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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-586, Jones v. Harris Associates.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONERS

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

In 1970, Congress amended the Investment Company Act to provide a cause of action when an investment adviser breaches its fiduciary duty with respect to compensation.

The Seventh Circuit upheld summary judgment for Respondent under a legal standard for fiduciary duty that Respondent here no longer defends.

For three reasons, the Seventh Circuit's judgment should be reversed: First, under the Court's longstanding precedent, in this context a fiduciary duty requires a fair fee, achieved through full disclosure and good-faith negotiation.

Second, the best gauge of a fair fee is what the investment adviser charges at arm's-length in other transactions for similar services.

1           And, third, applying that standard here,  
2 Harris charged twice as much in percentage terms for  
3 providing virtually identical advisory services in  
4 arm's-length transactions with institutional investors.

5           With respect to the first point, the  
6 standard for fiduciary duty has been clear from this  
7 Court's cases, at least since *Pepper v. Litton*, in which  
8 the Court said that a fair result in the  
9 circumstances -- a fair fee -- was an important  
10 component of a fiduciary duty.

11           Congress was aware of that standard when it  
12 enacted the 1970 amendments to the Investment Company  
13 Act. The SEC brought the case to the Congress's  
14 attention, and that standard, we submit, is one that  
15 Congress intended to incorporate.

16           Applying that standard, where *Pepper* said  
17 that the best gauge of a fair fee is what the person --  
18 the fiduciary charges in arm's-length transactions,  
19 applied here, the best way to understand how that  
20 fiduciary duty is being breached in this context is what  
21 Harris is charging for same or similar services at  
22 arm's-length to institutional investors.

23           JUSTICE KENNEDY: Is Harris a fiduciary in  
24 the same sense as a corporate officer and a corporate  
25 director? Or does his fiduciary duty differ? Is it

1 higher or lower, same with a guardian, same with a  
2 trustee?

3 I mean, the word "fiduciary" -- does  
4 "fiduciary" imply different standards, depending on what  
5 kind of fiduciary you are?

6 MR. FREDERICK: The basic concept,  
7 Justice Kennedy, is the same. There are two components,  
8 where there must be full disclosure of information and a  
9 fair result, and that fair result translates in  
10 different contexts in different ways. Here, because of  
11 the statutory references to fiduciary duty with respect  
12 to compensation, one focuses on the fairness of the fee  
13 charged.

14 But, as Professor DeMott points out in her  
15 amicus brief, the idea of a fiduciary duty is one that  
16 is well known in various circumstances of the law, and  
17 as applied here the concept goes to the fairness of the  
18 fee the adviser charges --

19 JUSTICE KENNEDY: Well, would the test for  
20 compensation in this case be the same as any director or  
21 any officer of a corporation?

22 MR. FREDERICK: The difference here, Justice  
23 Kennedy, is that in those circumstances the indicia of  
24 an arm's-length transaction may be achieved. The  
25 directors can fire the head of a company. They can call

1 for changes.

2 Here, the investment adviser has appointed  
3 the members of the board. As the -- this Court said in  
4 the Daily Income Fund case, the earmarks of an -- of an  
5 arm's-length transaction are absent precisely because  
6 the record --

7 JUSTICE KENNEDY: I just want to know, is  
8 the fiduciary duties the same? Is the fiduciary  
9 standard the same, without getting into how it's  
10 applied?

11 Is the fiduciary standard the same for  
12 Jones, for a guardian, for a trustee, for a corporate  
13 Officer, or a corporate director -- always the same?

14 MR. FREDERICK: Yes. The concept is fair  
15 results through full information and good-faith  
16 negotiations.

17 JUSTICE SCALIA: And for lawyers?

18 MR. FREDERICK: For lawyers --

19 JUSTICE SCALIA: Lawyers have a fiduciary  
20 obligation to their clients, right?

21 MR. FREDERICK: That is true.

22 JUSTICE SCALIA: So courts should review  
23 lawyers' fees for -- on the basis of whether it's a fair  
24 result.

25 MR. FREDERICK: That is how courts do it

1 every day in this country, Justice Scalia, when they are  
2 asked to make fee applications for reasonableness.

3 CHIEF JUSTICE ROBERTS: Well, but this is  
4 different. I mean, this is part of an expense of a  
5 fund. They don't get fees, but -- but they get -- they  
6 have to pay for the lawyers, just like they have to pay  
7 for management advice.

8 So why wouldn't you review the lawyers' fees  
9 to make sure they are fair?

10 MR. FREDERICK: The lawyers' fees in which  
11 context, Mr. Chief Justice? I'm not sure I understand  
12 the question.

13 CHIEF JUSTICE ROBERTS: Counsel for the  
14 fund.

15 MR. FREDERICK: Counsel for the fund is --  
16 that is actually not at issue here, but the issue of  
17 what constitutes reasonable expenses may arise in  
18 various circumstances.

