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 RESPONDENTS

ANNA-ROSE MATHIESON
WARD A. PENFOLD
GABRIEL MARKOFF
DIANA ROGOSA
BRIAN Y. CHANG
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

SERGEY TRAKHTENBERG
SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, CA 91770

JONATHAN D. HACKER
(*Counsel of Record*)
WALTER DELLINGER
BRIAN D. BOYLE
MEAGHAN VERGOW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
jhacker@omm.com

Attorneys for Respondents

QUESTION PRESENTED

The limitations ruling under review in this case held that petitioners could not challenge the *initial* decision to include certain mutual funds in the 401(k) lineup before ERISA's six-year statutory repose period. The ruling explicitly allowed petitioners to challenge respondents' subsequent monitoring of, and failure to remove, the same funds during the repose period. Petitioners accordingly introduced evidence at trial seeking to establish that respondents acted imprudently by conducting inadequate reviews of the funds during the repose period and thereby failing to remove the funds. The district court found that petitioners' evidence was insufficient to prove that claim as a matter of fact.

The sole question raised by that ruling is:

Whether the district court clearly erred in its factual finding that petitioners' evidence was insufficient to establish that respondents committed new breaches during the repose period by imprudently monitoring and retaining the challenged funds.

RULE 29.6 STATEMENT

Respondent Edison International is the parent of respondent Southern California Edison Company. Edison International is a publicly traded company and has no corporate parent, and no publicly traded company beneficially owns more than 10% of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (continued)

INTRODUCTION

Petitioners make the right argument about the wrong case.

Petitioners' central legal argument is that under the Employee Retirement Income Security Act ("ERISA"), fiduciaries responsible for selecting investment options in a 401(k) plan lineup have an ongoing duty to monitor the options to ensure that they remain prudent choices for the plan. Accordingly, petitioners contend, they should have been allowed a trial on their claim that respondents breached their duty of prudence within ERISA's six-year period of repose by failing to adequately monitor and remove three mutual funds added before that period, because less expensive share classes were available in the same funds.

Petitioners have a problem: *the district court did not bar them from pursuing that claim*. To the contrary, petitioners tried exactly that claim, after the court explicitly held that ERISA's statute of repose did not bar claims that accrued during the repose period. Accordingly, petitioners at trial sought to prove that respondents breached their fiduciary duties by imprudently monitoring and retaining the challenged funds. Specifically, they argued that, while respondents monitored all investment options according to specific investment criteria with periodic (quarterly) reviews, there were "significant changes" within the three challenged funds that should have triggered a much deeper, "full due diligence review" of those funds, which would have identified the availability of less expensive share classes. The district court rejected that theory of imprudence, *not* on limitations grounds, but solely because petitioners' evidence was insufficient to support their own changed circumstances theory. In the court's words: petitioners "have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees" for the three challenged funds. Pet. App. 149. Petitioners have never raised any substantive challenge to that factual finding.

This case, in short, does not present the limitations issue on which the Court granted certiorari, as evidenced by the fact that petitioners and respondents *agree* on its answer: No, ERISA's statute of repose does *not* bar a claim that a fiduciary breached its fiduciary duty by imprudently monitoring and retaining a given fund during the repose period, even if that fund was added before the repose period, so long as the plaintiff proves a *new* breach in the course of monitoring that fund. Put differently, no matter how the Court answers the Question Presented, the judgment below must be affirmed, because petitioners cannot establish—and do not even argue—clear error in the district court's factual finding that petitioners proved no new breach during the repose period as to the three challenged funds here.

The appropriate course in these circumstances is to dismiss the writ as improvidently granted, both because the limitations question on which certiorari was granted is not actually presented on this record, *see*, *e.g.*, *Rogers v. United States*, 522 U.S. 252, 259 (1998); *Smith v. Butler*, 366 U.S. 161, 161 (1961), and because the correctness of the judgment being reviewed turns entirely on case-specific factual findings, *see*, *e.g.*, *NLRB v. Hendricks Cnty. Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

In the alternative, the Court should affirm the judgment below. All agree that a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent. The only dispute even arguably at issue here concerns the *scope* of that duty, and whether it was fulfilled by respondents' quarterly reviews of the lineup options. The district court answered that question as a matter of fact, finding no breach during the repose period, and no authority under ERISA or trust law mandates a contrary result. There is certainly nothing requiring ERISA fiduciaries to conduct a full-scale, stem-to-stern diligence review of all investment options in a 401(k) lineup on a frequently recurring periodic basis. Any such rule would impose extraordinary administrative costs on plans, sponsors, and participants, contrary to ERISA's objectives.

Petitioners have abandoned their theory below that they were entitled to pursue their challenges to the three funds based on the continuing effects of imprudently including them in the first place. Petitioners now say they do not and need not seek to establish imprudence in the funds' initial inclusion, but only imprudence in failing to adequately monitor the funds. Petitioners are right to disavow their "continuing violation" theory—it is squarely at odds with the text and policies of ERISA § 413(1), as the Ninth Circuit explained. Yet in failing to identify any actual imprudence in respondents' monitoring process, petitioners' claim turns out to be materially identical to a continuing violation theory, and it fails for the same reasons.

If the writ is not dismissed, the judgment should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

1. The Employee Retirement Income Security Act of 1974 "represents a careful balancing between ensuring fair and prompt enforcement of rights under [employee benefit plans] and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citations and quotations omitted). While ERISA seeks to protect employee retirement accounts, it also seeks to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering … benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

ERISA imposes a variety of duties on fiduciaries of employee benefit plans, and allows participants to bring suit to obtain legal or equitable relief for violations of these duties. 29 U.S.C. §§ 1109(a), 1132(a)(2). At issue in this case is the duty of prudence imposed under ERISA § 404(a), which requires a fiduciary making investment decisions 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." *Id.* § 1104(a)(1)(B). As petitioners acknowledge, the "specific actions required by the duty of prudence may vary according to the factual circumstances." Petr. Br. 41 n.28; *see Frahm v. Equitable Life Assurance Soc'y*, 137 F.3d 955, 960 (7th Cir. 1998).

The prudent person standard, like much of ERISA, is informed by the common law of trusts.

Varity, 516 U.S. at 496. Trust law is not dispositive, but acts as "a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Id.* at 497; *see Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000).

2. Congress's "careful balance" between protecting employees' retirement assets and encouraging employers to provide retirement plans by minimizing costs is reflected in the limitations provisions codified at ERISA § 413, 29 U.S.C. § 1113. The statute provides:

> 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.

Id. While § 413(1) is sometimes referred to colloquially as a statute of "limitations," the six-year provision is actually a statute of repose because it "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014), as every circuit to have considered the issue has recognized, *see David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Ranke v. Sanofo-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006); *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998).

B. Factual Background

1. *Plan Overview And Structure*

Respondent Edison International, through its subsidiary Southern California Edison (collectively, "Edison"), offers a defined-contribution 401(k) savings plan (the "Plan") to current and former employees of Edison-affiliated companies. *See* Pet. App. 70. At the time of this litigation the Plan served around 20,000 employees and former employees, and had assets of approximately $3.8 billion. *Id.* at 13.

Prior to 1999, the Plan offered participants only six investment options. *Id.* at 72. The unions representing Edison employees sought more variety, specifically requesting the inclusion of retail mutual funds among the investment options so employees could more easily track their investments. *Id.* at 54. Following extensive negotiations, Edison in 1999 agreed to expand the Plan to offer about fifty investment options—including about forty retail mutual funds. *Id.* at 73, 169. The options covered a range of investment styles, risk profiles, fees, and the like. *Id.* Participants could freely choose where to invest from among these options, and each fund's "expense ratio" was fully disclosed to participants.[1]

Edison also fully and repeatedly disclosed that "revenue sharing" from the retail mutual funds would be used to defray the costs of plan administration, as authorized by the Plan terms. Pet. App. 78, 80. In a revenue-sharing arrangement, a mutual fund shares part of the revenue reflected in its expense ratio with outside entities that provide administrative services to some of the fund's shareholders. For example, 401(k) plans typically retain third-party recordkeepers to provide recordkeeping services to all 401(k) plan participants, including investment tracking and participant communications (such as prospectuses and monthly statements). Because the plan recordkeeper's provision of those services obviates the need for the mutual fund to provide the same services to participants who invest in the fund through the plan, the fund may share with the recordkeeper a portion of its revenue as compensation for providing those services. *Id.* at 78-80. Whether a fund shares revenues with outside recordkeepers does not affect the cost of investing in the fund for any investor or participant, because by law the expense ratio must be uniform for all investors in a given share class. *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011). In this case, some of the retail mutual funds initially included in the

[1] A mutual fund's "expense ratio" is the percentage of the value of the fund's assets that is deducted to pay for various expenses, including investor communications and manager compensation. *See* Pet. App 79-80. For example, a fund from which one percent of assets is withdrawn each year to pay for portfolio management and other expenses has an annual expense ratio of 1%, or 100 "basis points."

Edison lineup shared revenues with the plan's outside recordkeeper, Hewitt Associates, LLC, which applied the revenues against its charges for recordkeeping services provided to the Plan, reducing the express costs of Plan administration. Pet. App. 78, 80.

