No. 19-1401

In the Supreme Court of the United States

APRIL HUGHES, ET AL., PETITIONERS

v.

NORTHWESTERN UNIVERSITY, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SEEMA NANDA
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
JEFFREY M. HAHN
Counsel for Litigation
BLAIR L. BYRUM
ALEXANDRA J. GILEWICZ
Attorneys

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires the fiduciaries of an employee benefit plan to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Fiduciaries who breach their duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). The question presented is:

Whether participants in a defined-contribution ERISA plan stated a claim for relief against plan fiduciaries for breach of the duty of prudence by plausibly alleging that the fiduciaries caused the participants to pay investment-management or administrative fees higher than those available for other materially identical investment products or services.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
  A. Background 1
  B. The present controversy 4
Summary of argument 8
Argument:
  Petitioners stated a claim for relief under ERISA by plausibly alleging that respondents imprudently caused the plans' participants to pay excessive investment-management and administrative fees 12
  A. ERISA plan fiduciaries have an ongoing duty to control expenses and remove imprudent investments 13
  B. The court of appeals erred in concluding that none of petitioners' counts states a claim for relief 17
    1. Petitioners plausibly allege that respondents imprudently offered higher-cost investment funds when identical lower-cost funds were available 18
    2. Petitioners plausibly allege that respondents imprudently failed to use any of several methods to reduce recordkeeping fees 27
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 25, 30, 33
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 25, 30
Braden v. *Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) 20
Central States, Se. & Sw. Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985) 2, 13, 14

Cases—Continued: Page

Davis v. *Washington Univ. in St. Louis*, 960 F.3d 478 (8th Cir. 2020) 20, 23

Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) 26

Fifth Third Bancorp v. *Dudenhoeffer*, 573 U.S. 409 (2014) 2, 13, 21

Howell v. *Motorola, Inc.*, 633 F.3d 552 (7th Cir.), cert. denied, 565 U.S. 816 (2011) 23, 24

Jones v. *Harris Assocs. L. P.*, 559 U.S. 335 (2010) 30, 31

Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 14

Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 (2d Cir. 2013) 19

Pfeil v. *State St. Bank & Trust Co.*, 671 F.3d 585 (6th Cir.), cert. denied, 568 U.S. 1063 (2012), abrogated on other grounds by *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409 (2014) 23

Sacerdote v. *New York Univ.*, No. 18-2707, 2021 WL 3610355 (2d Cir. Aug. 16, 2021)............ 19, 23, 24

Sweda v. *University of Pa.*, 923 F.3d 320 (3d Cir. 2019), cert. denied, 140 S. Ct. 2565 (2020) 20, 23, 30

Tibble v. *Edison Int'l*:

575 U.S. 523 (2015) .... *passim*

843 F.3d 1187 (9th Cir. 2016).................................... 17, 19

Tussey v. *ABB, Inc.*, 746 F.3d 327 (8th Cir.), cert. denied, 574 U.S. 991 (2014) 30

Varity Corp. v. *Howe*, 516 U.S. 489 (1996).......................... 14

Young v. *General Motors Inv. Mgmt. Corp.*, 325 Fed. Appx. 31 (2d Cir. 2009) 30

Statutes and regulations: Page

Employee Retirement Income Security Act of 1974,
29 U.S.C. 1001 *et seq.* 1
29 U.S.C. 1001(b) 2, 13
29 U.S.C. 1002(13) 1
29 U.S.C. 1002(21)(A)(i) 2
29 U.S.C. 1002(34) 3
29 U.S.C. 1102(a)(1) 2
29 U.S.C. 1104(a) 2
29 U.S.C. 1104(a)(1)(A) 2, 13
29 U.S.C. 1104(a)(1)(A)(ii) 3, 16, 24, 29
29 U.S.C. 1104(a)(1)(B) 2, 3, 8, 13, 29
29 U.S.C. 1104(c) 24
29 U.S.C. 1106 32
29 U.S.C. 1106(a)(1) 5
29 U.S.C. 1108 32
29 U.S.C. 1109(a) 2, 13
29 U.S.C. 1132-1138 1
29 U.S.C. 1132(a)(2) 2, 13
29 U.S.C. 1135 24
Investment Company Act of 1940,
15 U.S.C. 80a-1 *et seq.* 30
15 U.S.C. 80a-35(b) 30
26 U.S.C. 403(b) 2, 28
29 C.F.R.:
Section 2550.404c-1(d)(2)(iv) 24
Section 2550.408b-2(c)(1)(iv)(D)(2) 32

Miscellaneous:

Employee Benefits Sec. Admin.,
U.S. Dep't of Labor:
A Look at 401(k) Plan Fees (Sept. 2019),
https://go.usa.gov/xAgan 3, 4, 17

Miscellaneous—Continued: Page

Meeting Your Fiduciary Responsibilities (Sept. 2020), https://go.usa.gov/xARbV 17

Understanding Retirement Plan Fees and Expenses (Dec. 2011), https://go.usa.gov/xANPH 3, 4

What You Should Know About Your Retirement Plan (Sept. 2020), https://go.usa.gov/xAR44 3

The Law of Trusts and Trustees:

Susan N. Gary, George Gleason Bogert & George Taylor Bogert, Secs. 511-550 (3d ed. 2019) 14

Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, Secs. 611-670 (3d ed. 2000) 15

Amy Morris Hess. George Gleason Bogert & George Taylor Bogert, Secs. 671-750 (3d ed. 2009) 15, 22

Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632 (Feb. 3, 2012) 32

Restatement (Second) of the Law of Trusts (1959) 14

Restatement (Third) of the Law of Trusts:

Vol. 3 (2007) 14, 15, 16, 19, 29, 34

Vol. 4 (2012) 22

Austin Wakeman Scott et al., *Scott and Ascher on Trusts* (5th ed. 2007):

Vol. 3 14

Vol. 4 .... 15, 16

Uniform Prudent Investor Act (1994), 7B U.L.A. 1 (2018) :

§ 2 cmt., 7B U.L.A. 26 15

§ 7 cmt., 7B U.L.A. 45 19

In the Supreme Court of the United States

No. 19-1401

APRIL HUGHES, ET AL., PETITIONERS

v.

NORTHWESTERN UNIVERSITY, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether petitioners have stated a claim for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Secretary of Labor has primary authority for administering ERISA. See 29 U.S.C. 1002(13), 1132-1138. The United States therefore has a substantial interest in the proper interpretation of the statute. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

A. Background

1. ERISA "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility,

and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Every ERISA plan must have at least one named fiduciary with authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). In addition, anyone who exercises discretionary authority or control respecting plan management, or any authority or control respecting disposition of plan assets, is a fiduciary. 29 U.S.C. 1002(21)(A)(i).

