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IN THE SUPREME COURT OF THE UNITED STATES

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 APRIL HUGHES, ET AL.,)
 Petitioners,)
 v.) No. 19-1401
 NORTHWESTERN UNIVERSITY, ET AL.,)
 Respondents.)
 - - - - -

Washington, D.C.

Monday, December 6, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 a.m.

APPEARANCES:

DAVID C. FREDERICK, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

MICHAEL R. HUSTON, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioners.

GREGORY G. GARRE, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

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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 maintained 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
4 do you draw the line after that? The
5 Respondents don't give any type of answer to
6 that question, 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 recordkeeper. 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 recordkeeper, we allege that that
4 led to a lower return, and that is a claim for
5 procedural imprudence, as well as a result of
6 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 institutional --

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 institutional 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 --

6 MR. FREDERICK: Well --

7 JUSTICE BREYER: -- just say: Hey,
8 the fiduciary has to go out and -- and -- and --
9 and -- and just make the best bargain on every
10 damn thing in front of him in that -- in that
11 grocery store. On the other hand, you don't
12 want to let him get away with doing nothing
13 either.

14 MR. FREDERICK: Justice Breyer --

15 JUSTICE BREYER: That's my real
16 question. I don't know.

17 MR. FREDERICK: -- this exact same
18 scenario was presented in Tibble, which, as
19 you'll recall, concerned --

20 JUSTICE BREYER: Yeah, yeah.

21 MR. FREDERICK: -- three funds that
22 had institutional share available but were --

23 JUSTICE BREYER: Yeah, but we didn't
24 answer this question in Tibble. It was a
25 question of -- it was a question --

1 MR. FREDERICK: But, on remand, what
2 happened in the courts below was that the
3 employees won the trial, that there were
4 available these institutional share classes, and
5 that was affirmed on appeal by the Ninth
6 Circuit.

7 The complaint -- the whole theory of
8 the complaint is that these were available
9 institutional share class and they were not
10 being offered to the plan recipients.

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

16 But your -- you -- you -- you say that
17 for purposes of pleading you didn't need to do
18 that. Is that right?

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

24 We pleaded -- and this is at JA 99 --
25 98 to 100 -- that they're available if the

1 Respondents would have asked. On allegation at
2 JA 100, we plead that other fiduciaries had
3 obtained waivers from TIAA and Fidelity, which
4 are the two that are at issue in this case.

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

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

25 Is that part of your complaint here,

1 that -- that they should have consolidated their
2 funds in order to get the institutional rates?
3 Or are you saying, no, forget the consolidation
4 piece of this. Even with their -- the number --
5 their existing number of funds, they could have
6 gotten the institutional rate and they should
7 have?

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

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

19 And what was happening in --

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

1 trust -- trustee management, whatever.

2 But, on the consolidation point, I
3 mean, there is at some -- at some point a
4 downside to having a non-diverse set of funds,
5 right? And isn't that much harder for courts to
6 figure out? Like, at what point is it like, no,
7 nobody's going to want that plan, it only has
8 three funds in it?

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

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

21 I would acknowledge that it is a
22 harder claim to show that there's consolidation
23 that would reduce fees, but there's a lot of
24 expert testimony and expert analysis of that
25 very situation because, in some instances, they

1 were offering 16 funds that offered the exact
2 same investment mix.

3 And the circumstances now suggest that
4 consolidation will lower fees, it will provide
5 an opportunity for less recordkeeping expense,
6 it will be better for the beneficiaries, and
7 that is to be benefitting -- benefitting the
8 plan.

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

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

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

1 MR. FREDERICK: I think what you can
2 say, Justice Gorsuch, is that the breach of
3 fiduciary claim is an ancient claim. It is one
4 that has always looked at objective
5 reasonableness.

6 JUSTICE GORSUCH: Yes, yes, yes, yes,
7 all right.

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

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

24 JUSTICE KAVANAUGH: But the problem I
25 think is -- you've referred to industry norm a

1 few times, but that's changing, I think you've
2 acknowledged, and, you know, you're trying to
3 look retrospectively at one university: Did
4 they change fast enough?

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

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

25 JUSTICE KAVANAUGH: So was it

1 unreasonable then to not follow that DOL
2 guidance and to provide, as Justice Gorsuch
3 says, more choice?

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

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

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

22 So it's not as though -- the -- the
23 actual evidence of harm -- what we're talking
24 about here is a couple of bad outliers that were
25 way behind industry standards in conforming

1 their plans, to the detriment of thousands and
2 thousands of employees.

