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

REPLY BRIEF FOR PETITIONERS

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The Ninth Circuit misinterpreted ERISA in affirming the district court's judgment dismissing petitioners' claims as untimely. Petitioners are participants in the Edison retirement plan. They presented evidence that respondents, who are fiduciaries of that plan, breached their fiduciary duty of prudence by offering retail-class shares of six mutual funds as investment options when institutional-class shares of the same funds were available. The institutional shares are identical in all relevant respects to the retail-class shares, except they charge lower fees. The district court concluded after a trial that respondents behaved imprudently by offering retail-class shares of the three funds added to the plan in 2002, and the court of appeals affirmed that conclusion. But the lower courts held that ERISA's six-year limitations provision for fiduciary-breach claims barred petitioners' claims regarding the three funds added in 1999, because those funds were first selected as investment options more than six years before the suit was filed.

The lower courts misconstrued the statute. ERISA requires fiduciaries of covered retirement plans to act as a "prudent" person would act under the circumstances. 29 U.S.C. § 1104(a)(1)(B). The statute places no temporal limit on that duty in the context of plan investments. *See id.* Background principles of trust law, and the United States' views, confirm that fiduciaries are obligated to review investments periodically and remove imprudent ones; their duties do not end with the initial selection of an investment. Plan participants may file an action within six years of a breach, *see id.* § 1113(1), and proof that a fiduciary has failed appropriately to monitor and remove an imprudent investment establishes a breach of ERISA's duty of prudence that is actionable for six years under the limitations provision.

The efforts of respondents and their *amici* to defend the Ninth Circuit's judgment are unpersuasive. Respondents do not quarrel with our reading of the limitations provision: they concede that each breach of ERISA's fiduciary-duty provision is actionable for six years. Nor do they dispute that ERISA's duty of prudence encompasses obligations to review the prudence of existing investments and to remove imprudent ones. And they no longer contest that they breached their fiduciary duties by choosing more expensive retail-class shares in 2002, when institutional-class shares were available.

Respondents contend, however, that a fiduciary's obligation to review existing investments applies only when "significant changes" in circumstances necessitate a "full diligence review." Br. 33, 48. Nothing in ERISA or background principles of trust law supports that limitation on ERISA's duty of prudence, and trust-law sources confirm that no such limitation exists. The obligation to review existing investments does not necessarily entail as thorough an examination as occurs when initially selecting an investment; the test is what a reasonably prudent fiduciary would do in the same or similar circumstances. But no prudent review could have overlooked the problem with the retail-class shares at issue here: the same investment was available at a lower cost to plan participants through the institutional-class shares. Neither respondents nor their *amici* offer any reason why a prudent fiduciary would continue to offer retail-class shares under those circumstances.

Unable to justify the Ninth Circuit's decision on the merits, respondents urge this Court to dismiss the writ as improvidently granted. They assert, for the first time in their merits brief, that this case

does not present the question on which this Court granted review because the district court permitted petitioners to establish at trial a breach of the duty of prudence within the limitations period based on any theory of petitioners' choosing. That contention mischaracterizes the record. As respondents themselves successfully argued in the lower courts, the district court held on summary judgment that ERISA's limitations provision barred petitioners' claims relating to funds first added to the plan more than six years before the complaint was filed, unless petitioners could prove "changes" sufficient to warrant a full "due diligence process."[1] The correctness of the Ninth Circuit's affirmance of that legal conclusion is squarely presented in this Court.

ARGUMENT

I. THE NINTH CIRCUIT ERRONEOUSLY BARRED PETITIONERS' TIMELY CLAIMS

As fiduciaries of the Edison ERISA plan, respondents had a duty to engage in the kind of periodic monitoring of investment options that a reasonably prudent fiduciary would conduct and to remove investment options that reasonable monitoring would reveal to be imprudent. Claims arising from breaches of those duties in the six years preceding commencement of this suit are timely under ERISA. That conclusion follows from the statutory text and background principles of trust law against which ERISA was enacted.

