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No. 13-550

IN THE
Supreme Court of the United States

GLENN TIBBLE, ET AL.,
Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institutional-class mutual funds were available, is barred by 29 U.S.C. § 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr. were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Respondents Edison International, The Edison International Benefits Committee f/k/a The Southern California Edison Benefits Committee, Edison International Trust Investment Committee, Secretary of the Edison International Benefits Committee, Southern California Edison's Vice President of Human Resources, and Manager of Southern California Edison's HR Service Center were defendants in the district court and appellees/cross-appellants in the court of appeals.

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INTRODUCTION

This case concerns the timeliness of breach-of-fiduciary-duty claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"). Petitioners brought this suit in 2007 alleging that, between 2001 and 2007, respondent fiduciaries of the Edison 401(k) retirement plan breached their duty to provide prudent investments for plan participants by offering "retail-class shares" of six mutual funds as investment options, despite the availability of "institutional-class shares" of those same funds. The retail-class shares were identical to the institutional-class shares in every way, save that the retail-class shares charged significantly higher fees, thus reducing the retirement assets of plan participants. Throughout that six-year period, despite conducting quarterly reviews of plan investments, respondents failed to consider the less-expensive institutional-class shares, and they continued to provide the costlier retail-class shares for years without justification. When petitioners filed suit in 2007, the plan still offered retail-class shares of five of the six mutual funds.

Of the six funds at issue, three were added to the Edison plan in 1999 and three were added in 2002. Both the district court and the Ninth Circuit concluded that respondents breached their duty of prudence under ERISA by offering the retail-class shares instead of the institutional-class shares as to the three funds added in 2002. The district court concluded, following a bench trial, that respondents "ha[d] not offered any credible explanation" for offering retail-class shares that "cost the Plan participants wholly unnecessary fees." App. 130, 142. The Ninth Circuit affirmed that judgment, and respondents did not cross-petition to challenge that ruling.

Although the pertinent facts underlying the claimed breaches of fiduciary duty were the same for the funds added in 1999, the Ninth Circuit affirmed the district court's judgment that petitioners' claims for breach as to those three funds were untimely under the six-year limitations provision of 29 U.S.C. § 1113(1). Section 1113(1) requires claims to be filed within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). The Ninth Circuit's ruling was erroneous and should be reversed.

Petitioners' claims are timely because they derive not from the imprudent *addition* of the retail-class shares outside the limitations period but from the imprudent *management* of the plan during the limitations period. ERISA's fiduciary duty of prudence, derived from the common law of trusts, requires plan fiduciaries to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time. When an ERISA fiduciary fails to fulfill that obligation, it breaches its duty of prudence under the Act. Each such breach gives rise to a new claim, actionable for six years under § 1113(1). The statute's text – which starts the limitations clock on the date of the "last action which constituted a part of the breach or violation" or the "latest date on which the fiduciary could have cured the breach or violation" – could hardly be clearer on that point.

That interpretation of § 1113(1) serves ERISA's statutory purposes. The Ninth Circuit's rule immunizes fiduciaries from ERISA liability – and deprives plan participants of any relief – for their failure to

manage plan assets prudently, once the initial plan investment selection is more than six years old. Given the average length of time to retirement for the typical ERISA-covered worker and the addition of new participants to a plan each year, Congress could not have intended to leave participants powerless to remedy imprudent investments that had been in place for more than six years. The court of appeals' concern that permitting such suits would resuscitate stale claims has no merit, because such claims will turn on whether the investments and the fiduciaries' conduct were imprudent during the limitations period, as they were conclusively so proved here.

OPINIONS BELOW

The court of appeals' amended opinion (App. 1-64) is reported at 729 F.3d 1110. The original opinion is reported at 711 F.3d 1061. The district court's post-trial Findings of Fact and Conclusions of Law (App. 65-165) is unreported (but is available at 2010 U.S. Dist. LEXIS 69119). The district court's order granting summary judgment in part (App. 166-268) is reported at 639 F. Supp. 2d 1074.

JURISDICTION

The court of appeals issued its opinion and judgment on March 21, 2013. 711 F.3d 1061. The court of appeals issued an amended opinion and denied a petition for rehearing on August 1, 2013. App. 12. A petition for a writ of certiorari was filed on October 30, 2013, and granted on October 2, 2014, limited to the first question presented as formulated by the Court (JA241). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of ERISA are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

ERISA regulates persons acting as fiduciaries of employee retirement plans. Congress enacted ERISA to protect "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

ERISA imposes duties of loyalty and prudence on plan fiduciaries. *See id.* § 1104(a)(1); *Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996). Plan fiduciaries must act loyally, that is, "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). They also must act prudently, that is, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B); *see Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2463, 2467 (2014) (ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets" and "'imposes a "prudent person" standard by which to measure fiduciaries' investment decisions'") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985)).

ERISA requires a plan fiduciary to make good any losses to the plan caused by that fiduciary's breach of statutory duties. *See* 29 U.S.C. § 1109(a). The Act also authorizes plan participants to sue on behalf of the plan to recover the relief provided for in § 1109(a). *See id.* § 1132(a)(2); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008).

ERISA contains a limitations provision governing breach-of-fiduciary-duty claims, which provides in full as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

B. Background Of The Parties' Dispute

1. Petitioners are participants in an ERISA plan for current and former employees of the subsidiaries of respondent Edison International. App. 13. The plan is a defined-contribution plan, meaning that participants' retirement benefits are limited to the value of their own individual investment accounts,

which is determined by employee and employer contributions plus market performance, minus expenses. *Id.*; *see* 29 U.S.C. § 1002(34); *LaRue*, 552 U.S. at 250 n.1, 255; *id.* at 262 (Thomas, J., concurring in the judgment). Expenses can significantly reduce the value of an account in a defined-contribution plan.[1]

Many participants in defined-contribution plans invest some or all of their contributions in mutual funds,[2] which are "pool[s] of assets, consisting primarily of portfolio securities." *Burks v. Lasker*, 441 U.S. 471, 480 (1979). The mutual fund deducts fees from the fund's assets, thereby reducing the value of the shares owned by fund investors. App. 79-80. Mutual-fund fees are usually expressed as a percentage of the assets under management, or expense ratio. *Id.* For example, if the investment company deducts 1% of the fund's assets each year in fees, then that fund's expense ratio would be 1%.

Many mutual funds also engage in a practice known as "revenue sharing." App. 78-80. In a revenue-sharing arrangement, a mutual fund pays a portion of the fees it charges investors to an entity that provides administrative services to a retirement plan. *Id.* To illustrate, an employer that sponsors a retirement plan might hire an outside firm to provide administrative services to the plan. If the plan included as an investment option a mutual fund that

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[1] *See*, *e.g.*, U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1-2 (Aug. 2013) (illustrating impact of expenses with example in which 1% difference in fees and expenses over 35 years reduces participant's account balance at retirement by 28%), http://www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf.

[2] *See* Investment Company Inst., *2014 Investment Company Fact Book* 11 (54th ed. 2014) (reporting that, in 2013, mutual funds managed 60% of the assets in defined-contribution plans), http://www.ici.org/pdf/2014_factbook.pdf.

offers revenue sharing, the outside service provider would receive revenue-sharing payments from that fund. App. 80. The amounts of those payments would depend on the extent of investments by plan participants in the fund. App. 233. The revenue sharing received by the service provider might in some cases offset part or all of the fees that the employer or plan administrator would otherwise have to pay that service provider for services furnished to the plan. App. 80. Revenue sharing thus provides an incentive for service providers to recommend and plan fiduciaries to select as investment options mutual funds that offer greater revenue sharing, even though that results in higher expenses for plan participants.

2. The fiduciaries of the Edison plan provide a set of plan investments for participants to choose from, including a number of mutual funds. App. 13-14, 72-73, 78. This appeal concerns six of those mutual funds. App. 84.

Each of the six funds at issue offered investors a choice of two share classes. App. 14, 68. One share class was marketed to individual retail investors, and the other to larger institutional investors. App. 14, 83-84. There "were no salient differences in the investment quality or management" between the two share classes. App. 61; *see* App. 83-84, 128-29. But "the retail share classes charged higher fees to the Plan participants." App. 128-29; *see* App. 61, 83-84. Although the institutional-class shares advertised minimum-investment requirements, the Edison plan (with $3.8 billion in assets under management) could have either satisfied those requirements or obtained a waiver from the fund managers. App. 13, 61 & n.24, 137-41.