ERISA subjects plan fiduciaries to certain fiduciary duties derived from the common law of trusts. See 29 U.S.C. 1104(a); *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). For example, plan fiduciaries must act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of "providing benefits" and "defraying reasonable [plan] expenses." 29 U.S.C. 1104(a)(1)(A). Most relevant here, ERISA's duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B); see *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 412, 415 (2014). A plan participant or beneficiary may sue on behalf of the plan to remedy a breach of fiduciary duty, 29 U.S.C. 1132(a)(2), and plan fiduciaries are personally liable for such breaches, 29 U.S.C. 1109(a).

This case involves two ERISA-governed defined-contribution plans whose tax treatment is determined by 26 U.S.C. 403(b), which applies to certain tax-exempt organizations. Pet. App. 27a. In a defined-contribution

plan (of which Section 401(k) plans are another type), participants maintain individual investment accounts, the value of which "is determined by the market performance of employee and employer contributions, less expenses." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 525 (2015); see 29 U.S.C. 1002(34). Fiduciaries of defined-contribution plans are responsible for assembling a menu of investment options, and plan participants then choose their investments from that menu. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *What You Should Know About Your Retirement Plan* 3, 25 (Sept. 2020), https://go.usa.gov/xAR44. Fiduciaries also hire administrative-service providers for the plan. See *id.* at 27.

2. ERISA plan fiduciaries are also responsible for monitoring and controlling the fees and expenses that are paid by plan participants for investing in the plan. See 29 U.S.C. 1104(a)(1)(A)(ii) and (B); Employee Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 2 (Sept. 2019), https://go.usa.gov/xAgan. Two types of expenses are relevant here: fees for management of plan investments and for administrative "recordkeeping" services. See Pet. App. 30a-34a.

Management fees are charged by the investment providers whose investment funds (*e.g.*, mutual funds or annuities) populate a plan's investment menu, in exchange for investing plan participants' assets according to the terms of each fund. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses* 4 (Dec. 2011), https://go.usa.gov/xANPH. Recordkeeping fees typically cover the cost of tracking the individual accounts for each plan participant and providing plan and account information to participants—such as quarterly

statements and a website where participants can monitor their accounts. See *id.* at 3. Recordkeeping services may be provided by the same investment providers whose investment funds are offered in the plan, or by a third party. See *ibid.*

The fees associated with a particular investment fund are often assessed as an "expense ratio," *i.e.*, a percentage of the assets invested in the fund. See *Understanding Retirement Plan Fees and Expenses* 4. For mutual funds specifically, some investment providers offer different share classes of the same fund, including a "retail" share class available to all investors and an "institutional" share class available only to large investors, which typically carries a lower expense ratio. See, *e.g.*, *A Look at 401(k) Plan Fees* 8 ("Plans with more total assets may be able to lower fees by using special funds or classes of stock in funds, which generally are sold to larger group investors."). The expense ratio may include fees for recordkeeping services in addition to investment management, which is sometimes referred to as "revenue sharing." See *Understanding Retirement Plan Fees and Expenses* 3. Alternatively, recordkeeping fees may be assessed on a flat, per-participant basis. See *ibid.*

B. The Present Controversy

1. Petitioners are employees of Northwestern University who participate in either or both of the two plans at issue here: the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan. Pet. App. 27a. Respondents are Northwestern University (the Plans' administrator and designated fiduciary), the Northwestern University Retirement Investment Committee, and certain university officials who have fiduciary duties. *Id.* at 27a-28a.

The Plans allow participants to invest in mutual funds and annuity contracts selected by the fiduciaries. Pet. App. 27a, 29a-30a. Prior to October 2016, the Retirement Plan offered 242 investment options and the Voluntary Savings Plan offered 187, largely through the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA) and Fidelity Management Trust Company. *Id.* at 29a. By October 2016, the Plans reduced their investment offerings to about 40 options each. *Id.* at 3a-4a.

2. Petitioners filed the Amended Complaint in this case (the operative complaint) in December 2016. Pet. App. 2a n.4. As most relevant here, Counts III and V claim that respondents breached their duty of prudence under ERISA, both before and after reducing the Plans' investment offerings in October 2016, by failing to adequately monitor and control the Plans' recordkeeping fees, and by failing to remove from the Plans imprudent funds with excessive expense ratios. See J.A. 166, 171; see also Pet. App. 41a-42a, 44a.[1]

Count III alleges that respondents imprudently obligated plan participants to pay excessive recordkeeping fees. See J.A. 165-168; see also J.A. 93-98. Petitioners allege that respondents unnecessarily retained both TIAA and Fidelity as recordkeepers, thereby failing to take advantage of economies of scale, J.A. 93-94, 167, and paid recordkeeping fees through revenue sharing

[1] The Amended Complaint also claims that respondents agreed to an imprudent "bundled" services arrangement with TIAA, that respondents are liable for transactions prohibited by ERISA, 29 U.S.C. 1106(a)(1), and that certain respondents failed to monitor other fiduciaries. See Pet. App. 29a-30a, 38a, 45a-47a, 50a. Those counts were not the focus of the petition for a writ of certiorari. See Pet. 5-6 & n.1, 19-20.

as opposed to a flat per-participant fee, which increased recordkeeping fees as the Plans' assets grew "even though the services provided by the recordkeepers remained the same," J.A. 166. Petitioners further allege that respondents, unlike fiduciaries of "similarly situated [Section] 403(b) plan[s]," failed to monitor the Plans' recordkeeping fees to determine whether "those amounts were competitive or reasonable for the services provided," "failed to solicit bids from competing providers," and failed to "use the Plans' size" to negotiate lower recordkeeping fees. J.A. 166-167.

Count V alleges that respondents included in the Plans a number of imprudent investment options with excessive management fees and weak investment performance. See J.A. 169-173; see also J.A. 98-117. In particular, petitioners allege that respondents offered 129 retail-class mutual funds in the Plans even though identical institutional-class mutual funds were available to the Plans based on their "jumbo" size, and even though those institutional-class funds differed only in their lower expense ratio. J.A. 171; see J.A. 99-117. Petitioners further allege that fiduciaries of other large defined-contribution plans have successfully negotiated with TIAA and Fidelity for institutional-class shares. J.A. 99-100.

