No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether ERISA's six-year statute of repose bars plaintiffs' challenges to the selection of certain mutual funds for the Edison 401(k) Plan lineup, where the challenged funds were added to the lineup more than six years before the complaint was filed.

2. Whether the fiduciaries' interpretation of the Plan language is entitled to deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), given the Plan's clear delegation of interpretive authority to the fiduciaries, and where the district court in any event held that the fiduciaries' interpretation was correct on de novo review.

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 owns more than 10% of its stock.

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INTRODUCTION

The petition raises two issues under the Employee Retirement Income Security Act ("ERISA"). Neither issue involves a conflict of authority among the courts of appeals. Both issues were carefully considered and correctly decided by the courts below. The petition does not warrant this Court's review.

The first issue involves ERISA's statute of repose, which bars actions filed more than six years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). Petitioners—plaintiffs in the district court—challenge the decision to add certain mutual funds in the Edison 401(k) Plan lineup in 1999, more than six years before they filed their action in 2007. Petitioners argue that the decision to include the challenged funds is subject to challenge in perpetuity, so long as the funds remain in the Plan lineup.

Every circuit to have considered the issue has rejected the "continuing violation" theory petitioners assert. The petition tries to manufacture a circuit conflict on the basis of two decades-old cases, but neither case recognizes anything close to the theory petitioners urge here. To the contrary, both are entirely consistent with the district court and appellate decisions below, which explicitly recognize—like the cited decisions—a fiduciary's duty to monitor *for material changes in circumstances* that require revisiting decisions implemented before the limitations period. Indeed, the district court allowed petitioners a trial to address precisely that issue, and found as a matter of fact that petitioners had failed to identify any materially changed circumstances requiring Edison to revisit its decision to include the challenged

funds in the lineup. Petitioners do not and cannot challenge that factual determination, and the legal question they raise is not subject to any conflict or controversy warranting this Court's intervention.

The second issue raised in the petition is whether the deference normally due under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), to a fiduciary's reasonable interpretation of plan terms applies outside the context of claims for benefits under ERISA § 502(a)(1)(B). That question is not properly presented here, because the district court specifically found that Edison's interpretation was *correct*, not just reasonable, and thus upheld this interpretation under a de novo standard as well. Petitioners do not and could not challenge that ruling. Petitioners' argument also rests on the incorrect factual premise that Edison's interpretation of the Plan harms participants' interests, and on the incorrect legal premise that the Ninth Circuit's deference ruling conflicts with other circuit decisions. There is no conflict, no legal error, and no reason for further review.

Certiorari should be denied.

STATEMENT OF THE CASE

1. Southern California Edison Company, a California utility company, has for years sponsored a 401(k) savings plan ("the Plan") for its employees and those of affiliated Edison companies (collectively, "Edison"). In the late 1990s, Edison employees' union representatives requested a larger selection of investment options than the six being offered at that time, and in particular a larger selection of retail mutual funds so that employees could easily monitor and diversify their investments. Edison complied in

1999, by increasing the number of institutional investment options and adding forty mutual funds. Thereafter, Edison "regularly reviewed the mutual funds" and removed underperforming investments, and the overall performance of the mutual funds "compared favorably to other benchmarks" over the years. Pet. App. 253-54.

Mutual funds deduct a portion of the value of their underlying assets to pay for various expenses. The percentage of asset value a fund deducts for expenses is reported in the fund's "expense ratio." For example, a fund that sets aside 0.25% of its annual asset value to pay for expenses has an annual expense ratio of 0.25%. Many mutual funds also engage in a practice called "revenue sharing," in which the 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) plan sponsors 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 provision of those recordkeeping services obviates the need for a mutual fund in the 401(k) plan lineup to provide the same services to the plan participant-investors, the fund may provide revenue sharing to the plan's recordkeeper as compensation for providing those services.

Some of the mutual funds added to the Edison lineup in 1999 provided revenue sharing to the Plan's recordkeeper, Hewitt Associates, LLC ("Hewitt"), which provided various administrative services to Edison Plan participants that the funds would otherwise be required to provide them as fund

investors. Hewitt used the revenue-sharing compensation to defray a portion of its charges to Edison and sent Edison an invoice for the remainder of the administrative costs. Pet. App. 205-06.