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

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

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

1 held to the highest -- highest standard.

2 I mean, is the fiduciary duty average,
3 or is it the highest standard?

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

11 CHIEF JUSTICE ROBERTS: Well, might
12 the --

13 MR. FREDERICK: -- it is a balancing
14 test --

15 CHIEF JUSTICE ROBERTS: -- prudent man
16 in a like capacity --

17 MR. FREDERICK: Yeah.

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

25 I mean, it's the same concern that I

1 think Justice Breyer had. If you said -- said
2 to somebody, you know, I want you to go out and
3 fill this car with gas, you know, if he came to
4 the intersection and one company, A, was however
5 many, you know, dollars a gallon and somebody
6 else was a lot less, you'd expect him to go to
7 the one that's a lot less. I don't know if
8 you'd expect him to drive, you know, another 10
9 miles and go to the Acme gas company or -- or
10 whatever.

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

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

24 And that's why I asked the first
25 question. The closest that it comes to saying

1 what you said is where it says on page 100 --
2 that I could find -- see, I'll go look at it
3 again, and I -- I will look -- we'll really look
4 through it -- the closest -- I couldn't find any
5 language which said column three, they didn't
6 have them, okay? But I bet they didn't. Why
7 didn't he say it?

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

11 MR. FREDERICK: It's the --

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

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

22 And if I read it not like a
23 nit-picker, it says what you said. So I'm
24 slightly stuck. And -- and -- and -- and I --
25 and I -- and I -- and that's why I'm -- and I

1 don't even know. I know the apple, if it says a
2 thousand dollars for an apple here and right
3 over there it says a dollar, I mean, my God, of
4 course. But -- but if -- if -- if it's like a
5 huge department store and time is limited and so
6 forth, well, you can't expect them to do
7 everything. So that's where I'm stuck.

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

17 JUSTICE BREYER: Well --

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

23 And I would third point out the whole
24 idea of moving to rules and -- and this kind of
25 notice pleading was that everybody was on notice

1 from the district court on that this was the
2 claim that we were asserting. That was how they
3 argued it in the district court. But what they
4 did was they asked the district court and the
5 court of appeals to adopt this anomalous rule
6 that doesn't exist anywhere else, which is that
7 if you have some prudent options, that
8 inoculates you as a matter of law from a claim
9 that you have imprudent options.

10 JUSTICE SOTOMAYOR: Mr. Frederick --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. FREDERICK: That's what we're
14 asking you to reverse.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas, anything further?

18 JUSTICE THOMAS: No.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE ALITO: I -- I understand your
21 argument about institutional and -- and retail
22 and about consolidating recordkeeping and
23 management. But, to the extent your claim is
24 that the fund -- that -- that the offering --
25 the list of offerings was bloated and included

1 some -- let's say it includes -- let's say a
2 portfolio includes some options that are popular
3 and well -- they're well-known, they're popular,
4 but they have high fees. What -- what is a
5 court supposed to do with a claim like that?

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

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

20 MR. FREDERICK: I think that if we get
21 to the merits, which is, I think, where your
22 question is going, Justice Alito, if I may, and
23 we're not at the merits now, we're just at the
24 pleading stage, but if we get to the merits, the
25 standard is going to be whether, in light of the

1 prevailing then circumstances, did the fiduciary
2 here breach the fiduciary duty by not -- not
3 acting reasonably with respect to expenses and
4 consolidating those funds where there was
5 duplication? We offer -- we offer a lot of
6 allegations of lots of duplication where there
7 is not a benefit to the beneficiary, other than
8 confusing that person by having too many options
9 that are basically all the same, and it's like
10 looking for the needle in the haystack.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

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

21 The second, which I have a problem
22 with, is your recordkeeping fees because I think
23 that your obligation there would be that you
24 have to allege what that market rate is on the
25 open market, and I don't see where you do that.

1 I mean, you -- I don't see -- you say it's \$35,
2 but you don't give examples of where people have
3 negotiated to that price, that that somehow is
4 the market rate.

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

10 MR. FREDERICK: So, Justice Sotomayor,
11 the price is a proxy for the imprudence in the
12 result of a failed process. We allege at pages
13 73 to 77 of the joint appendix that four other
14 universities consolidated their recordkeepers
15 and thereby lowered their recordkeeping fees.