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[1] *See*, *e.g.*, Dkt. 381, at 13.

A. ERISA's Duty Of Prudence Does Not Cease When A Fiduciary Selects An Investment

1. ERISA fiduciaries must 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." 29 U.S.C. § 1104(a)(1)(B). That statutory "standard of care" is "derived from the common law of trusts," *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985), which similarly imposes a duty on trustees "to administer the trust as a prudent person would," Restatement (Third) of Trusts § 77(1) (2007); *accord* Restatement (Second) of Trusts § 174 (1959); George T. Bogert et al., *The Law of Trusts and Trustees* § 541, at 159 (rev. 2d ed. 1993) ("Bogert"); *see* Pet. Br. 22-24; U.S. Br. 9-12, 15-16. Respondents agree (at 4) that ERISA's prudence standard "is informed by the common law of trusts."

A component of the duty of prudence is the "duty to be cost-conscious." Restatement (Third) of Trusts § 88 cmt. a. "Trustees, like other prudent investors, prefer (and, as fiduciaries, ordinarily have a duty to seek) the lowest level of risk and cost for a particular level of expected return." *Id.* § 90 cmt. f(1). Mutual fund expenses "require special attention by a trustee." *Id.* § 90 cmt. m. Because differences in fund expenses "can be significant, it is important for trustees to make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." *Id.*; *see* Pet. Br. 6 & n.1, 24-25; U.S. Br. 12-13, 33-34. Here, respondents' own investment criteria required consideration of expenses on an ongoing basis, *e.g.*,

JA145, 183, so the investment committees and staff would have been expected to consider the availability of lower-cost institutional-class shares.

Respondents do not dispute that investment expenses are important to the prudence inquiry, arguing only (at 29) that costs are not the "sole[]" relevant consideration. When, however, institutional-class shares offer the same investment as retail-class shares, but with lower expenses, the institutional-class shares are guaranteed to perform better "on a net-of-fee basis." Resp. Br. 9 (internal quotation marks omitted); *see* Pet. Br. 39; U.S. Br. 18-19; App. 84. In those circumstances, a difference in cost can be dispositive in choosing among share classes.

2. The duty of prudence includes an obligation to engage in prudent and periodic review of existing investments.[2] Respondents concede that point (at 3): "a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent."

The duty to monitor does not apply "only" when "significant changes" have occurred, as respondents assert (at 33).[3] The responsibility to collect "infor-

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[2] *See* Pet. Br. 24-28; U.S. Br. 13-15; 4 Mark L. Ascher et al., *Scott and Ascher on Trusts* § 19.1.2, at 1394-95 (5th ed. 2007) ("[T]he trustee has a continuing duty to supervise the trust's investment strategy."); Restatement (Third) of Trusts § 90 cmt. b; Bogert § 684, at 147-48 (3d ed. 2009); *Johns v. Herbert*, 2 App. D.C. 485, 499 (1894) ("[i]t was [the trustee's] duty to watch the investment with reasonable care and diligence"); *In re Cady's Estate*, 207 N.Y.S. 385, 387 (App. Div. 1925) ("[A trustee's] duty is not discharged when he has taken securities, but he must be actively vigilant to ascertain whether or not the investment is unsafe and insecure and constantly growing more so; and for want of reasonable care in that respect he is chargeable for the losses caused by depreciation.").