3. The district court granted respondents' motion to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted, and denied leave to file a second amended complaint. Pet. App. 26a-58a. The court of appeals affirmed. *Id.* at 1a-25a.

a. The court of appeals held that Count III, alleging excessive recordkeeping fees, failed as a matter of law because ERISA does not "require[]" paying recordkeeping fees through "a flat-fee structure" as opposed

to revenue sharing; "does not require a sole recordkeeper"; and did not require respondents "to search for a recordkeeper willing to take $35 per year per participant"—the amount that petitioners alleged would have been a reasonable recordkeeping fee. Pet. App. 15a-18a. The court noted petitioners' allegations that using multiple recordkeepers and failing to solicit competitive bids "impose[d] higher costs on plan participants." *Id.* at 16a. But respondents had "explained it was prudent to have this arrangement so [the Plans] could continue offering" one particular TIAA investment option in which a number of plan participants were invested (the "Traditional Annuity"), given that TIAA had required the Plans, as a condition of offering the Traditional Annuity, to use TIAA as the recordkeeper for all TIAA funds. *Ibid.*; see *id.* at 13a-14a; see also J.A. 70.

The court also stated that respondents had not identified an "alternative recordkeeper that would have accepted" a lower fee than the one paid by the Plans while still providing the same level of service. Pet. App. 18a. The court expressed concern that the flat-fee structure favored by petitioners might "have the opposite effect of increasing administrative costs" for some plan participants. *Id.* at 15a. And "[a]t any rate," the court reasoned, "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low," by choosing to "invest in various low-cost index funds." *Id.* at 18a n.10.

b. Regarding Count V, alleging that respondents offered imprudent investment funds with "'unnecessary'" management fees and inferior performance, the court of appeals stated that it "underst[ood]" petitioners' "clear

preference for low-cost index funds" and "acknowledge[d] the industry may be trending in favor of these types of offerings." Pet. App. 19a (citation omitted). But the court found that those types of funds "*were and are* available" in the Plans, "eliminating any claim that plan participants were forced to stomach an unappetizing menu." *Ibid.* (citation omitted). The court declined to endorse what it termed "a blanket prohibition on retail share classes." *Ibid.* And it reasoned that petitioners' "claim of imprudence" was "ma[de] * * * less plausible" by the fact that "[t]he plans here offered hundreds of [investment] options—over 400 combined"—because "plans may generally offer a wide range of investment options and fees without breaching any fiduciary duty." *Id.* at 20a-21a.

c. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 59a-60a.

SUMMARY OF ARGUMENT

Petitioners have stated a claim for relief under ERISA by plausibly alleging that respondents imprudently caused the Plans' participants to pay excessive fees.

A. ERISA's "prudent man" standard, 29 U.S.C. 1104(a)(1)(B), was derived from the common law of trusts, and this Court therefore often looks to trust law to determine the contours of an ERISA fiduciary's duties. See *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528-529 (2015). Trust law requires a prudent trustee making investment decisions for a trust to carefully compare available investment alternatives, to continuously monitor all trust investments and remove any imprudent ones, and to incur only costs that are reasonable. Controlling fees and other costs to an ERISA plan is im-

portant, because even small differences in costs can significantly reduce the value of an employee's investment account at retirement.

B. Taking petitioners' factual allegations in the Amended Complaint as true at the pleading stage, they have stated at least two plausible claims for relief for breach of ERISA's duty of prudence.

1. In Count V, petitioners plausibly allege that respondents selected for the Plans more than 100 retail-class mutual funds with higher expense ratios instead of available institutional-class alternatives of the same funds that differed only in their lower costs. Petitioners further allege that those institutional-class shares were available to the Plans because of their large size, and that fiduciaries of comparable defined-contribution plans successfully negotiated with the Plans' same investment providers for institutional-class shares. If petitioners prove those allegations, then respondents breached ERISA's duty of prudence by offering higher-cost investments to the Plans' participants when respondents could have offered the same investment opportunities at a lower cost.

The court of appeals erred in concluding that petitioners' Count V did not state a claim for relief. The court principally held that, because the Plans included some funds of the type that petitioners favor—index funds with low fees—petitioners could not object to the Plans' inclusion of other funds with higher fees. That reasoning conflicts with this Court's recognition in *Tibble* that trust law imposes on trustees "a continuing duty to monitor trust investments and remove imprudent ones," and that this duty applies to "'*all* the investments of the trust.'" 575 U.S. at 529 (emphasis added; citation omitted). Trust law does not excuse trustees

from their obligation to identify and divest imprudent investments with unreasonably high fees on the ground that the trustees have offered some (or even many) other prudent investments with appropriate fees. Petitioners' retail-class-fund claim is not about reasonable tradeoffs between differently managed investments; petitioners allege that the retail-class funds selected by respondents were *identical* to those funds' institutional-class counterparts except for their higher fees.

Respondents contend that the Amended Complaint did not adequately allege that institutional-class shares were available to the Plans, and did not include a claim based on allegedly imprudent retail-class shares. But the court of appeals rejected petitioners' Count V as a matter of law, not because petitioners' pleading was insufficiently detailed. In any event, petitioners pleaded facts about the Plans' size and the experience of other plans' fiduciaries to bolster their assertion that respondents could have obtained institutional-class shares if they had pursued them. Petitioners' allegations were sufficient to give respondents notice of their claims, as evidenced by the district court's observation that institutional-class shares were "a major theme in [the] complaint." Pet. App. 33a.

2. Petitioners also state a claim for relief in Count III by plausibly alleging that respondents caused the Plans' participants to pay excessive recordkeeping fees. Petitioners allege that respondents failed to employ any of several strategies used by fiduciaries of other defined-contribution plans to reduce their recordkeeping costs: Petitioners maintain that respondents failed to put the Plans' recordkeeping services out for competitive bidding; failed to take advantage of the Plans' size

to negotiate pricing rebates from existing recordkeepers; and failed to assess whether the Plans could have reduced costs by consolidating to a single recordkeeper. Those allegations, when considered together and taken as true at the pleading stage, support a plausible inference that respondents breached their duty of prudence by failing to monitor and control recordkeeping costs.

The court of appeals' reasons for affirming the dismissal of Count III were not persuasive. The court's observations that ERISA does not necessarily prohibit using multiple recordkeepers or paying for recordkeeping through revenue sharing, while true, do not refute petitioners' claim, which contends that respondents imprudently failed to monitor and limit recordkeeping costs, not that multiple recordkeepers or revenue sharing are imprudent per se.

The court of appeals next expressed doubt that the flat-fee recordkeeping arrangement favored by petitioners would benefit the Plans' participants, and it credited respondents' proffered justification for maintaining two recordkeepers. But that reasoning fails to take petitioners' allegations as true at the pleading stage and to draw all reasonable inferences in petitioners' favor. And in any event, the reasons offered by respondents in defense of their management choices would not explain why they did not seek competitive bids for recordkeeping or attempt to negotiate lower fees with their existing recordkeepers, as comparable ERISA plans' fiduciaries allegedly did.

Finally, the court of appeals reasoned that petitioners had options in the Plans to keep recordkeeping fees low. But here again that reasoning incorrectly suggests that ERISA plan fiduciaries can avoid liability for offering imprudent investments with unreasonably high fees

by also offering prudent investments with reasonable fees. Fiduciaries may not shift onto plan participants the responsibility to identify and avoid imprudent investments.

