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1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next today in 13-550, Tibble v. Edison International.  
5 Mr. Frederick.

6 ORAL ARGUMENT OF DAVID FREDERICK  
7 ON BEHALF OF THE PETITIONERS

8 MR. FREDERICK: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 This Court granted certiorari to decide  
11 whether ERISA's statute of limitations bars claims for  
12 breaches of fiduciary duty regarding investment options  
13 that were added to a plan more than six years before the  
14 suit was filed. The answer is no. The statute does not  
15 bar such claims for three reasons.

16 First, ERISA's fiduciary duties include  
17 monitoring existing investment options and removing  
18 imprudent ones. Second, each failure to review and  
19 remove an imprudent investment option starts a new  
20 statute of limitations.

21 JUSTICE SOTOMAYOR: One of the things that I  
22 was looking for, Mr. Frederick, in the record is some  
23 evidence as to what exactly that monitoring entails.  
24 I -- I took your brother's responsive brief as saying it  
25 can't be a complete due diligence that you do when you

1 buy something, otherwise, the funds would grind to a  
2 halt.

3 So where in the record is there some proof  
4 of what the monitoring -- or what the level of  
5 monitoring should have been and what the breach was  
6 here?

7 MR. FREDERICK: Justice Sotomayor, we were  
8 precluded at summary judgment from making the argument  
9 that the continued imprudence of maintaining these  
10 investment options was a breach of fiduciary duty. The  
11 district court's summary judgment order -- and I would  
12 direct the Court to Petition Appendix 262 to 263 --  
13 barred us from bringing imprudence claims as to the  
14 funds added in 1999. At page 180 in the Petition  
15 Appendix, the district court explained that applying a  
16 circuit precedent known as Phillips, the plaintiffs had  
17 to prove that there was a change in circumstances  
18 significant enough to make the continued investment in  
19 that investment option an imprudent one.

20 So the theory that we were precluded by the  
21 summary judgment order from advancing was the theory  
22 that keeping this investment option available during  
23 this time period was imprudent.

24 JUSTICE SCALIA: But if -- if we agree that  
25 there had to be some significant event or change that

1 would trigger the -- the need to reexamine this  
2 investment, then we would affirm.

3 MR. FREDERICK: That's correct.

4 JUSTICE SCALIA: Okay.

5 MR. FREDERICK: What -- what happened at  
6 trial was that after the summary judgment order, the  
7 judge barely opened the door to say if, plaintiffs, you  
8 can show that there was a significant enough change,  
9 I'll allow you to prove that there was -- that it was  
10 equivalent to the new selection of an investment option,  
11 and -- and we lost on that issue as a factual matter.  
12 That was affirmed on appeal. And --

13 JUSTICE SCALIA: What's your position?  
14 That -- that every -- every stock that is owned has to  
15 be reviewed every year as though it was a new purchase?

16 MR. FREDERICK: No. Our position is that  
17 the periodic duty to monitor requires at least some  
18 familiarity with the filings of that particular fund and  
19 an awareness of what the expenses and performance of it  
20 are. This expense ratio information, Justice Scalia, is  
21 readily available on the Internet; it is readily  
22 available with a phone call or two. It is part of the  
23 SEC filings. And unlike an initial review where a fund  
24 manager would look at thousands of mutual funds in the  
25 industry, all that we're saying here is that the trustee

1 should have looked at what was publicly available  
2 information about the very mutual funds that were part  
3 of this particular plan.

4 JUSTICE GINSBURG: You also said, did you  
5 not, that -- that there was this committee that met  
6 periodically to review investments? I think you said  
7 they met quarterly.

8 MR. FREDERICK: Correct.

9 JUSTICE GINSBURG: And that there had been,  
10 as a result of those quarterly reviews, changes --

11 MR. FREDERICK: That's correct.

12 JUSTICE GINSBURG: -- in investments.

13 MR. FREDERICK: That's correct. And, in  
14 fact, the district court found that as to a fund that  
15 was being reviewed in 2003, they discovered that there  
16 were institutional shares available and they immediately  
17 switched to the lower cost institutional shares. But  
18 the district court further found that as to the other  
19 funds that were added in 2002, the trustees had never  
20 made an inquiry about the availability of lower cost  
21 institutional funds.

22 JUSTICE SOTOMAYOR: That was one of the  
23 questions I had in my own mind. Did you ever argue  
24 below that once they found out about the  
25 institutional -- the institutional funds, that that was

1 a changed circumstance?

2 MR. FREDERICK: Well, it was only as to the  
3 one fund that had been changed, but the court recall in  
4 its summary judgment order on page 262 had said, you're  
5 barred from bringing claims of imprudence as to the  
6 funds added in 1999.

7 JUSTICE SOTOMAYOR: Unless there were  
8 changed circumstances.

9 MR. FREDERICK: Unless there were  
10 significant changes, so significant -- and this was the  
11 holding of the prior Ninth Circuit and the Fourth  
12 Circuit and Eleventh Circuit precedents that would be  
13 tantamount to adding a new fund. So just simply because  
14 there are existing institutional share funds for mutual  
15 funds out there was not deemed by the district court to  
16 meet that standard.

17 And in their post-trial brief, and this is  
18 at the docket at page 3 -- docket number 381 at page 13,  
19 which we quote in our reply brief, "Edison said we had  
20 gone beyond what the district court summary judgment  
21 order was and, therefore, we were precluded from making  
22 arguments about the imprudence of the 1999 funds."

23 JUSTICE ALITO: If we forget what happened  
24 at earlier stages of this litigation, and I think that  
25 the parties' positions have clarified, when you put it

1 that way, as this has progressed, what -- on what point  
2 of law do you and Mr. Hacker now disagree? I'm not sure  
3 you disagree. You certainly do not disagree about what  
4 the answer to the question presented is. You both say  
5 no. It is not categorically barred. So on what point  
6 of law do you disagree?

7 MR. FREDERICK: I think that the point of  
8 law that we disagree -- and I would urge you,  
9 Justice Alito, to ask that question to Mr. Hacker,  
10 because their brief is somewhat schizophrenic. At the  
11 beginning, they say no, and at the end, they say yes.  
12 They ask you to affirm the Ninth Circuit on the merits,  
13 and the Ninth Circuit held that there was a significant  
14 change in circumstances.

15 JUSTICE ALITO: Now, but forget --

16 MR. FREDERICK: And that is the point,  
17 Justice Alito, where I think we disagree. We do not  
18 believe that ERISA's statutory standard, which is at  
19 1104(a)(1)(b), and it says that the standard by statute  
20 is what a reasonable investor would do under the  
21 circumstances then prevailing, would require the  
22 introduction of an added burden to overcome, which is  
23 that there had been significant changed circumstances  
24 since the initial investment.

25 That lookback within the limitations period



1 looks at whether or not the investment option is an  
2 imprudent one. And it doesn't matter whether there had  
3 been significant or insignificant changed circumstances  
4 since the initial option.

5 And let me point to you the fact that the  
6 district court here adopted this principle and this rule  
7 to lead to really absurd results. The Ninth --

8 JUSTICE ALITO: Well, I will ask Mr. Hacker.  
9 But I -- you understand him to take the position that  
10 unless there are some changed circumstances, a trustee  
11 can simply make no inquiry about the continued prudence  
12 of assets purchased in the past.

13 MR. FREDERICK: That's actually --

14 JUSTICE ALITO: You just sit on them. You  
15 don't even think about whether this is still a good  
16 investment or not. That -- that -- you think that's his  
17 position.

18 MR. FREDERICK: Well, Justice Alito, whether  
19 that's his position anymore is of no moment to me.  
20 That's the position of the Fourth Circuit in the David  
21 case, the Eleventh Circuit in the Fuller case, the Ninth  
22 Circuit in this case applying the Phillips case. So  
23 those are the cases that we urged as conflicts that  
24 should be resolved in favor of a statutory construction  
25 that says the duty to monitor and remove imprudent

1 investments is part of ERISA's fiduciary duty.

2 JUSTICE KAGAN: And if I could just ask  
3 again, Mr. Frederick, what that duty includes in  
4 addition to the changed circumstances situation. In  
5 other words, just on a continuing basis -- and tell me  
6 in a way that includes this case but isn't limited to  
7 this case -- on a continuing basis what is a trustee  
8 supposed to do under the prudent person's standard?