The Plan's day-to-day administration, structure, and budgetary issues were run by Edison's Benefits Committee, while investment selection and monitoring was performed by Edison's Trust Investment Committee and Chairman's Subcommittee (together, the "Investment Committees"). Pet. App. 71-72. Edison employees who were investment professionals (the "Investment Staff" or "Staff") were specifically tasked with the job of "monitoring the Plan's investment options and, when needed, recommending to the Investment Committees that changes be made to the Plan's investment option line-up." *Id.* at 74; J.A. 150.

Respondents also relied on Hewitt Financial Services ("HFS") and Frank Russell Trust Company for extensive advice on the initial selection and subsequent monitoring of lineup options. Pet. App. 71, 75-76; J.A. 122-23, 152, 170-72, 175-77, 193, 206, 217

2. *Selection And Monitoring Of Investments*

When the Investment Committees were considering whether to add a new fund to the Plan, they conducted an "in-depth," "full due diligence review" of the proposed fund using research performed by the Investment Staff and HFS. Pet. App. 127-28; J.A. 154-55, 194-95, 234. The full due diligence review evaluated factors such as performance history, Morningstar ratings, expense ratios, and the public availability of information for share classes. J.A.

154-55, 157-58; Pet. App. 76-77. The review evaluated funds based on Edison's five "Investment Criteria": (1) the stability of the fund's overall organization; (2) the fund's investment process; (3) the fund's performance; (4) the fund's total expense ratio; and (5) with respect to mutual funds, the availability of information regarding the fund in newspapers and other widely available publications. J.A. 145, 151, 230; Pet. App. 75. Based on the information gathered in the full diligence review, the Investment Committees would ultimately decide whether to add a particular investment to the lineup. J.A. 157-58.

Separate from the in-depth, full diligence review marshaled when a new or replacement fund was under consideration, the Investment Staff also monitored all lineup options on a regular, periodic basis, through monthly, quarterly, and annual reports analyzing each fund's "short- and long-term performance, annualized performance, risk, and performance [compared to] benchmarks and peer groups." J.A. 152-53; *see* Pet. App. 75-76. The Staff met with HFS quarterly and annually to discuss and analyze these reports. Pet. App. 76; J.A. 169-70. In addition, the Staff conducted research and analysis regarding the investment options in the Plan by examining data from Morningstar and other online sources. Pet. App. 76-77. Working with HFS, the Staff identified "benchmarks" (typically general market indices, such as the Russell 2000 Value Index, that corresponded to the investment profile of each fund) to help determine whether the funds were meeting Edison's Investment Criteria. *Id.* at 76-77, 93-95; J.A. 178. The Staff evaluated fund performance "on a net-of-fee basis to ensure that relative performance comparisons [could] be made on a consistent basis."

J.A. 152, 178. The Staff's protocol for monitoring performance net-of-fees identified performance issues caused by outlier fees. 10/21/2009 Trial Tr. vol. 1, at 43:11-24.

If the Investment Staff's regular monitoring revealed warning signs—such as a performance issue, change in management, or deterioration in financial condition—suggesting that the fund in question might cease to meet Edison's Investment Criteria, the fund was moved to the "watch list." Pet. App. 76-77; J.A. 154. Funds on the watch list were categorized either "low priority" or "high priority," depending on the circumstances that triggered the concern. Pet. App. 94-95; J.A. 165.

Funds on the watch list were subject to review "in greater detail," tailored to the concerns identified, and were discussed at the Investment Committees' quarterly meetings. Pet. App. 76-77; J.A. 169-70, 178. The Investment Committees did not make changes to the plan lineup lightly, because changes could "cause participant confusion" as well as "disruptions to plan administration." J.A. 155, 199, 232. Accordingly, the Staff generally recommended changes in the Plan's offerings only if monitoring revealed "significant issues" under Edison's Investment Criteria. Pet. App. 77-78; J.A. 165, 199, 232.

3. *The Three Funds At Issue*

The three mutual funds still at issue in this case—the Janus Small Cap Value fund ("Janus fund"); Franklin Small-Mid Cap Growth fund ("Franklin fund"); and Allianz CCM Capital Appreciation fund ("Allianz fund")—were each added to the lineup in 1999 as part of the Plan overhaul negotiated with Edison's unions. Petitioners have disavowed any claim that including these funds with retail-class shares in 1999 was imprudent (Petr. Br. 2, 36-37, 44, 45), and because the district court's limitations ruling barred any challenge to the initial decision to include the funds with retail-class shares, *see infra* at 14, the record contains no evidence as to why retail-class shares were chosen for the Janus and Allianz funds in 1999.[2]

As to the Franklin fund, however, petitioners acknowledge that respondents had a legitimate reason for offering participants retail-class shares: only the retail-class shares had "a Morningstar rating and significant performance history." Petr. Br. 40 n.27 (quotation omitted); *see* Pet. App. 96-97; J.A. 193. Participants in 401(k) plans often prefer options with published ratings and performance histories so they can take this information into account when evaluating their investment choices. *See Loomis*, 658 F.3d at 671-72; Investment Company Institute, *Understanding Investor Preferences for Mutual Fund Information* 10 (2006), *available at*

[2] The district court observed that respondents did not explain why they did not initially select the institutional-class shares in the Janus and Allianz funds, Pet. App. 92, 94, but because petitioners' challenge to that initial decision was barred by ERISA's statute of repose, respondents had neither reason nor opportunity to proffer evidence concerning the circumstances of and motivations for that initial decision. There may well have been good reasons, as shown by the example of the Franklin fund discussed in the text. *See also infra* at 30-31. In any event, if the initial selection of retail-class shares in the Janus and Allianz funds was at all relevant to petitioners' claims, it was *petitioners'* burden to adduce evidence—through written or testimonial discovery—as to the reasons for and prudence of those selections.

http://www.ici.org/pdf/rpt_06_inv_prefs_full.pdf; *see also* Pet. App. 53-54; J.A. 124.

Retail-class shares often have higher expense ratios than institutional classes. Pet. App. 83-84. The difference in expense ratio between the institutional and retail share classes for the Janus, Franklin, and Allianz funds, for instance, ranged from 0.18% to 0.33%. *See id.* at 92, 94-95, 97. At the same time, however, institutional classes typically require a substantial minimum investment level. *Id.* at 83-84, 87, 90.[3]

In 2002, Edison added options to invest in retail-class shares of three other funds that also had institutional-class shares. Edison did not qualify for the institutional-class investment minimums of those funds, but the district court found (based on an expert's assertion) that the fund managers would have waived the minimums if Edison had requested a

[3] The Solicitor General incorrectly states that "[f]or each of the six mutual funds challenged in this case, '[t]he only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants.'" U.S. Br. 18 (citing Pet. App. 128-29, and Pet. App. 61); *see also* Petr. Br. 7. The cited record passages refer only to the *three funds added during the repose period*. There are no findings that for the three funds added before the repose period, the "only difference" between the share classes was their expense ratios. To the contrary, the record shows that the share classes for the Franklin fund were different in ways other than cost. *See supra* at 11. As explained in the text, there may have been material differences between the share classes for all the funds.

waiver, Pet. App. 137-41, relying on evidence particular to those three funds, *id.* at 139.[4]

C. Proceedings Below

1. *Petitioners' Complaint*

Petitioners filed their action on August 16, 2007. Pet. App. 65. Following extensive discovery, petitioners filed the operative Second Amended Complaint (J.A. 53-100), which set forth 27 different theories of liability. One of the complaint's central theories was that respondents violated the duty of prudence by including *any* mutual funds in the Edison Plan lineup, on the ground that *all* mutual funds are unreasonably expensive compared to other available investment options. *E.g.*, J.A. 54. The complaint did not include any explicit allegations that respondents breached their duty of prudence by failing to remove funds with retail share classes when institutional share classes were available.

2. *The District Court's Summary Judgment Ruling: Petitioners May Assert Any And All Claims For Breaches Occurring During The Repose Period*

Respondents moved for summary judgment under the six-year repose period of ERISA § 413(1), but only as to "any claims based on purported breaches that occurred prior to August 16, 2001." D.C. Dkt. 146-2, at 24. In response, petitioners did not draw a distinction between claims based on conduct that occurred before August 16, 2001, and claims addressed to conduct occurring after. Instead, petitioners

---

[4] The court characterized Edison's failure to seek a waiver as to the three new funds as a mere "oversight." D.C. Dkt. 448, at 8.

simply asserted that "the six year limitation does not apply in cases of fraud or concealment." D.C. Dkt. 198, at 24.

The district court granted summary judgment on the merits to respondents on all but two of the claims petitioners asserted: that respondents breached their duty of loyalty by offering mutual funds with revenue sharing during the repose period, and that they breached their duty of prudence by imprudently monitoring the fees of a money market fund selected in 1999 and otherwise imprudently managing the Plan's investment in that fund. Pet. App. 150-58, 166-67; J.A. 131-32, 139-40. Addressing respondents' argument based on § 413(1), the district court barred claims challenging decisions made before the repose period, holding that Petitioners' "claims will be limited to those that accrued within six years of the filing of this suit." Pet. App. 181. The court in no way restricted the theories or evidence petitioners could rely on to establish claims based on new breaches during the repose period.

