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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 THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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Heimeshoff v. Hartford Life & Accident Ins. Co.,
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29 C.F.R. § 2550.404a-5 23

401(k) for Small Businesses, Fidelity,
https://www.fidelity.com/retirement-ira/small-business/401k-plans 25

Deloitte Development LLC, Annual Defined Contribution Benchmarking Survey
(2014) .... *passim*

Deloitte Development LLC, Defined Contribution / 401(k) Fee Study (2009) ...... *passim*

Mutual Funds, U.S. Bancorp, https://www.usbank.com/cgi_w/cfm/invest/products_and_services/mutual_funds_ps.cfm....... 11

News Release, Bureau of Labor Statistics, Employee Benefits in the United States (Mar. 2014), http://www.bls.gov/ncs/ebs/sp/ebnr0020.pdf.. 16

Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) 15

Small Business 401(k), Merrill Edge, http://www.merrilledge.com/small-business/401k 25

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Stuart Robinson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes, Sept. 25, 2013 24

The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2012, ICI Research Perspective, June 2013 .... 3, 9

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U.S. Dep't of Labor, Advisory Op. 97-15A 4, 12

U.S. Dep't of Labor, Advisory Op. 2013-03A 12, 15, 21

U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html 17

U.S. Dep't of Labor, Pension and Welfare Benefits Administration, Study of 401(k) Plan Fees and Expenses (1998) 12

Vanguard Share Classes, Vanguard, https://advisors.vanguard.com/VGApp/iip/site/advisor/aboutus/philosophy/article?file=IWEShareClassExplanation 16

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INTEREST OF THE *AMICUS CURIAE*

The Securities and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States.[1] SIFMA's mission is to support a strong financial sector while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA members not only sponsor 401(k) plans for their own employees, they also regularly provide administrative, investment advisory, and other services to unaffiliated retirement plans. SIFMA and its members therefore have an interest in ERISA litigation, and SIFMA regularly files *amicus curiae* briefs in ERISA cases like this one, which raise issues of concern to plan sponsors and other fiduciaries. *See, e.g.*, *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619 (5th Cir. 2014); *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); *Gearren v. McGraw Hill Cos.*, 660 F.3d 605 (2d Cir. 2011).

As 401(k) plans and other defined-contribution plans have increasingly replaced defined-benefit plans, lawsuits like this one have followed. In these class action suits, plaintiffs allege—with 20/20 hindsight and often long after-the-fact—that plan fiduciaries breached their obligations to participants

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[1] All parties have consented to the filing of this brief in letters filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

when selecting the plan's investment options. If, as petitioners propose, there is no repose for investment decisions made years earlier, the ongoing risk of such litigation may require fiduciaries, including SIFMA members and their affiliates, to spend unnecessary time and money repeatedly reevaluating past decisions—time and money that otherwise could be used to benefit plan participants in other ways. In some cases, the unnecessary cost and burden could even discourage the formation of 401(k) plans in the first place. SIFMA has a strong interest in averting such a result.

SIFMA also has a strong interest in debunking the contentions that lie at the heart of petitioners' theory: that it is *necessarily* imprudent for a plan fiduciary to decide to offer retail share classes of mutual funds to plan participants, and that fiduciaries *necessarily* must reexamine that decision each and every time they give any thought to any of the plan's investments, even when nothing has changed. As explained below, there are good reasons why prudent fiduciaries (including fiduciaries for numerous 401(k) plans sponsored by SIFMA members) choose to offer to plan participants retail share classes of mutual funds, rather than institutional share classes or other types of investment vehicles. And there are good reasons why such a decision ought to be entitled to repose.

STATEMENT

Petitioners' counsel brought this case as part of a multi-front attack on the use of mutual funds for 401(k) plans. Although the question presented has been reformulated to focus on petitioners' most recent theory, that theory is merely the latest of many, all aimed at getting the courts to declare a

wide swath of commonly held investments to be categorically imprudent.

Since the 1990s, mutual funds have been by far the most popular investment vehicle for 401(k) plans. More than half of all 401(k) plan assets are held in mutual funds, and nine out of ten 401(k) plans include mutual funds on their investment menu.[2] In spite of this popularity—or, perhaps, because of it—over the past decade petitioners' counsel and other plaintiffs' lawyers have put forth numerous theories for why it is imprudent—and, thus, a breach of fiduciary duty—to choose to offer mutual funds as investment options for 401(k) plans.

