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 OF THE PENSION RIGHTS CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICUS CURIAE[1]

The Pension Rights Center is a nonprofit, nonpartisan consumer organization that has been working since 1976 to protect and promote the retirement security of workers, retirees, and their families. The Center represents the interests of retirement plan participants and beneficiaries before Congress, administrative agencies, and the courts.

Over the past three decades, the retirement landscape has shifted from guaranteed employer-paid traditional pensions in which employees are promised set monthly benefits for life, to voluntary employee-paid retirement savings arrangements, such as 401(k) plans, where an employee's retirement security depends on the employee's sophistication and ability to construct a suitable investment portfolio from the investment options that plan fiduciaries include in a plan's investment menu.

Recognizing the difficulties that participants face in managing their 401(k) accounts, the Pension Rights Center has devoted considerable attention to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus The Pension Rights Center represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represent that all parties have consented to the filing of this brief.

improving 401(k) plan outcomes. The Center has testified before Congress and federal agencies concerning 401(k) fees, fiduciary responsibilities, and plan transparency. Examples include the Center's testimony on disclosure of 401(k) fees before the Senate Health, Education, Labor, and Pensions Committee, and on fiduciary status before the Department of Labor.[2] Center staff have written fact sheets and blogs on 401(k) fee and fiduciary issues, have been quoted in the national media, and have filed amicus briefs on 401(k)-related issues in this Court and others.[3]

Ensuring that 401(k) management and investment fees are no higher than necessary is a key component to improving 401(k) outcomes. The Center believes that the Court of Appeals' decision in this case, by effectively permitting plans to ignore the level of fees charged by a mutual fund once a fund has been a plan investment option for six years, will

[2] *Testimony on 401(k) fee disclosure by Olena Berg Lacy on behalf of PRC to the Senate Health, Education, Labor, and Pensions Committee*, Pension Rights Center (September 17, 2008), http://www.pensionrights.org/newsroom/speeches-statements/testimony-401k-fee-disclosure-olena-berg-lacy-behalf-prc-senate-health-; *Testimony of Norman Stein before the Department of Labor on proposed regulations defining fiduciary*, Pension Rights Center (March 1, 2011), http://www.pensionrights.org/newsroom/speeches-statements/testimony-norman-stein-department-labor-proposed-regulations-defining-f.

[3] See www.pensionrights.org for fact sheets, blogs, news articles, and Center amicus briefs related to 401(k) issues.

result in higher fees and thus lower retirement savings for participants in 401(k) plans. The Center believes it is essential to recognize that a plan fiduciary has a continuing duty to periodically monitor plan investment options for prudence and that plan participants are able to enforce this duty.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in ruling that participants in a 401(k) plan cannot challenge the continued offering of mutual funds that charge excessive fees more than six years after the funds were chosen unless the participants show that changed circumstances should have prompted the plan's fiduciaries to conduct a review of those fees. Participants should be permitted to enforce the fiduciary duty to review and replace imprudent investments more than six years after the funds were chosen in light of the mechanics of the market for mutual funds available to 401(k) plans. Participants in plans managed by fiduciaries who do not comply with the duty to review and replace imprudent investments will pay unnecessarily high fees on their retirement savings. Further, insulating fiduciaries from claims challenging their failure to monitor mutual fund expenses after six years will reduce competition over fees and raise the cost of mutual fund investments in 401(k) plans, thereby eroding the retirement savings of American workers.

Restricting participants' ability to require 401(k) plan fiduciaries to replace overpriced investment options after they have been retained in the plan for more than six years is unsupported by the Employee Retirement Income Security Act of 1974 ("ERISA"), which requires fiduciaries to review and replace imprudent investments on a periodic basis. A fiduciary's failure to review and replace imprudent investments constitutes a distinct breach of fiduciary duty that is separate from any breach that occurred when the funds were selected. Because Tibble alleges violations of the duty to review and replace imprudent investments that occurred within the limitations period set by 29 U.S.C. § 1113(1), the Court of Appeals' judgment should be reversed.

ARGUMENT

I. THE COURT OF APPEALS' RULING WOULD REDUCE COMPETITION OVER MUTUAL FUND EXPENSES AND INCREASE THE COST OF 401(K) PLAN INVESTMENTS

The Court of Appeals' ruling would reduce mutual funds' incentive to compete in terms of fees offered to 401(k) plans, thereby increasing the cost of mutual funds to all 401(k) plan participants. If the Court of Appeals' holding were affirmed, even participants in plans that continued monitoring the fees charged by mutual fund providers might pay higher fees overall as a result of reduced competition.

