No. 19-1401

In The Supreme Court of the United States

APRIL HUGHES, et al.,
Petitioners,
v.

NORTHWESTERN UNIV., et al.,
Respondents.

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

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, BETTER MARKETS, INC., CONSUMER FEDERATION OF AMERICA, NATIONAL EMPLOYMENT LAW PROJECT, AND PENSION RIGHTS CENTER, SUPPORTING PETITIONERS AND URGING REVERSAL

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. **AARP's charitable affiliate, AARP Foundation**, works to end senior poverty by helping vulnerable older adults build economic opportunity.

Among other things, AARP and AARP Foundation seek to increase the security and adequacy of older individuals' public and private pensions and other employee benefits, through participation as amici curiae in state and federal courts, including this Court.[2] One of amici's main

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[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or its counsel and that no person other than amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), a letter by petitioner consenting to the filing of amicus briefs is on file with the Court. Respondent has consented to the filing of this amicus brief.

[2] *E.g.*, *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (scope of ERISA "church plan" exemption); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016) (ERISA preemption); *LaRue v. DeWolff, Boberg & Assocs., Inc.,* 552 U.S. 248 (2008) (ERISA's civil enforcement provision).

objectives is to ensure that participants receive all of the benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq*. The quality of these workers' lives in retirement depends substantially on their ability to obtain the benefits they were promised. To achieve that goal, amici work to ensure that fiduciaries manage and administer participants' plans prudently and loyally.

Better Markets, Inc. (Better Markets) is a nonprofit, non-partisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that stabilize our financial system; increase economic prosperity for all Americans; and protect investors from fraud, abuse, and conflicts of interest. Better Markets has fought long and hard to protect Americans' retirement savings. For example, through comment letters and amicus briefs, it has advocated for the adoption of strong fiduciary standards by the Department of Labor, as well as the SEC, to prevent financial advisers with conflicts of interest from siphoning away billions of dollars a year from Americans' retirement accounts. And in this Court, Better Markets has sought to protect retirement savers by supporting class actions that seek to hold private equity firms accountable when they take over a company, abandon it to bankruptcy, and then withdraw from a multiemployer pension plan without paying their portion of the unfunded plan liabilities. See Amicus Brief of Better Markets, *New England Teamsters &*

Trucking Indus. Pension Fund v. Sun Cap. Partners III, LP, 141 S. Ct. 372 (2020) (No. 19-1401) (cert. denied); *see generally* www.bettermarkets.com (archiving all comment letters and briefs). The issues presented in this case similarly involve the ability of millions of Americans to protect their retirement savings through private actions under ERISA.

The Consumer Federation of America (CFA) is an association of non-profit consumer organizations, established in 1968 to advance consumer interests through research, advocacy, and education. Today, nearly 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

CFA's investor protection work is based upon the fundamental premise that retail investors, especially those investing for retirement, deserve fair treatment in the marketplace. CFA promotes investor protection by advocating for strong laws and regulation, encouraging enforcement of existing investor protection laws, ensuring clear and accurate disclosures to investors, and principally, supporting investors' ability to obtain redress, whether through the courts or other processes. These protections are especially vital for investors that have saved through defined-contribution plans, where their investments are uniquely vulnerable to lapses in plan oversight, and whose protection in the marketplace is only

achievable by enforcement of the duties that legally bind their plan fiduciaries.

The National Employment Law Project (NELP) is a non-profit research and policy organization that for over 50 years has advocated for the employment and labor rights of workers earning low wages. These workers count on every dollar of their retirement and non-retirement savings to make ends meet. NELP's constituents include the millions of workers and their families in the U.S. who invest their savings for retirement. These investors are hardworking individuals who rely on advice for their economic security. Retail investors, especially small investors, are generally not aware of the differences between and among various investment options, and are too often harmed by weak standards of conduct that govern the provision of personalized investment advice.

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of workers, retirees, and their families. The Center advocates for the interests of retirement plan participants and beneficiaries before Congress, administrative agencies, and the courts. Numerous laws, regulations, and court cases are traceable to Center initiatives. As the nation's retirement landscape has shifted from employer-paid and employer-guaranteed traditional pensions to primarily employee-paid retirement savings arrangements where participants assume investment risks and responsibilities, judicial attention has

increasingly focused on the obligations of plan fiduciaries to prudently select and monitor investment options. This scrutiny is critical if 401(k) and 403(b) plan participants are to obtain reasonable returns, net of fees, on their contributions. The Pension Rights Center has testified before Congress and government agencies, and filed amicus curiae briefs, on the importance of ensuring that retirement savings plan investment and management fees are no higher than necessary, that they are fully disclosed, and that participants are offered appropriate investments that are periodically monitored. This case highlights the critical role played by participants in enforcing these all-important fiduciary requirements.