ARGUMENT

PETITIONERS STATED A CLAIM FOR RELIEF UNDER ERISA BY PLAUSIBLY ALLEGING THAT RESPONDENTS IMPRUDENTLY CAUSED THE PLANS' PARTICIPANTS TO PAY EXCESSIVE INVESTMENT-MANAGEMENT AND ADMINISTRATIVE FEES

Petitioners' Amended Complaint states at least two plausible claims for breach of ERISA's duty of prudence. Taking petitioners' factual allegations as true at the pleading stage, petitioners have shown that respondents caused the Plans' participants to pay excessive investment-management and administrative fees when respondents could have obtained substantially the same investment opportunities or services at a lower cost. Specifically, within Count V, petitioners plausibly allege that respondents selected retail-class investment funds for inclusion in the Plans even though identical institutional-class investment funds with lower fees were available to the Plans based on their size. In Count III, petitioners plausibly allege that respondents failed to monitor the Plans' cost of recordkeeping services and use any of several methods to reduce those costs.[2] The judgment below should be reversed, and the case remanded for further proceedings.

---

[2] The United States takes no position on petitioners' other allegations and claims.

A. ERISA Plan Fiduciaries Have An Ongoing Duty To Control Expenses And Remove Imprudent Investments

1. ERISA is designed to protect the interests of participants in employee benefit plans and their beneficiaries. 29 U.S.C. 1001(b). One way that it does so is by imposing certain trust-law duties on plan fiduciaries. ERISA's "strict standards of trustee conduct," *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985), require fiduciaries to act for the "exclusive purpose" of "providing benefits to participants and their beneficiaries" and "defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). ERISA also imposes on fiduciaries "a standard of care." *Central States*, 472 U.S. at 570. Plan fiduciaries must discharge their responsibilities "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B). The "prudent person" standard is based not on a prudent layperson, but on a prudent investor who is "acting in a like capacity," is "familiar with such matters," and is making decisions for "an enterprise of a like character and with like aims." *Ibid.* In other words, ERISA holds plan fiduciaries to the standard of prudent "trustees who manage investments * * * to secure [benefits] for the trust's beneficiaries." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 421 (2014).

ERISA authorizes plan participants, beneficiaries, and fiduciaries, as well as the Secretary of Labor, to sue for appropriate relief to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). Fiduciaries who breach their duties are "personally liable" to the plan for losses resulting from the breach. 29 U.S.C. 1109(a). Recovery

for a breach of fiduciary duty "inures to the benefit of the plan." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985). By placing fiduciary obligations on plan administrators and authorizing civil suits to remedy breaches of fiduciary duty, ERISA ensures that fiduciaries serve the interests of plan participants and beneficiaries, provide the benefits due under the plan, and pay only reasonable expenses. See *id.* at 142.

2. ERISA's fiduciary duties "draw much of their content from the common law of trusts." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). In particular, ERISA's prudent-person standard of care was "derived from the common law of trusts." *Central States*, 472 U.S. at 570. This Court therefore often "look[s] to the law of trusts" to "determine[e] the contours of an ERISA fiduciary's duty." *Tibble* v. *Edison Int'l*, 575 U.S. 523, 528-529 (2015).

Like ERISA, trust law uses a "prudent person" standard to describe the level of care and skill required of a trustee. See 3 Restatement (Third) of the Law of Trusts § 77, at 81 (2007) (Third Restatement); Restatement (Second) of the Law of Trusts § 174, at 379 (1959). Under the common law's prudent person standard, "[a] trustee must * * * exercise the care, skill, prudence, and diligence of an ordinarily prudent person engaged in similar business affairs and with objectives similar to those of the trust in question." Susan N. Gary, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 541, at 254 (3d ed. 2019); see 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 17.6, at 1205 (5th ed. 2007) (Scott).

When a trustee is making investment decisions, the trustee's conduct is judged using a "prudent investor" standard. Third Restatement § 90, at 292. The trustee

must "invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." *Ibid.*; see 4 Scott §§ 19.1, 19.1.25, at 1386, 1390-1394 (noting that virtually every State has codified the "prudent investor" standard). Prudent investing "involves obtaining relevant information about such matters as the circumstances and requirements of the trust and its beneficiaries, the contents and resources of the trust estate, and the nature and characteristics of available investment alternatives." Third Restatement § 90 cmt. d, at 299. The trustee may seek the advice of "attorneys, bankers, brokers and others," but the trustee is ultimately responsible for investment decisions. 4 Scott § 19.1.3, at 1397 (noting the "duty to exercise the trustee's own judgment" even if the trustee receives advice from others); Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 612, at 34-35 (3d ed. 2000).

"[S]eparate and apart from the trustee's duty to exercise prudence in selecting investments at the outset," a trustee also "has a continuing duty" "[u]nder trust law" "to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529; see Third Restatement § 90 cmt. b, at 295 ("[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments."); Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* §§ 684, 685, at 145-148, 156-157 (3d ed. 2009) (Hess & Bogert); 4 Scott § 19.3.1, at 1439. In short, prudent "[m]anaging embraces monitoring." Uniform Prudent Investor Act § 2 cmt. (1994), 7B U.L.A. 26 (2018) (internal quotation marks omitted). This Court has therefore explained that an ERISA

plaintiff "may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble*, 575 U.S. at 530.

3. In the administration of an ERISA plan, just as in the administration of other trusts, a prudent trustee strives to minimize costs. A prudent trustee incurs "only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." Third Restatement § 90(c)(3), at 293; 4 Scott § 19.1.2, at 1394 ("[T]he trustee must be cost-conscious * * * in carrying out the trustee's investment duties."). Indeed, "[t]rustees, like other prudent investors, prefer (and, as fiduciaries, ordinarily have a duty to seek) the lowest level of risk and cost for a particular level of expected return." Third Restatement § 90 cmt. f(1), at 308. In the particular context of investment funds, trustees should pay "special attention" to "sales charges, compensation, and other costs" and should "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." *Id.* § 90 cmt. m, at 332.

The general trust-law duty to control costs is reinforced by ERISA's requirement that plan fiduciaries "defray[] *reasonable* expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A)(ii) (emphasis added). Limiting ERISA plan fees and expenses is important because they "can sometimes significantly reduce the value of an account in a defined-contribution plan." *Tibble*, 575 U.S. at 525. Even small differences in fees can have a significant impact over time in light of compounding: Overspending causes plan participants to "lose not only the money spent on higher fees, but also 'lost investment opportunity'; that is, the money that the portion of their investment spent on unnecessary

fees would have earned over time." *Tibble* v. *Edison Int'l*, 843 F.3d 1187, 1197-1198 (9th Cir. 2016) (en banc) (citation omitted). The Department of Labor has explained, for example, that for an employee with a $25,000 starting account balance who averages a 7% annual return over a 35-year career, the "1 percent difference" between paying 1.5% for fees and expenses versus 0.5% "would reduce [the employee's] account balance at retirement by 28 percent." *A Look at 401(k) Plan Fees* 2.

