No.

CHARLES E. WHITE, JR., JOHN P. JACOBS, VERLAN D. HOOPES, NORA L. PENNINGTON, JAMES A. RAY, AND JEANNETTE A. FINLEY, individually and as representatives of a class of similarly situated persons of the Chevron Employee Savings Investment Plan,

Petitioners,

v.

CHEVRON CORPORATION AND ESIP INVESTMENT COMMITTEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is an action under the Employee Retirement Income Security Act (ERISA) for breach of fiduciary duties. In order to prove such a breach, a plaintiff must provide that the fiduciaries failed to follow an appropriate process in making their decision. But participants in ERISA plans are not privy to the fiduciaries' decision-making process.

In pleading a breach of fiduciary duty under ERISA, is it sufficient for a plaintiff to allege a deficient decision-making process indirectly through inferences from the facts known to her?

LIST OF PARTIES TO THE PROCEEDING

Petitioners Charles E. White, Jr., John P. Jacobs, Verlan D. Hoopes, Nora L. Pennington, James A. Ray, and Jeannette A. Finley were plaintiffs in the district court and appellants in the court of appeals.

Respondents Chevron Corporation and its ESIP Investment Committee were defendants in the district court and appellees in the court of appeals.

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PETITION

Charles E. White, Jr., John P. Jacobs, Verlan D. Hoopes, Nora L. Pennington, James A. Ray, and Jeannette A. Finley respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals for the Ninth Circuit issued an unpublished memorandum affirming the dismissal with prejudice of petitioners' complaint that is reprinted in the appendix at App. 1–3. 752 Fed.Appx. 453.

The district court's order dismissing petitioners' amended complaint is reprinted at App. 5–53. 2017 WL 2352137.

JURISDICTION

The court of appeals issued its memorandum affirming the district court on November 13, 2018. App. 1–3; 752 Fed.Appx. 453. Petitioner timely filed a petition for rehearing en banc on November 27, 2018. *White v. Chevron Corp.*, No. 17-16208, Doc. 47. The court of appeals denied that petition on January 3, 2019. App. 55–56. The Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1254(1) and Rule 13.3.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1104(a)(1) [ERISA § 404(a)(1)]:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan

solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter....

29 U.S.C. § 1109(a) [ERISA § 409(a)]:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1132 [ERISA § 502]:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;....

STATEMENT OF THE CASE

I. Statutory Background.

Congress, aware of the importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). In enacting ERISA, "the crucible of congressional concern was misuse and

mismanagement of plan assets by plan administrators." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985).

To address that concern, ERISA imposes strict fiduciary duties that are 'the highest known to the law.'" *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014). They include the "prudent man standard of care" which obligates a fiduciary to discharge his duties with respect to a plan "solely in the interest of the participants and beneficiaries[,]" for the "exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan[,]" and "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 aim[.]" 29 U.S.C. § 1104(a)(1)(A) and (B); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

In evaluating whether a fiduciary has acted prudently, courts focus on the process by which the fiduciary makes it decisions rather than on the results of those decisions. *Tibble v Edison Int'l*, 729 F.3d 1110, 1135, 1136 (9th Cir. 2013), *vacated on other grounds*, 135 S.Ct. 1823 (2015); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 n.8 (8th Cir. 2009).

Part of the fiduciary's duty of prudence includes a duty to monitor the plan's investment options and remove imprudent ones. *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1828–29 (2015). Another part of that duty is an obligation to minimize plan expenses. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197–98 (9th Cir. 2016) (en banc).

In addition to these general duties, a fiduciary must discharge its duties with respect to a plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [29 U.S.C. §§ 1009–1191c and §§ 1301–1461]." 29 U.S.C. § 1104(a)(1)(D).

A fiduciary in breach of its duty is

> personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary[.]

29 U.S.C. § 1109(a).

Essential to ERISA's enforcement is allowing a plan participant to bring an action against her fiduciaries who breach their duties to obtain remedies for their plan. 29 U.S.C. § 1132(a)(2), §1109(a). Although the Secretary of Labor is charged with enforcing of the statute, 29 U.S.C. § 1136(b), the Secretary depends on litigation by participants to help ensure compliance. *Braden*, 588 F.3d at 597 n.8. "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties[.]" *Id.* at 598.