9 MR. FREDERICK: Sure. Three things. One,  
10 look at the performance on a regular basis, a periodic  
11 basis. Number 2, look at the expenses and determine is  
12 there a cheaper way to get the same investment for less  
13 money that's coming out of the beneficiaries' assets.  
14 Number 3, has there been an -- an alteration in the  
15 management such that one ought to look further and more  
16 deeply into it.

17 And at the very least, Justice Kagan, one  
18 would think you'd look at the SEC filings for that  
19 mutual fund to determine whether or not there had been  
20 something that would require a -- a determination of  
21 imprudence. And that's not heavy lifting.

22 The district court here found that as to  
23 the three funds added in 2002, the trustee had never  
24 even called the mutual fund to say, hey, we've got  
25 \$3 billion in assets. Do you think we could get a

1 better rate for the expenses charged to the  
2 beneficiaries? They never even asked the question.

3 So at the very least, you could write an  
4 opinion that says, there's a tribal issue of fact as to  
5 whether or not the burden was so great on the fiduciary  
6 that it couldn't do the simple thing that the district  
7 court already found as a matter of fact had been  
8 breached with respect to the 2002 funds.

9 Now, it with respect to one of the 2002 funds,  
10 there were two funds that were still being held by the  
11 plan at the time of judgment. One was added in 2002.  
12 The other was added in 1999. The district court, as  
13 part of its order -- post-trial order, ordered Edison to  
14 change the 2002 fund. At that time, the retail share  
15 expense ratio was 24 percent higher than the  
16 institutional, and the district court ordered that that  
17 be changed so that the institutional share class be  
18 available. As to what the '99 fund, the Alliance  
19 Capital Appreciation Fund, the district court didn't do  
20 that, even though the expense ratio was 37 percent  
21 higher from the retail share to the institutional share.

22 JUSTICE KAGAN: I would think,  
23 Mr. Frederick -- tell me if you disagree with this. I  
24 would think that it's possible that a decision to buy  
25 one of these funds with high expenses would be imprudent

1 in the first place, and yet, it might be prudent not to  
2 switch midstream. In other words, there are costs to  
3 switching midstream. You have to tell everybody about  
4 it. I'm not sure what the costs are.

5 But is -- is it possible that a decision  
6 that was imprudent in the first place, to -- to buy,  
7 that it, nonetheless, could be true that a hold decision  
8 is prudent?

9 MR. FREDERICK: It -- it's theoretically  
10 possible, and in the world of Supreme Court  
11 hypotheticals, Justice Kagan, maybe there is a situation  
12 in which that would make sense.

13 In the real world of investing, what we're  
14 talking about here is economies of scale. The only  
15 difference between the retail share class and the  
16 institutional share class is that the institutional  
17 shares have more money invested in the exact same  
18 assets.

19 JUSTICE BREYER: Do you think both parties  
20 agree that there is a duty, a fiduciary duty every so  
21 often, and that's -- I don't know how often, to do some  
22 kind of prudence review of the investments you still  
23 hold? You agree to that. That's your point.

24 MR. FREDERICK: That's correct.

25 JUSTICE BREYER: So I should ask the other

1 side if they agree to it.

2 MR. FREDERICK: That's correct.

3 JUSTICE BREYER: Now, if they do agree to  
4 that, my guess is that they will possibly, from what  
5 they've read, is they're going to start arguing that the  
6 Ninth Circuit never held to the contrary. They are  
7 going to say, Oh, yeah, but it wasn't clearly put to  
8 them.

9 And the more I look into it, I'm not so sure  
10 it was so clearly put, but I can't quite say whether it  
11 was waived either. And -- and so what should we do  
12 about that? Should we -- I'm pretty sure that they  
13 didn't raise this as an objection in their reply brief  
14 on -- in this Court, in the cert petition.

15 MR. FREDERICK: Justice Breyer, this has  
16 been waived in six different briefs that the other side  
17 has filed.

18 JUSTICE BREYER: You say they waived their  
19 right to make that. Okay.

20 MR. FREDERICK: That's correct. Now --

21 JUSTICE BREYER: Let me assume you're right  
22 about that.

23 MR. FREDERICK: And let me --

24 JUSTICE BREYER: Now, still, then, what do I  
25 do?

1 MR. FREDERICK: Okay. What I'd like you  
2 to --

3 JUSTICE BREYER: Because I -- even if they  
4 waived this argument, there is a problem with me  
5 suddenly, or any of us, describing this fiduciary duty,  
6 the nature of it, whether it's violated here or not,  
7 when there is no real lower court opinion.

8 MR. FREDERICK: There is. That's -- that's  
9 incorrect, Justice Breyer. That assumption is not  
10 correct. If you look at Petition Appendix pages 18 and  
11 19, there are two passages where the Ninth Circuit got  
12 the law wrong, and we ask you to reverse and to disavow  
13 those two passages.

14 JUSTICE BREYER: Okay. So the opinion, in  
15 your view, could be just this. Here are the two  
16 passages. They said you don't have a prudence  
17 obligation to review unless there are changes. They are  
18 wrong about that. There is a prudence review. Send it  
19 back.

20 MR. FREDERICK: That's correct. And allow  
21 the district court to have a trial. We lost summary  
22 judgment.

23 JUSTICE BREYER: Well, I don't want to start  
24 that.

25 MR. FREDERICK: Well --

1 JUSTICE BREYER: I mean, they might find  
2 there is enough to get to the trial. I don't know about  
3 all of that.

4 MR. FREDERICK: Right. But the two passages  
5 start midway down page 18 of -- of the Petition Appendix  
6 where the court said, "Characterizing the mere continued  
7 offering of a plan option without more as a subsequent  
8 breach would render the statute of limitation  
9 meaningless."

10 That's not -- that does not take into  
11 account the continuing duty that the fiduciary has to  
12 periodically review and --

13 JUSTICE SCALIA: I am sure some -- some such  
14 duty, but I am -- life is too short. You're -- you're  
15 going to ask every Federal district court not only to  
16 determine whether a particular purchase was sensible or  
17 not, but to say year by year whether you've done a  
18 careful enough review. I mean, I -- I just -- I just  
19 don't think courts are capable of doing that.

20 The -- the other side offers some help by  
21 saying if there's a changed circumstance, you've got to  
22 do it.

23 MR. FREDERICK: Well --

24 JUSTICE SCALIA: And -- and you yourself  
25 say, Oh, well, this is a very special case, because it

1 was obvious. Any fool would know that there are two  
2 classes of these stocks and the one class has a much  
3 cheaper expense to holding it. Why not say that  
4 where -- where there's been a change of circumstance or  
5 the imprudence of holding it is obvious?

6 MR. FREDERICK: Well, that's putting  
7 barnacles on the statute Congress didn't put,  
8 Justice Scalia. And if you take the 53 million  
9 Americans that rely on 401(k) programs for their  
10 retirement assets and you tell them year after year  
11 after year you have to pay expense ratios that are much  
12 higher than they should, you're depleting retirees'  
13 assets in a way Congress did not envision when it  
14 enacted the statute.

15 JUSTICE SCALIA: The expense ratio is  
16 handled -- is handled in -- in what I propose. Where  
17 it's obvious on its face that you -- you continue the  
18 investment in the same company, but you -- you just get  
19 a different class of stock and you get lower charges.

20 MR. FREDERICK: Well, I don't think --

21 JUSTICE SCALIA: That's obvious.

22 MR. FREDERICK: The -- it's --  
23 Justice Scalia, there's no basis in the statutory  
24 language for the rule.

25 If I could save the balance of my time.



1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Ms. Saharsky.

3 ORAL ARGUMENT OF NICOLE A. SAHARSKY  
4 FOR UNITED STATES, AS AMICUS CURIAE,  
5 SUPPORTING PETITIONERS

6 MS. SAHARSKY: Mr. Chief Justice, and may it  
7 please the Court:

8 I think the Court's questions today  
9 recognize that there are ultimately two issues that will  
10 need to be resolved in this case. Only one of them,  
11 though, is before the Court in the question presented.  
12 And those two issues are: First, whether this claim for  
13 ongoing monitoring and failure to switch the funds is  
14 timely; and then the second issue is, is there breach of  
15 fiduciary duty within the limitations period. As  
16 Justice Kagan asked, what does the monitoring duty  
17 entail, et cetera, et cetera.

