No. 14-

IN THE
Supreme Court of the United States

RONALD TUSSEY, ET AL.,
Petitioners,

v.

ABB, INC., ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID C. FREDERICK
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

JEROME J. SCHLICHTER
Counsel of Record
MICHAEL A. WOLFF
SEAN E. SOYARS
SCHLICHTER, BOGARD & DENTON, LLP
100 S. Fourth Street
Suite 900
St. Louis, Missouri 63102
(314) 621-6115
(jschlichter@uselaws.com)

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QUESTION PRESENTED

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court addressed the standard under which a court should review a denial of benefits by an administrator of a retirement plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"). The Court held that "a denial of benefits . . . is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115. The Second and Third Circuits have held that *Firestone*'s exception to *de novo* review for discretionary benefits determinations does not apply when a court reviews an ERISA fiduciary's compliance with its statutory duties under 29 U.S.C. § 1104 to act prudently and with exclusive loyalty to plan participants. The Eighth Circuit's decision below—which vacated a district court judgment issued following a bench trial on the merits—directly conflicts with those decisions. The court of appeals held that the district court erred in finding breaches of the statutory duties of loyalty and prudence without deferring to the defendant fiduciaries' determinations under the plan.

The question presented is:

Whether a court should defer to fiduciaries of a retirement plan governed by ERISA when plan participants allege and prove that those fiduciaries breached their statutory duties of loyalty and prudence under 29 U.S.C. § 1104(a)(1)(A)-(B).

LIST OF PARTIES TO THE PROCEEDING

Petitioners Ronald C. Tussey, Charles E. Fisher, and Timothy Pinnell were plaintiffs in the district court and appellees in the court of appeals.

Respondents ABB, Inc., John W. Cutler, Jr., Pension Review Committee of ABB, Inc., Pension & Thrift Management Group of ABB, Inc., and Employee Benefits Committee of ABB, Inc. were defendants in the district court and appellants in the court of appeals.

Fidelity Management Trust Company and Fidelity Management & Research Company were defendants in the district court and appellants in the court of appeals, 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 reversing the district court's judgment against those defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

Petitioners Ronald C. Tussey, Charles E. Fisher, and Timothy Pinnell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

The Eighth Circuit in this case deepened an acknowledged conflict in the circuits regarding the standard for reviewing an ERISA fiduciary's compliance with its statutory duties of prudence and loyalty. There is a pending invitation to the Solicitor General to file a brief expressing the views of the United States in a case from the Ninth Circuit that also presents this issue. *See* Order, *Tibble v. Edison Int'l*, No. 13-550 (Mar. 24, 2014). Because the deference question in this case arises in a distinct (but related) context, the Court should grant both *Tibble* and this case and decide the cases together. At a minimum, this petition should be held for *Tibble*, because a vacatur or reversal of the Ninth Circuit's judgment in that case would necessitate granting, vacating, and remanding in this case.

This case arises in a critically important context. "Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). Seventy-three million American workers have nearly $4 trillion invested in 401(k) plans.[1] To protect the retirement income of those workers, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), imposes duties of prudence and loyalty on the fiduciaries who administer such plans and

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[1] *See* American Benefits Council, *401(k) Fast Facts* (updated Apr. 2014), http://www.americanbenefitscouncil.org/documents2013/401k_stats.pdf.

authorizes any plan participant to bring an action on behalf of the plan to enforce those statutory duties. This case presents a fundamental and recurring question of federal law concerning the proper standard for reviewing a plan fiduciary's compliance with its statutory duties of prudence and loyalty under ERISA: under an ordinary *de novo* standard, or under the deferential abuse-of-discretion standard developed to address discretionary benefits determinations.

The courts of appeals are divided over whether to defer to plan administrators in cases asserting breaches of ERISA's statutory fiduciary duties. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that an ERISA plan administrator's denial of benefits should be reviewed *de novo*, except when the employer has granted the administrator discretion to interpret the plan's terms in making benefits determinations. *See id.* at 115. The Second and Third Circuits have held that *Firestone*'s deferential standard of review for discretionary benefits determinations does not apply to claims that a fiduciary has breached its duties of prudence and loyalty to the plan. *See John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 369 (2d Cir. 1994); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir. 1999). Had the Eighth Circuit below followed those decisions, it would not have vacated the district court's judgment, which followed a bench trial on the merits. Instead, the Eighth Circuit (siding with the Ninth Circuit) erroneously held that the district court should have reviewed deferentially the defendant fiduciaries' determinations under the plan in carrying out their statutory fiduciary duties. App.

19a-20a; *see* App. 10a-14a & n.6 (acknowledging conflict with *John Blair*).

