Supreme Court, U.S.
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No. __-__

IN THE
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE, AND JANICE RIGGINS,
Petitioners,

v.

DEERE & COMPANY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October 14, 2009

QUESTIONS PRESENTED

Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA") to create "judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (internal quotations omitted). Section 404(a) of ERISA requires pension plan fiduciaries to act solely for the benefit of plan participants and to use the care that "a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1). Section 404(c) creates a limited exemption from liability for plan losses that are not caused by the fiduciary's breach of duty but instead "result[] from [the] participant's . . . exercise of control" over plan assets. *Id.* § 1104(c)(1)(A)(ii).

The questions presented are:

1. Whether the court below erroneously held – despite a contrary decision of the Fourth Circuit and the authoritative interpretation of the Department of Labor ("DOL") – that a plan fiduciary's imprudent selection of investment options with excessive fees is exempt from liability under § 404(c) of ERISA, as long as plan participants can choose from a sufficiently broad range of investment options.

2. Whether the court below erred in holding – contrary to numerous other circuit decisions and the considered views of DOL – that petitioners' allegations that a plan fiduciary selected retail mutual funds with excessive fees, without adequate investigation and without any effort to explore readily available, lower-cost options, failed to state a claim under § 404(a) of ERISA.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Dennis Hecker, Jonna Duane, and Janice Riggins were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondent Deere & Company was a defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Fidelity Management Trust Company and Fidelity Management & Research Company were defendants in the district court proceedings and appellees in the court of appeals proceedings, but, pursuant to this Court's Rule 12.6, are not parties in this Court because petitioners do not seek review of the portion of the decision below affirming the district court's dismissal of their claims against those defendants.

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Dennis Hecker, Jonna Duane, and Janice Riggins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

This case presents an exceptionally important issue of federal pension law that has divided the lower courts. American employees hold more than $5.2 trillion in assets in pension plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), accounting for nearly 13% of all household financial assets in the United States. *See* Investment Company Institute, *The U.S. Retirement Market, First Quarter 2009*, at 1-3 (Aug. 2009), *available at* http://www.ici.org/pdf/09_q1_retmrkt_update. pdf (hereinafter "*U.S. Retirement Market*"). Pension plan participants do not have free rein to invest the retirement assets in those pension plans. Rather, participants' choices are limited to a range of investment options selected by the plan's administrator. The value of a participant's retirement assets upon redemption is a function not only of the performance of the chosen investment, but also, critically, of the fees and expenses incurred.

To protect the value of the assets of American employees' pension plans, ERISA imposes strict fiduciary duties on plan administrators. Plan administrators must act "solely in the interest" of the plan's beneficiaries, and they must use "the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). Accordingly, when selecting investment options for the plan, plan administrators must not only avoid self-dealing, but also "employ[] the appropriate methods to investigate the merits of the investment and to structure the investment." *Flanigan v. General Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001) (internal quotations omitted).

In the decision below, the Seventh Circuit created an enormous and unjustified loophole in ERISA's fiduciary protections. Petitioners' complaint alleged that respondent Deere, the administrator of two ERISA-governed plans in which petitioners participate, imprudently limited participants' investment options to retail mutual funds offered by affiliates of Fidelity Investments ("Fidelity"), without any investigation into whether those mutual funds' fees (ranging from 0.07% for index funds to over 1% for actively managed funds) were reasonable for a plan of Deere's size ($2.5 billion) and without any effort to explore other readily available and less costly investment alternatives. By contrast to the mutual fund fees charged by Fidelity, the largest money managers charge pension funds, on average, fees of only 0.08%. Thus, Deere caused the plans, in some instances, to pay more than 10-fold what comparable pension funds pay, and participants incurred significant losses that Deere readily could have avoided.

The Seventh Circuit dismissed the complaint with prejudice, holding that defendants were immunized from liability by § 404(c) of ERISA and, in the alternative, that petitioners' allegations failed to state a claim under § 404(a) of ERISA. Both holdings warrant this Court's review. As the Seventh Circuit itself recognized, *see* Pet. App. 26a, its expansive interpretation of § 404(c)'s exemption from liability conflicts not only with the Department of Labor's ("DOL") longstanding interpretation of § 404(c) and its implementing regulations, but also with a decision of the Fourth Circuit. *See infra* pp. 14-18.

Moreover, the Seventh Circuit's alternative holding under § 404(a) ignores decades of precedent from other circuits, as well as DOL's consistent and carefully considered views. *See infra* pp. 22-28.

The proper scope of ERISA's fiduciary duty to select prudent investments is critically important to tens of millions of American employees whose retirement savings are invested through ERISA-governed pension plans. Each year, American employees lose hundreds of millions of dollars due to imprudent selection of investment options with unnecessary fees. This Court should grant review and reverse the Seventh Circuit's unwarranted exemption from fiduciary liability for such imprudent investment selection.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 556 F.3d 575. That opinion was supplemented as part of the order denying rehearing (Pet. App. 50a-54a), which is reported at 569 F.3d 708. The opinion of the district court (Pet. App. 32a-48a) is reported at 496 F. Supp. 2d 967.

JURISDICTION

The court of appeals entered its judgment on February 12, 2009. A petition for rehearing was denied on June 24, 2009. *See* Pet. App. 49a-54a. On September 14, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 14, 2009. *See id.* at 84a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 404 of ERISA, 29 U.S.C. § 1104, and 29 C.F.R. § 2550.404c-1 are set forth at Pet. App. 55a-83a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress, aware of the critical 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, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). "The floor debate . . . reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). To address that concern, ERISA requires that employee benefit plans "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). Among the central responsibilities of plan fiduciaries is the duty to select appropriate investment options for the plan.