At first, petitioners' counsel argued in this and other cases that it is *per se* imprudent to choose to offer mutual funds rather than other, purportedly less expensive investment products. But this argument was universally rejected by the courts, which recognized that mutual funds offer numerous advantages over other types of investment vehicles.[3]

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[2] *See The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2012*, ICI Research Perspective, June 2013, at 2, *available at* http://www.ici.org/pdf/per19-04.pdf [hereinafter *Economics of Providing 401(k) Plans*] ("In the past two decades, mutual funds have become a primary provider of 401(k) plan investments, with the share of employer-sponsored 401(k) plan assets held in funds increasing from 9 percent in 1990 to 60 percent at year-end 2012."); Deloitte Development LLC, Defined Contribution / 401(k) Fee Study 15 (2009), *available at* http://www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf [hereinafter Deloitte 401(k) Fee Study] (noting that mutual funds are "the most common investment vehicle used by [401(k)] plans," with "91% of plans offering them").

[3] *See, e.g.*, Pet. App. 53-54; *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-72 (7th Cir. 2011); *Renfro v. Unisys Corp.*, 671 F.3d

Petitioners' counsel also argued (once again, unsuccessfully) that the common practice of "revenue sharing" between mutual fund service providers and 401(k) plan service providers violates ERISA. *See* Pet. App. 45.[4]

By the time this case made its way to trial, petitioners' principal arguments—that defendants violated ERISA by selecting mutual funds as investment options for plan participants and by engaging in revenue sharing—had both been squarely rejected. *See* Pet. App. 45-46, 53-54. So, on the eve of trial, well *after* the summary judgment ruling on the statute of repose that is under review here, petitioners' counsel came up with a new theory: that it was *per se* imprudent to offer *retail share*

314, 326-27 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 584-87 (7th Cir. 2009). For example, when compared to institutional investment products, such as separate accounts or commingled pools, mutual funds offer greater transparency and ease of valuation, *see Loomis*, 658 F.3d at 671-72; portability of funds for plan participants, *id.* at 672; and substantial regulatory safeguards, including investment diversification requirements, limitations on leverage, and mandatory oversight by a primarily independent board of directors, *see* 15 U.S.C. § 80a-18(f); 26 U.S.C. § 851(b)(3); 17 C.F.R. § 270.0-1(a)(7).

[4] As explained below, *see infra* Section I.A.2, revenue-sharing arrangements typically require mutual fund service providers to share some portion of the fees they collect on 401(k) plan assets with the plan's administrative service provider. *See, e.g.*, U.S. Dep't of Labor, Advisory Op. 97-15A, at 1-2 (May 22, 1997) [hereinafter DOL Advisory Op. 97-15A] (describing a revenue-sharing arrangement between a mutual fund and a 401(k) service provider). This sharing of fees reflects the reality that, for plan investments, the plan's service provider performs many of the administrative services that otherwise would have to be performed by the mutual fund's service provider.

classes of mutual funds, when less expensive *institutional share classes* of those same mutual funds may have been available. It is this final substantive theory—which was expressly rejected by the court of appeals, Pet. App. 55[5]—that is now embedded in the question presented and that we address below.

SUMMARY OF ARGUMENT

Although the question presented to this Court concerns the applicability of ERISA's statute of repose, the Court chose to reframe that question in the narrow context of a particular factual claim—"that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical, lower-cost institutional-class mutual funds were available." Pet. Br. i. In presenting their repose argument, petitioners repeatedly suggest, as if it were a foregone conclusion, that retail share classes of mutual funds are an inherently imprudent investment vehicle for 401(k) plans, at least where

[5] Petitioners imply in their brief (at 39-40) that they prevailed below on that theory, but that suggestion misconstrues the court of appeals' holding in this case. *See* Pet. App. 55 (rejecting plaintiffs' "broadside" challenge "against retail-class mutual funds"). "The basis of liability" that the court of appeals upheld on deferential review "was not the mere inclusion of retail-class shares," *id*. at 60-61, nor was it the failure to remove such shares. Rather, the Ninth Circuit affirmed the district court's finding that respondents had failed to conduct a sufficiently thorough review before the (non-time-barred) share classes were selected. And that holding is of no help to petitioners here, because the issue before this Court pertains to selection decisions that were made more than six years before petitioners filed suit.

institutional share classes are also available. This assertion is the latest in a series of attacks made by petitioners' counsel, in this and other cases, on the selection of mutual funds as an investment vehicle for 401(k) plans. But, like the prior arguments raised by petitioners' counsel, this assertion is unfounded. In fact, retail share classes of mutual funds may well be a prudent choice for 401(k) plans, even where institutional share classes are also available.