18 And although I'm happy to answer questions  
19 on that second issue, I just want to make the Court  
20 aware that the reason it's not briefed in any kind of  
21 extensive way is because it's not the question on which  
22 the Court granted cert.

23 If I can just turn to the first question, to  
24 look at the nature of Petitioner's claims.

25 JUSTICE SCALIA: And that's fine. Would you

1 just -- just give us a hint as to whether the government  
2 agrees with Mr. Frederick?

3 MS. SAHARSKY: Yes. I mean, we filed a -- a  
4 brief in support of him.

5 JUSTICE SCALIA: Yeah. So -- so you agree  
6 entirely that there's no -- no particular test --

7 MS. SAHARSKY: Well, let me --

8 JUSTICE SCALIA: -- not -- not obviousness  
9 or not change of circumstances?

10 MS. SAHARSKY: Let -- let me be as concrete  
11 as possible really, and I think there's really two  
12 answers to your question.

13 Okay. The first is the legal standard  
14 that's in ERISA, which is the Court recognized in the  
15 Fifth -- Fifth Third case is one that depends on what a  
16 prudent investor would do under the circumstances then  
17 prevailing. That's the legal test.

18 But then there's a question to the second  
19 part about how you would apply that legal test to an  
20 on -- a claim of imprudent ongoing monitoring. And I do  
21 think that depends on the circumstances, but I'd like to  
22 give the Court four data points.

23 The first is that the duty for ongoing  
24 monitoring is not the same as what you would do when  
25 initially putting the funds in place.

1           The second is, is that what typically  
2 happens out in the world is that after the funds are put  
3 in place, there is -- there are benchmarks set; and in  
4 this case, there were the investment criteria set,  
5 performance, expense ratios, et cetera, that would be  
6 revisited at a periodic basis. I think as  
7 Justice Ginsburg pointed out, there are quarterly  
8 meetings in this case to look at those investment  
9 criteria, and those include performance and expenses.

10           The third thing is in terms of how you prove  
11 this or how you establish it, there's a -- there's not a  
12 checklist that can be checked in every case. The way  
13 that this is litigated typically, and what happened in  
14 this case, is that an expert is on the stand and says,  
15 Here's what I would do as a prudent investor under these  
16 circumstances.

17           But then the fourth data point, which I  
18 think is actually a very important one, is that the  
19 ongoing monitoring duty is not limited to circumstances  
20 in which the fund changed so much that it's like a new  
21 fund is being put in place. You have a duty to look on  
22 a periodic basis and, really, how are you going to know  
23 if there have been changes unless you looked.

24           And just to make it clear, the Ninth Circuit  
25 did not say, Well, whether you should make a change or

1 not depends on whether the circumstances change. The  
2 Ninth Circuit's changed circumstances was fundamental to  
3 its limitations ruling. They looked at the limitations  
4 period as running only from the initial time a new fund  
5 is put in place. And so what this changed circumstances  
6 had to do with is whether there was something that  
7 changed about the fund that made it like a new fund  
8 being put in place.

9           And just one other point.           The argument that  
10 was being made below by Respondents, and it's not clear  
11 to me to -- to -- the extent to which they continue to  
12 believe it, is that you have six years from when the new  
13 fund is put in place, and that's it. Other -- after  
14 that, unless the fund changes so much that it's like a  
15 new fund, these funds are basically insulated forever  
16 from any scrutiny, which is a problem for the reason  
17 that Mr. Frederick pointed out.

18           And really one of the reasons the Department  
19 of Labor is here today is you're talking about a long  
20 time horizon, and to say that people's investments  
21 can -- the -- the value of their funds can really be  
22 decreased in that way without any scrutiny is -- is  
23 unfair.

24           But I'm also happy to answer questions that  
25 the Court has.

1 JUSTICE BREYER: No, no, no. You started  
2 with the first. What was the first thing? Remember,  
3 you said that's the second question. But --

4 MS. SAHARSKY: Oh, yes.

5 JUSTICE BREYER: What's the first question?

6 JUSTICE SCALIA: That you are not going to  
7 address. Exactly.

8 JUSTICE BREYER: I want to hear the one you  
9 weren't going to address.

10 MS. SAHARSKY: Yes, yes. Well, the question  
11 that was -- to make sure I get to this, of course. The  
12 question that was teed up for the Court was, is there --  
13 is -- is the fact that the funds were put in place  
14 outside of the limitations period something that would  
15 preclude you from bring -- bringing a case about what  
16 happened during the limitations period. And that's how  
17 we listed -- the question presented was listed in the  
18 petition. It was the question that was presented also  
19 in the opp. It's the question that we presented.

20 No, the fact that the selection was --  
21 happened more than six years ago does not preclude you  
22 from bringing a monitoring claim. Those are different.  
23 You're not challenging the initial selection anymore.  
24 You're challenging the ongoing monitoring. But what the  
25 Ninth Circuit did was really limit the claim to --

1 related to the initial selection.

2 And -- and just to be clear.

3 JUSTICE SOTOMAYOR: Excuse me. And that's  
4 because they have this changed circumstance rule where  
5 it has -- the change can only be something like a new  
6 fund?

7 MS. SAHARSKY: Yes. They understood that,  
8 and they -- they described that in the record to be like  
9 a new fund.

10 And I'd just -- one other point I would like  
11 to address is with respect --

12 JUSTICE SCALIA: Excuse me, though. It  
13 seems to me that -- that you -- you're -- you're  
14 misdescribing them when you say that they said it's only  
15 the purchase that can be subject to scrutiny. I -- I  
16 think they -- they did say that the holding can be  
17 subject to scrutiny as well so long as there has been  
18 some change in circumstance.

19 MS. SAHARSKY: The change --

20 JUSTICE SCALIA: Now, you can say that, you  
21 know, that refers you back to a -- to a new -- new  
22 purchase standard, but it's still -- they -- they say  
23 that within that period, you can bring a suit.

24 MS. SAHARSKY: Right. If it is the  
25 equivalent -- the changed circumstances are the

1 equivalent of bringing a new fund. The reason that I  
2 was trying to clarify that is because I think a  
3 person -- an ordinary person could just be talking and  
4 say, well, should I make changes to the fund or not? It  
5 depends on if circumstances change. But that's not --  
6 the Ninth Circuit wasn't addressing that merits question  
7 of whether they had breached the duty of prudence or  
8 they hadn't breached the duty of prudence. They were  
9 limiting the claim on statute of limitations grounds  
10 because it either had to be a fund -- a new fund being  
11 put in place or changed circumstances that made it like  
12 a new fund. So that's -- that's what I meant to say and  
13 hopefully am more clear about that.

14 I guess if I could just say on the first  
15 question presented, the one that we think is before the  
16 Court just to make clear because there is disagreement  
17 in the circuits about this, that we essentially want the  
18 Court to hold three things.

19 The first is that Plaintiffs can bring a  
20 claim for imprudent monitoring and retention of funds  
21 based on what happened within the limitations period.  
22 That's timely under the statute.

23 The second is that the Ninth Circuit was  
24 wrong to say that the only way the claim can be timely  
25 is either if it's from the time of a new fund or based

1 on this changed circumstances that make it like a new  
2 fund because there is an ongoing duty of prudence that  
3 runs for the fiduciaries under the statute. And that's  
4 really why we got into this case at the court of appeals  
5 stage and why we're here now is that ERISA has ongoing  
6 fiduciary duties, and both the courts below and  
7 Respondents were arguing against that and finding  
8 against that below.

9           And then the third thing is that we think  
10 that the Court should remand for consideration of the  
11 merits of this. And I know that the Court has questions  
12 about the merits because you just wonder what need --  
13 would need to be done for the monitoring whatever else.  
14 But that's not a claim that was really addressed at all  
15 below. It wasn't something that we briefed in any kind  
16 of detailed way before this Court or that was briefed  
17 below because these claims were really cut off at the  
18 outset. So although the Court could provide some  
19 general guidance, it is, after all, a statutory  
20 standard. It depends on the facts and circumstances.

21           JUSTICE KAGAN:           So if I could just  
22 understand that, essentially, you want us to say, look,  
23 there is this prudent person standard. It applies  
24 throughout to monitor and as well as to the original  
25 purchase, but then we're not really going to tell you



1 what that prudent person standard is, that we will  
2 instead let the lower courts deal with that in -- in  
3 considering this case. Is that what you want?