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

21 MR. FREDERICK: We --

22 JUSTICE SOTOMAYOR: -- because I'm
23 assuming that there is value to having two
24 because you don't want to get rid of TIAA
25 because of its institutional situation.

1 So, if I reject that argument that
2 having one or two is the classic fiduciary
3 right, don't you -- or -- or choice, how do you
4 get to your second stage, that having two would
5 still have gotten you a lower price? Where do
6 you allege that in your complaint?

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

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

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

1 JUSTICE SOTOMAYOR: The process has to
2 lead to losses.

3 MR. FREDERICK: Correct. And the
4 losses --

5 JUSTICE SOTOMAYOR: So I'm getting to
6 what's the loss. How have you alleged the loss
7 here?

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

12 JUSTICE SOTOMAYOR: For two?

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

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

23 It is plausible to suppose that a plan
24 that was even bigger than those university plans
25 also could get a rebate for recordkeeping

1 expenses that were unnecessary.

2 JUSTICE SOTOMAYOR: Did they negotiate
3 for a reduction in fee? You talk about 2016.
4 Did they reduce the rate as well?

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

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

20 MR. FREDERICK: Yes. We --

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

25 MR. FREDERICK: That's correct.

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

4 MR. FREDERICK: That's --

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

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

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

24 MR. FREDERICK: That's correct.

25 JUSTICE KAGAN: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: So I -- I understand
4 the institutional share point. I understand, I
5 think, the cost point. I'm still stuck on the
6 duplicative investment point.

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

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

25 JUSTICE GORSUCH: Okay. Let -- let --

1 let --

2 MR. FREDERICK: I would say --

3 JUSTICE GORSUCH: -- let's -- let's
4 say reading *Twigg*, if I might, reasonably but
5 not too parsimoniously, we find that -- that
6 there isn't sufficient allegations with respect
7 to your -- the three named plaintiffs. What
8 would be the upshot of that?

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

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

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

25 JUSTICE BREYER: If we do that, I

1 mean, that's, again, a dilemma. Look -- and, to
2 me, it's a dilemma. Maybe it isn't to anybody
3 else.

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

14 MR. FREDERICK: Right.

15 JUSTICE BREYER: Okay. So -- so what
16 -- what do we do? You don't want them to -- you
17 -- you don't want them to behave imprudently.
18 We're -- we're at a -- at the same time, you
19 don't want a -- a -- a group of plaintiffs to be
20 able to say whatever they do, we're going to
21 call it imprudently and there we go, ha-ha.
22 Nobody wants that. So -- so what is it that we
23 say that -- that prevents those two evils, which
24 are opposite?

25 MR. FREDERICK: Well, I think, number

1 one, you rely on facts and you rely on the
2 development of facts in the ordinary process.
3 When you're at the pleading stage, you read the
4 complaint plausibly to assume the truth.

5 JUSTICE BREYER: I would have said
6 that before Twombly and Iqbal.

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

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

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

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

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

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

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Huston.

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

16 MR. HUSTON: Mr. Chief Justice, and
17 may it please the Court:

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

24 Mr. Frederick has ably explained why
25 the allegations in this complaint, assuming them

1 to be true at this stage, show that Respondents
2 here acted imprudently by wasting plan
3 participants' retirement savings.

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

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

21 For all of those reasons, the judgment
22 of the court of appeals should be reversed.

23 I'd like to just begin with the
24 statutory text. As was discussed in the last
25 argument, the statutory standard requires

1 careful, skillful, prudent, diligent management.
2 These are the benchmarks that Congress
3 incorporated, drawing on trust law, the -- the
4 wide body of trust law, in order to determine
5 what constitutes prudent management.

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

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

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

23 JUSTICE THOMAS: So then why should it
24 focus principally on the expenses?

25 MR. HUSTON: Well, it focuses on

1 process, but expenses are an important part of
2 prudent management, Your Honor, absolutely. The
3 Respondent makes -- the Restatement makes that
4 clear. All of the trust treatises say that.

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

12 And I think it --

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

22 MR. HUSTON: Let's pick Fidelity.

23 CHIEF JUSTICE ROBERTS: They say I
24 like that guy --

25 MR. HUSTON: Yeah, I know.

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

3 MR. HUSTON: Sure.

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

7 MR. HUSTON: No, Your Honor. You -- I
8 think that the situation that you're
9 hypothesizing is one where fiduciaries are
10 comparing apples and oranges. They're trying to
11 decide, should we invest in the Vanguard small
12 cap index fund or the Fidelity bond fund?