The choice between retail share classes and institutional share classes is not, as petitioners suggest, a narrow, black-and-white choice between a more expensive and a less expensive investment option. Rather, it is a decision that must be made in the context of the total costs, interests, and objectives of the plan. As explained in detail below, when a plan offers retail share classes of mutual funds, it has a greater opportunity, through the use of a practice called "revenue sharing," to offset or even eliminate separate administrative service fees that the plan (and, thus, its participants) otherwise would be required to bear.[6] Accordingly, the choice between retail and institutional shares is, in essence, a choice about how to pay for the administrative expenses of a plan. And a prudent fiduciary may (and often does) choose to cover these expenses through revenue sharing—a decision that, in turn, typically necessitates the selection of retail shares.

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[6] Although some 401(k) plans (including the Edison plan at issue here) require the plan sponsor to bear the costs of administrative services, more often "participants bear the majority of 401(k) costs." Deloitte 401(k) Fee Study 17.

Moreover, this precise factual scenario—a fiduciary considering the choice between retail and institutional shares in the broader context of its decision about how to pay for administrative services—illustrates perfectly why petitioners' interpretation of ERISA's repose statute cannot be correct. A fiduciary's decision about whether to pay for administrative services with revenue sharing from retail shares, or to offer institutional shares and pay hard-dollar administrative service fees, is a complex one that may appropriately take into account numerous factors and involve examination of voluminous data. If petitioners were right, and fiduciaries were required to constantly reassess this decision even in the absence of any changed circumstances (or else face lawsuits like this one, filed years after-the-fact), it would lead to a result that is not only wholly unworkable, but also potentially quite costly for the plan. And, as this Court has recognized, when Congress enacted ERISA it sought to avoid imposing precisely such undue "administrative costs, or litigation expenses," which risk "discourag[ing] employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (second alteration in original) (internal quotation marks omitted).

The Court should affirm the decision below.

ARGUMENT

Petitioners' argument about timeliness depends on accepting their skewed portrayal of the fiduciary decisions they challenge. Petitioners contend that retail share classes are always inferior, and obviously so, because of their fee structure. If retail share classes are so obviously inferior, petitioners

reason, then every time a fiduciary sees a retail share class listed on the ERISA plan's investment menu and does nothing about it, the fiduciary is making a conscious—and imprudent—choice to pay higher fees. But that is not so.

The choice between retail and institutional share classes is not a simple comparison of sticker prices. In fact, determining which option will be better for the plan is a far more complex task than petitioners would have it. And, in this case, that choice was made more than six years before petitioners filed suit. Petitioners' claim is therefore time-barred.

I. A PRUDENT FIDUCIARY, CONSIDERING THE INTERESTS OF THE PLAN AS A WHOLE, COULD SELECT RETAIL SHARE CLASSES OF MUTUAL FUNDS OVER INSTITUTIONAL SHARES.

Throughout their brief, petitioners assert that the choice between retail and institutional share classes of mutual funds is a simple and obvious choice between a more expensive option (retail shares) and a less expensive option (institutional shares)—and, thus, that selection of the purportedly more expensive option (retail shares) will *always* be imprudent. *See*, *e.g.*, Pet. Br. 32 ("[S]ome 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."); *id.* at 39-41, 47 n.32. But, in making this assertion, petitioners focus on only one aspect of plan expenses and ignore the impact of share-class selection on the plan's total costs. And, as explained below, when a fiduciary takes into account all plan fees and expenses, it often may

prudently decide to select retail shares over institutional shares.

A. 401(k) Plans Pay Several Different Types Of Fees That May Be Affected By The Choice Between Retail And Institutional Share Classes.

Retail share classes of mutual funds can have real benefits for 401(k) plans. The extent of those benefits depends on the nature of the plans' service arrangements, and how those services are priced. All 401(k) plans require two principal types of services: (1) investment management services, which are provided by the investment advisors to the mutual funds and other investment options offered by the plan, and (2) recordkeeping and other administrative services, which are provided by 401(k) plan service providers that are engaged directly by the plans or their sponsors or administrators.[7] As explained further below, in asserting that retail share classes of mutual funds are a *per se* imprudent choice, petitioners improperly focus solely on the costs associated with the first category of services, completely ignoring the costs associated with the second category.

1. Services in the first category—investment management services—are paid for through an asset-based fee assessed by investment advisors upon the mutual funds and other investment vehicles in which plan participants invest. These

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[7] *See* U.S. Dep't of Labor, A Look at 401(k) Plan Fees 2-3 (2013), *available at* http://www.dol.gov/ebsa/publications/401k_employee.html [hereinafter DOL 401(k) Plan Fees]; Deloitte 401(k) Fee Study 10; *Economics of Providing 401(k) Plans* 3, 4.

investment management fees are included in the fund's "expense ratio" and, thus, impact all shareholders, including plan participants, on a *pro rata* basis. Deloitte 401(k) Fee Study 15.