3. *<u>Petitioners' Belated, Narrow Share-Class Theory</u>*

Petitioners introduced their theory of liability based on share classes for the first time in this case in a brief they filed shortly before trial was set to begin. D.C. Dkt. 323, at 1-2 (Oct. 1, 2009). "In preparing for (and during) trial," the district court observed, petitioners developed "a new legal theory regarding the selection of retail share classes rather than institutional share classes of certain mutual funds." Pet. App. 68-69. This new theory asserted "that Defendants violated both their duty of loyalty and their duty of prudence by investing in the retail share classes of six mutual funds." *Id.* at 68. The court permitted petitioners to develop their new theory at trial notwithstanding its belated appearance. The court allowed petitioners to submit an amended expert report to support their share-class theory, and after the trial the court took supplemental briefing and additional evidence on the issue. *Id.* at 68-69.

Petitioners did not base their theory of breach as to the Janus, Franklin, and Allianz funds added in 1999 on the regular, periodic reviews respondents conducted during the repose period. Instead they sought to show that respondents should have conducted a *different* review of these three funds—a "full due diligence review of the funds, equivalent to the diligence review Defendants conduct when adding new funds to the Plan." *Id.* at 127-28. That distinct, full due diligence review was required, petitioners argued, because the Janus, Franklin, and Allianz funds "all underwent significant changes during the statute of limitations period that should have triggered" a "full due diligence review." *Id*. at 127.

Indeed, petitioners maintained an exclusive focus on changed circumstances allegedly meriting a "full due diligence review," despite being all but invited by the district court to develop a theory that ordinary-course monitoring should have revealed the share-class issue. In response to direct questioning by the court about the nature of the breach petitioners were asserting, petitioners' expert *refused* to opine that respondents should have identified the share-class issue in the funds during their regular, periodic review process. *See* J.A. 188-90. Petitioners' expert instead carefully limited his testimony to the contention that the share-class issue should have been identified because of *changes* in the funds "significant enough that [they] should have triggered the committees *to deal with them as if they were new funds*." *Id.* at 189 (emphasis added). It was *only* "at that point," the expert explained, that respondents "should have … identified, amongst other things, the share class issue." *Id.* at 189-90.[5] Following that exchange, petitioners' expert reiterated the point in his post-trial declaration: because of the ostensibly "significant changes" in the funds, he asserted, a prudent fiduciary would have evaluated the funds "in the same way a new fund added to the Plan would be evaluated," and "in so doing, would have identified the cheaper share class and determined that it was in the best interests of the Plan participants to utilize this cheaper share class." D.C. Dkt. 402-2, ¶¶ 27, 35 (reprinted at Appendix B, at 4a-6a).

Nowhere else in testimony or in their trial submissions did petitioners seek to establish that the alleged share-class issue should have been identified in respondents' regular, periodic reviews of the lineup options. Their entire case as to the Janus, Franklin, and Allianz funds instead was limited to trying to prove that significant changes in each fund required the distinct, full diligence review appropriate for adding new funds, at which point, they argued, the share-class issue should have been identified. *See*, *e.g.*, J.A. 185-90; D.C. Dkt. 393, at 15-19 (post-trial brief for petitioners: "Breaches for the [Janus, Allianz, and Franklin funds] Accrued within the Limitations Period Because The Name Changes were Accompanied by Events that Should have Trig-

[5] The court's effort to probe this important distinction is reprinted in Appendix A to this brief as well as J.A. 188-90.

gered Substantive Evaluation like that Required for a 'New Fund.'"); D.C. Dkt. 402, at 3-8 (similar).

4. *The District Court's Factual Findings: Petitioners Failed To Prove A New Breach Of The Duty Of Prudence During The Repose Period*

After reviewing petitioners' trial testimony and post-trial submissions concerning the changes to the Janus, Franklin, and Allianz funds during the repose period, the district court rejected petitioners' contention that those changes were substantial enough to require the kind of full diligence review that, in petitioners' view, would properly have identified the alleged share-class issue. According to the court, petitioners "have not met their burden of showing that a prudent fiduciary would have reviewed the available share classes and associated fees … as a result of the events" that petitioners claimed should have triggered a full due diligence review. Pet. App. 149-50.[6] And because petitioners

---

[6] The change identified by petitioners in the Janus fund was "nothing more than a rebranding" (the fund previously had been called the Berger Small Cap Value Fund); the fund's management team, investment style, performance benchmarks, and Morningstar categorization remained the same. Pet. App. 93-94. The change in the Allianz fund was likewise merely a rebranding (it had been known as the PIMCO CCM Capital Appreciation Fund) following Allianz's acquisition of PIMCO, which again did not result in changes to management, investment strategy, Morningstar classification, or fund benchmarks. *Id.* at 95. Edison's Investment Staff put both the Janus and Allianz funds on the watch list for closer monitoring, but ultimately identified no concerns under the Investment Criteria warranting further action. The change in the Franklin fund was a revised investment strategy in September 2001 to allow investments in some larger companies. *Id.* at 97. Notwithstanding the new investment strategy, the fund's ownership and core managers remained the same after the change, Morn-

asserted no other basis on which respondents should have identified the alleged share-class issue in these three funds, the district court rejected petitioners' claim as to the Janus, Franklin, and Allianz funds.[7]

For the three funds added with retail-class shares in 2002, when respondents *did* conduct a full diligence review—as they always did when considering new funds—the court found that respondents breached their duty of prudence by failing to identify the institutional-class alternative and to seek a waiver of the investment minimum in order to offer it. *Id.* at 128-42. The court entered judgment and awarded a total of $370,732 in damages for all three funds combined. J.A. 237.

Finally, the district court rejected petitioners' other remaining claims that respondents breached their duty of loyalty by offering funds that provided revenue sharing to the Plan's recordkeeper. Pet. App. 117-25. The court found (for all funds) that respondents did not make "fund selections with an eye toward increasing revenue sharing" or advancing Edison's interests over those of the Plan's participants. *Id.* at 124-25. The evidence instead

---

ingstar maintained its original style classification of the Fund, and many of the Fund's equity investments remained the same. *Id.* at 97-98, 148-49; J.A. 213-14, 226-27. Edison's Investment Staff consulted with HFS and decided to reclassify the Franklin Fund as a mid-cap fund, but again determined that no other changes were required. Pet. App. 98. Petitioners have never challenged on appeal any of the foregoing findings.

[7] Edison removed the Janus and Franklin funds from the lineup two years before trial. Pet. App. 94, 98. The Allianz fund remained in the Plan as of the district court's decision, *id.* at 95-96, 147, but Edison subsequently removed the fund when the Plan lineup was substantially overhauled in January 2011.

showed that the new funds added between 2002 and 2008 overwhelmingly offered *less* revenue sharing than the funds they replaced. *Id.* at 122-25.

5. *Petitioners' Appeal: Abandoning "Changed Circumstances" To Argue "Continuing Violations"*

On appeal, petitioners abandoned their theory that changes within the funds required Edison to conduct the kind of full diligence review necessary to have identified the alleged share-class issue. C.A. Dkt. 14, at 24-29; C.A. Dkt. 51-3, at 38 n.11. Instead of challenging the district court's factual findings as clearly erroneous, petitioners argued for the first time that ERISA § 413(1) "incorporates the continuing violation doctrine." C.A. Dkt. 14, at 26. Petitioners thus argued that they should be allowed to challenge the *initial decision* to include the Janus, Franklin, and Allianz funds in 1999 and thereby obtain damages for the six years prior to the filing of suit as a continuation of the original violation, based on the respondents' act of "keeping these funds in the Plan" and failing to identify and reverse the alleged initial selection error through "monitoring." *Id*. at 24-29. Petitioners did not point to any record evidence establishing that a prudent fiduciary would have identified the alleged share-class issue during regular, periodic reviews.

The Ninth Circuit affirmed the district court's summary judgment and trial rulings in full, addressing both the new "continuing violation" argument and the argument that respondents committed new breaches during the limitations period.

First, the court of appeals rejected petitioners' legal argument that § 413(1) incorporates a continuing violation theory. The Ninth Circuit explained that this theory would effectively hold Edison liable for its *initial* selection of the funds: "[Petitioners'] logic confuses the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period." Pet. App. 18 (citation and alterations omitted). Accordingly, the Ninth Circuit held that petitioners' continuing violation claims were time-barred insofar as they were merely a challenge to "the design of the plan menu" and thus effectively a challenge to the initial fund selection itself. *Id.* at 17-18.