For each of the six mutual funds, respondents provided to participants the more expensive retail-class shares, rather than the materially identical and less expensive institutional-class shares. App. 68. The retail-class shares offered larger revenue-sharing payments to the firm (Hewitt Associates) that provided administrative services to the Edison plan.[3] *Id.* ("The retail share classes of the six mutual funds offered more favorable revenue-sharing arrangements to [Edison] but charged the Plan participants higher fees than the institutional share classes."); App. 84 ("The retail share classes of each of [the six] funds had higher expense ratios than the institutional share classes; the higher fees were directly related to the fact that the retail share classes offered more revenue sharing."); *see* App. 14, 78-80.

3. Two committees, the Edison International Trust Investment Committee (a defendant below and a respondent here) and the Chairman's Subcommittee, chose what investment options to provide participants for investing their retirement savings.[4] The committees were fiduciaries of the Edison plan. JA143 (¶ 5).

The investment committees' staff was "responsible for monitoring and evaluating the investments for the Plan." App. 74.[5] The staff provided "information and recommendations to the Investment Committees regarding which investment options to maintain or

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[3] An affiliate of Hewitt Associates, Hewitt Financial Services, provides investment advice to the Edison investment committees' staff. App. 75.

[4] App. 72, 74, 169-70; JA102-07; JA113-16; JA118-20 (¶¶ 40-48).

[5] *See* App. 75-77; JA115-16; JA122-24 (¶¶ 54-59), 128-29 (¶¶ 75-80); JA151-52 (¶¶ 8-9), 154 (¶¶ 15-16); JA183-84.

replace." *Id.* The investment committees received "ongoing reports regarding Plan investments and their performance from the Investments Staff." JA120-21 (¶ 49).

The investment committees met quarterly to review plan investments.[6] At those meetings, the staff provided the committees with "reports regarding the performance and related status of the assets of the Plan as a whole." JA144 (¶ 11).[7] The committees considered at the quarterly meetings whether to remove, replace, or add investment options based on the staff's recommendations, functionally deciding which investment options would be offered to plan participants. App. 74-75, 77.[8] On numerous occasions, the committees removed investment options from the plan. App. 76-78; JA164-67.

During the time period relevant here (2001-2007), although the committees reviewed the plan's investment options on a periodic basis and made numerous changes to those options, they provided plan participants with the more expensive but otherwise iden-

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[6] *E.g.*, App. 94 ("On June 30, 2003, the Trust Investment Committee/Chairman's Subcommittee ('Sub-TIC') held a meeting in which they reviewed the funds for the Plan . . . ."); App. 95 ("In June 2005, the Sub-TIC held a meeting in which they reviewed the funds for the Plan . . . ."); *see* JA143 (¶ 6) ("One or both of the Investment Committees has generally met each quarter since 2001."); JA121 (¶ 50) (same); JA164-67 (minutes from one of the committees' meetings).

[7] *See* App. 74-75 ("On a quarterly basis, the Investments Staff attends the meetings of the Investment Committees and gives presentations regarding the Plan's overall performance."); JA125 (¶¶ 64-66); JA151 (¶ 8); JA164-67.

[8] *See* JA125-26 (¶¶ 65, 67, 70), 129 (¶ 80); JA144 (¶ 11); JA164-67.

tical retail-class shares of the six mutual funds at issue. App. 84-98.

C. Proceedings In The District Court

1. On August 16, 2007, petitioners brought suit under ERISA against respondents in federal court. App. 14, 65. They alleged multiple ways in which respondents failed to comply with their statutorily imposed fiduciary duties to the plan. JA71-87 (¶¶ 49-102). Relevant here, petitioners alleged that respondents breached their fiduciary obligations by "subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs." JA76 (¶ 73); *see* JA77 (¶ 78) ("Defendants breached their fiduciary duties by subjecting the Plan to pay the excess and unnecessary fees of retail mutual funds."); JA92 (¶ 105(I)-(J)).

2. The parties filed cross motions for summary judgment; the district court denied petitioners' motion and granted respondents' motion in part. App. 66-69, 166-268; JA131-41. Relevant here, respondents argued on the last page of their summary judgment motion that "[a]ll claims arising before August 16, 2001" – that is, six years before the complaint was filed – "are barred by ERISA's statute of limitations." Mem. in Support of Defs.' Mot. for Summ. J. at 24 (May 18, 2009) (Doc. 146-2). The pertinent portion of ERISA's limitations provision, which is quoted in full above, states that no action for breach of fiduciary duty may be commenced more than "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on

which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1).[9]

The district court ruled that § 1113(1) barred petitioners' claims arising from respondents' offering of mutual funds that were first selected as plan investments more than six years before the complaint was filed. App. 178-81, 247-48, 262-63. The court reasoned that "[t]here is no 'continuing violation' theory" under ERISA. App. 180. Three of the six mutual funds at issue were first included as plan investments in March 1999, more than six years before the filing of the complaint in August 2007. App. 92-98. The other three funds were added to the plan in July 2002, within the six-year limitations period. App. 85-92.

3. After a bench trial on the claims remaining after its summary judgment rulings, the district court issued findings of fact and conclusions of law. App. 65-165. With respect to the three funds added to the plan in 2002, the court held that respondents breached their duty of prudence by offering retail-class shares of mutual funds as plan investments when identical lower-cost institutional-class shares of those same funds were available. App. 68-69, 84-92, 128-42. The court found that respondents "could not offer any credible reason why the Plan fiduciaries chose the retail share classes." App. 134. In fact, the court found "***no evidence*** that Defendants even considered or evaluated the different share classes

[9] Section 1113 also bars claims filed more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Both courts below rejected respondents' reliance on that provision, App. 19-21, 181, and respondents did not cross-petition on that issue.

. . . when the funds were added to the Plan." App. 129. The investment committees "were not informed about the institutional share classes and did not conduct a thorough investigation." App. 130.

The district court concluded that, "had the Investments Staff and the Investment Committees considered the institutional share classes," they "would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants" and "would have known that investment in the retail share classes would cost the Plan participants wholly unnecessary fees." *Id.* The court held that, "[i]n light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes." App. 142.

The district court also observed that, in the one instance in which respondents did consider the fee differential between retail-class and institutional-class shares, they decided to invest in the institutional-class shares. App. 131-32. In 2003, the investment staff reviewed the available share classes for one of the funds at issue (the PIMCO global technology fund) because they were considering transferring a large amount of assets from another fund into the PIMCO fund. App. 131. The staff confirmed that the institutional-class shares were cheaper for investors. *Id.* On the staff's recommendation, the committees transferred the retail-class shares of the PIMCO global technology fund into the institutional-class shares. *Id.* The district court found those facts "very telling: In the one instance in which the Plan fiduciaries actually reviewed the different share classes of one of these three funds, the fiduciaries realized that

it would be prudent to invest in the institutional share class rather than the retail share class." App. 131-32. "Had they done this diligence earlier," the court found, "the same conclusion would have been apparent with regard to all three funds" added in 2002, "and the Plan participants would have saved thousands of dollars in fees." App. 132.[10]

In light of its summary judgment ruling that § 1113(1) barred petitioners' claims with respect to the three funds added to the plan before 2001, the court limited its finding of a violation to the three mutual funds first provided to plan participants within six years of the filing of petitioners' lawsuit. App. 128-42. The court permitted petitioners to argue that "significant changes during the statute of limitations period . . . should have triggered Defendants to conduct a full due diligence review" of the three funds added before 2001. App. 127. But it concluded that none of the events raised by petitioners was sufficiently significant to require a full due diligence review of the available share classes and associated fees. App. 68-69, 142-50; JA239 (¶ 2).

4. As of the district court's post-trial decision, respondents continued to provide participants retail-class shares of two of the six funds at issue – the William Blair Fund and the Allianz fund. App. 86, 96.[11]

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[10] In contrast to its finding with respect to the duty of *prudence*, the district court concluded that respondents did not breach the duty of *loyalty* in deciding to invest in retail- rather than institutional-class shares. App. 117-25. It found an absence of evidence that "the fiduciaries' decisions were *motivated by* a desire to serve the interests of" Edison over those of the beneficiaries. App. 126 n.19.