As petitioners repeatedly state, the expense ratio is typically higher for retail share classes of mutual funds than for institutional share classes. *E.g.*, Pet. Br. 7, 8. This price difference reflects the fact that the expense ratio is composed of both (1) investment management fees and (2) fees for other, largely administrative services provided to the mutual funds (including recordkeeping and distribution services). By law, the portion of the expense ratio allocated to investment management services must be the same for all fund investors, irrespective of share class. *See* 17 C.F.R. § 270.18f-3(a)(1). But the portion of the expense ratio assessed to cover administrative and other expenses can vary by share class. *See id.* And, because institutional share classes are offered to larger investors who require fewer administrative services, this portion of the expense ratio (and thus the total expense ratio) typically is lower for institutional share classes than for retail share classes.

2. The second category of services required by 401(k) plans includes recordkeeping and other administrative services, such as tracking account balances, processing and managing payroll deductions, sending out account statements and required notices, processing distributions, tax reporting, and so forth. As noted above, 401(k) plans generally engage service providers (many of which are SIFMA members) to perform these duties.

Recordkeeping and administrative fees are typically priced and paid for in one of two ways.

First, the administrative service provider can charge direct, hard-dollar fees on a per-participant or per-transaction basis. *See* DOL 401(k) Plan Fees 3, 4; Deloitte 401(k) Fee Study 5, 15.[8] More often, though, the 401(k) plan's administrative service provider is compensated indirectly, through the receipt of revenue-sharing payments from the service providers for the mutual funds in which plan participants invest. *See* Deloitte Development LLC, Annual Defined Contribution Benchmarking Survey 29 (2014), *available at* http://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-cons-annual-defined-contribution-benchmarking-survey2013-081914.pdf [hereinafter Deloitte Benchmarking Survey] (noting that revenue sharing is "[t]he most common arrangement sponsors have for payment of administration and recordkeeping fees").[9] Revenue sharing makes sense because, in

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[8] For example, each calendar quarter a stated dollar amount may be charged against each participant's plan account to pay for recordkeeping services.

[9] Revenue-sharing rates are set in a competitive market, based on negotiations between the mutual fund service providers and the plan service providers. *See* Wendy J. Dominguez, *Retirement Plan Expenses Uncovered*, National Association of Government Defined Contribution Administrators, Oct. 2005, at 2, *available at* http://www.nagdca.org/dnn/portals/45/Publications/Issues/retirementPlanExpenses.pdf ("Revenue sharing is negotiated independently between each mutual fund company and each retirement plan vendor, and it varies depending on the size and clout of the vendor."); Mutual Funds, U.S. Bancorp, https://www.usbank.com/cgi_w/cfm/invest/products_and_services/mutual_funds_ps.cfm (last visited Jan. 22, 2015) ("The amount and type of revenue sharing payments received from a Mutual Fund Product Partner may vary and is subject to negotiation."). The plans themselves play no direct role in the negotiation of revenue-sharing payments.

the case of 401(k) plan investments, the plan's service provider performs many of the administrative services that otherwise would have to be performed by the mutual fund's providers (including tracking individual account balances, sending out individual account statements, and the like).

This pricing mechanism—whereby the mutual fund "expense ratio" is used to cover both investment management services (directly) and the plan's administrative services (indirectly, through revenue sharing)—is often referred to as "bundled pricing." U.S. Dep't of Labor, Pension and Welfare Benefits Administration, Study of 401(k) Plan Fees and Expenses § 3.3.2 (1998), *available at* http://www.dol.gov/ebsa/pdf/401krept.pdf. Bundled pricing arrangements are quite popular: In a recent survey, 47% of plans reported that they relied *exclusively* on bundled pricing for payment of administrative and recordkeeping fees. Deloitte Benchmarking Survey 29.[10]

But however 401(k) plans pay for administrative services—whether through hard-dollar fees, through bundled pricing, or through some combination of

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[10] Moreover, both the courts and the Department of Labor have recognized that bundled pricing is a "common and 'acceptable' investment industry practice[] that frequently inure[s] to the benefit of ERISA plans." *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014); *see also Hecker*, 556 F.3d at 585; Pet. App. 14, 48-49; U.S. Dep't of Labor, Advisory Op. 2013-03A, at 1-2 (July 3, 2013) [hereinafter DOL Advisory Op. 2013-03A] (suggesting that a fiduciary may prudently enter into a contract with a service provider who receives revenue-sharing payments so long as the sum total compensation received by the service provider, including the revenue-sharing payments, is reasonable); DOL Advisory Op. 97-15A, at 2.

both[11]—the service providers need to be compensated for their services. So if the plan does not fully compensate service providers through revenue sharing, it must compensate them by paying direct, hard-dollar fees.

