No. 13-550

In the Supreme Court of the United States

GLENN TIBBLE, ET AL., PETITIONERS

v.

EDISON INTERNATIONAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, imposes a duty on fiduciaries of an employee benefit plan to administer the plan prudently. 29 U.S.C. 1104(a). Plan participants and beneficiaries and the Secretary of Labor may sue on behalf of the plan to remedy a breach of fiduciary duty. 29 U.S.C. 1109, 1132(a)(2). A claim for breach of fiduciary duty must be 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), unless the plaintiff had actual knowledge of the breach, 29 U.S.C. 1113(2), or there was fraud or concealment of the breach, 29 U.S.C. 1113. The question presented is:

Whether a 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, is barred by 29 U.S.C. 1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

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INTEREST OF THE UNITED STATES

This case concerns the timeliness of claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. The Secretary of Labor has primary authority for administering Title I of ERISA. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. ERISA "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans." 29 U.S.C. 1001(b). In particular, ERISA imposes the trust-law duties of loyalty and prudence on plan fiduciaries. 29 U.S.C. 1104(a)(1). The fiduciaries

must act "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable plan expenses. 29 U.S.C. 1104(a)(1)(A). They also must discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B); see *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2463, 2467 (2014).

A plan participant, beneficiary, or fiduciary, or the Secretary, may sue on behalf of the plan to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). Fiduciaries are personally liable for such breaches. 29 U.S.C. 1109. With exceptions not applicable here (see note 4, *infra*), an action for breach of fiduciary duty must be 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).

2. a. Respondent Edison International is a holding company for electric utilities and energy interests (collectively, Edison). Pet. App. 13. Petitioners are current or former employees of Edison and participants in the Edison 401(k) Savings Plan (the Plan), which serves approximately 20,000 employees. *Id.* at 12-14, 70, 105.

The Plan is a defined-contribution plan under ERISA, meaning that participants are entitled to the value of their own investment accounts, rather than any specific benefit amount. Pet. App. 13; see 29 U.S.C. 1002(34). The value of each participant's account depends upon the participant's and employer's contributions and the investments' market performance, minus expenses. Pet. App. 13; see *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008).

Respondent Southern California Edison Benefits Committee (Benefits Committee) is the plan administrator, and respondents Edison International Trust Investment Committee and Trust Investment Subcommittee (collectively, the Investment Committees) choose the plan investments that will be made available to participants. Pet. App. 167, 169-170. Participants in turn choose their investments from the menu of funds selected by the Investment Committees. *Id.* at 72-73. The Investment Committees "have the authority to decide whether to select, maintain or replace the investment options in the Plan." *Id.* at 74. During the time period at issue, they met quarterly to review plan investments. *Id.* at 74-75. At those meetings, they received reports and recommendations from investment staff and decided whether to remove, replace, or add funds. *Ibid.*; *id.* at 77; see J.A. 120-121, 125-126. The members of the Investment Committees are plan fiduciaries. Pet. App. 72.

Since 1999, plan participants have been able to choose from a variety of investment options, including approximately 40 mutual funds. Pet. App. 13-14. For six mutual funds, the Investment Committees selected retail-class funds as plan investments, even though lower-cost institutional-class versions of the funds were available. *Id.* at 14, 83-84. Aside from the fees charged, the retail-class funds and institutional-class funds were identical: they invested in the same securities and were overseen by the same managers. *Id.* at 61, 84. The fees were collected out of mutual fund assets before any returns were paid to investors, thereby reducing the value of the investments. *Id.* at 171-172.

b. Petitioners sued Edison, the Benefits Committee, the Investment Committees, and others (respondents in this Court), alleging breach of fiduciary duties. Pet. App. 65-67. Petitioners sued on behalf of the Plan for losses suffered by the Plan, as well as for injunctive and other equitable relief. *Id.* at 65-66, 107. As relevant here, petitioners contended that respondents breached their duty of prudence by offering six higher-cost retail-class mutual funds as plan investments when identical lower-cost institutional-class funds were available. *Id.* at 65-68, 126. Respondents argued that petitioners' claims regarding three of the six mutual funds were time-barred because those funds were initially selected as plan investments more than six years before petitioners filed suit. *Id.* at 127.

c. The district court granted partial summary judgment to respondents. Pet. App. 166-268. The court held that 29 U.S.C. 1113(1) barred claims arising from respondents' retention of mutual funds that were first selected as plan investments more than six years before the complaint was filed, on the ground that "[t]here is no 'continuing violation' theory" under ERISA. Pet. App. 180 (quoting *Phillips* v. *Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)); *id.* at 262-263. The court stated that "although the [fiduciaries'] 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.'" *Id.* at 180 (quoting *Phillips*, 944 F.2d at 520).

After a bench trial, the district court held that respondents breached their duty of prudence by offering retail-class mutual funds as plan investments when identical lower-cost institutional-class funds were available. Pet. App. 68-69. The court concluded that respondents "ha[d] not offered any credible explanation" for why they chose to invest in the higher-cost funds. *Id.* at 142. The court found "no evidence" that the Investment Committees "even considered or evaluated the different share classes," and it determined that if the Investment Committees had considered the issue, "they would have realized that the institutional share classes offered the exact same investment at a lower cost to the Plan participants" and that plan participants were paying "wholly unnecessary fees." *Id.* at 129-130 (emphasis omitted).

The district court limited its finding of liability to the three mutual funds that were first offered to plan participants within the six-year limitations period, Pet. App. 68-69, 128-142, because it had already held that ERISA's six-year limitations period barred petitioners' claims regarding the three funds first offered before that period. The court allowed petitioners to argue that certain changed circumstances required removal of the latter three funds, but then rejected that argument. *Id*. at 142-150.