[11] The investment committees had eliminated three of the other four funds as investment options at various points in time

The district court ordered respondents to replace the retail-class shares with institutional-class shares for the William Blair fund, which was first added to the plan in 2002. App. 164; JA238. The court failed, however, to provide that relief as to the Allianz fund, which was added in 1999.

D. The Court Of Appeals' Decision

On appeal, each side challenged various aspects of the district court's rulings. The Ninth Circuit affirmed the district court's judgment in full. App. 1-64.

1. Supported by the Department of Labor as *amicus curiae*, petitioners challenged the district court's conclusion that § 1113(1) barred petitioners' imprudence claims relating to the three mutual funds first offered more than six years before the complaint was filed. The court of appeals sustained the district court's interpretation. App. 16-19.

The Ninth Circuit viewed the initial designation of the investment as the start of the "six-year period under section [1113](1)(A) for claims asserting imprudence in the design of the plan menu." App. 17. It opined that "the mere continued offering of a[n] [imprudent] plan option" does not constitute "a subsequent breach" because ERISA does not permit "a 'continuing violation theory,'" which it previously had rejected under a different part of ERISA's limitations provision. *Id.* (citing *Phillips v. Alaska Hotel &*

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for reasons unrelated to the fee differential between retail-class shares and institutional-class shares. App. 92, 94, 98. With respect to the sixth fund – the PIMCO global technology fund – the investments committees converted the retail-class shares to institutional-class shares in 2003, as noted above. App. 88-89, 131-32.

Rest. Emps. Pension Fund, 944 F.2d 509, 520-21 (9th Cir. 1991) (interpreting 29 U.S.C. § 1113(2))).

The court also expressed concern that allowing claims relating to the continued offering of imprudent investments could result in stale claims challenging previous actions by plan fiduciaries. App. 18 ("institutional memory may no longer exist") (internal quotation marks omitted). It also rejected the Department of Labor's argument "that our holding will give ERISA fiduciaries carte blanche to leave imprudent plan menus in place," App. 19, reasoning that participants would still be permitted "to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full due diligence review of the funds," *id.* (internal quotation marks omitted).

2. On cross-appeal, respondents challenged the district court's ruling that they breached their duty of prudence in offering the three retail-class mutual funds added to the plan in July 2002. Rejecting that challenge, the Ninth Circuit explained that "[t]he trial evidence . . . shows that an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund." App. 63. It noted that the district court had found "an utter absence of evidence that Edison considered the possibility of institutional classes for the funds litigated" – an absence the court of appeals described as "startling." App. 63-64. The court of appeals had "little difficulty agreeing with the district court that Edison did not exercise" the prudence required by the statute "in the selection of these retail mutual funds." App. 64.

SUMMARY OF ARGUMENT

I. Petitioners brought timely claims that, within the six years preceding the suit, respondents breached their obligations to review periodically the prudence of investments and to remove imprudent investments.

A. ERISA's duty of prudence, like many of ERISA's fiduciary provisions, was "derived from the common law of trusts." *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985). This Court therefore routinely consults background principles of trust law in interpreting ERISA's fiduciary provisions.

Leading trust authorities confirm that a trustee has an ongoing duty to monitor periodically the prudence of existing investments. When a trust contains an imprudent investment, the trustee's fiduciary obligation is to remove the investment within a reasonable time. Further, the trustee's obligation to reexamine investments and remove imprudent ones is not limited to situations in which significant changes have occurred. Rather, a trustee must review trust investments "currently as changes occur, *and also* by a systematic consideration of all the investments of the trust at regular intervals." George T. Bogert et al., *The Law of Trusts and Trustees* § 684, at 147-48 (3d ed. 2009) ("*Bogert's Trusts & Trustees*") (emphasis added). Thus, a trustee that makes an imprudent investment and fails to review or remove it over time has committed multiple separate breaches.

B. Under § 1113(1), every breach of the obligation to review investments prudently and remove imprudent ones starts the running of a new limitations period. As this Court has confirmed in other contexts, a plaintiff may recover for breaches committed

within the applicable limitations period, even if those breaches relate to other breaches outside the limitations period. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 208 (1997). Section 1113(1)'s text, which allows a plaintiff to bring suit within six years of "(A) the date of the *last action* which constituted a part of the breach or violation, or (B) in the case of an omission the *latest date* on which the fiduciary could have cured the breach or violation," 29 U.S.C. § 1113(1) (emphases added), makes that principle explicit here.

C. Petitioners presented ample evidence that respondents breached their fiduciary duty of prudence during the limitations period. Throughout that period, respondents provided retail-class shares of mutual funds, despite the availability of institutional-class shares of the same funds that provided the same investment with lower fees. Respondents reviewed plan investment options quarterly, yet evidently failed to recognize that the plan participants were paying unnecessary fees and failed to switch to the lower-cost (but otherwise identical) institutional-class shares. Those failures constitute breaches of the obligation to examine investments periodically and to remove imprudent investments, regardless of whether they are viewed as breaches by action (imprudent periodic reviews resulting in retention of imprudent investments) or by omission (imprudent failures to consider institutional-class shares and remove imprudent retail-class shares). A fiduciary that has "held . . . patently unsound investments" has "fail[ed] to invest prudently," and plan participants may recover for harm "attributable

to action [the defendants] took or failed to take during th[e] [limitations] period." *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962-63 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (citing *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1520-23 (S.D.N.Y. 1983)).

II. The Ninth Circuit erred in affirming the grant of summary judgment. *First*, the Ninth Circuit misconstrued petitioners' legal claims as an attempt to recover for the addition of the retail-class shares outside of the limitations period. The court's analysis improperly disregarded petitioners' claims of independent breaches committed within the limitations period. *Second*, the Ninth Circuit expressed misguided concern that a contrary holding would expose ERISA fiduciaries to liability for decades-old decisions to add investments. In fact, claims based on imprudent retention of investments will depend on the prudence of the investment and the fiduciary's conduct during the limitations period, not the prudence of the initial decision to add the investment. *Third*, the Ninth Circuit unjustifiably ignored petitioners' argument that respondents' failures to remove the retail-class shares constituted imprudent "omission[s]" under § 1113(1)(B). *Fourth*, the Ninth Circuit wrongly limited the obligation to reexamine and remove imprudent investment options to situations in which "significant changes in conditions . . . should have prompted a full due diligence review." App. 19 (internal quotation marks omitted). An ERISA fiduciary's duty of prudence is not so limited.

III. A rule barring claims for the imprudent retention of investment options added outside the limitations period would hinder ERISA's protective and remedial policies.

A. Congress enacted ERISA to protect employees and their beneficiaries from abuse and mismanagement of the funds in their benefit plans, including imprudent investment of such funds. When enacting ERISA, Congress declared it "to be the policy of [ERISA] to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). ERISA must be interpreted in light of these protective and remedial policies.

B. The Ninth Circuit's holding would undermine ERISA's policies by immunizing plan fiduciaries from an ongoing duty of prudence in managing plan assets and depriving new plan participants and beneficiaries of any remedy against imprudent investment options that had been provided for more than six years. Thus, a participant joining a plan with a menu of imprudent, but longstanding, investment options could not even obtain injunctive relief to remove those imprudent investments. Neither ERISA's text nor sound policy supports such an absurd result.

ARGUMENT

I. PETITIONERS' CLAIMS FOR BREACHES OF FIDUCIARY DUTIES WITHIN THE SIX YEARS PRECEDING THE COMPLAINT'S FILING WERE TIMELY

The relevant portion of ERISA's limitations provision does not begin to run until, at a minimum, the defendant fiduciary has committed a "breach of any responsibility, duty, or obligation" under ERISA's fiduciary provisions or otherwise violated the statute. 29 U.S.C. § 1113. Specifically, § 1113(1) requires a claim to be filed within six years of either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1). Both clauses of that provision require a "breach or violation" before the six-year period begins to run. To be sure, the limitations period does not inevitably begin running at the moment the fiduciary first acts or omits to act in a way that violates the statute: in the case of a breach by action, the period commences on "the date of the last action which constituted a part of the breach"; in the case of a breach by omission, the period starts running on "the latest date on which the fiduciary could have cured the breach or violation." *Id.* Under no circumstances, however, could the six-year period begin to run before the fiduciary has committed the "breach or violation" giving rise to the plan participant's claim.