II. Factual background and Petitioners' allegations of breach.

Chevron Corporation maintains for its employees an individual-account defined contribution retirement plan (the Chevron Employee Savings Investment Plan). App. 59 ¶1, App. 61 ¶8; *see* 29 U.S.C. § 1002(2)(A), § 1002(7), § 1002(34). The Plan has over $15 billion in assets and over 40,000

participants. App. 59 ¶2, App. 62 ¶12. Chevron controls what investment options are included in the Plan and is responsible for engaging a recordkeeper to maintain participants' accounts. App. 61 ¶10, App. 65 ¶26, App. 112–113 ¶112. Chevron established an ESIP Investment Committee to assist it in administering the Plan, and with whom it is a fiduciary to the Plan. App. 63–64 ¶¶20–22; 29 U.S.C. § 1102(a); 29 U.S.C. § 1002(21)(A).

Petitioners participate in the Plan. They contend that Chevron and the ESIP Investment Committee (collectively "Chevron") breached their fiduciary duties under ERISA. App. 59–60 ¶¶3–4. They sued under 29 U.S.C. § 1132(a)(2) in the United Stated District Court for the Northern District of California. *White v. Chevron Corp.*, No. 16-793, Doc. 1 (February 17, 2016).[1]

Petitioners contend Chevron breached its fiduciary duties by providing two imprudent investment options—the Vanguard Prime Money Market Fund (Count I) and Artisan Small Cap Value Fund (Count V)—and by causing the Plan to incur excessive fees for investment management (Count II) and administration (Count III). App. 85–88 ¶¶60–64. Each count alleges violations of the duties of loyalty and prudence, 29 U.S.C. § 1104(a)(1)(A)–(B), while Counts I and V additionally allege violations of § 1104(a)(1)(D) based on Chevron's failure to follow the Plan's Investment Policy Statement (IPS). *Id.*[2] Petitioners' allegations included the following facts .

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[1] The district court dismissed plaintiffs' first complaint and granted leave to amend. *White*, No. 16-793, Doc. 40 (Aug. 29, 2016). Plaintiffs filed their amended complaint on September 30, 2016 (Doc. 41), which is the operative complaint included in the appendix. App. 57–146.

[2] Additional allegations in the complaint are not germane to this petition.

A. The money market fund

The IPS required Plan investment options to provide "maximum current income ... consistent with preservation of capital and liquidity." App. 90–91 ¶67. The Plan's sole capital preservation option was a money market fund designed for retail investors, which paid practically no interest since 2009. App. 81–81 ¶50. Instead of a money market fund, retirement plan fiduciaries can provide an investment that has the same level of safety, but a higher return: a stable value fund. App. 75–78 ¶¶46–50. Stable value funds are designed specifically for retirement plans as a conservative capital-preservation investment. App. 79–80 ¶¶47–48 (quoting *Abbott v. Lockheed Martin Corp*., 725 F.3d 803, 806 (7th Cir. 2013), and citing Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 Akron L. Rev. 9, 24 (2006)); App. 91 ¶68. There are many providers of stable value fund investments for large plans such as Chevron's. App. 78–79 ¶46, App. 85–86 ¶60.

Since 1988, stable value fund returns have been "more than double" money market fund returns, while preserving principal and incurring less risk than money market funds. App. 81–82 ¶¶54–57. Money market funds failed to preserve principal during the 2008 financial crisis, and many had to be bailed out, but stable value funds protected principal without sacrificing returns. App. 81–82 ¶¶51–53. The 2009 prospectus of the Plan's money market fund even warned Chevron that its short-term investments would likely cause the fund's income to "decline because of falling interest rates." App. 75 ¶41.

In view of the decades-long advantage of stable value returns compared to money market returns for the same level of risk as of 2010,[3] petitioners contend that a prudent fiduciary would have concluded that the Plan's money market fund was not providing meaningful retirement benefits to participants and was not "maximizing current income[.]" App. 92–94 ¶¶69–70, App. 137–138 ¶¶153–56.

B. Excessive investment management fees.

The Plan's $19 billion in assets allowed it to provide investment products with much lower expenses in the same type of investments than products that are available to smaller investors. App. 59 ¶2, App. 96 ¶75. These options included lower-cost share classes of the same mutual funds that Chevron had already selected as Plan investment options, as well as non-mutual fund alternatives (separately managed accounts) that would have provided an identical investment at significantly lower cost. App. 96–112 ¶¶76–110. Petitioners provided lists of Plan investment options that were available in lower-cost versions of the exact same investment, including institutional-class shares of Plan mutual funds. App. 98–104 ¶¶79–89. Providing participants a more-expensive share class is the same type of claim that the Court addressed in *Tibble*. Petitioners contend that no prudent fiduciary would provide participants the more expensive version of the same investment, and thus that these facts show that Chevron's

[3] Participants may recover plan losses for breaches that occur within the preceding 6 years. 29 U.S.C. § 1113. Fiduciaries have a continuing duty to monitor plan investments and remove imprudent ones, no matter how long they have been in the plan. *Tibble*, 135 S.Ct. at 1828.

process (if any) for monitoring Plan investments was deficient. App. 138–139 ¶¶157–60.

