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

---

SUPPLEMENTAL BRIEF IN OPPOSITION

ANNA-ROSE MATHIESON
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111
(415) 984-8700

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

Attorneys for Respondents

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Angell v. John Hancock Life Ins. Co.,
421 F. Supp. 2d 1168 (E.D. Mo. 2006) 2

Biglands v. Raytheon Emp. Sav. & Inv. Plan,
801 F. Supp. 2d 781 (N.D. Ind. 2011) 2

David v. Alphin,
704 F.3d 327 (4th Cir. 2013) 2, 5, 8

Fuller v. Suntrust Banks, Inc.,
744 F.3d 685 (11th Cir. 2014) 2, 8

Kanawi v. Bechtel Corp.,
590 F. Supp. 2d 1213 (N.D. Cal. 2008) 2

Martin v. Consultants & Administrators, Inc.,
966 F.2d 1078 (7th Cir. 1992) 2, 3, 4, 7

Morrissey v. Curran,
567 F.2d 546 (2d Cir. 1977) 2, 3, 4

Phillips v. Alaska Hotel & Rest. Emps. Pension Fund,
944 F.2d 509 (9th Cir. 1991) 7

Stargel v. SunTrust Banks, Inc.,
968 F. Supp. 2d 1215 (N.D. Ga. 2013) 2

STATUTES

29 U.S.C. § 1113(1)(A)..................................... passim

29 U.S.C. § 1113(1)(B)....................................... 5, 6, 7

29 U.S.C. § 1113(2)... 7

TREATISE

Restatement (Second) of Trusts (1959) 4

For the reasons explained in respondents' brief in opposition, neither question presented in the petition for certiorari merits review. The Solicitor General's invitation brief adds very little to that analysis.

The Solicitor General agrees that review is not warranted on the deference question, for the reasons already stated by respondents: there is no circuit conflict on the issue of deference as it is presented in this case (SG Br. 21-23); the Ninth Circuit correctly resolved the issue as it arises here (*id.* at 17-18); and the distinct deference question petitioners seek to raise is not properly presented here (*id.* at 20-21).

The Solicitor General does contend that review is warranted on the limitations question, but he says almost nothing petitioners have not already said, and he is wrong for the same reasons petitioners are wrong. The Solicitor General proposes one new analogy to the common law of trusts, but that analogy does not support his position. *See infra* at 4-5. Importantly, the Solicitor General makes no claim to any level of deference toward the Department of Labor's views on the limitations question, and none is warranted. Certiorari should (still) be denied.

1. The Solicitor General's argument for review of the limitations issue rests primarily on his assertion that the decision below "conflicts with the decisions of other courts of appeals." SG Br. 7. That assertion borders on frivolous.

The Fourth, Ninth, and Eleventh Circuits have all held that a claim challenging the selection of mutual funds for a 401(k) plan lineup is barred by the six-year limitations period of ERISA § 413(1)(A), 29 U.S.C. § 1113(1)(A), *if* the claim challenges funds that were selected more than six years before the

claim was filed, and the claim does *not* allege that any materially new circumstances arose within the previous six years that required removal of the funds. *See Fuller v. Suntrust Banks, Inc.*, 744 F.3d 685, 700-02 (11th Cir. 2014); *David v. Alphin*, 704 F.3d 327, 331-32 (4th Cir. 2013); Pet. App. 17-19. Multiple district court decisions agree. *See, e.g.*, *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1225 (N.D. Cal. 2008); *Stargel v. SunTrust Banks, Inc.*, 968 F. Supp. 2d 1215, 1230 (N.D. Ga. 2013); *see also Biglands v. Raytheon Emp. Sav. & Inv. Plan*, 801 F. Supp. 2d 781, 788-89 (N.D. Ind. 2011); *Angell v. John Hancock Life Ins. Co.*, 421 F. Supp. 2d 1168, 1175 (E.D. Mo. 2006). No circuit has reached a contrary conclusion on the application of § 413(1)(A), and the Solicitor General does not suggest otherwise.

The Solicitor General instead asserts the same non-conflict asserted by petitioners, relying on two decades-old decisions standing for the unexceptionable proposition that ERISA fiduciaries have an ongoing duty to monitor investments and remove options that become imprudent. *See* SG Br. 15 (citing *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)). As respondents have already explained, *nobody disagrees with that rule*—not respondents, not the district or appellate courts in this case, and not the circuits that agree with them. Opp. 8-9. Indeed, the district court here specifically found that Edison *did* monitor all 401(k) investment options on a monthly, quarterly, annual, and as-needed basis, ensuring that all investment options continued to meet the "Investment Criteria" for the Plan, including with respect to performance on a net-of-fee basis.

Pet. App. 75-77.[1] Neither *Martin* or *Morrissey* required respondents to do more than that. Opp. 9-11.