Mutual funds "have become the primary vehicle for 401(k) plan investments, with the share of employer-sponsored 401(k) plan assets held in mutual funds jumping sevenfold – from 9 percent at year-end 1990 to 63 percent at year-end 2013." 20 Investment Company Institute, *The Economics of Providing 401(k) Plans*, ICI Research Perspectives 2 (July 2014) [hereinafter *2014 ICI Research Perspectives*], *available at* www.ici.org/pdf/per20-03.pdf. Mutual funds held in defined contribution plans and individual retirement accounts constituted twenty-eight percent, or $6.5 trillion, of the U.S. retirement market in 2013. Investment Company Institute, *2014 Investment Company Fact Book* 147 (54th ed. 2014) [hereinafter *2014 ICI Fact Book*], *available at* www.icifactbook.org. As mutual funds have increased as a percentage of retirement plan assets, their costs have declined. Average expense ratios of mutual funds in 401(k) plans declined by twenty-five percent for equity funds, twenty-one percent for bond funds, and nineteen percent for mixed bond and equity funds since 2000. *2014 ICI Research Perspectives*, *supra*, at 1.

Competition among mutual fund providers has contributed significantly to the decline in expense ratios. *See id.* at 11 ("Both inside and outside the 401(k) plan market, mutual funds compete among themselves and with other financial products."); John C. Coates, IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry*, Harvard Law and Econ. Discussion Paper No. 592, August 2007, pt. III, *available at* http://ssrn.com/abstract=1005426 (collecting evidence of price competition in mutual fund industry); Brian Reid, Investment Company Institute, *Competition in the Mutual Fund Business*, Research Commentary 6 (2006), *available at* http://www.ici.org/pdf/rc_competition.pdf ("[S]hareholders reward funds that are best able to deliver performance and service at a competitive level of fees.").

Competition over price depends on fiduciaries actively comparing the cost and performance of alternative funds and substituting funds when cheaper or better-performing alternatives are available. *See 2014 ICI Research Perspectives*, *supra*, at 11 ("In the 401(k) plan market, performance and cost-conscious plan sponsors also impose market discipline [by] regularly evaluat[ing] the performance of the plans' investments, and performance reflects fees." (footnote omitted)). Empirical evidence corroborates that plan fiduciaries conduct this monitoring activity on an ongoing basis. *See* Deloitte et al., *Annual Defined Contribution Benchmarking Survey* 27 (2014) (survey of 265 defined contribution plan sponsors, reporting that in 2013, sixty-five percent of plans reviewed funds' investment performance on a quarterly basis, seventeen percent semiannually, and thirteen percent annually, and that seventy-one percent handle underperforming funds by replacing them). By shielding fiduciaries from liability for failing to monitor plan investments after six years, the Court of Appeals' ruling would reduce the incentive for fiduciaries to select lower-cost, better-performing mutual funds and undercut the competitive trend that has driven down costs borne by 401(k) plan participants.

Eliminating participants' right to seek recovery from fiduciaries who fail to replace overpriced investment options with less expensive equivalents after six years will have serious consequences for 401(k) plan participants. A participant who invested last year in an equity mutual fund charging last year's average rate paid twenty-five percent less in fees for her investment than a participant who invested and paid the average rate in 2000. *See 2014 ICI Research Perspectives*, *supra*, at 1. Over the lifetime of a typical retirement investment, even marginal differences in mutual fund expenses translate to significant decreases in participants' investment returns and aggregate retirement savings. *See* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, *Investor Bulletin: Mutual Fund Fees and Expenses* 1-2 (May 12, 2014), *available at* www.sec.gov (providing example showing fourteen percent decrease in investment return due to .75 percentage point increase in annual expenses over 20 years). If the fiduciaries responsible for choosing the investment options in participants' 401(k) plans do not take advantage of declining expense ratios by replacing their initial investments with cheaper alternatives, the benefits of competition in the form of decreased fund expenses are lost to the participants. Allowing fiduciaries to remain passive while participants' retirement savings are eroded by avoidably high fees is incompatible with ERISA fiduciaries' fundamental duty "to preserve and maintain" participant investments. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 572 (1985).

II. EDISON VIOLATED THE DUTY TO REVIEW AND REPLACE IMPRUDENT INVESTMENTS WITHIN THE STATUTE OF LIMITATIONS PERIOD

A. ERISA's Duty of Prudence Includes the Duty to Monitor and Replace Imprudent Investments

29 U.S.C. § 1104(a)(1)(B) provides that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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[.]