Second, the Ninth Circuit agreed with both sides that ERISA fiduciaries have a duty "to exercise prudence on an ongoing basis." *Id.* at 19. Citing the general rule that "fiduciaries are required to act 'prudently' when determining whether or not to invest, or continue to invest," the Ninth Circuit held the district court was "entirely correct" to allow petitioners to offer evidence that a new breach occurred during the limitations period. *Id.* (quotation omitted). But in addressing the only argument petitioners raised at trial to demonstrate a new breach—the changes within the three funds allegedly warranting full diligence review—the Ninth Circuit found no error in the district court's ruling that petitioners failed to meet their burden of proof. *Id.*

SUMMARY OF THE ARGUMENT

I. The writ should be dismissed as improvidently granted. Petitioners' argument in this Court is that the district court improperly applied the statute of repose to bar them from trying to prove at trial that respondents committed new breaches of the duty of prudence during the repose period by inadequately monitoring the Janus, Franklin, and Allianz funds and failing to remove them. But petitioners were allowed to prove exactly that claim at trial—their proof just failed as a matter of fact. The Court did not grant certiorari to consider the factual correctness of the ruling, or to consider arguments about the appropriate scope of a fiduciary's continuing duty to review existing plan investment options. As for the question the Court did grant review to consider, the parties agree on its answer, demonstrating its irrelevance to the actual dispute between them.

II. If the Court does reach the merits of the judgment below, it should affirm. The district court did not clearly err in finding that petitioners failed to establish a breach of the duty of prudence during the repose period.

A. Petitioners' challenge rests on the premise that it is per se imprudent to keep funds with retail-class shares in a 401(k) lineup when institutional-class shares of the same funds are available. But a fiduciary may have perfectly legitimate reasons to add—or maintain—retail-class shares rather than institutional-class shares, including different published performance histories, ratings, and investment minimums. A plaintiff challenging a given retail-share class fund therefore must *prove* why it was imprudent to add or maintain the fund, not simply assume the imprudence.

B. In addition to incorrectly assuming the categorical imprudence of retail-class shares, petitioners wrongly assume that the process of adding funds is equivalent to the process of monitoring them for potential removal. Under common law trust principles, a full due diligence review generally is required before initially selecting trust assets. After that initial selection, the fiduciary may conduct much less intensive periodic reviews, monitoring only for significant changes in the value and risks of the investments. None of the trust-law sources cited by petitioners establish that the duty to monitor entails frequently recurring full diligence reviews of the kind on which petitioners' claim depends.

ERISA likewise does not impose any such duties on fiduciaries monitoring existing plan investments and lineup options. To the contrary, a rule requiring constant, exhaustive reviews, re-reviews, and re-re-reviews would impose staggering costs, undermining a core ERISA objective of promoting plan formation by minimizing plan expenses. Such costs would inevitably be passed on to participants to some extent, either in the form of increased fees, reduced benefits, or both. And repeated exhaustive reviews would encourage repeated changes to lineup options, subjecting participants to instability, paperwork, and confusion. Avoiding such disruption for participants is exactly why respondents' monitoring process was designed—partly in response to a complaint from an Edison employee union—to remove or replace funds only when significant issues arise under the specific Investment Criteria applied in periodically reviewing existing funds.

C. Because the process of adding investment options differs significantly from the process of subsequently monitoring them, the question whether it was imprudent to *add* a given fund likewise differs significantly from the question whether it was imprudent to *maintain* the same fund. In this case, the undisputed record evidence shows that respondents engaged in a prudent monitoring process, reviewing all options periodically to track their net-of-fee performance compared to benchmark and to identify other developments relevant to the Investment Criteria. The district court's unchallenged factual findings determined that respondents did not act imprudently by not conducting the more intensive full diligence review of the three challenged funds that, according to petitioners' trial expert, would have identified the share-class issue with those three funds. Nothing in trust-law or ERISA precedents required such a review as a matter of law. And petitioners' expert *refused* to opine that respondents should have identified the alleged share-class issue in the funds during their regular, periodic review process. There was accordingly no factual or legal error in the trial court's judgment.

III. Petitioners complain that the Ninth Circuit's opinion characterizes their claim as asserting a form of "continuing violation" theory, but this Court reviews *judgments*, not opinions. And the judgments below are correct for the reasons explained above. In any event, petitioners clearly did assert on appeal a continuing violation theory, which was correctly rejected.

A. Although petitioners now deny resting their claims on a continuing violation theory, their claims amount to the same thing, given their failure to challenge the district court's factual finding that respondents acted prudently in monitoring and retaining the challenged funds. Absent any imprudence in the post-selection monitoring process, petitioners' claims necessarily challenge only the continuing effects of an allegedly imprudent initial selection.

B. That theory of liability is contrary to the text and purpose of ERISA § 413(1). Because the bar to suit established by § 413(1) is based on the *last* culpable act of the defendant, it constitutes not just a traditional statute of limitations, but a statute of repose. As such, the provision establishes not just a time limit on suit, but a period after which the defendant is to have absolute freedom from liability for pre-repose acts. Holding fiduciaries liable for simply failing to reverse allegedly imprudent pre-repose decisions would render the textual right to repose meaningless and other portions of the statute superfluous.

C. Petitioners' invocation of the "omission" provision in § 413(1)(B) only highlights the flaws in their claims. That provision prohibits the filing of suit more than six years after the latest date on which the fiduciary could have cured an earlier omission. If an actionable "omission" can simply be a fiduciary's failure to correct some earlier allegedly imprudent decision, in many cases the latest date would never arrive—presumably most fiduciaries in theory could at any time revisit and correct errors made long ago, so every day they omit to do so creates a new six-year window for suit. The statute of repose would thus establish the opposite of repose: perpetual liability.

D. Enforcing the right to repose will not permanently immunize funds added before the repose period from review. Everyone agrees that fiduciaries must act prudently in monitoring existing investment options and deciding whether and when to remove or replace them. A plaintiff thus is not barred by § 413(1) from seeking to establish that a fiduciary committed a new breach of that duty during the repose period, so long as the claim is based on distinct facts establishing that the fiduciary acted imprudently in the process of monitoring existing funds. Further, patently imprudent funds are unlikely to go undetected and unchallenged for six full years, and if they do it will often be because of fraud or concealment—in which case the repose period will not commence until the imprudence is exposed. And even if some legitimate claims of imprudence go unremedied, that result is inevitable for any statute of repose, the very *point* of which is to terminate liability for what would otherwise be a viable claim.

E. Finally, subjecting fiduciaries to liability for pre-repose decisions would harm plan participants and impose the kind of costs that Congress worried would discourage employers from offering ERISA plans.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

This case does not present the question the Court granted certiorari to consider. There is, at most, only a factbound dispute concerning the sufficiency of the evidence petitioners introduced at trial to support their claims that respondents committed new breaches of their fiduciary duties during the repose period by imprudently monitoring and retaining the Janus, Franklin, and Allianz funds.

When plenary consideration reveals that "the record does not fairly present the question that [the Court] granted certiorari to address," the writ normally will be "dismissed as improvidently granted." *Rogers v. United States*, 522 U.S. 252, 259 (1998); *see Smith v. Butler*, 366 U.S. 161, 161 (1961) (dismissing writ where, "[a]fter full argument and due consideration, it became manifest that the course of litigation and the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted"). The Court similarly will dismiss the writ when it turns out to "present[] primarily … a question of fact, which does not merit Court review." *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *see* Robert L. Stern et al., *Supreme Court Practice* 362 (10th ed. 2013) ("Because review of a factual matter 'would be of no importance save to the litigants themselves,' it is … appropriate to dismiss the writ." (quoting *S. Power Co. v. N.C. Pub. Serv. Co.*, 263 U.S. 508, 509 (1924))).

Those considerations apply fully here. Petitioners' entire opening brief rests on the premise that the trial court applied ERISA § 413's six-year statute of repose to bar them from pursuing a claim that respondents committed new breaches of prudence during the repose period as to the Janus, Franklin, and Allianz funds. Petr. Br. 11, 13, 14; *see* U.S. Br. 4 (same). The court did no such thing.

As explained above, respondents' motion based on § 413(1) sought only to exclude imprudence claims for alleged breaches accruing *before* the repose period. *Supra* at 13. Petitioners' sole response was that their claims challenging the pre-repose *initial* selection should proceed because § 413(1)'s fraud or concealment exception applied. *Id.* at 13-14. The district court agreed with respondents, and accordingly barred claims challenging decisions made before the repose period. *Id.* The court did not bar any claim asserting new breaches during the repose period, or impose any restrictions on the theories or evidence respondents could introduce to prove such a claim. *Id.*

At trial, petitioners chose to prove their claim in a particular way. As detailed above, petitioners did *not* try to prove that respondents should have identified the share-class issue in their regular, periodic monitoring of the Janus, Franklin, Allianz, and other funds in the lineup. They instead chose to limit their claim to an argument that significant changes in the three funds should have triggered the more in-depth, full diligence review applied to *new* fund selections. *Supra* at 15-17. When the court specifically pressed petitioners' expert to address whether in his opinion routine monitoring should have revealed the share-class issue, the expert did not endorse that theory, instead reiterating his contention that changes within the funds should have triggered the full diligence review otherwise appropriate only for adding new funds. *Supra* at 15-16; *see also* App. A, at 1a-3a; App. B, at 4a (¶ 27), 5a-6a (¶ 35).

Petitioners thus starkly mischaracterize the record in stating that the district court prohibited petitioners from asserting a new breach during the repose period *unless* they could identify "'significant changes during the [repose] period'" that "'should have triggered [respondents] to conduct a full diligence review.'" Petr. Br. 13 (quoting Pet. App. 127). The district court did not impose any such restriction. In the opinion passage petitioners cite, the district court was describing *petitioners' own theory* based on changes within the funds. Nowhere in the record is there so much as a hint that the district court conditioned petitioners' claim of breach during the repose period on proof of changed circumstances.