19 The statute prohibits fees that are  
20 unreasonable in terms of their unfairness to the fund.  
21 The concept here is that the board cannot fire the  
22 investment adviser. So in evaluating the fairness of  
23 the fee the adviser is charging the fund, the normal  
24 indicia of an arm's-length transaction is absent, and  
25 that is the key principle here because this adviser is

1 using the same manager to provide the same research  
2 analytics from the same research group, from the same  
3 meetings, buying the same stocks, and simply allocating  
4 them to different accounts and charging those to whom it  
5 owes a fiduciary duty twice what it is getting at  
6 arm's-length.

7 JUSTICE GINSBURG: But there was in this  
8 record, was there not, a submission by the adviser  
9 comparing what mutual funds this fund was charged, what  
10 institutional funds were charged, but explaining the  
11 differential in terms of the services provided, that  
12 more services were provided to the fund and less  
13 services were provided to the institutional investors?

14 MR. FREDERICK: And, Justice Ginsburg, that  
15 is where there is a disputed issue of fact for which  
16 summary judgment is not appropriate, because the  
17 plaintiffs submitted evidence that in fact the services  
18 provided to the institutional investors were greater,  
19 even though they were being charged a lower amount of  
20 money.

21 JUSTICE GINSBURG: Who would have the  
22 burden? You said that that's an issue that has not been  
23 decided, it's a disputed issue of fact, appropriate for  
24 remand. Who -- would you have the burden if they came  
25 forward and said: Look, this is what our situation is;

1 these are the services. Would you have the burden to  
2 show that in fact they were comparable and the  
3 differences did not warrant the differences in the fee?

4 MR. FREDERICK: Yes.

5 JUSTICE GINSBURG: You would have the  
6 burden?

7 MR. FREDERICK: We have the burden. And we  
8 --

9 JUSTICE SCALIA: That's different from  
10 normal trust law, isn't it?

11 MR. FREDERICK: It is.

12 JUSTICE SCALIA: Normally, where you are a  
13 fiduciary, it's up to you to prove that it was  
14 reasonable.

15 MR. FREDERICK: That's true.

16 JUSTICE SCALIA: So Congress evidently did  
17 not mean ordinary trust law to apply in this context.

18 MR. FREDERICK: We disagree with that last  
19 part, Justice Scalia. We agree that Congress did make  
20 modifications to the way a cause of action ordinarily  
21 would have been brought at common law for breach of  
22 fiduciary duty in several respects, including imposing  
23 the burden of proof on the investor. Where we disagree  
24 is that when they used the phrase "fiduciary duty" they  
25 intended to mean something less than what fiduciary duty

1 had meant at common law.

2 CHIEF JUSTICE ROBERTS: What if -- if you  
3 are having courts decide -- review what is fair, a fair  
4 fee, what if the adviser had given such good advice that  
5 the fund beat the industry average for his category of  
6 fund by, you know, 5 percent over the last 5 years.  
7 Does he get double the normal compensation of the  
8 average fees? Does he get triple? Fifty percent more?  
9 How is a court supposed to decide that?

10 MR. FREDERICK: Well, there is an issue of  
11 fact as to how relevant performance is. They didn't  
12 give the money back when their performance lagged behind  
13 the market, Mr. Chief Justice, in this case. And so the  
14 question of whether or not a performance metric is  
15 relevant is certainly a factor that will be entitled to  
16 less weight --

17 CHIEF JUSTICE ROBERTS: Well, surely you  
18 think it is. When you say they don't give the money  
19 back, you are not suggesting that the amount of the fees  
20 should be the same regardless of whether they outperform  
21 by 10 percent or not?

22 MR. FREDERICK: My point, Mr. Chief Justice,  
23 is that when they charge the same amount, buying the  
24 same stocks, to institutional investors and achieve the  
25 same performance, there is no reason why the -- why

1 mutual fund should be charged twice as much.

2 JUSTICE SOTOMAYOR: Counsel --

3 CHIEF JUSTICE ROBERTS: Well, but there is  
4 different parameters, right, in the sense that you're  
5 trying -- the company is trying to attract investors to  
6 the mutual fund? If you are advising a pension fund, it  
7 is not the case that they are trying to attract  
8 pensioners who have other choices.

9 MR. FREDERICK: But the investor doesn't  
10 gain because of the marketing skill of the adviser.  
11 Simply having a larger asset pool which increases the  
12 fee that the adviser can charge doesn't inure to the  
13 individual benefit of the investor. And the point of  
14 this statute was to provide protection against investors  
15 so that when the adviser charged excessive fees that  
16 excess would be returned to the fund for the pro  
17 rata benefit --

18 JUSTICE KENNEDY: Now, you said that  
19 Congress used "fiduciary" in a special sense. Then --  
20 then, I have to conclude that your earlier answer is  
21 confusing for me, because I thought you were going to  
22 tell us that this investment adviser has the same  
23 fiduciary standard that officers and directors of  
24 corporations have. Then you say that Congress used it  
25 in a special sense. So that doesn't quite square.

1           MR. FREDERICK: Well, Justice Kennedy, let  
2 me just add the extra words of the statute, because what  
3 Congress said was a fiduciary duty "with respect to  
4 compensation." And so when I say special sense, I mean  
5 that Congress used additional words to elaborate on the  
6 circumstance in which the fiduciary duty would be  
7 examined.