4 MS. SAHARSKY: Yes. That the courts would  
5 need to depend on the facts and circumstances -- figure  
6 out under the facts and circumstances whether there was  
7 a breach of the duty of what -- based on what happened  
8 within the limitations period.

9 JUSTICE SCALIA: Well, you want us to say  
10 that whatever it is, it isn't solely whether there's  
11 been a change in circumstances so extreme as to amount  
12 to purchasing a new stock.

13 MS. SAHARSKY: Yes. That's right. And  
14 that -- that's the trust loss sources. We say that, you  
15 know, you have a duty to look from time to time. You  
16 can't just set the funds and hold them and forget about  
17 them. And the duty to look isn't triggered by something  
18 external that's like a new fund being put in place. You  
19 just -- you have a duty to look. And it might depend --  
20 how often you look might depend on the circumstances,  
21 and how deep you look might depend on the circumstances,  
22 but you have a duty to look.

23 JUSTICE KAGAN: But when Mr. Frederick said  
24 before, he said something like anything -- any periodic  
25 review, you're going to look at the returns, you're

1 going to look at the expenses, and you're going to look  
2 to see whether there's a change in the -- in the, you  
3 know, basic nature of the company or something. You  
4 agree with all of that; is that right?

5 MS. SAHARSKY: Yeah. I think that's fairly  
6 typical, and it actually was -- those were the  
7 benchmarks that were set by the investment committee in  
8 this case, that they had five investment criteria, and  
9 the first of them -- the first three of them were you  
10 always look at performance, you always look at the  
11 expense ratio, and you look at the management of the  
12 fund. And actually, I think that follows from ERISA  
13 that you need to look at both performance and expense  
14 ratio on a regular basis because the first fiduciary  
15 duty that's listed in Section 1104 is to -- to act for  
16 the exclusive -- the exclusive purpose of paying  
17 benefits and defraying the reasonable expenses of the  
18 fund. ERISA itself tells you to look at expenses.

19 If the Court has no further questions, we  
20 would urge you to reverse and remand for a consideration  
21 of the merits.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 Mr. Hacker.

24 ORAL ARGUMENT OF JONATHAN D. HACKER

25 ON BEHALF OF THE RESPONDENTS

1           MR. HACKER:           Mr. Chief Justice, and may it  
2 please the Court:

3           I agree to be sure that there are no serious  
4 differences between the parties with respect to the core  
5 legal question on which this Court granted review. For  
6 that reason, it is our primary submission that the Court  
7 ought to dismiss -- dismiss the writ as improvidently  
8 granted rather than --

9           JUSTICE KAGAN:           Mr. Hacker, I don't know  
10 what that means. It seems to me when I read your brief,  
11 that your brief is supporting the -- the Ninth Circuit's  
12 position, which is that it's only when significant  
13 changes occurs.

14          MR. HACKER:           We -- we are not supporting  
15 that position because that's not the Ninth Circuit's  
16 position. I don't think the opinion can reasonably be  
17 read that way because it wasn't the issue before the  
18 court. The issue before the Ninth Circuit was the same  
19 issue that Petitioners raised -- or that the district  
20 court addressed, which was that there's no continuing  
21 violation theory under ERISA, i.e., you cannot bring a  
22 claim that addresses the initial selection and says  
23 that was imprudent --

24          JUSTICE GINSBURG:           Well, the district court  
25 said more than that. It did say there has to be a

1 change in circumstances. Mr. Frederick told us -- and  
2 you can tell us if he was wrong -- that they did not  
3 have any opportunity in the district court to say there  
4 should be these periodic monitorings because the court  
5 said after the initial investment in the fund first when  
6 you buy the plan. After that, there's no obligation  
7 other than if there's changed circumstances. Then you  
8 have to take another look. That's what the district  
9 court -- as I read it -- said, and that hemmed in these  
10 Plaintiffs and they couldn't say. We're talking not  
11 about a continuing violation, ongoing monitoring not  
12 necessarily triggered by a change in circumstances.

13 MR. HACKER: With all due respect, Justice  
14 Ginsburg, the district court opinion does not say that.  
15 It cites the Phillips case on page 180, describes the  
16 holding of Phillips. And it says in Phillips -- this is  
17 talking about Phillips, not this case -- it says in  
18 Phillips, "The Court rejected the notion that after the  
19 first alleged breach of fiduciary duty, any failure to  
20 rectify the breach constituted another discrete breach."

21 JUSTICE KENNEDY: Where -- where are you  
22 reading from?

23 MR. HACKER: Page 180 of the Petition  
24 Appendix.

25 "The Court" -- and it goes onto say, "The

1 Court said that although the trustee's conduct could be  
2 viewed as a series of breaches, the statute of  
3 limitations did not begin anew because each breach was  
4 of the same character." It's referring back to the  
5 failure to rectify. Nowhere in that passage and nowhere  
6 anywhere in the district court summary judgment opinion  
7 or at trial is there a hint or whisper of a suggestion  
8 that the Plaintiffs would be prohibited as a matter of  
9 law from trying a claim that says we want to challenge  
10 the monitoring process during the repose period, and  
11 here's the problems that we have with your monitoring  
12 process. Here's all the flaws we want to identify.  
13 Here's the things we think a prudent fiduciary should  
14 have done, and here's the things you didn't do.

15 JUSTICE GINSBURG: Mr. Hacker, Mr. Frederick  
16 cited Petition Appendix page 18 and 19.

17 MR. HACKER: Right.

18 JUSTICE GINSBURG: He said that is a  
19 statement of the Ninth Circuit law that Petitioners  
20 think is incorrect and that they would like to have this  
21 Court correct.

22 MR. HACKER: A couple points on that one if  
23 I may, Your Honor.

24 First of all, the passage that Mr. Frederick  
25 pointed to on page 18 says, "Characterizing the mere

1 continued offering of a plan option" -- and I agree with  
2 him, the key words are the next two that follow --  
3 "without more as a subsequent breach would render  
4 the" -- "the statute meaningless," et cetera, et cetera.  
5 The "without more" is clearly referring to establishing  
6 a breach of the duty to monitor in that process.

7 If you don't come into court and show that  
8 there was a problem or flaw in the monitoring process,  
9 you can't win a claim -- a challenge to the monitoring  
10 process. What you don't get to do -- the Ninth Circuit  
11 is responding to the argument they made, which was that  
12 we want to come into court and say we establish that the  
13 -- that the fund was initially selected through an  
14 imprudent process, and therefore, the fund was initially  
15 imprudent and as long as it stayed in the plan, it was a  
16 continuing violation. And we don't have to talk about  
17 the monitoring process. And the reason --

18 JUSTICE ALITO: On what point -- on what  
19 point of law do you and Mr. Frederick now disagree?

20 MR. HACKER: We certainly don't disagree on  
21 the -- the question presented. We disagree, I think,  
22 and it became clearer today, with a couple of points  
23 that Mr. Frederick made.

24 First of all -- and this, I think, was in  
25 response to your question. Mr. Frederick said that the

1 continuing duty to monitor and -- to go back to my point  
2 about the dismissal of the writ. I would be surprised  
3 if this Court wanted to be the first to elaborate what  
4 the duty -- duty to monitor looks like on an absent  
5 record like this one. But Mr. Frederick wants you to  
6 say that the -- the duty to monitor includes a  
7 continuing duty to look for cheaper funds. With respect  
8 to a fund like this when there's 40 funds in the lineup,  
9 his theory is that on a periodic basis, whether it's  
10 daily, or monthly, or quarterly, or annually, every time  
11 you look at the fund, you ought to be looking at whether  
12 or not there is a cheaper option.

13 JUSTICE KAGAN: No, I don't think --

14 JUSTICE ALITO: I mean -- I mean, at a  
15 higher level of -- level of abstraction than that. Not  
16 as applied, not the particular things that need to be  
17 done. He says in his reply brief, "No precise rule  
18 dictates how often a fiduciary must review the portfolio  
19 or how detailed periodic reviews must be. Rather, as  
20 with trust administration, generally, the duty to  
21 monitor is subject to the reasonable person's standard;  
22 that is, the fiduciary must engage in the kind of review  
23 that a reasonable, prudent fiduciary would conduct under  
24 the circumstances."

25 Do you disagree with any of that?

1 MR. HACKER: Not a word of it.

2 JUSTICE KAGAN: Well, Mr. Hacker, here's  
3 what you say -- here's what you say in your brief. What  
4 you say in your brief is, "After the initial selection,  
5 the fiduciary may conduct much less intensive periodic  
6 reviews monitoring only" -- "monitoring only for  
7 significant changes in the value and risks of the  
8 investments." That presents a very different view.

