No. 13-550

IN THE

Supreme Court of the United States

GLENN TIBBLE, ET AL.,

Petitioners,

v.

EDISON INTERNATIONAL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over twelve million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of the nation's business community in matters before Congress, the Executive Branch, and the courts.

The ERISA Industry Committee is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare,

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[1] Counsel for each party consented to the filing of this brief and correspondence reflecting this consent is on file with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit design or administration.

The American Benefits Council is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Business Roundtable is an association of chief executive officers of leading U.S. companies with $7.2 trillion in annual revenues and nearly sixteen million employees. BRT member companies comprise more than a quarter of the total value of the U.S. stock market and invest $190 billion annually in research and development–equal to seventy percent of U.S. private R&D spending. BRT companies pay more than $230 billion in dividends to shareholders and generate more than $470 billion in sales for small- and medium-sized businesses annually. United and amplifying the diverse business perspectives and voices of America's top CEOs, BRT promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

NAM, the Chamber, ERIC, the Council, and the BRT frequently participate as *amici curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans. Many of these organizations' members offer their employees the opportunity to participate in defined-contribution plans similar to the one at issue here. Both the companies that sponsor those plans and the fiduciaries who administer them have significant interests in the theories of legal liability that may be enforced against them as well as the length of time they may be exposed to potential litigation. *Amici* respectfully submit that overturning the Ninth Circuit's judgment could have a detrimental impact on employer-sponsored retirement plans.

SUMMARY OF THE ARGUMENT

Section 413(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility . . . six years after (A) the date of the last action which constituted a part of the breach . . . 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).

Petitioners, current and former participants in an ERISA-covered 401(k) plan sponsored by respondent Edison International, brought suit in 2007 to challenge (as pertinent here) the prudence of three investment options that had been selected for inclusion in the plan in 1999. These investment options were retail-class shares of mutual funds; petitioners' claim of imprudence is based on the availability of institutional-class shares in the same funds that offered lower fees. Both courts below concluded that petitioners' challenge to those three investment options was barred by ERISA's timely filing provision, as suit was brought more than six years after the fiduciary act complained of (*i.e.*, the selection of the retail-class mutual funds) had been completed. Pet. App. 16-19; 178-81.

In this Court, petitioners argue that, even in the absence of any material change in circumstances, the plan fiduciaries' failure to remove those three retail-class options from the plan and replace them with available institutional-class shares in the same mutual funds was an actionable breach of fiduciary duty that is not time-barred because it occurred continuously during the six years prior to the filing of the complaint. Pet. Br. 2. This type of "continuing violation" theory would subject fiduciaries to perpetual exposure to litigation and potential liability for investment selection and other acts completed long before suit was actually filed. If accepted by this Court, it would upset the careful balance between protecting beneficiaries and preserving benefit plans that is central to ERISA by transforming Section 413(1) from a time bar into a mere limitation on damages.

I. One of ERISA's primary goals is to reduce the regulatory burden and the volume of potential litigation faced by ERISA plan sponsors and fiduciaries in order to encourage employers to offer employee benefit plans. ERISA Section 413(1) furthers that goal by cutting off liability for breaches of fiduciary duties six years after they occur, thereby providing plan fiduciaries the repose and finality they require to effectively administer employee benefit plans. Although this cutoff, like all time bars, might prevent some plaintiffs from bringing meritorious claims, it also bars unmeritorious claims and saves the expense of litigating all untimely claims.

Petitioners attempt to avoid the clear import of Section 413(1) and subvert Congress's considered judgment that six years is sufficient by advancing an interpretation of a fiduciary's duty to monitor that would render fiduciaries perpetually liable for allegedly imprudent decisions made more than six years before. This Court should reject this effort to rewrite Section 413(1), which would effectively transform it from a statute of repose into a rolling limitation on damages, and instead preserve the careful balance struck by Congress when it crafted ERISA.

II. Petitioners and the Department of Labor conflate two different aspects of fiduciary decision-making—the initial selection of investment options and the ongoing monitoring of investment performance—in an unprecedented effort to encumber plan fiduciaries with a constant duty to reevaluate the entirety of a portfolio on some unstated periodic basis. Petitioners' (and the DOL's) argument hinges on this conflation. Yet, while both the selection duty and the monitoring duty are well-established and rigorous, they are *not* the same and there is no support in the law to say otherwise.

Petitioners' theory appears nowhere in the statute and is not supported by the authorities they rely on. Rather, petitioners cobble together pieces of various treatises and rely primarily on an 1891 decision of the New York Surrogate's Court to support their view that a fiduciary's duty to monitor investment performance extends to factors that are unchanged and unchanging—and perhaps may only be evident when the process for selecting an investment is recreated in its entirety, as with the instant claims. In so arguing, petitioners gloss over the fact that neither this Court nor any federal appellate court has ever accepted this approach to fiduciary duties under ERISA in the over forty years since that statute was passed. They also ignore the fact that ERISA plan participants are protected by numerous ongoing fiduciary duties—which were primarily developed via rulemaking or established by statute, rather than ad hoc during litigation—as well as by their ability to move their investments to other funds. The duty proposed by petitioners is both unprecedented and unnecessary to protect ERISA participants, and should be rejected by this Court.