8           Here what is happening is that at  
9 arm's-length transactions for the same services -- the  
10 same manager is going out and touting its services to  
11 the institutional investor, but simply charging them  
12 half as much money for providing the same portfolio  
13 management.

14           CHIEF JUSTICE ROBERTS: Do technological  
15 changes make a difference in terms of disclosures  
16 required? These days all you have to do is push a  
17 button and you find out exactly what the management fees  
18 are. I mean, you just look it up on Morningstar and  
19 it's right there, and you can make -- as an investor,  
20 you can make whatever determination you'd like,  
21 including to take your money out.

22           MR. FREDERICK: The fact that an investor  
23 may know going in what the fee is does not address the  
24 problem Congress was intending to address, which is that  
25 as larger and larger sums of assets were accreted to the

1 mutual fund, the investor was not obtaining the benefits  
2 of economies of scale. And that's the central problem  
3 --

4 CHIEF JUSTICE ROBERTS: So we could look  
5 at -- you know, as the fund grows bigger and he doesn't  
6 get those benefits, he can go look at another fund. It  
7 takes 30 seconds.

8 MR. FREDERICK: And that again doesn't  
9 address the problem Congress was trying to get at, which  
10 is to protect the company, not the individual investor.  
11 The individual investor might lessen the damages that  
12 that investor suffers, but the fund -- the people  
13 remaining, continue to pay excessive fees.

14 JUSTICE SCALIA: No, but he protects the  
15 company ultimately, because when investors leave the  
16 company that is charging excessive fees to go to other  
17 companies, the company that they are leaving sees that  
18 something is wrong and has to lower its compensation to  
19 its -- its adviser. Why doesn't that affect the company  
20 at issue?

21 MR. FREDERICK: A large number of assets  
22 under management in mutual funds, something like 26 to  
23 35 percent according to materials that are in the  
24 record, are from 401(k) plans, where the investor is  
25 essentially locked into the fund that his or her company

1 chooses to make that investment. And even as to  
2 investors who are not locked in, there are significant  
3 tax consequences where over time an investor might be in  
4 the Oakmark Fund and have to suffer large tax  
5 consequences in order to get the benefit of the  
6 statute --

7 CHIEF JUSTICE ROBERTS: Companies --  
8 companies change who they invest with under the 401(k)'s  
9 all the time. If the employees are not happy with the  
10 return they are getting because the company had limited  
11 their choices, they change. It happens all the time.

12 MR. FREDERICK: And, Mr. Chief Justice, as  
13 the Court recognized in the Daily Income Fund case, this  
14 is a unique cause of action in which Congress was  
15 intending to protect the entire corpus of the investors  
16 in the fund, because precisely --

17 CHIEF JUSTICE ROBERTS: You told me just a  
18 little while ago, or told somebody, Congress wasn't  
19 interested in protecting investors; they were interested  
20 in protecting the company.

21 MR. FREDERICK: The company is comprised of  
22 the investors, Mr. Chief Justice. What the right of  
23 action does not do is to provide individual damages to  
24 the investor who brings the suit. The recovery inures  
25 to the entire benefit of all the investors who compose

1 that fund.

2 JUSTICE SOTOMAYOR: Counsel, can I unpackage  
3 your argument a little bit? Because using the word  
4 "fair fee" in my mind is meaningless, because it has to  
5 be fair in relationship to something. And so what is  
6 your definition of what that something is that it's fair  
7 to, and -- or unfair against? And start from there,  
8 because I understood the Seventh Circuit to be saying:  
9 Look, a fair fee is paying market value. If one takes a  
10 sort of reading -- it's whatever negotiation goes on  
11 between the two, as long as there has been full  
12 disclosure as required, that's the market. So that's  
13 fair. You're saying it's something else. What's that  
14 something else?

15 MR. FREDERICK: Well, what the Court said in  
16 Pepper is that fair is what is reflective of what an  
17 arm's-length agreement would produce.

18 JUSTICE SOTOMAYOR: All right. So you start  
19 there.

20 MR. FREDERICK: Yes.

21 JUSTICE SOTOMAYOR: All right. So let's  
22 stop confusing this -- the articulation of the standard,  
23 which is -- that's fair. What would an arm's-length  
24 transaction produce? And let's go to what seems to be  
25 part of your argument and sort of what everyone's

1 skirting around, which is what's the proof that a  
2 particular transaction is not arm's-length?

3           The Seventh Circuit appeared to be saying,  
4 it's arm's-length when the parties have done all of the  
5 disclosure that is required, because then the buyer can  
6 decide whether they want to pay that fee or not, and  
7 once they choose to, it's a fair price. It's an arm's-  
8 length transaction. You are saying not, and that's  
9 what -- that's where I am trying to get to the nub of  
10 why not? Why is --

11           MR. FREDERICK: Because the directors can't  
12 fire and walk away from the adviser. In any arm's-  
13 length transaction, if I sell you a car and you don't  
14 like the price, you can you walk away.