ERISA accordingly holds fiduciaries "to a high standard of care and diligence" regarding fees: Fiduciaries must, among other things, "[e]stablish a prudent process for selecting investment options and service providers"; "[e]nsure that fees paid to service providers and other plan expenses are reasonable in light of the level and quality of services provided"; and "[m]onitor investment options and service providers once selected to make sure they continue to be appropriate choices." *A Look at 401(k) Plan Fees* 2. The Department of Labor has consistently reminded ERISA fiduciaries of their responsibilities to carefully evaluate fees when selecting plan investment options and then to monitor fees on an ongoing basis. Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities* 5 (Sept. 2020), https://go.usa.gov/xARbV.

B. The Court Of Appeals Erred In Concluding That None Of Petitioners' Counts States A Claim For Relief

At least two of the claims for relief in the Amended Complaint state a plausible claim for breach of ERISA's duty of prudence. The court of appeals' reasons for affirming the dismissal of those claims are not persuasive.

1. Petitioners plausibly allege that respondents imprudently offered higher-cost investment funds when identical lower-cost funds were available

a. Petitioners state a plausible claim for relief within Count V by alleging that respondents selected investment funds for the Plans "with far higher costs than were and are available for the Plans based on their size." J.A. 100.

Petitioners allege in particular that respondents included in the Plans more than 100 retail-class mutual funds with higher-fee expense ratios when they "knew or should have known that investment providers would have allowed the Plans to provide lower-cost share classes to participants if [respondents] had asked." J.A. 100. Petitioners emphasize that the institutional-class funds—which are available only to "[j]umbo investors like the Plans"—carry "significantly" lower costs "but [are] otherwise identical": they have "identical portfolio managers, underlying investments, and asset allocations." J.A. 99-100, 117. The Amended Complaint alleges that the institutional-class shares were available here because the Plans are "jumbo" sized: in 2015, the Retirement Plan allegedly held $2.34 billion in assets and the Voluntary Savings Plan held $530 million, making the Plans among the largest defined-contribution plans in the United States by total assets (the top 0.04% and 0.2%, respectively). J.A. 40-41. Petitioners further allege that "fiduciaries of other defined contribution plans have successfully negotiated" for institutional-class shares, including specifically from TIAA and Fidelity. J.A. 99-100.

If petitioners prove those allegations, then respondents breached ERISA's duty of prudence by offering higher-cost investments to the Plans' participants when

respondents could have offered the same investment opportunities at a lower cost. As discussed above (p. 16, *supra*), prudent investing trustees "have a duty to seek[] the lowest level of * * * cost for a particular level of expected return," Third Restatement § 90 cmt. f(1), at 308. In furtherance of that duty, trustees must "obtain[] relevant information about * * * the nature and characteristics of available investment alternatives," *id.* § 90 cmt. d, at 299, and must "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio," *id.* § 90 cmt. m, at 332. A trustee also "cannot ignore the power the trust wields to obtain favorable investment products." *Tibble*, 843 F.3d at 1198. ERISA thus requires plan fiduciaries to make a diligent effort to ensure that plan fees are reasonable compared to what prudently managed plans of similar size and type pay for similar services. Put simply, "[w]asting beneficiaries' money is imprudent." Uniform Prudent Investor Act § 7 cmt. (1994), 7B U.L.A. 45 (2018).

Multiple courts of appeals have accordingly held that plaintiffs state a claim for breach of ERISA's duty of prudence by plausibly alleging that plan fiduciaries "should have offered lower-cost institutional shares instead of higher-cost retail shares." *Sacerdote* v. *New York Univ.*, No. 18-2707, 2021 WL 3610355, at *6 (2d Cir. Aug. 16, 2021); see *ibid.* (ERISA plaintiffs state a claim for relief by alleging "'that a superior alternative investment was readily apparent such that an adequate investigation'—simply reviewing the prospectus of the fund under consideration—'would have uncovered that alternative.'") (quoting *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir.

2013)); *Davis* v. *Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (plaintiffs "clear[ed] th[e] pleading hurdle" by alleging that defendants offered retail-class shares rather than available institutional-class shares); *Sweda* v. *University of Pa.*, 923 F.3d 320, 332 & n.7 (3d Cir. 2019) (plaintiffs "plausibly allege[d] that [the defendant] breached its fiduciary duty" by, among other things, "frequently selec[ting] higher cost investments when identical lower-cost investments were available"), cert. denied, 140 S. Ct. 2565 (2020).

That is not to say that an ERISA plaintiff could state a claim for relief by alleging merely that alternative investment funds with lower fees than those included in a plan were available in the marketplace. A "bare allegation that cheaper alternative investments exist," on its own, likely does not state a claim for relief, because ERISA does not require fiduciaries "'to scour the market to find and offer the cheapest possible fund.'" *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 n.7 (8th Cir. 2009) (citation omitted). Fiduciaries should not consider costs *alone* when establishing an investment menu for plan participants; rather, prudent fiduciaries must consider all relevant factors. See *id.* at 596-597 (A fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility."). And courts evaluating imprudence claims likewise should consider all relevant factors in determining whether the plaintiff has plausibly alleged that the fiduciary acted unreasonably. "Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the

fiduciary acts, [29 U.S.C.] 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific." *Fifth Third Bancorp*, 573 U.S. at 425.

In this case, though, petitioners have stated a claim for relief by alleging that respondents selected retail-class investment funds instead of available alternatives, offered by the same investment providers, that differed *only* in their lower costs. J.A. 53, 100. Petitioners allege that TIAA and Fidelity would have made the institutional-class shares available to the Plans if respondents had asked for them, and petitioners bolster that assertion by pleading facts about the Plans' "jumbo" size and the experience of other fiduciaries of large defined-contribution plans who obtained institutional-class shares. See J.A. 40-41, 99-100. If petitioners succeed in proving that respondents had the opportunity to offer identical lower-cost institutional-class investments in the Plans, then there is no apparent justification for respondents' failure to do so.

b. The court of appeals erred in concluding that petitioners' Count V did not state a claim for relief.

The court of appeals principally reasoned that the large number of options offered in the Plans "ma[de] [petitioners'] claim of imprudence less plausible," because ERISA fiduciaries "may generally offer a wide range of investment options and fees without breaching any fiduciary duty." Pet. App. 20a-21a. The court determined that "the types of funds [that petitioners] wanted"—index funds with low fees—"'*were and are* available to them,'" which precluded petitioners from "object[ing] that numerous additional funds were offered as well." *Id.* at 19a (citation omitted); see Resp. Supp. Br. 10-11.