3. The court of appeals affirmed. Pet. App. 1-64. The court assessed the timeliness of petitioners' claims concerning the retention of the higher-cost mutual funds under 29 U.S.C. 1113(1)(A), the provision that requires suit to be brought within six years of the "last action" constituting the fiduciary breach. Pet. App. 17. The court reasoned that "the act of designating an investment for inclusion starts the six-

year period under [Section 1113(1)(A)] for claims asserting imprudence in the design of the plan menu," and so such a claim must be filed within six years of that initial designation. *Id.* at 17-18. In support of that holding, the court noted that it had previously rejected a "continuing violation" theory for ERISA claims. *Id.* at 17 (citing *Phillips*, 944 F.2d at 520).

With respect to the three mutual funds initially offered within the limitations period, the court of appeals upheld the district court's determination that respondents breached the duty of prudence by offering the higher-cost funds. Pet. App. 60-64. The court explained that "all three funds offered institutional options" in which the Plan "almost certainly could have participated"; the three institutional-class funds were significantly "cheaper than the retail class options"; and "there were no salient differences in the investment quality or management" of those funds. *Id.* at 61.[1]

SUMMARY OF ARGUMENT

Petitioners' claims that respondents breached their fiduciary duties by failing to prudently manage plan investments within the limitations period are timely under 29 U.S.C. 1113.

A. ERISA imposes on plan fiduciaries certain duties drawn from the law of trusts. Under ERISA's duty of prudence, plan fiduciaries must discharge

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[1] The court of appeals also held that respondents may not rely on ERISA's safe-harbor provision for certain individual-account plans, 29 U.S.C. 1104(c). Pet. App. 21-32. That holding is not before this Court, because respondents did not cross-petition on the issue or raise it as an alternate ground for affirmance in their brief in opposition. See Br. in Opp. 15 n.5 (characterizing the issue as "a completely separate issue not before this Court").

their duties using the "care, skill, prudence, and diligence" that a prudent person would use in making decisions for the plan. 29 U.S.C. 1104(a)(1)(B).

The duty of prudence under ERISA, as under trust law, requires plan fiduciaries with investment responsibility to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time. A prudent trustee investigates a potential investment and then makes a reasonable decision based on that investigation. A prudent trustee also is cost-conscious in making investments. And once a trustee chooses investments, the trustee has an ongoing duty to systematically review them and to remove imprudent investments from the trust. Just as an individual investor would choose initial investments for her retirement plan and then revisit them periodically, so too an ERISA fiduciary who chooses investments for an ERISA plan must revisit those investments from time to time.

B. ERISA's limitations period applicable to suits for fiduciary breach provides that a suit must be brought within six years of "the last action which constituted a part of the breach or violation" or, 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)(A)-(B). Petitioners' contention that respondents breached the duty of prudence by offering higher-cost retail-class funds as investments when the same funds were available as lower-cost institutional-class funds is timely under that provision.

Respondents had an ongoing duty of prudence, which included a duty to revisit the plan investments and remove imprudent ones. Offering higher-cost retail-class funds when the same investments were available as lower-cost institutional class funds was a breach of the duty of prudence. Accordingly, regardless of what happened before the limitations period, petitioners have adequately alleged that respondents breached the duty of prudence within the limitations period by failing to monitor fund fees and to switch to the lower-cost funds.

C. None of the court of appeals' reasons for finding petitioners' claims untimely has merit. First, petitioners' claims are based not on the initial decision to offer the higher-cost funds as plan investments, but on the breaches of fiduciary duty committed when the imprudent investments remained in the plan. These claims do not rely on a "continuing violation theory," Pet. App. 17, because they concern only acts and omissions *within* the limitations period—petitioners are not seeking to reach back and recover for fiduciary breaches before that time. Second, petitioners' claims do not impose liability on current fiduciaries for past fiduciaries' mistakes. Current fiduciaries have their own duty of prudence, and under petitioners' theory, they are being held liable for their own breaches, not those of others. Third, a plaintiff is not required to demonstrate significant changes in circumstances (*id.* at 19) to challenge the imprudent retention of plan investments. Under the law of trusts, a trustee must periodically review trust assets and remove imprudent investments, regardless of whether there has been a significant change in circumstances.

D. The court of appeals' rule would seriously jeopardize the investments of plan participants and beneficiaries. The court of appeals effectively exempted plan fiduciaries from a significant aspect of the trust-law duties imposed by ERISA once an investment has been in an ERISA plan for six years. Such an exemption would have a real and substantial impact on the millions of Americans who participate in retirement savings plans. The court of appeals' decision therefore should be reversed and the case remanded for further proceedings.

ARGUMENT

A CLAIM THAT ERISA FIDUCIARIES BREACHED THEIR FIDUCIARY DUTIES BY OFFERING IMPRUDENT PLAN INVESTMENTS WITHIN THE SIX-YEAR LIMITATIONS PERIOD IS TIMELY EVEN THOUGH THE FIDUCIARIES INITIALLY SELECTED THOSE INVESTMENTS BEFORE THAT TIME

A. ERISA Fiduciaries Have An Ongoing Duty To Review Plan Investments And Divest Investments That Are Imprudent

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, is designed to protect the interests of participants in employee benefit plans and their beneficiaries. 29 U.S.C. 1001(b). One way that it does so is by imposing certain trust-law duties on plan fiduciaries.[2] Fiduciaries must discharge their duties for the "exclusive purpose" of "providing benefits to participants and their beneficiaries" and "defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). ERISA's "strict standards of trustee conduct" include "a stand-

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[2] ERISA requires that every plan have one or more named fiduciaries who have authority to control and manage the operation and administration of the plan. 29 U.S.C. 1102(a)(1). In addition, anyone who exercises authority or control respecting management or disposition of plan assets is a fiduciary. 29 U.S.C. 1002(21)(A)(i).

ard of care." *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp. Inc.*, 472 U.S. 559, 570 (1985) (*Central States*). ERISA requires plan fiduciaries to discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. 1104(a)(1)(B). The "prudent person" standard is based not on a prudent layperson, but on a prudent fiduciary who is "acting in a like capacity" and is "familiar with such matters" and is making decisions for "an enterprise of a like character and with like aims." *Ibid.*; see Pet. App. 113; accord *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014).