III. In supporting petitioners' position here, the DOL is attempting to engage in regulation via amicus brief. By joining in petitioners' broadside attack on retail-class mutual fund shares, the DOL is effectively saying that these are imprudent options for 401(k) plans, without having made any regulatory pronouncement to that effect. An amicus brief is not the appropriate vehicle to establish standards for a hitherto unknown theory of fiduciary duty that could have such a sweeping effect. Rather, that effort, if appropriate at all, is properly the topic of notice-and-comment rulemaking, where industry participants and employers could provide guidance as to precisely what the contours of any new duties should be. This Court should therefore not afford any deference to the DOL's position.

The judgment of the Ninth Circuit holding that petitioners' challenge to the three mutual funds at issue is time-barred by Section 413(1) should be affirmed.

ARGUMENT

I. ERISA SECTION 413(1) REQUIRES BREACH OF FIDUCIARY DUTY CLAIMS TO BE BROUGHT WITHIN SIX YEARS

Congress's aim in enacting ERISA was to protect the interests of participants in employee benefit plans and their beneficiaries, 29 U.S.C. § 1001(b), while simultaneously recognizing that employers were not required to offer these benefits in the first instance, and therefore should not be discouraged from doing so by the imposition of an unduly burdensome regulatory regime. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Consequently, this Court has acknowledged that the enforcement of ERISA must reflect a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of [employee benefit] plans" in the first instance. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

As part of this "careful balancing," ERISA is designed to streamline the regulatory landscape and cut down on the costs, including litigation expenses, faced by plan sponsors and fiduciaries. *Conkright*, 559 U.S. at 517. Accordingly, when interpreting ERISA, courts should "take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits [and] its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), this Court described "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Id.* at 379.

Section 413(1) is one of the ways that ERISA limits the exposure (and thus the costs) of plan sponsors and fiduciaries, which Congress believed would encourage employers to offer benefit programs, thus benefitting employees. It does so by cutting off liability for breaches of fiduciary duties six years after 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); *see Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) (per curiam); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994). Section 413(1) serves the "basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" (*Rotella v. Wood*, 528 U.S. 549, 555 (2000)), which are particularly important in the context of ERISA litigation.

By cutting off liability after a set date, ERISA Section 413(1) reduces the uncertainties faced by plan fiduciaries, plan sponsors, and plan participants. *See Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d

197, 205 (3d Cir. 2006); *Radford*, 151 F.3d at 400; *Larson*, 21 F.3d at 1172. Section 413(1), like all statutes of limitation or repose, is "intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. SEC,* 133 S. Ct. 1216, 1221 (2013) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)). Like other time-bar provisions, Section 413(1) provides "security and stability" for both ERISA fiduciaries and beneficiaries by "stimulat[ing] activity and punish[ing] negligence" of potential plaintiffs. *Wood v. Carpenter*, 101 U.S. 135, 139 (1897). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers*, 321 U.S. at 349.

Section 413(1) unequivocally expresses Congress's clear intent to provide plan fiduciaries with some measure of repose and finality with respect to the decisions they make, including the selection of investment options to include in 401(k) plans. Section 413(1) reflects Congress's best judgment "on the proper balance between the policies of repose and the substantive policies of enforcement" that should apply to claims for breaches of fiduciary duties under ERISA. *See Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

Section 413(1) is an unequivocal legislative determination that finality is warranted six years after a fiduciary decision had been made. The very nature of a period of limitations or repose is that some claims, even if meritorious, might be cut off or prevented in favor of allowing a decision-maker to achieve finality based on previous decisions, such as the selection of investment plan options. It also deters plaintiffs from advancing non-meritorious or even frivolous claims in the hope of securing a settlement, thereby saving litigation expenses that could be put to better use providing benefits to participants.

Despite their assertions to the contrary, petitioners attempt to either ignore or undermine the clear Congressional intent embodied in Section 413(1) to bar stale claims of fiduciary breach by asserting a continuing violation theory which was rejected by the courts below and is inconsistent with ERISA in general. To adopt petitioners' unprecedented theory of fiduciary responsibility in the circumstances reflected in this case would undermine the benefits to both fiduciaries and participants that Congress saw in that finality. It would create perpetual exposure to litigation for decisions made perhaps decades earlier by other fiduciaries.