ERISA's statutory provisions "abound[] with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Rather than enumerate all applicable requirements, ERISA imposes general fiduciary duties of loyalty and prudence, which are the "highest known to the law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), and directs federal courts to apply them in specific cases. *See* 29 U.S.C. § 1104(a)(1) (duty to act "solely in the interest of the participants and beneficiaries"); *id.* § 1104(a)(1)(B) (duty to act with "the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use"). Plan participants are empowered to enforce these duties through private civil actions for damages or equitable relief. *See id.* §§ 1109(a), 1132(a).

ERISA also establishes a limited "safe harbor" from civil liability for fiduciary breach in certain circumstances where the "pension plan . . . provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account." *Id.* § 1104(c)(1)(A). For the safe harbor to apply, a plan must meet the standards promulgated by the Secretary of Labor ("Secretary") for an "ERISA section 404(c) plan" by, among other things, giving a participant "independent control in fact with respect to the investment of assets in his individual account." 29 C.F.R. § 2550.404c-1(c). Even when those prerequisites are satisfied, ERISA makes clear that fiduciaries are protected from liability only for a "loss . . . which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). As described more fully below, pursuant to expressly delegated authority, the Secretary has consistently interpreted § 404(c) and her own implementing regulation, 29 C.F.R. § 2550.404c-1, to mean that fiduciaries are not immunized from liability for losses attributable to a plan fiduciary's improper selection of investment options, because such losses are not the "direct and necessary result of that participant's or beneficiary's exercise of control." *Id.* § 2550.404c-1(d)(2); *see infra* pp. 18-22.

B. Factual Background

Petitioners are participants in two tax-qualified defined-contribution pension plans, popularly known as "401(k)" plans, established by Deere, a manufacturer of heavy equipment for use in agriculture, construction, forestry, and landscaping, with more than 47,000 employees in 26 countries worldwide. The two plans – called the Savings & Investment Plan and the Tax Deferred Savings Plan – operate in substantially the same fashion: qualified Deere employees are permitted to contribute a certain amount of their pre-tax earnings into an individual plan account, and Deere matches those contributions in varying percentages up to 6%. Deere may also make profit-sharing contributions to the Savings & Investment Plan. As of the end of 2005, the two Deere plans held more than $2.5 billion in contributed assets.

Because ERISA requires that pension plan assets be held in trust, *see* 29 U.S.C. § 1103(a), Deere, as the plans' sponsor and administrator, *see id.* § 1002(16), entered into a written trust agreement in 1991 with Fidelity Management Trust Company ("Fidelity Trust"), a subsidiary of Fidelity Investments, to provide administrative and recordkeeping services as the plans' trustee. That agreement also provided that Deere's selection of mutual funds for the plans would be limited to funds offered by another Fidelity affiliate, Fidelity Management & Research Company ("Fidelity Research"). Fidelity Research is a registered investment company that acts as the investment advisor to the Fidelity family of mutual funds. It is compensated for those services through fees – calculated as a percentage of assets and expressed as an "expense ratio" – that it charges to each of the Fidelity funds that it advises.

At the time of petitioners' Second Amended Complaint ("Amended Complaint"), participating employees could invest plan contributions in 26 primary investment options. Of those 26 options, 23 were retail Fidelity mutual funds – the same mutual funds that Fidelity makes available to any investor in the general public, large or small. The three remaining options consisted of two Fidelity pooled funds – investment vehicles similar to mutual funds – managed directly by Fidelity Trust, and an investment fund that held exclusively Deere common stock. Participants also had access to BrokerageLink, a service by which Fidelity enables participants, for a fee, to invest in a large number of additional retail mutual funds offered by Fidelity as well as other mutual fund companies. All of the mutual fund options Deere made available to plan participants were retail mutual funds, which, as discussed further below, charge significantly higher fees than other investment options readily available to large institutional investors such as the Deere plans.

C. Proceedings Below

1. On December 8, 2006, petitioners filed a complaint against Deere and Fidelity in the United States District Court for the Western District of Wisconsin. The crux of petitioners' complaint against Deere, as amended, was that Deere failed to conduct a prudent investigation of the retail Fidelity mutual funds and their associated fees, and made no effort to use the plans' large size (more than $2.5 billion in assets) to obtain better than retail-level fees from

Fidelity or another investment manager.[1] As a result of this imprudence, the plans and their participants paid unnecessary and excessive fees to Fidelity, and suffered significant economic losses. *See* Am. Compl. ¶¶ 36, 44, 76, 105. The complaint further alleged that, under an undisclosed arrangement by which Fidelity Research shared certain revenue with Fidelity Trust, Deere caused plan participants to incur these excessive fees as a means of covering payments that Deere otherwise would have paid to Fidelity Trust for its administrative services, in violation of Deere's duties of candor and loyalty. *See id.* ¶¶ 88-90, 125; *see also* Pet. App. 17a-18a (finding that Deere "creat[ed] the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing no such thing").[2]

In March 2007, Deere filed a motion to dismiss the Amended Complaint. According to Deere, petitioners' claim that Deere breached its fiduciary duties by imprudently selecting unduly expensive investment options – specifically, retail mutual funds with unne-

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[1] Petitioners alleged that Fidelity was liable for breach of fiduciary duty because it was involved with Deere in the selection of investment options for the plans. The district court dismissed the claims against Fidelity on the ground that the trust agreement gave Deere "sole responsibility for selection of plan investment options." Pet. App. 47a. The court of appeals affirmed. Although petitioners believe that ruling is erroneous because fiduciary status under ERISA turns on how an entity functions, not what the documents recite, they acknowledge that the issue is fact-bound and thus do not challenge it here.

[2] The complaint also alleged that Deere's failure to disclose the revenue-sharing arrangement constituted an independent violation of Deere's fiduciary duties under ERISA. Both the district court and the court of appeals disagreed and dismissed that aspect of the complaint.

cessarily high fees – was barred by the "safe harbor" under § 404(c) of ERISA.