ERISA authorizes plan participants, beneficiaries, and fiduciaries, as well as the Secretary of Labor, to sue for appropriate relief to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). In determining whether an ERISA fiduciary's investment was prudent, the court in such a suit reviews the investigation and decisionmaking process leading up to the challenged conduct. *Howard* v. *Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), cert. denied, 520 U.S. 1237 (1997). Fiduciaries who breach their duties are "personally liable" to the plan for losses resulting from the breach and for profits they made as a result of the breach. 29 U.S.C. 1109(a). Recovery for a breach of fiduciary duty "inures to the benefit of the plan." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985). By placing fiduciary obligations on plan administrators and authorizing civil suits to remedy breaches of fiduciary duty, ERISA ensures that fiduciaries serve the interests of plan participants and beneficiaries, provide the benefits due under the plan, and pay only reasonable expenses. See *id.* at 142.

2. ERISA's fiduciary duties "draw much of their content" from the common law of trusts. *Varity Corp.* v. *Howe*, 516 U.S. 489, 496-497 (1996). In particular, ERISA's standard of care was "derived from the common law of trusts." *Central States*, 472 U.S. at 570. This Court therefore "look[s] to principles of trust law for guidance" to interpret ERISA's fiduciary-duty provisions, including the duty of care at issue here. *Conkright* v. *Frommert*, 559 U.S. 506, 512 (2010) (citation and internal quotation marks omitted).

Trust law uses a "prudent person" standard to define the level of care, skill, and judgment required of a trustee. See, *e.g.*, 3 Restatement (Third) of the Law of Trusts § 77, at 81-82 (2007) (Third Restatement); 1 Restatement (Second) of the Law of Trusts § 174, at 379 (1959) (Second Restatement). Under that standard, "the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 541, at 167 (rev. 2d ed. 1993); see 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 17.6, at 1205 (5th ed. 2007) (Scott).

When a trustee is making investment decisions, the trustee's conduct is judged using a "prudent investor" standard. Third Restatement § 90, at 292. The trustee must "invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." *Ibid.*; see Second Restatement § 227, at 529; see also 4 Scott § 19.1, at 1386, 1390-

1392 (noting that virtually every State has codified the "prudent investor" standard). The trustee must "make[] an investigation as to the safety of [an] investment and the probable income to be derived therefrom" and then make a reasonable investment decision based on that investigation. Second Restatement § 227 cmt. b, at 530. The trustee may seek the advice of "attorneys, bankers, brokers and others," but the trustee ultimately is responsible for the investment decision. *Ibid.*; see 4 Scott § 19.1.3, at 1397 (noting a trustee's "duty to exercise the trustee's own judgment" even if the trustee receives advice from others).

In making investment decisions, a prudent trustee seeks to minimize costs. "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." Third Restatement § 90 cmt. f(1), at 308; see *id.* § 88 cmt. a, at 256 (trustee has "a duty to be cost-conscious"). Put simply, "[w]asting beneficiaries' money is imprudent." Uniform Prudent Investor Act § 7 & cmt., 7B U.L.A. 37 (2006). If a trustee pays improper expenses "from the trust estate," the trustee "ordinarily has a duty to restore the amount of the improper payment(s) to the trust." Third Restatement § 88 cmt. a, at 256-257.

A prudent trustee incurs "only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." Third Restatement § 90(c)(3), at 293; 4 Scott § 19.1.2, at 1394 ("[T]he trustee must be cost-conscious * * * in carrying out the trustee's investment duties."). And in the particular context of mutual funds, trustees should pay "special attention" to "sales charges, compensation, and other costs" and should "make careful overall cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Third Restatement § 90 cmt. m, at 332.

3. A trustee has a duty to periodically review investments and to remove imprudent investments from the trust. "[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments." Third Restatement § 90 cmt. b, at 294-296. A trustee "owes the beneficiary the duty of examining and checking the trust investments periodically throughout the life of the trusteeship." Amy Morris Hess, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 684, at 145 (3d ed. 2009) (Bogert 3d). The trustee's ongoing review of trust investments must be "reasonable and appropriate to the particular investments, courses of action, and strategies involved." Third Restatement § 90 cmt. b, at 294-296. The trustee "cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely." Bogert 3d § 684, at 145-146; see Second Restatement § 231 cmt. a, at 550.

A trustee's ongoing duty to review trust investments is not limited to situations in which the trustee might be prompted to act because of a significant change in circumstances. A trustee, to be sure, must "review trust investments" as "changes occur," but the trustee also must "systematic[ally] consider[] * * * all the investments of the trust at regular intervals" to ensure that they are appropriate. Bogert 3d § 684, at 147-148 (suggesting an interval such as "once every six months").[3] The trustee has a "continuing duty to see to it that the trust remains appropriately invested," and that includes a "duty, from time to time, to examine the state of the trust's investments." 4 Scott § 19.4, at 1451; see Bogert 3d § 685, at 159 (noting that "a trustee has a duty to continue to monitor investments regularly to ensure that they are still legal and productive"). The Uniform Prudent Investor Act (upon which many States' "prudent investor" laws are based) confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." Uniform Prudent Investor Act § 2 cmt., 7B U.L.A. 21 (internal quotation marks omitted); see 4 Scott § 19.1.2, at 1390-1392. Accordingly, a trustee may be held liable for his "failure to use such proper care, watchfulness, and oversight" to monitor the trust's investment and prevent losses. *In re Stark's Estate*, 15 N.Y.S. 729, 731-732 (N.Y. Surr. Ct. 1891) (holding that a trustee who invested in bonds secured by a mortgage failed to "exercise[] a reasonable degree of diligence in looking after the security after the investment had been made").