This provision "imposes 'strict standards of trustee conduct . . . derived from the common law of trusts[.]' " *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465 (2014) (quoting *Central States*, 472 U.S. at 570). Among the principles developed in the law of trusts is the trustee's "continuing duty to see to it that the trust remains appropriately invested." 4 Austin Wakeman Scott et al., *Scott & Ascher on Trusts* § 19.4, p. 1451 (5th ed. 2007); G. Bogert & G. Bogert, Law of Trusts and Trustees § 684, pp. 147-48 (3d ed. 2009) ("The duty to review trust investments" includes "a systematic consideration of all the investments of the trust at regular intervals."). If it is improper to retain a particular trust investment, the trustee has a duty to dispose of the investment within a reasonable time. 4 Scott, *supra*, at 1439.

For example, in *In re Stark's Estate*, 15 N.Y.S. 729 (N.Y. Surr. Ct. 1891), the court held that a trustee who retained mortgages that were depreciating in value and had defaulted on interest payments at the time they were added to the trust breached separate duties, "*first*, in making the original investment of the fund; and, *second*, in the failure to use such proper care, watchfulness, and oversight . . . as men in general of ordinary intelligence and prudence in such matters exercise in their own affairs." *Id.* at 732. The trustee's failure to review and replace the trust's mortgage investments constituted an independent breach of duty, distinct from the original selection of the investment, because

> [i]t is not by a prudent investment alone that a trustee performs his whole duty in regard to a trust fund. He is still bound to be watchful, keep himself informed . . . and take notice of all those things affecting the investment which a man of fair judgment, care, and prudence would take and keep in

> consideration in the matter of a loan of his own moneys[.]

Id. at 731.[4]

Similarly, in *State St. Trust Co. v. De Kalb*, 157 N.E. 334 (Mass. 1927), trustees were held liable for retaining mortgage investments as part of the trust over an eleven-year period, despite knowing that the mortgages were declining in value at the time they became responsible for the trust. *Id.* at 335-36. Pre-ERISA cases from other jurisdictions were in accord that trustees have an ongoing duty to review and replace imprudent investments and that this monitoring duty is distinct from the duty to act prudently when the investments are initially made or received. *E.g.*, *In re Allis' Estate*, 209 N.W. 945, 948 (Wis. 1926) (statute authorizing investment in particular stock "did not relieve the trustees from the duty of exercising the degree of diligence and prudence required of trustees in determining whether this stock should be continued as an investment for these trust funds"). Courts interpreting ERISA's fiduciary duties have recognized that the duty to review and replace inappropriate investments was "well established at common law" at the time of ERISA's enactment. *Morrissey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977) (citing

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[4] *Accord In re Cady's Estate*, 207 N.Y.S. 385, 376 (N.Y. App. Div. 1925) (trustee "neither acted originally in good faith in the exercise of sound discretion nor after he obtained [trust investments] with reasonable care in protecting the estate against loss").

3 Austin Wakeman Scott, *The Law of Trusts* § 209 (3d ed. 1967)).

No "competing congressional purposes" justify excusing ERISA fiduciaries from these trust law duties. *Varity Corp. v. Howe*, 516 U.S. 489, 489 (1996). Departing from the trust law standard would "afford less protection to employees and their beneficiaries than they enjoyed" at common law, *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 114 (1989), contravening "Congress' desire to offer employees enhanced protection for their benefits[.]" *Varity*, 516 U.S. at 497. The weight of authority among the Courts of Appeals recognizes that ERISA fiduciaries must review plan investments periodically to determine whether they should be retained or sold and that this duty is distinct from the obligation to act prudently when selecting investments.[5] Holding that

[5] *See Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 597 (6th Cir. 2012) (plan administrator bore fiduciary responsibility for both selection and monitoring of defined contribution plan investment options), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("[W]e agree with the position taken by the Secretary of Labor in her amicus curiae brief that the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach."); *Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299, 312 (5th Cir. 2007) (noting distinct duties of "selection and monitoring of plan investments alternatives"); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (ERISA's fiduciary standards apply to "initially choosing or continuing to designate investment alternatives" in defined contribution plan) (quoting Letter from the Pension and