B. A Prudent Fiduciary Taking Into Account All 401(k) Plan Fees And Expenses Might Well Choose To Offer Retail Share Classes of Mutual Funds.

In presuming that the choice of retail share classes over institutional share classes is "imprudent in any portfolio," Pet. Br. 32, petitioners focus solely on the different expense ratios charged for retail and institutional shares. But a plan fiduciary's job, when making a decision about the plan's investment options, is to assess the total impact of that decision on the plan as a whole.[12] And, in fact, the choice of share class affects more than just the expense ratio paid by plan participants invested in the particular mutual funds at issue. The choice of share class also affects the administrative service fees paid by the plan as a whole, because revenue-sharing payments are typically much smaller or entirely unavailable

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[11] A significant percentage of plans pay for administrative services through some combination of revenue sharing and hard-dollar fees. *See* Deloitte Benchmarking Survey 29 (reporting that 14% of plan sponsors utilized a payment structure that included both direct fees and revenue sharing).

[12] Of course, a fiduciary also considers numerous other factors besides fees when considering and comparing investment options. As the Department of Labor has cautioned, fees should not be considered "in a vacuum. They are only one part of the bigger picture including investment risks and returns and the extent and quality of services provided." DOL 401(k) Plan Fees 9.

for institutional shares. *See, e.g.*, *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 961 F. Supp. 2d 393, 397 (D. Conn. 2013) ("ILIAC receives less revenue sharing from institutional ('I') share classes than from retirement ('R') share classes . . . ."); Pet. App. 84 (noting that the retail share classes in the funds at issue in this case "offered more revenue sharing").

As discussed above, institutional share classes have a "discount" up front, in their expense ratios, to reflect decreased administrative costs. *See supra* Section I.A.1. Necessarily, then, institutional share classes cannot offer the same "discount" on the back end, via revenue sharing. So, if a plan fiduciary selects institutional shares instead of retail shares, the mutual fund's expense ratio may decline, but the amount of revenue sharing available to cover the cost of administrative services will also decline. And, because administrative service providers can and will insist on receiving reasonable compensation for their services, a decline in the total amount of revenue-sharing payments may require such providers to charge a 401(k) plan new or additional hard-dollar, per-participant fees. Accordingly, prudent plan fiduciaries understand that the choice between retail and institutional shares is inherently linked to the choice about how to pay for the plan's administrative services.

Indeed, not only are plan fiduciaries *entitled* to consider the impact of share class on administrative service fees, they are *required* to do so, according to both general rules and specific, on-point guidance from the government. The Department of Labor ("DOL") has repeatedly recognized in regulations and advisory opinions that fiduciary decisions about

which investments to offer cannot be assessed in isolation, and must instead take into account the impact of that decision on the plan *as a whole*. *See* 29 C.F.R. § 2550.404a-1(b) (emphasizing the importance of a totality-of-the-circumstances inquiry); Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) ("The Department is of the opinion that . . . the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio."). And, in fact, DOL has expressly advised that fiduciaries must consider the impact of share class selection on administrative service fees. *See* DOL Advisory Op. 2013-03A, at 3 ("[R]esponsible plan fiduciaries must assure that the compensation the plan pays directly or indirectly to [its service providers] for services is reasonable, taking into account the services provided to the plan *as well as all fees or compensation received by [the service provider] in connection with the investment of plan assets, including any revenue sharing*." (emphasis added)).

Moreover, a fiduciary with discretion to choose between retail and institutional shares (or revenue sharing and hard-dollar administrative fees) may reasonably consider not only the *total cost* of that decision to plan participants, but also *how those costs are distributed*. A prudent fiduciary might take into account, for example, that direct, hard-dollar administrative service fees are often assessed on a per-participant basis (*i.e.*, distributed equally among all plan participants), DOL 401(k) Plan Fees 4, whereas the mutual fund expense ratios subject to

revenue sharing are charged as a percentage of assets under management. Accordingly, in the absence of revenue sharing, lower-balance, lower-income employees—the very individuals who stand to benefit most from investment in 401(k) plans[13]—may shoulder a significantly larger share of the plan's fees. A prudent fiduciary therefore might conclude that, all else being roughly equal, revenue sharing is preferable to fixed, per-participant, hard-dollar fees.