A trustee also has a duty at all times to divest investments that are imprudent or otherwise inappropriate for the trust. If an investment is "determined to be imprudent," the trustee "must dispose of it within a reasonable time." Bogert 3d § 685, at 156-157; see

[3] For example, federal law requires national banks to conduct at least yearly reviews of "all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account." 12 C.F.R. 9.6(c).

4 Scott § 19.3.1, at 1439-1440. The duty to dispose of imprudent investments corresponds with the trustee's ongoing duty to monitor investments and runs throughout the trusteeship, from the time the trustee first takes office until the trustee leaves office. See Second Restatement § 230, at 544; *id.* § 231, at 550. A trustee who fails to remove imprudent investments is liable to the trust for losses suffered by the trust. See, *e.g.*, *State St. Trust Co.* v. *DeKalb*, 157 N.E. 334, 336 (Mass. 1927) (trustee was required to take action to "protect the rights of the beneficiaries" when the value of trust assets declined); *Johns* v. *Herbert*, 2 App. D.C. 485, 499 (1894) (holding trustee liable for failure to discharge his "duty to watch the investment with reasonable care and diligence"); see also 4 Scott 19.4, at 1451-1452 & n.10 (citing cases).

4. These trust-law principles apply to ERISA fiduciaries with investment responsibility. See, *e.g.*, *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011) (ERISA "typically treats" a plan fiduciary as a trustee and the plan as a trust.). Like a trustee, an ERISA fiduciary is required to manage plan assets prudently at all times. See 29 U.S.C. 1104(a)(1)(B); *Fifth Third Bancorp*, 134 S. Ct. at 2463, 2467 (ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets"). As part of that ongoing duty, ERISA fiduciaries have a "continuing fiduciary duty" to "review plan investments and eliminate imprudent ones" within a reasonable period of time. *Martin* v. *Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1087-1088 (7th Cir. 1992); see Br. in Opp. 8 ("Nobody disagrees" that "ERISA fiduciaries have a continuing duty to monitor the investments offered."). This duty is a common-sense one: just as an individual investor

would make an initial choice of investments for her retirement plan and then revisit that choice periodically, so too a fiduciary choosing investments for an ERISA plan makes an initial decision about what funds to offer and then must revisit those investments from time to time.

This duty of periodic review of plan investments includes not only consideration of performance, but also of costs, because a prudent investor is "cost-conscious." Third Restatement § 88 cmt. a, at 256; see, *e.g.*, *Martin* v. *Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (overpaying for an ERISA plan asset is imprudent and not in the interests of the participants and beneficiaries), cert. denied, 506 U.S. 1054 (1993). Indeed, ERISA expressly requires that, in discharging their duties, fiduciaries limit expenses to those that are "reasonable." 29 U.S.C. 1104(a)(1)(A).

The duty to remove imprudent investments is ongoing, and it applies even if the fiduciary is not responsible for the initial investment decision or the initial decision is beyond challenge. See *Morrissey* v. *Curran*, 567 F.2d 546, 548-549 & n.9 (2d Cir. 1977) (explaining that plan fiduciaries in that case "cannot be excused" from their obligation to review plan assets "merely because the unwise investment was made before ERISA took effect"); cf. 29 U.S.C. 1105(a)(3) (ERISA fiduciary has an obligation to make "reasonable efforts" to remedy a breach of fiduciary duty by another plan fiduciary). Accordingly, an ERISA fiduciary cannot evade the ongoing duty of prudence by relying on investment decisions made by a different fiduciary or at an earlier time.

B. Petitioners' Claims For Breach Of Fiduciary Duty Are Timely Under 29 U.S.C. 1113

1. ERISA includes a limitations provision applicable to suits for breach of fiduciary duty. It provides that "[n]o action" for breach of fiduciary duty "may be commenced" after the earlier of "six years after (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). A three-year limitations period applies if the plaintiff had "actual knowledge of the breach or violation," and a six-year discovery rule applies in "case[s] of fraud or concealment." 29 U.S.C. 1113. Neither of those special rules is at issue here.[4]

By its plain terms, the limitations period allows a plan participant or beneficiary (or the Secretary) to bring suit for any breach of fiduciary duty that occurred by act or omission within six years of the suit. Further, the statute specifies that only the "last action" constituting "part of" the breach or violation, or the "latest date" on which the breach or violation by omission could have been cured, needs to have occurred within the six-year limitations period. 29 U.S.C. 1113(1). Accordingly, petitioners' claims are

[4] Petitioners contended below that the discovery rule for cases of fraud or concealment applied, but the district court rejected that argument, Pet. App. 179-181, and petitioners did not renew it on appeal. Respondents argued that the shortened limitations period for cases of actual knowledge applied, but the district court and court of appeals rejected that argument. *Id.* at 19-21, 181. Respondents did not cross-petition for certiorari on that issue and only mentioned it in passing in their brief in opposition. See Br. in Opp. 11 n.3.

timely as long as petitioners allege that some part of respondents' breach of the duty of prudence occurred within six years of the filing of the complaint, or that respondents breached the duty of prudence by omission and could have cured the breach within the six-year period.

2. Petitioners contend that respondents breached the duty of care in making certain investments available for the Edison Plan. The Plan offers participants a selection of investments, including about 40 mutual funds. Pet. App. 13-14. This case focuses on six of those mutual funds. Petitioners' claim is that "it was objectively imprudent for the Plan fiduciaries to decide to invest (or to continue to invest) in retail share classes of the six mutual funds where identical investments were available in the institutional share classes for lower fees." *Id.* at 126.