Accordingly, to apply § 1113(1) properly, it is necessary first to determine the nature of the asserted

breach of fiduciary duty.[12] ERISA's duty of prudence imposes an obligation on plan fiduciaries such as respondents to review the prudence of plan investments periodically and to remove imprudent investments. Each failure to fulfill that duty constitutes a separate "breach or violation" of ERISA, triggering a new six-year period under § 1113(1) in which plan participants can commence an action with respect to that breach. Here, respondents conducted imprudent periodic reviews and thereby failed to remove imprudent investments multiple times within the six years preceding the filing of this action. The lower courts therefore erred in dismissing petitioners' claims as untimely.

A. ERISA Imposes An Obligation On Plan Fiduciaries To Review The Prudence Of Plan Investments Periodically And Remove Imprudent Investments

ERISA imposes a duty of prudence on plan fiduciaries. The statute requires a fiduciary to "discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This Court looks to background principles of trust law to define the contours of an ERISA fiduciary's duty of prudence. Trust law has long provided that a fiduciary's duty of prudence encompasses a responsibility to review investments periodically and to remove

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[12] *Cf. Lewis v. City of Chicago*, 560 U.S. 205, 214 (2010) (in applying Title VII time bar, whether plaintiff has alleged "a 'present violation' within the limitations period . . . depends on the claim asserted").

imprudent ones. That duty of review and removal is not limited to cases in which the beneficiary can prove significant changes in circumstances affecting the investment.

1. ERISA's duty of prudence is informed by background principles of trust law

The Court has long recognized that ERISA's "fiduciary responsibility provisions 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649) (alterations in original, citations omitted); *see also Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465, 2472 (2014).

The Court therefore "look[s] to 'principles of trust law' for guidance" when interpreting ERISA's fiduciary provisions, particularly on matters not directly addressed by the text of ERISA. *Conkright v. Frommert*, 559 U.S. 506, 512 (2010) (quoting *Firestone*, 489 U.S. at 111). For example, in *Central States*, the Court looked to the power of common law trustees to take all appropriate actions necessary to carry out the trust's purposes to conclude that an ERISA fiduciary had the power to conduct an audit of the employment records of a member employer. 472 U.S. at 569-72. Similarly, in *Firestone*, the Court adopted from trust law the principle that a deferen-

tial standard of review applies where an ERISA plan grants the fiduciary discretion to make a benefits determination. 489 U.S. at 111, 114. In ascertaining the relevant trust law principles, the Court routinely draws on leading authorities such as the Scott and Bogert treatises and the Restatements of Trusts.[13]

"[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). That is in significant part because "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.*; *see, e.g.*, *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.") (internal quotation marks omitted). ERISA's fiduciary duties generally track common law trust duties except when "the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity*, 516 U.S. at 497. In *Varity*, for example, the Court concluded there was "no adequate basis . . . , in the statute or otherwise," to justify "a departure from ordinary trust law principles" that deception violates the duty of loyalty. *Id.* at 506.

In this case, nothing in ERISA suggests that Congress intended to relax the common law trust

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[13] *See*, *e.g.*, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011); *Conkright*, 559 U.S. at 514-15; *Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 294 (2009); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008); *Firestone*, 489 U.S. at 111-12; *Central States*, 472 U.S. at 570-71; *see also Dudenhoeffer*, 134 S. Ct. at 2472.

duty to invest trust funds prudently. *Cf.* 29 U.S.C. § 1104(a)(2) (providing that acquisition of employer stock does not violate diversification requirement of duty of prudence). Indeed, ERISA's "standard of care" was "derived from the common law of trusts." *Central States*, 472 U.S. at 570; *see also Dudenhoeffer*, 134 S. Ct. at 2465.[14] Common law trust authorities thus inform ERISA's duty of prudence as it applies here.

2. Trust law imposes a duty to examine the prudence of existing investments periodically and to remove imprudent investments

Trust law imposes two related obligations on trustees with respect to existing investments that are relevant here: (1) to reexamine the prudence of existing investments periodically, and (2) to remove imprudent investments within a reasonable time.

Under the common law, a trustee has a duty to invest prudently. *See* Restatement (Second) of Trusts § 174 (1959) ("[t]he trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"). That includes an obligation to minimize investment costs. *See* Restatement (Third) of Trusts §§ 88, 90(c)(3)

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[14] *Compare* 29 U.S.C. § 1104(a)(1)(B) (imposing duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims") *with* Restatement (Third) of Trusts § 77(1)-(2) (2007) ("The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. . . . The duty of prudence requires the exercise of reasonable care, skill, and caution.").

& cmt. b; *see also id.* § 90 cmt. m (noting that mutual fund costs "require special attention by a trustee" and that "it is important for trustees to make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio").

The trustee's duties with respect to an investment do not cease after the trustee makes a decision to invest. To the contrary, "[t]he trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." Restatement (Third) of Trusts § 90 cmt. b; *see also* 4 Mark L. Ascher et al., *Scott and Ascher on Trusts* § 19.4, at 1450-51 (5th ed. 2007) ("*Scott & Ascher*") ("The trustee has a continuing duty to see to it that the trust remains appropriately invested."); *Bogert's Trusts & Trustees* § 685, at 159 ("[A] trustee has a duty to continue to monitor investments regularly to ensure that they are still legal and productive."); Uniform Prudent Investor Act § 2 cmt. (1995) ("'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641, 665 (1996) ("[i]nvestment includes not only the initial selection of securities or other assets, but also the task[] of monitoring the investments for continuing suitability").

The trustee's duty to monitor investments entails an obligation to reexamine periodically the trust portfolio to determine whether existing investments

are prudent. Although there is no precise rule for how frequently such a reexamination must occur, the leading trust law authorities make clear that the trustee has a duty, "from time to time, to examine the state of the trust's investments." 4 *Scott & Ascher* § 19.4, at 1450-51; *see Bogert's Trusts & Trustees* § 684, at 147-48 (stating that a trustee should engage in "systematic consideration of all the investments of the trust at regular intervals, for example, once every six months").[15]

As a corollary to the duty to reexamine the prudence of trust investments, trustees have a responsibility to remove imprudent investments within a reasonable time, so long as the circumstances so warrant. *See* 4 *Scott & Ascher* § 19.3.1, at 1439-40 ("When the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time."); *Bogert's Trusts & Trustees* § 685, at 157-58 (noting that modern prudent-investor standard "is the same as that of earlier investment standards" in the respect that, under all standards, "[o]nce an investment is determined to be imprudent . . . , the trustee must dispose of the asset within a reasonable time"); 90A C.J.S. *Trusts* § 526 ("A trustee who has made an improper investment has both the right and duty to dispose of it."). Reported decisions

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[15] The Office of the Comptroller of the Currency requires national banks that manage investments in trust to form a committee that shall, "[a]t least once during every calendar year, . . . conduct a review of all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account." 12 C.F.R. § 9.6(c). A similar regulation has existed since before the enactment of ERISA. *See* 28 Fed. Reg. 3309, 3310 (Apr. 5, 1963).

applying common law trust principles recognize the obligations to review investments periodically and to remove imprudent ones.[16]

This Court recently recognized that retention of an imprudent investment can constitute a breach of ERISA's duty of prudence. *See Dudenhoeffer*, 134 S. Ct. at 2464, 2471 (declining to dismiss plaintiffs' claim that the fiduciary breached its duty of prudence by "continu[ing] to allow the Plan's investment in [company stock]" when "[a] prudent fiduciary facing similar circumstances would not have stood idly by") (internal quotation marks omitted). Lower courts likewise have recognized and applied the obligation to review investments periodically and to remove imprudent ones in the ERISA context. Thus, when a plan fiduciary "h[o]ld[s] . . . patently unsound investments," the fiduciary has violated ERISA through a "failure to invest prudently." *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (citing *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1520-23 (S.D.N.Y. 1983)); *see Buccino*, 578 F. Supp. at 1521 ("[A]s Fund fiduciaries they were under a continuing obligation to advise

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[16] *See*, *e.g.*, *In re Mendleson's Will*, 261 N.Y.S.2d 525, 541 (N.Y. Surrogate's Ct., Albany Cnty. 1965) ("[I]f the prudent thing to do was sell, failure to sell was a breach of duty."); *In re Davenport's Will*, 104 N.Y.S.2d 433, 436-37 (N.Y. Surrogate's Ct., Kings Cnty. 1951) (where "[t]he slightest inquiry would have warned of the imprudence of continuing a trust investment . . . , retention of these common stocks, in the absence of an exposition of cogent reasons for so doing, is a sufficient showing of negligence"); *In re Cook's Will*, 40 A.2d 805, 809 (N.J. Prerog. Ct. 1945) (concluding that, where various circumstances "exhibited the inexpediency of retaining [an] investment," the trustee "must be surcharged for the material loss proximately occasioned by its dereliction").

the Fund to divest itself of unlawful or imprudent investments.").[17] If a fiduciary fails to review investments periodically, or performs the reviews imprudently, he has breached the duty of prudence. *See Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part). A participant may recover for losses caused by the retention of imprudent investments as a result of a failure to review investments or an imprudent review. *See id.* at 962-63.

