or not to invest. Let employers know
2 your preference.

3 They said that on page 8 specifically
4 with respect to the retail versus institutional
5 class shares.

6 Under Petitioners' view, it's not a
7 question of letting employers know your
8 preference. It's a question of one plaintiff
9 coming in, bringing a class action, seeking to
10 hold the entire plan hostage to a massive
11 damages claim as long as they pick one asset and
12 they can claim that that asset was available at
13 some marginally less expensive cost.

14 There's no limit to the price
15 difference. I think that came up earlier.
16 There's no limit to the price difference under
17 their theory that I've seen. And that -- that
18 is an extremely dangerous state of affairs for
19 ERISA plans.

20 And it -- frankly, I don't think it
21 would put the courts in a role that they are
22 well suited to, managing and micro- --
23 micromanaging investment decisions, fee
24 decisions, services decisions.

25 Your Honors, the claims here -- if the

1 claims here can proceed, then any plaintiff can
2 subject a plan to the threat of massive damages
3 and millions of dollars of discovery just by
4 alleging that a cheaper fee, asset, or service
5 was available, even if they provide no facts
6 that would support an inference that that --
7 that fee or service was actually available to
8 the plans.

9 And that would have -- that would
10 drive a hole through the pleading standards that
11 this Court has established in *Iqbal* and *Twombly*.
12 It would thrust the courts into a role that they
13 are not well suited to in micromanaging plans.
14 And it ultimately would harm retirees and
15 employees as plans struggle with the heightened
16 costs, administrative burdens, litigation, as
17 premium insurance skyrockets.

18 We would urge this Court to avoid all
19 that and affirm the judgment of the Seventh
20 Circuit below.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 Justice Breyer, anything further?

24 Justice Kagan?

25 Justice Kavanaugh?

1 Thank you, counsel.

2 Rebuttal, Mr. Frederick?

3 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

4 ON BEHALF OF PETITIONERS

5 MR. FREDERICK: My friend doesn't
6 defend the Seventh Circuit, and he nowhere
7 talked about the statute, which is what we're
8 here to be explicating. On that basis, I would
9 urge you to, at the very least, send the case
10 back.

11 What you got was an extended motion to
12 dismiss argument, which is what happens in the
13 district courts. And I apologize to you all for
14 the way this case had to come to you based on
15 the Seventh Circuit's error, but the case must
16 be reversed.

17 I will start with the questions Mr.
18 Chief Justice, yours, with respect to the
19 damages. Had Northwestern acted in 2009 and
20 2010 when many, many other universities, the
21 majority of the universities, it would have
22 saved the plan millions and millions of dollars
23 that rightfully belongs to the retirees.

24 Justice Alito, we're talking about
25 brand name sodium chloride and whether you

1 charge \$1 or \$2 for the same bottle of sodium
2 chloride.

3 Justice Sotomayor, if you look at page
4 JA 80, there are multiple recordkeeping, and we
5 specifically allege there that there were
6 inefficiencies with marketing and that there
7 could have been a reduction in the costs that
8 were given.

9 Justice Gorsuch, in answer to your
10 question about standing, confusion is not a
11 cause of action. We allege financial harm.
12 Confusion, though, is one of the process
13 problems that is associated with the kinds of
14 financial harm that we're talking about.

15 And we asserted on behalf of everyone
16 in the plan, they were paying unnecessary
17 recordkeeping fees. They were not having access
18 to institutional share classes. And that
19 because of the failure to consolidate, their
20 investment opportunities were fewer.

21 Justice Kavanaugh, the fees have
22 decreased so much that there are almost no new
23 cases being filed in this area. That is an
24 indication that the litigation that initially
25 started this, coupled with the Department of

1 Labor regulations, have actually redressed the
2 problem of breaches of fiduciary duty that were
3 identified early by the Labor Department during
4 the Bush administration.

5 So I would urge you not to take
6 seriously this idea about insurance premiums and
7 all these other things because the reality is
8 that the number of people who are taking
9 advantage of defined-contribution plans has gone
10 up from 75 million to 109 million. The number
11 of plans has increased from 630,000 to almost
12 700,000 in the period since we filed this
13 complaint.

14 So you cannot say as an empirical
15 matter that litigation is somehow causing a
16 problem. The whole point of the Department of
17 Labor's regulations was to bring reform to this
18 area. Some universities acted prudently and did
19 so quickly, and they saved their retirees lots
20 and lots of money. Northwestern did not.

21 This case should be remanded so that
22 we have an opportunity to prove at trial just
23 how much they cost harm to our participants.
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 1:05 p.m., the case was
3 submitted.)

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