13 That is not anything like the
14 allegations that we're talking about here. The
15 allegations in this complaint are that the funds
16 are identical. The only difference between the
17 share cost --

18 CHIEF JUSTICE ROBERTS: That's one of
19 the --

20 MR. HUSTON: -- is the cost.

21 CHIEF JUSTICE ROBERTS: -- it's one of
22 the sets of allegations. One -- one thing Mr.
23 Frederick emphasized that I'd like to get the
24 government's view on it is that one reason you
25 know these people were bad is because they fixed

1 something. In other words, their own actions
2 show that they were doing something wrong.

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

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

22 It's not dispositive by any means, but
23 it's one piece of evidence that the trier of
24 fact will need to consider in response to the
25 defense asserted by my friend, Mr. Garre, that

1 these -- these opportunities really weren't
2 available to the plan.

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

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

14 MR. HUSTON: Well, Your Honor, I think
15 the fact --

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

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

25 JUSTICE BREYER: Yeah.

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

3 JUSTICE BREYER: But not other in the
4 same type --

5 MR. HUSTON: Exactly.

6 JUSTICE BREYER: -- totally? Okay. I
7 got that.

8 MR. HUSTON: Exactly. Other,
9 different --

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

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

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

21 JUSTICE BREYER: Okay. I got it.

22 MR. HUSTON: When the fiduciaries made
23 the decision that particular kinds of mutual
24 funds were good options to offer to their plan
25 participants, they said we've looked, we think

1 Fidelity's small cap mid-value fund is the one
2 that we want, that's one that we want to offer
3 to our participants in the plan, the obligation
4 on the fiduciaries was to offer that specific
5 investment at the lowest price that they could
6 get it.

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

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

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

24 And as for me, that's the one that
25 seems a little bit more, I don't know, I have to

1 think about that.

2 MR. HUSTON: Sure.

3 JUSTICE KAGAN: So what do you think
4 about that?

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

11 So just to take one concrete example,
12 life cycle funds, right? These are funds that
13 are offered to participants based on the target
14 date of their retirement, and they automatically
15 balance themselves. And so you pick a fund,
16 like, if you want to retire in 2050, you pick
17 the 2050 life cycle fund.

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

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

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

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

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

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

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

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

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

17 All I'm saying is that when the
18 question is -- we certainly have taken a
19 position, as Your Honor notes, that these -- it
20 was imprudent to offer retail class shares once
21 --

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

24 MR. HUSTON: I think a factual
25 allegation that's in the complaint that supports

1 the plausibility of that claim in which --

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

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

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

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

1 better, and what is the cost of the choice?

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

6 JUSTICE GORSUCH: Thank you.

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

14 JUSTICE KAVANAUGH: What do we --

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

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

23 JUSTICE KAVANAUGH: And those settled,
24 though. I mean, isn't the -- the concern in the
25 amicus briefs, and I don't know how to deal with

1 this, is that these class action complaints are
2 such that the game is to get past pleading
3 stage.

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

10 MR. HUSTON: Respectfully, Justice
11 Kavanaugh, I don't think that's quite right that
12 it doesn't happen in the real world. It came in
13 --

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

22 MR. HUSTON: There --

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

25 MR. HUSTON: Justice Kavanaugh, there

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

4 I think the important point for
5 purposes of this Court is that the Court was
6 confronted with almost exactly the same argument
7 in Dudenhoeffer. The fiduciaries in
8 Dudenhoeffer came in and said, unless you really
9 tighten up the pleading standard, it's going to
10 be way too easy to bring imprudence lawsuits,
11 it's going to be too expensive to do this kind
12 of management, and plans are going to stop
13 offering 401(k)s.

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

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

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

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

9 JUSTICE KAVANAUGH: Right.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Breyer?

4 Justice Kagan?

5 Justice Kavanaugh?

6 Thank you, counsel.

7 Mr. Garre.

8 ORAL ARGUMENT OF GREGORY G. GARRE

9 ON BEHALF OF THE RESPONDENTS

10 MR. GARRE: Thank you, Mr. Chief

11 Justice, and may it please the Court:

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

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

23 First, Petitioners' claims are based
24 on a flawed conception of the duty of prudence
25 which overlooks the role that Congress left for

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: Well, the United

1 States didn't support it as an independent
2 claim, but as I understand the United States'
3 argument, they're perfectly fine with
4 considering that in -- in addressing whether
5 there were too -- you know, whether the -- the
6 investment fees were too high or whether the
7 management fees -- whether the recordkeeping
8 fees were too high.