That reasoning was unsound. The court of appeals' conclusion that the availability of various prudent investments in the Plans foreclosed petitioners from objecting to allegedly imprudent retail-class funds conflicts with this Court's observation that, "[u]nder trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 575 U.S. at 529. This Court has also made clear that this monitoring duty applies to each of a trust's investments: "the trustee must 'systematic[ally] conside[r] *all* the investments of the trust at regular intervals' to ensure that they are appropriate." *Ibid.* (quoting Hess & Bogert § 684, at 147-148) (emphasis added; brackets in original). A trustee who allows the trust to invest in one or more imprudent funds breaches that duty, and the trustee is liable for losses that result.

Trust law does not excuse trustees from their obligations to identify and remove imprudent investments with unreasonably high fees on the ground that they have offered some (or even many) other prudent investments with appropriate fees. On the contrary, the court of appeals' reasoning is at odds with the trust-law rule that a trustee may not escape liability for losses due to imprudent investments by offsetting those losses against gains from prudent investments. See 4 Restatement (Third) of the Law of Trusts § 101 cmt. a, at 78 (2012) ("If a trustee is liable for a loss caused by a breach of trust, the amount of liability is not reduced by a profit resulting from the actions of the trustee that do not involve a breach of trust."); Hess & Bogert § 708, at 261 (a trustee who has breached his fiduciary duties "may not offset gains against losses in determining liability for breach of trust"). That rule helps ensure that

trustees fulfill their ongoing responsibility to offer only prudent investments.

Thus, under ERISA as under general trust law, "[i]t is no defense to simply offer a 'reasonable array' of options that includes some good ones, and then 'shift' the responsibility to plan participants to find them." *Davis*, 960 F.3d at 484 (8th Cir.) (brackets and citations omitted); see *Sacerdote*, 2021 WL 3610355, at *7 (2d Cir.) ("Fiduciaries cannot shield themselves from liability—much less discovery—simply because the alleged imprudence inheres in fewer than all of the fund options."); *Sweda*, 923 F.3d at 330 and 332 n.7 (3d Cir.) (offering "a meaningful mix and range of investment options [does not] insulate[] plan fiduciaries from liability for breach of fiduciary duty" for selecting higher-cost investments instead of identical lower-cost alternatives); *Pfeil* v. *State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir.) ("A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options."), cert. denied, 568 U.S. 1063 (2012), abrogated on other grounds by *Fifth Third Bancorp*, 573 U.S. at 418-419. Rather, plan fiduciaries have an ongoing responsibility "to ensure that imprudent options are not offered to plan participants." *Howell* v. *Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir.), cert. denied, 565 U.S. 816 (2011).

Respondents attempt to defend the court of appeals' holding by asserting that ERISA is not "paternalistic," Br. in Opp. 26 (citation omitted), and so fiduciaries should be permitted to offer plan participants "a wide mix of investment options, including relatively higher-cost options," Resp. Supp. Br. 10. There is nothing inherently wrong with a wide mix of options, but ERISA

does not permit respondents to offer any *imprudent* investments in the mix. See *Sacerdote*, 2021 WL 3610355, at *7 ("[T]he principle that a portfolio should be assessed holistically does not preclude critical assessment of individual funds."). ERISA is not paternalistic in the sense that it does not hold fiduciaries liable for investment losses that result from plan participants' own choices when exercising control over their own accounts. See 29 U.S.C. 1104(c). But the Department of Labor has explained that Section 1104(c) "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." 29 C.F.R. 2550.404c-1(d)(2)(iv); see 29 U.S.C. 1135 (The Secretary of Labor "may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter."). Fiduciaries are thus liable, notwithstanding Section 1104(c), for any losses attributable to the imprudent selection or monitoring of the funds on a plan's investment menu. See, *e.g.*, *Howell*, 633 F.3d at 567.

Petitioners' retail-class-fund claim is not about reasonable tradeoffs between, say, higher-fee funds that offer more-involved management versus passively managed index funds. Petitioners instead allege that the retail-class funds selected by the Plans' fiduciaries were *identical* to available institutional-class funds except for their higher cost. Under those circumstances, the cost of the retail-class funds was not "reasonable," and prudent fiduciaries would not have selected those funds for the Plans. 29 U.S.C. 1104(a)(1)(A)(ii).

c. Moving beyond the court of appeals' mistaken reasoning, respondents attempt to defend the judgment below on the case-specific alternative ground that this

complaint was deficient. But those arguments offer no sound basis for the lower courts' conclusion that Count V should be dismissed in its entirety.

Respondents assert (Supp. Br. 11) that petitioners did not adequately allege that the institutional-class shares were available to the Plans, pointing to the Amended Complaint's statement that institutional-class shares often "have certain minimum investment requirements." The court of appeals did not decide the case on that basis: the court found that petitioners' claim for relief based on imprudent retail-class funds failed as a matter of law, not because the Amended Complaint's factual allegations were insufficiently detailed. See Pet. App. 19a-21a. In any event, as discussed above, petitioners pleaded facts to bolster their assertions about these Plans' ability to access the institutional-class shares, see p. 18, *supra*, and those factual allegations must be "accepted as true" for purposes of respondents' motion to dismiss. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Respondents reply (Supp. Br. 11) that petitioners' other examples are insufficient comparators because they were Section *401(k)* plans, not Section 403(b) plans, which may "have significant plan assets concentrated in annuity contracts with withdrawal penalties." But the differences between large 401(k) and 403(b) plans are not such an "obvious alternative explanation" as to make it implausible that the Plans here could have obtained institutional-class shares. *Iqbal*, 556 U.S. at 682 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)).

Respondents next object that petitioners' argument based on allegedly imprudent retail-class shares "was not presented as part of any claim in the amended complaint." Br. in Opp. 27; see Resp. Supp. Br. 3-7. Here

again, the court of appeals did not reject Count V on that ground; the court understood the Amended Complaint to claim that respondents had imprudently offered funds that "could have been cheaper but [respondents] failed to negotiate better fees," including some "retail funds with retail fees." Pet. App. 19a. Petitioners devoted several pages in their Amended Complaint to that specific theory of imprudence, describing in detail the retail-class investment funds that respondents selected for the Plans and comparing their costs to those of the institutional-class investment options that petitioners claim respondents could have offered instead. See J.A. 98-117. Petitioners then referred to those allegations in Count V. See J.A. 171.

