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 FOR PETITIONERS

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Petitioners submit this supplemental brief under Rule 15.8 to apprise the Court of a recent circuit decision, *Fuller v. SunTrust Banks, Inc.*, ___ F.3d ___, No. 12-16217, 2014 U.S. App. LEXIS 3610 (11th Cir. Feb. 26, 2014), that deepens the circuit split on the first question presented in the petition, as to whether ERISA's statute of limitations immunizes the use of imprudent 401(k) plan investments if the fiduciaries initially selected the funds more than six years prior to suit. See Pet. i, 16–26; Reply 1–8. The deepening of this split underscores the need for this Court's review.

Fuller affirmed the dismissal, based on ERISA's six-year limitations period,[1] of claims that fiduciaries of the SunTrust 401(k) plan breached their duties of prudence and loyalty by selecting excessively costly and poorly-performing SunTrust-affiliated mutual funds for the plan, and then repeatedly failing to remove or replace them. *Fuller*, 2014 U.S. App. LEXIS 3610, *7, *8–9. The fiduciaries added the challenged funds to the plan in 1997 and 2002, and the plaintiff filed her action over six years later, in 2011. *Id.* *3, *4–5. The district court originally rejected the six-year limitations argument, *id.* *4–5, relying on the Second Circuit's decision in *Morrissey* to conclude that the defendants' "duties of loyalty and prudence … did not end upon selecting the funds", because "[c]ourts have widely recognized an ERISA fiduciary's ongoing duty to monitor investments and remove investments that are no longer viable." *Fuller v. SunTrust Banks, Inc.*, No. 11-784, 2012 U.S. Dist. LEXIS 56602, *32–33 (N.D. Ga. Mar. 20, 2012) (citing *Morrissey v. Curran*, 567 F.2d 546, 548–49 n.9

[1] 29 U.S.C. §1113(1).

(2d Cir. 1977), among other cases). However, after the Ninth Circuit's decision below and *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013), the district court reversed course on the six-year limitations issue. *Fuller*, 2014 U.S. App. LEXIS 3610, *18–21.

On appeal, the Eleventh Circuit agreed with the Ninth Circuit that, in the absence of "changed circumstances", characterizing the failures to remove the SunTrust funds as separate violations would undermine the purpose of the six-year limitations period. *Id.* *44–45. (citing *Tibble v. Edison Int'l*, 729 F.3d 1110, 1120 (9th Cir. 2013)); see Pet. App. 18–19. And as in *David*, given that Fuller had not alleged such changed circumstances, the court "decline[d] to decide whether the Committee Defendants had an ongoing duty to remove imprudent investment options from the Plan in the absence of a material change in circumstances." *Fuller*, 2014 U.S. App. LEXIS 3610, *43–44 (citing *David*, 704 F.3d at 341).

In reaching its conclusion, the Eleventh Circuit attempted to distinguish *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1087–88 (7th Cir. 1992), as involving a repeated breach arising from a distinct transaction when a new contract was signed. *Fuller*, 2014 U.S. App. LEXIS 3610, *42–43. The Eleventh Circuit's purported distinction overlooks the basis of the Seventh Circuit's decision—"the continuing nature of a trustee's duty under ERISA to review plan investments and eliminate imprudent ones." *Consultants*, 966 F.2d at 1087–88 (citing 29 U.S.C. §1104(a)(1)(B) and *Morrissey*, 567 F.2d at 549 n.9). As *Morrissey* explained, ERISA imported a trustee's common-law duty "to dispose of improper investments within a reasonable time[.]" 567 F.2d at 548–49 and n.9. As with the Ninth Circuit decision

below, the Eleventh Circuit eliminated that duty by finding that the failure to dispose of improper investments was not a "cognizable breach[.]" *Fuller*, 2014 U.S. App. LEXIS 3610, *41, *43; Reply 2.

Fuller deepens the circuit split as to the first question presented by the petition and further demonstrates the devastating effects of the decision below in depriving workers of their ability to seek judicial redress for disloyally or imprudently managed retirement plans as Congress intended. Given the dominant role of defined contribution plans in American workers' retirement portfolios, the proper interpretation of §1113(1) has enormous economic significance. Pet. 5–6; Reply 8. The petition should be granted.

Respectfully submitted,

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