As petitioners conceded in the court below, the use of revenue sharing to reduce the Plan's total administrative costs was fully disclosed in the negotiations to expand the Plan offerings. *Id.* at 36. Then, after the Plan offerings were expanded, "on at least seventeen occasions participants were specifically advised that mutual funds were being used to reduce the cost of retaining Hewitt." *Id.* at 45. The employees' bargaining representatives accepted the revenue-sharing arrangement, which imposed no cost on employees. As the district court explained: "[E]ven if Hewitt had not received any portion of the fees from the mutual funds, the individual Plan participant *would have been charged the same fee* for investing with that mutual fund" since a mutual fund is required by law to charge the same fee to all investors in that mutual fund. *Id.* at 206 (emphasis added).

2. In August 2007, petitioners filed suit under ERISA on behalf of a class comprising all members of Edison's eligible workforce. The central contention in the original complaint was that offering *any* retail mutual fund in a plan was imprudent because retirement plans should be limited to institutional funds and the like, but the complaint also included a motley collection of other theories.[1] The district

[1] Petitioners' class counsel made this same claim in numerous cookie-cutter complaints filed against large corporations; not surprisingly, courts have had little trouble rejecting this argument. Pet. App. 53; *see also, e.g.*, *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-72 (7th Cir. 2011).

court granted summary judgment in Edison's favor on almost all claims. *Id.* at 166-268.

The court did allow the case to proceed to a three-day bench trial on limited issues. First, the court heard and rejected petitioners' claim that Edison violated its "duty of loyalty" by adding to the Plan mutual funds with revenue sharing. *Id.* at 68. The court found as a matter of fact that Edison's selections "evidence a pattern that is flatly inconsistent with a desire to capture more favorable revenue sharing arrangements." *Id.* at 123. The "Plan fiduciaries did not," in fact, "make fund selections with an eye toward increasing revenue sharing and did not put the interests of [Edison] above those of the Plan participants." *Id.* at 125.

Second, the court addressed a factual issue relating to ERISA's six-year statute of limitations, which runs from "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). For funds added to the lineup more than six years before the complaint was filed, the court allowed plaintiffs to try to establish that events occurred during the six-year limitations period that should have compelled Edison to reassess the specific funds offered to the employees. The court found that Edison had monitored the funds throughout the class period with the appropriate level of prudence and that plaintiffs had failed to identify any materially changed circumstances triggering a duty to revisit fund selections. Pet. App. 142-49. The court accordingly held that claims challenging any funds added more than six years before the filing of the complaint were time-barred. *Id.* at 149-50, 180-81.

Petitioners did, however, prevail on a challenge to three mutual funds that *were* added to the Plan lineup within the limitations period—a challenge they first advanced on the eve of trial. *Id.* at 68. As to those three funds, the court held that Edison breached its fiduciary duty by offering only a "retail class" investment in the funds, when a less expensive "institutional class" of the same fund was available. *Id.* at 142. The court emphasized, however, that the share-class offering was an "oversight" that did not rise to the level of bad faith. C.A. Exc. Rec. 22.

3. Petitioners appealed to the Ninth Circuit, which unanimously affirmed. Pet. App. 1-64. As relevant here, the court first affirmed the district court's conclusion that ERISA's six-year statute of limitations bars any claims based on funds added to the Plan more than six years before the filing of the complaint. *Id.* at 17. The court of appeals noted that plaintiffs did not allege any changed circumstances sufficient to trigger a duty to reexamine the merits of the investment, and thus the "last action" for purposes of the statute of limitations was the addition of the funds to the lineup. *Id.* at 17-19. Plan participants had fully six years to challenge the addition of those funds, but after that period the fiduciaries were entitled to repose, unless and until changed circumstances required the fiduciaries to remove the funds. *Id.* Petitioners' contrary view that the limitations period runs forever, the court explained, "would make hash out of" ERISA's statute of repose and would be "unworkable." *Id.* at 17.