3. The obligation to reexamine and remove imprudent investments is not limited to situations in which "significant changes" have occurred

The lower courts' limitation of the obligation to reexamine investments and remove imprudent ones to situations in which "significant changes in conditions" have occurred, App. 19, 144, is unsupported by authority and unworkable in practice.

a. Leading trust authorities establish a general duty to monitor existing investments[18] and remove

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[17] *See also Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) (noting "the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones"); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977) ("The trustee's obligation to dispose of improper investments within a reasonable time is well established at common law. ERISA can hardly be read to eviscerate this duty . . . .") (citation omitted); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("the selection of plan investment options *and the decision to continue offering a particular investment vehicle* are acts to which fiduciary duties attach") (emphasis added).

[18] *See, e.g.*, *Bogert's Trusts & Trustees* § 684, at 145 ("A trustee also owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship."); Restatement (Third) of Trusts § 92 cmt. a

imprudent investments[19] that need not be triggered by any change, let alone a significant change, in circumstances. Although fiduciaries do have an obligation to remove imprudent investments that become inappropriate as a result of changed circumstances, *see* 4 *Scott & Ascher* § 19.4, at 1450-51, that responsibility is an aspect of, rather than the entirety of, the fiduciary's duty to review investments periodically and remove imprudent ones. "The duty to review trust investments should be performed by the collection of information currently as changes occur, *and also by a systematic consideration of all the investments of the trust at regular intervals*, for example, once every six months." *Bogert's Trusts & Trustees* § 684, at 147-48 (emphasis added). Thus, a fiduciary may satisfy the duty to reexamine investments periodically by performing a systematic review each January. Yet, if market developments rendered some of the investments imprudent in March, the fiduciary may have a duty to remove the investments sooner than the systematic review the following January. But that obligation to respond to changed circumstances in no way obviates the additional obligation to review the entire portfolio periodically.

The decision in *In re Stark's Estate*, 15 N.Y.S. 729 (N.Y. Surrogate's Ct., Rensselaer Cnty. 1891), illustrates a trust fiduciary's responsibility to monitor and remove imprudent investments even in the

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(describing the duty articulated in § 90 cmt. b as a "general, ongoing duty to monitor investments").

[19] *See*, *e.g.*, *Bogert's Trusts & Trustees* § 685, at 157-58 ("Once an investment is determined to be imprudent . . . , the trustee must dispose of the asset within a reasonable time."); 90A C.J.S. *Trusts* § 526 ("A trustee who has made an improper investment has both the right and duty to dispose of it.").

absence of changes in circumstances.[20] There, the "principal question" concerned "the propriety" of the trustee's "investment of . . . trust funds" in a particular mortgage and, "*also*, whether the trustee exercised a reasonable degree of diligence *in looking after the security after the investment had been made*." *Id.* at 731 (emphases added). The court explained that "[i]t is not by a prudent investment alone that a trustee performs his whole duty in regard to a trust fund." *Id.* Rather, the trustee "is still bound to be watchful . . . and take notice of all those things affecting the investment which a man of fair judgment, care, and prudence would take and keep in consideration in the matter of a loan of his own moneys." *Id.* The court concluded that the trustee breached his fiduciary duty in two ways: "*First*, in making the original investment of the fund; and, *second*, in the failure to use such proper care, watchfulness, and oversight, and the adoption of such prompt means to prevent loss to the estate after the investment had been made, as men in general of ordinary intelligence and prudence in such matters exercise in their own affairs." *Id.* at 732.

In *Stark's Estate*, the breach by the trustee's failure to "be watchful" in monitoring the investment did not arise out of any change in circumstances. When the initial investment was made, the property securing the mortgage was "depreciating in value year by year," and the interest was already "in arrears." *Id.* at 731-32. By permitting those circumstances to

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[20] Bogert's treatise cites *Stark's Estate* as authority for the proposition that "[a] trustee also owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship." *Bogert's Trusts & Trustees* § 684, at 145.

persist, to the detriment of the trust, the trustee breached his duty to exercise "a reasonable degree of diligence in looking after the security after the investment had been made." *Id.* at 731; *see id.* at 732 ("[T]he trustee, knowing when he made the investment that interest was in arrear, and real estate depreciating, was called upon in the discharge of his duty to be watchful, and, if a mistake had been made in making the investment, to see that the estate suffered as little loss as possible through his error of judgment.").

In attempting to reconcile the lower court's "changed circumstances" approach with the common law, respondents have argued that, under the Second Restatement, "the duty to divest arises when 'owing to a subsequent *change of circumstances* the investment is no longer a proper investment.'" Resp. Supp. Cert. Br. 4 (quoting Restatement (Second) of Trusts § 231 cmt. a) (emphasis added by respondents). But the portion of the Second Restatement on which respondents rely concerned circumstances in which the investment originally "was a proper investment." Restatement (Second) of Trusts § 231 cmt. a. Nothing in the Second Restatement endorsed respondents' and the lower courts' view that, when an investment is improper from the start, the fiduciary has no further duty with respect to that investment unless the beneficiary proves a significant change in circumstances. Other trust law sources confirm the duty to monitor investments and remove imprudent ones is not limited to changed circumstances, as *Stark's Estate* illustrates. *See Bogert's Trusts & Trustees* § 684, at 145, 147-48; 4 *Scott & Ascher* § 19.4, at 1450-51.

b. The contention that a trustee need only reexamine an investment when it has undergone

significant changes also conflicts with the principle that the prudence of investments must be evaluated both individually and in the context of the portfolio as a whole. *See* Restatement (Third) of Trusts § 90(a); Uniform Prudent Investor Act § 2(b). ERISA's fiduciary responsibility provision incorporates that standard by regulation. *See* 29 C.F.R. § 2550.404a-1(b)(1)(i) (stating that relevant circumstances in evaluating an investment include "the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties"). The Department of Labor accordingly has recognized that "the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio." 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) (promulgating 29 C.F.R. § 2550.404a-1).

The standard advocated by the courts below is unfaithful to that administrative guidance. In conditioning the duty to reexamine an investment on whether that particular investment has undergone "significant changes," the Ninth Circuit's standard ignores the fiduciary's responsibility to consider the prudence of the plan's investment lineup as a whole. To be sure, some investments (such as retail-class shares of a mutual fund that offers institutional-class shares providing the same investment with lower fees) are imprudent in any portfolio. But, in other situations, it is necessary to examine the entire portfolio to determine whether an investment is prudent. An investment may be imprudent for reasons unrelated to any changes in that particular

investment.[21] Thus, a review of plan investments artificially limited to those investments that have experienced "significant changes" is insufficient to assess the prudence of an ERISA plan's investment lineup.

c. Such a limitation would also prove unworkable for plan fiduciaries and courts alike. In determining whether a fiduciary had breached a duty by failing to remove an imprudent investment, courts would first need to determine whether changes to the investment were "significant," adding a subjective and unnecessary step to the inquiry. The standard would also be difficult for fiduciaries to apply. A fiduciary would need to engage in two tiers of review: first, to examine the entire portfolio to determine whether each investment had undergone "significant changes"; and, second, to engage in a "full due diligence review" of those investments. App. 19, 127. Such a regime would shift much of the fiduciary's efforts away from reviewing the prudence of investments and toward the superfluous task of determining whether investments had experienced "significant changes." The lower courts' approach would therefore erode ERISA's protections for plan participants while complicating fiduciaries' efforts to comply with the statute.