In short, petitioners were allowed to pursue at trial *exactly* the claim they now say they should have been allowed to pursue at trial, i.e., "whether respondents acted imprudently in retaining the retail-class shares throughout the limitations period." Petr. Br. 40 n.27; *see id.* at 41 n.28 ("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 shares and failing to remove the higher-cost retail-class shares for six years, respondents breached their duty of prudence."). The district court rejected that claim on its merits as a matter of fact, not on limitations grounds as a matter of law. The sole question properly raised by that ruling is whether the court's factual finding is clearly erroneous. And the answer to that factbound, case-specific question has nothing to do with the answer to the limitations question on which the Court granted certiorari. No matter how the Court answers that question, the judgment still must be affirmed unless the Court finds that the district court clearly erred in rejecting petitioners' prudence claim on its merits. The irrelevance of the limitations question is confirmed by the fact that respondents *agree* with petitioners on its answer: a claim challenging retention of a fund added to the lineup before the repose period is not time-barred, *if* the claim actually asserts new, distinct breaches during the repose period, i.e., that the fiduciaries conducted imprudent reviews and thereby failed to remove an existing fund that a prudent fiduciary would have removed.

The only relevant disagreement is whether respondents in fact breached their monitoring duty, and the district court resolved that dispute after a full and fair trial. Petitioners have not challenged the court's factual findings, and this Court did not grant certiorari to review them.

The writ should be dismissed.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT RESPONDENTS ACTED PRUDENTLY IN MONITORING AND RETAINING THE CHALLENGED FUNDS DURING THE REPOSE PERIOD

A. It Is Not Categorically Imprudent To Include Funds With Retail-Class Shares Merely Because Institutional-Class Shares Are Available

Petitioners' current effort to find error in the trial court's judgment seeks to distract from the actual trial record by suggesting that no prudent fiduciary would ever, under any circumstances, include mutual funds with retail-share classes in a 401(k) lineup when institutional-class shares in the same fund are available. *E.g.*, Petr. Br. 32 ("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 there are—or can be—differences material to a fiduciary's evaluation of mutual fund share classes, and thus imprudence in the inclusion of retail-class shares must be proved through evidence, not just asserted or assumed.

As a general matter, there is no requirement that an ERISA fiduciary focus solely on the cost of an investment to the exclusion of other considerations. "[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *see Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (a fiduciary might "have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility"). As the Ninth Circuit put it, there are "simply too many relevant considerations for a fiduciary, for [this] type of bright-line approach to prudence to be tenable." Pet. App. 55.

More specifically, despite their lower cost, institutional-class shares are not categorically superior to retail-class shares for all 401(k) plans in all circumstances. The record in this case proves the point: because the Franklin fund institutional-class shares were new, they did not have a Morningstar rating or a significant performance history, *see supra* at 11, which would have left participants without important information to evaluate in deciding whether to direct their retirement funds to that option. Moreover, the performance of retail-class shares was more likely to be covered in daily newspapers, making it easier for participants to track the fund's performance. Institutional-class shares also typically require minimum investment amounts, which a given 401(k) may or may not be able to satisfy, or which may or may not be waivable. *See supra* at 12-13. Finally, many plan fiduciaries choose retail-class shares over institutional-class shares to obtain greater revenue sharing, which is used to defray costs of plan administration (*see supra* at 7-8) that would otherwise under plan terms be imposed on participants through per-capita or per-transaction fees.[8]

For the foregoing reasons, the "fundamental proposition that no investments or techniques are imprudent per se," Restatement (Third) of Trusts, Ch. 17 Intro. Note, at 290 (2007), is as true for different mutual fund share classes as it is for any other type of investment. Accordingly, it was incumbent on petitioners to affirmatively *prove*, through sufficient competent evidence, that respondents acted imprudently by not removing the Janus, Franklin, and Allianz funds on share-class grounds during the repose period.

B. The Requirements Of Prudence In Monitoring And Removing Funds Differ Significantly From The Requirements Of Prudence In Adding New Funds

In addition to wrongly assuming the categorical imprudence of including retail-class shares over institutional-class shares, petitioners wrongly treat the process of monitoring and removing funds as equivalent to the process for adding new funds. *See* Petr. Br. 47-48. Petitioners thus rely heavily on the district court's finding that respondents acted imprudently in *adding* three funds with retail-class shares during the repose period as proof that respondents acted imprudently in *retaining* three different funds added before the repose period. *Id.* at 11-13, 39-41.

---

[8] Unlike most plan sponsors, Edison agreed to bear the costs of plan administration. Accordingly, respondents did not consider revenue sharing in evaluating funds, as the district court found. *See supra* at 18-19.

Petitioners' equation of the review required for adding funds with the review required for monitoring funds is directly at odds with their own trial theory, which treated the two inquiries as separate and distinct. *See supra* at 14-17. At trial, petitioners' expert distinguished periodic monitoring reviews from the "full due diligence review" appropriate for evaluating potential new options, and suggested that only the latter, more in-depth review would be expected to identify a less expensive share class within an existing fund. *See supra* at 15-16.

Petitioners' current theory is contrary not only to their own trial theory, but also to the trust-law principles they now invoke. *See* Petr. Br. 24-28. It is also at odds both with ERISA's core objective of promoting plan formation by minimizing administrative costs, and with the interests of plan participants in avoiding instability and confusion over 401(k) lineup options.

1. <u>*Trust Law Does Not Require A Full Due Diligence Review During Routine Monitoring*</u>

a. Common law trust principles do not support petitioners' suggestion (Petr. Br. 48) that a fiduciary must conduct a complete diligence review of all investments on a frequently recurring periodic basis after they are selected. A full diligence review, including a thorough vetting of alternative investment products that can achieve the trust's purposes, instead is required *before* initially selecting investments for trust assets. *See* George G. Bogert, *The Law of Trusts and Trustees* § 685, at 393 (2d ed. 1946) ("*Bogert's Trusts and Trustees* (2d ed.)"); Restatement (Second) of Trusts § 227 cmt. o, at 535 (1959); American Bankers' Ass'n Trust Company Division, *Handbook for the Review and Survey of Trust Securities* 16 (1930) ("*ABA Handbook*"). Once investments are selected, a fiduciary must monitor only for significant changes in the value and risks of the investments. *See* III Austin W. Scott, *The Law of Trusts* § 231, at 1883 (3d ed. 1967) ("duty to consider whether in view of the circumstances there is danger that [the assets] will subsequently fall in value"); George G. Bogert et al., *The Law of Trusts and Trustees* § 684, at 146 (3d ed. 2009) ("*Bogert's Trusts and Trustees* (3d ed.)") ("duty to reevaluate the trust's investments periodically as conditions change"); Restatement (Second) of Trusts § 231 cmt. a, at 550-51 (duty to divest "if owing to a subsequent change in circumstances the investment is no longer a proper investment"); *Bogert's Trusts and Trustees* (2d ed.) § 685, at 393-94.

Trust-law treatises advise monitoring fiduciaries to watch for such changes as "a serious depreciation in the market price of the investment, a noticeable diminution in the value of the property which secures the investment, [or] an important adverse change in the financial situation of the obligor." *Bogert's Trusts and Trustees* (3d ed.) § 685, at 161-65 (footnote omitted). The Restatement provides similar guidance, suggesting a trustee monitor "the marketability of the particular investment" and "the probable condition of the market with respect to the value of the particular investment at the termination of the trust," among other considerations. Restatement (Second) of Trusts § 227 cmt. o, at 535; *see also* Uniform Prudent Investor Act § 2(c) (1995).

As these factors indicate, the duty to monitor under trust law involves periodic reviews to identify significant changes to the value or risk of the asset.

The trustee of a mortgage, for instance, must "keep in touch with the general real estate market in the vicinity of the mortgaged property, and, if he has any reason to suspect a *marked falling off in market price*, he should have a revaluation of the property made and act accordingly." *Bogert's Trusts and Trustees* (2d ed.) § 685, at 395 & n.99 (emphasis added). Similarly, trustees of corporate obligations are counseled to "keep abreast of the announcements received from corporations" and to track "the relative yearly [financial] progress made by the company under consideration." *ABA Handbook* at 37, 45. Significant depreciation of an investment should cause the trustee to examine the asset more closely and dispose of it if necessary. *See In re Stark's Estate*, 15 N.Y.S. 729, 731-32 (N.Y. Sur. Ct. 1891); *Johns v. Herbert*, 2 App. D.C. 485, 499 (1894).