Second, the court of appeals rejected petitioners' submission that revenue-sharing arrangements were barred by the terms of the Plan. The court held that

deference to the interpretation of the Plan's fiduciaries was appropriate under *Firestone*: the fiduciaries' interpretation allowing revenue sharing was the "more natural reading" of the Plan language, had been applied consistently, and had been fully and repeatedly disclosed to the employees' union representatives when funds with revenue sharing were added, with no objections heard. *Id.* at 44-45.

Petitioners sought panel and en banc rehearing. The panel modified one section of its opinion and denied rehearing, and en banc rehearing was denied, with no judge calling for a vote. *Id.* at 12.

REASONS FOR DENYING THE PETITION

There is no conflict on either issue presented in the petition, and both issues were resolved correctly by the court of appeals.

I. THE APPLICATION OF ERISA'S SIX-YEAR LIMITATIONS PERIOD DOES NOT WARRANT THIS COURT'S REVIEW

A. There Is No Circuit Conflict

1. The court of appeals held that ERISA's six-year limitations period barred plaintiffs' claims that Edison had breached its duty of prudence in selecting investment options as to any decision made more than six years before the filing of the complaint. Pet. App. 17-19. In so holding, it joined the only other circuit to have squarely considered the issue on materially identical facts. *See David v. Alphin*, 704 F.3d 327, 342-43 (4th Cir. 2013). And both decisions are consistent with ERISA limitations decisions from other circuits, which have uniformly rejected efforts to apply a continuing violation theory to ERISA claims. *See Med. Mut. of Ohio v. k. Amalia Enters.*,

548 F.3d 383, 394 (6th Cir. 2008); *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 522 (3d Cir. 2007); *Berger v. AXA Network LLC*, 459 F.3d 804, 816 n.16 (7th Cir. 2006); *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 139 (1st Cir. 2005); *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1332 (9th Cir. 1996); *Adamson v. Armco, Inc.*, 44 F.3d 650, 653-54 (8th Cir. 1995).

2. The two circuit decisions cited by petitioners—*Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992), and *Morrissey v. Curran*, 567 F.2d 546, 548-49 & n.9 (2d Cir. 1977)—do not depart from that consensus. *Morrissey* is not even a limitations decision. And both are entirely consistent with the decisions below.

Petitioners cite *Martin* and *Morrissey* for the unexceptionable proposition that ERISA fiduciaries have a continuing duty to monitor the investments offered. Pet. 17-20. Nobody disagrees. The district court, in fact, applied exactly that principle in holding a trial to allow petitioners "to put on evidence that significant changes in conditions occurred within the limitations period that should have prompted a full diligence review of the funds." Pet. App. 19 (quotation omitted). And while the district court found that petitioners "could not establish changed circumstances engendering a new breach," *id.*; *see id.* at 149, the court of appeals emphasized that it "was entirely correct to have entertained that possibility," *id.* at 19.[2] Neither *Martin* nor *Morrissey* suggests

[2] Petitioners also cite a litany of district court cases (Pet. 19), but they are not relevant under Supreme Court Rule 10, and they generally stand for little more than the uncontested point recognized in *Martin* and *Morrissey*, *viz.*, that ERISA fiduciaries have a continuing duty to monitor the investments offered. *E.g.*, *Leber v. Citigroup, Inc.*, 2011 U.S. Dist. LEXIS

that a different approach was required.

In *Morrissey*, the district court dismissed a case for lack of jurisdiction under ERISA because the allegedly imprudent investment was made before ERISA's effective date. *Morrissey*, 567 F.2d at 547-48. The Second Circuit reasoned that plaintiffs should have at least had the opportunity to present evidence as to whether the plan fiduciaries had a duty to monitor and liquidate the investment, in the face of allegations the investment generated "no return of either income or principal" over a period of several years. *Id.* at 548-49 & n.7. That holding is consistent with both decisions below. As explained, the district court here gave petitioners exactly the opportunity the *Morrissey* plaintiffs had been denied: a trial in which they could present whatever evidence they could muster (after extensive discovery) to establish a new breach within the limitations period. At that trial, the district court examined the evidence concerning Edison's monitoring of investments (e.g., performance net of fees, changes in management, etc.), including evidence offered by plaintiffs in their attempt to show that defendants did not satisfy their ongoing duty to prudently monitor selected investment funds. After reviewing the full record, the district court found that plaintiffs had failed to establish any new material event or cir-