Some mutual funds offer both retail and institutional share classes, and the institutional share classes "often charge lower fees (i.e., a lower expense ratio) because the amount of assets invested" by institutional investors "is far greater than the typical individual investor." Pet. App. 84.[5] For each of the six mutual funds challenged in this case, "[t]he only difference between the retail share classes and the institutional share classes was that the retail share classes charged higher fees to the Plan participants." *Id.* at 128-129; see *id.* at 61. The difference in fees was significant—for the six funds at issue, the retail-class funds ranged from 18 to 40 basis points higher than the institution-

[5] Mutual fund fees are commonly expressed in an expense ratio, which is the percentage of the assets under management that is paid as fees. Pet. App. 79-80.

al-class funds. *Id.* at 85, 87, 90, 92, 94, 97.[6] As the courts below recognized (*id.* at 60-64, 68-69), it was imprudent to offer retail-class mutual funds to plan participants when the same funds were available as lower-cost, institutional-class funds.

The district court found, however, that respondents engaged in no "discussion or evaluation of the institutional versus retail share classes" and that there is "no evidence" that respondents "even considered or evaluated the different share classes" for these funds. Pet. App. 129 (emphasis omitted); see *id.* at 90, 94, 98. Had respondents sought to invest in the institutional-class funds, as opposed to the retail-class funds, they could have done so. *Id.* at 61, 86-87, 91-92, 94, 96. Although the institutional-class funds all had investment minimums, "a prudent fiduciary managing a 401(k) plan the size of the Edison Plan could have (and would have) obtained a waiver of the investment minimums." *Id.* at 137-140.[7] The result of respondents' decision to offer the higher-cost retail-class funds was that participants in the Plan paid "wholly unnecessary

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[6] A basis point is one-hundredth of one percent. *Black's Law Dictionary* 172 (9th ed. 2009).

[7] For one of the three mutual funds added to the Plan within the limitations period, the Investment Committees did "review the merits of the institutional share class of the [fund] versus the retail share class" as part of an inquiry about whether to transfer assets from another fund into that fund, and they ultimately decided to switch from the higher-cost retail-class fund to the lower-cost institutional-class fund. Pet. App. 131. That decision was "very telling," because the one time the plan fiduciaries "actually reviewed the different share classes of one of these three funds," they "realized that it would be prudent to invest in the institutional share class rather than the retail share class." *Id.* at 131-132.

fees" that eroded the value of their retirement accounts. *Id.* at 130.

The courts below correctly concluded that respondents breached their duty of prudence by offering the higher-cost retail-class funds as plan investments when the lower-cost institutional-class funds were available. "[A] prudent person managing his own funds would invest in the cheaper share class, all else being equal, because doing so saves money." Pet. App. 126-127; see, *e.g.*, Third Restatement §§ 88 & cmt. a, 90(c)(3) & cmt. f(1), at 256-257, 293, 308 (trustee has a duty to minimize costs). But the courts below limited their holdings to the three funds that were first added as plan investments within the six-year limitations period. That was error, because respondents had an ongoing duty of prudence with respect to plan investments, and petitioners have alleged breaches of that duty within the six-year limitations period.

3. The timeliness of a fiduciary-breach claim depends on the nature of the claim. See, *e.g.*, *Fish* v. *GreatBanc Trust Co.*, 749 F.3d 671, 680 (7th Cir. 2014) (court must "examine the nature of the alleged breaches" to determine whether fiduciary-breach claims are timely). For the three mutual funds at issue for limitations purposes, petitioners challenge the imprudent retention of the funds during the limitations period from 2001 through 2007 and not the initial selection of the funds in 1999. Petitioners seek to recover "losses caused to the Plan * * * within the six years preceding commencement of their action" by respondents' "failure" to "switch[] from retail to institutional class shares." Pet. C.A. Br. 16 (cita-

tion and internal quotation marks omitted); see Pet. Br. 39-42.

Petitioners' claims are timely because they are claims for breaches of the duty of prudence within the limitations period. ERISA's duty of prudence requires fiduciaries with investment responsibility to periodically examine the prudence of existing investments and remove imprudent investments from the Plan. Here, the Investment Committees had "a continuing duty to see to it that the [plan assets] remain[ed] appropriately invested," and that duty required them "to examine the state of the trust's investments" "from time to time" to determine whether the investments were appropriate. 4 Scott § 19.4, at 1451; see, *e.g.*, *id.* § 19.1.2, at 1395; Bogert 3d § 684, at 147-148. The Investment Committees met quarterly, and at those meetings, they received reports and recommendations from investments staff and decided whether to make changes to the investment portfolio. Pet. App. 74-75, 253-254; J.A. 120-121, 170. On several occasions, the Investment Committees removed funds from the Plan. Pet. App. 76-78.

Although the Investment Committees took those steps to monitor plan investments, they failed to consider a key question, which was whether the mutual funds at issue were available as lower-cost institutional-class funds. Although "the fund's total expense ratio" was one of the Plan's investment criteria, J.A. 145, 151, 176, 230, and those criteria "were expected to be applied periodically in [the] monitoring of the[] plan investments," J.A. 183; see J.A. 124, 155-156, 169, respondents never "even considered or evaluated the different share classes" of the mutual funds at issue, Pet. App. 129; see *id.* at 63-64. The Investment Committees "were not informed about the institutional share classes and did not conduct a thorough investigation" of fund fees. *Id.* at 130. These facts establish breaches of the ongoing duty of prudence within the limitations period, because a prudent fiduciary would have considered whether institutional-class funds were available and would have offered those funds to save money for plan participants. *Id.* at 142.

4. Petitioners have argued that respondents violated their fiduciary duties within the limitations period through both actions constituting breaches and omissions that they failed to cure, and petitioners have invoked both parts of Section 1113(1).[8] They contend that respondents committed "breaches by action" when they "conduct[ed] imprudent reviews during each quarterly meeting," and that respondents breached their fiduciary duties by "omission" by "failing to monitor properly the investment options on a periodic basis and to remove the imprudent retail classes." Pet. Br. 41.