But absent meaningful triggering events like these, a trustee "need not make as complete an investigation as he was under a duty to make originally, and he need not watch the [stock] ticker as a speculator would." Scott, *The Law of Trusts* § 231, at 1882; *see Beam v. Paterson Safe Deposit & Trust Co.*, 92 A. 351, 351 (N.J. 1914) (not the duty of a trustee "to watch the 'ticker'"); *O'Neill v. O'Neill*, 865 N.E.2d 917, 921-22 (Ohio Ct. App. 2006); Austin W. Scott et al., *Scott and Ascher on Trusts* § 19.4, at 1450-51 (5th ed. 2007).

b. None of the trust-law sources petitioners cite supports their view that post-selection monitoring entails the same full diligence review appropriate when considering the addition of a new fund. Petitioners' main support for their theory—a passage they quote four times—is the following sentence from the Bogert treatise: "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." Petr. Br. 16, 26, 29, 48 (citing *Bogert's Trusts and Trustees* (3d ed.) § 684, at 147-48) (emphasis as in Petr. Br. 29); U.S. Br. 13-14 (same). But to say there must be "systematic consideration" says nothing about the *scope* of that consideration, and the cited support makes clear that it does *not* contemplate a full diligence review.[9]

For example, Bogert identifies the practice of the Comptroller of the Currency "as a model for all corporate trustees," *Bogert's Trusts and Trustees* (3d ed.) § 684, at 148; *see id.* at 148 n.13, and the Comptroller's guidelines explicitly distinguish between the review process when first accepting an account and subsequent monitoring each year. *See* U.S. Dep't of Treasury, *Comptroller's Handbook: Personal Fiduciary Services* 27-32 (Aug. 2002). The initial review is a comprehensive assessment that requires detailed consideration of all of the account documents and a formal due diligence process. *Id.* at 27, 30-31; *see* 12 C.F.R. § 9.6(a)-(b). By contrast, once an account is accepted, the monitoring is geared toward assessing dynamic risk to the value of a portfolio. U.S. Dep't of Treasury, *Comptroller's Handbook: Investment Management Services* 12 (Aug. 2001); U.S.

[9] The surrounding text also makes it clear that periodic reviews are geared toward monitoring for *changes* to an investment, not attributes that have been static since the investment was initially selected. *See Bogert's Trusts and Trustees* (3d ed.) § 684, at 144-45 (trustee must "reevaluate the trust's investments periodically as conditions change").

Dep't of Treasury, *Personal Fiduciary Services* at 32; *see* 12 C.F.R. § 9.6(c).[10]

The trial court decision in *Stark's Estate* (Petr. Br. 29-31) also does not suggest any duty to conduct full-scale diligence reviews during routine monitoring. To the contrary, the judge in *Stark's Estate* observed only that a trustee must be "watchful" and must "keep himself informed" about matters such as "depreciation," missed interest payments, "the pecuniary responsibility of the obligor," and in general "to take all lawful prudent means with a fair degree of promptness to … prevent a loss coming to the estate." 15 N.Y.S. at 731.

c. Respondents engaged in just the kind of monitoring process contemplated by the *Stark's Estate* judge, the Bogert treatise, and other trust-law sources, as petitioners elsewhere concede. Petr. Br. 8-10, 40. Respondents monitored "on an as-needed basis" when changes occurred, Pet. App. 76, such as when a fund changed its investment style, *id.* at 144-45. Respondents *also* systematically reviewed the funds on a "monthly, quarterly, and annual basis," reviewing a variety of performance and risk factors and comparing the funds to appropriate benchmarks. *Id.* at 75-76.

---

[10] The other sources Bogert cites for the discussion of periodic reviews confirm that these are not the full diligence reviews conducted at the investment selection stage. *See Bogert's Trusts and Trustees* (3d ed.) § 684, at 148 n.13. These resources generally take guidance from the Federal Reserve Board's Regulation F, which simply requires an annual review of investments "to determine their *safety and current value* and the advisability of retaining or disposing of them." Fed. Res. Bd., Reg. F, § 6(c) (as amended Dec. 31, 1937) (emphasis added).

Nothing in trust law indicates that those periodic reviews were insufficiently frequent or searching. Nor does any trust-law source establish that, absent the kind of materially changed circumstances petitioners failed to prove at trial, respondents were required to conduct a full due diligence review during their regular monitoring process. ERISA imposes no such duty either, as the next section shows.

2. *ERISA Does Not Require Fiduciaries To Conduct Full-Scale Diligence Reviews In The Absence Of Materially Changed Circumstances*

No ERISA case or formal guidance from the Department of Labor suggests that fiduciaries' duty to conduct periodic reviews entails full diligence reviews. Even the Solicitor General's brief here for the DOL falls short of asserting such an extreme position.

The absence of authority is not surprising, because requiring that sort of exhaustive review as a routine matter—i.e., absent changed circumstances warranting closer scrutiny—would be contrary to ERISA's core objective of promoting plan formation by minimizing plan expenses. *See supra* at 4. Even regular, periodic monitoring is complicated and costly, as the facts of this case show. Edison employed both full-time internal Investment Staff and outside consultants at HFS to conduct the periodic review process for identifying developments that might affect the funds' performance and risk. Pet. App. 72-76. If that process involved full diligence reviews on a regular basis, plans or their sponsors would be required to expend enormous resources to investigate every investment option every few months, comparing each one to every possible alternative in the market.[11] The costs imposed by that process on all 401(k) plans in the United States would be staggering.

And such costs are inevitably passed on to participants, to some extent, in one form or another. Participants themselves pay some portion of costs directly in most 401(k) plans. U.S. GAO Report to Congressional Requesters, *401(k) Plans: Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees* 21 (Apr. 2012) ("[p]articipants generally pa[y] part or all of the fees charged for key 401(k) plan services"), *available at* http://www.gao.gov/assets/600/590359.pdf. Even when employers have agreed to bear costs, they may choose to offset the massive expense of frequent full diligence reviews by reducing services, offerings, or other benefits—precisely the outcome that ERISA seeks to avoid by minimizing administrative and litigation expenses. *See supra* at 4.

In addition to the increased direct monetary costs imposed on employers and participants, a dramatically intensified, frequently recurring full diligence review process would result in a constantly changing lineup that would subject participants to significant informational and transactional costs. Participants would face a constant flurry of notices—not to mention frequent requests to redirect their investment funds or face involuntary "remapping"—every time a full diligence review identified "better" options. *E.g.*,

---

[11] Petitioners say there is "no precise rule for how frequently such a reexamination must occur," but they suggest it must happen "from time to time," perhaps "once every six months." Petr. Br. 26; *see* U.S. Br. 13-14.

29 U.S.C. § 1104(c)(4)(B)-(C). Respondents' own review policies were designed to avoid precisely this kind of "participant confusion" by limiting fund changes to situations in which "significant issues arise" and the fund no longer met Edison's Investment Criteria. J.A. 165, 199; *see also id.* at 155, 202-03, 232. This policy was adopted partly in response to complaints from one of the Edison employees' unions. Pet. App. 134-35 & n.21.

These employee concerns illustrate why the process and standards for removing a fund must be different from the process and standards for initially selecting a fund. A fund that a prudent fiduciary would not *add* might still be a fund that a prudent fiduciary would not *remove*, not only because of the different review process employed during monitoring, but also because of participants' reliance interests both in the particular fund and in the overall stability of the lineup.

C. The District Court Did Not Err In Rejecting Petitioners' Trial Claim That Respondents Acted Imprudently In Monitoring And Retaining The Challenged Funds

For the reasons discussed in the prior section, the process for monitoring and removing 401(k) lineup options has never been understood as equivalent to the process for deciding which options should be included in the first place.

It is therefore incorrect to suggest that plan fiduciaries necessarily breach their ongoing monitoring duties when they fail to remove an option that should not have been included in the lineup initially. The question, rather, is whether the issue overlooked in *selecting* the option is one that would be identified in the distinct process used to *monitor* existing options, and also whether the issue is substantial enough to require *removing* the option given considerations of cost, reliance, stability, and simplicity for participants.

The undisputed record here shows that respondents engaged in a state-of-the-art monitoring process, reviewing all options periodically to track their net-of-fee performance compared to benchmark and to identify other developments relevant to the specific Investment Criteria. *See supra* at 8-10. Petitioners' own expert repeatedly declined to opine that the periodic review process should have identified a share-class issue in the funds added before the repose period. *See supra* at 15-16. And no deeper, full diligence review was required as a matter of fact (according to the district court) or as a matter of law (according to trust-law and ERISA precedents). The district court accordingly did not err in rejecting petitioners' claim that respondents committed new breaches of the duty of prudence during the repose period by not conducting a full diligence review of the Janus, Franklin, and Allianz funds and thereby identifying the alleged share-class issue and removing the funds.

The two cases on which petitioners (Petr. Br. 34-35) and the Solicitor General (U.S. Br. 25-26) rely most heavily—*Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), and *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192 (1997)—actually help explain why petitioners' claims failed at trial. In *Petrella*, the Court held that once a copyright plaintiff establishes that a given work is infringing, each subsequent act of copying the work "gives rise to a discrete claim." 134 S. Ct. at 1969 (citations and alteration marks omitted). In *Bay Area Laundry*, the Court held that once the plaintiff proves that the defendant was required to make installment payments, "each missed payment" constitutes a new breach. 522 U.S. at 208-10. In each situation, in other words, the plaintiff needed only to establish an original wrongful act, and thereafter each repetition of the *same* act necessarily constituted a new breach.