2. The district court dismissed the complaint in its entirety, with prejudice. With respect to petitioners' claim of imprudent investment selection, the court acknowledged that Deere "could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates." Pet. App. 35a. The court also recognized that Deere "made no effort" to obtain lower prices for the plans' beneficiaries. *Id.* Notwithstanding Deere's acknowledged failure to take any steps to reduce beneficiaries' costs, the court held that Deere was immune from liability under § 404(c) of ERISA because, "to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments." *Id.* at 46a-47a. The court reasoned that participants had access to a wide range of retail mutual funds that "were also offered to investors in the general public" and that it was "untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios." *Id.* at 46a. In addition to dismissing petitioners' complaint, the court assessed more than $200,000 in costs on petitioners.

3. On appeal, the Secretary of Labor (then Elaine L. Chao) filed a brief as *amicus curiae* in support of petitioners, arguing that the district court had erred in construing the § 404(c) safe harbor to immunize plan fiduciaries from liability for imprudent selection of investment options ("DOL Initial Brief"). The Secretary noted that the preamble to DOL's 1992 regulations implementing § 404(c) provided that "the act of designating investment alternatives . . . in an

ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992). The selection of investment options does not fall under the plain terms of § 404(c) or the Secretary's implementing regulations because "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan . . . is not a direct or necessary result of any participant direction of such plan." *Id.* at 46,924 n.27. The Secretary's *amicus* brief contended that her interpretation was entitled to *Chevron*[3] deference because it had been issued after notice-and-comment rulemaking pursuant to an express delegation of authority by Congress, and had been consistently adhered to by DOL. *See* DOL Initial Br. 15-17.

Despite the Secretary's contentions, the Seventh Circuit affirmed. First, the court held that petitioners' allegations "that Deere violated its fiduciary duty by selecting investment options with excessive fees" failed to state a claim for breach of fiduciary duty under ERISA because "the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants." Pet. App. 19a. The Seventh Circuit, like the district court, relied on the fact that "there was a wide range of expense ratios" (0.07% to just over 1%) among the retail mutual funds available to plan participants. *Id.* Moreover, "all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition." *Id.* According to the court,

[3] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

that combination of pled facts – the supposedly broad range of retail funds offered by Deere with a supposedly wide range of fees set against the backdrop of market competition – was sufficient to defeat petitioners' claim of imprudent selection of investment options at the pleading stage. Like the district court, the Seventh Circuit acknowledged that Deere could have obtained lower fees through other investment vehicles, such as institutional funds, but it dismissed that fact as "beside the point" for purposes of dismissal of petitioners' complaint, because "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Id.* at 19a-20a.

Moreover, the Seventh Circuit held that, "[e]ven if [it had] underestimated the fiduciary duties that Deere had to its plan participants," Deere was exempt from liability under § 404(c). *Id.* at 21a. Although the court declined to decide whether § 404(c) "always shield[s] a fiduciary from an imprudent selection of funds under every circumstance that can be imagined," it ruled in the decision below that § 404(c) does protect a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss." *Id.* at 26a. According to the court, as long as there is a sufficiently "broad range of investment alternatives" with a variety of fees to allow plan participants to diversify and manage their exposure to fees, any investment loss caused by excessive fees is attributable to the participants' own investment choices. *Id.* at 26a-27a. The court relied on the Fifth Circuit's decision in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 310-11 (5th Cir. 2007), but it also recognized that its holding was at odds with the Fourth Circuit's contrary decision in *DiFelice v. U.S.*

Airways, Inc., 497 F.3d 410, 418 n.3 (4th Cir. 2007). *See* Pet. App. 26a.

4. On petition for rehearing, the Secretary (now Hilda L. Solis) once again filed an *amicus* brief in support of petitioners. As in DOL's initial *amicus* brief, the Secretary again objected to the Seventh Circuit's refusal to give *Chevron* deference to "the Secretary's interpretation of [ERISA] and her 404(c) regulation" and expressed disagreement with the panel's holding that an imprudent selection of investment options is insulated from liability as long as the fiduciary provides a sufficiently broad range of investment choices. DOL Rehearing Br. 1-2. The Secretary also criticized as "mistaken" the Seventh Circuit's "conclusion that the fees [incurred by the plans] were necessarily prudent because the Plans' array of investment funds w[as] offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 9-10. The Secretary noted that petitioners' core "assertion that the fiduciaries could and should have considered fees and favorable pricing arrangements finds some support in the Secretary's previous pronouncements," *id.* at 11 n.1, and she took issue with the Seventh Circuit's disposition of the case on the pleadings, "without full consideration of any evidence that might be developed and introduced," *id.* at 13. The Secretary urged the panel to reconsider its decision in light of the "far-reaching ramifications" of its holding, which would "permit[] fiduciaries to evade accountability for the imprudent selection and maintenance of funds in defined contribution plans" nationwide. *Id.* at 2.

The Seventh Circuit denied rehearing and rehearing *en banc*. In its order denying rehearing, the panel supplemented its original opinion in response to the Secretary's *amicus* brief. First, the panel refused to give *Chevron* deference to the Secretary's interpretation of § 404(c) and her own implementing regulations, on the ground that it was not contained "in the regulation proper," but only in a preamble to the regulation. Pet. App. 50a. The panel then dismissed the Secretary's concerns about the ramifications of its decision as "more hypothetical than real." *Id.* at 52a. The panel claimed that its decision was "limited to the complaint before the court," and it denied that it would give a "green light" to "reckless" inclusion of "unsound" investment alternatives based on "the simple expedient of including a very large number of investment alternatives" in the portfolio. *Id.* at 52a-53a. However, the panel did not explicitly repudiate its holding that § 404(c) shields a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss." *Id.* at 26a. Instead, the panel continued to rest its affirmance of the district court's dismissal on the fact that the particular package of mutual funds offered by the Deere plans gave participants thousands of investment options with significant "variation in associated fees." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's interpretations of § 404(c) and § 404(a) of ERISA warrant this Court's review because they are at odds with the decisions of other federal courts of appeals and the position of DOL, and they undermine critical congressional policies under ERISA. The Seventh Circuit's refusal to apply DOL's longstanding interpretation that § 404(c) does not immunize a plan fiduciary from liability for improper selection of investment options runs contrary to a decision of the Fourth Circuit. Likewise, the Seventh Circuit's view that a claim for imprudent investment selection can be foreclosed by the availability of a broad range of retail mutual fund options with market-based fees is at odds with both DOL policy and longstanding case law from other circuits.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS ON THE PROPER INTERPRETATION OF § 404(c) OF ERISA