9 MR. HACKER: That's -- that comes straight  
10 out of trust law, because that is what the typical duty  
11 to monitor is what you're looking for are significant  
12 changes because, as Mr. Frederick says, and I fully  
13 agree, how else -- I think it was Ms. Saharsky,  
14 actually -- how else would you know if there had been  
15 changes if you're not looking for them?

16 We are not suggesting -- I think  
17 Ms. Saharsky was wrong about this. We aren't saying,  
18 neither Court below said in any respect --

19 JUSTICE KAGAN: As I see the difference, you  
20 say you're monitoring only for significant changes in  
21 the value and risks of the investment, and they're  
22 saying, look, you have this periodic duty. One of the  
23 things you're looking for is significant changes; but  
24 you also, on an ongoing basis, just like ordinary people  
25 do with their own investment portfolio, you look at the



1 return, you look at the expense.

2 In something like this, it's not like we're  
3 scouring the whole universe for cheaper funds. It's  
4 like we realize, oh, look, it's the exact same fund with  
5 cheaper expenses. In something like this, you make the  
6 change.

7 MR. HACKER: Right. There's three things  
8 that I would say about that. First of all, there was a  
9 trial on that. Contrary to everything you just heard,  
10 there was a trial on whether or not they could and  
11 should -- the fiduciaries could and should have switched  
12 the share classes.

13 The court went on and on, took over the  
14 questioning to ask whether or not that should have  
15 happened here; and there was evidence in the record as  
16 to why it didn't happen here. And I can go into that  
17 evidence. And it was in the letter I provided to the  
18 Court last week to show that everybody understood that  
19 that was a claim at -- at stake.

20 And what happened was their expert  
21 ultimately said, I don't think, during the regular -- he  
22 would not endorse the proposition that during the  
23 routine, periodic monitoring that everybody agreed our  
24 fiduciaries conducted, that they would have caught this  
25 kind of problem.

1           And as the second point, the reason is,  
2     you're not looking in the periodic monitoring to see  
3     whether each of the funds in the lineup is the cheapest  
4     one available.

5           Now, they say it looks easy here because it  
6     was just a different share class in the same fund, but  
7     that's actually a different investment. In order to  
8     switch, you don't just press a button and switch into  
9     the institutional-share class. You have to sell the  
10    institutional -- the retail-share class; buy new shares  
11    in the retail-share class; make all of the changes with  
12    respect to that kind of change, with respect to each  
13    participant who is already invested in the retail-share  
14    class.

15           And the evidence at trial, uncontradicted by  
16    plaintiffs and their expert, was that that kind of  
17    change causes disruptions that employees don't like,  
18    which is why the monitoring process generally was  
19    limited to looking for changes. Now --

20           JUSTICE KAGAN:           Now, really, are you  
21    saying -- what kind of disruption could be worth, on an  
22    ongoing basis, for people who have invested in funds for  
23    30 and 40 years and where there's a significant  
24    difference in fees, what kind of disruption could be  
25    worth the price of that?

1           MR. HACKER:           Well, but -- but the problem  
2 is -- and this is the third point I was going to make,  
3 is --

4           JUSTICE KAGAN:       Well, why don't you answer  
5 that one?

6           (Laughter.)

7           MR. HACKER:           Well, because it's not just --  
8 it's -- it's oversimplifying the kind of disruption  
9 we're talking about. It would be easy for any one  
10 person, if it were as simple as, oh, I understand my  
11 investment is now cheaper today. But that's not how it  
12 works. Employees don't -- the evidence -- there's  
13 evidence on this. I'm not just making this up.

14           There's record evidence that the cost of  
15 removing and switching, there were costs that the  
16 fiduciaries cared about. But the key point is to think  
17 about this: If you're selling the institutional -- the  
18 retail-share class to move into the retail-share class,  
19 at that point -- and this is Mr. Frederick's own  
20 argument. You're supposed to be looking for cheaper  
21 options, not just necessarily the -- the  
22 institutional-share class. You would have an  
23 obligation. If we just switched into the  
24 institutional-share class, I -- and there was one other  
25 option anywhere in the market that was a comparable

1 investment but less expensive, I assure you  
2 Mr. Schlichter and his firm would have showed up the  
3 next day with a lawsuit suing us for breach of the  
4 fiduciary duty for failing to shift into the cheaper  
5 option that was available when all we did was simply  
6 switched to the --

7 JUSTICE BREYER: That's -- that's the nature  
8 or --

9 MS. HACKER: -- institutional-share class.

10 JUSTICE BREYER: You're talking about the  
11 nature of the fiduciary's duty to continuously monitor.  
12 Isn't that your subject?

13 I'd like before doing that, since you seem  
14 to agree there is some such duty, but you may disagree  
15 of what it consists of and nobody so far in the lower  
16 courts has really gone into that, probably we should  
17 send it back on that, say they agree about that.

18 But then you want it dismissed because you  
19 say that that issue wasn't fairly raised. All right.

20 So I look at the cert petitions; and in  
21 their cert petition on page 18, 19, 20, et cetera, it  
22 seems to me pretty clear that they're saying the mistake  
23 in the Ninth Circuit was ignoring the continuing nature  
24 of a trustee's duty under ERISA to review plan  
25 investments and eliminate imprudent ones.

1 MS. HACKER: Yes.

2 JUSTICE BREYER: They're quoting the Seventh  
3 Circuit.

4 So when I read that, they're making the  
5 argument pretty clearly. Add that that's -- there is  
6 this nature, that there is this duty. And they say the  
7 Ninth Circuit didn't hold that. The Ninth Circuit  
8 thought it existed only when there was a change.

9 So I looked to your reply to that.

10 You do not, to -- to -- I can't find a place  
11 in your reply -- in your reply to their cert petition,  
12 in either, where you say they have an incorrect  
13 assumption here because you should dismiss this case and  
14 never hear it because that isn't what the Ninth Circuit  
15 said. Rather, the Ninth Circuit said a different thing.

16 Now, where -- where do you say that? I  
17 couldn't find it. And if you didn't say it, it seems to  
18 me that you have waived, in a sense, the argument that  
19 they have waived in a different sense.

20 All right. You see the point.

21 MR. HACKER: Right. We -- we definitely  
22 argued and pointed out, which is on the face of the  
23 opinion true, which is the next paragraph of the opinion  
24 after the -- the "without more" cite that the court  
25 recognized a continuing duty. It acknowledged the

1 existence of a continuing duty, and this is in the --  
2 our cert opposition and explicitly says, "Therefore, the  
3 district court was correct to allow them to assert a  
4 changed circumstances theory."

5 That's clearly in the cert opp. On pages 8  
6 through 10, we're explaining --

7 JUSTICE BREYER: Well, what you say, I have  
8 this that you said.

9 The Ninth Circuit held that a statute --  
10 that "a claim challenging the selection of mutual  
11 funds" -- da, da, da -- "is barred by the six-year  
12 statute if the claim challenges funds that were selected  
13 more than six years before, and the claim does not  
14 allege that any materially new circumstances arose  
15 within the previous six years."

16 So that sounds like the very  
17 characterization of the Ninth Circuit that they are  
18 saying was mistaken.

19 MS. HACKER: Right.

20 JUSTICE BREYER: So it seems as if you are  
21 agreeing that the Ninth Circuit made a mistake. You are  
22 agreeing they should have put this in, and I guess you  
23 also agreed that in their brief in the Ninth Circuit,  
24 they did say, "Edison had a continuing duty to ensure  
25 that each of the plans' investments was and remained

1 prudent, was and remained prudent within the six years,"  
2 et cetera.

3 So -- so they raised it in the Ninth  
4 Circuit. You agree the Ninth Circuit made the wrong  
5 holding --

6 MS. HACKER: Well --

7 JUSTICE BREYER: -- and -- and you agree  
8 what the right holding is. All right. So what's --  
9 what is the argument we should dismiss it?

10 MR. HACKER: Well, there are a few problems  
11 in that, but most of them just quibbles. Okay?

12 First of all, the -- the description you  
13 read of the cert -- from the cert opposition is  
14 describing accurately what the Ninth Circuit said with  
15 respect to what it was they were arguing.