This case presents an even more dramatic and unwarranted extension of *Firestone* than *Tibble*. In *Tibble*, the Ninth Circuit applied *Firestone* to claims that a fiduciary breached its statutory fiduciary duty under 29 U.S.C. § 1104(a)(1)(D) to comply with plan documents. *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013), *petition for cert. pending*, No. 13-550 (filed Oct. 30, 2013). The Eighth Circuit has gone even further than the Ninth Circuit, extending *Firestone* deference beyond § 1104(a)(1)(D) to claimed violations of ERISA's fundamental statutory duties of loyalty and prudence under § 1104(a)(1)(A)-(B)—duties that are independent of, and cannot be limited by, the terms of a plan. Because this case presents the deference question in a distinct context, it would make a suitable companion to *Tibble*, and the Court should grant both cases and hear them together.

The decision below is incorrect. The Eighth Circuit disregarded the fundamental difference between individual benefits claims and plan-wide fiduciary-breach actions that rest on statutory violations. The court's erroneous reliance on benefits-claim policies and common-law principles is analogous to the approach this Court recently rejected in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The decision below severely undermines ERISA's strict statutory duties and the rigor with which Congress intended the federal courts to monitor the conduct of the fiduciaries trusted with safeguarding the retirement assets of tens of millions of American workers. In effect, the Eighth Circuit's rule permits a fiduciary to be the judge of his own assertedly disloyal and imprudent conduct.

This case is an ideal vehicle for resolving the question presented because it presents a pure issue of law based on a factual record determined after a bench trial—a record that the court of appeals did not disturb. Correcting the decision below will prevent unnecessary additional litigation in the district court under an erroneous legal standard and will clarify the proper standard of review for all present and future fiduciary-breach actions under ERISA.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-27a) is reported at 746 F.3d 327. The district court's order setting forth its post-trial Findings of Fact and Conclusions of Law (App. 28a-108a) is unreported (but is available at 2012 U.S. Dist. LEXIS 45240).

JURISDICTION

The court of appeals entered its judgment on March 19, 2014. The court of appeals denied petitioners' petition for rehearing on May 20, 2014. App. 109a-111a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*., are reproduced at App. 112a-114a.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted 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). ERISA protects the "financial soundness" of retirement plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b).

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." *Id.* § 1102(a)(1). The statute also provides that anyone who exercises authority or control over plan assets or who has or exercises any discretionary authority or control over the administration or management of a plan is an ERISA fiduciary. *Id.* § 1002(21)(A). ERISA fiduciaries are entrusted with protecting "'the continued well-being and security of millions of employees and their dependents [who] are directly affected'" by employee benefit plans. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 n.5 (1993) (quoting 29 U.S.C. § 1001(a)).

To effectuate its protective purposes, ERISA imposes "'strict standards'" of fiduciary conduct. *Dudenhoeffer*, 134 S. Ct. at 2465 (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)); *see John Hancock*, 510 U.S. at 96. Section 1104(a)(1) obligates

ERISA fiduciaries to act "solely in the interest of the participants and beneficiaries," and imposes four additional, related statutory duties. First, ERISA fiduciaries must act "for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A) (punctuation omitted); *see also id.* § 1103(c)(1). Second, those fiduciaries must act "with the care, skill, prudence, and diligence" that a prudent person would use under the circumstances. *Id.* § 1104(a)(1)(B). Third, they must diversify the plan's investments, unless "it is clearly prudent not to do so." *Id.* § 1104(a)(1)(C). Fourth, ERISA fiduciaries must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" the statute. *Id.* § 1104(a)(1)(D).

Those statutory fiduciary duties derive from the common law of trusts, *see Dudenhoeffer*, 134 S. Ct. at 2465, but ERISA is not a mere incorporation of common-law trust standards, *see Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Instead, Congress intended through ERISA to *enhance* the protection of plan participants and beneficiaries beyond what the common law provided. *See id.*

A fiduciary who breaches a duty under § 1104 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." 29 U.S.C. § 1109(a). Furthermore, the fiduciary is subject to such "equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Id.*

ERISA's civil enforcement provisions empower various parties to bring civil actions to enforce, and to obtain remedies for the violation of, various rights and duties under the Act. *See id.* § 1132(a). One of those provisions entitles plan participants to challenge benefit determinations under the plan. *See id.* § 1132(a)(1)(B). Another provision authorizes any participant or beneficiary of a plan to bring an action on behalf of the plan for the remedies provided for in § 1109(a), authority that is shared with the Secretary of Labor and the plan fiduciaries. *See id.* § 1132(a)(2). Such an action is not a personal action by the participant or beneficiary to secure damages for herself, but instead is a representative action on behalf of the plan to secure the plan's remedies under § 1109(a). *See Russell*, 473 U.S. at 142 n.9. Federal courts have exclusive jurisdiction over fiduciary-breach actions under § 1132(a)(2) and concurrent jurisdiction over benefits actions under § 1132(a)(1)(B). *See* 29 U.S.C. § 1132(e)(1).