Respondents can hardly protest that they lacked "fair notice" of petitioners' allegations about retail-class shares, Resp. Supp. Br. 5 (quoting *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005)), when the district court described "[t]he charging of higher retail expense ratios instead of institutional-rate expense ratios" as "a major theme in [petitioners'] complaint." Pet. App. 33a. And while respondents emphasize that the lower courts rejected a proposed second amended complaint that would have reorganized the retail-class-share allegations into a separate count, see Br. in Opp. 17 n.1, 27, 31-32, that ruling is of no moment to the question presented here. The court of appeals determined that the proposed second amended complaint "rel[ied] on the same allegations and facts," and presented "essentially the same claims separated into different counts." Pet. App. 23a-24a.

At bottom, the court of appeals rejected petitioners' Count V based not on the specifics of the Amended Complaint but on its understanding of the substantive

obligations that ERISA imposes on plan fiduciaries. This Court should reverse that decision so that fiduciaries are not insulated from liability for offering imprudent high-cost investments simply because they also offered other prudent investments.

2. Petitioners plausibly allege that respondents imprudently failed to use any of several methods to reduce recordkeeping fees

a. Petitioners also state a claim for relief in Count III by plausibly alleging that respondents caused the Plans' participants to pay excessive recordkeeping fees. Petitioners allege that respondents incurred unnecessary fees by failing to "adequately monitor the amount of the revenue sharing received by the Plans' recordkeepers, determine if those amounts were competitive or reasonable for the services provided to the Plans, or use the Plans' size to reduce fees or obtain sufficient rebates." J.A. 166-167. Petitioners claim that the Plans paid between $3.96 and $5 million combined per year in recordkeeping fees during the relevant period, whereas if respondents had acted prudently, "a reasonable recordkeeping fee for the Plans would be approximately $1,050,000" combined per year. J.A. 95-96.

More specifically, petitioners allege that respondents "failed to conduct a competitive bidding process for the Plans' recordkeeping services" between 2010 and 2015. J.A. 96-97. By contrast, petitioners say, "[p]rudent fiduciaries of defined contribution plans * * * obtain competitive bids for recordkeeping at regular intervals of approximately three years." J.A. 59. Petitioners further allege that, if respondents had received competitive bids for the Plan's recordkeeping services, then they could have "demanded 'plan pricing' rebates from [TIAA] based on the Plans' economies of scale,"

J.A. 97—as, for example, fiduciaries for employee-benefit plans at the California Institute of Technology did by "negotiat[ing] over $15 million in revenue sharing rebates from [TIAA]" between 2013 and 2015, J.A. 77 (emphasis omitted). See J.A. 80-81 (citing a 2016 investment-consultant report advising Section 403(b) plan fiduciaries to reduce costs by, among other things, "leveraging aggregate plan size and scale to negotiate competitive pricing") (brackets and citation omitted). Petitioners allege that respondents, by contrast, negotiated only a "modest" credit from TIAA and Fidelity and did not do so until 2016. J.A. 150-151 (citations omitted).

Petitioners also allege that respondents failed to assess whether the Plans could have avoided duplication and achieved savings by consolidating recordkeepers, see J.A. 93-94, even though fiduciaries of other universities' Section 403(b) plans used that strategy to reduce costs, see J.A. 73-79, 93. Petitioners allege that employing a single recordkeeper is an industry standard, pointing to a 2013 study showing that "more than 90% of [Section 403(b)] plans use[d] a single recordkeeper," J.A. 79-80, and to public literature recommending that Section 403(b) plan fiduciaries seek to "consolidat[e] recordkeepers," J.A. 81 (brackets and citation omitted); see J.A. 80-82. Petitioners allege that additional investigation or effort by respondents would have produced lower recordkeeping fees for the Plans because "the market for defined contribution recordkeeping services is highly competitive," because "market rates for recordkeeping services have declined in recent years," and because recordkeeping services are largely "commoditized" such that recordkeepers "will vigorously compete to win a recordkeeping contract for a jumbo

defined contribution plan" by "differentiat[ing] themselves based on price." J.A. 51, 93.

Those allegations, when considered together and taken as true at the pleading stage, support a plausible inference that respondents breached their duty of prudence by failing to monitor recordkeeping costs and ensure that those costs remained appropriate. As discussed above, ERISA obligates plan fiduciaries to act "prudent[ly]" and incur only "reasonable" expenses, 29 U.S.C. 1104(a)(1)(A)(ii) and (B), and fiduciaries are thus required to take active measures to limit plans' recordkeeping expenses: Fiduciaries must, among other things, make a diligent effort to compare alternative service providers in the marketplace, seek the lowest level of costs for the services to be provided, and continuously monitor plan expenses to insure that they remain reasonable under the circumstances. See pp. 15-17, *supra*; see also Third Restatement Ch.17, Introductory Note at 290 (trustees have a "duty to avoid fees, transaction costs, and other expenses that are not justified by the needs and realistic objectives of the trust's investment program"); Third Restatement § 80 cmt. d(2), at 159 (trustees must "exercise reasonable care, skill, and caution in the selection and retention of agents" to provide services to the trust, including as to "matters of agent compensation").

Here, the Amended Complaint adequately states a claim that respondents acted imprudently because a reasonable plan fiduciary would have regularly assessed the recordkeeping fees paid by the Plans' participants, determined whether those fees were competitive in comparison to available alternatives, and attempted to reduce costs without diminishing services. Petitioners offered more than mere "'naked assertions' devoid

of 'further factual enhancement'" that the Plans' recordkeeping fees were too high, *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (brackets omitted); they substantiated their claim with specific factual allegations about market conditions, prevailing practices, and strategies used by fiduciaries of other comparable Section 403(b) plans. See pp. 27-29, *supra*.

If petitioners' allegations are true, then they show a breach of fiduciary duty by respondents for causing the Plans' participants to pay excessive recordkeeping fees—as other courts have concluded when analyzing similar claims. See, *e.g.*, *Sweda*, 923 F.3d at 330-332 & n.7 (complaint stated a claim for relief by alleging that defendant fiduciaries "paid excessive administrative fees, failed to solicit bids from service providers, failed to monitor revenue sharing, [and] failed to leverage the Plan's size to obtain lower fees or rebates"); *Tussey* v. *ABB, Inc.*, 746 F.3d 327, 336 (8th Cir.) (affirming district court's conclusion that defendant fiduciaries breached their fiduciary duty by failing to "calculate the amount the Plan was paying Fidelity for recordkeeping through revenue sharing," "determine whether Fidelity's pricing was competitive," and "adequately leverage the Plan's size to reduce fees"), cert. denied, 574 U.S. 991 (2014).[3]

---

[3] Some courts evaluating motions to dismiss ERISA claims based on excessive fees have looked to the standard that governs excessive-fee claims under the Investment Company Act of 1940 (ICA), 15 U.S.C. 80a-1 *et seq.*, which imposes a fiduciary duty on investment advisers to mutual funds, 15 U.S.C. 80a-35(b). See, *e.g.*, *Young* v. *General Motors Inv. Mgmt. Corp.*, 325 Fed. Appx. 31, 33 (2d Cir. 2009). That comparison is inapt. In *Jones* v. *Harris Assocs. L. P.*, 559 U.S. 335 (2010), this Court held that the ICA imposes liability only where an investment adviser "charge[s] a fee

b. The court of appeals' reasons for affirming the dismissal of Count III—which respondents echo—are not persuasive.