(Continued on following page)

prudence claims challenging fiduciaries' failure to review and sell imprudent investments are time-barred because the fiduciaries also violated their duties in *choosing* the investments would eliminate the distinction between these separate duties and "would recognize no obligation on the part of a plan fiduciary to dispose of unsound investments once he had been neglectful for six years[.]" *Buccino v. Cont'l Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

Enabling participants to challenge fiduciaries' failure to monitor and replace imprudent investments more than six years after the investments were made would not require fiduciaries to screen investments daily. *See* 4 Scott, *supra*, at 1451 ("The trustee need not, perhaps, watch the ticker as closely as a day trader would[.]"). The common law looked to "'the usual conduct of the man of average prudence in the care of his own estate . . . in making permanent investment of his savings outside of ordinary business risks'" to determine the prudence of a trustee's investment actions. *In re Cook's Estate*, 171 A. 730, 731 (Del. Ch. 1934) (quoting *Mattocks v. Moulton*, 24 A. 1004, 1006 (Me. 1892)). Similarly, ERISA requires

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Welfare Benefits Administration, U.S. Dep't. of Labor, to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997)); *Martin v. Consultants & Adm'rs., Inc.*, 966 F.2d 1078, 1087-88 (7th Cir. 1992) (faulting trustees for "ignor[ing] the continuing nature of a trustee's duty under ERISA to review plan investments and replace imprudent ones"); *Morrissey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977) (holding that ERISA fiduciaries, like common-law trustees, must review plan investments and dispose of imprudent ones).

fiduciaries to act according to the standard of "a prudent man acting in a like capacity and familiar with such matters . . . in the conduct of an enterprise of a like character and with like aims[.]" 29 U.S.C. § 1104(a)(1)(B).

Empirical evidence demonstrates that the prevailing practice among fiduciaries "acting in a like capacity" is to review plan investments on a quarterly or other periodic basis and to replace imprudent funds with better alternatives. According to a survey of 265 defined contribution plan sponsors conducted by Deloitte, sixty-five percent of respondents reported that they evaluated fund performance quarterly,[6] seventeen percent did so semi-annually, and thirteen percent did so annually. Deloitte et al., *supra*, 27. In addition, seventy-one percent of respondents reported that they replaced funds that underperformed. *Id.* These results were approximately the same in each of the three survey years reported. *Id.* Because fiduciaries generally monitor and replace investments on a regular basis, no significant additional costs will be imposed on plan fiduciaries by requiring them to continue their existing practices. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 113 (2008) (applying trust-law standards absent a "significant inconsistency" with other purposes).

[6] Because mutual funds' expenses are paid out of fund assets, the funds' "performance reflects fees." *2014 ICI Research Perspectives, supra*, at 11.

Department of Labor regulations facilitate fiduciaries' monitoring duty by requiring service providers to disclose their compensation "with respect to each investment contract, product, or entity that holds plan assets," both initially and upon request by the fiduciary, or whenever the service provider's compensation changes. 29 C.F.R. § 2550.408b-2(c)(iv)(E); *see id.* § 2550.408b-2(c)(v)-(vi). In the 2014 Deloitte survey, sixty percent of respondents acknowledged that these disclosures would enable them to manage plan investments more actively. Deloitte et al., *supra*, at 32 ex. 6.11. Thirty-five percent of respondents who thought the disclosures would have a "low impact" thought so because "most plan sponsors already have access to this information and are actively managing fees already." *Id.* Moreover, because the prudent person standard "is not concerned with results," fiduciaries who comply with the duty to review plan investments will not be held liable merely because the investments performed poorly. *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). Rather, they will be liable if they did not "employ[ ] the appropriate methods to investigate the merits of the investment[,]" *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (internal quotation marks omitted), and replace investments that were imprudent to retain.

B. The Edison Fiduciaries Breached the Duty to Monitor and Replace Imprudent Investments Within the Statute of Limitations

The Court of Appeals erred in construing the Edison fiduciaries' alleged breaches of the duty to review plan investments periodically and replace imprudent ones as a failure to remedy an earlier breach that occurred when the investments were selected. Pet. App. 18 (claiming Tibble "confus[ed] the failure to *remedy* the alleged breach of an obligation, with the commission of an alleged *second* breach, which, as an overt act of its own recommences the limitations period" (internal quotation marks omitted)). Contrary to the Court of Appeals' holding, because the duty to review and replace inappropriate investments is distinct from the duty to act prudently when selecting investments initially, failure to remove an imprudent investment *is* "an alleged *second* breach[.]" *Id.* (internal quotation marks omitted).