B. Factual Background

Petitioners are participants in two ERISA-governed 401(k) plans that ABB Inc. maintains for its employees. App. 3a; *see* 29 U.S.C. § 1002(2)-(3), (34).[2] Petitioners represent a class of all current and former participants in and beneficiaries of the Plan. App. 3a. As of 2000, the Plan had more than 14,000 participants and $1.4 billion in assets. App. 4a. Respondents (collectively referred to as "ABB") are fiduciaries of the Plan responsible for the investments that were included in the Plan. App. 3a n.2;

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[2] The plans are identical except that one included salaried employees and the other included union-represented employees. App. 29a n.1. That difference is irrelevant to this petition. Petitioners refer to both plans as "the Plan."

see 29 U.S.C. §§ 1002(21)(A), 1102(a), 1103(c)(1), 1104(a)(1)(A).

ABB hired Fidelity Management Trust Company to provide recordkeeping and trustee services for the Plan. App. 3a-4a n.3. Fidelity was paid primarily through revenue sharing—it received a percentage of the annual expenses deducted from certain mutual funds respondents included in the Plan, including Fidelity mutual funds.[3] App. 4a-5a, 30a-31a. Revenue sharing came from asset-based fees: as the Plan's mutual fund assets increased over time, Fidelity's revenue sharing fees grew even though Fidelity provided no additional recordkeeping services to the plan. App. 30a-31a. Fidelity's recordkeeping arrangement with the Plan was very profitable. App. 86a. After becoming recordkeeper, Fidelity began to provide various corporate services to ABB Inc. It agreed to provide those corporate services at a loss because of the substantial profit it was earning as recordkeeper of the Plan. App. 31a-32a. Thus, the high mutual fund expenses and revenue sharing from the Plan subsidized the corporate services that ABB Inc. received from Fidelity. App. 32a.

ABB Inc. sought to enhance the subsidization of the corporate services that it received from Fidelity. ABB chose investment options for the Plan not based on their merits or the benefits they provided to participants, but because of the higher revenue sharing they provided to Fidelity. App. 80a-81a. In one particular instance, ABB removed from the Plan the Vanguard Wellington Fund—a low-cost option

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[3] Various Fidelity entities provided different Plan and mutual funds services. *See* App. 30a-31a. The distinction among these entities is irrelevant to this petition. Petitioners refer to the various entities collectively as "Fidelity."

with a stellar performance history—and replaced it with Fidelity's Freedom Funds, because the Freedom Funds paid Fidelity more in revenue sharing. App. 60a-68a. ABB then transferred all participant investments in the Wellington Fund ($120 million) over to the Freedom Funds in a process called "mapping." App. 60a, 67a. Participants who did not choose a fund in which to invest their subsequent contributions were automatically invested in Fidelity's Freedom Funds. App. 67a. As a result of that mapping decision (referred to in this litigation as the "Wellington mapping claim," *see* App. 60a-79a), the Plan lost a total of $21.8 million due to the higher fees and the poorer performance of the Freedom Funds relative to Wellington. App. 102a.

C. Proceedings Below

1. District court proceedings

On December 29, 2006, petitioners commenced a civil action in the United States District Court for the Western District of Missouri to pursue remedies for the plan under 29 U.S.C. § 1132(a)(2). Compl. for Breach of Fiduciary Duty, *Tussey v. ABB, Inc.*, No. 2:06-cv-4305, Doc. 1 (W.D. Mo. filed Dec. 29, 2006). The district court certified a class action on behalf of all participants in the Plan under Federal Rule of Civil Procedure 23(b)(1)(A) and (B). Mem. and Order, *Tussey v. ABB, Inc.*, No. 2:06-cv-4305, Doc. 183 (W.D. Mo. Dec. 3, 2007); *see* App. 8a.

On March 31, 2012, following a four-week bench trial, the district court entered an order finding that ABB breached its fiduciary duties under ERISA in various respects, including by removing the Vanguard Wellington Fund from the Plan and replacing it with Fidelity's Freedom Funds. App. 107a-108a. The court entered extensive findings of fact and conclusions of law. App. 43a-98a.

The court found that ABB breached its duty of loyalty because it removed Wellington not due to any failure on its merits or a desire to add another fund to the Plan, but because the Freedom Funds generated more revenue sharing for Fidelity, which reduced administrative expenses that ABB Inc. would have had to pay and rendered Plan administrative expenses opaque to participants. App. 64a-68a. The court determined that ABB breached its duty of prudence because its decision to remove Wellington was unsupported by "research and analysis" or even a "modicum of inquiry." App. 73a. Its decision to add the Freedom Funds lacked "sufficient analysis supporting that decision" and was based on "scant" research, a "cursory" review, and a "superficial and minimal" consideration of other options. App. 65a-66a, 67a-68a, 70a. The court found ABB's *post hoc* explanation for the mapping decision to be not credible and unsupported by the evidence. App. 67a-68a.[4]