To the contrary, the court in *Morrissey*—which is not even a limitations case, and thus on its face does not present the kind of "conflict" that normally justifies certiorari (Opp. 8)—simply held that plaintiffs were entitled to factfinding into whether the fiduciary should have liquidated an investment *given the lack of return over several years*. 567 F.2d at 548-49 & n.7. In other words, the court allowed the plaintiffs to challenge not the original decision itself to invest, but the failure to monitor and react when the investment did not perform. Far from disagreeing with *Morrissey*, the district court here permitted petitioners to litigate exactly that kind of claim, authorizing discovery and a full trial into whether respondents failed to react to any material new information during the limitations period that required removal of the challenged funds. Petitioners were unable to identify any such failure. Opp. 9-10.

Martin also supports the decision below. *Martin* involved claims challenging the fiduciaries' bidding and monitoring practices under two different contracts, one awarded for 1984 and the other for 1987. 966 F.2d at 1087. The Seventh Circuit found the claims involving bidding activities for the 1987 con-

---

[1] The district court further explained the monitoring process: "If an investment option's performance or a change in management or deterioration in financial condition suggests that the option may cease to meet the Investment Criteria in the future, the Investments Staff places the fund on a 'Watch List' for closer monitoring. If an option on the Watch List fails to meet the Investment Criteria, the Investments Staff will recommend to the Investment Committees that the option be removed from the Plan line-up." Pet. App. 76-77.

tract to be timely, but barred the claims involving bidding activities for the 1984 contract. Despite the fiduciaries' similar bidding procedures for both contracts, the 1987 contract (and the bidding conduct associated with it) constituted a "new transaction and a distinct violation" within the limitations period, making that claim timely. *Id.* The same result obtains here: the challenges to the three funds added before 2001 are barred, but the challenges to funds added after 2001 survive.[2]

2. For the same reasons, the decision below is not only consistent with *Martin* and *Morrissey*, it is correctly decided, contrary to the Solicitor General's submission. The premise of the Solicitor General's argument is that an ERISA fiduciary has an ongoing duty to constantly revisit and reconsider all prior decisions, no matter how long-settled, and even if there are no changed circumstances that warrant new action. SG Br. 12 n.4. The Solicitor General cites no authority supporting such an unbounded conception of a fiduciary's duty. Under trust law, which the Solicitor General cites by analogy, the duty to divest arises when "owing to a subsequent *change of circumstances* the investment is no longer a proper investment." Restatement (Second) of Trusts § 231, at 550 (1959) (emphasis added); *see id.* at 551 (when bonds "become speculative owing to a *change in circumstances*," trustee must dispose of them within reasonable time (emphasis added)); *id.* (when mortgage loses value "owing to a *change in the character* of the neighborhood," trustee must foreclose (empha-

[2] The Seventh Circuit in *Martin*, like courts below in this case, also permitted claims challenging monitoring practices during the limitations period. 966 F.2d at 1089.

sis added)). Trust law is thus consistent with—not contrary to—the decisions below, which enforced respondents' duty to monitor by allowing petitioners to try to prove that changed circumstances required respondents to remove funds added before 2001. Petitioners could not make that showing. Given the lack of any material change in circumstances, petitioners necessarily were alleging only that the *initial decision* to include the funds was itself a fiduciary breach. *See David*, 604 F.3d at 341 ("It is, at its core, simply another challenge to the initial selection of the funds to begin with."). And because the "last action" that constituted part of *that* alleged breach occurred in 1999, their claim was properly held to be time-barred under the plain language of ERISA § 413(1)(A), 29 U.S.C. § 1113(1)(A).

3. The Solicitor General comes close to acknowledging that petitioners' claims cannot survive under § 413(1)(A), the only limitations bar actually addressed by the decision below. "At a minimum," the Solicitor General urges (SG Br. 11), the claims should be deemed timely under the distinct language of § 413(1)(*B*), which governs claims of *omissions* and provides a limitations period of six years from the "latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1)(B).

There are at least two flaws in that position. First, it would render § 413(1)(A) superfluous, because on the Solicitor General's unbounded view of the duty of ongoing prudence, *any* failure to correct *any* earlier imprudent act could be reframed as a claim that the fiduciary "omitted" to "cure" the violation.

Second, the "omission" theory was not adequately

pressed or passed on below. The language the government quotes (SG Br. 11) is the only place in petitioners' opening brief below that suggested that the omissions language of § 413(1)(B) might apply—and the relevant sentence is simply a conclusory assertion that both § 413(1)(A) and (B) are satisfied. C.A. Dkt. 14, at 16 ("[T]he 'last action which constituted a part of the breach'—using retail class shares—occurred within six years and the 'latest date on which the fiduciary could have cured the breach'—replacing retail with institutional shares—also occurred within six years." (quotations omitted)). When petitioners actually developed their argument, and sought to distinguish the adverse precedents, they focused only on what qualified as the "last action" under § 413(1)(A), not on the date when an omission could have been "cured" under § 413(1)(B). C.A. Dkt. 14, at 18 ("the six-year limitation period starts on *the last date of the acts* constituting the breach" (emphasis added)); *id.* ("In addition to *the last-date focus* of ERISA's six-year limitation period, ERISA imposes a continuing duty upon plan fiduciaries to discharge their duties to the plan loyally and prudently." (emphasis added)).