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129444, at *14 (S.D.N.Y. Nov. 8, 2011) ("plan fiduciaries are required to monitor a plan investment 'with reasonable diligence and to withdraw the investment if it bec[omes] clear or should have become clear that the investment [is] no longer proper for the Plan'" (citation omitted) (alterations in original)); *George v. Kraft Foods Global, Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011) (citing *Martin* and *Morrissey* for proposition that failure to review investments "can" constitute a breach).

cumstance within the limitations period that required the Plan fiduciaries to remove the challenged funds. Pet. App. 143-50. Accordingly, as the Ninth Circuit emphasized, the plaintiffs here did not prove a *new breach* within the limitations period. *Id.* at 18-19.

In *Martin*, 966 F.2d at 1082, the complaint alleged that defendants had committed violations based on two entirely different contracts, one awarded in 1984 and the other in 1987. *Id.* at 1087. Because the 1984 contract was outside the limitations period, that claim was barred, and defendants tried to argue that the 1987 contract claim was barred as well, because the bidding procedures for both contracts were similar. *Id.* The court rejected that theory, explaining that the 1987 contract claim was a "distinct violation" involving a new and separate contract and different bidding process. *Id.* at 1087-88. Like *Morrissey*, the holding in *Martin* is entirely consistent with the decisions below, which likewise held that claims based on decisions implemented outside the limitations period were barred, while allowing claims based on new and separate decisions —i.e., the addition of new funds—within the period to proceed. Indeed, as noted above, if petitioners had been able to show that a new breach occurred even as to the funds added before the limitations period, they could have challenged that breach, but petitioners could not make that showing. *See supra* at 5, 8.

Petitioners' challenges to funds added in 1999, in short, failed as *a matter of fact* under a legal rule that is uniformly recognized and applied in federal appellate decisions. There is no legal controversy requiring this Court's intervention.

B. The Court of Appeals' Decision Is Correct

Petitioners are also wrong on the merits. ERISA does not recognize claims that can persist in perpetuity. Just the opposite: ERISA's six-year provision constitutes a statute of repose, *see Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998), and categorically precludes any claim filed more than six years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). As the court of appeals held, petitioners are challenging "the act of designating an investment for inclusion" in the Plan lineup, an act that was complete before the limitations period commenced. Pet. App. 17.[3]

1. Petitioners argue that even though the three funds they are challenging were added before the limitations period, their claims are timely because Edison did not act to remove them (even absent changed circumstances requiring their removal). As

[3] Edison argued as an alternate ground of affirmance that ERISA's three-year statute of limitations should apply since plaintiffs "had actual knowledge of the breach or violation" more than three years before they filed suit. 29 U.S.C. § 1113(2). The court of appeals did not reach the issue as to the claims at issue here, because the court found those claims barred under the six-year statute. Pet. App. 20 n.3. The court of appeals rejected the three-year statute of limitations as to the three funds on which petitioners prevailed, *id*. at 20-21, but the three-year statute could still apply to the claims still in issue, since plaintiffs knew, more than three years before they filed suit, that the challenged funds had been added to the lineup, *see Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985) (three-year statute requires only knowledge of underlying facts or transaction constituting alleged violation). Any decision by this Court on the six-year statute thus may be irrelevant to the disposition of the case. *See infra* at 16, 19.

the court of appeals explained, however, that theory "'confuse[s] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach.'" Pet. App. 18 (citation omitted). Put differently, petitioners challenge not an "action" within the limitations period, but *inaction*. *Cf. David*, 704 F.3d at 340 ("Courts have held that a decision to continue certain investments, or a defendant's failure to act, cannot constitute a 'transaction' for purposes of section 406(a) or 406(b)."). Treating "action" to include "inaction" not only perverts the meaning of the word, but would allow claims in perpetuity, thereby rendering the statute of repose "'meaningless.'" Pet. App. 18 (quoting *David v. Alphin*, 817 F. Supp. 2d 764, 777 (W.D.N.C. 2011), *aff'd*, 704 F.3d at 342-43). It also could "expose present Plan fiduciaries to liability for decisions … which may have been made decades before and as to which institutional memory may no longer exist." *Id.* (quoting *David*, 817 F. Supp. 2d at 777.