C. Excessive administrative fees.

The cost of recordkeeping depends on the number of participants in the plan, not the amount of money in participant accounts. App. 112–113 ¶112. It costs no more to maintain records on a $100,000 participant account than on a $1,000 account. App. 112–113 ¶112. Because the market is highly competitive, the surest way to determine the market rate for recordkeeping is through a competitive bidding process. App. 59 ¶2, App. 112–113 ¶112, App. 117–118 ¶120. *See*, *e.g.*, *George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798–800 (7th Cir. 2011); *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014). Chevron hired The Vanguard Group, Inc. to be the Plan's recordkeeper in 2002. App. 119–120 ¶¶125–26. Until 2012, Chevron allowed Vanguard to be compensated for its administrative services through revenue sharing payments from the Plan's mutual funds. App. 119–120 ¶125. Because a revenue sharing model is asset-based, it bears no direct relation to the participant-based cost of the recordkeeping service, and results in excessive compensation if assets increase (through participant contributions and investment gains) without any change in services. App. 113–118 ¶¶113–20.

From February 2010 through March 2012, the Plan's assets grew 22%—from $13 billion to $16 billion. App. 119–120 ¶125. That $3 billion increase in Plan assets caused Vanguard's asset-based revenue sharing compensation to rise, even though Vanguard's services to the Plan stayed largely the same. *Id.* As far as Plaintiffs have been informed, Chevron has not put the Plan's recordkeeping services out for competitive bidding since at least

2002, even though recordkeeping rates for large plans have been declining in that time. App. 120 ¶126. Based on the services provided by Vanguard and the number of participants in the Plan, Plaintiffs allege that a reasonable market rate for Vanguard's services would have been an average charge of $25 per participant, which is consistent with the rate Vanguard agreed to once the contract was renegotiated in 2012 and is within the range of fees that an expert calculated for another similarly large plan. App. 118 ¶121 (citing *George*, 641 F.3d at 798), App. 118 ¶123. Based on the information available to them, petitioners calculated that the Plan paid an average of $167 to $181 per participant in 2010 and 2011. App. 118 ¶122.

Given the impropriety of asset-based compensation for recordkeeping services that vary by the number of participants and not amount of assets, and given the apparent overpayment of Vanguard because of that unmonitored, asset-based compensation, according to the only information available to them, petitioners contend there is a plausible inference that Chevron neglected its duty to monitor and minimize the Plan's recordkeeping expenses.

D. Artisan Small Cap Value Fund.

Chevron provided participants the retail shares of the Artisan Small Cap Value Fund when cheaper shares were available. App. 102 ¶82. Part of its high fees included payments that went to Vanguard, putatively for recordkeeping, which plaintiffs alleged contributed to excessive compensation. App. 123 ¶130. In addition to its high expense, this fund consistently performed poorly. The fund began underperforming as of the first quarter of 2010, and then consistently performed at the bottom of its

peers. App. 124–127 ¶133–39. Chevron did not remove it from the Plan until 2014, even though the IPS required Chevron to monitor the fund's performance on a regular basis. App. 123 ¶131. Petitioners contend a prudent fiduciary would have removed this fund at least by March 31, 2013, after 3 years of underperformance. App. 126–127 ¶139–40.

III. The proceedings below.

A. The district court's dismissal.

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6). App. 5–53. The court found petitioners' allegations did not show a plausible breach.

1. The court held that petitioners did not plausibly show that Chevron failed to evaluate stable value funds in comparison to the money market fund. App. 24–25. The court held that merely alleging the relative merits of a stable value fund against a money market fund "[w]ithout more" is not enough to state a claim. App. 25–26. The court held the complaint deficient because it "pleads no facts showing that the fiduciaries failed to consider a stable value fund, or showing that the process by which the fiduciaries chose the funds was somehow flawed or imprudent." App. 28.

2. The court held that petitioners' allegations regarding excessive investment management fees, was not sufficient to create a plausible inference that Chevron's process of selecting and monitoring funds was imprudent. App. 35. The court noted the absence of facts "regarding any process for choosing funds" or "investigations into the appropriateness of various funds." *Id.* The court found the variety of investment options and expenses prudent on its face and the fact that Chevron eventually did change some investment

options supported the inference that "the fiduciaries were monitoring the investments[.]" App. 32–33. The court found it an "obvious, alternative explanation" that Chevron used retail mutual funds shares for the compensation those funds paid to Vanguard as the Plan recordkeeper. App. 34. The court concluded that the complaint alleged "no facts that were suggestive of imprudent action" and instead only was "speculation that Plan fiduciaries 'could have' provided lower-cost versions of the funds, or 'could have' had the same advisors manage the same funds in a separate account, or 'could have' structured the investments differently." App. 28.