A. The Seventh Circuit's Refusal To Defer To DOL's Construction Of § 404(c) Deepens The Division Among The Courts Of Appeals

The question whether § 404(c) immunizes a plan fiduciary from liability arising from the fiduciary's selection of investment options has divided both the federal courts of appeals and the federal district courts. The Secretary's interpretation of § 404(c) since 1992 has provided that liability for losses due to a fiduciary's selection of improper investment alternatives is not foreclosed by § 404(c) because such losses do not "result[] from" the participant's "exercise of control" over the assets in his account. 29 U.S.C. § 1104(c)(1)(a)(A)(ii). The Seventh Circuit rejected that longstanding interpretation and held that fiduciaries are immunized from liability for any such losses under § 404(c) as long as they "include[] a sufficient range of options so that the participants have control over the risk of loss." Pet. App. 26a.

As the Seventh Circuit recognized, that holding deepened a preexisting disagreement between the Fourth and Fifth Circuits. In *Langbecker*, a divided panel of the Fifth Circuit also rejected the Secretary's interpretation of § 404(c) and her own implementing regulation. The majority in *Langbecker* recognized that there is "much disagreement" about whether the Secretary's interpretation is entitled to deference. 476 F.3d at 310 n.22. Without resolving that question, the majority held that, even assuming that *Chevron* deference applied, the Secretary's interpretation was unreasonable. In the majority's view, the Secretary's "contradict[ed] the governing statutory language" because it would "render the § 404(c) defense applicable only where plan managers breached no fiduciary duty" and thus "eliminate [the] § 404(c) defense altogether." *Id.* at 311. The majority held, instead, that whether § 404(c) bars a claim of improper investment selection must be analyzed on a "transactional, case-by-case" basis. *Id.*

Judge Reavley, in dissent, criticized the majority for "misappl[ying]" § 404(c). *Id.* at 319. He would have held that "imprudent designation of an option for participants to choose constitutes grounds for fiduciary liability, and falls outside the scope of participant control envisaged by § 404(c)." *Id.* Judge Reavley concluded that the Secretary's interpretation was entitled to *Chevron* deference under this Court's decisions because it had been promulgated as part of a final rule after formal notice-and-comment processes under the Administrative Procedure Act ("APA") and because it had been "uniformly adhered to" by DOL. *See id.* at 320; *see also infra* pp. 18-22. Judge Reavley also concluded that the Secretary's interpretation was reasonable because, "[i]f no duty of prudence attaches to selection of investment options, plan fiduciaries could imprudently select a full menu of unsound investments, among which participants would be free to choose at their peril, while the fiduciaries remain insulated from responsibility." 476 F.3d at 321-22.

In contrast with the decision below and the Fifth Circuit's decision in *Langbecker*, the Fourth Circuit in *DiFelice* expressly adopted the Secretary's interpretation and ruled that the § 404(c) "safe harbor provision does not apply to a fiduciary's decisions to select and maintain certain investment options within a participant-driven 401(k) plan." 497 F.3d at 418 n.3. Citing Judge Reavley's dissent in *Langbecker*, the Fourth Circuit stated that, "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance." *Id.* Had petitioners' complaint been brought in the Fourth Circuit, § 404(c) would have offered defendants no immunity from liability. Indeed, the *Hecker* panel expressly acknowledged that *DiFelice* is squarely at odds with *Langbecker* and the decision below. Pet. App. 26a.

The division among the Fourth, Fifth, and Seventh Circuits has spawned inconsistent decisions in the federal district courts. *See, e.g., In re Washington Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919 MJP, 2009 WL 3246994, at *7 (W.D. Wash.

Oct. 5, 2009) (recognizing disagreement between *Hecker* and *DiFelice*); *Page v. Impac Mortgage Holdings, Inc.*, No. SACV 07-1447 AG (MGLx), 2009 WL 890722, at *4 (C.D. Cal. Mar. 31, 2009) (noting the "directly conflicting circuit court cases on this issue"). On one hand, virtually all of the district court decisions outside of the Fifth and Seventh Circuits have sided with DOL, *DiFelice*, and Judge Reavley's dissenting opinion in *Langbecker*, and have held that the § 404(c) "safe harbor" does not foreclose claims alleging improper selection of investment alternatives for an ERISA-governed pension plan.[4] In the Seventh Circuit, however, district courts are now bound by the contrary decision below. *See Lingis v. Motorola, Inc.*, No. 03 C 5044, 2009 WL 1708097, at *13 (N.D. Ill. June 17, 2009) (following *Hecker* but recognizing the inconsistent holdings of *Tyco* and *Page*); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-

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[4] *See Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGRx), 2009 WL 2382340, at *41-*42 (C.D. Cal. July 16, 2009) (disagreeing with *Hecker* and "find[ing] that the § 1104(c) safe harbor does not apply" to "claims of imprudent or disloyal selection of investment options"), *clarified on other grounds*, 2009 WL 2382348 (C.D. Cal. July 31, 2009); *Page*, 2009 WL 890722, at *4 (adopting *DiFelice*, Judge Reavley's dissent in *Langbecker*, and DOL's interpretation); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 606 F. Supp. 2d 166, 169 (D.N.H. 2009) (agreeing with Judge Reavley's dissent in *Langbecker* that "DOL's interpretation of its own regulations is reasonable and should not be ignored"); *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1232 (N.D. Cal. 2008) (Breyer, J.) (adopting DOL's interpretation); *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 65-66 (M.D.N.C. 2008) (following *DiFelice*); *see also Spano v. Boeing Co.*, No. 06-cv-743-DRH, 2007 WL 2688456, at *1 (S.D. Ill. Sept. 10, 2007) (noting that "[t]he majority of courts to have interpreted ERISA § 404(c) have adopted the DOL's position") (citation omitted); *Langbecker*, 476 F.3d at 322 n.5 (Reavley, J., dissenting) (citing additional cases).