Petitioners' theory also ignores the explicit statutory distinction between breaches of commission and breaches of omission. "[I]n the case of omissions the statute already embodies what the beneficiaries urge for the last action. Section 413(1)(B) ties the limitations period to 'the latest date on which the fiduciary could have *cured* the breach or violation.'" *Id.* (emphasis added). To say that a failure to cure a prior breach is equivalent to a new breach would be to render the distinct "omission" language of subparagraph 413(1)(B) "surplusage," *id.*, "which means, of course, that such a reading must be rejected," *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302

(2003).[4] It also is unreasonable to frame defendants' alleged failure to eliminate investment options in the absence of changed circumstances as "omissions" subject to § 413(1)(B). Permitting such a construction would allow any artful plaintiff to avoid the operation of § 413(1)(A) in any case where § 413(1)(A) should, by its terms, apply.

2. Petitioners also complain that unless a continuing violation theory is recognized, some alleged wrongs could not be rectified. Pet. 20. Petitioners' concern is seriously exaggerated. For one thing, harmful fiduciary decisions generally do not go unnoticed, uncorrected, and unchallenged for fully six years. And even for those that do, a fiduciary still will not have "immunity for all time" (*id.*) for any particular decision, because the fiduciary will be required to revisit the decision whenever "significant changes in conditions" warrant it. Pet. App. 19. Ultimately, even if some small number of injustices "can be imagined," that is *inherently* true in "the application of *any* statute of limitations," *id.* at 18 (emphasis added), and especially for a statute of repose, *see Radford*, 151 F.3d at 400; *Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006). As the D.C. Circuit has recognized, ERISA's limitations periods "suggest[] a judgment by Congress that

[4] Contrary to their suggestion here (Pet. 24-25), petitioners did not adequately preserve below any argument that their claims were governed by the "omission" limitations period set forth in § 413(1)(B)—their principal brief argued the issue in only one half of one sentence. C.A. Dkt. 14, at 24. Their argument from the outset has been that the failure to remove the funds was the "last *action*" under § 413(1)*(A)*. In any event, petitioners cite no circuit decisions treating the conduct alleged here as an omission under § 413(1)(B).

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).

Congress did not enact ERISA to facilitate and promote costly benefit-plan lawsuits, especially stale lawsuits challenging plan decisions made many years earlier. Just the opposite: Congress enacted ERISA to promote plan formation by *reducing* litigation and other administrative expenses. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) ("Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." (quotation and alteration marks omitted)). Adopting plaintiffs' limitations theory would deny plan sponsors and fiduciaries the repose they require to ensure uniform and consistent operation of plans over time. It also would expose plans to the most costly and burdensome kind of litigation, i.e., lawsuits challenging decisions upon which the plan and its beneficiaries have relied for many years. Far from providing meaningful protection against fiduciary breaches, plaintiffs' theory would needlessly increase plan costs and thereby discourage plan formation, undermining ERISA's most important objective.

3. Finally, petitioners contend that the court of appeals erred by not granting deference to the limitations argument asserted by the Department of Labor ("DOL") in an amicus brief below. Pet. 22. But DOL itself *did not seek deference* for its limitations

position. *See* DOL C.A. Amicus Br. 12-19.[5] As DOL's silence indicates, no such deference was due, a point petitioners themselves unwittingly confirm. Their deference argument relies entirely on the so-called "*Auer* deference" standard, Pet. 22 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007)), but that standard applies only to an agency amicus brief construing *the agency's own regulations*. *See*, *e.g.*, *Chase Bank U.S.A., N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) ("Under *Auer* … we defer to an agency's interpretation of its own regulation, advanced in a legal brief …."). Even assuming that standard has continuing vitality, *but cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (reciting criticisms of *Auer* deference), it has no application to this case, which does not involve any DOL regulation concerning the statute of repose.