At a minimum, petitioners have stated timely claims of a breach of fiduciary duty by omission. Petitioners' claims that respondents failed to review fund fees, inquire about the availability of lower-cost

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[8] See Pet. C.A. Br. 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." (quoting 29 U.S.C. 1113(1)(A)-(B)); Pet. C.A. Reply Br. 29-30 (specifically arguing that respondents' "breach also is one of omission"); J.A. 76 (alleging that respondents breached their fiduciary duties by "subjecting the Plan and its participants to the high costs of retail/publicly-traded mutual funds and failing to provide investment options with significantly lower costs").

institutional-class funds, and switch to those funds are based on "omission[s]" that occurred at the quarterly meetings within the limitations period, and those breaches by omission were ones the "fiduciary could have cured" during that period. 29 U.S.C. 1113(1)(B). The courts below did not specifically address whether petitioners' claims are better characterized as claims of breaches of fiduciary duty by action or by omission because they categorically rejected any such claims.[9] But it is clear that petitioners' challenge concerns events that occurred within the limitations period, so whether viewed as breaches of the ongoing duty of prudence by actions or by omissions, their claims are timely under 29 U.S.C. 1113.

C. The Court Of Appeals' Reasons For Finding Petitioners' Claims Untimely Lack Merit

1. The court of appeals found petitioners' claims untimely by characterizing them as "alleging imprudence in plan design" and then reasoning that such claims accrued when "the decision to include th[e] investments in the Plan was initially made." Pet. App. 17. The court misunderstood the nature of petitioners' claims. For the three mutual funds added before

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[9] Although petitioners argued below that their fiduciary-breach claims are timely under both parts of Section 1113(1), the court of appeals analyzed the claims only under paragraph (A), which addresses affirmative actions within the limitations period. See Pet. App. 17-18. The court did not give any reason for that limited consideration. It was wrong for the court to ignore paragraph (B), which addresses omissions, because petitioners relied on both parts of Section 1113(1) in their briefing (see, *e.g.*, Pet. C.A. Br. 16; Pet. C.A. Reply Br. 29-30) and because they have identified specific ways in which respondents failed to act as prudent fiduciaries within the limitations period (see, *e.g.*, Pet. Br. 39-42).

the limitations period, petitioners challenge not the initial selection of the funds but the imprudent management of the Plan during the limitations period. Petitioners do not seek to recover damages for the fees charged going back to 1999, when the three funds were first added to the Plan; instead, they seek to recover for losses resulting from the excessive fees charged to plan participants from 2001 to 2007 (the six years before they filed suit). Their claims do not depend on the propriety of the initial investment decision; they depend on an ERISA fiduciary's "continuing fiduciary duty" to review plan investments periodically and remove those that are imprudent. *Martin*, 966 F.2d at 1087-1088. Petitioners have alleged breaches of that continuing duty during the limitations period, and so their claims are timely. The court of appeals' contrary conclusion absolves ERISA fiduciaries of their continuing duty of prudence and immunizes bad investment decisions after six years have elapsed.

Relatedly, the court of appeals reasoned that petitioners' claims are untimely because there is no "continuing violation theory" under ERISA. Pet. App. 17. That rationale again assumes that petitioners alleged a single breach of fiduciary duty that occurred when the funds were added to the Plan in 1999 and that continued to harm plan participants through the limitations period. But petitioners do not argue that there was a "continuing violation," in the sense of one violation starting on the date of the initial selection of investments that permits a plaintiff to obtain damages reaching back to that date. Instead, they contend that respondents breached a continuing duty of prudence *within* the limitations period by failing to research fund options and offer available lower-cost institutional-class funds. J.A. 71, 76-78.[10]

2. The court of appeals confused "[s]eparately accruing harm" with "harm from past violations that are continuing." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 n.6 (2014). Petitioners do not seek to recover for the initial decision to include the mutual funds as plan investments. Instead, they seek to recover for the "new wrong[s]" committed within the limitations period, when respondents breached their ongoing duty to manage the plan investments in a prudent manner. *Id.* at 1969. Those new wrongs gave petitioners a new opportunity to bring suit to recover for losses suffered during the limitations period, even though petitioners could not recover for losses caused by the same type of imprudent actions or omissions before the limitations period.

The Court has recognized that a plaintiff may sue for violations occurring within the limitations period even if the plaintiff is barred from recovering for

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[10] The decision upon which the court of appeals relied—*Phillips* v. *Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), cert. denied, 504 U.S. 911 (1992)—provides no valid basis for finding petitioners' claims untimely. *Phillips* concerned the shortened limitations period applicable to a fiduciary-breach claim when the plaintiff had actual knowledge of the breach. *Id.* at 520. In that context, the court concluded that because the limitations period began on "the earliest date" the plaintiff had "actual knowledge" of the breach (29 U.S.C. 1113(2)), the plaintiff must sue within three years of that first breach. *Ibid.* That holding is inapposite here because the limitations period uses materially different language—not the "earliest date" the plaintiff had knowledge but the "last action" constituting a breach or the "latest date" when the breach by omission could have been cured. See 944 F.2d at 520; compare 29 U.S.C. 1113(2) with 29 U.S.C. 1113(1).

similar violations outside the limitations period. For example, in the copyright context, the Court has explained that each act of copyright infringement gives rise to a separate claim, and a plaintiff may sue for acts of infringement within the three-year limitations period even when she cannot sue for similar acts of copyright infringement committed before that time. See *Petrella*, 134 S. Ct. at 1969. In those circumstances, the copyright holder may recover only for acts of infringement within the limitations period and may not reach back to recover for acts of infringement before that time. *Id.* at 1969-1970.