[3] Respondents are inconsistent regarding the scope of the monitoring duty. Although they assert (at 33) that a fiduciary

mation currently as changes occur," Bogert § 684, at 147, is *an aspect of* the duty to monitor. But a fiduciary "also" must monitor "by a systematic consideration of all the investments of the trust at regular intervals, for example, once every six months." *Id.*; *see* Pet. Br. 28-33; U.S. Br. 13-14.[4]

The duty to conduct reasonably prudent periodic reviews, even absent changed circumstances, is a basic application of ERISA's general standard of reasonable prudence, incorporated from trust law. Because no decisionmaker is infallible, *cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result), a prudent fiduciary would revisit previous investment decisions periodically, even when unaware of any significant changes. Thus, a fiduciary who makes an imprudent investment and thereafter fails to monitor the investment prudently has committed two distinct breaches: "*First*, in making the original investment of the fund; and, *second*, in the failure to use . . . proper care, watchfulness, and oversight" in monitoring the investment. *In re Stark's Estate*, 15 N.Y.S. 729, 732 (N.Y. Surrogate's Ct., Rensselaer Cnty. 1891); *see also Cady's Estate*, 207 N.Y.S. at 387 (trustee breached fiduciary duty by investing in speculative stocks because "he made no inquiry concerning the stocks before their purchase, . . . and it does not appear that he made any inquiry afterward as to their value or future security").

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must monitor "only for significant changes," elsewhere (at 37) they appear to acknowledge that fiduciaries have a "duty to conduct periodic reviews."

[4] The leading benefits consulting groups advise fiduciaries to conduct regular reviews of investment performance and fees, *see* AARP Br. 13-15, and most plan fiduciaries in fact engage in periodic reviews, *see* Pension Rights Center Br. 13 (65% of plan sponsors conduct quarterly reviews and 95% at least conduct annual reviews), as respondents did here, Pet. Br. 9.

Those principles of trust law apply fully under ERISA. An ERISA fiduciary that "has made (*or held*) patently unsound investments" has violated its duty "to invest prudently," and plan participants may recover damages arising out of the imprudent retention of investments. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962-63 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) (emphasis added); *see* U.S. Br. 15-16.[5]

Respondents attack a straw man (at 32-39) by insisting that they were not required to repeat a "full due diligence review." Periodic reviews of existing investment options must be prudent, but neither petitioners nor the United States contend that those reviews must always be as thorough as reviews undertaken when initially selecting an investment option. No precise rule dictates how often a fiduciary must review the portfolio or how detailed periodic reviews must be; rather, as with trust administration generally, the duty to monitor is subject to the reasonable-person standard. That is, the fiduciary must engage in the kind of review that a reasonably prudent fiduciary would conduct under the circumstances.[6] Here, moreover, no "full-scale, stem-to-

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[5] *See also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007); *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992); *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

[6] *See*, *e.g.*, Restatement (Second) of Trusts § 231 cmt. b ("[t]he trustee is under a duty to use reasonable care to keep himself informed in regard to the property which he holds in trust"); Restatement (Third) of Trusts § 90 cmt. d (trustee must "exercise reasonable effort and diligence in . . . monitoring investments"); Bogert § 684, at 146 ("a trustee must exercise reasonable care, skill, and caution" in monitoring investments).

stern diligence review" (Resp. Br. 3) would have been required to determine that continuing to offer retail-class shares was imprudent given the availability of "institutional share classes offer[ing] the exact same investment at a lower cost to the Plan participants." App. 130. Respondents could have, and should have, recognized that fact during the quarterly reviews they were already conducting. Reversing the decision below therefore will not impose on employers the supposedly "staggering" administrative burdens hypothesized by respondents and their *amici*. *See* Resp. Br. 37-39; ESOP Ass'n Br. 3; NAM Br. 21-22.

B. A Fiduciary's Failures Prudently To Monitor And Remove Investments Give Rise To Timely Claims Under 29 U.S.C. § 1113(1)

Claims for breaches of the duty to monitor investments and remove imprudent ones are timely if brought within six years of the imprudent monitoring or failure to remove. *See* Pet. Br. 34-38; U.S. Br. 17-18, 22-23. The limitations provision for breaches of ERISA fiduciary duties provides that a claim is timely if brought within six years of "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). Thus, a plan participant may bring claims arising out of any fiduciary breach (by action or omission) occurring within six years of filing suit. Again, respondents expressly concede petitioners' point, stating (at 2) that § 1113(1) "does *not* bar a claim that a fiduciary breached its fiduciary duty by imprudently monitoring and retaining a given fund during" the six-year period, "even if that fund was added before" that period.