A. Section 413(1) Is A Traditional Time Bar

Petitioners and their *amici* frame their argument as one about the duties of ERISA fiduciaries, effectively arguing that ERISA fiduciaries should be perpetually exposed to litigation regarding long-past decisions. This is, however, plainly at odds with the clear terms of Section 413(1), which operates as a statute of repose: It extinguishes the underlying liability of a defendant as to potential claims arising from a particular action and is not subject to equitable tolling. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014); *United States v. Beggerly*, 524 U.S. 38, 48 (1998). A statute of repose begins to run "from the date of the last culpable act or omission of the defendant" and cuts off liability "even if this period ends before the plaintiff has suffered a resulting injury," as Section 413(1) does. *CTS*, 134 S. Ct. at 2182-83 (internal quotation marks omitted).

That Section 413(1) is a statute of repose is further demonstrated by the inclusion of Section 413(2), which cuts off liability for breaches of fiduciary duties three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation" if that date precedes the six-year cutoff in Section 413(1). 29 U.S.C. § 1113(2). This three- and six-year structure is "fundamentally inconsistent" with equitable tolling—a hallmark of a statute of repose—because the inclusion of the six-year period "can have no significance in this context other than to impose an outside limit." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (internal quotation marks and citation omitted). Section 413 is therefore designed to provide ERISA fiduciaries an even greater measure of finality than would a statute of limitations.[2]

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[2] Section 413(1) is better read as a statute of repose, rather than a traditional statute of limitations. The key difference is that a statute of limitation may be subject to equitable tolling, while a statute of repose is not. Since petitioners do not advance any arguments that the six-year time bar in Section 413(1) should be equitably tolled, whether Section 413(1) is a statute of repose or a statute of limitations would not have a

Numerous other statutes of repose operate in a similar fashion, extinguishing the underlying liability for the challenged actions after the passage of a specified period of time. *See*, *e.g.*, *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (Truth In Lending Act); *Lampf*, 501 U.S. at 363 (Sections 11 and 12 of the Securities Act). In those contexts, as under ERISA, repose serves to reduce litigation, thereby reducing uncertainty and allowing decision-makers to achieve finality with regard to their actions.

ERISA Section 413(1) reduces plan litigation costs by extinguishing potential fiduciary liability after six years from the last act that formed part of the alleged breach, which ultimately helps to preserve value for the plan participants and their beneficiaries. In this case, the increased litigation costs to ERISA plans outweigh any benefits to plan participants that might flow from reading Section 413(1) as merely a limitation of the period for which damages may be recovered, as petitioners and their *amici* do. *Cf. Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (weighing "the threat of increased litigation" against the value of the proposed standard).

To skirt the clear terms of ERISA's six-year time bar, petitioners and their *amici* contend they are not challenging the initial selection of the funds as imprudent, but rather their ongoing inclusion in the plan as evidence of imprudent monitoring of the plan. Pet. Br. 39-41. Petitioners' assertion that the failure to remove the challenged investment options

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different result on petitioners' claims at issue. In either case, those claims would be time-barred.

is a new breach of duty that has caused them harm is nothing more than a disingenuous effort to avoid the preclusive effect of ERISA Section 413(1). What petitioners are truly complaining about is the alleged current injury resulting from an act—the initial selection of the challenged mutual funds—that was completed more than six years before they filed suit.

Although petitioners and the DOL assert they are not advancing a "continuing violation" theory, that is the real import of their argument. Petitioners would convert Section 413(1) from a statute of repose into a mere rolling limitation on damages by allowing an ERISA plaintiff to recover six years of damages for an allegedly imprudent fiduciary act that occurred more than six years prior to suit. This is inconsistent with the structure of ERISA Section 413(1), which clearly bars liability based on conduct that was completed more than six years earlier, and does not allow for the "separate accrual" of repeated causes of action arising out of that single completed act. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).

Not only would this theory of perpetual exposure to litigation and liability be inconsistent with the text of Section 413(1), it would contradict the policies underlying ERISA, by imposing the distractions on fiduciaries that any litigation causes, compounded by the difficulties of litigating stale claims. It would also burden plan fiduciaries with new and continuing duties that would increase the likelihood of litigation at all times. Such an uncapped structure undermines ERISA's goals of containing fiduciary liability (remembering that fiduciaries are personally liable for breaches) and curtailing litigation expenses. *See*

Varity, 516 U.S. at 497. These increased costs might well discourage plan sponsors—who will often indemnify fiduciaries for litigation expenses or purchase insurance on their behalf—from offering benefits plans, result in diminished plan benefits, or discourage qualified individuals from serving as ERISA fiduciaries at all.

B. Section 413(1) Bars The Claims At Issue

Contrary to petitioners' and the DOL's assertions, reading Section 413(1) to operate as it is written to cut off liability after six years from the selection of the investment option is fully consistent with the balance Congress struck between making fiduciaries accountable to participants for their decisions and putting matters to rest. *See Lampf*, 501 U.S. at 360-61 (rejecting the SEC's argument that adopting a three-year period of repose would frustrate the policies underlying § 10(b)).