0701-MJR, 2009 WL 839099, at *6 (S.D. Ill. Mar. 31, 2009) (dismissing complaint based on *Hecker*); *cf. Boeckman v. A.G. Edwards, Inc.*, Civil No. 05-658-GPM, 2007 WL 4225740, at *6 (S.D. Ill. Aug. 31, 2007) (pre-*Hecker* decision expressing doubt about *Langbecker*). Likewise, in the Fifth Circuit, district courts that had previously adhered to DOL's position are now bound by *Langbecker*'s ill-defined "trans-actional, case-by-case" approach to the § 404(c) safe harbor. *Cf. In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 578-79 (S.D. Tex. 2003) (adopting DOL's interpretation); *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 893-94 & n.57 (S.D. Tex. 2004) (same). The Court should grant certiorari to resolve the clear disagreement among the lower courts.

B. The Seventh Circuit's Rejection Of DOL's Construction Of § 404(c) Is At Odds With This Court's Precedents And Should Be Reversed

The Seventh Circuit's decision is wrong and should be reversed. It is well settled under this Court's administrative law precedents that a federal agency's interpretation of a federal statute or its own regulation, rendered pursuant to delegated authority and notice-and-comment rulemaking, must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (collecting cases). Here, not only did Congress generally delegate authority to the Secretary to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of" Title I of ERISA, 29 U.S.C. § 1135, but it also specifically instructed the Secretary to prescribe regulations to determine when the conditions set forth in § 404(c) are satisfied. Because Congress recognized that "there may be difficulties in determining whether [a] participant in fact exercises independent control over his account," it vested the Secretary with the power to make the necessary policy judgments regarding the scope and application of § 404(c). H.R. Conf. Rep. No. 93-1280, at 305 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5086 ("[W]hether participants and beneficiaries exercise independent control is to be determined pursuant to regulations prescribed by the Secretary of Labor.").

Pursuant to that express delegation of authority, the Secretary issued a notice of proposed rulemaking ("NPRM") in 1991. *See* 56 Fed. Reg. 10,724 (Mar. 13, 1991). The Secretary's proposed regulation provided that, "[i]f a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (d) of this section, then no other person who is a fiduciary with respect to such plan shall be liable to such participant or beneficiary for any loss, or with respect to any breach of part 4 of Title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control." *Id.* at 10,737-38 (proposed 29 C.F.R. § 2550.404c-1(e)(2)). The Secretary made clear in the NPRM, moreover, that proposed § 2550.404c-1 would not foreclose liability for improper selection of investment options, because "the act of limiting or designating investment options which are intended to constitute the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan." *Id.* at 10,732 n.21.

Numerous commentators addressed the Secretary's proposed regulations, including comments directed at the issue of fiduciary duties in investment selection. *See* 57 Fed. Reg. at 46,922-23, 46,925. Ultimately, the Secretary adhered to the proposed regulation's "direct and necessary result" requirement. *See id.* at 46,935 (promulgating 29 C.F.R. § 2550.404c-1(d)(2)). Moreover, "[a]fter carefully reviewing the public comment on this matter," the Secretary twice emphasized in the preamble to the final regulation that, under the final rule, "the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." *Id.* at 46,922; *see id.* at 46,924 n.27 ("[T]he Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which . . . is not a direct or necessary result of any participant direction of such plan."). This part of DOL's preamble was thus an integral part of the agency's final rule, which was promulgated pursuant to full notice-and-comment procedures under the APA.

The Seventh Circuit's sole reason for refusing to give *Chevron* deference to the Secretary's preamble was that it was not codified "in the regulation proper." Pet. App. 50a. That rationale puts form over substance and runs flatly contrary to this Court's precedents. Indeed, many binding agency regulations are promulgated through formal orders, but not codified, and that distinction has never been material to the applicability of *Chevron* deference. *See, e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (applying *Chevron* to Federal Communications Com-mission declaratory ruling). Rather, the question of formality turns on the extent to which the agency's interpretation was "subject to the rigors of the [APA], including public notice and comment." *Mead*, 533 U.S. at 228 & n.9 (internal quotations omitted; brackets in original). Here, the preamble to the Secretary's 1992 regulations is entitled to *Chevron* deference because it went through the full rigors of notice-and-comment rulemaking.

Moreover, even putting aside the regulatory preamble, "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (internal quotations omitted). Since 1992, in opinion letters[5] and numerous *amicus* briefs[6] under three successive presidential administrations, DOL has consistently construed the "direct and necessary result" requirement in its own regula-

[5] *See* DOL Opinion Letter No. 98-04A, 1998 WL 326300, at *3 n.1 (May 28, 1998); DOL Information Letter, 1997 WL 1824017, at *2 (Nov. 26, 1997).

[6] *See* DOL Rehearing Br. 7; DOL Initial Br. 12-16; Br. of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees 22-23, *Lively v. Dynegy Inc.*, No. 07-2073 (7th Cir. filed Oct. 10, 2007), *available at* http://www.dol.gov/sol/media/briefs/lively(A)-10-10-2007.pdf; Br. of Sec'y of Labor as *Amicus Curiae* Supporting Plaintiffs-Appellants 17 n.7, *In re Schering-Plough Corp. ERISA Litig.*, No. 04-3073 (3d Cir. filed Oct. 21, 2004), *available at* 2004 WL 5215266; Br. of Sec'y of Labor as *Amicus Curiae* Opposing Motions To Dismiss 37, *Tittle v. Enron Corp.*, Civ. Action No. H-01-3913 (S.D. Tex. filed Aug. 30, 2002), *available at* 2002 WL 32913113.

tions, 29 C.F.R. § 2550.404c-1, to mean that liability for improper investment selection is not foreclosed by the § 404(c) safe harbor. *Cf. Coke*, 551 U.S. at 170-71 (upholding DOL regulation under *Chevron* even though it had changed over time). These definitive agency pronouncements are themselves entitled to deference because they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see also Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 158 & n.13 (1982) (preamble to Federal Home Loan Bank Board regulation constituted "administrative construction of the [Board's] regulation, to which deference is . . . clearly in order") (internal quotations omitted; ellipsis in original); *Rucker v. Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir. 2006) (DOL regulatory preamble entitled to "controlling weight"). The Seventh Circuit's rejection of DOL's construction of § 404(c) and its own regulations is clearly at odds with this Court's precedents and should be reversed.

II. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S INTERPRETATION OF § 404(a) BECAUSE IT ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND THE POSITION OF DOL

A. The Seventh Circuit's Newly Minted Defense To Fiduciary Liability For Imprudent Investment Selection Is At Odds With The Decisions Of Numerous Other Circuit Courts

The Seventh Circuit dismissed petitioners' allegations for failure to state a claim under § 404(a) of ERISA based on its conclusion – made without any discovery or evidentiary basis – that the specific funds included by the Deere plans had a sufficiently wide range of fees that were "set against the backdrop of market competition." Pet. App. 19a. According to the Seventh Circuit, this range of funds and associated fees negated any duty by Deere to take advantage of available, lower-priced investment vehicles. Even though Deere could have obtained a better fee structure for its plans, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Id.* at 19a-20a. The Seventh Circuit's holding is contrary to the decisions of numerous circuits and improperly curtails ERISA's fiduciary duty of prudent investment selection.

As this Court has recognized, ERISA's requirement that a plan fiduciary act with "the care, skill, prudence, and diligence" of "a prudent man acting in a like capacity and familiar with such matters," 29 U.S.C. § 1104(a)(1)(B), establishes an objective test derived from the common law's "prudent person" rule. *See Bruch*, 489 U.S. at 110-11; *see also, e.g.*, S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (§ 404(a) of ERISA, "in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts"). The cornerstone of the common-law duty of prudence is the requirement that a trustee use due care in investigating the investment in light of the purposes of the trust and the best interests of the beneficiaries. *See* Restatement (Second) of Trusts § 212 cmts. a-c (1959).

Consistent with this core common-law principle, the majority of the federal circuits have recognized that "the most basic of ERISA's investment fiduciary duties" is "the duty to conduct an independent investigation into the merits of a particular investment." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996). The test under § 404(a)(1)(B) of ERISA focuses on the "fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Id.* at 434; *see also, e.g.*, *DiFelice*, 497 F.3d at 418, 420; *Flanigan*, 242 F.3d at 86; *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994); *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 955-56 (D.C. Cir. 1985); *Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir. 1983); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).

DOL's regulations concerning the investment-selection duties of ERISA fiduciaries confirm ERISA's focus on the adequacy of the fiduciary's investigation. Under those regulations, fiduciaries satisfy their duty of prudence under § 404(a) if they conduct a reasonable investigation and give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment . . . plays in that portion of the plan's investment portfolio." 29 C.F.R. § 2550.404a-1(b)(1)(i).

The Seventh Circuit's singular focus on the result of Deere's investment decision – namely, the range of available mutual funds and fees – is at odds with these precedents because it "improperly focus[es] the breach of duty inquiry on results and ignore[s] the process by which a trustee made his decision." *Roth*, 16 F.3d at 918. Indeed, the crux of petitioners' claim was that Deere could readily have selected other investment vehicles – such as institutional mutual funds – with significantly lower fees, by taking advantage of the plans' large size. The three largest money managers, for example, charge an average fee of 0.08% to pension customers,[7] compared to the range of 0.07% to over 1% charged by Fidelity's retail mutual funds. In dismissing this fact as "beside the point," Pet. App. 19a, the Seventh Circuit fundamentally departed from the longstanding rule adopted by its sister circuits that a "[c]ourt must inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Flanigan*, 242 F.3d at 86 (internal quotations omitted).

B. The Seventh Circuit's Holding Is Also At Odds With DOL's Policy Judgment

The decision below is also inconsistent with the position consistently adopted by DOL, both in this case and in other ERISA litigation. In addition to challenging the Seventh Circuit's erroneous interpretation of § 404(c), the Secretary contended that petitioners' allegations stated a claim for fiduciary breach and supported reversal of the district court's decision. *See* DOL Initial Br. 23. Moreover, the Secretary argued in her brief on rehearing that petitioners' allegations – namely, that "fiduciaries failed to establish, implement and follow any procedures to prudently determine the reasonableness of the fees and, as a consequence, caused the multi-billion dollar

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[7] *See* Gretchen Morgenson, *Fair Game: He Doesn't Let Money Managers Off the Hook*, N.Y. Times (Apr. 11, 2009), *available at* http://www.nytimes.com/2009/04/12/business/12gret.html?_r=2.

Plans to pay excessive, retail-level fees" – were not only plausible but "factually supported by materials considered by the panel." DOL Rehearing Br. 3. DOL criticized the panel for dismissing petitioners' cognizable allegations "in large part on a mistaken impression that plaintiffs' claims hinge on the fiduciaries' failure 'to scour the market to find and offer the cheapest possible fund.'" *Id.* at 9-10.[8] DOL also criticized as similarly "mistaken" the Seventh Circuit's "conclusion that the fees were necessarily prudent because the Plans' array of investment funds were offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 10. The Secretary's submissions make clear that the decision below runs contrary to the settled views of DOL as the enforcement agency for Title I of ERISA.