SUMMARY OF ARGUMENT

This Court has made clear that inherent in a fiduciary's duty of prudence is "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison Intern.*, 575 U.S. 523, 530 (2015). The Seventh Circuit's view that fiduciaries need not eliminate investment options with unreasonably high fees and poor performance so long as another, prudent option is available is inherently inconsistent with the duty to monitor and remove. It also rests on a fundamental misunderstanding of a fiduciary's duty. While individuals, with proper guidance, certainly may choose their risk tolerance and select a preferred *type* of investment product, a fiduciary must ensure that no available options in any category are objectively imprudent. The danger of doing so is increased when, as in Northwestern's plan, the fiduciary offers so many options—over 200, here—

that the plan cannot effectively monitor all options, and inexpert employees will likely be too overwhelmed and confused to differentiate among products and make beneficial choices.

In this case, Petitioners have alleged with appropriate specificity a claim for breach of fiduciary duty based on excessive fees. For a cause of action based on a breach of fiduciary duty, at the pleading stage, "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior," in part because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, 598 (8th Cir. 2009). In this case, Petitioners pled not only known facts about Respondents' specific investment choices, but also numerous other facts "indirectly showing unlawful behavior," such as comparisons with the approach of similarly situated fiduciaries. No more is or should be required.

Allowing Petitioners to proceed furthers a key Congressional purpose in enacting ERISA: to protect plan participants from fiduciaries' abuses. ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-99 (1983). Americans' retirement security is increasingly in jeopardy, and defined contribution plans are the primary way for them to bridge the current and growing gap between the resources they will have in retirement and what they will require to meet their basic needs. Thus, it is more important than ever that the Court allow claims policing those plans to cross the judicial threshold.

ARGUMENT

I. FIDUCIARIES MUST ELIMINATE IMPRUDENT INVESTMENT OPTIONS REGARDLESS OF THE RANGE OF THEIR OTHER OFFERINGS.

The Seventh Circuit dismissed Petitioners' claim regarding the plan's inclusion of the investment options with excessive fees because "no participant was required to invest in" those options. *Divane*, 953 F.3d at 988. In the Court of Appeals' view, no duty was breached because "any participant could avoid what plaintiffs consider to be the problems with those products (excessive recordkeeping fees and underperformance) simply by choosing from hundreds of other options within a multi-tiered offering system." *Id.*

This analysis fundamentally misunderstands the nature of fiduciary duty. Such an approach would provide fiduciaries with a free pass to include any and all funds that cross their desks as investment options in the mix. So long as the plan offered any investment option that benefits participants, it would not matter if all the other options (including those that participants chose) were undisputedly bad investments—there could be no breach of fiduciary duty. This is not, and cannot be, the law. Fiduciaries must remove all imprudent options from their plans, regardless of the range of options available. In fact, when the plan offers a large number of options, the duty to monitor and remove imprudent options becomes even more crucial.

A. The Seventh Circuit's view that fiduciaries are absolved simply because participants could have chosen a different, prudent investment option is contrary to this Court's precedent and fundamental principles of fiduciary duty.

The Seventh Circuit's approach to breach of fiduciary duty claims would not only undercut a core remedial purpose of ERISA—protecting employees' retirement benefits (*see infra*, Part III)—but it also would be inconsistent with the important duty-to-monitor standard this Court established in *Tibble v. Edison Intern.*, 575 U.S. 523, 530 (2015). As the Court explained, "the duty of prudence involves a continuing duty to monitor investments *and remove imprudent ones.*" *Id.* (emphasis added). Performing this duty is not overly "paternalistic," as the court of appeals insisted, *Divane*, 953 F.3d at 989, but rather a core responsibility of common law trustees and, thus, ERISA fiduciaries. *Tibble*, 575 U.S. at 530.

The Seventh Circuit's evident view is that offering an extensive menu of investment options—even one riddled with bad options—provides an appropriate "choice" that should be "left . . . to the people who have the most interest in the outcome." *Divane*, 953 F.3d at 989. That view is sorely misguided. It is the fiduciary's responsibility to ensure that there are *no* objectively imprudent options (as described in Section II) on its menu, no matter how extensive.