Finally, even where a plan does not use bundled pricing to pay for administrative services, there are still circumstances in which a prudent fiduciary might reasonably choose to offer retail share classes of mutual funds to plan participants. For example, some mutual funds simply do not offer institutional share classes, and others have set minimum investments for institutional shares that sometimes reach into the tens or hundreds of millions of dollars—making them inaccessible to most 401(k) plans.[14] Additionally, fees are only one of many

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[13] *See* News Release, Bureau of Labor Statistics, Employee Benefits in the United States 5 (Mar. 2014), http://www.bls.gov/ncs/ebs/sp/ebnr0020.pdf (reporting that only 22% of workers in the bottom quartile wage group participate in retirement benefits, whereas 79% of wage earners in the top quartile do so).

[14] *See, e.g.*, Pet. App. 90; Vanguard Share Classes, Vanguard, https://advisors.vanguard.com/VGApp/iip/site/advisor/aboutus/philosophy/article?file=IWEShareClassExplanation (last visited Jan. 22, 2015) (listing minimum initial investments of $5 million and $100 million for institutional share classes). Although the district court made an evidentiary finding *in this case* that the minimums set by the funds at issue likely would have been waived for Edison's plan, given its size, Pet. App.

factors that fiduciaries consider in selecting investment options for a 401(k) plan,[15] and other factors may counsel in favor of retail shares. For example, as respondents note, retail share classes may have favorable and established performance histories and ratings that their institutional-share counterparts do not, making investment in retail shares more appealing to plan participants. Resp. Br. 21, 30.

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In short, plan fiduciaries are not only entitled, but required, to consider the full impact on the plan as a whole when choosing between retail and institutional share classes. And when the interests of the plan as a whole are considered, a prudent fiduciary may well have good reason to select retail shares.

III. THE COMPLEXITY OF FACTORS INFLUENCING A FIDUCIARY'S CHOICE BETWEEN RETAIL AND INSTITUTIONAL SHARE CLASSES ILLUSTRATES WHY PETITIONERS' REPOSE ARGUMENT CANNOT BE CORRECT.

Petitioners argue that, despite the express six-year repose provision set forth in 29 U.S.C. § 1113(1), their claims are timely even where the decision to

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161, that will not always be the case, particularly with respect to small plans sponsored by small-business employers.

[15] *See, e.g.*, U.S. Dep't of Labor, Meeting Your Fiduciary Responsibilities, http://www.dol.gov/ebsa/publications/fiduciary responsibility.html (last visited Jan. 22, 2015); *see also* DOL 401(k) Plan Fees 9 ("[D]on't consider fees in a vacuum. They are only one part of the bigger picture . . . .")).

select retail share classes was made more than six years before suit. According to petitioners, such a decision is never entitled to repose, because fiduciaries are under a continuing duty to reevaluate it even when nothing has changed since the decision. *See* Pet. Br. 38 n.25, 41 n.28 (asserting that no matter what "the precise scope of an ERISA fiduciary's obligation to review plan investments" may be, it encompasses the "particular circumstance[s]" petitioners identify here—failure to remove retail share classes). But as shown above, choosing between the benefits of retail and institutional share classes requires a context-sensitive analysis, and that analysis is undertaken *before the investment is selected*. Insisting that fiduciaries reengage in this same analysis over and over again, even in the absence of changed circumstances, would lead to an unworkable result that would undermine Congress's clear intent in enacting both the repose provision in particular and ERISA more generally.

Petitioners concede that, for three of the challenged funds, the very decision they question—the selection of retail share classes instead of institutional share classes—was made more than six years before suit. In fact, the very basis of the claim petitioners present to this Court is that *absolutely nothing* happened during the six-year period: "[t]here is no evidence . . . that [respondents] gave any, let alone appropriate, consideration to switching to the institutional classes of those three funds" during the six years before they filed suit. Pet. Br. 40. Petitioners contend that, for a decision of this type, mere inaction is enough to establish a breach "during each quarterly meeting of the investment committees [during the six years prior to suit] at

which they reviewed plan investments but neither considered nor switched to institutional-class shares for [these] three funds." *Id.* at 41.

If petitioners' theory were correct, fiduciaries would essentially be required by ERISA to *constantly* reassess—at each and every meeting, and on each and every phone call—every investment decision previously made, by themselves or by their predecessors. But ERISA fiduciaries "ha[ve] no obligation to continually reassess" every decision previously made. *Novella v. Westchester County*, 661 F.3d 128, 146 (2d Cir. 2011) (internal quotation marks omitted); *see also* Resp. Br. 32-36 (noting that, absent a material change in circumstances, trust law imposes no duty to conduct a full diligence review of investment decisions and instead requires a periodic assessment only of changes to the value or risk of the investment). And, as the precise fact pattern of this case illustrates, this interpretation of ERISA "would make hash out of the limitations period and lead to an unworkable result." Pet. App. 17.