Here, by contrast, the original act of including an allegedly imprudent fund is factually and legally *different* from the subsequent acts involved in deciding whether to retain the fund, for the reasons explained above.[12] Accordingly, retaining the fund is not simply a repetition of the original act of including the fund—the facts establishing the distinct, subsequent breach must be pleaded and proved distinctly. Petitioners were given the opportunity to make that showing at trial, but they could not do so.

For similar reasons, petitioners gain nothing by citing *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and then-Judge Scalia's concurring and dissenting opinion in *Fink v. National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), for the unexceptionable proposition that "retention of an imprudent investment can constitute a breach of ERISA's duty of prudence." Petr. Br. 27. The question is not whether retaining an imprudent investment *can* breach the duty of prudence, but *under what circumstances*, and whether the circumstances

[12] In addition, both *Petrella* and *Bay Area Laundry* involved statutes of limitations rather than repose. *See* 17 U.S.C. § 507(b); 29 U.S.C. § 1451(f)(1); *Waldburger*, 134 S. Ct. at 2182.

of a particular case establish such a breach. The district court here answered that case-specific question, and neither *Dudenhoeffer* nor Judge Scalia's *Fink* opinion suggests that a contrary finding was compelled by ERISA. Indeed, the Court in *Dudenhoeffer* rejected, as legally insufficient under the particular circumstances of that case, an allegation that the fiduciaries imprudently retained an investment that precipitously declined in market value. 134 S. Ct. at 2471. By contrast, a precipitous decline in value was enough for Judge Scalia to consider the imprudent-investment claim in *Fink* viable in the specific circumstances of that case, *see* 772 F.2d at 962, but of course respondent here *did* monitor for changes in performance, *see supra* at 9-10. And what matters in any event is that petitioners were given the chance at trial to establish imprudence in respondents' monitoring and retention of the Janus, Franklin, and Allianz funds. The district court found their proof insufficient as a purely factual matter, and there is no basis in ERISA or trust law for reversing that finding.

III. THE NINTH CIRCUIT CORRECTLY REJECTED THE "CONTINUING VIOLATION" THEORY PETITIONERS ASSERTED ON APPEAL

Ignoring the actual summary-judgment and bench-trial rulings under review, petitioners take issue with language in the Ninth Circuit's opinion affirming those rulings. But "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, No. 13-7211, slip op. 6 (Jan. 14, 2015); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). And the judgment under review is that petitioners failed as a matter of fact to prove the very claim they now want to assert, *viz.*, that respondents acted imprudently during the repose period because their monitoring process did not identify and address the alleged share-class issue with the Janus, Franklin, and Allianz funds.

Petitioners' objections to the Ninth Circuit's analysis lack merit in any event.

A. Petitioners' Current Theory Is Equivalent To A "Continuing Violation" Challenge To The Initial Fund Selection

Petitioners chiefly complain that the Ninth Circuit characterized their claim as an effort to "either equitably engraft onto, or discern from the text of section 413 a 'continuing violation' theory," i.e., a claim that the initial selection of the Janus, Franklin, and Allianz funds in 1999 remained a violation during the repose period "without more." Pet. App. 17. But petitioners' opening brief explicitly argued that "ERISA's six-year limitation incorporates the continuing violation doctrine." C.A. Dkt. 14, at 26. Indeed, the theory was a tactical *necessity* given their failure of proof at trial: only a continuing violation theory would enable petitioners to challenge respondents' failure to reverse the initial selection *without* establishing that respondents conducted imprudent reviews during the repose period—the showing rejected on its merits by the trial court.

The Ninth Circuit rejected the continuing violation theory as a matter of law, Pet. App. 17-19, and petitioners themselves all but concede the correctness of that ruling—they now deny that their claim is based in any way on imprudence in the initial fund selection *before* the repose period. *See* Petr. Br.

36-37 ("petitioners do not base their claim on the March 1999 decision to provide retail-class shares of the three funds at issue"); 45 ("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.... For petitioners' claims ... the imprudence of the original investment decision is immaterial."); *see also id.* at 2, 44, 46. Yet to the extent petitioners disregard the actual record and findings concerning respondents' post-selection review of the funds, they can only assert a claim functionally identical to a claim impermissibly challenging the initial selection itself. That is, absent sufficient proof of a *subsequent*, *distinct* breach in the monitoring process, a claim challenging retention of funds selected before the repose period "is not truly one of a failure to remove an imprudent investment," but "is, at its core, simply another challenge to the initial selection of the funds to begin with." *David*, 704 F.3d at 341; *see Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 701 (11th Cir. 2014).

To assert a timely challenge to a fund added before the repose period, a plaintiff must identify facts "that would allow [the court] to distinguish between the alleged imprudent acts occurring at selection from the alleged imprudent acts occurring thereafter." *Fuller*, 744 F.3d at 701. Such facts include changed circumstances that would have prompted a prudent fiduciary to review and remove an option. *Id.* at 700-01; Pet. App. 19; *see supra* at 33-34. Petitioners tried to establish such changed circumstances at trial but failed, and they have since given up distinguishing between alleged imprudence in the initial selection of the Janus, Franklin, and Allianz funds and the alleged imprudence in continuing to retain them. Because petitioners' "allegations concerning [respondents'] failure to remove the [challenged funds] are in all relevant respects identical to the allegations concerning the selection process," their claims are in substance a challenge to the pre-repose initial selection process, *Fuller*, 744 F.3d at 701, and they cannot be revived on a continuing violation theory, for the reasons explained in the following sections.

B. The Text Of ERISA § 413(1) Bars Claims Challenging Fund-Selection Decisions Implemented Before The Repose Period

Section 413(1) prohibits any claim challenging "a fiduciary's breach of any responsibility, duty, or obligation" that is filed 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). The measurement "from the date of the last culpable act or omission of the defendant" makes the bar a statute of repose. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014); *see supra* at 5-6.

As a statute of repose, § 413(1) does more than impose a time limit on suit—it erects an "absolute bar on a defendant's temporal liability." *Waldburger*, 134 S. Ct. at 2183 (quotation and alterations omitted). Indeed, absent fraud or concealment, the plaintiff's injury from the assertedly unlawful act "need not have occurred, much less have been discovered," for a claim to be barred. *Id.* at 2182 (quotation omitted). A statute of repose provides "freedom from liability," even where the liability would otherwise be unquestioned, and thus "embodies the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2183. Section 413(1), in sum, "suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994).

Holding fiduciaries liable for failing to reverse pre-repose decisions, "without more," would obviously render the textual right to repose "meaningless." Pet. App. 18. Indeed, the statute would create the *opposite* of repose, subjecting fiduciaries to potential liability for "decisions which may have been made decades before and for which institutional memory may not exist." *Id.* (quotation omitted). Far from keeping events of the distant past in the distant past, the statute would keep those events tethered permanently to the present, separated only by a rolling six-year limitation on recoverable damages. *See* U.S. Br. 25-27. Congress, however, knows how to create a rolling damages limitation period, and it looks nothing like the repose language Congress used in § 413(1). *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). Section 413(1) is not a damages rule, but "a judgment that defendants should be *free from liability* after the legislatively determined period of time, beyond which *the liability will no longer exist* and will not be tolled for any reason." *Waldburger*, 134 S. Ct. at 2183 (emphasis added; quotation omitted).

Allowing allegedly imprudent acts to remain permanently subject to attack on a continuing-duty-to-correct theory under § 413(1) also would make nonsense of other statutory language. If a fiduciary's failure to correct a previous breach by itself constitutes a new breach absent proof of subsequent imprudence, the same is true with respect to the "actual knowledge" subsection, § 413(2). Even a plaintiff who had actual knowledge of a fiduciary's imprudent decision at the moment it was made could sue at any time in the future—even decades later—simply by framing the claim as a breach of the continuing duty to correct.

The theory would also effectively negate the provision that "in the case of fraud or concealment, [an] action may be commenced not later than six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113. This clause "provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute only in instances of fraud or concealment." *Larson*, 21 F.3d at 1172. But if an allegedly imprudent act always remains subject to attack for failure to correct the act, the "fraud or concealment" proviso serves little purpose: a plaintiff could always bring a timely suit by pleading breach of the failure to correct the original act, regardless whether the act had been concealed. That result could not more directly contravene the function of repose.

C. Petitioners' "Omission" Theory Only Highlights The Deficiency Of Their Claims

Petitioners' and the Solicitor General's invocation of the "omission" provision in § 413(1)(B) only further undermines their position, by confirming that their analysis would eviscerate the statute of repose. Section 413(1)(B) by its terms permits suit, "in the case of an omission," up to six years after "the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1)(B). But if an actionable omission can be nothing more than the failure to correct an earlier decision or act that constituted a breach, it would ordinarily be difficult, if not impossible, to identify the "latest date" on which the fiduciary could have corrected the earlier decision or act—so long as it remains in place and subject to the fiduciary's control, the fiduciary presumably could undo it, no matter how many years have passed since the decision or act was implemented. On that view of the "omission" proviso, there would literally be no repose at all in many or most cases of fiduciary breach.