15           JUSTICE SOTOMAYOR: That's -- now, that's  
16 begging the question, because Congress hasn't said "a  
17 reasonable fee." It did say "fiduciary duty," but it  
18 didn't -- there is a subtle but very important  
19 difference between reasonable and -- a reasonable fee  
20 and a fiduciary duty with respect to fees.

21           MR. FREDERICK: True. There are two  
22 components: Was there full information and good-faith  
23 negotiating? And was the result fair? In Pepper, the  
24 Court said if the result is not fair, there can be a  
25 breach of fiduciary duty.

1 JUSTICE SOTOMAYOR: I'm still begging the  
2 question: Fair against what?

3 MR. FREDERICK: Fair against what the  
4 adviser actually charged for same or similar services to  
5 an outsider to -- who had the right to walk away.

6 JUSTICE SCALIA: Mr. Frederick, I don't  
7 understand your -- your statement that they can't fire  
8 the investment adviser. Maybe they can't fire him, but  
9 they can insist that he accept a lower fee, right?

10 MR. FREDERICK: And in fact --

11 JUSTICE SCALIS: Surely they can do that,  
12 can't they?

13 MR. FREDERICK: They -- in --

14 JUSTICE SCALIA: Can they insist that he  
15 accept a lower fee? Right? Can they do that?

16 MR. FREDERICK: In practical terms, no.

17 JUSTICE SCALIA: Why?

18 MR. FREDERICK: Because the adviser picks  
19 the board of directors.

20 JUSTICE SCALIA: Oh, no, that's something  
21 different. I -- let --

22 MR. FREDERICK: Well --

23 JUSTICE SCALIA: Let's assume you have a  
24 disinterested board of directors, which is what the  
25 statute requires. You tell me even though they are

1 disinterested, they can't fire the adviser. It seems to  
2 me, while they can't fire him, they can say: We are  
3 going to cut your fee in half. Whereupon they don't  
4 have to fire him. He will pack up and leave, and they  
5 will get a new adviser. Doesn't that work?

6 MR. FREDERICK: There is actually no  
7 evidence in any record I am aware of where that has  
8 actually happened. The directors have no leverage. And  
9 that's the problem the Court -- this Court recognized in  
10 the Daily Income Fund case.

11 If I could reserve the balance of my time,  
12 please.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Gannon.

15 ORAL ARGUMENT OF CURTIS E. GANNON

16 ON BEHALF OF THE UNITED STATES,

17 AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONERS

19 MR. GANNON: Mr. Chief Justice, and may it  
20 please the Court:

21 The fiduciary duty imposed by section 36(b)  
22 prohibits an investment adviser's fees from being  
23 outside the range that arm's-length bargaining would  
24 produce. The courts below erred by failing to consider  
25 evidence about what the investment adviser in this case

1 charges its unaffiliated clients when it provides  
2 services that Petitioners claim are, in fact, comparable  
3 to the services at issue here.

4 JUSTICE KENNEDY: Do you think Congress used  
5 the term "fiduciary" in a very special sense here? I  
6 will just tell you the problem I'm having with the case.  
7 If I look at a standard that fees must be reasonable  
8 and I compare that with what a fiduciary would do, I  
9 thought a fiduciary has the highest possible duty. But  
10 apparently the submission is the fiduciary has a lower  
11 duty, a lesser duty than to charge a reasonable fee. I  
12 just find that quite a puzzling use of the word  
13 "fiduciary."

14 Now, if Congress uses it as a term of art or  
15 in some special sense, fine.

16 MR. GANNON: Well, we do think that --

17 JUSTICE KENNEDY: But it seems to me an odd  
18 use of the term "fiduciary." I don't know why Congress  
19 didn't use some other word.

20 MR. GANNON: Well, we do think that the term  
21 "fiduciary duty" is here used to counterbalance the lack  
22 of arm's-length bargaining that exists between the board  
23 of directors and the investment adviser, and we do think  
24 that it drew upon the established term of art in  
25 *Pepper v. Litton*, the case that counsel for Petitioners

1 was already referring to. That's a case that actually  
2 involved corporate directors, and there the same test,  
3 the same ultimate standard, was -- was stated, which is  
4 whether the -- the bargain carries the earmarks of an  
5 arm's-length bargain and whether it's inherently fair.

6           And so we do think that in the development  
7 of the legislation in 1969, the memorandum that the SEC  
8 submitted to Congress in 1969 explained that the shift  
9 from reasonableness to fiduciary duty largely achieved  
10 some procedural objectives of shifting the focus from  
11 the board of directors to the investment adviser, and  
12 the text of the statute specifically makes it a  
13 fiduciary duty with respect to the receipt of  
14 compensation.

15           We think one salutary effect of that was to  
16 -- to make it clear that the court's burden here, the  
17 court's duty here, wasn't just to establish what the  
18 single most reasonable fee would be, but harking back to  
19 the *Pepper v. Litton* test, whether the bargain fell  
20 within the range of what arm's-length bargaining  
21 otherwise would have achieved. And --

22           CHIEF JUSTICE ROBERTS: Counsel, if we are  
23 going to have regulation of what fees can be charged --  
24 you cite in your brief the various regulations the SEC  
25 has issued. It makes a lot more sense to have the SEC

1 regulate rates than to have courts do it, doesn't it?