3. The court found petitioners' allegations regarding excessive recordkeeping fees were deficient because they did not state exactly what Vanguard received in total compensation or how that compensation was excessive. App. 42. The court found petitioners' estimate from public records to be "guesswork" that was "either invalid or relatively incomprehensible." App. 42–43, 46. The court also noted the absence of allegations that Vanguard would have accepted at an earlier date the per-participant fee it agreed to in 2012. App. 43. The court also found the claim time-barred under the three-year limitation of 29 U.S.C. § 1113, because Chevron informed petitioners of the new arrangement with Vanguard in 2012. App. 43–44. The court concluded that the same facts petitioners alleged in their complaint in 2016 were available to them in 2012. App. 46.

4. As to the Artisan fund, the court found Chevron's removal of the fund in 2014 to "create a plausible inference that the Plan fiduciaries were attentively monitoring the fund[.]" App. 46–47. The fund's poor performance for years preceding that removal was not "objective indicia of imprudence." App. 48–49.

B. The circuit court's summary affirmance.

In an unpublished memorandum, the court of appeals affirmed the dismissal. App. 1–3. The court held that where there are "two possible explanations, only one of which can be true and only one of which results in liability, plaintiff cannot offer allegations that are 'merely consistent with' its favored explanation but are also consistent with the alternative explanation." App. 2 (editing marks omitted, quoting *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)). The court held that Petitioners' allegations "showed only that Chevron could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund. None of the allegations made it more plausible than not that any breach of a fiduciary duty had occurred." App. 3.

REASONS FOR GRANTING THE PETITION

I. The standard by which a participant can plead a claim of breach of ERISA's fiduciary duties is an issue of national importance because of the national scope of the statute and because the Secretary of Labor opposes heightened pleading requirements for such actions.

An essential component of ERISA's remedial purpose is to prevent through private civil litigation "misuse and mismanagement of plan assets." *Braden*, 588 F.3d at 597. Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties. *Id.* at 598. The Secretary of Labor "depends in part on such private litigation to ensure compliance with the statute." *Id.*

at 598 n.8. ERISA's enforcement scheme is especially important because defined contribution plans, such as Chevron's, "dominate the retirement scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). In 2016, there were 656,241 defined contribution plans in the United States, with $5.69 trillion dollars in assets and over 100 million participants. DOL Employee Benefits Security Admin., *Private Pension Plan Bulletin Abstract of 2016 Form 5500 Annual Reports* (Dec. 2018), Table A1.[4] The standard by which any of those 100 million participants can state a claim that their fiduciaries breached their duties under ERISA thus is an issue of broad national scope and effect.

ERISA provides "ready access to the Federal courts." 29 U.S.C. § 1001(b). The Federal courts have exclusive jurisdiction over fiduciary breach actions under § 1132(a)(2). 29 U.S.C. § 1132(e)(1). However, ERISA actions can be filed only in the district in which the plan is administered, where the breach took place, or where the defendant resides or may be found. 29 U.S.C. § 1132(e)(2). The standard by which a participant can plead a claim of fiduciary breach should not vary the circuit in which she must file her action. It is essential to the enforcement of ERISA's fiduciary duties, then, that the standard for pleading a breach is the same in all circuits. As noted below, the circuits are in conflict over that pleading standard.

It is especially important that participants be allowed to plead their claims indirectly, based on the information available to them. The Secretary of Labor has expressed concern over the erection of

[4] As of April 1, 2019, available at: https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2016.pdf.

"unnecessarily high pleadings standards[.]" *Braden*, 588 F.3d at 598 n.8 (quoting Secretary's amicus brief). If participants are required to plead directly how a fiduciary's process was imprudent, they will not be able to pursue their claims and an important method for enforcing ERISA's fiduciary duties will be lost. That would undermine ERISA's remedial purpose. That is precisely what the Ninth Circuit has done in this case, precluding Petitioners from pursuing claims that have been recognized as sufficiently plead in other circuits.

Setting the standard by which a participant can plead a claim of fiduciary breach under ERISA is critical to the enforcement of that statute and affects potentially hundreds of millions of individuals. It is an issue of national importance that the Court should address by issuing its writ in this case.

II. By requiring a participant to plead directly how a fiduciary's process was imprudent, the Ninth Circuit's decision in this case conflicts with this Court's decisions and the decisions of the Second, Fifth, Seventh, and Eighth Circuits.