16 Remember, the changed circumstances theory  
17 was introduced by the Plaintiffs' own expert. When it  
18 came into the trial, the judge expressed puzzlement as  
19 to why the Plaintiffs were talking about changed  
20 circumstances because he thought their claim was going  
21 to be what you hear it is today. And then the --  
22 the expert disavowed --

23 JUSTICE GINSBURG: Because they thought that  
24 was the circuit law, that they had to show changed  
25 circumstance; otherwise, they wouldn't have a monitoring

1 claim.

2 MR. HACKER: There was no circuit law like  
3 that, there was no precedent saying that. And doctor --  
4 and this was not Plaintiffs' theory. Plaintiff  
5 specifically said we have a broader theory. It appears  
6 at page 33 of Volume 1, the first morning of the -- of  
7 the trial.

8 Nelson Wolff, counsel for Plaintiffs,  
9 explains that our theory is not limited to changed  
10 circumstances. That was Dr. Pomerantz's own theory.

11 And the court ultimately says, I will hold  
12 the Plaintiffs to whatever Dr. Pomerantz said.

13 But there's an even clearer answer to this,  
14 which is we know that the Plaintiffs did not think  
15 themselves limited to proof of changed circumstances  
16 because half of the trial, fully half of the trial was a  
17 challenge to the money market fund, one of the funds at  
18 issue below.

19 And the argument -- and the only argument  
20 Plaintiffs made with respect to the money market fund  
21 was that it was too expensive. The money market fund  
22 was added in 1999, and it was -- 18 basis points were  
23 paid to the -- the -- the record keeper, the service  
24 provider, of the money market fund.

25 And throughout the period, through a post



1 period, the money market fund stayed in the -- in the  
2 lineup. And the Plaintiffs' only argument at trial  
3 which they were allowed to make -- the Court didn't  
4 suggest there was any limit and Respondents didn't  
5 suggest any limit -- was that it stayed too expensive.

6 JUSTICE BREYER: What about this --

7 MS. HACKER: They never pointed to any  
8 changed circumstances.

9 JUSTICE BREYER: -- about this result? Two  
10 paragraphs: The parties agree that there is this  
11 ongoing monitoring, et cetera. The Ninth Circuit did  
12 say changed circumstances. It's wrong about that.

13 Nobody here in the reply brief to cert  
14 really raised the question of whether it had been  
15 properly raised; and, therefore, we remand the case to  
16 apply the law insofar as is in the proper procedure to  
17 do it, something like that.

18 MR. HACKER: That would -- I don't disagree  
19 with most of that. The only point I would make is I  
20 don't think there's a reason to remand.

21 I do think the Ninth Circuit, in referring  
22 to the continuing -- whenever you hear "continuing  
23 duty," that doesn't mean they raised the argument.  
24 Their point below -- quite different from what you here  
25 in this Court today -- their point below was because

1 there's a continuing duty, it follows that whenever  
2 there's a prudent fund in the -- in the plan on day 1,  
3 it's a continuing violation as long as it stays in the  
4 plan.

5 JUSTICE KAGAN: Mr. Hacker, here is what you  
6 argued to the Ninth Circuit -- what you argued to the  
7 Ninth Circuit. ERISA's 6-year limitations period bars  
8 challenges to funds added to the plan more than 6 years  
9 before this action was filed. Then you got exactly what  
10 you wanted from the Ninth Circuit with the single  
11 exception that the Ninth circuit added a fact, that by  
12 the way, that doesn't apply to changed circumstances.  
13 Then you described to this Court what you got from the  
14 Ninth Circuit, in the terms that Justice Breyer said,  
15 which was exactly that the only kind of monitoring claim  
16 available to a plaintiff is when there are changed  
17 circumstances.

18 And then you file a brief in which you  
19 sometimes say that the Ninth Circuit is completely right  
20 and then you sometimes purport to be agreeing that the  
21 Ninth Circuit was wrong.

22 Now, to me, that's raising a lot of dust for  
23 something that is pretty clearly what the Ninth Circuit  
24 said, what you asked for, and what is wrong?

25 MR. HACKER: The last point I was going to

1 make, which I didn't get a chance to get back to it,  
2 Justice Breyer, was we do think it's appropriate, if you  
3 don't like the language that the Ninth Circuit used, if  
4 you it don't read it the way I do, and think that the  
5 Ninth Circuit is announcing a categorical rule that says  
6 nobody can proceed on a monitoring challenge unless they  
7 approve changed circumstances, that's not the argument  
8 we believe is the correct argument. And we do not argue  
9 that that's required anywhere in our brief. If you  
10 think that --

11 JUSTICE KAGAN: That was -- that was --

12 MR. HACKER: But if you -- if you disagree  
13 with that --

14 JUSTICE KAGAN: -- page 22. It's in your  
15 summary of the argument. "A fiduciary may conduct much  
16 less intensive periodic reviews, monitoring only for  
17 significant changes."

18 MR. HACKER: That's during the periodic  
19 monitoring process. But it can still be a breach.  
20 We're not resisting the point Justice Scalia raised,  
21 that if the plaintiff thinks that something was so  
22 galactically imprudent on its face, that any proper,  
23 reasonably prudent review process would identify and  
24 remove the fund, then that can proceed, or at least it's  
25 not barred by the statute of repose. That's a

1 permissible type claim, because of course it's an  
2 argument that there's been a breach of the duty of  
3 prudence during the repose period.

4           It is true as a general matter, that that is  
5 not pulled out of whole cloth. That's straight from  
6 trust law that, as a general matter, what you're looking  
7 for in the periodic review process is changed  
8 circumstances. And that goes back to my earlier point  
9 that it cannot be, it cannot be and you should not write  
10 in whatever opinion you write, you should not endorse  
11 Mr. Frederick's proposition that during the periodic  
12 review process, you actually do have a duty to  
13 constantly look and scour the market for more cheaper  
14 investment options.

15           JUSTICE KENNEDY:           Well, you certainly do, if  
16 that's what a prudent trustee would do.

17           MR. HACKER:           And there's no evidence, in all  
18 of the trust -- none of the trust law sources, zero of  
19 them that either side cites, suggests that that's what a  
20 prudent fiduciary would do. If that was an argument to  
21 be made -- that could have been made below, their expert  
22 would have made it, because there's nothing in the  
23 district court summary judgment opinion that precludes  
24 it, and we know from the way they litigated the money  
25 market fund, which was only a challenge to um -- the

1 continuing high fees, allegedly high fees, with  
2 absolutely no argument by them, or suggestion that they  
3 needed to show changed circumstances.

4 The whole trial was about whether or not  
5 they could prove a breach of the duty to monitor. We  
6 accept that a breach of the -- a challenge to the duty  
7 to monitor can proceed -- excuse me, an argument that  
8 the duty to monitor was breached can proceed, but -- and  
9 here's the key point that I think Mr. Frederick is  
10 overlooking -- it has to be a challenge to the duty to  
11 monitor. It has to challenge the monitoring process  
12 itself. It cannot be, simply because of the continuing  
13 duty, that it follows that you have a per se duty to  
14 pull out a fund that should not have been selected  
15 initially.

16 This is a point Justice Kagan made and she's  
17 absolutely right about that.

18 JUSTICE GINSBURG: How about just saying  
19 that the changed circumstances seems to have confused  
20 everybody? The Ninth Circuit used it. You used it  
21 repeatedly. This Court should X that out and then  
22 you're in perfect harmony.

23 MR. HACKER: And that was the point I was  
24 getting to earlier. I do agree that if the Court is  
25 uncomfortable with the language used in the Ninth

1 Circuit, it obviously doesn't have to endorse that  
2 language. The Court can write whatever opinion it  
3 believes is appropriate.

4 But we think the question really is, as a  
5 court of review reviewing the judgment, the question is,  
6 is the judgment incorrect. And there's no basis for  
7 challenging the district court judgment, and there's no  
8 basis for challenging the Ninth Circuit's judgment  
9 affirming that judgment.

10 And the analysis, what's going on in the  
11 Ninth Circuit opinion -- again, if you don't like the  
12 language or think it's susceptible to misunderstanding,  
13 the point the Ninth Circuit was simply making is one I  
14 think this Court should endorse, which is that there is  
15 no continuing violations theory. A plaintiff has to do  
16 more than simply say there was an imprudent fund one  
17 day, and because you have a continuing duty, you  
18 therefore have to remove it.