2 MR. GANNON: Well, in the abstract, it might  
3 make more sense, Mr. Chief Justice. I think the choice  
4 that Congress made here was to counterbalance the --

5 CHIEF JUSTICE ROBERTS: Well, you are not  
6 suggesting the SEC wouldn't have authority to do that,  
7 are you?

8 MR. GANNON: Well, even under this statute,  
9 the SEC has the authority to file suits under section  
10 36(b).

11 JUSTICE GINSBURG: Has it filed any?

12 MR. GANNON: It hasn't filed any since --  
13 since 1980, Justice Ginsburg. I think that the SEC in  
14 this context -- it has -- it has primarily directed its  
15 resources and energies into encouraging there to be  
16 better disclosure of fees, both the disclosure of  
17 information to the board, disclosure to investors,  
18 better education to shareholders so that they would be  
19 able to go --

20 JUSTICE SCALIA: It -- it must be aware of  
21 the -- of the divergence between the fees that  
22 investment advisers charge to these companies and what  
23 they charge to other clients. Isn't the SEC aware of  
24 that?

25 MR. GANNON: It is aware of that, and --

1 JUSTICE SCALIA: And yet has brought no  
2 suits against this industry?

3 MR. GANNON: Since 1980, it hasn't used  
4 section 36(b). It has used less formal mechanisms in  
5 the context of examinations and investigations --

6 JUSTICE SCALIA: Disclosure -- just for  
7 disclosure. But that suggests to me that the SEC may  
8 think that this is indeed a self-contained industry and  
9 that the comparison with investment advice given to  
10 other entities is -- is not a fair one.

11 MR. GANNON: Well, when the SEC helped draft  
12 the statute in the 1960s, it recognized that there was  
13 this systematic disparity between the amounts that  
14 mutual funds were being charged by investment advisers  
15 and the amounts that investment advisers were charging  
16 their unaffiliated clients, and in the 1969 memorandum  
17 that I referred to, which is reprinted in an appendix to  
18 the amicus brief by John Bogle in its entirety, the SEC  
19 mentioned that comparison as being something that may  
20 well be relevant in proving in an individual case that  
21 that particular investment adviser's fees are excessive.

22 And we think that the test here of whether  
23 under all the circumstances, which is what section  
24 36(b)(2) points the court towards, of having to weigh --  
25 having to weigh the board's approval of fees in light of

1 all the circumstances, that those circumstances include  
2 things like the evidence that Petitioners have presented  
3 here, that this --

4 JUSTICE GINSBURG: Mr. Gannon, the -- all  
5 the circumstances, that comes from the Second Circuit's  
6 Gartenberg case?

7 MR. GANNON: Well, it also comes,  
8 Justice Ginsburg, from the text of section 36(b)(2),  
9 which --

10 JUSTICE GINSBURG: But in -- in that case,  
11 at least there was a footnote that seemed to say, you  
12 don't have to engage in a -- in a comparison with what  
13 institutional investors are paid.

14 MR. GANNON: The footnote that you are  
15 talking about did point out that in that case the  
16 comparison that the plaintiffs were attempting to draw  
17 between the money market fund at issue and a pension  
18 fund wasn't a particularly relevant one, because the  
19 services at issue were so different. And here the  
20 parties appear to dispute how different the services  
21 are. At -- at the summary judgment stage, the  
22 Respondent stated that it disputed how comparable the  
23 relevant services were.

24 The district court and the court of appeals  
25 considered that dispute immaterial because, instead of

1 comparing, instead of determining whether this  
2 investment adviser is selling the same services at half  
3 the price to its unaffiliated clients who actually can  
4 engage in arm's-length bargaining, those courts simply  
5 said that if it -- if it falls within the range that is  
6 charged by other mutual funds, that would be acceptable.  
7 And we --

8 CHIEF JUSTICE ROBERTS: Counsel, the statute  
9 does not say, in considering the rates you look at all  
10 the circumstances. Am I right? It says, in considering  
11 whether to defer to the board, you look at all the  
12 circumstances.

13 MR. GANNON: It does say that you should  
14 give the board such --

15 CHIEF JUSTICE ROBERTS: The board.

16 MR. GANNON: -- such consideration as is  
17 deemed appropriate under all the circumstances. That's  
18 correct.

19 CHIEF JUSTICE ROBERTS: Right. But isn't  
20 that different than saying, in looking at what the rates  
21 should be or whether they are excessive, you look at all  
22 the circumstances?

23 MR. GANNON: Well --

24 CHIEF JUSTICE ROBERTS: It may well be that  
25 you don't defer to the board, but that doesn't mean it's

1 a free-for-all in deciding what you do look at.

2 MR. GANNON: Well, I think that it  
3 demonstrates that the Court is obligated to look to all  
4 the circumstances simply to determine whether the  
5 board's approval -- how much weight it should be given.