Applying the Court's pleading standards in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007), to the context of ERISA, the Eighth Circuit in *Braden* recognized that ERISA plan participants do not have access to the details of how their fiduciaries discharged their duties and thus cannot plead directly how the fiduciaries' decision-making process was deficient. The Eighth Circuit recognized that requiring a participant to plead facts that tend systemically to be in the sole possession of the defendant-fiduciaries would undermine ERISA's remedial scheme of enforcement through participant-

led actions. Therefore, the Eighth Circuit established that an ERISA plan participant can state claim of breach by pleading facts that show only indirectly that it is plausible the fiduciary acted imprudently. That is a standard that has been accepted in the Second, Fifth, and Seventh Circuits. Even the Ninth Circuit has agreed with the principles underlying *Braden*. Petitioners' allegations would survive dismissal under the *Braden* standard, as many district courts have concluded when considering complaints far less detailed than the complaint in this case.

The Ninth Circuit in this case imposed a stringent pleading requirement that a participant must allege directly how the defendant-fiduciary acted imprudently and must rule out all possible lawful explanations for the plan deficiencies about which the participant complains. That directly conflicts with the *Braden* standard and imposes a probability requirement that conflicts with *Twombly* and *Iqbal*. The Court should issue its writ to resolve this conflict among the circuit courts and provide the correct pleading standard for ERISA fiduciary breach actions in all circuits.

A. The Court's pleading standards.

To meet the standard of Federal Rule of Civil Procedure 8, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007)). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully[,]" but it does not impose "a probability requirement." *Id.* at 678. A complaint need not contain "detailed factual allegations," but only "sufficient factual matter,

accepted as true, to state a claim to relief that is plausible on its face." *Id.* "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. Applying these standards is a 'context-specific task[.]'" *Iqbal*, 556 U.S. at 679; *Dudenhoeffer*, 573 U.S. at 425 ("careful, context-sensitive scrutiny of a complaint's allegations").

B. The Eighth Circuit's application of the pleading standards in the context of ERISA.

The Court has not yet applied its pleading standards in the context of a case like this.[5] Many circuit courts have, and recognize that in the context of a participant action under § 1132(a)(2), it is improper to require the participant to plead facts directly showing an imprudent process when participants do not have access to those facts.

The Eighth Circuit first applied these pleading standards in a case similar to this in *Braden*, 588 F.3d at 585. That was a participant action under § 1132(a)(2) against the fiduciaries of Wal-Mart's defined contribution plan. The participant claimed that his fiduciaries "failed adequately to evaluate the investment options included in the Plan," resulting in plan losses due to excessive fees. *Id.* at 589–90. He alleged that despite the plan's "substantial bargaining power in the highly competitive 401(k) marketplace" and ability to obtain "institutional shares of mutual funds," the plan included "retail class shares, which charge significantly higher fees

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[5] *Dudenhoeffer* concerned an employee stock ownership plan and the unique problems that arise when that plan owns publicly traded stock. 573 U.S. at 423–24.

than institutional shares for the same return on investment." *Id.* at 589–90, 595. The complaint included specific comparisons of "the relative cost of institutional and retail shares in the funds actually included in the Plan." *Id.* at 595 & n.5. The participant contended his fiduciaries selected the plan's investment options despite the availability of better alternatives for the compensation those options paid the plan's recordkeeper. *Id.* at 596.

The district court dismissed the complaint under Rule 12(b)(6). *Id.* at 590–91. In vacating that decision, the Eighth Circuit noted "the practical context of ERISA litigation." *Id.* at 598. "No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences." *Id.* "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Id.*

In light of this context, the court held that it was improper to require a participant "to describe directly the ways in which appellees breached their fiduciary duties" such as requiring "allegations regarding the fiduciary's conduct." *Id.* at 595. Instead, "it is sufficient for a plaintiff to plead facts *indirectly* showing unlawful behavior, so long as the facts pled give the defendant fair notice of what the claim is and the grounds upon which it rests and allow the court to draw the reasonable inference that the plaintiff is entitled to relief." *Id.* (emphasis added, quotation and editing marks omitted, quoting *Twombly*, 550 U.S. at 555, and *Iqbal*, 556 U.S. at 677).

The Eighth Circuit noted that a complaint does not need to rule out every possible explanation for

the fiduciary's action. *Id.* at 597. "Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the 'complaint is construed most favorably to the nonmoving party,' and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Id.* (citations omitted). Thus, a participant is not required to explain away possible lawful reasons for choosing challenged investment options, such as a potentially higher return, lower risk, or greater management flexibility. *Id.* at 596. Only when the facts alleged "are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged" is there a "concrete, obvious alternative explanation" that the plaintiff must address. *Id.* "[A] defendant is not entitled to dismissal if the facts are *merely consistent with* lawful conduct." *Id.* A participant's pleaded facts need only lead to a reasonable inference that the fiduciary's decision-making process was "tainted by failure of effort, competence, or loyalty." *Id.*

C. The Eighth Circuit's ERISA pleading standards have been accepted in the Second, Fifth, and Seventh Circuits and its principles have been recognized even by the Ninth Circuit.