This Court's cases confirm that a claim arising out of a breach within the limitations period does not become untimely because it relates in some way to an earlier alleged breach outside the limitations period for which the plaintiff could not pursue a claim. *See* Pet. Br. 34-37; U.S. Br. 25-27. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), for example, this Court held that a copyright holder could pursue claims for infringement that occurred within three years of the lawsuit, even though the original act of infringement occurred 18 years previously. *See id.* at 1967-69. So long as a "freestanding violation" occurs, it "may always be charged within its own charging period regardless of its connection to other violations." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 636 (2007). Respondents' failures to review and remove imprudent investment options within the limitations period are therefore actionable, even for investments initially selected outside of that period. No other result comports with § 1113(1)'s text, which states that the six-year period runs from the "*last* action" or "*latest* date" of an omission, regardless of when the *first* action related to the breach occurred. 29 U.S.C. § 1113(1) (emphases added).

Petitioners' and the United States' interpretation does not, as respondents assert (at 48), "eviscerate" the limitations provision by making all breaches actionable indefinitely so long as the fiduciary has not "cured" them. In the ordinary course, failure to cure a prior breach is not an independent breach and would not give rise to a timely claim. For example, a challenge to a prohibited transaction in which a fiduciary collected an improper commission, *see* 29 U.S.C. § 1106, would be untimely if not commenced within six years of the transaction, because that claim

would involve no breach of an ongoing duty within the limitations period. By contrast, this case concerns the acknowledged "ongoing duty to monitor" existing investment options, the violation of which constitutes a "*new* breach" actionable for six years. Resp. Br. 2-3.

C. Enforcing ERISA's Duty Of Prudence With Respect To Existing Investments Supports ERISA's Purposes

Permitting plan participants (and the Secretary of Labor) to enforce ERISA's duty of prudence with respect to existing investment options furthers Congress's stated purpose of "protect[ing] . . . the interests of participants in employee benefit plans and their fiduciaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, *and by providing appropriate remedies, sanctions, and ready access to the Federal courts*." 29 U.S.C. § 1001(b) (emphasis added). The Ninth Circuit's limitations ruling is unfaithful to ERISA's purposes because it would bar any judicial scrutiny of the prudence of investment options that have been offered for more than six years, absent proof of changed circumstances. *See* Pet. Br. 50-51; U.S. Br. 31-32. Respondents bravely assert (at 50) that "patently imprudent funds are unlikely to remain in a lineup for six years, or to go unchallenged." But *that is this case*: the evidence shows that respondents maintained as investment options retail-class shares of mutual funds when institutional-class shares of the same funds offered an identical investment at a lower cost to plan participants. *See* Pet. Br. 7-10; U.S. Br. 18-20. Respondents removed the retail-class shares of the 1999 funds as investment options only after this lawsuit was filed. App. 92-98.

Reversing the Ninth Circuit's judgment here would not, as respondents (at 4) and their *amici* (NAM Br. 4, 26-28) speculate, discourage "employers from offering . . . benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Respondents and their *amici* concede the central premises of petitioners' and the United States' position: ERISA's duty of prudence entails an "ongoing" (Resp. Br. 3) and "rigorous" (NAM Br. 5) duty to monitor existing investments, and a violation of that duty within the limitations period gives rise to a timely claim even if the investment option in question was first selected outside of that period (Resp. Br. 2). Enforcing a duty acknowledged by respondents and their employer *amici* to exist cannot possibly pose any significant risk to the availability of retirement plans.[7] Moreover, neither respondents nor their *amici* offer any evidence that litigation challenging the prudence of investment options offered by ERISA plans has caused employers to abandon or decline to establish those plans. *See* AARP Br. 20-23.