Ignoring or undermining the time bar of Section 413(1) is also unnecessary, as ERISA mandates the protection of plan participants and their beneficiaries by way of its reticulated design. ERISA sets forth numerous ongoing fiduciary duties, including the obligations, *inter alia*, to review financial audits, *see* 29 U.S.C. § 1023; to monitor the performance of service providers, *see* 29 C.F.R. § 2509.75-8; to provide plan participants with adequate information to inform their plan selections, *see* 29 U.S.C. § 1104(c); and to ensure ongoing compliance with plan documents and the ERISA statute itself, *see id.* § 1104(a)(1)(D). In fact, the regulations set forth by the DOL that do describe a fiduciary's duty to monitor the prudence of plan investments, and which have been in place for nearly thirty-five years, do not require repeated full reassessments of all of the investment options in light of what other options may be available. *See* 29 C.F.R. § 2550.404a-1.

In pressing for an interpretation of an ERISA fiduciary's ongoing duty to monitor that would require continuous reassessment, petitioners and the DOL argue that enforcing Section 413(1) as written could harm ERISA plan participants by preventing them from challenging the inclusion of an investment option in a plan if it has been part of the plan for six years or longer "even if the continued imprudence of the investment is obvious." DOL Br. 31. This argument is flawed on multiple levels.

If an included investment option were "obviously" imprudent, it is highly unlikely that it would escape challenge within six years of its inclusion, just as it is unlikely that other egregious breaches of fiduciary duties would escape challenge within that period. Additionally, purported breaches that do escape challenge within six years will likely do so either because they have been concealed or the conduct involved has been misrepresented to participants, and will thus fall within Section 413's separate provision for when a fiduciary breach has been fraudulently concealed. 29 U.S.C. § 1113(2); *see In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 242 F.3d 497, 502 (3d Cir. 2001) (holding fraud or concealment exception applies where fiduciary took affirmative steps to hide breach).

Indeed, the limited exception for cases of "fraud or concealment" in Section 413(2), 29 U.S.C.

§ 1113(2), strongly suggests that the statute of repose should be fully enforced in all other circumstances. *See Larson*, 21 F.3d at 1172 ("the special provision Congress made elsewhere in § 1113 for fraud or concealment . . . provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute only in instances of fraud or concealment"). Congress's inclusion of an exception in the statute should preclude the Court from reading another one into it. *Cf. Gabelli*, 133 S. Ct. at 1223-24 (declining to read an exception into a statute of limitations where Congress has not expressly provided one). The Court should not depart from the clear text of Section 413(1) by embracing what is—if not the discredited "continuing violation" theory—the first cousin to that approach.

There is no compelling reason to override Congress's clear intent and decline to enforce Section 413(1)'s time bar in this case. All repose and limitations periods operate to cut off stale claims, even potentially meritorious ones. But time bars also deter stale unmeritorious claims, thus saving litigation expenses. Petitioners offer no reason that would warrant "accept[ing] a lesser degree of responsibility on the part of" an ERISA plaintiff than from plaintiffs in other contexts where time-barring provisions have been applied to stale claims. *Rotella*, 528 U.S. at 556 (finding RICO plaintiffs are "responsible for determining within the limitations period then running" whether they have valid claims).

Although petitioners contend that a great injustice would take place if a participant who joins an ERISA plan could not challenge the inclusion of an imprudent investment option chosen over six years before even if she filed suit on the day she joined the plan, *see* Pet. Br. 50, they overlook the simple point that a participant may choose not to invest at all in a plan option that has been in the plan for six years.

Petitioners' theory of perpetual exposure to litigation and potential liability is not only at odds with the policy of ERISA, but of statutes of repose and limitation in general, which recognize that "[i]n compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson*, 471 U.S. at 271. In this instance, the value of finality outweighs the risk that certain ERISA participants and beneficiaries will not have the opportunity to challenge some allegedly imprudent decisions made more than six years before. This is particularly true where, as here, participants were already protected by a full complement of ongoing fiduciary duties, were able to move their investments to other options if they chose to, and could have challenged the inclusion of imprudent investment options if a change in circumstances had occurred (which petitioners here tried to establish, but which the district court determined after trial that they had failed to prove).

II. PETITIONERS' NEW THEORY OF LIABILITY WOULD MAKE SECTION 413(1) MEANINGLESS

Petitioners attempt to end-run the clear terms and policies of Section 413(1) by inventing a new theory of fiduciary responsibility under ERISA that is neither supported by statute or precedent nor necessary to protect beneficiaries. Petitioners and their *amici* purport to ground their arguments in the common law of trusts, which they argue expands the monitoring duties currently performed by ERISA fiduciaries to include not only monitoring investment performance, but constantly reevaluating the entire portfolio, even if circumstances remain unchanged since the portfolio was assembled. *See* DOL Br. 29, 32-33. To that end, they cite snippets of trust treatises that are taken out of context and heavily rely on an 1891 case from the New York Surrogate's Court in an attempt to gloss over the fact that there is no federal appellate precedent to support their position.