2. Eighth Circuit decision

The court of appeals vacated the district court's judgment as to the Wellington mapping claim. App. 18a-20a. Relying on this Court's decisions in *Firestone* and *Conkright v. Frommert*, 559 U.S. 506 (2010), the Eighth Circuit held that ABB was entitled to a deferential abuse-of-discretion standard of review because the plan granted ABB "sole and absolute discretion to determine eligibility for, and the amount of, benefits under the Plan and to take

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[4] In addition to the Wellington mapping claim, the district court also found that respondents breached their fiduciary duties "by failing to monitor and control recordkeeping fees," for which it ordered ABB to pay $13.4 million in Plan losses. App. 43a, 48a-50a, 100a-102a. The Eighth Circuit affirmed that part of the judgment, and it is not at issue in this petition. App. 14a-18a.

any other actions with respect to questions arising in connection with the Plan, including . . . the construction and interpretation of the terms of the Plan." App. 10a (internal quotations omitted; alteration in original). The court reasoned that deference was warranted by "the application of trust principles to the exercise of fiduciary discretion under ERISA's provisions." App. 12a (citing *Firestone*, 489 U.S. at 111). The court found the policy reasons expressed in *Conkright* for deferring to benefits determinations to be equally applicable in fiduciary-breach actions. *Id.* (citing *Conkright*, 559 U.S. at 517). The court believed it was following "most circuits" in refusing to limit *Firestone* deference to benefits claims, although it acknowledged a conflict with the Second Circuit's decision in *John Blair*. App. 13a & n.6.

Specifically as to the Wellington mapping claim, the Eighth Circuit held that ABB "deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time" and that it was "not manifest the district court afforded any deference to the ABB Plan administrator's determinations under the Plan documents." App. 20a.[5] The court ordered the district court on remand to apply "the required deferential standard of review in evaluating whether the ABB fiduciaries, at the time they made their investment decisions, breached their fiduciary duties in implementing the redesign and evaluating and selecting Plan investment options in accordance with the Plan." *Id.*

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[5] The court of appeals also opined that the district court's decision was influenced by hindsight because it had referred to Wellington's post-mapping outperformance. App. 19a-20a. The court did not find any of the district court's factual findings to be in error.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE STANDARD FOR REVIEWING A FIDUCIARY'S COMPLIANCE WITH ERISA'S DUTIES OF LOYALTY AND PRUDENCE

A. Petitioners Would Have Prevailed Under The Standard Applied In The Second And Third Circuits

The Second and Third Circuits have rejected efforts to extend *Firestone* deference to § 1132(a)(2) actions, which seek to remedy a fiduciary's breach of its statutory duties to the plan. *See John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 369 (2d Cir. 1994); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir. 1999).

John Blair involved a corporate transaction in which one ERISA plan was split in two. The plan administrator was accused of favoring participants in one of the successor plans over participants in the other successor plan by, among other things, allocating to the favored plan all of the surplus income earned during a delay in transferring assets. The district court, citing *Firestone*, concluded that the administrator's conduct was "reasonable . . . and thus should not be disturbed by a reviewing court." 816 F. Supp. 949, 957 (S.D.N.Y. 1993). Defending the district court's judgment on appeal, the administrator contended that *Firestone* applied and that, because the plan gave the administrator "discretion to interpret the provisions of the plan, . . . its decision to allocate the Equity Fund surplus . . . must be upheld unless arbitrary and capricious." 26 F.3d at 369.

The Second Circuit "reject[ed]" the argument "that *Firestone*'s arbitrary and capricious standard" applied

to the fiduciary conduct at issue there because the case "d[id] not involve a simple denial of benefits." *Id.* (citing *Struble v. New Jersey Brewery Emps.' Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984)). The court explained that applying *Firestone* deference to § 1132(a)(2) actions would be incompatible with ERISA's strict statutory fiduciary duties. Deferring to plan fiduciaries in such cases

> would allow plan administrators to grant themselves broad discretion over all matters concerning plan administration, thereby eviscerating ERISA's statutory command that fiduciary decisions be held to a strict standard.

Id. Unlike actions challenging benefits determinations under § 1132(a)(1)(B), actions under § 1132(a)(2) seek to enforce a statutorily defined fiduciary standard of conduct that is 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*, 134 S. Ct. 2459, 2465 (2014) ("Section 1104(a)(1) imposes 'strict standards of trustee conduct'") (quoting *Central States, Se. & Sw. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)). Granting deference to a fiduciary's interpretation of its own duties improperly dilutes that strict standard. *See John Blair*, 26 F.3d at 369.