Similarly, in a case about an employer's liability for withdrawal from a multi-employer pension plan, the Court recognized that an employer may be liable for missed withdrawal liability payments within the limitations period, even if the employer also had missed payments before the limitations period. See *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 206-208 (1997) (*Bay Area Laundry*). The Court recognized that "each missed payment creates a separate cause of action with its own six-year limitations period." *Id.* at 206. And the Court rejected the argument that "a plan that sues too late to recover the first payment forfeits the right to recover any of the outstanding withdrawal liability." *Ibid.* Instead, the Court recognized that the way to account for the limitations period is to limit the plaintiffs' recovery to violations that occurred within that period. *Id.* at 195-196.

Just as the copyright owner in *Petrella* and the pension fund in *Bay Area Laundry* could bring claims for violations within the limitations periods even though similar violations occurred before those periods, so too may petitioners bring claims for breach of fiduciary duty during the limitations period even though they may not challenge the initial decision to invest in those funds. Section 1113 cannot bar a claim of a "failure to invest prudently during the period within [six] years of the commencement of th[e] suit" when it is based on discrete breaches within the limitations period, even if they are part of a series of acts or omissions that commenced earlier; the effect of Section 1113 in that situation is to limit "damages recoverable" to the breaches within the limitations period. *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 962-963 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

Accordingly, petitioners' failure to challenge the initial decision to offer the three mutual funds added as plan investments in 1999 does not bar them from recovering for imprudent investment management within the limitations period. That result would be contrary not only to the general principles of limitation law discussed above but also to Congress's specific decision under ERISA to permit plan participants and beneficiaries to sue based on the "*last* action" constituting a part of the breach and the "*latest* date" on which a breach by omission could be cured. 29 U.S.C. 1113(1) (emphases added).

3. The court of appeals' decision was based in part on its concern that finding petitioners' claims timely would "expose present Plan fiduciaries to liability for decisions made by their predecessors." Pet. App. 18 (citation omitted). That concern is misplaced. ERISA expressly provides that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty * * * if such breach was committed before he became a fiduci-

ary or after he ceased to be a fiduciary." 29 U.S.C. 1109(b). But the new fiduciary may be liable for his own breaches of the ongoing fiduciary duty of prudence.

An ERISA fiduciary with responsibility for plan investments has a duty to periodically review those investments and remove imprudent ones, even if that fiduciary did not make the initial investment decision. Under the law of trusts, it is well-established that one of a trustee's first duties upon taking office is to review the settlor's investments and "dispose of any part of the trust property included in the trust at the time of its creation which would not be a proper investment for the trustee to make." Second Restatement § 230, at 544. Similarly, an ERISA fiduciary may not simply assume that past investment decisions were (or continue to be) proper; the fiduciary has an independent obligation to periodically review the plan investments. ERISA makes this point clear, because it requires fiduciaries to "make[] reasonable efforts" to remedy a breach of fiduciary duty by another fiduciary. 29 U.S.C. 1105(a)(3).

If ERISA fiduciaries fail to periodically monitor the investments and remove imprudent ones, the fiduciaries are being held liable for their own mismanagement of plan investments, not for "decisions made by their predecessors" (Pet. App. 18). And the court of appeals' decision would have the perverse effect of enshrining a predecessor's imprudent investment decisions and exempting the new fiduciary's ongoing management of the plan from scrutiny.

4. The court of appeals concluded that petitioners could only bring a timely claim for fiduciary breach if they demonstrated "significant changes in conditions

* * * that should have prompted a full due diligence review of the funds." Pet. App. 19 (citation and internal quotation marks omitted). But an ERISA fiduciary's ongoing duty of prudence is not limited to reacting to changed circumstances. As explained above (see pp. 13-15, *supra*), under the law of trusts, "[t]he duty to review trust investments should be performed" not only "as changes occur," but "also by a systematic consideration of all the investments of the trust at regular intervals." Bogert 3d § 684, at 147-148; see 4 Scott § 19.4, at 1451 (trustee has a "duty, from time to time, to examine the state of the trust's investments"); Uniform Prudent Investor Act § 2 cmt., 7B U.L.A. 21 (a trustee has "continuing responsibility for oversight of the suitability of investments already made"). A trustee who fails to monitor investments and make appropriate changes breaches the duty of prudence. See, *e.g.*, *Johns*, 2 App. D.C. at 499 (trustee breached his "duty to watch the investment with reasonable care and diligence"); *Stark's Estate*, 15 N.Y.S. at 731-732 (trustee failed to "exercise[] a reasonable degree of diligence in looking after the security after the investment had been made").

Respondents contend that the trust-law duty to remove imprudent investments arises only when changed circumstances make the investment imprudent. Resp. Supp. Cert. Br. 4 (citing Second Restatement § 231, at 550). But the Restatement language upon which respondents rely assumes that the trustee's initial investment decision was prudent and then addresses whether changed circumstances have made the investment imprudent. The Restatement first explains that a trustee has a duty upon taking office to review the trust investments and "dispose of any part of the trust property" that is not a proper investment. Second Restatement § 230, at 544. The Restatement then provides that, if the initial investment was prudent, but the investment at some point has become imprudent, the trustee must divest it within a reasonable period of time. *Id.* § 231, at 550. In particular, the Restatement provides that if the "trustee holds property which when acquired by him was a proper investment, but which thereafter becomes an investment which would not be a proper investment for the trustee to make," the trustee has a "duty * * * to the beneficiary to dispose of the property within a reasonable time." *Ibid.*

The point of this provision is that a trustee has a duty at all times to remove imprudent investments from the trust. If the initial investments were proper, the trustee still has an ongoing duty of prudence to periodically review the investments and dispose of an inappropriate investment. Nothing in the Restatement—or the law of trusts generally—establishes that a trustee may continue to retain an investment that has been imprudent from the outset and remains imprudent, simply because circumstances have not significantly changed. And not only is respondents' view inconsistent with the law of trusts, but it would create uncertainty for fiduciaries about whether circumstances have changed enough to warrant a review of plan investments and would complicate fiduciary-breach suits by requiring mini-trials on that question.