Their arguments in favor of recognizing this never-before-known-under-ERISA duty fail because: (A) petitioners and their *amici* conflate the ERISA fiduciary's duty to monitor with his duties upon selection of an investment in an attempt to import tasks performed at selection into this duty to monitor; (B) there is no such duty that would extend to the constant reevaluation of a portfolio of investments; and (C) adoption of petitioners' position could result in a drastic increase in fiduciary liability for decisions previously considered to be final, defeating the purpose of Section 413(1).

A. Petitioners' Theory Improperly Conflates The Separate Duties Of Selection And Monitoring

Central to the position taken by petitioners and the DOL is a misunderstanding of an ERISA fiduciary's duties at various times during the life of a plan. Specifically, petitioners and the DOL conflate a fiduciary's duty in selecting investments with its ongoing duty to monitor the performance of those investments, importing the tasks performed at selection into the duty to monitor in order to make their claims plausible. Without merging those two distinct responsibilities, petitioners and the DOL would not be able to support their position that Section 413(1)(A) really operates as a damages limitation, not a statute of repose, or even of limitation.

But neither this Court nor any federal appellate court has ever accepted this approach to fiduciary duties under ERISA. And for good reason: the selection duty and the monitoring duty are not the same. Yet, petitioners' (and the DOL's) argument principally hinges on erroneously conflating these different fiduciary functions.[3]

The processes undertaken by an ERISA fiduciary during the separate selection and monitoring phases of managing a portfolio of investments are distinct. An ERISA fiduciary's obligations under the prudent man standard vary depending on the "circumstances then prevailing" and according to the specific context of "an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Therefore, the reasonableness of a fiduciary's actions is judged in the context of, and varies depending upon, the context of the decision being made and the goals being addressed. The question is not whether ERISA fiduci-

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[3] The fact that petitioners cannot support their position without conflating these two duties demonstrates why the writ should be dismissed as improvidently granted. *See* Resp. Br. 26-29. Given that petitioners were unable to prove in the district court that respondents violated their duty to monitor and do not challenge that finding in this Court, there is no dispute left for this Court to resolve, particularly not one within the scope of the limited question on which certiorari was granted. *Id.*

aries have a duty to monitor, but whether that duty reasonably includes a duty to remove an investment option when nothing has changed to indicate that its initial selection was imprudent and when participants have chosen to invest in that option, having received full and accurate disclosures as to the option's characteristics. Despite petitioners' and their *amici*'s arguments to the contrary, that question can only be answered in the negative.

The prudence of the selection process is judged in the context of the industry standards existing at the time of the action. *See Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999). When a fund is added to a plan menu, an ERISA fiduciary will consult various sources of data to determine the prudence of offering that fund option, including comparisons of different fund options in the asset class along various performance metrics. Fiduciaries frequently engage outside consultants to assist in the selection of funds. At this stage, a fiduciary's goal is to put together a portfolio of investment options that is sufficiently broad so as to allow participants to establish personal portfolios that match their station in life (*i.e.*, age, marital status, income, and assets outside the plan).

The prudence of the selections made by the fiduciary are evaluated in part by the procedural measures and precautions taken, as ERISA does not mandate that there is one "correct" option that all plan fiduciaries must pursue, and therefore ERISA fiduciaries have a strong incentive to engage in a comprehensive selection process. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 722 (6th Cir. 2000);

Frahm v. Equitable Life Assurance Soc'y of the U.S., 137 F.3d 955, 960 (7th Cir. 1998).

Once an investment selection has been made, the fiduciary's responsibility is to engage in ongoing monitoring of the investment option to determine if its objectives are being met and its performance is adequate by comparison to identified benchmarks or other metrics. *See* 29 C.F.R. § 2550.404a-1; *see also Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014) (finding "continuing to monitor and receive regular updates on the investment's performance" to be evidence of fiduciary prudence), *petition for cert. filed*, No. 14-656 (Dec. 1, 2014). The fiduciary compares the performance of the particular option selected for the plan with a benchmark or index of the other available investments of a similar kind and character. Absent a change in circumstances, the fiduciary does not revisit the initial determination to offer the option.

Unless there has been a material change in circumstances suggesting that a full due diligence review is necessary, the fiduciary's duty to monitor does not include the obligation to revisit the initial determination to include a particular investment option in the plan. Indeed, it would be highly impractical and expensive to periodically recreate the selection process of an investment option. Plan fiduciaries generally do not reconsider the choice of an investment option that is meeting its performance benchmarks. In this case, petitioners were unable to prove that circumstances warranted performing a "full due diligence review" at any time during the limitations period or that respondents' ongoing monitoring process was otherwise imprudent. Resp. Br. 39-40.