Petitioners and their *amici* drastically understate the complexity of the assessment that fiduciaries must make in order to decide which investment options to offer to plan participants—including decisions about whether to offer retail mutual funds or other types of investment vehicles, and, if mutual funds are selected, whether to offer retail or institutional share classes. Comparing the propriety of various investment options is not a simple comparison of expense ratios. It cannot be accomplished, as one amicus suggests, through a "quick evaluation of the cost basis," AARP Br. 16, and a "simple peer comparison," *id.* at 18. Instead, as DOL and the courts have recognized, there are

many considerations that bear on the determination of what investment options to offer to a plan, including the fee structure, the type of investment vehicle (mutual funds versus institutional investment products, for example), the experience level of the portfolio manager, the reputation of the investment advisor, past fund performance, expected market changes, risk tolerance, current diversification of the plan, and so forth.[16] And many of these factors are not even readily quantifiable, let alone easily weighed.

The decision concerning what share class to offer is similarly complex. As explained above, fiduciaries consider, among other things, the potential benefits offered by revenue sharing, should they choose retail share classes. And, in order to make this assessment, a fiduciary would need to collect information about the nature and extent of the revenue sharing relationship between the mutual fund's service providers and the plan's service

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[16] *See* 29 C.F.R. §2550.404a-1(b) (noting that a fiduciary must "give[] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved"); DOL 401(k) Plan Fees 1, 9; *see also Loomis*, 658 F.3d at 671-72 (describing the characteristics and benefits, which are properly considered by plan fiduciaries, of mutual funds versus other investment options, and the benefits of certain fee structures over others depending on the characteristics of plan participants); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438 (3d Cir. 1996) (noting that Congress requires a fiduciary to consider numerous factors, and the "facts and circumstances of each case," in determining the extent to which fund diversification is necessary).

provider,[17] and then compare the expected savings from offering retail shares with revenue sharing, as compared to the savings that the plan could achieve by offering institutional shares. This assessment involves consideration of the extent to which the plan's administrative service provider is (or is not) being sufficiently compensated by revenue sharing from other mutual funds offered by the plan (or by any supplemental hard-dollar payments), and the extent to which anticipated market forces (or changes in participant investment practices) might alter the sufficiency of existing revenue sharing-payments going forward. A prudent fiduciary may then consider, based on these and other factors, whether and to what extent the administrative service provider is likely to increase hard-dollar fees if revenue-sharing payments decrease, or to decrease hard-dollar fees if revenue-sharing payments increase.

As DOL has recognized, this analysis is fact-intensive and complex. *See* DOL Advisory Op. 2013-03A, at 3. It is not something that can be repeated at every investment committee meeting, even for one fund. Yet, if petitioners' argument were correct, then fiduciaries would be required to conduct precisely such an analysis at every meeting not just for one fund, but for every single mutual fund on the plan's investment menu.[18] Nothing in ERISA requires such

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[17] As discussed in note 9, *supra*, revenue-sharing rates are set by the mutual fund advisors and the 401(k) plan administrative service providers; 401(k) plans are not typically part of these negotiations or party to these agreements.

[18] Plans generally offer numerous investment options, including numerous mutual funds, as part of their investment line-up. Indeed, of the plans surveyed by Deloitte in 2013-2014, "[t]he

an unworkable, impractical, and inefficient undertaking.

Instead, as the court of appeals appropriately recognized here, ERISA fiduciaries must reassess past decisions only where relevant circumstances have materially changed. *See* Pet. App. 19. So, for example, if a plan renegotiates its compensation structure with its administrative service provider in a way that renders revenue sharing materially less attractive, then the fiduciary might well be required to reconsider a past decision to offer retail shares.[19] Conversely, if an administrative service provider declares that the present amount of revenue sharing is insufficient to cover its fees, and that it may need to add or increase hard-dollar payments, a fiduciary might have an obligation to reconsider past selections of institutional shares. But, absent such a material change in circumstances, a plan fiduciary cannot be required to constantly reevaluate its past decisions concerning share class.

Petitioners' contrary position—that share class decisions must be constantly reassessed even where the circumstances have not changed *at all*—is not only unworkable, it might well do more harm than good. If the choice between institutional and retail share classes is a close call, then the "right" or "best" decision might fluctuate with even the most modest

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average number of investment options offered per plan was 15," although some offered as many as 100 different choices, and mutual funds were "the most common investment vehicle" offered. Deloitte 401(k) Fee Study 14.