Respondents (at 45-47) and their *amici* (NAM Br. 10-14) are not helped by characterizing ERISA's limitations provision as a statute of repose and invoking the policies underlying such provisions. As *amici* ultimately acknowledge (NAM Br. 11 n.2), the characterization of § 1113 as a statute of repose or a

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[7] For similar reasons, NAM's characterization (at 31) of the United States' brief as "inappropriate" "regulation by litigation" is unfounded. This Court requested the United States' views at the certiorari stage, and the Secretary of Labor has primary authority to administer the statute, *see* 29 U.S.C. § 1135; *see also Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2257 n.1 (2011) (U.S. *amicus* brief represents agency's views). The Secretary's views on the meaning of a statute he administers should be given weight. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011).

statute of limitations does not matter in this case. No one contends that § 1113(1)'s six-year period begins to run before the "breach or violation" on which the action is based, and petitioners seek to recover for breaches occurring within that period. Respondents have no claim to "repose" for conduct occurring within six years of petitioners' suit.[8]

D. Respondents Mischaracterize The Proceedings Below

Respondents erroneously assert that the district court allowed petitioners to prove imprudent monitoring during the limitations period without restriction and that the district court simply rejected petitioners' evidence at trial as a matter of fact. *See*, *e.g.*, Resp. Br. i, 1, 14, 26-27, 42. All parties and the courts below understood the district court's summary judgment ruling to preclude petitioners from pursuing claims relating to the three funds initially selected as investment options in 1999, unless petitioners could prove that those funds had experienced such significant changes that retaining them was equivalent to choosing a new investment within the limitations period.

Respondents' contrary assertion presupposes that petitioners voluntarily restricted themselves to a changed-circumstances theory, then litigated an irrelevant limitations question before the court of appeals and this Court, and that both courts unnecessarily agreed to adjudicate that limitations issue. Respondents' far-fetched supposition is contradicted

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[8] Moreover, § 1113 is unlike the provisions described by this Court as statutes of repose because it provides for tolling "in the case of fraud or concealment," 29 U.S.C. § 1113; consequently, the six-year period is not measured solely "from the date of the last culpable act or omission of the defendant," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014).

by the record and by respondents' own arguments throughout the litigation.

1. The judgment under review is the Ninth Circuit's. In that court, all parties agreed that the district court's summary judgment order precluded petitioners from pursuing claims relating to the 1999 funds unless they proved changed circumstances necessitating a full diligence review. Respondents argued that "[t]he district court correctly held that ERISA's six-year limitations period bars challenges to funds added to the Plan more than six years before this action was filed. Plan fiduciaries do have a continuing duty under ERISA to monitor investment options for changed circumstances rendering a once-prudent investment now imprudent, but plaintiffs here allege no changed circumstances." Second Br. on Cross-Appeal 18 (July 25, 2011). The court of appeals likewise recognized that the district court's summary judgment ruling "determined that ERISA's limitations period barred recovery for claims arising out of investments included in the Plan more than six years before beneficiaries had initiated suit." App. 15. The court of appeals affirmed that ruling, "hold[ing] that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) for claims asserting imprudence in the design of the plan menu." App. 17. The court of appeals stated that the district court was "correct" to allow a claim of "changed circumstances engendering a new breach," but affirmed the district court's summary judgment ruling that precluded any other claim. App. 19. The court of appeals' holding and analysis of the limitations issue would have been entirely unnecessary if, as respondents assert, petitioners' claims had failed at trial on factual grounds.

The district court record likewise does not support respondents' newfound position. The court granted partial summary judgment to respondents on their statute-of-limitations defense, ruling that petitioners' claims relating to funds selected for inclusion in the plan more than six years before the complaint was filed were time-barred. The court stated that, because "the initial decision to add retail mutual funds, including the sector funds, as an option in the Plan was made in 1999 and 2000," "the prudence claims arising out of these decisions are barred by the statute of limitations." App. 262-63. The court's reasoning foreclosed claims challenging the prudence of respondents' monitoring of those investment options during the limitations period. The court cited *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), for the proposition that, when an initial breach occurs before the limitations period, claims arising out of subsequent breaches related to the original breach are untimely. App. 180 ("[A]lthough the trustee's conduct could be viewed as a series of breaches, the statute of limitations did not begin anew because each breach was 'of the same character.'") (quoting *Phillips*, 944 F.2d at 520).