The difference between the two duties is clear from a simple, and common, example. A plan fiduciary may decide to include as a plan option a particular investment opportunity—*e.g.*, a regional real estate fund, an emerging markets fund, or a small-cap equity fund—or a particular investment structure—*e.g.*, an actively managed mutual fund, a passively managed index fund, or a stable value money market fund. Once the initial selection has been made, the monitoring duty requires the fiduciary to ensure that the particular option chosen is performing in line with other available options of similar kind and character—for example, that the emerging markets mutual fund option is on par with other available emerging markets mutual funds. *See* Resp. Br. 32-37, 39-42.

Petitioners' attempt to conflate the selection and monitoring duties is exposed in the DOL's argument that the fiduciaries in the instant case breached their "continuing duty of prudence . . . by failing to research fund options and offer available lower-cost institutional-class funds." DOL Br. 24-25. This alleged breach translates into a failure to continually research and replace investment options, and, taken to its logical extreme, would require ERISA fiduciaries to constantly reevaluate the balance within an entire portfolio in a search for the cheapest option. But the initial duty to assess investment options at the front end is not coextensive with the monitoring obligation, which requires a full due diligence review only in changed circumstances. Moreover, the courts, and even the DOL, have recognized that fiduciaries are not obligated to select the mutual funds with the lowest fees. *See, e.g.*, *Loomis v. Exelon Corp.*, 658 F.3d 667, 672-73 (7th Cir. 2011).

Petitioners underscore this point, and the depth of their misunderstanding, by arguing that the Ninth Circuit's standard "ignores the fiduciary's responsibility to consider the prudence of the plan's investment lineup as a whole" because, in some instances, "it is necessary to examine the entire portfolio to determine whether an investment is prudent" as "[a]n investment may be imprudent for reasons unrelated to any changes in that particular investment." Pet. Br. 32-33. But this position would interpret "changed circumstances" much more narrowly than it is applied in practice, as the review conducted when circumstances are changed is not limited to a single investment and may extend to evaluating the portfolio as a whole.

B. Petitioners' Theory Is Not Supported By The Common Law Of Trusts

Petitioners and their *amici* cite the common law of trusts to support their argument that a fiduciary's duty to monitor an investment includes the ongoing duty to reassess the prudence of those investments. *See* Pet. Br. 25-30. The trust law authorities petitioners cite cannot support the weight that they and their *amici* place on them.

The sources of trust law relied upon by petitioners and their *amici* define a duty to monitor that cannot reasonably be read to extend to petitioners' claims here; rather, those authorities support the position that a fiduciary has a duty to monitor investment performance and only to reevaluate the entire portfolio when a change in circumstances warrants it. For instance, a trust treatise upon which petitioners heavily rely indicates that a trustee has a "duty of examining and checking the trust investments periodically" because they might "depreciate in character" and, in doing so, the trustee must "consider[] certain factors . . . such as economic conditions." George T. Bogert et al., *The Law of Trusts and Trustees* § 684, at 145-46 (3d ed. 2009). The treatise goes on to say that "[i]nherent in this standard is the duty to reevaluate the trust's investments periodically as *conditions change*." *Id.* at 146 (emphasis added).

This language clearly envisions a fiduciary being vigilant about the *value* of the trust assets and reevaluating the investments upon changed conditions, which is consistent with the position adopted by the district court, and affirmed by the Ninth Circuit. *See* Pet. App. 19. Notably, the district court gave petitioners the opportunity to establish changed circumstances that would have warranted the performance of a "full due diligence review," but petitioners could not establish that one had occurred. Resp. Br. 15-16, 39-40.

Despite petitioners' protests to the contrary, the trust treatises cited by petitioners and their *amici* are consistent with the standard adopted by the Ninth Circuit. Although petitioners claim that "[n]othing in the Second Restatement endorse[s]" the position that a fiduciary does not need to conduct a complete review absent a change in circumstances, nothing in the sources they cite supports petitioners' contention that once an allegedly imprudent investment option is selected, a fiduciary operates under a constant duty to realize that it was imprudent and to remove it. *Cf.* Pet. Br. 31. Petitioners' arguments in favor of this duty presuppose that a fiduciary is already aware that an investment option is imprudent, despite the fact that the investments they are actually challenging may be imprudent only in light of the other options available at the time of their selection, and therefore would have required a full due diligence review to uncover their alleged imprudence. *Cf. id*.

Neither petitioners nor their *amici* cite a single federal case that supports their view of a fiduciary's continuing duty to reevaluate the selection of an investment option in the absence of changed circumstance, much less one that extends that duty to apply under ERISA. Instead, petitioners and their *amici* rely on an 1891 decision of the New York Surrogate's Court. *In re Stark's Estate*, 15 N.Y.S. 729, 730-31 (Surrogate's Court 1891). But that 124-year-old case cannot carry the weight petitioners place on it. In the forty-year history of ERISA, neither this Court nor any federal court of appeals has ever accepted anything like the theory proposed by petitioners.[4]

In any event, although courts are guided by trust law in interpreting fiduciary duties under ERISA, this Court has recognized that "trust law does not tell the entire story" (*Varity*, 516 U.S. at 497), and