The Eighth Circuit's application of the Court's pleading standards in the context of ERISA has been adopted in the Second, Fifth, and Seventh Circuits. *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 728–31 (5th Cir. 2018) (applying to claim under 29 U.S.C. § 1132(a)(1)(B)); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 675 (7th Cir. 2016); *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v.*

Morgan Stanley Inv. Mgmt., 712 F.3d 705, 718 (2d Cir. 2013)("*St.Vincent's*").

The Second Circuit found *Braden* to be the appropriate standard but affirmed dismissal of the complaint before it in part because the plaintiff was a plan administrator who had access to more information about the investment manager it hired to invest plan assets than would a plan participant. *St. Vincent's*, 712 F.3d at 719 n.15. The plaintiff also alleged only facts regarding the *ex post* performance of the investment and not facts *ex ante* to show a prudent investment manager would have recognized before the decline that the investment was imprudent. *Id.* at 721–22.[6]

St. Vincent's is distinct from Petitioners' case in this respect because Petitioners alleged facts showing that their Plan's investment were imprudent for years before they contend Chevron should have taken action. Nonetheless, the decision in *St. Vincent's* resulted in a dissent that noted that the majority in effect "embraced a heightened pleading standard" that "gutted" ERISA "with no basis in law." 712 F.3d at 728; *see also id.* at 734–35. The conflict between the panel members in *St. Vincent's* resembles the conflict between the courts below and the circuits that have adopted *Braden*, and demonstrates the need for this Court to resolve whether the relaxed standards of *Braden* or the heightened standards of the courts below apply to ERISA fiduciary breach claims.

The Seventh Circuit's adoption of the *Braden* standard in *Allen* represents a distinction from its prior pleading-standard decisions in *Hecker* and *Loomis*, on which the district court below erroneously

[6] In that case, the investments were mortgage-backed securities that suffered a precipitous drop in market value during the financial crisis of 2008. *Id.* at 709.

relied. App. 28–29, 34–35; *see Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011); *see also Renfro v. Unisys Corp.*, 671 F.3d 314, 326–28 (3d Cir. 2011)(addressing *Hecker* and *Braden*). The participants in *Allen* contended that their fiduciary caused their ESOP to overpay for privately held stock, which subsequently lost value. 835 F.3d at 673–74. Distinguishing *Dudenhoeffer* for being limited to publicly traded stock and applying *Braden*, the Seventh Circuit held that it was sufficient to create a plausible inference of a breach by alleging that the stock dropped in value after the sale and that the sale was seller-financed at a high interest rate. *Id.* at 673–74, 679–80. The court found those facts enough to show that the fiduciary failed to conduct an adequate inquiry into the value of the stock or intentionally facilitated an improper transaction. *Id.* at 678–79. Requiring a participant to plead more special circumstances about the fiduciary's breach was a "stringent pleading requirement" that the court rejected as improper. *Id.* at 679. The fiduciary's arguments as to why its process was prudent and why it should not have foreseen the drop in value of the stock were issues to be addressed at summary judgment. *Id.* at 679, 680.

In *Hecker*, the Seventh Circuit had held that bare allegations of unspecified cheaper alternative investments that are available to a plan was not sufficient to create an inference of fiduciary breach. *Hecker*, 556 F.3d at 586. In denying rehearing, the court specifically noted that the plaintiffs there had not alleged that any of the plan investment options was unsound or reckless. *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009). The Seventh Circuit thus distinguished between generic allegations of an unspecified prudent alternative and specific allegations of how a plan investment was imprudent.

See Loomis, 658 F.3d at 670, 671–62 (rejecting broad allegations regarding institutional versus retail investment vehicles); *see also Renfro*, 671 F.3d at 326 (no allegation of "the prudence of the inclusion of any particular investment option"). The Eighth Circuit recognized this distinction. *Braden*, 588 F.3d at 596 n.7 ("we do not suggest that a claim is stated by a bare allegation that cheaper alternative investments exist in the marketplace"). The Seventh Circuit expressly noted that *Hecker* was "tethered closely" to its facts. *Hecker*, *569* F.3d at 711; *see also Tussey*, 746 F.3d at 336 ("carefully limited their decisions to the facts presented"). The Ninth Circuit itself had noted that while *Hecker* and its progeny properly rejected generic "broad-sides" against mutual funds sold in the retail market, they did not preclude a court from concluding that a fiduciary imprudently provided retail-class shares of mutual funds when institutional-class shares were available to the plan. *Tibble*, 729 F.3d at 1135, 1137.