Indeed, conceptualizing a list of investment options as a “menu” at all may contribute to this misapprehension. This analogy evokes an arms-length transaction in which a restauranteur provides an array of food choices, and customers are free to select among them as they desire. The restauranteur is not responsible for advising customers as to which options will be better for their diets or which they would prefer according to their individual tastes. Restauranteurs may list and even promote costly, non-nutritious items solely to increase their profits. Fiduciaries offering investment options, on the other hand, have the highest duty of care to participants and beneficiaries—the furthest thing from an arms-length transaction. They must consider participants’ financial needs and interests and offer—and advise participants to select—options that will meet those needs and further those interests. And they must do this to the exclusion of their own interests or anyone else’s.

A fiduciary is less akin to a restauranteur and more like a doctor. Just as a doctor must attend to a patient’s physical health, a fiduciary must look out for participants’ financial health. Just as doctor may offer a range of treatment options to a patient, provided she explains the risks and benefits of each, likewise, fiduciaries may recommend a range of investment products for participants, provided that they disclose the relevant characteristics of each option. But doctors may not provide a patient with an extensive list of potential treatment protocols, leave them to do their own research about the risks and benefits of each, and include on the list a therapy that is known to be unsafe

or ineffective. If they did, it would be no defense to say that patients could simply have chosen another treatment. It is no more appropriate for a fiduciary to disclaim responsibility for a too-costly, poor-performing investment product because participants could have chosen a different one. While the choice is always ultimately up to the patient or participant, the doctor or fiduciary cannot present them with ineffective or dangerous options from which to choose. That is no more "paternalistic" than the common law trustee's duty has always been.

B. Rather than relieve fiduciaries of the duty to eliminate imprudent options, a plan's decision to include hundreds of investment options amplifies fiduciaries' responsibility to avoid confusing and overwhelming participants.

For both participants and fiduciaries, the sheer number of options in a plan like Northwestern's can make it more difficult, if not impossible, to avoid objectively bad products on the menu. Many behavioral economics studies, including some in the context of employee benefit funds, have concluded that when people are given too many options, they simply freeze up and make no choice at all.[3] One study found "a negative correlation between the number of

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[3] Richard H. Thaler & Shlomo Benartzi, *The Behavioral Economics of Retirement Savings Behavior,* AARP, Jan. 2007, at 5 https://assets.aarp.org/rgcenter/econ/2007_02_savings.pdf (hereinafter, "Thaler and Benartzi").

investment options offered in the plan and participation rates."[4] When plans offer more investment options, a higher rate of prospective participants choose not to participate. *Id.*

When employees are already plan participants, and therefore *must* make decisions, bad choices tend to be more common when the plan offers more investment options. One study found that when the plan offers multiple options, participants most often take the "buffet" approach,[5] investing some of their money into each option. This approach has diminishing returns as the number of options increases. Thaler and Benartzi, *supra* note 3, at 7. Additionally, when a plan offers too many investment options for participants to consider or understand fully, "human inertia often causes [workers] never to revisit their choices. Over time, their portfolios can end up being heavily weighted in riskier stocks, putting their nest egg in jeopardy."[6]

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[4] John Turner, *Designing 401(K) Plans That Encourage Retirement Savings: Lessons from Behavioral Finance,* AARP Pub. Pol'y Inst., Mar. 2006, at 6, https://assets.aarp.org/rgcenter/econ/ib80_pension.pdf.

[5] Thaler and Benartzi's analogy is to a buffet dinner, where if the number of choices is small, patrons "take a little bit of each item," but when the number of options gets large, people have to devise other simplifying strategies, "such as to take one item from each category." Thaler and Benartzi, *supra* note 3, at 7.

[6] Gary Koenig, *You Just Need a Little Nudge*, AARP Bulletin (May 1, 2017), https://www.aarp.org/money/investing/info-2017/behavioral-economics.htm.

Providing information to plan participants may not effectively ameliorate this problem. "Many employers have tried to educate their employees to make better decisions or supplied tools to help them improve their choices. The empirical evidence does not suggest that this can solve the problems . . . raised." Thaler and Benartzi at 20. Even with appropriate monitoring and education, when plan participants face an overwhelming number of investment options, they still make bad investment decisions. To make matters worse, an August 2021 study by the U.S. Government Accountability Office (GAO) found that 45% of 401(k) plan participants cannot understand fee disclosure information, and 41% incorrectly believe that they are not paying any fees at all. U.S. Gov't Accountability Off., GAO-21-357, *401(k) Retirement Plans: Many Participants Do Not Understand Fee Information, but DOL Could Take Additional Steps to Help Them* (2021), https://www.gao.gov/products/gao-21-357. Given this information on the behavioral science of decision making in the ERISA context, plan fiduciaries should consider the likelihood that participants will be unable to make sound decisions when too many options are offered to them—especially decisions about whether any given option's fees are too high.