II. THE *FIRESTONE* DEFERENCE QUESTION IS NOT PROPERLY PRESENTED AND NOT THE SUBJECT OF ANY CIRCUIT CONFLICT

The second question raised in the petition is whether the court of appeals properly invoked the deferential standard of review prescribed in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), to Edison's longstanding interpretation of the Plan document language (in Plan § 19.02) addressing payment of Plan administrative costs. That

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[5] By contrast, DOL *did* argue that deference was owed to a DOL regulation—and to DOL's interpretation of that regulation—concerning a completely separate issue not before this Court. DOL C.A. Amicus Br. 24. When DOL wants deference, it knows how to ask.

question is irrelevant here, because the district court applied de novo review and held that Edison's interpretation was correct as a matter of law—a holding that petitioners do not challenge. Deference is thus beside the point. Petitioners' deference argument also rests on a factual premise rejected by both decisions below, neither of which conflicts with any other circuit decision.

A. The Deference Question Is Irrelevant Because Edison's Plan Interpretation Is Correct

If this Court were to grant review, it could not reach the deference question, because Edison's longstanding, fully disclosed interpretation of Plan § 19.02 is correct as a matter of law, which renders the standard of deference irrelevant. *See* S. Shapiro et al., *Supreme Court Practice* 248 (10th ed. 2013) (certiorari inappropriate when Court could "decide the case on another ground").

1. Under *Firestone*, courts give wide deference to a plan fiduciary's interpretation of plan documents, and will uphold any interpretation that is reasonable, so long as the plan confers discretion on the fiduciary to interpret the plan. *Firestone*, 489 U.S. at 111; *see Conkright*, 559 U.S. at 517-18; *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). In this case, there was a brief window at the beginning of the class period when the Plan documents did not grant discretion to Edison to interpret the Plan. Pet. App. 214. The district court accordingly reviewed Edison's interpretation of § 19.02 *both* de novo and for reasonableness under *Firestone*. *Id.* Even under de novo review, the court determined, Edison's interpretation of § 19.02 was correct. *Id.* at 215-17.

Section 19.02 provided that the "cost of the administration of the Plan will be paid by [Edison]." *Id.* at 205 (quotation omitted). The bills submitted by Hewitt for recordkeeping services were a "cost" of plan administration, and Edison paid 100% of those bills. *Id.* at 44. Nothing in the Plan prohibited Hewitt from using revenues it received from third parties, such as mutual funds, to offset its charges and thereby reduce the bills Edison had to pay. *Id.* at 44, 213. As the court of appeals observed, "[t]hat kind of interpretation, nonsensically, would … imply that if Hewitt had simply lowered its prices (maybe due to efficiency or market pressure) Edison would somehow be shirking its obligation under Plan § 19.02." *Id.* at 44.

The district court also emphasized the extrinsic evidence that overwhelmingly confirmed Edison's interpretation—most importantly, the parties' longstanding mutual acceptance of revenue-sharing under the Plan. *See* Restatement (Second) of Contracts § 202(4) (1981) ("any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement") (emphasis omitted); *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) ("the parties' own course of performance is highly relevant to contract interpretation"). When adding funds with revenue sharing was initially considered in 1998 and 1999, Edison had "extensive discussions" with union representatives about the process, and "personally walked" them through exactly how it worked. Pet. App. 215. "The union representatives had no objection to this arrangement." *Id.* Edison subsequently "informed the Plan participants *at least seventeen times* ... that fees from the mutual

funds were being used to reduce Hewitt's record-keeping costs," again without objection for many years, until this lawsuit was filed. *Id.* (emphasis added).

In addition to the parties' mutual acceptance of the practice, the district court also emphasized that the participants suffered no harm from the practice, because a mutual fund is required to charge the same fees to all investors in the fund, and participants *would not have received the revenue sharing* even if it had not been used to reduce Hewitt's recordkeeping costs. Pet. App. 216. Revenue sharing did not harm participants in any way, and indeed affirmatively benefited them by facilitating the expansion of the Plan's mutual fund offerings, as the court of appeals observed. *Id.* at 44.

For all these reasons, the district court held that, "when applying a de novo review to [Edison's] interpretation of the Plan documents, the Court finds that the interpretation was correct." *Id.* at 217.