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

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

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

25 JUSTICE KAGAN: Suppose there were a

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

12 That's sufficient, isn't it?

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

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

24 MR. GARRE: Right.

25 JUSTICE KAGAN: -- of whether you have

1 one or two. It's just that they didn't go back
2 to those two and say: How are you doing on --
3 on fees there? Can you come up with a lower
4 price? Because you're giving lower prices to
5 some of our competitors.

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

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

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

23 JUSTICE KAGAN: You didn't do standard
24 things that you should do in order to decrease
25 your fees. You didn't put it out for

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

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

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

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

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

1 closest that they point to is the one example,
2 the Cal Tech example. Cal Tech itself had to
3 shed many popular mutual funds by Fidelity.

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

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

10 MR. GARRE: Yes.

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

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

1 Why doesn't that allege, hey, it says
2 -- and then the page before, I mean, they have
3 -- the sentence before, exact same mutual fund.
4 That's the allegation, exact same mutual fund.

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

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

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

21 MR. GARRE: And you --

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

1 they were available. I mean, really? At some
2 point, when you're in the business of selling
3 share funds and they're saying was available,
4 that's good enough, isn't it?

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

6 JUSTICE BREYER: Not? Why not?

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

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

17 MR. GARRE: No, it --

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

20 MR. GARRE: With respect, the question
21 is whether or not the conduct is equally
22 consistent with lawful behavior. And if the
23 minimum requirements haven't been met, then a
24 plan that has both institutional class shares
25 and retail class shares is perfectly consistent

1 with lawful conduct, and there's no basis to
2 infer just by the virtue of retail class shares
3 that they have somehow acted imprudently. It's
4 just as equally plausible that we simply hadn't
5 missed the -- met the minimum requirements for
6 those shares, Your Honor.

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

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

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

25 And those are both reasons why a

1 prudent fiduciary would have a plan that allowed
2 a mix of retail and institutional class shares,
3 particularly if we hadn't met the minimum
4 investment requirements for retail -- for
5 institutional class shares.

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

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

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

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

22 MR. GARRE: Sure.

23 JUSTICE SOTOMAYOR: Eight hundred
24 thousand seems very close to a million to me.
25 And I know that when people are -- as an

1 individual, when I'm close to a minimum, the
2 first thing I ask is, won't you waive the
3 minimum for me?

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

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

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

15 JUSTICE SOTOMAYOR: That's one.

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

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

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

1 large jumbo 401(k) plans have gotten waivers.

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

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

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

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

25 And -- and -- and what they allege is

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

5 MR. GARRE: I absolutely think you do.

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

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

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

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

25 MR. GARRE: Because, Your Honor, two

1 reasons. One, the regulatory changes in 2009,
2 which came into effect, and that did require
3 plans in the 403(b) university space to begin
4 managing plans differently, and that's -- that
5 was a rule change.

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

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

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

1 it's doing to the insurance premium market.

2 Premiums have skyrocketed, and the
3 market is in serious state. And we've cited
4 articles just as recently as the fall on that.
5 This would have disastrous consequences for
6 plans.

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

22 And that has never been the law.

23 JUSTICE SOTOMAYOR: But why? It's a
24 fine balance, I agree with you. It's a fine
25 balance between litigation and not. But some of

1 this litigation has ended up being to the
2 benefit of the retirees because the universities
3 were not doing basic steps like just asking for
4 price reductions, like just asking for waivers.

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

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

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

13 JUSTICE SOTOMAYOR: -- and what the
14 Seventh Circuit had.

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

20 JUSTICE SOTOMAYOR: It's hard to do it
21 on this one, at least with respect to the
22 investment institutional and -- and -- and maybe
23 with respect to price. I have to go back to the
24 complaint more carefully, but at least my law
25 clerk did and told me that there was no

1 allegation, and so you might be right, that
2 keeping two fiduciaries would have reduced the
3 price and to what level, but --

4 MR. GARRE: They themselves plead at
5 -- at page 78 of the joint appendix that use of
6 multiple recordkeepers were common -- was
7 common. But, Your Honor, on this complaint --

8 JUSTICE SOTOMAYOR: I agree with you.
9 I agree with you. What I'm saying is I don't
10 know if they gave an allegation that's staying
11 with that model, which I think is likely
12 reasonable.