This is not to suggest that numerosity alone would be enough to state a claim for breach of fiduciary duty or that there is some bright-line number of options that inherently exceeds the legal limit. Rather, this evidence makes clear why the Seventh Circuit's preference for number of choices over prudent product selection by fiduciaries is so

problematic. At some point the options become so numerous that two problems arise: not only the greater inability of employees to prudently choose among them, but also the greater inability of fiduciaries to properly monitor them. Certainly, the multiplicity of options should not be viewed as a reason to forgive a breach of a fiduciary's basic duty to remove bad investments from ERISA pension plans. To the contrary, having decided to provide participants with upwards of 200 choices, Northwestern assumed the responsibility of ensuring that none of those options were imprudent.

II. FORECLOSING CLAIMS LIKE HUGHES' WOULD IMPOSE AN OVERLY STRINGENT PLEADING STANDARD THAT WOULD REQUIRE PLAINTIFFS TO PLEAD INFORMATION SOLELY IN DEFENDANTS' POSSESSION, THUS BARRING MERITORIOUS CLAIMS.

Petitioners have alleged with more than sufficient detail that the plan fiduciaries breached their duty of prudence by allowing options with excessive and unnecessary fees to remain on the plan's investment menu. To state a cause of action based on a breach of fiduciary duty, plaintiffs must plausibly allege that defendants are plan fiduciaries, that defendants breached their fiduciary duties, and that plaintiffs were harmed as a result of the breach. *Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 465 (7th Cir. 2005).

With respect to the breach element presented here, at the pleading stage, "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior," in part because "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, 598 (8th Cir. 2009). To satisfy this standard, plaintiffs may "allege facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (citing *Gray v. Citigroup Inc. (In re Citigroup ERISA Litig.),* 662 F.3d 128, 141 (2d Cir. 2011)). This is sufficient "even absent any well-pleaded factual allegations relating directly to the methods employed by the ERISA fiduciary[.]" *Pension Benefit Guar. Corp.*, 712 F.3d at 718. This pleading standard enables plan participants who have been injured as a result of a breach of fiduciary duty to fulfill ERISA's remedial purpose (*see infra*, Part III), while still requiring that they provide more than "mere conclusory statements." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Excessive fee claims pled at the level of detail Petitioners alleged here easily clear this bar. For example, Petitioners alleged dollar values showing that Respondents charged combined fees of $5 million per year for the Retirement Plan and Voluntary Plan, versus the $1.05 million that would have been charged

had those fees reflected the market rate. Pet. Br. at 1-2. The vast difference between the market rate for recordkeeping fees and the fees paid by these funds casts in sharp relief the excessive costs imposed by many of the Plans' investment options. Moreover, Petitioners alleged that plan fiduciaries failed to calculate how much TIAA also received in revenue sharing and direct payments. Am. Comp. ¶ 248. Without this information, plan administrators could not determine whether the recordkeeping fee was reasonable.

Petitioners further alleged that Respondents "retained multiple investment options in each asset class and investment style until October 2016, thereby depriving the Plans of their ability to qualify for lower cost share classes of certain investments, while violating the well-known principle for fiduciaries that such a high number of investment options causes participant confusion and inaction." *Id.* at ¶ 266. And, Petitioners pled various means by which the Plan could have performed better and could have had lower fees, demonstrating that all were possible under the circumstances. *See* Am. Comp. ¶ 109 ("in contrast with the comprehensive plan reviews conducted by the similarly situated fiduciaries described [in ¶¶ 45-79] Defendants failed to adequately engage in a similar analysis."); *see also* ¶¶ 148-152, 154, 183-184, 208, 214-215. These allegations explain with appropriate specificity the nature of the plan's fiduciary breach—to the extent that Petitioners could possibly have known those facts before discovery.

Requiring more before discovery would demand that plaintiffs meet an unattainable standard: they would need to plead information such as the processes and methods that fiduciaries used to arrive at the challenged decision. As the Eighth Circuit explained in *Braden*, this is information typically "kept secret" and that plaintiffs "could not possibly show at this stage in the litigation." 588 F.3d at 602. "It would be perverse to require plaintiffs bringing [such claims] to plead facts that remain in the sole control of the parties who stand accused of wrongdoing." *Id.*

III. EMBRACING THE SEVENTH CIRCUIT'S APPROACH WOULD THWART ERISA'S CORE PURPOSE: TO PROTECT PLAN PARTICIPANTS FROM ADMINISTRATORS' FAILURE TO PERFORM THEIR FIDUCIARY DUTIES.