6 And as this Court explained in Daily Income  
7 Fund, the entire point of section 36(b) is to provide an  
8 independent check, the -- independent of the fact that  
9 the directors approved the fees. We think that an  
10 appropriately informed board that asks the right  
11 questions, that gets the right information, and fully  
12 considers the sort of factors that are discussed --

13 JUSTICE SOTOMAYOR: Even if they agree to  
14 pay double the price?

15 MR. GANNON: We think that -- that the right  
16 process followed by the board would be probative, but  
17 something like double the price may -- may demonstrate  
18 that that is an unfair bargain.

19 JUSTICE SOTOMAYOR: That -- that's what --  
20 are you advocating that there is a stand-alone cause of  
21 action or breach of duty when there isn't full  
22 disclosure, even if the fee is within arm's-length --  
23 normal -- begging the question of what's normal, but  
24 assuming that --

25 MR. GANNON: I --

1 JUSTICE SOTOMAYOR: -- it's within an arm's-  
2 length transaction range in the market?

3 MR. GANNON: If there was a lack of full  
4 disclosure, that might in the abstract be a breach of  
5 fiduciary duty even under the Seventh Circuit's test.  
6 We think that if it didn't actually have an effect on  
7 the fees, then it wouldn't be actionable here because  
8 there would be no actual damages flowing from the lack  
9 of disclosure.

10 JUSTICE SCALIA: But even if there is full  
11 disclosure, your -- your position is, in every case, a  
12 court must decide whether the fee is reasonable or not.

13 MR. GANNON: A court would need to decide  
14 whether the plaintiff has met its burden of proving that  
15 it falls outside the range of fees that arm's-length  
16 bargaining would have -- would have arrived at, and  
17 that's a cause of action that would be --

18 JUSTICE SOTOMAYOR: Well, how much deviance,  
19 and what is the scope of the range?

20 MR. GANNON: Well, I think that the term of  
21 art of "fiduciary duty" doesn't necessarily demonstrate  
22 how much deviance away from the range there would be. I  
23 think that, depending upon the segment of the market,  
24 the range might be more or less narrow.

25 In segments of the market where services are

1 more commoditized and standardized, perhaps with index  
2 funds, there might be a much narrower range of fees that  
3 are arrived at through arm's-length bargaining, and even  
4 -- and smaller disparities might be inappropriate there.  
5 And --

6 JUSTICE KENNEDY: How is the -- how is the  
7 standard you've just described different from a standard  
8 of reasonableness?

9 MR. GANNON: It -- I think that the chief  
10 way it differs from reasonableness, Justice Kennedy, is  
11 in saying that the Court doesn't actually have to decide  
12 what the single most reasonable fee is. But as -- as  
13 the SEC explained in 1969, the shift from reasonableness  
14 to fiduciary duty was --

15 JUSTICE KENNEDY: Well, I would be very  
16 surprised if "reasonableness" always meant one -- one  
17 figure. It can mean a range.

18 MR. GANNON: Well, I think reasonableness  
19 is -- is inevitably going to be part of the inherent  
20 fairness inquiry that this Court referred to in *Pepper*  
21 *v. Litton* as being part of the fiduciary duty test as  
22 to whether the transaction carries --

23 JUSTICE STEVENS: May I ask you a question  
24 going back to Justice Kennedy's early question? Do you  
25 think the fiduciary status of the defendant in this case

1 is different from the fiduciary status of the -- of a  
2 president of a corporation?

3 MR. GANNON: I -- I think that it is  
4 different from the status of a president of a  
5 corporation, that the term of art, "fiduciary,"  
6 which Congress was invoking here can mean different  
7 things in different circumstances.

8 Pepper was a case that involved corporate  
9 directors. The chief difference here and what Congress  
10 was intending to counteract was the inherent structural  
11 impediment to arm's-length bargaining between the  
12 investment adviser and the board of directors. And  
13 that's what makes that high burden that was used in  
14 *Pepper v. Litton* for controlling shareholders the  
15 relevant analogy, we believe.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. GANNON: Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Mr. Donovan.

19 ORAL ARGUMENT OF JOHN D. DONOVAN, JR.

20 ON BEHALF OF THE RESPONDENT

21 MR. DONOVAN: Mr. Chief Justice, and may it  
22 please the Court:

23 The point that Mr. Gannon just made and that  
24 Mr. Frederick made before, that there was some  
25 structural impediment to negotiation between a mutual

1 fund board and adviser, is at the heart of this dispute,  
2 because that is a judgment that Congress made. The  
3 Investment Company Act, in the first instance, delegates  
4 responsibility to the board of directors to approve  
5 fees. A fee may not be approved that does not have the  
6 consent of a majority of the independent trustees in the  
7 first instance.

8 The independent check on fees that is  
9 erected by section 36(b) --

10 JUSTICE SOTOMAYOR: Let's assume -- let's  
11 assume that all of the independent board of director  
12 members vote for a particular fee, but the fee is  
13 negotiated by an insider, and the insider is the one who  
14 does the evaluation, looks at them and says: I think  
15 this is really a great deal, guys. And they just fell  
16 for it. Is that a process that would guarantee an  
17 arm's-length transaction in the sense that Congress  
18 intended in this Act?