The Secretary's position in this case is also consistent with her position in other similar ERISA litigation. In *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798 (8th Cir. argued Sept. 24, 2009), the plaintiffs made substantially the same allegations as petitioners here – that Wal-Mart imprudently chose 10 retail

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[8] Contrary to the Seventh Circuit's mischaracterization, petitioners did not allege that plan fiduciaries must always pick the cheapest fund; rather, they alleged that Deere failed to conduct a diligent and prudent investigation to determine whether the retail mutual funds that were selected charged unnecessarily high fees. As discussed herein, DOL has consistently viewed such allegations as stating a viable claim for fiduciary breach under § 404(a). *See also* BNA, *Fiduciary Responsibility: Labor Department Official Faults Court for Not Deferring to 404(c) Regulation*, Pension & Benefits Daily (Apr. 8, 2009) (statement of DOL official, Timothy Hauser, criticizing *Hecker* and stating that DOL's position is not that fiduciaries must get the "absolute cheapest product," but rather that they must "prudently consider[]" the trade-off between cost of the investment and the value received for that cost).

mutual funds with excessive fees because it failed to "conduct[] an adequate investigation of available fund options, fees and performance," and, moreover, "fail[ed] to use the Wal-Mart Plan's considerable bargaining power, given its massive size, to negotiate better fees for the Plan, . . . instead choosing off-the-shelf products with their relatively higher fees." Br. of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant 4, *Braden*, *supra* (filed Mar. 13, 2009) ("DOL *Braden* Br."), *available at* http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf. After the district court dismissed the complaint for failure to state a claim, the Secretary filed an *amicus* brief in support of the plaintiffs, in which she argued that the alleged "conduct, if true, would constitute a breach of fiduciary duty under ERISA and would make the responsible fiduciaries liable for any resulting losses." *Id.* at 10; *see id.* at 17-18.[9] Given the substantial similarity between the allegations in the two cases, the Secretary's position in *Braden* also supports reversal in this case.

In sum, the Secretary has taken the consistent position that petitioners' allegations of inadequate investigation and irresponsible refusal to use available bargaining power to obtain lower fees state a cognizable and plausible claim for breach of fiduciary duty under § 404(a) of ERISA, and would, if proven, entitle plaintiffs to recover any financial losses to the plans from the resulting excessive retail-level fees, despite § 404(c). That position represents "the agency's fair and considered judgment on the matter"

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[9] The Secretary's *amicus* brief in *Braden* attempted to distinguish the decision below as a litigation matter, but it did not abandon DOL's disagreement with that decision as a policy matter. *See* DOL *Braden* Br. 19-20 & n.7.

and thus warrants deference from this Court. *Auer*, 519 U.S. at 462 (deferring to DOL position taken in litigation); *Coke*, 551 U.S. at 171 (same). If the Court deems it appropriate to have the Government express its views on the questions presented, petitioners request that the Court call for the views of the Solicitor General. Petitioners believe, however, that DOL's past pronouncements make clear that the decision below conflicts with the agency's authoritative interpretation of § 404(a) and § 404(c) of ERISA.

III. THIS COURT'S REVIEW IS WARRANTED NOW BECAUSE THE QUESTIONS PRESENTED HAVE ENORMOUS RAMIFICATIONS FOR AMERICAN WORKERS' PENSION PLANS

This Court should grant review of the decision below because it erred on a question of critical importance to American workers regarding the scope of a pension plan fiduciary's obligation to select appropriate investments for the plan. The Seventh Circuit's decision is already being used as a blueprint for plan sponsors and administrators throughout the country to avoid ERISA's fiduciary protections against unnecessarily and imprudently high fees. As DOL predicted, these errant fiduciaries argue that, under the decision below, ERISA's fiduciary duties are met merely by including many retail mutual funds with a variety of fees.[10] Because of the tremendous negative impact of management fees on investment returns, the decision below threatens enormous dissipation of American employees' retirement assets. In the Seventh Circuit alone, the decision will eviscerate

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[10] *See, e.g.*, Defs.' Mem. in Support of Mot. To Dismiss the Am. Compl. 5, *Loomis v. Exelon Corp.*, No. 06 CV 4900 (N.D. Ill. filed Sept. 11, 2009).

fiduciary protections for millions of participants in plans worth hundreds of billions of dollars. This case presents an ideal vehicle for this Court to resolve these critical questions.

A. The Fiduciary Standard For Selection Of Investment Options Affects Millions Of American Employees Who Have Trillions Of Dollars Invested In ERISA-Governed Pension Plans

Whether a pension plan's fiduciary responsibilities include a duty to obtain lower fees by taking advantage of lower-priced investment options entails tremendous financial consequences for the tens of millions of American workers whose retirement assets are invested in pension plans governed by ERISA. As of the first quarter of 2009 (even after the stock market crash of October 2008), American workers had assets of nearly $2.3 trillion in 401(k) plans alone. *See U.S. Retirement Market* at 7. More than half of those 401(k) assets are in plans, such as Deere's, that have more than $500 million in assets and are thus far larger than needed feasibly to invest in institutional investment vehicles, such as institutional mutual funds, rather than higher-priced retail funds. *See* Investment Company Institute, Press Release, *A Number of Factors Impact Retirement Plan Fees, ICI-Deloitte Study Finds Plan Size, Contribution Rates, and Auto Enroll Associated with Lower Fees* (Apr. 14, 2009).