The United States' brief in support of certiorari rightly notes that Respondents' approach, which the Seventh Circuit embraced, would improperly "shift onto plan participants the burden of identifying and rejecting investments with imprudent fees." Br. of United States at 17. Such a shift would undermine the core purposes of ERISA: to create enforceable fiduciary duty requirements in the employee benefit context, and, as the Act's name suggests, to assure participants' retirement income security. Especially when Americans depend on the quality of their investments in defined-contribution plans more than at any time since ERISA's enactment, the Court should not deprive participants of their ability to use

the remedial tools Congress gave them to secure their retirement incomes.

A. Congress intended ERISA's fiduciary duties to be broadly construed.

One of ERISA's core purposes is to remedy participants' injuries resulting from a breach of duty by plan fiduciaries. ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 15 (1987) ("ERISA's fiduciary standards 'will prevent abuses of the special responsibilities borne by those dealing with plans.'"). Accordingly, Congress intended ERISA's fiduciary duties to be construed broadly. *See, e.g., LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) ("As this Court has recognized, Congress intended ERISA's definition of fiduciary 'to be broadly construed.'"); *accord Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989); *Farrell v. Auto. Club of Michigan*, 870 F.2d 1129, 1134 (6th Cir. 1989); *Jackson v. Martin Marietta Corp.*, 805 F.2d 1498, 1499 (11th Cir. 1986); *Belland v. Pension Ben. Guar. Corp.*, 726 F.2d 839, 848 (D.C. Cir. 1984).

The context of ERISA's enactment makes particularly clear why this must be so. Before ERISA, no federal standards required benefit plans, or the people administering them, to pay promised benefits to plan participants. *See, e.g.*, Jeffrey Lewis et al.,

EMPLOYEE BENEFITS LAW xcix-ci (4th ed. 2012). As a reaction to events such as the Studebaker Motor Company's plant closure, the sale of P. Ballantine and Sons, the trial of Jimmy Hoffa, and other instances of kickbacks, embezzlement, and mismanagement discovered in other benefit plans, Congress wanted to "make as certain as possible that pension fund assets would be adequate" to meet expected benefits payments by requiring that fiduciaries act in the best interests of participants. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 n.22, 375 (1980); Symposium, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA,* 49 BUFFALO L. REV. 683, 694-695 (2001).

In short, the primary purpose of ERISA and the fiduciary standard is to protect employees' assets. *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("ERISA protects employee pensions and other benefits by . . . setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans."). In service of that goal, fiduciary duties must not be constricted, as they have been by the Seventh Circuit, but instead must be applied with a breadth that fulfills Congress's remedial intent.

B. ERISA's fiduciary duties are more important than ever because most employers offer only defined contribution plans, participants rely heavily on the quality of their investments, and the retirement savings crisis has escalated.

The relatively few employees who still participate in "defined benefit" plans—i.e., traditional pensions—are guaranteed a known precalculated stream of retirement income, typically independent of how the investment markets perform. That is not the case with "defined contribution" plans, such as 401(k)s and 403(b)s, which pose the double risk of employees having to choose investments themselves and then having to live with the consequences in terms of uncertain and unpredictable future income. Defined contribution plans, which now constitute the vast majority of retirement funds, involve a fundamental reallocation of investment risk. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 n.5 (2008). With the increasing number of defined contribution plans, more plan participants bear the risk associated with the performance of the funds in which their money is invested. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004) ("The defined benefit configuration principally assigns risk to the employer because the employer guarantees the employee a specified benefit, while the more privatized defined contribution approach apportions risk to the employee[.]"). Although defined contribution plans may have accumulated millions of dollars in the aggregate,

individual accounts tend to be modest, and plan participants rely on them heavily. The quality of plan performance hugely affects the income that participants receive upon retirement. *Tibble*, 575 U.S. at 530.