That intolerable outcome helps explain why a claim challenging a pre-repose act cannot be framed as merely challenging the failure to cure a pre-repose breach. The challenge instead must address proven imprudent omissions—e.g., a failure to respond to developments warranting full diligence review and removal of a fund—in the *subsequent process* of managing plan assets.

The problem is especially acute here, now that petitioners have explicitly disclaimed any effort to establish any breach—whether by act or omission—in the initial selection of the Janus, Franklin, and Allianz funds. As the case comes to the Court, there is no factual or legal basis for assuming that it was imprudent to include those funds with retail-class shares in the lineup in 1999. Indeed, as shown above, respondents may well have had good reasons for doing so. *See supra* at 11-12, 29-31.

Petitioners' long-overdue concession that their claims do not depend on showing a breach in the initial selection process only highlights the burden they had at trial to identify exactly which aspects of the monitoring process during the repose period they consider imprudent, why and how a prudent fiduciary would have conducted a different monitoring process, and what evidence establishes that fact. Petitioners recognized that burden at trial, but their evidence was found insufficient to prove the post-repose monitoring breach they alleged. Petitioners have never raised any substantive challenge to that factual finding. Therefore, despite petitioners' attempt to repackage their claim, they are still essentially merely challenging respondents' alleged failure to correct a breach in the initial selection, even though petitioners are no longer alleging a breach in the initial selection.

D. Enforcing The Right To Repose Will Not Permanently Immunize Funds Added Before The Repose Period From Review

Petitioners and the Solicitor General warn that enforcing the repose period will "immunize imprudent plan investments" added before the repose period so long as "circumstances have not significantly changed." U.S. Br. 31; *see* Petr. Br. 49. Not so.

To start, as already discussed at length, respondents and the Ninth Circuit agree with petitioners and the Solicitor General that "fiduciaries are required to act 'prudently' when determining whether or not to … continue to invest." Pet. App. 19 (quoting *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878-

79 (9th Cir. 2010)). A plaintiff thus is *not* barred by § 413(1) from seeking to establish that a fiduciary committed a new breach during the repose period by maintaining a given fund in the lineup, so long as the claim is based on distinct facts establishing that the fiduciary acted imprudently in the process of monitoring existing funds.

What is more, patently imprudent funds are unlikely to remain in a lineup for six years, or to go unchallenged by entrepreneurial lawyers when they do. Few if any fiduciaries would ever *want* to act imprudently (disloyalty in the face of conflicting incentives might be a different concern, but there is no such issue here), especially given the liability that could result from allowing patent imprudence to fester openly for years. And if an imprudent act does manage to go uncorrected, undetected, and unchallenged for six full years, it is almost certainly because the act was affirmatively concealed, in which case the repose period would not commence until the imprudence was exposed.

Finally, if some imprudent acts do go unremedied despite all the foregoing safeguards and vehicles for challenge, that is the inevitable consequence of a statute of repose. *Waldburger*, 134 S. Ct. at 2182. When a statutory limit operates to bar a claim, "it is generally immaterial whether hardship to one or the other party results, because the legislature, in formulating the statute, has presumably already balanced the respective hardships to its own satisfaction." *Scott and Ascher on Trusts* § 24.24.2, at 1785 (5th ed.).

E. Subjecting Fiduciaries To Liability For Pre-Repose Acts Would Increase Costs To The Detriment Of Participants

The strict repose period of § 413(1) promotes Congress's core objective of avoiding the kind of "administrative costs" and "litigation expenses" that "discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quotations omitted); *see supra* at 37-39.

Holding fiduciaries liable merely for failing to reverse pre-repose decisions would directly contravene that objective. As discussed above, the existing periodic review process already requires the investment of significant resources. *See supra* at 8-10, 37-39. Exponentially greater resources would be required if fiduciaries knew they could be held liable for decisions made in the distant past, with only the small comfort that damages would range back "only" six years. And as also discussed above, such costs invariably are passed on to participants to some degree, as higher fees, reduced benefits, or both. *See supra* at 38.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

ANNA-ROSE MATHIESON
WARD A. PENFOLD
GABRIEL MARKOFF
DIANA ROGOSA
BRIAN Y. CHANG
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111

SERGEY TRAKHTENBERG
SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, CA 91770

JONATHAN D. HACKER
(*Counsel of Record*)
WALTER DELLINGER
BRIAN D. BOYLE
MEAGHAN VERGOW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
jhacker@omm.com

Attorneys for Respondents

January 16, 2015

APPENDIX

APPENDIX A

The following transcript passage is reprinted at J.A. 188-90:

THE COURT: …. Why is it relevant as to whether the—it was a name change or the fund remained the same? Isn't it part of your thesis that even if a mutual fund was in the plan prior to August of 2001 and the fund had purchased the retail shares and the retail shares, class shares, were more expensive fee wise than the institutional share class, all things being equal, that within the statutory period, that is August 2001, forward, that the plan was obligated to exchange that for the institutional share, or is your testimony limited to when a fund first came into the plan?

THE WITNESS: Well, I think that in the case of these three funds that counsel is discussing, I believe that the events that I address are significant enough that they should have triggered a due diligence process.

THE COURT: But not so with regard to a plan—a fund that came into the plan pre-August 2001 that didn't have some structural change … or mission change with the three funds that we're talking about here. There you are not saying that due diligence would have required the plan to transfer from retail to institutional.

THE WITNESS: I guess what I'm saying—

THE COURT: I want to get the clarification.

THE WITNESS: Yeah. For these three funds, I believe that the events that are identified should have triggered a due diligence process and that the result of that due diligence process would have identified—

should have identified that there was an alternate share class that the plan should have been invested in.

THE COURT: Let me put it a different way: Let's say that these plans didn't have a name change, that they existed as they were initially put into the plan, and because of the statute of limitations, there couldn't be any damage except for August of 2001. Would you contend that if these plans—that the three in question before their name changes and/or structural change were in the plan, that during the relevant time period due diligence would have required the plan to nevertheless buy an institutional share class, all things being equal, assuming the institutional share class had a lower fee?

THE WITNESS: Well, in a perfect world, independent of … when the option initially went into the plan, I would think that some due diligence process should be undergone with some frequency. Could be quarterly, could be annually—

THE COURT: That isn't really the thrust of your testimony, right?

THE WITNESS: It is a part because I believe that with respect to these three funds, even though they were in the plan prior to the time period that you identified, I believe that what occurred in these funds was significant enough that it should have triggered the committees to deal with them as if they were new funds because, in fact, they were. They weren't legally new entities, they weren't new—well, in two cases they were—but it wasn't because the legal entity changed, but because there were significant enough changes in the funds that the due diligence process should have been triggered and it should have at that point identified, amongst other things, the share class issue.

APPENDIX B

The following passage is excerpted from the Rebuttal Declaration of petitioners' expert witness, Dr. Steven Pomerantz, D.C. Dkt. 402-2, filed April 7, 2010 (footnotes omitted):

27. On three of the funds at issue in this case, the Franklin Small Mid-Cap Growth Fund, the Janus Small Cap Investors Fund, and the Allianz CCM Capital Appreciation Fund, I previously addressed the fact that the funds should be evaluated in the same way a new fund added to the Plan would be evaluated because they were subject to significant structural or mandate changes.

28. Mr. Esch's stance that the reorganization of a fund's parent company would result in simply a "name change[]" that fiduciaries would not need to further investigate is inaccurate. As I stated in my trial declaration, with the rebranding of the funds came a potential shift in investment strategy of the management of the fund. The fiduciaries should have taken that time to evaluate the fund just as they would a new fund being added to the Plan.

29. Furthermore, stability of the investment management process is of paramount concern for investors. It is for this reason that a prudent financial expert should scrutinize an investment when there is any type of significant change to the fund, such as a potential change in portfolio management or a change in fund ownership. In particular, a prudent financial expert should be concerned whether, under new ownership, a continuity of the underlying investment team and process will remain.

30. Additionally, Defendants themselves recognized that the changes to the Allianz and Janus

funds warranted further review when they placed these funds on an internal watch list, a list that required that the funds be closely examined by the fiduciaries.

31. As to the Franklin fund, Mr. Esch contends that the significant style change to the fund was not of great concern, rather, it was simply a conversion of shares by Franklin from the Franklin Small Cap Growth Fund to the Franklin Small-Mid Cap Growth Fund.

32. A change in the mandate of a fund that is so great that it is re-categorized from a Small Cap to a Small-Mid Cap fund is quite significant.

33. Furthermore, the Edison fiduciaries knew that the mandate change was a significant change because they, internally, changed its categorization on their own documents. The change was not merely cosmetic, but was a change to the very nature of the fund itself, and a prudent financial expert would have investigated that change further and, in doing so, would have noted the significantly lower fees offered by the institutional share class and changed to that less expensive share class.

34. Additionally, during the time of the changes to the Franklin and Janus Funds, Morningstar, a service used by Defendants in evaluating and monitoring their funds, issued a number of statements regarding these funds that should have alerted the Plan fiduciaries of a need to closely review the funds.

35. Given the significant changes and further potential changes to these funds when they were rebranded, a prudent and loyal fiduciary would have investigated these funds and, in so doing, would have identified the cheaper share class and deter-

mined that it was in the best interests of the Plan participants to utilize this cheaper share class.