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[4] As best we can determine, only one federal court since ERISA's enactment has accepted petitioners' view that a fiduciary's monitoring function, even in the absence of changed circumstances, includes an evaluation of the prudence of the challenged investment option. *See Spano v. The Boeing Co.*, No. 3:06-CV-743-NJR-DGW, Slip. Op. at 10-19 (S.D. Ill. Dec. 30, 2014).

does not govern where ERISA's text or application has been held to diverge from the common law (*Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2469 (2014)). Where trust law does not resolve the specific issue, the "guiding principles . . . underlying ERISA," as well as the specific statutory provision Section 413(1), should be used to resolve the question. *Conkright*, 559 U.S. at 516. The common sense meaning and intent of Section 413 should not be ignored regardless of the pre-ERISA common law references made by petitioners and their *amici*.

In this instance, ERISA's core principles—particularly the balance achieved by regulatory consistency and protecting fiduciaries from perpetual exposure to litigation for decisions made perhaps decades before (and perhaps by other fiduciaries)—should guide the Court to reject the variant of the "continuing violation" theory that petitioners advance, and to apply Section 413(1) as it is written and as it was intended by Congress to operate.

C. Petitioners' Theory Is Contrary To Public Policy

Petitioners' unprecedented theory that ERISA fiduciaries must engage in constant, portfolio-wide evaluation of all aspects of the investment options offered to plan participants would not necessarily improve fiduciary decision-making. It would more likely hinder the operation of ERISA plans by spurring a significant increase in litigation, which would undermine the incentive to offer ERISA plans—to the detriment of plan participants and their beneficiaries.

ERISA fiduciaries are already subject to some of the "highest [fiduciary duties] known to the law" (*Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)), and a concomitantly large volume of litigation challenging their performance of these duties. Indeed, lower courts have handed down a number of mandates as to the rigor expected in the duty of prudence and the expectations of thoroughness in monitoring that supplement the DOL's already voluminous regulations on that front. *See*, *e.g.*, *Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996) (failure to "make certain that reliance on [an] expert's advice is reasonably justified under the circumstances" is a breach of the duty of prudence). If proper attention is not given to a changed circumstance, a fiduciary may be held accountable. *See*, *e.g.*, *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013).

Moreover, ERISA fiduciaries must discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *Dudenhoeffer*, 134 S. Ct. at 2465. Because fiduciaries must "balanc[e] competing interests under conditions of uncertainty," their decisions—for example, selecting investment options for a 401(k) plan—are entitled to substantial deference. *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006); *see Conkright*, 559 U.S. at 517; *Firestone*, 489 U.S. at 110-11.

Petitioners and their *amici* seek to dilute this deference, and its valuable role in minimizing the courts' interference with plan design as well as ERISA litigation costs, by burdening ERISA fiduciaries with an unintended, ongoing, and ill-defined duty to constantly reevaluate plan offerings on top of their already established duty to monitor—which has never before been interpreted to include the duties petitioners and the DOL expound. Adoption of that rudderless view of fiduciary duties would leave thousands of ERISA fiduciaries adrift without a reasonable understanding of when they should review the prudence of continuing to offer an investment option selected years before, and perhaps by other fiduciaries, based on a comprehensive selection process.

This would be particularly punishing for sponsors and fiduciaries of small plans that do not have the resources to regularly hire consultants and legal counsel. Indeed, the vast majority of 401(k) plans are not sponsored by large employers and may not have the resources to adequately confront this ever-changing landscape. *See* U.S. Dep't of Labor, *Private Pension Plan Bulletin* 48 (2015), *available at* http://www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf. The response by fiduciaries of small (and even large) 401(k) plans may be to reduce the number of investment options to a category of "safe" options where the risk is low, but the return lower and the opportunity for broad diversification among asset classes reduced.

Further, by seeking to impose a duty on fiduciaries to review the prudence of investment options selected by previous fiduciaries even in the absence of changed circumstances, the DOL position is contrary to ERISA Section 409(b), which provides that no fiduciary is liable for breaches of fiduciary duties before he or she became a fiduciary. *See* 29 U.S.C. § 1109(b). The resulting confusion and liability could unnecessarily increase the operational and litigation expenses of many ERISA plans, to the detriment of both plan sponsors and participants.

As petitioners and the DOL do not deny, adoption of their position would result in a drastic increase in fiduciary liability, which Congress did not intend. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257-59 (1993) (declining to read a remedy into ERISA where Congress did not expressly provide for it). Their theory could expose fiduciaries to potential liability for making decisions that were prudent at the time they were made in the context of providing plan participants with a wide range of options with which they could assemble their own portfolios, but are challenged as imprudent more than six years later, with all the benefits of hindsight.