That retirement income is now, more than ever, likely to be insufficient for an increasing portion of the population. Older Americans are retiring at record rates. As the Baby Boomer generation ages, approximately 10,000 individuals retire each day. University of Michigan Health and Retirement Study, *Aging in the 21st Century: Challenges and Opportunities for Americans* 8 (2017). By 2030, twenty percent of the U.S. population will be at typical retirement age. *Id.*

Yet, Americans are financially unprepared for retirement. Since the Covid-19 pandemic began, retirement insecurity has increased dramatically: 55% of Americans had insufficient savings to retire securely as of July 2020, a 5% jump in only three months. Alicia H. Munnell, Anqi Chen, & Wenliang Hou, *How Widespread Unemployment Might Affect Retirement Security* 4 (July 2020), https://bit.ly/3kh CqNo. Given the absence of pensions and the modest amount available in Social Security benefits, saving money through work—usually through defined contribution plans—is the only way for most Americans to have any hope of a secure retirement. *See* Alicia H. Munnell, Wenliang Hou, and Geoffrey T. Sanzenbacher, *How Would More Saving Affect the National Retirement Risk Index?*, Center for Retirement Research, Boston College 1 (Oct. 2019),

https://bit.ly/35FqyQw ("[I]ncreasing saving is a realistic option only for those workers who have access to a retirement plan at work.").

Thus, it is more important than ever to ensure that fiduciaries keep fees reasonable in defined contribution plans' investment options. Even a small increase or decrease in the fees charged by plan administrators can make a very significant difference in the amount in employees' retirement accounts when they retire. For instance, as the U.S. Department of Labor has explained:

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only $163,000. *The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.*

Holly Yeager, *Mutual Fund Fees Still Hard to Challenge*, AARP Bulletin (Apr. 2010), https://bit.ly/3l0Yiy2 (emphasis added).

Consequently, holding plans accountable for failing to prune investment options with excessive fees is crucial to ERISA's effectiveness in the modern retirement landscape.

C. ERISA relies on plan participant enforcement, and, thus, claims such as Petitioners' are vital to the successful enforcement of ERISA.

Congress gave civil enforcement rights not only to the Secretary of Labor but also to plan participants, beneficiaries, and plan fiduciaries. ERISA § 502(a); 29 U.S.C. § 1132(a). And those enforcement rights extend specifically to breach of the fiduciary obligations related to the financial integrity of benefit plans. Thus, Congress chose to rely upon all four parties to enforce ERISA. *Varity Corp.,* 516 U.S. at 512; *see also* S. Rep. No. 93-127, at 35 (1973), reprinted in 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), reprinted in 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms).

Congress's creation of these enforcement rights reflected its intent to enable plan participants, as private litigants, to bring cases against fiduciaries who have breached their duties essentially to the same extent that the Department of Labor might bring such

actions. *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5107. That enforcement regime—if allowed to work as intended—is both fair and effective, as no one will police a plan more diligently than the participants who have a vital stake in the proper management of their often modest retirement funds.

Barring claims like Petitioners' would curtail private litigants, who lack the government's investigatory tools and cannot plead proprietary facts in a complaint, from bringing meritorious cases. Not only is that result legally incorrect, but also,it is problematic from a practical enforcement standpoint. The Department of Labor has consistently had inadequate resources to police the retirement system. *See, e.g.*, U.S. Dep't of Labor, PWBA Task Force On Assistance To The Public (1992); U.S. Gov't Accountability Off., Pension And Welfare Benefits Admin., GAO-02-232, *Opportunities Exist For Improving Management Of The Enforcement Program* 2-3 (2002); U.S. Gov't Accountability Office, Employee Benefits Security Admin., GAO-07-22, *Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight* 10, 28 (2007); *see also* Karen L. Handorf & Daniel R. Sutter, Cohen Milstein*, Watch These ERISA Cases in 2019* (Jan. 1, 2019), https://bit.ly/3DURlHl.

Thus, for ERISA to be enforced as Congress intended, plan participants must have a navigable path to file breach of fiduciary claims, given the limited information to which they are privy. *Braden*, 388 F.3d at 597 n.8 ("The Secretary of Labor, who is

charged with enforcing ERISA . . . depends in part on private litigation to ensure compliance with the statute. To that end, the Secretary has expressed concern over the erection of 'unnecessarily high pleading standards' in ERISA cases."). Preventing plan participants from enforcing their rights under ERISA due to a failure to plead facts unattainable to them, and solely in the possession of plan fiduciaries, undermines Congress's intent when it passed ERISA. It will also hinder the overall enforcement of ERISA, thereby further increasing the risk that individual workers face when entrusting plan administrators with their savings.

CONCLUSION

For these reasons, the Court should reverse the Seventh Circuit's decision.

Respectfully Submitted,

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