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

22 But the problem with this complaint,
23 Your Honor, is it doesn't plead facts which
24 would allow a reasonable inference that the
25 alternative fees and services they claim should

1 have been provided were even available to the
2 plan.

3 And under this Court's decision in
4 Fifth Third and a basic application of Twombly
5 and Iqbal, that is not sufficient to state a
6 plausible claim.

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

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

18 Here, you have a plan that had
19 institutional class shares and retail class
20 shares. If you looked at the plan, the most
21 reasonable inference is that the plan was
22 prudently exercising choice based on whether
23 minimum requirements were met and -- and in
24 light of the fact that retail class shares would
25 help defray administrative expenses of the plan,

1 which is exactly, by the way, what ERISA says.
2 It looks to the administrative expenses of the
3 plan.

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

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

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

25 I mean, the Court in the Jones versus

1 Harris Associates case under the Investment
2 Company Act took a much more prudent approach
3 when -- when it said that if we're going to get
4 into this question of cost differences, they are
5 going to have to show that the cost difference
6 was so disproportionately large that one
7 couldn't get to that, one couldn't look at that
8 and say it was the result of an arms-length
9 negotiation.

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

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

25 The same standard would make sense to

1 apply in this context, but it wouldn't -- it
2 wouldn't allow a petitioner to -- a plaintiff to
3 proceed in this kind of case, either with
4 respect to the institutional class share claim
5 or the recordkeeping claim, where you're talking
6 about marginal differences in costs, where you
7 failed to plead facts which would show that the
8 alternative fee or service was even available to
9 the plan and when you couldn't say that a
10 prudent fiduciary in the same circumstances
11 could not have concluded that pursuing that fee
12 or service, even if available, would do more
13 harm than good, which is the other thing that --

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

21 Now that's what they allege. And
22 perhaps because you say no, you need \$100
23 million, you need a big outlay, well, then
24 they're not identical, okay? But they say
25 identical. And so what are we supposed to do

1 about that?

2 MR. GARRE: Well, Your Honor, I mean,
3 first of all, you have to look at the complaint.
4 I'm sure my friend is going to get up here --

5 JUSTICE BREYER: I looked at the --

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

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

10 MR. GARRE: Right.

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

13 MR. GARRE: Well --

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

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

21 I would look at the fact that this
22 claim, which is Count V, is premised on the
23 argument that the number of options deprive them
24 of the ability to qualify for low class shares,
25 which explicitly recognizes that the minimum

1 requirements weren't met, Your Honor. And
2 that's in the complaint. It's paragraph 266,
3 page 170.

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

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

25 I mean, really, the fact is is that

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

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

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

1 plans to do, you're harming participants as
2 well.

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

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

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

18 MR. GARRE: I wouldn't because I don't
19 -- I -- I think the question is whether, when a
20 plan offers generally sound, diversified
21 investments and adequately informs employees
22 about the aspects of those investments,
23 including cost, is it a breach of the fiduciary
24 duty? And I would say no, and I would point you
25 to the Department of Labor's own materials and

1 look at the --

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

4 MR. GARRE: Okay.

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

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

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

1 JUSTICE KAGAN: Well, sure --

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

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

9 MR. GARRE: Right.

10 JUSTICE KAGAN: -- the managed fund
11 with higher fees and the index fund with lower
12 fees.

13 MR. GARRE: Right.

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

18 MR. GARRE: Right.

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

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

1 in any respect with respect to cost or anything
2 else.

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

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

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

1 some good decisions in your plan, are you?

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

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

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

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

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

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

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

1 should look at those expenses in deciding
2 whether or not to invest. Let employers know
3 your preference.

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 Justice Breyer, anything further?

25 Justice Kagan?

1 Justice Kavanaugh?

2 Thank you, counsel.

3 Rebuttal, Mr. Frederick?

4 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

5 ON BEHALF OF PETITIONERS

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

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

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

25 Justice Alito, we're talking about

1 brand name sodium chloride and whether you
2 charge \$1 or \$2 for the same bottle of sodium
3 chloride.

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

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

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

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

1 started this, coupled with the Department of
2 Labor regulations, have actually redressed the
3 problem of breaches of fiduciary duty that were
4 identified early by the Labor Department during
5 the Bush Administration.

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

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

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

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 1:05 p.m., the case was
4 submitted.)

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