19 What a plaintiff in that situation has to  
20 show, is a violation, a breach, of the continuing duty  
21 to monitor, so then the case becomes about what the  
22 scope of that duty is. And I want to make two points  
23 where I do think there is some disagreement between us  
24 and Mr. Frederick on that.

25 The first is that, and I agree with what

1 Ms. Saharsky said, it's absolutely true that there is a  
2 fundamental and major difference between the process for  
3 selecting funds initially and the process for monitoring  
4 existing funds. When you're selecting funds, you're  
5 going through this comprehensive review of the market;  
6 when you're monitoring them, you're basically looking  
7 for changed circumstances. That's what you're reviewing  
8 for.

9           And the reason for that is the enormous  
10 disruption, both to the fiduciaries, the enormous work a  
11 fiduciary would have to do if literally every month or  
12 literally every quarter -- these were periodic quarterly  
13 reviews we did. Every quarter you have to go through  
14 all 40 funds and investigate to see whether that fund  
15 was the cheapest available funds that provided the kind  
16 of investment profile that fund provided. And then do  
17 it for the next fund, and then the next fund, and then  
18 the next fund. Every quarter. That's the point --  
19 that's the argument Mr. Frederick is suggesting and you  
20 won't find any source of -- either under ERISA or trust  
21 law or DOL guidance that endorses that.

22           JUSTICE GINSBURG:           He didn't say the  
23 cheapest fund. He said there is a stock difference  
24 between the retail and the institutional cost.

25           MR. HACKER:           Well, the only difference with

1 respect to the particular fund, I don't disagree, is  
2 the -- is the fees. But there is still a difference  
3 between -- it's not the same thing. As I said before,  
4 not just pushing a button to jump into the institutional  
5 share clause -- class. One of the reasons for that is the  
6 second point I want to make generally about the duty to  
7 monitor, which I think Mr. Frederick and I fundamentally  
8 disagree on, in answer to Justice Kagan's question I  
9 believe was, he said it's only the most distant Supreme  
10 Court law school hypothetical that there might ever be a  
11 difference between the duty that a fiduciary has in the  
12 initial selection process and the duty a fiduciary has  
13 with respect to whether or not to remove a fund, that  
14 that's just an imaginary kind of situation.

15 JUSTICE KAGAN: No, I don't think he said  
16 that. I asked a very particular question relating to  
17 this particular fund, saying what kind of disruption --  
18 is there any kind of disruption that would be worth the  
19 price of holding onto a fund that is the exact same as  
20 another fund except that it has much higher fees. And  
21 he said, as to that particular case, no, there wouldn't  
22 be.

23 MR. HACKER: I understood the question to be  
24 more -- the question and the answer to be more general.  
25 But it's even better if you talk about this specific



1 case because there is evidence on it, which tells you,  
2 by the way, that there was a trial on this and they  
3 understood they could do it. Dave Bartel, Barbara  
4 Decker, Marvin Tom and Daniel Esh were all witnesses  
5 submitted by Edison, subject to cross-examination both  
6 by plaintiff's counsel and the court who would examine  
7 them at length. All of them testified that with respect  
8 to this particular type of change, the changing -- the  
9 question by the court in particular, why couldn't you  
10 just switch? It seems like it's easy, why didn't you  
11 just do it? And reasons given were, and there was zero  
12 contradictory evidence, was that there's participant  
13 confusion when there's a switch, even if you might think  
14 it's a good one, they don't like change unless there's a  
15 performance change. There's a stability issue um -- and  
16 there are transition costs of any kind.

17 JUSTICE KAGAN: How might a lessor of --

18 CHIEF JUSTICE ROBERTS: How was there  
19 investor confusion? It seems to me one sentence saying,  
20 well, we have been paying .3 percent, this is  
21 .2 percent, that's why we're changing. They're not  
22 going to, you know, running out in the halls screaming  
23 that there's confusion about that.

24 (Laughter.)

25 MR. HACKER: But it was -- first of all,

1 that's contrary. The ultimate question is answered by  
2 the evidence in this case, but the -- and the evidence  
3 was -- it's not just -- you know, it seems simple to us  
4 in retrospect that this could be easily explained. The  
5 point is investors didn't like, excuse me, the  
6 participants didn't like changes in the lineup. The  
7 union had even grieved an effort to change --

8 JUSTICE KAGAN: They don't like changes.  
9 They would rather have fees?

10 MR. HACKER: No, what they care about is  
11 performance, and this is performance --

12 JUSTICE KAGAN: Mr. Hacker --

13 MR. HACKER -- fee.

14 JUSTICE KAGAN: -- the day when you get from  
15 your mutual funds a notice that says, by the way, you're  
16 a preferred investor, we're switching you, it's the  
17 exact same fund under a different name, now you don't  
18 pay fees -- that's a red-letter day for an investor.

19 MR. HACKER: But that's not how it works in  
20 this situation. Again, there was a trial on this. The  
21 plaintiff's tried to make this argument. Their expert  
22 could have made exactly this argument, and what he said,  
23 he wouldn't endorse the proposition that this was the  
24 kind of thing you would catch in periodic review,  
25 because it's not what you're looking for. You don't

1 look for less expensive options. And I haven't heard an  
2 argument from the other side that says as a general  
3 matter with respect to the breach of -- with respect to  
4 the duty to monitor, your duty is limited only to  
5 whether or not there's a cheaper share class and you  
6 don't actually have a duty to look for other cheaper  
7 options.

8 I don't understand why that would be. If  
9 it's true that you have a duty as a matter of law, and  
10 that we don't respect your fiduciary decision and  
11 judgment because you could have switched to a cheaper  
12 share class in the same fund, it would seem to follow,  
13 as night follows the day, that you also would have a  
14 duty to switch to a different fund if it's available and  
15 provides the same investment profile --

16 JUSTICE ALITO: With respect to all or some  
17 of these funds, did the plan qualify for the  
18 institutional shares or did it have to get a waiver from  
19 the administrator?

20 MR. HACKER: That was an issue tried at  
21 trial. With respect to the three funds that were added  
22 in 2002, they had to get a waiver, but the court found,  
23 based on expert -- this expert's testimony that they  
24 would have gotten the waiver had they asked. There was  
25 not evidence with respect to these three funds because

1 the plaintiff's expert put on a different case. He  
2 wasn't making this kind of -- there was lots of  
3 inquiries. The court kept asking what was the  
4 eligibility rules, couldn't you just switch as soon as  
5 you became eligible. But it turned out, if you look at  
6 the transcript, which is not very long -- particular  
7 citations I provided last week -- the plaintiff's expert  
8 went a different way. He wanted to put on a case that  
9 says, I can tell you why they should have removed the  
10 fund -- identified and removed the fund because it would  
11 have been --

12 JUSTICE ALITO: Just so I understand this,  
13 you're saying that as to some funds, it was necessary to  
14 get a waiver. As to others, the record doesn't show  
15 whether it was necessary to get a waiver or not?

16 MR. HACKER: As to the three funds that  
17 remain in the case, the record is not clear on that.  
18 There was inquiries, the court asked about that, and  
19 there wasn't evidence. Because when we came to trial,  
20 we thought the plaintiffs were arguing what  
21 Dr. Pomerantz argued, which is that the only way we ever  
22 would have had a duty to identify this problem -- this  
23 is Dr. Pomerantz, their own expert's view -- was the  
24 only way we would have had a duty to identify this  
25 problem is if there was sufficient changes within the

1 funds to have triggered the full due diligence review.

2 JUSTICE ALITO: This is a very big pension  
3 plan and it seems odd that it would not have enough  
4 funds to qualify for institutional shares. These  
5 institutional shares must be restricted to -- I don't  
6 know what, the most gigantic investor in the world.

7 MR. HACKER: Right. And again, there's  
8 evidence on this. The point there is simply that you  
9 don't look at the overall assets of the whole fund  
10 because as to any one investment, you know, there might  
11 only be a \$1 million or \$500,000 invested, and so,  
12 that's the -- that's the threshold issue.