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[21] For example, a plan's investments in risky high-yield bonds may be prudent in the context of an overall bond portfolio that consists mostly of investment grade municipal bonds. Yet, if a fiscal crisis causes the municipal bonds to become riskier, it may no longer be prudent to hold the high-yield bonds, even though nothing has changed with respect to those particular investments.

B. Under § 1113(1), Each Breach Of The Obligation To Review Investments And Remove Imprudent Ones Begins A New Limitations Period For That Breach

1. Each breach of a fiduciary's obligation to review investments periodically and remove imprudent ones starts the running of a new limitations period for claims arising out of that breach. Section 1113(1) permits the filing of a claim within six years of either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). If the fiduciary takes an "action which constitute[s]" a breach, or part of a breach, the plaintiff may bring suit within six years of such action. *Id.* § 1113(1)(A). If the fiduciary fails to take a required action and therefore breaches her duties by omission, the plaintiff may bring suit within six years of any "date on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1)(B). Section 1113(1) functionally creates a six-year lookback provision permitting a plan participant to recover for breaches occurring within the six years prior to suit.

This Court has recognized that a plaintiff may recover for violations occurring within a limitations period, even if those violations relate to other violations occurring prior to the limitations period for which the plaintiff could no longer bring a claim. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), for example, the Court held with respect to the three-year copyright limitations provision that, "when a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or

distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs. In short, each infringing act starts a new limitations period." *Id.* at 1969 (quoting 17 U.S.C. § 507(b)) (alteration in original, footnote omitted). The plaintiff in *Petrella* brought a copyright infringement lawsuit in 2009 alleging that a film that debuted in 1980 infringed on a copyright dating from 1963. *Id.* at 1970-71. The Court held that the plaintiff could obtain relief for acts of infringement occurring within the three years preceding the lawsuit, even though those acts involved the distribution of a film produced nearly three decades earlier. *Id.* at 1978-79.[22]

Similarly, a plaintiff may recover for omissions within the limitations period that relate to an original violation outside the limitations period. In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997), an employer had withdrawn from a multiemployer pension plan, yet failed to make withdrawal liability payments required by the Multiemployer Pension Plan Amendments Act of 1980, an amendment to ERISA. *Id.* at 198. The initial missed withdrawal payment occurred outside the limitations period, but

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[22] *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (in antitrust context, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act"); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (same); *Turley v. Rednour*, 729 F.3d 645, 654 (7th Cir. 2013) (Easterbrook, C.J., concurring) ("Violations begin and continue, and the prevailing rule treats new acts, or ongoing inaction, as new violations. . . . The period of limitations runs from each independently unlawful act or failure to act.").

the employer also missed subsequent payments within the limitations period. *Id.* at 206. Even though claims arising out of the original missed payment were untimely, the plan could pursue claims for each missed payment within the limitations period because "'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Id.* at 208 (quoting *Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 857 (3d Cir. 1994)).

This case is unlike those in which the plaintiff bases a claim on an unlawful act that "occurred prior to the [limitations] period" but that has "continuing effects during that period." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625 (2007). In the employment-discrimination context, this Court has rejected arguments that the "continuing effects" of "precharging period discrimination" constitute "a present violation." *Id.*[23] Thus, for example, when a professor alleges that his college denied him tenure based on his nationality, the time for filing a claim runs from the date on which tenure was denied, not from the later date on which the professor ceases to be employed by the school, because the ending of the professor's employment was an "effect" of the discriminatory denial of tenure. *See id.* at 626 (discussing *Delaware State College v. Ricks*, 449 U.S. 250 (1980)). Here, petitioners do not base their claim on the March 1999 decision to provide retail-class

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[23] Congress later amended Title VII to state that "an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

shares of the three funds at issue. Instead, the "breach[es] or violation[s]," 29 U.S.C. § 1113(1), underlying petitioners' claims are respondents' failures prudently to review and remove retail-class shares within the limitations period. Even in the employment context, *Ledbetter* expressly recognized that such claims are timely, explaining that, "of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." 550 U.S. at 628 (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)); *see id.* at 636 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations."); *Morgan*, 536 U.S. at 113 ("The existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed."); *Lewis*, 560 U.S. at 214 (cases such as *Ricks* "establish only that a Title VII plaintiff must show a 'present violation' within the limitations period").

2. Section 1113(1)'s text removes any doubt that petitioners may recover for breaches or violations occurring after imprudent funds are initially added to the plan. Whereas *Petrella* and *Bay Area Laundry* involved generically worded limitations provisions,[24] § 1113(1) specifies precisely when the limitations

[24] *See* 17 U.S.C. § 507(b) ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."); 29 U.S.C. § 1451(f)(1) ("An action under this section may not be brought after . . . 6 years after the date on which the cause of action arose . . . .").

clock begins to run. For breaches in the form of actions, the clock begins to run at "the date of the *last action* which constituted a *part of* the breach or violation." *Id.* § 1113(1)(A) (emphases added). Each wrongful action within the limitations period gives rise to a timely claim, whether classified as an entirely separate breach or as part of a breach that began before the limitations period. Under no plausible reading of § 1113(1)(A) could the *first* wrongful action – in this case the addition of the funds in 1999 – start the limitations clock on subsequent breaches or violations.

Likewise, where a defendant breaches its fiduciary duties by omission in failing to take a required action, the statute specifies that the limitations clock begins to run on "the *latest date* on which the fiduciary could have cured the breach or violation." *Id.* § 1113(1)(B) (emphasis added). Under that provision, it is immaterial that a prior breach occurred before the limitations period or that the defendant had an initial opportunity to cure the breach before the limitations period, because the six-year period runs from the "latest date," not the first date, that the fiduciary could have cured the violation.[25]

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[25] Respondents incorrectly suggest that petitioners' and the United States' position requires holding that "*any* failure to correct *any* earlier imprudent act could be reframed as a claim that the fiduciary 'omitted' to 'cure' the violation." Supp. Cert. Opp. 5. Petitioners' claim rests not on a failure to cure past violations, but on new breaches of the fiduciary obligation under ERISA's duty of prudence to monitor investments and remove imprudent ones within a reasonable time. In this particular circumstance, that fiduciary duty required respondents to remove imprudent investments previously selected.

C. Petitioners Presented Evidence Of Breaches Within The Limitations Period

The record evidence demonstrates respondents' failure prudently to review and remove retail-class mutual funds within the six years preceding commencement of this action in August 2007. The three funds at issue – the Janus fund, the Allianz fund, and the Franklin fund – offered two share classes, retail and institutional. App. 14, 68. The two share classes were identical in all material respects, except that the retail-class shares were significantly more expensive for plan participants. App. 61, 83-84, 128-29. Throughout the six years preceding the filing of the complaint, respondents provided as plan investments the more expensive retail-class shares. App. 68.[26]

To defeat summary judgment, petitioners need only show that a genuine issue of material fact exists as to whether respondents breached their duty of prudence. The lower courts' findings and conclusions demonstrate that petitioners easily surmounted that threshold. For the funds added in 2002, the lower courts properly concluded that respondents breached the duty of prudence by providing retail-class shares when less expensive institutional-class shares were available. As the Ninth Circuit explained, "an experienced investor would have reviewed all available share classes and the relative costs of each when selecting a mutual fund." App. 63. Yet there was no "evidence that Edison considered the possibility of institutional classes for the funds litigated." App. 63-64. Moreover, as the district court found after a

[26] The three funds at issue were first included as plan investments in March 1999, and they remained in the plan through the filing of the complaint. App. 92-98.

bench trial, no prudent fiduciary who had considered institutional-class shares would have invested instead in retail-class shares: "In light of the fact that the institutional share classes offered the exact same investment at a lower fee, a prudent fiduciary acting in a like capacity would have invested in the institutional share classes." App. 142.