"It is not by prudent investment alone that a trustee performs his whole duty in regard to a trust fund"; the trustee is "bound to be watchful," to "keep himself informed" about the fund, and to "tak[e] all prudent means to prevent a loss to the estate." *Stark's Estate*, 15 N.Y.S. at 731-732. The same is true under ERISA. ERISA fiduciaries have an ongoing duty of prudence, and that duty requires them to periodically assess whether investments and the expenses associated with them remain prudent—regardless of whether any external event should have prompted a review.

D. The Court Of Appeals' Rule Disserves The Purposes Of ERISA

1. A primary reason that Congress enacted ERISA was to stop the "misuse and mismanagement of plan assets by plan administrators" *Russell*, 473 U.S. at 141 n.8. ERISA imposes "standards of conduct, responsibility, and obligation"—and authorizes suits to enforce those duties—to stop and prevent such mismanagement. 29 U.S.C. 1001(b). These duties apply both to named fiduciaries and those who act as fiduciaries by exercising authority or control over plan assets, and there is no limit on the duration of fiduciary duties so long as the fiduciaries continue to hold the position. See 29 U.S.C. 1002(21)(A)(i), 1102(a)(1). But the effect of the court of appeals' rule is to exempt ERISA fiduciaries from those important duties and to immunize imprudent plan investments so long as those investments have been offered in the plan for more than six years and circumstances have not significantly changed.

Under the court of appeals' rule, so long as an investment had been in an ERISA plan for at least six years, plan participants and beneficiaries—and the Secretary—could not challenge the fiduciary conduct regarding the investment as imprudent unless a change in circumstances made the investment even more imprudent. That would be true even if the continued imprudence of the investment is obvious. See

Pet. App. 126-127 ("[A] prudent person managing his own funds would invest in the cheaper share classes, all else being equal, because doing so saves money."). And a participant who invested in the plan or the particular investment option at issue more than six years after the initial investment decision could never sue. See J.A. 58 (class includes participants who began investing in the Plan more than six years after the mutual funds at issue initially were added as plan investments).

Further, a person who became a fiduciary within the limitations period would be immunized from liability even if she never reviewed the investments. Under the court of appeals' rule, fiduciaries would have no incentive to monitor and update plan investments, and they could retain imprudent investment options forever (absent changed circumstances) once the investment options had been available for more than six years. The result would be to place plan participants' retirement savings in jeopardy. And the effect of the court of appeals' rule would be particularly significant in light of the long investment horizon for retirement savings accounts.

2. The court of appeals' rule could have a great adverse effect for participants in and beneficiaries of ERISA retirement plans. Saving for retirement is a significant undertaking for many Americans. As of 2011, more than 88 million Americans participated in defined-contribution plans like the plan at issue here. Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin: Abstract of 2011 Form 5500 Annual Reports* 3 tbl. A1 (Sept. 2014), http://www.dol.gov/ebsa/pdf/2011pensionplanbulletin.pdf. As of 2014, those defined-contribution

plans held an estimated $5.2 trillion in assets. Bd. of Governors of the Fed. Reserve Sys., *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts* 131 tbl. L.117.c (Sept. 2014), http://www.federalreserve.gov/releases/z1/Current/z1.pdf; see Pet. App. 167 (in 2007, the Edison Plan held $3.8 billion in assets). Defined-contribution plans make up more than one quarter of all retirement assets in the United States. Investment Co. Inst., *Defined Contribution Plan Participants' Activities, First Half 2014* 2 fig. 1 (Nov. 2014), http://www.ici.org/pdf/ppr_14_rec_survey_q2.pdf. Mutual funds make up a majority of the assets in defined-contribution plans. See Investment Co. Inst., *2014 Investment Company Fact Book* 11 (54th ed.), http:// www.ici.org/pdf/2014_factbook.pdf.

A key concern of investors in retirement plans is the erosion of their long-term earnings by fees. Even small differences in fees can make a significant difference in the value of an individual account over time. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1-2 (Aug. 2013), http://www.dol.gov/ebsa/pdf/401kFees Employee.pdf.[11] In this case, respondents' breach of their duty of prudence shortchanged plan participants and beneficiaries by charging them "wholly unnecessary fees." Pet. App. 129-130. Left unremedied, that fidu-

[11] For example, a 30-year-old earning $60,000 per year, receiving 2% annual raises, and investing 15% of annual salary will (assuming a 7% rate of return and 1% in expenses) have $1.3 million by age 65. Walter Updegrave, *How High Fees Can Derail Retirement*, Wall St. J., June 21, 2014, at B8. But if the expenses were just half a percentage point higher, the value of the account at age 65 would fall by $100,000 to $1.2 million. *Ibid.*

ciary breach will continue to harm the tens of thousands of participants in the multi-billion-dollar plan in this case. See *id.* at 167. And the court of appeals' broad ruling, if affirmed by this Court, would severely weaken the fiduciary duties Congress put in place to protect participants and beneficiaries in ERISA plans.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for appropriate proceedings.

Respectfully submitted.

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DECEMBER 2014

APPENDIX

1. 29 U.S.C. 1104 provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

2. 29 U.S.C. 1105 provides in pertinent part:

Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) If he participate knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) If, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) If he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

* * * * *

3. 29 U.S.C. 1109 provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

4. 29 U.S.C. 1113 provides:

Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (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, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

5. 29 U.S.C. 1132 provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection

with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or

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[1] So in original. Probably should be "subtitle".

comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

* * * * *