The Third Circuit reached the same conclusion in *Unisys*. The court of appeals there held that the district court had erred in applying "an arbitrary and capricious standard" in reviewing whether the plan administrator acted prudently in making certain investments. 173 F.3d at 154-55. The Third Circuit explained that its pre-*Firestone* decision in *Struble* (a case on which the Second Circuit relied in *John Blair*) "held specifically that the duties of loyalty and

prudence demanded by ERISA should not be reviewed through an 'arbitrary and capricious' lens." *Id.* at 154. The court concluded that *Struble* continues to "govern[] the question of [an administrator's] duty of prudence under ERISA." *Id.* *Firestone* did not warrant a contrary approach, the court explained, because *Firestone*'s exception to *de novo* review concerned "a denial of benefits," not "the prudence of investment decisions." *Id.*[6]

In *Struble*, the Third Circuit had elaborated on the reasons why discretionary review applicable to benefits determinations is incompatible with ERISA's fiduciary duties:

> The use of different fiduciary standards in these cases is justified by the different challenge to fiduciary loyalty that each type of action presents. In actions by individual claimants challenging the trustees' denial of benefits, the issue is not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants. . . . In such circumstances it is appropriate to apply the more deferential "arbitrary and capricious" standard to the trustees' decisions. In the latter type of action, the gravamen of the plaintiff's complaint is not that

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[6] Although the Third Circuit in *Unisys* concluded that the district court's error in applying a discretionary standard of review was "harmless," a subsequent panel of that court would nonetheless be bound to follow *Struble*'s holding that discretionary review does not apply to loyalty and prudence claims—a holding that *Unisys* confirmed continues to "govern[]" after *Firestone*. 173 F.3d at 154-55.

> the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries.

Struble, 732 F.2d at 333-34.[7]

B. The Eighth And Ninth Circuits Are Now Aligned Against The Second And Third Circuits

The Ninth Circuit in *Tibble* was the first court of appeals to apply *Firestone* deference to fiduciary-breach actions in which the fiduciary is accused of benefiting outside parties over the interest of participants.[8] Initially, the Ninth Circuit held that *Firestone* applied to ERISA actions "globally." 711 F.3d

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[7] Ignoring *Unisys* and *Struble*, the court below claimed support from the Third Circuit's pre-*Unisys* decision in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). In *Moench*, the Third Circuit indicated that discretionary review ought to apply when an administrator balances the competing interests of participants in an employee stock ownership plans or ESOP. *See id.* at 563-65 (distinguishing *Struble* because the *Moench* plaintiff did not contend that the fiduciary's conduct "favored non-beneficiaries at the necessary expense of beneficiaries"); *see also Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (cited below at App. 13a n.6). In *Unisys*, the Third Circuit refused to expand *Moench* beyond the ESOP context. *See Unisys*, 173 F.3d at 155. After the decision below was issued, this Court overruled *Moench*'s holding that a presumption of prudence applies to an ESOP fiduciary's investments in employer stock. *See Dudenhoeffer*, 134 S. Ct. at 2466-71. To the extent *Moench*'s analysis of standards of review in the ESOP context has any continuing validity after *Dudenhoeffer*, it does not support the Eighth Circuit's decision here.

[8] The Eighth Circuit also believed its decision was supported by the Sixth Circuit's decision in *Hunter v. Caliber System, Inc.*, 220 F.3d 702 (6th Cir. 2000), but that case "was brought under § 1132(a)(1)(B)" and was "about benefits." *Id.* at 710-11.

1061, 1077 (9th Cir. 2013). After receiving the plan participants' rehearing petition, the *Tibble* panel amended its opinion to limit its extension of *Firestone* "to issues of plan interpretation that *do not* implicate ERISA's statutory duties." 729 F.3d 1110, 1115-16 (9th Cir. 2013) (emphasis added). The claimed fiduciary breach in *Tibble* was the failure to follow the terms of the plan, a breach under § 1104(a)(1)(D) separate from a breach of the statutory duties of loyalty and prudence in § 1104(a)(1)(A) and (B). *Id.* at 1129. Because reliance on the terms of the plan was not asserted as a defense to claims of fiduciary breach beyond § 1104(a)(1)(D), *Tibble* found deference to the fiduciary's interpretation of plan terms to be appropriate and not in conflict with the Second and Third Circuits. *Id.*[9]

The Eighth Circuit's decision in this case extends even further than the Ninth Circuit's decision in *Tibble*. Here, petitioners did not contend only that their fiduciaries failed to follow the terms of the Plan in violation of § 1104(a)(1)(D). Instead, they proved facts at a bench trial—undisturbed on appeal—showing that the defendant fiduciaries breached their separate statutory duties of loyalty and prudence under § 1104(a)(1)(A) and (B). In its amended opinion, the Ninth Circuit in *Tibble* disclaimed any holding that *Firestone* deference extends to claims, such as petitioners', that "implicate ERISA's statutory duties." *Id.* Thus, the Eighth Circuit went beyond *Tibble* and applied *Firestone* deference to a