Within the six-year limitations period, respondents breached their duty prudently to review and remove the retail-class shares of the funds added in March 1999. As plan fiduciaries, respondent had "a continuing duty to see to it that the trust remain[ed] appropriately invested," 4 *Scott & Ascher* § 19.4, at 1450-51, and "a duty to dispose of" imprudent investments "within a reasonable time," *id.* § 19.3.1, at 1439-40. *See supra* pp. 24-28. During the limitations period, respondents periodically monitored the plan investments. *See supra* pp. 9-10. There is no evidence, however, that they gave any, let alone appropriate, consideration to switching to the institutional classes of those three funds.[27] Thus, the consideration of institutional classes that the lower courts found lacking as to the three funds added in July 2002 was

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[27] For the Franklin Small-Mid Cap Growth Fund added in March 1999, respondents offered an explanation for selecting the retail-class shares: unlike the institutional-class shares, the retail-class shares "had a Morningstar rating and significant performance history." App. 96. Yet, given that the institutional-class shares offered the same investment at a lower fee, and that respondents retained the retail-class shares even after the institutional-class shares developed a significant performance history, petitioners at least raised a genuine issue of material fact as to whether respondents acted imprudently in retaining the retail-class shares throughout the limitations period.

equally absent throughout the limitations period for the three funds added in March 1999.[28]

Respondents' failures prudently to review and remove the retail-class shares within the six-year limitations period gave rise to timely causes of action under ERISA. That is true whether those failures are viewed as breaches by action (imprudent periodic reviews, resulting in the retention of imprudent investments) or by omission (imprudent failures to consider institutional classes during periodic reviews and failures to remove imprudent investments in retail classes). If viewed as breaches by action, respondents breached their duty of prudence by conducting imprudent reviews during each quarterly meeting of the investment committees at which they reviewed plan investments but neither considered nor switched to institutional-class shares for the three funds at issue. If viewed as breaches by omission, respondents breached their duty of prudence by failing to monitor properly the investment options on a periodic basis and to remove the imprudent retail classes. Under both clause (A) and clause (B) of § 1113(1), respondents committed multiple "breach[es] or violation[s]" of ERISA during the six years preceding the filing of the complaint. Because the statute provides that unlawful actions and omissions each start the running of a new limitations

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[28] The Court need not decide the precise scope of an ERISA fiduciary's obligation to review plan investments and remove imprudent ones. The specific actions required by the duty of prudence may vary according to factual circumstances. To reverse the holding below, it is sufficient to conclude that petitioners have raised a genuine issue of material fact that, by failing to consider the availability of lower-cost institutional-class shares and failing to remove the higher-cost retail-class shares for six years, respondents breached their duty of prudence.

period, it is unnecessary here for the Court to decide the precise dividing line between actions and omissions.

Then-Judge Scalia's opinion in *Fink* illustrates that the retention of imprudent investments within ERISA's limitations period gives rise to timely claims for losses attributable to that retention. In *Fink*, the plaintiffs alleged that a plan trustee acquired imprudent investments between three years and six years before the lawsuit's filing. *See* 772 F.2d at 956-58. The court held that the plaintiffs lacked sufficient knowledge to trigger ERISA's three-year limitations provision in § 1113(2) and that claims arising out of the acquisition of the investments were timely under the six-year period of § 1113(1). *See id.* at 957-58. In an opinion concurring in part and dissenting in part, Judge Scalia disagreed with the panel majority's conclusion that the plaintiffs lacked actual knowledge of the imprudent acquisition of the investments more than three years before bringing suit; he therefore would have held that the claims arising out of the original acquisition were time-barred under § 1113(2). *Id.* at 962 (Scalia, J., concurring in part and dissenting in part). He distinguished, however, between the initial acquisition of the investments and the "alleged failure to invest prudently during the [limitations] period." *Id.* at 962-63. Judge Scalia noted that "a trustee who has made (*or held*) patently unsound investments" has violated ERISA. *Id.* at 962 (emphasis added). He therefore concluded that the plaintiffs were entitled to relief for harm "attributable to action [the defendants] took or failed to take during th[e] [limitations] period." *Id.* at 963. Under that view, as under the common law, retention of imprudent investments through action or omission gives rise to a timely claim for relief.

II. THE NINTH CIRCUIT'S REASONS FOR AFFIRMING SUMMARY JUDGMENT WERE ERRONEOUS

The Ninth Circuit erroneously held that the initial inclusion of the retail-class shares started the limitations period on all of petitioners' claims. That conclusion misconstrued petitioners' arguments, failed to consider the full scope of respondents' fiduciary duties, and reflected several legal errors.

First, the Ninth Circuit's analysis failed to address petitioners' claim of breaches within the limitations period, after the addition of the imprudent share classes. The Ninth Circuit characterized petitioners' claim as based on "the act of designating an investment for inclusion" and "the mere continued offering of a plan option, without more." App. 17, 18. That simplistic presentation mischaracterized petitioners' claim. Petitioners contend that respondents breached their obligation to review the prudence of existing investments and remove imprudent ones. "The real question . . . is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a [fiduciary-breach] claim *at all*." *Lewis*, 560 U.S. at 211. ERISA's duty of prudence, informed by trust law, requires periodic review of existing investments and prompt removal of imprudent ones. Here, petitioners have demonstrated that respondents breached those obligations within the six years preceding the filing of the complaint, giving rise to actionable claims within the limitations period.

The Ninth Circuit's error in conceptualizing petitioners' claim led it to use an incorrect legal framework to analyze the application of the limitations provision. The court viewed petitioners' sole

argument for timeliness as an effort to apply a "continuing violation theory," which would allow petitioners to recover for the addition of the retail-class shares that occurred outside the limitations period. App. 17 (internal quotation marks omitted). But petitioners brought claims of new violations of the fiduciary obligations to reexamine the prudence of investments periodically and to remove imprudent investments (and petitioners did not seek to recover losses incurred more than six years before the suit). Those new violations, distinct from the initial act of adding the retail-class shares (for which petitioners do not seek to recover), began new limitations periods under which petitioners' claims are timely.[29]

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[29] The Ninth Circuit erroneously relied on its prior decision in *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991). App. 17-18. That case involved a challenge to restrictive vesting rules for benefits under a traditional pension plan (known as a "defined-benefit plan"). *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (distinguishing a defined-benefit plan from a defined-contribution plan, such as the plan at issue here). The challenged vesting rules in *Phillips* had been in place for nearly 10 years before the plaintiffs filed suit. *See* 944 F.2d at 512; *id.* at 522 (O'Scannlain, J., concurring). The Ninth Circuit reasoned that, even if the trustees' repeated failures to relax the vesting rules could be considered "a series of discrete but related breaches," the action was barred by § 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation." *See id.* at 520-21. According to the Ninth Circuit, when a plaintiff challenges "[a] continuous series of breaches . . . of the same kind and nature," "actual knowledge of [any] one of [those breaches] more than three years before commencing suit" bars the claim under § 1113(2). *Id.* at 521. But, whereas § 1113(2) runs from "the *earliest* date" on which the plaintiff had knowledge, § 1113(1) runs from "the date of the *last* action" or "the *latest* date" on which a breach could have been cured. 29 U.S.C. § 1113 (emphases added). Accordingly, even if the *Phillips* court were

Second, the Ninth Circuit further erred in expressing concern that allowing claims relating to the continued offering of imprudent investments could "expose present Plan fiduciaries to liability for decisions made by their predecessors – decisions which may have been made decades before and as to which institutional memory may no longer exist." App. 18 (internal quotation marks omitted). A claim based on the failure properly to monitor and remove imprudent investments within the six years preceding the filing of the complaint does not premise liability on the initial decision to include an investment outside of the limitations period. Moreover, the statute itself addresses the court of appeals' concern by providing that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty . . . if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." 29 U.S.C. § 1109(b).