All parties understood the district court's ruling to mean that petitioners could pursue claims relating to the 1999 funds only to the extent that significant changed circumstances had occurred during the limitations period such that retaining those funds could be considered equivalent to a decision to add a new fund. Accordingly, petitioners' expert's pre-trial declaration asserted that, in light of changed circumstances, the three funds added in 1999 should be treated as ones added within the limitations period. *See* Dkt. 354, ¶¶ 24 & n.16, 30(a), 31(a). Not once

during the trial did respondents or the court suggest that petitioners were permitted to assert a broader claim.[9] At the end of the trial, the court provided for post-trial submissions on the funds added in 1999, but only on the argument that name changes by those three funds within the limitations period constituted sufficiently significant changes to warrant a review of the share classes. *See* App. 68; 10/22/09 Vol. I Tr. 5:22-6:13, 9:2-15.

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[9] Early in the trial, respondents' counsel acknowledged that petitioners' expert "believe[d] himself precluded by the court's earlier rulings and ha[d] not made the argument that [respondents] should have switched out of existing funds," 10/20/09 Vol. I Tr. 27:17-20; in other words, counsel recognized that the expert understood the summary judgment ruling to mean that § 1113(1) barred a claim that respondents breached a duty to review and remove the imprudent retail-class shares. Petitioners' counsel and the district court acquiesced in that understanding. *See* 10/20/09 Vol. I Tr. 27:21-22 ("THE COURT: Is that your understanding? MR. WOLFF: Yes, Your Honor. THE COURT: Okay.").

Respondents' erroneous assertion (at 15-16) that the district court "all but invited" petitioners to re-assert their imprudent-monitoring theory (notwithstanding the summary judgment ruling barring that theory) rests on a mischaracterization of a brief exchange between the court and petitioners' expert. The court asked for "clarification" from petitioners' expert regarding the scope of his opinion. JA188. The witness focused his answers on the changed-circumstances theory, but also stated his opinion that prudence requires periodic review "with some frequency." JA 189. In context, that brief exchange indicates that the court sought to determine whether the expert's testimony was consistent with the court's statute-of-limitations ruling; it was not inviting the expert to advance a theory inconsistent with that ruling. The court offered no guidance about the claims that petitioners were legally permitted to bring; nor did it suggest that petitioners could pursue a claim for imprudent periodic monitoring without proving significant changed circumstances.

In post-trial briefing, respondents confirmed their understanding that the summary judgment ruling barred petitioners' monitoring claims. Respondents argued that, "[b]y challenging the prudence of *maintaining* retail share classes of the three . . . funds [added in 1999], plaintiffs have done what the Court has forbidden, by attempting to resurrect claims that were properly held barred by the six-year statute of limitations." Dkt. 381, at 13 (emphasis added).

In sum, the district court's summary judgment ruling on timeliness generally barred all claims regarding investments added before the limitations period, including claims that respondents engaged in imprudent monitoring. To attempt to revive their claims involving investments added in 1999, petitioners were forced to characterize the funds as new investments added within the limitations period and to claim that the funds experienced significant changes in circumstances that should have triggered a full due diligence review. As to the 1999 funds, the district court's post-trial ruling thus did not rule generally on claims for fiduciary breaches within the limitations period, but only on the more limited changed-circumstances theory.