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[9] The plan participants in *Tibble* have filed a petition for a writ of certiorari (No. 13-550), and the Court has requested the views of the Solicitor General in that case. The petition in No. 13-550 explains in greater detail why the Ninth Circuit's analysis conflicts with the Second and Third Circuits' decisions and is erroneous.

fiduciary's claim that its interpretation of the plan is a defense to claimed breaches of § 1104(a)(1)(A) and (B).[10] By doing so, the Eighth Circuit suggested that a plan document can excuse trustees from their statutory duties. *But see Dudenhoeffer*, 134 S. Ct. at 2469 ("[B]y contrast to the rule at common law, 'trust documents cannot excuse trustees from their duties under ERISA.'") (quoting *Central States*, 472 U.S. at 568, and citing 29 U.S.C. §§ 1104(a)(1)(D), 1110(a)).

This case would have come out differently in the Second and Third Circuits. Indeed, the Eighth Circuit expressly acknowledged the conflict between its decision and the Second Circuit's decision in *John Blair*. App. 13a n.6. In the Second and Third Circuits, *Firestone* deference would not have been applied in reviewing ABB's actions with respect to the Wellington mapping claim. The district court found that ABB sacrificed the interest of participants in investing their retirement savings in the well-performing (and lower cost) Wellington fund by: removing it from the Plan altogether and mapping participants' investments into the Fidelity Freedom Funds, with poorer performance and higher fees, all for the sake of generating more revenue sharing for Fidelity; removing recordkeeping expenses from ABB Inc.'s books; disguising from participants the cost of administering the Plan; and furthering ABB Inc.'s

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[10] Some defendants might even misconstrue the Eighth Circuit's decision to support an argument that *Firestone* deference applies to *all* fiduciary actions, regardless of whether interpretation of ambiguous plan terms is at issue. *Cf.* App. 20a ("The Plan administrator deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time."). The possibility of such an unwarranted expansion of *Firestone* deference magnifies the importance of this Court's review.

corporate relationship with Fidelity at the expense of Plan participants.

In sum, the judgment below is an even more extreme extension of *Firestone* deference than *Tibble* and is in direct conflict with the Second and Third Circuits. As explained below, it is also wholly unsupported by the text and principles underlying ERISA's statutory fiduciary duties.

II. THE EIGHTH CIRCUIT ERRED

A. Fundamental Differences Between Benefits Claims And Fiduciary-Breach Actions Render *Firestone* Deference Inappropriate For Fiduciary-Breach Actions

In *Firestone*, this Court overruled a number of circuit court decisions that had applied in ERISA cases the deferential arbitrary-and-capricious standard of review that had developed under the Labor Management Relations Act, 1947 (specifically 29 U.S.C. § 186(c)). 489 U.S. at 109-10. The Court held "that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." *Id.* at 109. Instead, the Court held, consistent with trust law principles, that the standard of review is *de novo*, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115.

The Court expressly limited its analysis to actions challenging the denial of plan benefits under 29 U.S.C. § 1132(a)(1)(B):

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to

> the appropriate standard of review for actions under other remedial provisions of ERISA.

Id. at 108. The Court twice has revisited *Firestone*, but has never extended it to fiduciary-breach actions under § 1132(a)(2). *See Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (applying *Firestone* to benefits determinations made by plan administrator that also paid benefits and thus had an interest in denying them); *Conkright v. Frommert*, 559 U.S. 506 (2010) (applying *Firestone* to plan administrator's second attempt to interpret plan in calculating benefits, after court had rejected first interpretation).

As the Second and Third Circuits correctly recognize, there are significant differences between a personal claim for benefits under § 1132(a)(1)(B) and a § 1132(a)(2) fiduciary-breach claim. ERISA treats the former much more deferentially than the latter. Thus, while a deferential standard may apply in certain circumstances to the former, it does not apply to the latter.

Multiple features of ERISA's text reflect the significant procedural and substantive differences between benefits claims and fiduciary-breach claims. Procedurally, ERISA grants state courts concurrent jurisdiction over benefits claims, but confers exclusive jurisdiction to the federal courts over fiduciary-breach claims. *See* 29 U.S.C. § 1132(e)(1). ERISA provides no limitations period for benefits claims (leaving courts free to borrow potentially shorter limitations periods under state law), but provides a special six-year federal limitations provision for fiduciary-breach claims. *Compare Ruppert v. Alliant Energy Cash Balance Pension Plan*, 726 F.3d 936, 941 (7th Cir. 2013), *with* 29 U.S.C. § 1113. Benefits claims are inherently administrative proceedings,

requiring exhaustion of all administrative remedies provided in the plan as a condition precedent to judicial review of a denial of benefits. *See Angevine v. Anheuser-Busch Cos. Pension Plan*, 646 F.3d 1034, 1037 (8th Cir. 2011). The better view is that fiduciary-breach cases have no such condition precedent and are not administrative in nature. *See*, *e.g.*, *Smith v. Sydnor*, 184 F.3d 356, 364-65 (4th Cir. 1999); *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1416 n.1 (9th Cir. 1991), *abrogation on other grounds recognized by Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666 (9th Cir. 2011).[11]