For petitioners' claims, and more generally for claims based on retaining imprudent investments, the imprudence of the original investment decision is immaterial. The crucial question is the imprudence of the investment during the limitations period, for

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correct that knowledge of the first breach in a series triggers the running of § 1113(2) as to all of the breaches (and that proposition is doubtful), there is no plausible interpretation of § 1113(1) that would bar all claims as to a series of breaches simply because the first breach occurred more than six years before the action was commenced. Moreover, as Judge O'Scannlain explained in his concurring opinion in *Phillips*, the challenged conduct in that case was not best understood as a series of discrete breaches. *See* 944 F.2d at 522-23 (O'Scannlain, J., concurring). There, unlike here, the participants identified no ongoing fiduciary obligation to reexamine and remove the challenged vesting rules. Thus, according to Judge O'Scannlain, the plaintiffs in *Phillips* had "confused the failure to *remedy* the alleged breach of an obligation with the commission of an alleged *second* breach." *Id.* at 523.

which memories will be fresh. For example, if a plaintiff brought a lawsuit in 2015 based on an investment that was imprudent when added in 1980, but had become prudent before 2009, the plaintiff would have no claim.[30] Conversely, if the investment was prudent when added in 1980, but had become imprudent and remained imprudent within the limitations period, the plaintiff would have a claim based on failure to remove the investment. *See Dudenhoeffer*, 134 S. Ct. at 2464, 2471-72; *Fink*, 772 F.2d at 962-63 (Scalia, J., concurring in part and dissenting in part). In either case, the claim would turn on the prudence of the investment during the limitations period, not on the prudence of the initial decision to add the investment outside the limitations period.[31]

Third, the Ninth Circuit erroneously ignored petitioners' argument that their claims were timely under the "omission" prong of § 1113(1)(B). In rejecting petitioners' argument based on the "last action" prong of § 1113(1)(A), the Ninth Circuit "observe[d]

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[30] *See* III Austin W. Scott, *The Law of Trusts* § 230.5, at 1880 (3d ed. 1967) ("[w]here a trustee makes an investment which at the time when he makes it is not a proper trust investment, but which subsequently becomes a proper trust investment, and no loss has been incurred in the meantime, the trustee is not subject to liability").

[31] In all events, the supposition that events from long ago may prove relevant to claims for recent breaches does not justify dismissing claims that are timely under § 1113. *Cf. Morgan*, 536 U.S. at 113 ("Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim."); *Lewis*, 560 U.S. at 216-17 (rejecting argument that allowing disparate-impact claim arising out of application of policy developed long ago would "result in a host of practical problems" because the Court's "charge is to give effect to the law Congress enacted").

that in the case of omissions the statute already embodies what the beneficiaries urge for the last action" by tying "the limitations period to 'the latest date on which the fiduciary could have cured the breach or violation.'" App. 18 (quoting 29 U.S.C. § 1113(1)(B)). That observation should have led the Ninth Circuit to conclude that petitioners presented timely claims that respondents violated their fiduciary duty by omission in failing to carry out the required action of removing the imprudent investments. Yet, without explanation, the Ninth Circuit failed to consider whether the omissions prong applied.[32]

Fourth, the Ninth Circuit erred in concluding that any fiduciary duty to reexamine and remove invest-

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[32] Petitioners presented that argument in their opening appellate brief, and respondents' assertion that petitioners "argued the issue in only one half of one sentence," Cert. Opp. 13 n.4, is incorrect. *See* First Brief on Cross-Appeal at 16 (Apr. 20, 2011) ("At any time in that six-year period Defendants could have switched from retail to institutional class shares. Their failure to do so caused the Plan to pay unnecessary, retail fees in each of those six years. Therefore, . . . the 'latest date on which the fiduciary could have cured the breach' – replacing retail with institutional shares – . . . occurred within six years.") (quoting 29 U.S.C. § 1113(1)(B)). Further, petitioners elaborated on the argument in their reply brief. *See* Third Brief on Cross-Appeal at 29-30 (Oct. 6, 2011) ("Since Defendants never actually decided that retail shares were more prudent than institutional shares for Plan mutual funds, their breach also is one of omission. . . . It was a breach of omission in the sense that Defendants failed even to consider the institutional share class alternatives that provided the exact same investments at a lower cost. Defendants could have cured that omission at any time after the initial selection of the funds within six years preceding Plaintiffs' complaint. Since Defendants 'could have cured the breach or violation' that resulted from their 'omission' within that six-year period, Plaintiffs' claims were timely even as to investments included in the Plan before August 16, 2001.").

ments is limited to situations in which "significant changes in conditions . . . should have prompted a full due diligence review." App. 19 (internal quotation marks omitted). The Ninth Circuit offered no authority for that limitation, and no such limitation exists. *See supra* pp. 28-33. Rather, a fiduciary's review of investments "currently as changes occur" must be accompanied "also by a systematic consideration of all the investments of the trust at regular intervals." *Bogert's Trusts & Trustees* § 684, at 147-48. No prudent fiduciary would "review[] all available share classes and the relative costs of each" only once, "when *selecting* a mutual fund," instead of throughout the time that fiduciary maintains that mutual fund in the plan. *Cf.* App. 63 (emphasis added).[33]

[33] In *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685 (11th Cir. 2014), on which respondents relied in their supplemental brief in opposition, the court concluded that a claim based on imprudent retention of plan funds was based on "simply a failure to remedy the initial breach" because there were no "allegations that would distinguish the two types of claims." *Id.* at 701-02. But the *Fuller* court failed to recognize that a claim based on imprudently adding an investment depends on the fiduciary's prudence at the time of addition, whereas a claim based on an investment's imprudent retention depends on the fiduciary's prudence at the time of retention.

David v. Alphin, 704 F.3d 327 (4th Cir. 2013), on which respondents have also relied, is unpersuasive because it purported not even to "decide whether ERISA fiduciaries have an ongoing duty to remove imprudent investment options in the absence of a material change in circumstances." *Id.* at 341.

III. AN ATEXTUAL RULE BARRING CLAIMS RELATING TO INVESTMENTS FIRST ADDED OUTSIDE THE LIMITATIONS PERIOD WOULD HINDER ERISA'S PURPOSES

A rule permitting ERISA fiduciaries to maintain imprudent plan investments so long as those investments were first selected more than six years ago finds no support in ERISA's text or the common law trust authorities that underlie ERISA's fiduciary duties. This Court should reject the court of appeals' rule on that basis alone. The Ninth Circuit's rule also frustrates ERISA's broad remedial purpose to protect participants in employee benefit plans from mismanagement of plan assets.

A. Congress Enacted ERISA To Safeguard The Management Of Employee Benefit Funds And Provide Remedies For Imprudent Management

Congress enacted ERISA "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 112 (1989). Those abuses included "'self-dealing, *imprudent investing*, and misappropriation of plan funds.'" *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) (quoting 120 Cong. Rec. 29,932 (1974)) (emphasis added). Congress found that there existed a "lack of . . . adequate safeguards concerning [employee benefit plans'] operation." 29 U.S.C. § 1001(a). In enacting ERISA "following almost a decade of studying the Nation's private pension plans," *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), Congress sought both to protect plan beneficiaries from mismanagement of benefit plans and to provide robust remedies:

> It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b); *see also Firestone*, 489 U.S. at 108 ("ERISA provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans.") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

B. The Ninth Circuit's Rule Deprives New Beneficiaries Of Protection Against Longstanding Imprudent Investments

Under the Ninth Circuit's rule, if plan fiduciaries provide an imprudent investment option for more than six years, that investment is immune from scrutiny so long as no "significant changes" with respect to the investment have occurred. Thus, if a plan had maintained a menu of imprudent investment options from 2008 through 2014, a participant who joins the plan in 2015 would have no recourse to challenge those imprudent investments, even if she filed suit promptly on the day she joined the plan.

That concern is not merely academic; the lower courts denied relief to new plan participants in this very case. The class that petitioners represented included new members of the plan.[34] And, if affirmed,

[34] *See* App. 66 (certified class defined as: "All persons, excluding the Defendants . . . , who were or are participants or beneficiaries of the Plan and who were, are, or may have been affected by the conduct set forth in the Second Amended Complaint.").

the judgment below would have preclusive effect against all class members. *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). Yet the lower courts denied all relief, even declining to order the removal of the Allianz retail-class fund, which was added in 1999 and remained in the plan as of the district court's post-trial decision. That anomalous result finds no support in ERISA's text, and it contradicts Congress's purpose of providing "ready access to the Federal courts" "to protect . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

1. Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104, provides:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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

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

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is

not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout

period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of –

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon-

(A) the earlier of –

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which –

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if –

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change

to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements.

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary –

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice.

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement –

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement –

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection –

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

2. Section 413 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1113, provides:

§ 1113. Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.