2. The court of appeals did not explicitly address that conclusion, but in analyzing the reasonableness of Edison's interpretation under *Firestone*'s deferential standard, the court strongly signaled its agreement that Edison's reading was correct. Edison's construction of the Plan language is the "more natural" and "commonsense" reading, the court observed, while dismissing petitioners' reading as "nonsensical[]." *Id.* at 44. The Ninth Circuit also found Edison's interpretation to be "most consistent with the goals of the plan," because it "facilitated the expansion of the Plan's mutual fund offerings," and the court emphasized that Edison's interpretation "has been applied consistently over time." *Id.*

3. The petition for a writ of certiorari does not expressly challenge the district court's holding that Edison's interpretation of the Plan was correct on de novo review. Nor does the petition address the lower courts' analysis of the Plan language and the undisputed extrinsic evidence. The petition instead merely asks this Court to rule that "*Firestone* deference does not apply in this case." Pet. 38. It plainly does, *see infra* at 21-24, but even if it did not, the case still would be controlled by the district court's unchallenged and unassailable ruling that Edison followed the correct interpretation of Plan § 19.02. There is no reason for this Court to consider whether deference properly applies in this case, because the answer to that question "could not change the result reached below." *Supreme Court Practice*, *supra*, at 249.

B. Petitioners' Deference Question Is Premised On A Fundamental Misstatement Of Fact

Petitioners' deference question is also premised on a fundamental misstatement of fact. According to petitioners, a court should not defer to Edison's interpretation of Plan § 19.02 because that interpretation allowed Edison "to shift some of the cost of administering the Plan to the participants through revenue sharing." Pet. 27; *id.* at Pet. ii (stating Question Presented as whether deference applies to an interpretation that "came at the expense of plan participants").

That premise is incorrect: the revenue-sharing arrangements did *not* shift any costs to Plan participants, as the district court specifically found. Pet. App. 216. When a 401(k) plan purchases shares in a

mutual fund on behalf of a plan participant, the *shares* become a plan asset, but the *underlying assets* of the mutual fund do not. *See* 29 U.S.C. § 1101(b)(1). And revenue sharing comes from the fund's own underlying assets—specifically, the *fixed amount* of those assets (reflected in percentage terms by the "expense ratio") that is segregated to cover the fund's own expenses. Revenue sharing, in other words, comes entirely out of assets belonging to the mutual fund company—not from assets that belong to the Plan or participants in any respect. *See Hecker v. Deere & Co.*, 556 F.3d 575, 584-85 (7th Cir. 2009). And if a given fund company decides to share a portion of its revenues reflected in the expense ratio with other parties, the ratio remains the same for all fund investors. Accordingly, a fund's decision to share its revenues with a 401(k) recordkeeper like Hewitt—which provides services that reduce the fund's own expenses—does not cause a participant investing in the fund to incur higher fees.

When the recordkeeper receives compensation for its services from the mutual fund company, it obviously allows the recordkeeper to reduce its own charges to the plan sponsor, which is exactly what happened here. That benefit to Edison, however, did not in any sense come "at the expense of plan participants" (Pet. ii), for the reasons just explained. To the contrary, Edison's lower costs were plainly a benefit to Plan participants as well, because they "facilitated the expansion of the Plan's mutual fund offerings." Pet. App. 44. There is a reason, after all, that the employees' union representatives did not object to the revenue-sharing arrangements when they were described in connection with the new lineup in 1998 and 1999. *Supra* at 4, 17-18.

In short, this case does not present the question whether *Firestone* deference should apply to a fiduciary's plan interpretation that benefits the plan sponsor at the participants' expense. Edison's interpretation of Plan § 19.02 did not shift any costs of Plan administration to participants.

C. The Decision Below Correctly Invokes *Firestone* Deference And Does Not Conflict With Any Other Circuit Decision

Petitioners argue that *Firestone* deference does not apply here because it is "limited to benefit-claims cases" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Pet. 29, citing Second and Third Circuit cases ostensibly endorsing that position. Petitioners are wrong. Neither case holds that *Firestone* deference is inapplicable where, as here, the fiduciary decision being challenged is a discretionary interpretation of the plan terms, and the interpretation does not result in unlawful conduct or otherwise harm the interests of plan participants.