That the adoption of petitioners' theory of liability would result in enormous costs to ERISA plans is well-illustrated in this specific context, where numerous current plan fiduciaries have chosen to include retail mutual funds in their plans. Petitioners' underlying case is a broadside attack on the inclusion of retail mutual funds in 401(k) plans, but many plan fiduciaries at the time made the same selection decision for reasons discussed in the respondents' brief. The selection of retail mutual funds as investment options is a decision to be made by fiduciaries on a case-by-case basis using a reasonable process and taking into account the objectives of the plan and all other relevant matters, such as the availability of other investment options. *See Loomis*, 658 F.3d at 672-73. Although fundamental to petitioners' position, courts have rejected the proposition that retail mutual funds are somehow per se imprudent. *See Renfro v. Unisys Corp.*, 671 F.3d 314, 326-27 (3d Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 584-86 (7th Cir. 2009), *reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009). This is even true when institutional shares may be available. *See Loomis*, 658 F.3d at 672-73. Rather, courts have examined the entire mix of investment options made available to participants to determine if the plan fiduciaries have acted prudently. *See id*. To overturn the Ninth Circuit's decision and permit plaintiffs to litigate their retail-class theory would create significant litigation pressure on thousands of ERISA fiduciaries—thus upsetting the careful balance struck by Congress in crafting ERISA. *See supra* Part I.

The DOL's contrary assertion that upholding the Ninth Circuit's decision would "effectively exempt[] 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," DOL Br. 8-9, is incorrect. As already noted (*see supra* Parts I.A. & I.B.), ERISA fiduciaries are neither insulated from liability for their ongoing monitoring duties nor able to evade any applicable trust law duties. Rather, upholding the Ninth Circuit's position would only prevent the very type of litigation intended to be foreclosed by Section 413(1) and the vast amount of uncertainty and confusion that litigation over perhaps decades-old decisions would foster for sponsors, fiduciaries, and participants.

III. The DOL's Attempt To Regulate Via Litigation Warrants No Deference

The DOL's brief is a prime example of "regulation by litigation," an ad hoc process that creates enormous practical difficulties for fiduciaries trying to conform their conduct to the law, and warrants no deference from this Court. The DOL argues for the creation of a new standard of fiduciary responsibility previously unknown under ERISA and not previously articulated by the DOL. Indeed, the standard the DOL advances is not even foreshadowed by its regulations. It is inappropriate for the DOL to try to establish such a standard through litigation rather than the notice-and-comment regulatory process, where it would have the benefit of industry input. That is of particular concern where, as here, the DOL's litigation position, if adopted, would revive claims previously considered to be expired.

The DOL frequently issues guidance to ERISA fiduciaries about how to properly perform their duties, *see*, *e.g.*, U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities*, *available at* http://dol.gov/ebsa/publications/fiduciaryresponsbility.html (last visited Jan. 22, 2015), and even how to evaluate certain classes of investments, *see*, *e.g.*, U.S. Dep't of Labor, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* (2013), *available at*: http://www.dol.gov/ebsa/pdf/fsTDF.pdf. Prior to its briefing in this case, the DOL has issued no guidance that supported the view that retail mutual funds are in some sense imprudent when institutional shares are available. So, fiduciaries who have acted entirely in accordance with then-applicable standards might now face litigation exposure for the choices they or their predecessors have made.

The regulations the DOL *has* promulgated regarding the monitoring of fees require neither a full reassessment of the plan's portfolio absent changed circumstances nor that funds with objectively reasonable fees be set aside in favor of other, perhaps cheaper, options. Rather, the DOL regulations require a more robust reporting of fees from service providers to fiduciaries and the disclosure of those fees and expenses to plan participants where participants direct the investments of their own individual accounts. *See* 29 CFR § 2550.408b-2; 29 C.F.R. § 2550.404a-5.

Through those regulations, the DOL has already ensured that fiduciaries and plan participants have the fee and other expense information they need to make reasoned decisions about the investment options available to them in their plans. Without providing any further guidance as to the propriety of investing in retail mutual funds, much less fair notice to plan sponsors and fiduciaries that such funds are inappropriate investment options for 401(k) plans, the DOL is now supporting a litigation-driven approach to disapproving these funds, and its effort to do so warrants no deference from this Court. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012).

Prescription of what acts a fiduciary should take should be done by Congress, or if by the DOL via notice-and-comment rulemaking. Significantly, petitioners themselves admit that "there is no precise rule for how frequently" a fiduciary should reexamine their investments, but say that they should "examine the state of the [plan's] investments" from "time to time." Pet. Br. 26 (internal quotation marks omitted). Petitioners do not tell the Court whether that review should be undertaken quarterly, yearly, every five years, or on some other timeline. During the period when petitioners' inchoate standard would be litigated in the courts, thousands of plan fiduciaries would be operating under a cloud of uncertainty and millions of dollars may be spent on legal fees rather than benefitting the plans and their participants. If the DOL wants to create such an amorphous duty, it should go through the rulemaking process, with the benefits of notice and comment (and, if necessary, judicial review under the Administrative Procedure Act).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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