The district court below did not recognize this distinction between *Hecker* and *Braden* and the distinction between generic allegations of some prudent alternative somewhere in the market and specific allegations of how specific plan options were imprudent in light of specific alternatives. (Petitioners' complaint clearly falls into the latter category.) Instead, the court interpreted *Hecker* to bless any plan that had a range of investment options and fees and require specific allegations regarding a deficient fiduciary process in a challenge to the prudence of any one of those options. App. 28–29. The district limited *Braden* to allegations of kickbacks relating to the selection of investment options. App. 32. Disloyalty, however, is separate from imprudence. In addition to establishing an inference of a process tainted by failure of loyalty, *Braden* recognizes the sufficiency of inferences of a

process tainted by failure effort or competence. *Braden*, 588 F.3d at 596. As noted below, the district court's application of *Hecker* has been rejected by most other district courts.

D. Even the Ninth Circuit agrees with the principles underlying *Braden*.

Although the Ninth Circuit has not directly addressed the *Braden* standard until now, it agrees with the principles underlying that decision. In *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995), the court recognized that, under ERISA, "the circumstances surrounding alleged breaches of fiduciary duty may frequently defy particularized identification at the pleading stage" because they are "in the exclusive possession of the breaching fiduciary." 62 F.3d at 1503. "Where a fiduciary exercises discretionary control over a plan, and assumes the responsibilities that this control entails, the victim of his misconduct often will not, at the time he files his complaint, be in a position to describe with particularity the events constituting the alleged misconduct." *Id.* The court recognized that pleading requirements must be relaxed in such cases, just as the Eighth Circuit did in *Braden*. *Id.*

Concha addressed the question of whether Federal Rule of Civil Procedure 9(b) applies to allegations of fiduciary breach under ERISA. *Id.* at 1502. It also predates *Twombly* and *Iqbal*, but is not based on foundations undermined by those cases. The Ninth Circuit subsequently recognized that *Concha* remains valid, holding that a court must "relax pleading requirements where the relevant facts are known only to the defendant." *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017)(quoting *Concha*, 62 F.3d at 1503).

Under the principles recognized in *Concha* and affirmed in *Soo Park*, the Ninth Circuit should have adopted the *Braden* standard and reversed the dismissal of petitioners' complaint. Neither of the courts below, however, addressed *Concha* or *Soo Park*.

E. Petitioner's allegations state a claim of breach under the *Braden* standard.

Under the *Braden* standard, Petitioners' allegations are sufficient to state claims of fiduciary breach, as the many district courts cited below have found. As noted above, Petitioners' allegations that Chevron imprudently provided retail instead of institutional shares of Plan mutual funds was specifically recognized as a breach in *Tibble* and *Braden*. Petitioner's allegations that Chevron failed to put Plan recordkeeping services out for competitive bidding and caused the Plan to overpay for recordkeeping was specifically recognized as a breach in *George*, 641 F.3d at 798–800, and *Tussey*, 746 F.3d at 336. Unlike the plaintiffs in *Hecker*, *Loomis*, and *Renfro*, but like the plaintiff in *Braden*, Petitioners identified the specific Plan investments that were imprudent and their specific prudent alternatives. Petitioners cited facts that existed before the date they contend Chevron should have acted. They are not basing their claims of imprudence upon *ex post* failings of the challenged investment options.

In sum, Petitioners' factual allegations establish a plausible inference that Chevron's discharge of its fiduciary duties to the Plan was "tainted by failure of effort, competence, or loyalty." *Braden*, 588 F.3d at 596. They established more than a "sheer possibility" that Chevron breached its duty. *Iqbal*, 556 U.S. at