The court of appeals clearly understood the gravamen of petitioners' argument and treated it as invoking only the § 413(1)(A) period applicable to affirmative *acts*, rather than the § 413(1)(B) period governing alleged *omissions*. *E.g.*, Pet. App. 17 (summarizing petitioners' argument: "Because fiduciary duties are ongoing, and because section 413(1)(A) speaks of the '*last* action' that constitutes the breach, these claims are said to be timely for as long as the underlying investments remain in the plan."). The court of appeals distinguished the case

before it from cases involving alleged omissions, Pet. App. 18, and explicitly limited its holding to the § 413(1)(A) limitations period, Pet. App. 17 ("Today we hold that the act of designating an investment for inclusion starts the six-year period under section 413(1)(A) . . . .").

As the Solicitor General argues with respect to the deference question, review generally is not appropriate for an issue "only minimally briefed below." SG Br. 7. An omission case governed by § 413(1)(B) does not necessarily raise the same issues as an affirmative act case governed by § 413(1)(A)—in particular, a fiduciary's duty to revisit and unwind some prior act, once settled and relied upon, may well differ from the duty to avoid taking the action in the first place. If and when the lower courts reach conflicting results in cases clearly articulating omission claims, this Court can grant review to decide the scope of the limitations period that governs them. Now is not the time, and this is not the case, to address that undeveloped issue.

4. Finally, the Solicitor General recommends certiorari on the policy ground that the unanimous reading of the statute among circuit decisions "fails to protect plan participants' retirement savings" (SG Br. 13) and threatens their "security and integrity" (*id.* at 16). Given that courts began rejecting "continuous violation" theories under ERISA as early as 1991, *see, e.g.*, *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991),[3]

[3] The Solicitor General seeks to distinguish *Phillips* (SG Br. 13) on the ground that it involved the three-year limitations period of ERISA § 413(2), which applies when the plaintiff has "actual knowledge" of the breach. 29 U.S.C. § 1113(2). But so did *Martin*, which the Solicitor General considers to be on

one would expect substantial empirical support for such an ominous warning from the government—evidence of fiduciary abuse would be rampant, and the nation's 401(k) plans would be filled with imprudent investment options. There is no such evidence, because the premise makes no sense.

According to the Solicitor General, retirement savings are at risk under the decision below because it "effectively exempt[s] ERISA fiduciaries from their statutorily-mandated, ongoing duty of prudence" (SG Br. 16) and eliminates their "incentive to monitor and update plan investments" (*id.* at 13). That assertion reflects the same mistake that underlies the false conflict invoked by the Solicitor General: the consensus rule adopted by the Ninth Circuit in no way exempts fiduciaries from their duty to monitor and update investments, because fiduciaries always must identify and respond to developments that cause investments to become imprudent. Nothing in *Tibble* or *David* or *Fuller* permits a fiduciary to simply ignore an investment once it remains in the plan for six years.

The Solicitor General also inexplicably assumes that a fiduciary would simply refuse to remove or change an unsound investment, once its unsoundness is brought to the fiduciary's attention. The Solicitor General again cites nothing indicating such a problem exists. This case itself certainly does not

---

point. *See* 966 F.2d at 1087-88. What matters about *Phillips* is its focus on when a new cause of action accrues under ERISA: while a "continuous series of breaches may allow a plaintiff to argue that a new cause of action accrues with each new breach," that theory does not apply to breaches that "are of the same kind and nature." 944 F.2d at 520.

suggest any such threat to the retirement funds of America's workers. The three funds that remain at issue here were removed from the Plan years ago, and the amount at stake is a tiny fraction of the billions the Plan has under management. In 2010, petitioners' own expert calculated that the compounded damages for those three funds was approximately $463,000 *total for the entire class*. D.Ct. Dkt. 402-2 Exs. C, G & H. And the district court specifically found as a matter of fact that Edison fulfilled its duty of loyalty to all Plan participants (Pet. App. 123-25), and that Edison's selection of a few imprudent share classes among the numerous funds selected for the Plan was an unintentional "oversight" that did not demonstrate any bad faith (D.Ct. Dkt. 448 at 8). There is nothing here warranting further review.

CONCLUSION

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

Respectfully submitted,

ANNA-ROSE MATHIESON
O'MELVENY & MYERS LLP
Two Embarcadero Center
28th Floor
San Francisco, CA 94111
(415) 984-8700

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

Attorneys for Respondents

September 3, 2014