2. Respondents' fundamental mischaracterization of the record infects many of their arguments. First, respondents express their arguments as defenses of factual findings by the district court, which would be reviewed only for clear error. For example, respondents argue that "the district court did not err in rejecting petitioners' trial claim that respondents acted imprudently in monitoring and retaining the challenged funds." Br. 39 (capitalization omitted). *See also* Br. 29 ("The district court did not clearly err in finding that respondents acted

prudently . . . .") (capitalization omitted). But, as shown above, the district court barred the claims at issue here as a matter of law at summary judgment. The district court did not find, as respondents claim (at 40), that they "engaged in a state-of-the-art monitoring process." Whether respondents' monitoring lived up to a standard of reasonable prudence remains a disputed issue of fact because the district court granted summary judgment on limitations grounds.

Second, respondents' misconception that the district court rejected on factual grounds any claims for imprudent monitoring leads them to assume incorrectly that petitioners are actually challenging the initial decision to invest in the challenged funds. Respondents therefore argue that challenges to that initial decision are untimely. *See* Br. 45-47 (arguing that § 1113(1) bars challenges to initial decision); *id.* at 43-45 (arguing that challenge to initial decision cannot be maintained on a "continuing violation theory"). But petitioners made abundantly clear that their claims "derive not from the imprudent *addition* of the retail-class shares outside the limitations period but from the imprudent *management* of the plan during the limitations period." Pet. Br. 2.[10] Those claims do not turn on the prudence of initially selecting the retail-class shares, but rather on respondents' prudence in reviewing and maintaining the retail-class shares during the limitations period.

3. Assessed under the proper legal standards, petitioners' evidence establishes breaches of the duty of prudence or, at a minimum, the existence of a

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[10] *See* First Brief on Cross-Appeal at 20 (Apr. 20, 2011) ("Defendants are liable for the losses to the Plan caused by their breach of duty in keeping these funds in the Plan in the six years before commencement of this action.").

genuine issue of material fact regarding respondents' compliance with ERISA. The district court found after a bench trial that respondents breached their duty of prudence when they selected retail-class shares of three funds in 2002 when lower-cost institutional-class shares of the same funds were available. App. 130. The Ninth Circuit affirmed that conclusion, App. 64, and respondents did not seek further review. If not dispositive, that analysis is highly probative of respondents' prudence in retaining retail-class shares of the three 1999 funds. As with the 2002 funds, the 1999 funds offered institutional-class shares, which provided the same investments as the retail-class shares, but with lower expenses. Pet. Br. 39-41. From the time respondents added the three funds in 1999 to the time petitioners filed suit in 2007, respondents did not once consider switching to institutional-class shares. *Id.* Given that respondents undisputedly never considered whether to switch from retail-class shares to institutional-class shares that were guaranteed to provide better performance net of fees, petitioners are at least entitled to a trial on whether respondents' monitoring was prudent.

Respondents protest (at 30) that "institutional-class shares are not categorically superior to retail-class shares for all 401(k) plans in all circumstances." That assertion does not help respondents, because they offer no reason why institutional-class shares were not superior to retail-class shares for this plan in these circumstances. Respondents (at 30-31) and their *amici* (SIFMA Br. 11-17) suggest that, in some plans, retail-class shares are justified by revenue-sharing payments that benefit participants. Even if that were true in some cases, the plan sponsors in this case agreed to bear administrative costs, so

participants did not benefit from revenue sharing[11]; respondents accordingly do not justify their conduct on that basis. *See* Resp. Br. 31 n.8. Respondents also observe that, in 1999, the retail-class shares of one of the funds had a "Morningstar rating" and "a significant performance history," whereas the corresponding institutional-class shares did not. Br. 11-12, 30-31.[12] But respondents do not explain why a Morningstar rating would justify offering retail-class shares over institutional-class shares of the same fund that are guaranteed to have better net performance. Plus, respondents offer no excuse for retaining the retail-class shares during the limitations period once the institutional-class shares gained a Morningstar rating and a significant performance history.[13]

II. RESPONDENTS' ASSERTION THAT THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED LACKS MERIT

Respondents' attempt to avoid a decision on the question presented – a question formulated by this Court (JA241) based on the United States' invitation brief – should be rejected. Respondents forfeited their objections to this Court's consideration of the question presented by failing to raise them before

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[11] Edison, however, did benefit from revenue sharing, which "offset the cost of . . . record-keeping expenses" that Edison otherwise would have paid itself. App. 78.