Substantively, benefits claims are individual claims for individual benefits. *See* 29 U.S.C. § 1132(a)(1)(B); *Struble*, 732 F.2d at 333-34. Fiduciary-breach claims are representative claims on behalf of *all* plan participants seeking to enforce duties owed to the *plan*, and to secure *plan* remedies. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). ERISA provides only minimal standards regarding the grant or denial of benefits. *See* 29 U.S.C. § 1133. The statute, however, imposes strict standards that govern the fiduciary's discharge of her duties. *See id.* § 1104(a)(1); *Dudenhoeffer*, 134 S. Ct. at 2465.

Moreover, those statutory fiduciary standards are "*judicially enforceable* standards." *Russell*, 473 U.S. at 140 n.8 (internal quotations omitted; emphasis added). Giving fiduciaries deference in judicial review of the discharge of their duties to the plan is incompatible with ERISA's imposition of duties that are strict and the highest known to the law. *See*

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[11] *Cf. Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (applying exhaustion requirement to fiduciary-breach claim).

Bierwirth, 680 F.2d at 272 n.8. Judicial review of fiduciary conduct has a long-standing history in equity jurisprudence, and that review generally is *de novo*. *See Firestone*, 489 U.S. at 112-13.

The Eighth Circuit ignored those important differences between actions under § 1132(a)(1)(B) and actions under § 1132(a)(2) in erroneously applying *Firestone* deference to fiduciary-breach claims.

B. *Conkright*'s Policy Considerations For Applying *Firestone* Deference To Benefits-Claim Appeals Do Not Apply To Fiduciary-Breach Actions

The Eighth Circuit opined that the policy considerations cited in *Conkright* in support of *Firestone* deference for benefits claims apply equally to fiduciary-breach actions. App. 12a (citing *Conkright*, 559 U.S. at 517). It relied on *Conkright*'s conclusion that applying *Firestone* deference to individual benefits claims was appropriate to protect the "'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'" *Id.* (quoting *Conkright*, 559 U.S. at 517). The court also opined that applying *Firestone* deference to fiduciary-breach actions

> (1) encourages employers to offer ERISA plans by controlling administrative costs and litigation expenses; (2) creates administrative efficiency; (3) "promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review"; and (4) "serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan."

Id. (quoting *Conkright*, 559 U.S. at 517).

The Eighth Circuit erred in applying those considerations to fiduciary-breach actions. Fiduciary-breach actions under § 1132(a)(2) are not *individual* actions; they are representative actions on behalf of *the plan* to secure *the plan's* rights and remedies. *See Russell*, 473 U.S. at 142 n.9. Therefore, fiduciary-breach actions do not concern enforcement of individual participants' "rights under [the] plan." App. 12a (internal quotations omitted).[12]

In addition, because § 1132(a)(2) actions are representative actions on behalf of the plan, they do not present the risks of administrative inefficiency and conflicting benefits decisions that were the focus of concern in *Conkright*. Judicial review of fiduciary-breach actions is not inherently an administrative proceeding, requiring exhaustion of administrative remedies as a condition precedent to judicial review, as are § 1132(a)(1)(B) actions. Thus, giving deference in fiduciary-breach actions would not make administrative proceedings more efficient. Moreover, ERISA's grant of exclusive federal jurisdiction over fiduciary-breach actions, subject to a uniform, federal limitations statute and explicit federal statutory standards of conduct, further ensures uniformity of decisions and evidences congressional intent for greater judicial involvement in review of fiduciary-breach actions than in review of individual benefit claims. *See supra* pp. 18-21. The district court's finding that the fiduciaries breached their duties in removing the Wellington fund and mapping participants into the

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[12] As explained below, *Conkright*'s policy consideration relating to encouraging the creation of ERISA plans by reducing litigation expenses provides no legitimate basis for truncating judicial review of fiduciary-breach claims, as this Court confirmed in *Dudenhoeffer*.

Fidelity Freedom Funds applies to the Plan as a whole and concerns all participants; given the nature of a certified class action, there can be no conflicting decisions by different courts.[13]

In short, none of the *Conkright* factors relied on by the Eighth Circuit properly applies to fiduciary-breach actions such as this one.