1. Several circuits have expressly recognized that *Firestone* deference is not limited to benefit-claim cases under § 502(a)(1)(B). *See* Pet. App. 38-43; *Hunter v. Caliber Sys.*, 220 F.3d 702, 711 (6th Cir. 2000); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 155 (3d Cir. 1999); *Mahoney v. Bd. of Trs.*, 973 F.2d 968, 971 (1st Cir. 1992). As the decision below explains, that conclusion follows directly from *Firestone*'s own logic, which emphasizes that the trust-law principles that compel deference pervade ERISA in general, not just one provision, and that deference in any context promotes ERISA's objectives of uniformity and reducing litigation costs. Pet. App. 42-43. The Supreme Court strongly reaffirmed those

principles in *Conkright*:

> Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review. Moreover, *Firestone* deference serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

559 U.S. at 517 (quotation omitted).

2. Despite the central role deference plays in advancing ERISA's core objectives, petitioners say (Pet. 29) it is limited solely to benefit-claim cases under § 502(a)(1)(B), citing two pre-*Conkright* decisions from the Second and Third Circuits—*John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 368-69 (2d Cir. 1994), and *Unisys*, 173 F.3d at 154-55. Neither decision supports the elimination of deference in the circumstances of this case.

In *Unisys*, the Third Circuit explained (in what amounts to extended dicta) that *Firestone* deference does not apply to all ERISA claims outside the benefit-denial context, but the court explicitly stated that

it *does* apply to *any discretionary plan interpretation*, regardless whether the claim asserts a denial of benefits. *See* 173 F.3d at 155 ("[O]nly when the plan gives the trustee discretion to deny benefits or construe the terms of the plan should a court employ the arbitrary and capricious standard. As the instant case does not concern a denial of benefits under 29 U.S.C. § 1332(a)(1)(B) or an interpretation of Unisys's Plan, *Firestone*'s standard is inapplicable." (emphasis omitted)). Unlike the claim in *Unisys*—which asserted that the fiduciary made imprudent investment selections for the 401(k) plan lineup—the claim at issue here "rises or falls exclusively on what Plan section 19.02 allows." Pet. App. 41. Under *Unisys*, deference applies to Edison's longstanding interpretation of what § 19.02 allows.

The Second Circuit's decision in *John Blair* is distinguishable for a related reason, as the Ninth Circuit expressly recognized. Pet. App. 40-41. In *John Blair*, the fiduciary had allegedly adopted a plan interpretation that violated ERISA's duty of loyalty under § 404(a)(1)(B). 26 F.3d at 368-69. In this case, by contrast, petitioners assert that Edison violated *only* the distinct requirement under § 404(a)(1)(D) that the fiduciary's "actions be in line with the plan documents." Pet. App. 40. In other words, in *John Blair*, if the fiduciary's interpretation of the plan was correct, then the plan authorized conduct prohibited by ERISA; whereas here, if Edison's interpretation of the Plan is correct, then the Plan authorizes conduct—revenue sharing—that is perfectly lawful under ERISA.[6] For that reason, the

[6] DOL regulations authorize revenue-sharing with disclosure to the plan sponsor. 75 Fed. Reg. 64,910, 64,913-14 (Oct. 20, 2010), codified at 29 C.F.R. § 2550.404a-5(c)(2)(ii)(C).

Ninth Circuit explained that it could "leave for another day what judicial review standard would apply in a case like *John Blair* where the plan is said to authorize what the statutory duties in ERISA forbid." Pet. App. 41 n.17. This Court, too, can leave the same question for another day—if and when the circuits actually issue conflicting decisions on its answer.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[7] There is little likelihood, however, that a live conflict will ever materialize on that question, because this Court's decision in *Conkright* effectively answers it. *Conkright* rejects *John Blair*'s premise that *Firestone* is subject to ad hoc exceptions depending on as little as which ERISA provision the plaintiff cites in his complaint. According to *Conkright*, *Firestone* establishes "a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions." 559 U.S. at 513. *Conkright* also recognizes that making special exceptions to *Firestone* deference would be equally contrary to *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), which rejected another ad hoc exception essentially on the ground "that ERISA law was already complicated enough without adding 'special procedural or evidentiary rules' to the mix." *Conkright*, 559 U.S. at 513 (quoting *Glenn*, 554 U.S. at 116). *John Blair* represents just the sort of ad hoc exception to *Firestone* deference that was rejected in *Conkright* and *Glenn*.

Respectfully submitted,

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