The Court of Appeals for the Second Circuit recognized as much in *Morrissey v. Curran,* 567 F.2d 546 (2d Cir. 1977), where a participant challenged the investment of an employee benefit plan in an allegedly imprudent venture. *See id.* at 548. The district court concluded that the act of making the investment did not constitute a breach of any duty governed by ERISA or other federal law because the investment was made prior to ERISA's enactment. *See id.* at 547. The Court of Appeals reversed, holding that regardless of whether the original decision to make the investment was subject to ERISA, the fiduciaries' failure subsequently to review and remove this investment after ERISA's enactment constituted a separate breach of the ERISA-imposed duty "to dispose of any part of the trust estate which would be improper to keep." *Id.* at 548-49.

Similarly, in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992), the Department of Labor ("DOL") challenged the award of a series of contracts to a dental services provider in exchange for kickbacks. *Id.* at 1082. The plan fiduciaries argued that the DOL's suit challenged the bidding procedure for the contracts and, because that procedure was established after the applicable limitations period expired, the DOL's suit was barred as to both the initial contract and a subsequent contract awarded according to the same procedure. *Id.* at 1087. The Seventh Circuit rejected this defense as to the second contract because, notwithstanding that the bidding procedure was adopted after the statute of limitations expired, the award of the second contract constituted "a repeated, rather than a continued, violation" of the fiduciaries' obligation "to review plan investments and eliminate imprudent ones." *Id.* at 1087-88.

As in *Morrissey* and *Martin*, Tibble alleges violations of the duty to monitor and replace plan investments within the applicable limitations period. 29 U.S.C. § 1113(1) establishes two limitations periods, one (Subpart (A)) that runs six years from "the last action which constitutes a part of the breach," and another (Subpart (B)) that, "in the case of an omission," runs from "the latest date on which the fiduciary could have cured the breach." 29 U.S.C. § 1113(1)(A)-(B). Tibble alleges that the Edison fiduciaries breached duties "to monitor the fees and expenses paid by the Plan," thereby "causing and/or allowing the Plan to pay fees and expenses that were . . . unreasonable," and to "establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable[.]" J.A. at 92 & 93.

The District Court found that all three of the challenged funds were held by the Plan no less recently than October 2007. Pet. App. 94, 96, 97. Accordingly, under Subpart (A), the "last action which constitutes part of the breach" was the fiduciaries' failure to use prudence in monitoring the fees charged by the challenged retail funds until 2007. 29 U.S.C. § 1113(1)(A). Alternatively, Tibble's allegations that the Edison fiduciaries failed to comply with their monitoring obligations readily may be characterized as "omissions," and therefore subject to the limitations period in § 1113(1)(B). *See* "Omission," Black's Law Dictionary 1197 (9th ed. 2009) ("A failure to do something; esp., a neglect of duty."); "Omission," Webster's Seventh New Collegiate Dictionary 589 (1970) ("[A]pathy toward or neglect of duty."). Although Tibble argued under both subparts of 29 U.S.C. § 1113(1),[7] the Court of Appeals confined its analysis to Subpart (A) of § 1113(1), but recognized that Tibble's claims would be timely under Subpart (B). Pet. App. 18 (acknowledging that "in the case of omissions the statute already embodies what the beneficiaries urge"). Under Subpart (B), the "latest date on which the fiduciaries could have cured the breach" by replacing the challenged funds with their cheaper institutional equivalents also occurred no earlier than 2007. 29 U.S.C. § 1113(1)(B); *cf.* "Cure," Black's Law Dictionary 439 (9th ed. 2009) ("To remove legal defects or correct legal errors."). Because Tibble filed his lawsuit in August of 2007, his prudence claims are timely under either subpart of § 1113(1).

The Court of Appeals' decision is unfounded in its concern that § 1113(1)(A) would be "meaningless" if participants are allowed to challenge the prudence of offering overpriced funds more than six years after they were added to the plan. Pet. App. 18 (internal quotation marks omitted). Under Tibble's interpretation, § 1113(1)(A) will prevent participants from suing for breaches of the failure to monitor and replace imprudent investments that occurred more than six years in the past. Similarly, any losses recoverable by participants will be limited to losses caused by

[7] *See* Pet. C.A. Br. at 16 (arguing that " 'the latest date on which the fiduciary could have cured the breach' " occurred within six years (quoting 29 U.S.C. § 1113(1)(B))).

fiduciaries' failures to review and replace imprudent investments that occurred in the past six years.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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