C. This Court In *Dudenhoeffer* Rejected The Sort Of Judicial Revision Of ERISA Exemplified By The Eighth Circuit's Decision

The Eighth Circuit's resort to *Firestone* deference as a means to reduce litigation is analogous to the judicial policy choice that this Court disavowed in *Dudenhoeffer*. There, the Court rejected the presumption of prudence that had been adopted by most circuit courts for ESOP claims. *Dudenhoeffer*, 134 S. Ct. 2470. The Court held that, notwithstanding the balancing considerations expressed in *Conkright*, judicially created rules are not the appropriate means to address perceived "meritless, economically burdensome lawsuits." *Id.* The same reasoning governs here. Applying *Firestone* deference to fiduciary-breach actions is inappropriate because it "does not readily divide the plausible sheep from the meritless goats," a task that is "better accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* Given the district court's factual

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[13] This uniformity of decision and avoidance of conflicts is further ensured by certification of fiduciary-breach actions as class actions under Federal Rule of Civil Procedure 23(b)(1). *See, e.g.*, *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (§ 1132(a)(2) actions are "paradigmatic" Rule 23(b)(1) class actions); Mem. and Order, *Tussey v. ABB, Inc.*, No. 2:06-cv-4305, Doc. 183 (W.D. Mo. Dec. 3, 2007).

findings and conclusions of law, application of deference to the plan administrator is especially inappropriate in this case.

Moreover, the Eighth Circuit's reliance upon the common law of trusts to create its "defense-friendly" (*Dudenhoeffer*, 134 S. Ct. at 2470) judicial gloss ignores the fact that ERISA was enacted to provide participants *more* protection than the common law of trusts. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). In *Dudenhoeffer*, the Court similarly rejected lower courts' resort to trust law in crafting a "presumption of prudence" for ESOP fiduciary-breach actions. *See* 134 S. Ct. at 2469.

III. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE AND IN *TIBBLE*

Both this case and the second question presented in *Tibble*—in which this Court recently called for the views of the Solicitor General—present the same basic question whether *Firestone* deference applies to breach-of-fiduciary-duty claims under ERISA. This Court's review is urgently needed to resolve the division of authority in the courts of appeals on that important and recurring question of federal statutory interpretation. The "defense-friendly" (*Dudenhoeffer*, 134 S. Ct. at 2470) judicial amendment to ERISA's statutory enforcement scheme created by the Eighth and Ninth Circuits threatens significantly to limit the ability of ERISA plan participants (and the Secretary of Labor) to enforce compliance with ERISA's fiduciary duties. Already, fiduciary defendants are contending that *Firestone* deference applies not only to the interpretation of plan documents, but also

to *all* fiduciary decisions.[14] This case and *Tibble* present ideal vehicles for the Court to resolve the conflict in the courts of appeals regarding the scope of *Firestone* deference and to restore the ability of ERISA plan participants to obtain meaningful judicial review of fiduciaries' compliance with the duties Congress imposed on them.

Rather than holding this case pending *Tibble*, the Court should grant both cases and consider them together, because the two cases present the deference question in distinct contexts. The Ninth Circuit's decision in *Tibble* (as amended on rehearing) pertains only to claims that a fiduciary breached its statutory obligation under § 1104(a)(1)(D) to comply with the plan. This case, by contrast, extends deference to claimed violations of ERISA's independent statutory duties of prudence and loyalty under § 1104(a)(1)(A)-(B). Accordingly, the Court should grant the petitions in both this case and *Tibble*, so that it can consider the applicability of *Firestone* to fiduciary-breach claims based on violations of a plan and on violations of statutory duties.

Alternatively, if the Court decides to grant review in *Tibble* but not in this case, this petition should be held pending *Tibble* and disposed of as appropriate in

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[14] *See*, *e.g.*, Defs.' Mem. in Supp. of Mot. for Summ. J. at 8-9, *Spano v. Boeing Co.*, No. 06-743-DRH, Doc. 406 (S.D. Ill. filed Jan. 8, 2014) (arguing that investment decisions should be reviewed only for abuse of discretion); Defs.' Resp. to Pls.' Notice of Suppl. Authority, *Spano v. Boeing Co.*, No. 06-743-DRH, Doc. 424 (S.D. Ill. filed Apr. 17, 2014) (citing decision below as supplemental authority for deferential standard); Defs.' Mem. of Law in Supp. of Their Mot. To Dismiss at 9, *Kruger v. Novant Health, Inc.*, No. 1:14-cv-208, Doc. 20 (M.D.N.C. filed May 20, 2014) (citing decision below to argue that all fiduciary decisions are entitled to deference).

light of the Court's decision in that case. Reversal or vacatur of the Ninth Circuit's adoption of *Firestone* deference would necessitate vacatur of the decision below. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (vacatur and remand appropriate when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"). Thus, if the Court does not grant plenary review in this case, it should hold the petition pending *Tibble*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID C. FREDERICK
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

JEROME J. SCHLICHTER
Counsel of Record
MICHAEL A. WOLFF
SEAN E. SOYARS
SCHLICHTER, BOGARD & DENTON, LLP
100 S. Fourth Street
Suite 900
St. Louis, Missouri 63102
(314) 621-6115
(jschlichter@uselaws.com)

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