As this Court recognized in granting certiorari in *Jones v. Harris Associates L.P.*, 129 S. Ct. 1579 (2009) (No. 08-586), the issue of mutual fund fees has a tremendous effect on the American economy and American investors. Studies have shown that even a small reduction in fees for such large pension plans can significantly affect an individual's retirement savings over the life of the investment. For instance, one study estimates that the difference in the expense ratio of the typical institutional mutual fund and the typical retail mutual fund – 0.25% – can erode the value of a 401(k) by 6% over the average working life of an American employee. *See, e.g.*, Hewitt Associates, Press Release, *Companies Can Save Millions of Dollars by Suspending Their 401(k) Match for Just One Year, According to New Hewitt Analysis* (Apr. 13, 2009); *see also* Morgenson, *supra* note 7 (noting that pension funds pay an expense ratio of, on average, 0.08% compared to 0.61% for mutual fund shareholders); DOL, *A Look At 401(K) Plan Fees*, *available at* http://www.dol.gov/ebsa/publications/401k_employee.html (difference of 1% in fees would reduce plan assets by 28% over 35 years). Assuming a 0.25% differential, 401(k) plan participants whose assets are invested in retail mutual funds pay up to $1.2 billion annually in unnecessary fees that could be avoided if plan fiduciaries invested in lower-cost institutional investment options. *See* Investment Company Institute, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2008*, at 3, 9-10 (Aug. 2009), *available at* http://www.idc.org/pdf/fm-v18n6.pdf. A rule that allows pension plan fiduciaries to invest in a range of retail mutual funds without investigating these lower-priced institutional investment vehicles will inflict enormous financial losses on the pension plan assets of tens of millions of American workers. *See* DOL Rehearing Br. 2 (describing the decision's "far-reaching ramifications").

This Court's immediate review is also critical because the Seventh Circuit's decision effectively exempts a significant proportion of the nation's employees and retirement assets from ERISA's fiduciary duties of prudent investment selection. Forty-seven Fortune 500 companies are headquartered geographically in the Seventh Circuit. *See* http://money.cnn.com/magazines/fortune/fortune500/2008/full_list/. The pension funds for those companies alone hold more than $125 billion in assets. *See* http://www.brightscope.com/ratings. Many more American corporations conduct significant business in the Chicago area and are therefore amenable to jurisdiction and venue in the Seventh Circuit. The decision below thus directly affects millions of Americans and hundreds of billions of dollars in pension assets.

B. This Case Presents An Ideal Vehicle For Resolving The Important Questions Presented

The Court should not await further percolation of the questions presented in the lower courts. The proper standard for addressing a breach of fiduciary duty claim for imprudent investment selection under § 404(a) of ERISA has now been discussed in the courts of appeals for more than two decades. *See supra* pp. 23-24. Moreover, three circuits and DOL have considered whether § 404(c)'s safe harbor applies to claims of improper investment selection and have come to opposite conclusions. *See supra* pp. 14-16. The court below acknowledged its disagreement with DOL and the Fourth Circuit, *see* Pet. App. 26a, and the district courts are now also divided, *see supra* pp. 16-18. These issues are thus ripe for this Court's review. Declining to intervene will merely lead to further confusion and inconsistent results in the lower courts.

In addition, this case is an ideal vehicle for resolving the questions presented. The Seventh Circuit's dismissal of petitioners' claim under Rule 12(b)(6) creates no jurisdictional questions, and there is no threshold issue that this Court would have to resolve before reaching the questions presented, which raise clean issues of legal interpretation. Moreover, if the Seventh Circuit's holdings on the questions presented are reversed, there would be no alternative ground for affirming the district court's dismissal of petitioners' claim of fiduciary breach against Deere. Because the Seventh Circuit's dismissal of petitioners' claim rested on rulings of law on which the circuit courts and DOL disagree, the case presents an ideal vehicle for resolution of the questions presented.

IV. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE PETITION FOR *JONES V. HARRIS ASSOCIATES*

In *Jones v. Harris Associates L.P.*, No. 08-586, this Court granted certiorari to review a decision of a different panel of the Seventh Circuit, holding that, under § 36(b) of the Investment Company Act of 1940, a mutual fund shareholder's challenge to the excessiveness of the fees charged by the investment adviser to the fund could not withstand summary judgment unless the shareholder showed that the investment adviser actively misled the mutual fund's board of directors. Judge Easterbrook's decision for the panel concluded that § 36(b) should be construed narrowly to prevent only deception because the existence of a wide range of mutual funds is adequate "to put competitive pressure on advisory fees." *Jones v. Harris Assocs. L.P.*, 527 F.3d 627, 634 (7th Cir. 2008). Judge Posner's dissent from denial of rehearing *en banc*, joined by four other active judges, criticized that assumption as resting on "an economic analysis that is ripe for reexamination," especially given that "[m]utual funds are a component of the financial services industry, where abuses have been rampant." *Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 730 (7th Cir. 2008) (dissenting op.).

Both Judge Easterbrook and Judge Posner recognized in *Jones* that there are "substantial advisory fee level differences between equity pension fund portfolio managers and equity mutual fund portfolio managers." *Id.* at 731 (dissenting op.) (internal quotations omitted); *accord* 527 F.3d at 634 (panel op.). Judge Posner noted that "advisory fees in the pension field are subject to a marketplace where arm's-length bargaining occurs," but advisory fees for mutual funds are not. 537 F.3d at 731-32 (dissenting op.) (internal quotations omitted). Tellingly, the evidence in *Jones* showed that mutual funds were charged more than double what their investment advisers charged arm's-length institutional investors, like pension funds. To the extent this Court also recognizes these market realities, its decision will further support petitioners' claim that, in the pension fund marketplace, plan administrators normally seek lower fees through "arm's-length bargaining" and that Deere's failure to do so violated its fiduciary duties to the plans.

A hold for *Jones* is also appropriate because a reversal in that case will create a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (standard for GVR). The decision below rested on a critical premise – that selecting retail mutual funds was reasonable because mutual fund fees are "set against the backdrop of market competition" (Pet. App. 19a) – that is directly at issue in *Jones*. *See* Pet. Br. 41-44, *Jones*, No. 08-586; AARP & CFA *Amicus* Br. in Support of Petitioners 13-26, *Jones*, No. 08-586 (showing that market competition is ineffective to reduce retail mutual fund fees). If this Court agrees with Judge Posner that market forces are insufficient to hold mutual fund advisory fees to competitive levels, that conclusion necessarily will require reexamination of the *Hecker* court's ruling that Deere's selection of retail mutual funds satisfies ERISA's fiduciary duties because they were "set against the backdrop of market competition." Pet. App. 19a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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