19 MR. DONOVAN: It may not, and it may give  
20 rise to a cause of action. As I started to --

21 JUSTICE SOTOMAYOR: Which cause of action?

22 MR. DONOVAN: A cause of action --

23 JUSTICE SOTOMAYOR: Under what?

24 MR. DONOVAN: It may give a cause of action  
25 under section 36(b) if the circumstances you described,

1 Justice Sotomayor, are -- have an impact upon the fee.  
2 And the reason --

3 JUSTICE SOTOMAYOR: So, then their process  
4 is part of your definition of "fiduciary duty"? A court  
5 has to look at the nature of process?

6 MR. DONOVAN: If there is an impact upon fee  
7 that is outside of the range of what could have been  
8 bargained. The reason for that --

9 JUSTICE SOTOMAYOR: Now -- now you are  
10 adding what has been added, which is outside of the  
11 range, correct?

12 MR. DONOVAN: Yes. And --

13 JUSTICE SOTOMAYOR: All right.

14 MR. DONOVAN: If I understand your question  
15 correctly, will a process flaw alone justify a  
16 section 36(b) cause of action? My answer is no. Will a  
17 process flaw that affects a fee justify a 36(b) action?  
18 Yes, it will. And the reason that --

19 JUSTICE SOTOMAYOR: All right. But what you  
20 are -- but what you are arguing is, if the process is  
21 fair, even if the fee is outside the range of an arm's-  
22 length transaction, there is no cause of action?

23 MR. DONOVAN: No, I -- I doubt that as  
24 well. There are two separate causes of action, I can  
25 imagine, under 36(b): One, a process flaw that has a

1 fee impact; and, second, a fee that is so far outside of  
2 the bounds of what could have been bargained that it  
3 justifies independent review.

4 The question under 36(b) is whether, having  
5 delegated responsibility in the first instance to a  
6 board, there is a reason to second-guess their judgment.  
7 And the independent check that Mr. Gannon referred to  
8 that section 36(b) erects should not be a de novo judicial  
9 review of the size of a fee for a couple of reasons,  
10 the first of which is section 36(b)(2). That statute  
11 instructs courts to give such consideration as they  
12 consider due to the deliberations of the board. What  
13 did they see? What did they get? Did they negotiate?

14 JUSTICE SCALIA: That's a wonderfully clear  
15 command, isn't it? Such --

16 MR. DONOVAN: That there would be no --

17 JUSTICE SCALIA: Such consideration as is  
18 appropriate? What is the language? Read it. What is  
19 it?

20 MR. DONOVAN: The language is "such  
21 consideration that the court considers due in the  
22 circumstances."

23 JUSTICE SCALIA: Wow.

24 (Laughter.)

25 MR. DONOVAN: But there would be no reason

1 for that instruction at all, Your Honor, if a court were  
2 to make its own judgment about what is fair and  
3 reasonable.

4 JUSTICE SCALIA: No, it's meaningless. It  
5 tells the court to make its own judgment. Such  
6 consideration as the court deems due. Give it  
7 whatever -- whatever consideration you -- you feel like.  
8 It's utterly meaningless to me.

9 MR. DONOVAN: What I think Congress was  
10 doing was considering what the source of the common law  
11 had been before. The corporate context,  
12 Justice Kennedy, I think was what inspired -- at  
13 corporate law, a decision would not be second-guessed by  
14 a court unless there was a reason to do so, unless the  
15 judgment of directors and the presumption of regularity  
16 that attached to their decisions could for some reason  
17 be second-guessed. Was there a process flaw? Was it so  
18 far out of bounds that --

19 CHIEF JUSTICE ROBERTS: Well, what is "so  
20 far out of bounds"? In other words, you are saying, you  
21 can look at what the directors did if it's, as you said,  
22 too far out of bounds, but 10 percent off, 50 percent  
23 off?

24 MR. DONOVAN: Mr. Chief Justice --

25 CHIEF JUSTICE ROBERTS: Double, as they say

1 is the case here?

2 MR. DONOVAN: I'm sorry.

3 CHIEF JUSTICE ROBERTS: Double, as they say  
4 is the case here?

5 MR. DONOVAN: As the plaintiffs say is the  
6 case here.

7 CHIEF JUSTICE ROBERTS: Yes.

8 MR. DONOVAN: I suggest there is no  
9 numerical basis, because in fact every kind of mutual  
10 fund and every stripe of mutual fund is different. You  
11 could --

12 CHIEF JUSTICE ROBERTS: Well, then you say:  
13 Look to see if it's outside the bounds. And now you  
14 tell me there is no way to look if it's outside the  
15 bounds.

16 MR. DONOVAN: Well, I think the first  
17 comparator would be other funds of a similar stripe.  
18 So, for example, you could imagine that a mutual fund  
19 with the same investment objective and style that is two  
20 times might be inappropriate. You could also imagine a  
21 different circumstance where -- passively managed funds,  
22 for example -- a multiple of fees would be  
23 inappropriate.