[19] Deloitte reports that approximately one-third of plan service agreements have terms of less than three years, and about 40% are renegotiated every five years or more. *See* Deloitte Benchmarking Survey 38.

changes in market condition. In other words, the fiduciary's choice could change every quarter, meaning that the plan would be required to switch from institutional to retail shares and back again several times a year. But such constant change is not in the participants' best interest: 401(k) plans are *long-term* investment vehicles, and regularly forcing participants to switch from one investment option to another is inconsistent with long-term investment objectives, not to mention extremely confusing to participants who are attempting to track their savings.

Moreover, it would be logistically impractical for a plan to make such regular changes among share classes. Implementing investment changes, including share class changes, can take months. In this case, for example, Edison was required to provide its administrative service provider with two to five months' advance notice of any fund change, including share class conversions. *See* Kobashigawa Supp. Decl., ECF No. 381-3, ¶ 6 (C.D. Cal. Nov. 19, 2009). The service provider, in turn, was required to undertake numerous steps to implement such changes to the plan, including distributing a notice of the change to participants,[20] recoding its recordkeeping software, updating its website for plan

[20] ERISA requires plan administrators to furnish written notice of a change in investment options to all plan participants and beneficiaries. *See* 29 U.S.C. 1104(c)(4). Additionally, plan fiduciaries must disclose to participants certain investment-related information, including information about the performance and fees of investment options designated under the plan, *see* 29 C.F.R. 2550.404a-5, and such disclosures must be made anew whenever a new investment option (or a new share class of an investment option) is added to the plan's investment menu.

participants, modifying its database, updating its automated telephone system, updating its communications statements that are periodically mailed to participants, updating its call center and training documentation regarding the change, and testing all of its electronic systems to make sure all changes were properly implemented. *Id.* ¶ 5.

Such tasks are time- and labor-intensive. So, if plans were to constantly reassess and change their share-class decisions, the implementation of those choices would lag so far behind as to potentially render the choice outdated. And, perhaps more importantly, the administrative costs associated with making such logistical changes likely would result in a significant increase in the total fees charged by the plan's administrative service provider.

The additional resources that would be required to constantly reassess (and, potentially, to change) share classes offered to the plan cannot be pulled out of thin air. Perhaps some of the largest plan sponsors might be able to field these additional costs with relative ease. But a significant percentage of plan sponsors are small or mid-sized businesses. *See* Deloitte Benchmarking Survey 6 (reporting that more than one-third of plan sponsors surveyed by Deloitte in 2013 and 2014 employed 500 or fewer employees); Stuart Robinson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes, Sept. 25, 2013, http://www.forbes.com/sites/stuartrobertson/2013/09/25/three-myths-keeping-small-businesses-from-starting-a-401k/ (reporting that 24% of businesses with fewer than 50 employees offer a 401(k) plan).[21] And, if forced to assume these

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[21] Indeed, several of SIFMA's members offer products and services that are specifically tailored to 401(k) plans sponsored

additional expenses—or risk the additional expense of defending lawsuits like this one—these plan sponsors might have no choice but to divert resources away from other plan benefits, such as (1) tools to assist participants with retirement planning, (2) personalized investment advising services, and, most notably, (3) employer matching and profit-sharing programs, whereby a plan sponsor contributes directly to participants' retirement savings accounts. *See* Deloitte Benchmarking Survey 11 (reporting that 43% of employees participated in 401(k) plans for the primary reason of taking advantage of an employer match). And, for some of the smallest plan sponsors, these additional administrative costs might be so significant as to impede their ability to offer a 401(k) plan in the first place.

When Congress enacted ERISA, it recognized precisely this concern. As this Court has explained on numerous occasions, 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." *Conkright*, 559 U.S. at 517 (alterations in original) (internal quotation marks omitted); *accord Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (same); *Heimeshoff v. Hartford*

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by small businesses. *See, e.g.*, Small-Business Plans, Vanguard, https://investor.vanguard.com/what-we-offer/small-business/overview (last visited Jan. 22, 2015); 401(k) for Small Businesses, Fidelity, https://www.fidelity.com/retirement-ira/small-business/401k-plans (last visited Jan. 22, 2015); Small Business 401(k), T.RowePrice, http://individual.troweprice.com/public/Retail/Retirement/Small-Business-Retirement-Plans/Small-Business-401%28k%29 (last visited Jan. 22, 2015); Small Business 401(k), Merrill Edge, http://www.merrilledge.com/small-business/401k (last visited Jan. 22, 2015).

Life & Accident Ins. Co., 134 S. Ct. 604, 612 (2013) (same); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (same). Petitioners' interpretation of ERISA—requiring constant reassessment of past fiduciary decisions, even in the absence of a material change in circumstances—would lead to precisely the type of undue "administrative costs, or litigation expenses" that Congress sought to avoid. Accordingly, this Court should affirm the decision below and hold that petitioners' claims are time-barred.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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