678. Outside of the Ninth Circuit, Petitioners' complaint would have survived dismissal.

F. Complaints less detailed than Petitioners' have been found to state claims of fiduciary breach.

Applying the proper standard under *Braden*, many district courts in different circuits have found allegations similar to (an even less detailed than) Petitioners' sufficient to state claims of fiduciary breach and have noted the above distinction between *Braden* and *Hecker*. *See*, *e.g.*, *Hay v. Gucci Am., Inc.*, No. 17-7148, 2018 WL 4815558, *5–8 (D.N.J. Oct. 3, 2018); *Cunningham v. Cornell Univ.*, No. 16-6525, 2017 WL 4358769, *7–8 (S.D.N.Y. Sept. 29, 2017); *Tracy v. MIT*, No. 16-11620, 2017 WL 4453541, *9–12 (D.Mass. Aug. 31, 2017), *sustained in relevant part*, 2017 WL 4478239 (D.Mass. Oct. 4, 2017); *Henderson v. Emory Univ.*, 252 F.Supp.3d 1344, 1349–53 (N.D.Ga. 2017); *Terraza v. Safeway Inc.*, 241 F.Supp.3d 1057, 1077–1079 (N.D.Cal. 2017); *Bowers v. BB&T Corp.*, No. 15-732, Doc. 58 (M.D.N.C. Apr. 18, 2016); *Kruger v. Novant Health, Inc.*, 131 F. Supp.3d 470 (M.D.N.C. 2015); *George v. Kraft Foods Global, Inc.*, 674 F.Supp.2d 1031, 1047–49 (N.D.Ill. 2009).

For example, the court in *Cunningham* noted that allegations of failure to solicit bids for plan recordkeeping and monitoring revenue sharing are sufficient to state a claim and that allegations of providing retail instead of institutional shares of mutual funds states a claim despite *Hecker* and its progeny and the decisions below in this case. 2017 WL 4358769, *6, *8. The court in *Tracy* recognized that *Hecker* says nothing regarding the duty owed as to plan recordkeeping fees. 2017 WL 4453541, *14 (quoting *George*, 674 F.Supp.2d at 1048, *inter alia*).

The court in *Kruger* described the difference between *Hecker* and *Braden* and found *Braden* to apply, especially for claims that a fiduciary provided retail instead of institutional shares of plan mutual funds. 131 F.Supp.3d at 475–78.

Under the standard applied by the Ninth Circuit here, all of these complaints would have been dismissed. The same allegations cannot state a claim of fiduciary breach in one circuit but not another. The Court should issue a writ in this case to resolve for all circuits the proper pleading standard to apply in ERISA fiduciary breach actions, so that participants are not deprived of the right to enforce ERISA's fiduciary duties in the plans merely by virtue of their geographic circumstances.

G. The decisions below directly conflict with the *Braden* standard the Court's pleading standards and create a circuit split.

By compelling Petitioners to allege facts about Chevron's hidden process for making its challenged decisions regarding the Plan, the courts below have established a heightened, stringent pleading standard that contradicts the *Braden* standard accepted by other circuits and effectively precludes participant-led fiduciary breach actions in all but the rare circumstances in which a participant has inside information about the fiduciary process. The requirement to directly plead an imprudent fiduciary process directly contradicts *Braden* and the other circuits that follow it. *See Allen*, 835 F.3d at 678 (citing *Braden*, 588 F.3d at 595).

The decisions below erect an insuperable hurdle to any non-insider of the Chevron Plan from challenging decisions that appear on their face to have been imprudent. The Ninth Circuit's holding in

affirming the district court that it is not enough to plead facts that are merely "consistent with" a finding of imprudence, App. 2, directly contradicts *Braden*'s holding that an ERISA participant does not need to allege facts that "rule out every possible lawful explanation for the conduct he challenges[.]" 588 F.3d at 597. The Ninth Circuit did not address *Braden* and relied instead on a securities case that, unlike ERISA, includes a heightened pleading standard and is factually inapposite to this case. App. 3 (citing *In re Century Alum. Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)(claim under 15 U.S.C. § 77k)).[7]

The decisions below improperly impose a "probability requirement" on Petitioners (*Iqbal*, 556 U.S. at 678), contrary to the standard set in other circuits. The courts below apparently found it improbable that Petitioners could prove their alleged facts and believed Petitioners' recovery to be very remote and unlikely, but that is not a basis on which to dismiss a complaint. *Twombly*, 550 U.S. at 556.

The Ninth Circuit's decision creates a split among the circuit courts regarding the standard by which a participant can plead a fiduciary breach under ERISA. In most circuits, a participant can plead that breach indirectly, by alleging the facts known to the participant that plausibly suggest a deficient fiduciary process. In the Ninth Circuit, however, that is not enough; a participant must plead directly how that process was deficient. In most cases, as in this case, participants do not have access to the facts to

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[7] *Century Aluminum* concerned § 11 of the Securities Act of 1933 (15 U.S.C. § 77k), which imposes a heightened pleading requirement to trace the plaintiff's security purchase to an offering that contained the alleged misrepresentation. 729 F.3d at 1106–07. It, thus, is distinct from ERISA, which has no similar requirement.

satisfy the Ninth Circuit's stringent standard. That will undermine ERISA's enforcement mechanism and lead to the result that whether a participant can proceed with her action to enforce her plan's rights under ERISA will depend on the circuit in which her plan happens to be located. The Court should prevent that disparate treatment of participants and the ability to enforce ERISA by establishing a standard for pleading a fiduciary breach that applies in all circuits.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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