[12] Morningstar rates mutual funds based on historic returns, but requires at least three years of performance history to issue a rating. *See* 10/20/09 Vol. II Tr. 5:17-21. The institutional-class shares of the Franklin fund lacked a Morningstar rating in 1999 because they were first offered in 1997 and so lacked the requisite performance history. App. 96.

[13] *See* 10/20/09 Vol. II Tr. 6:3-7; 27:23-28:2.

now, and no barrier exists to this Court's review of that question in any event.

A. Respondents waived their objections to the Court's review by failing in the brief in opposition to identify "any perceived misstatement made in the petition" or nonjurisdictional "objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2. The certiorari petition challenged the Ninth Circuit's affirmance of the district court's summary judgment ruling that claims involving the 1999 funds were time-barred, absent proof of changed circumstances. *See* Pet. 12-14. In opposing certiorari, respondents agreed with petitioners' characterization of the lower courts' holdings: "the court [of appeals] . . . 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." Opp. 6. Respondents argued that no circuit conflict existed, Opp. 7-10, and that the court of appeals' decision was correct, Opp. 11-15. The United States filed an invitation brief recommending review of the limitations question, framed in terms that this Court subsequently adopted. *Compare* U.S. Inv. Br. I *with* JA241. Respondents filed a supplemental brief again opposing certiorari based on the supposed lack of a circuit split, Supp. Opp. 1-4, and the correctness of the decision below, *id.* at 4-7; that brief also attempted to rebut a policy argument in favor of certiorari, *id.* at 7-9. Respondents neither made any procedural objection to certiorari nor raised a vehicle problem in their brief in opposition or supplemental brief. The Court should therefore "deem[]" respondents' new objection to certiorari "waived." Sup. Ct. R. 15.2.

Even if hints of respondents' current objection to certiorari can be discerned in their certiorari briefing, respondents have offered no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (quoting *United States v. Williams*, 504 U.S. 36, 40 (1992)). Respondents identify no new development since the Court granted certiorari that affects the Court's ability to decide the question presented.

Moreover, respondents failed to advance their current interpretation of the district court proceedings before the Ninth Circuit. There, petitioners argued that § 1113(1) bars claims "only as to breaches that occurred more than six years earlier, but not as to the breaches within six years." First Br. on Cross-Appeal 19. In response, respondents argued only that the statute of limitations precluded such claims, not that the district court had resolved those claims against petitioners as a matter of fact. *See* Second Br. on Cross-Appeal 22-28.

B. In any event, respondents' argument turns on their mischaracterization of the proceedings below. The Ninth Circuit affirmed the district court's summary judgment ruling, which precluded petitioners from pursuing at trial claims that respondents had failed prudently to review and remove investments within the limitations period and instead required proof of changed circumstances sufficient to treat retaining retail-class shares like the decision to add a new investment. *See supra* Part I.D.1. This appeal squarely presents the correctness of that legal conclusion, not "a factbound dispute concerning the sufficiency of the evidence petitioners introduced at trial." Resp. Br. 25.

Indeed, although respondents initially suggest that there is no legal dispute between the parties, they ultimately *defend* the lower courts' reasoning. Respondents argue (at 33) that they committed no breach within the limitations period because, "[o]nce investments are selected, a fiduciary must monitor only for significant changes in the value and risks of the investments." They also endorse (at 44) the Ninth Circuit's conclusion that, under § 1113(1), only a showing of "changed circumstances" would permit petitioners to pursue a timely claim relating to existing investment options. Thus, a live dispute remains regarding the governing legal standards, and the Court's resolution of that dispute will determine whether petitioners will ever be able to litigate their imprudent-monitoring claims with respect to the three 1999 funds.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded.

Respectfully submitted,

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