13 The counterpoint is the one that their  
14 expert made, which is, yeah, but the fund can expect  
15 that -- the mutual fund can expect greater investments.  
16 So in my experience, he said, they'll often waive for  
17 precisely that reason. But that's the reason; it wasn't  
18 like an automatic thing. And there isn't evidence as to  
19 what the -- what the remaining funds -- at least the  
20 evidence was ambiguous as to what that --

21 JUSTICE ALITO: That seems like a  
22 potentially important point, but maybe it's not. I  
23 mean, if -- if the investment advisor can simply look at  
24 the criteria for getting institutional shares and see that  
25 the fund would qualify and the costs for those would be

1 less, then that seems like a more obvious switch to make  
2 than if you look at the criteria and you see that you  
3 don't qualify and you would have to inquire about  
4 whether you could get a waiver. Maybe in the industry,  
5 it's well known that you can obtain a waiver, but it  
6 seems like a somewhat different inquiry.

7 MR. HACKER: But these are exactly the kinds  
8 of things you would have a trial about. You would have  
9 an expert asked about that, and there would be testimony  
10 as to whether or not a reasonably prudent fiduciary  
11 would have the kind of process that would not only ask  
12 all of the questions that we asked and looked at  
13 regularly, but also would ask and add to that criteria,  
14 is there a cheaper alternative? And I don't think  
15 you're going to see any case law that says, well, that  
16 can be limited to is there a cheaper share class in the  
17 particular fund? The criteria would -- if it allowed  
18 for that, would be is there a cheaper alternative.

19 And the reason doesn't exist is, it would be  
20 so extraordinarily demanding on fiduciaries to  
21 constantly, on a monthly or quarterly basis, to be  
22 looking at the whole market to see whether there was a  
23 cheaper share class. That's not how anybody operates in  
24 their own life, in their own investments, in their own  
25 consumer purchases.

1           That's not the way people behave.  
2           Particularly fiduciaries make a decision, they determine  
3           whether it makes sense at a given time, and then they  
4           look to see if anything's changed to make it imprudent.  
5           It is true that if something, as I said, is so  
6           transparently imprudent that any reasonable process  
7           would catch it, that claim can survive the statute of  
8           limitations. But they had an opportunity to bring that  
9           claim. That was the claim that they themselves  
10          described. That was the claim the courts thought they  
11          were going to bring. But instead, they brought a claim  
12          based on their own expert's theory that we should have  
13          captured the problem, identified the problem and removed  
14          the funds because of the changes within the funds that  
15          should have triggered the full due diligence review.  
16          Absent that, there's no requirement for that kind of  
17          review.

18                 CHIEF JUSTICE ROBERTS:           Thank you, counsel.

19                 Mr. Frederick, four minutes.

20                 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

21                 ON BEHALF OF THE PETITIONERS

22                 MR. FREDERICK:           In the their post trial  
23                 brief, they said on page 13 -- this is Docket No. 381 --  
24                 "By challenging the prudence of maintaining retail share  
25                 classes of the three name-changed funds, plaintiffs have

1 done what the court" -- this is the district court --  
2 "has forbidden, by attempting to resurrect claims that  
3 were properly held barred by the 6-year statute of  
4 limitations." On page 15 of the petition appendix, the  
5 Ninth Circuit said, "These claims have been barred by  
6 the statute of limitations."

7 We had argued that in our court of appeals  
8 brief, that these are proper claims. We raised it in  
9 our cert petition. There's a conflict for you to  
10 resolve between the Second and the Seventh Circuits on  
11 the one hand, which say that an ongoing monitoring claim  
12 is proper under ERISA, and it resets the statute of  
13 limitations, and the three circuits led by the Ninth,  
14 the Fourth and the Eleventh that say you only start the  
15 limitations period from the initial selection date.

16 So I --

17 JUSTICE SOTOMAYOR: Answer his point,  
18 however. I mean, there's some force to his argument  
19 that you can't have every three months, a sort of  
20 general market evaluation of whether something should be  
21 selected or not.

22 MR. FREDERICK: And I think I disavowed  
23 that, Justice Sotomayor. We're not saying that every  
24 three months the have to look at thousands of mutual  
25 funds. Here, there's publicly available information,



1 it's on the Internet, you can ask the question and  
2 you'll get an answer, that the retail share class is  
3 more expensive than the institutional share class.

4 JUSTICE SOTOMAYOR: He says your -- your  
5 expert would not commit that a -- during a prudent  
6 monitoring, this would have been caught.

7 MR. FREDERICK: Well, Justice Sotomayor, I  
8 think that the distortion of the record based on what  
9 the expert testified was because the expert was  
10 concerned about running afoul of the judge's summary  
11 judgment order, which had said, I'm not hearing anything  
12 about the 1999 funds unless you can tell me that the  
13 changes were so significant that that change would  
14 warrant a review of the type you would do from an  
15 initial review.

16 Look, there are a lot of interesting fact  
17 questions. This Court does not need to resolve them.  
18 All this Court needs to do and all we ask you to do, is  
19 to rule that our claims for imprudent monitoring were  
20 within the statute of limitations because they were  
21 within the 6-year period. The case should be remanded.  
22 We lost on summary judgment. We're entitled to go to  
23 trial as to whether or not there are triable issues of  
24 fact. That's all we're asking and that's all that you  
25 have to decide.

1           If you want to decide a little bit more  
2 about what the content of this monitoring duty -- you  
3 can say look at expenses, look at performance, look at  
4 publicly available information --

5           JUSTICE SOTOMAYOR:           I, for one, am not ready  
6 to do that, because I'm not a trier of fact for what a  
7 reasonable investor would do --

8           MR. FREDERICK:           I -- Justice Kennedy was  
9 absolutely right when he said it's what a reasonably  
10 prudent investor would do, and that's the standard.  
11 That's all we've been arguing for and that may be  
12 different in different circumstances --

13          JUSTICE SOTOMAYOR:           I'm not -- I'm very -- I  
14 don't, as you may know, I have just a little invested so  
15 I don't know much. But it seems to me that in 2003,  
16 when they were made aware of the institutional class,  
17 that I would have looked at my portfolio and seen if I  
18 had retail class.

19          MR. FREDERICK:           Well, we think --

20          JUSTICE SOTOMAYOR:           Now, whether it was  
21 prudent to stay in that because of expenses or other  
22 things, I don't know.

23          MR. FREDERICK:           Well, the district courts  
24 found the case easy as to the 2002 funds, but felt  
25 constrained as to the 1999 funds because they had been

1 selected before the 6-year period of the limitations.  
2 And that's why, if this case goes back to the district  
3 court, we believe we have a strong argument that as to  
4 the imprudence of maintaining the 1999 funds within the  
5 6-year limitations period, we have a strong argument.

6 And -- And just to take one point of fact,  
7 Justice Sotomayor, there was a fund added in 1999, an  
8 Allianz fund; in footnote 7 of the red brief, they say,  
9 finally they got around to getting rid of it in 2011.  
10 So for 10 years, the 6 years before the lawsuit was  
11 filed starting in 2001, in 2011 beneficiaries had to  
12 incur costs of as much as 37 percent more.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:59 a.m., the case in the  
16 above-entitled matter was submitted.)

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<p style="text-align: center;"><b>A</b></p> <p><b>aboveentitled</b> 1:11 59:16</p> <p><b>absent</b> 31:4 55:16</p> <p><b>absolutely</b> 45:2,17 47:1 58:9</p> <p><b>abstraction</b> 31:15</p> <p><b>absurd</b> 9:7</p> <p><b>accept</b> 45:6</p> <p><b>account</b> 15:11</p> <p><b>accurately</b> 39:14</p> <p><b>acknowledged</b> 37:25</p> <p><b>act</b> 26:15</p> <p><b>action</b> 42:9</p> <p><b>add</b> 37:5 54:13</p> <p><b>added</b> 3:13 4:14 6:19 7:6 8:22 10:23 11:11,12 40:22 42:8,11 51:21 59:7</p> <p><b>adding</b> 7:13</p> <p><b>addition</b> 10:4</p> <p><b>address</b> 21:7,9 22:11</p> <p><b>addressed</b> 24:14 27:20</p> <p><b>addresses</b> 27:22</p> <p><b>addressing</b> 23:6</p> <p><b>administration</b> 31:20</p> <p><b>administrator</b> 51:19</p> <p><b>adopted</b> 9:6</p> <p><b>advancing</b> 4:21</p> <p><b>advisor</b> 53:23</p> <p><b>affirm</b> 5:2 8:12</p> <p><b>affirmed</b> 5:12</p> <p><b>affirming</b> 46:9</p> <p><b>afoul</b> 57:10</p> <p><b>ago</b> 21:21</p> <p><b>agree</b> 4:24 12:20,23 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