The court of appeals first stated that "ERISA does not require a sole recordkeeper or mandate any specific recordkeeping arrangement at all," and there is "nothing wrong" with paying recordkeeping fees through revenue sharing as opposed to a flat-fee structure. Pet. App. 17a-18a; see *id.* at 15a-16a; see also Br. in Opp. 15, 25. While it is true that ERISA does not enact *per se* prohibitions against multiple recordkeepers or revenue sharing, those observations do not refute petitioners' claims. The Amended Complaint states a claim for relief in Count III by alleging that petitioners failed to monitor the Plans' recordkeeping costs and employ strategies used by other plan fiduciaries to reduce those costs, not by alleging that it was inherently imprudent to pay two recordkeepers or use revenue sharing. See, *e.g.*, J.A. 57 ("Revenue sharing, while not a *per se* violation of ERISA, can lead to excessive fees if not properly monitored and capped.").

The court of appeals' reasoning also gave insufficient attention to the problems that can arise from using multiple recordkeepers or revenue sharing. Paying two

---

that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." *Id.* at 346. But compensation negotiations between a mutual fund and its investment adviser—where the fund "cannot[] as a practical matter sever its relationship with the adviser," *id.* at 338 (citations omitted)—are not analogous to an ERISA fiduciary's selection of third-party service providers, where ERISA requires cost-conscious decisionmaking and consideration of available alternatives. The ICA's standard therefore should not be imported into ERISA.

providers to perform very similar administrative services raises obvious questions about whether the Plans' overall costs are reasonable. And the Department of Labor's regulations are consistent with petitioners' contention (J.A. 55-59) that paying for recordkeeping through revenue sharing can, without careful monitoring, lead to unreasonable fees. The Department has directed that, to ensure that fiduciaries do not cause their plan to engage in transactions prohibited by ERISA, see 29 U.S.C. 1106, 1108, fiduciaries who pay recordkeepers via revenue sharing must in certain circumstances obtain "a reasonable and good faith estimate of the cost to the covered plan of such recordkeeping services." 29 C.F.R. 2550.408b-2(c)(1)(iv)(D)(2). That estimate must take into account "the rates that the covered service provider, an affiliate, or a subcontractor would charge to, or be paid by, third parties, or the prevailing market rates charged, for similar recordkeeping services for a similar plan with a similar number of covered participants and beneficiaries." *Ibid.* The Department has explained that "plan fiduciaries need this information, when selecting and monitoring service providers, to satisfy their fiduciary obligations under ERISA." *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 77 Fed. Reg. 5632, 5632 (Feb. 3, 2012).

Next, the court of appeals concluded that petitioners had failed to show that a flat-fee recordkeeping arrangement "would even benefit [the Plans'] participants," reasoning that such an arrangement "may have the opposite effect of increasing administrative costs" for some or all participants. Pet. App. 15a; see Br. in Opp. 15 ("[W]hile 'a flat-fee structure might be beneficial for participants with the largest balances,' it may in

fact lead to higher fees 'for younger employees and others with small investment balances.'") (brackets and citation omitted). The court also stated that petitioners had "identified no alternative recordkeeper that would have accepted * * * any fee lower than what was paid" by the Plans. Pet. App. 18a. That reasoning fails to take petitioners' factual allegations as true at the pleading stage and to resolve reasonable inferences in petitioners' favor. See *Iqbal*, 556 U.S. at 678. It ignores petitioners' allegations that recordkeepers compete on price to service large defined-contribution plans like those here, see J.A. 51, and that fiduciaries of comparable Section 403(b) plans sought competitive bids, negotiated rebates, and consolidated recordkeepers in order to reduce their plans' recordkeeping fees, see J.A. 73-77. Moreover, respondents' concerns for younger investors overlooks petitioners' explanation that, if respondents had obtained an overall reasonable fee for recordkeeping, then they could have assessed that fee proportionally within the Plans—meaning "that every participant pays the same percentage of his or her account balance"—in order to avoid disadvantaging smaller-balance investors. J.A. 56-57.

The court of appeals also reasoned that, even assuming the truth of petitioners' allegation that multiple-recordkeeper arrangements "impose higher costs on plan participants," respondents had "explained it was prudent to have this arrangement so [they] could continue offering the Traditional Annuity among" the Plans' investment offerings—given TIAA's requirement that it must be allowed to serve as recordkeeper if a plan wished to maintain the Traditional Annuity. Pet. App. 16a; see Resp. Supp. Br. 11. But respondents' desire to preserve one particular investment option in

the Plans would not justify their alleged failure even to *consider* whether the Plans' recordkeeping costs were reasonable, such as by soliciting competitive bids and comparing the potential advantages of a switch against the disadvantages of eliminating the Traditional Annuity. See Third Restatement § 90 cmt. d, at 299 (trustees must "obtain[ ] relevant information about * * * the nature and characteristics of available investment alternatives"). And even if respondents show at trial that they were justified in using TIAA as the Plans' recordkeeper, that defense would not explain why respondents did not use the Plans' leverage to negotiate a fee credit from TIAA until 2016, see J.A. 150-151, as other plans' fiduciaries allegedly did, see J.A. 77.

Last of all, the court of appeals stated that "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low." Pet. App. 18a n.10. But that simply repeats the same error discussed above by wrongly suggesting that fiduciaries can avoid liability for offering imprudent investments with unreasonably high fees by also offering prudent investments with reasonable fees. See pp. 22-24, *supra*. Petitioners have alleged that a prudent fiduciary would have pursued multiple strategies to lower the Plans' participants' overall recordkeeping costs without sacrificing the quality of services. It is no defense to respondents' alleged imprudent failure to take those steps that they offered some prudent, low-fee options. ERISA requires *fiduciaries* to work actively to limit a plan's expenses and remove imprudent investments; fiduciaries may not shift onto plan participants the burden of identifying and avoiding investments with imprudent fees.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for appropriate proceedings.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General

SEEMA NANDA
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
JEFFREY M. HAHN
Counsel for Litigation
BLAIR L. BYRUM
ALEXANDRA J. GILEWICZ
Attorneys
Department of Labor

SEPTEMBER 2021