24 You could also, though, imagine a case where  
25 there is substantial risk taken, where the types of

1 securities that are invested in are unusual, where  
2 substantial differences could be justified.

3 JUSTICE SCALIA: Is that the test that the  
4 court of appeals here applied?

5 MR. DONOVAN: Pardon me.

6 JUSTICE SCALIA: Is that the test that the  
7 court of appeals here applied, whose judgment you want  
8 us to affirm?

9 MR. DONOVAN: The court of appeals did not  
10 apply the test. Judge Easterbrook --

11 JUSTICE SCALIA: So we should remand it for  
12 application of the test that you propose?

13 MR. DONOVAN: I don't think you have to.  
14 And the reason is because of what the district court  
15 did. And there I get to, Justice Ginsburg, what you  
16 said. The -- the argument is made that services are the  
17 same. In fact, that is not the record. And if you look  
18 at page 161 of the joint appendix and following, there  
19 is a list of services that the trust -- the investment  
20 adviser gave to the trustees in this case, about all of  
21 the services that they did for their fee in the case.

22 JUSTICE SCALIA: Surely that's a disputed  
23 fact, isn't it? And you want us to dispose -- or you  
24 want this to be disposed of on summary judgment.

25 MR. DONOVAN: Oh, in fact --

1 JUSTICE SCALIA: The other side says the  
2 services aren't that much different.

3 MR. DONOVAN: They are very different. Page  
4 161 and following will tell you how. And the district  
5 court, at page 30 -- 16a, excuse me, of the district  
6 court's opinion, notices that the services were  
7 different. So, on the record --

8 JUSTICE SOTOMAYOR: Well, they claim --

9 JUSTICE SCALIA: He wasn't talking about  
10 this particular case.

11 MR. DONOVAN: Oh, he was.

12 JUSTICE SCALIA: He was talking about in  
13 general, wasn't he?

14 MR. DONOVAN: No, he was talking about this  
15 case, Justice Scalia.

16 JUSTICE SOTOMAYOR: Except that they claim  
17 that you were receiving additional payment for the  
18 services, or some or at least a substantial number of  
19 the services, that you claim are attributed by the  
20 difference. So they're saying if you compare apples to  
21 apples, you were charging twice the amount. If you  
22 compare apples to oranges, there are differences because  
23 the oranges were different, but you were getting paid  
24 for those oranges separately. I think that was their  
25 argument.

1 MR. DONOVAN: That is their argument and  
2 it's not accurate, Your Honor.

3 JUSTICE SOTOMAYOR: Well, that's the issue  
4 of disputed fact. So let's go back. Are you disavowing  
5 the Seventh Circuit's approach? Because I read your  
6 brief and it doesn't appear as if you are defending  
7 their market approach that says, so long as the process  
8 was fair, any fee is okay. That's how I thought they  
9 had reached their conclusion.

10 MR. DONOVAN: I think what Judge Easterbrook  
11 said -- and we are not disagreeing -- is if there is  
12 deceit of directors that would justify a cause of action  
13 under 36(b). But in the absence of, in his words,  
14 "pulling the wool over the eyes of the trustees" --

15 JUSTICE SOTOMAYOR: That's what I'm talking  
16 --

17 MR. DONOVAN: Right.

18 JUSTICE SOTOMAYOR: I am using his words in  
19 terms of a fair process --

20 MR. DONOVAN: And I think --

21 JUSTICE SOTOMAYOR: -- and you're disavowing  
22 that?

23 MR. DONOVAN: I do not defend that, because  
24 I can imagine, as your hypothetical asked earlier,  
25 directors or trustees who are not paying attention --

1 JUSTICE SOTOMAYOR: Your positions is no  
2 different than the Solicitor General's, that there has  
3 to be some measure of fair process and some measure of a  
4 fair fee, at least within -- in terms of it not being  
5 outside the range, an arm's-length transaction?

6 MR. DONOVAN: The Solicitor General gets it  
7 right when she describes Gartenberg as the standard. Is  
8 this a result that could have been fairly bargained at  
9 arm's-length? Where we part company is with respect to  
10 two things: One is, she says and Mr. Gannon said today,  
11 that the most important consideration is a comparison to  
12 other kinds of fees, and that is required in the  
13 calculus in a district court. In fact, that would  
14 make mandatory what the SEC rules only make  
15 discretionary.

16 Chief Justice, you asked earlier about the  
17 SEC's rules in this area. And, in fact, they compel  
18 disclosure of fees charged by advisers to their funds  
19 in their complex of similar investment objectives.  
20 They do not require disclosure of accounts within an  
21 adviser's business operations that are institutional  
22 accounts. Now, to be sure --

23 JUSTICE SCALIA: That -- that are what?

24 MR. DONOVAN: That are -- that the adviser  
25 -- institutional accounts that the adviser serves. If

1 -- if a trust --

2 JUSTICE GINSBURG: But the -- the fund  
3 adviser here -- I mean, the investment adviser did  
4 disclose -- that's in the record -- did disclose the  
5 difference between what were charged mutual funds, what  
6 were charged institutional investors, and then explained  
7 that the services were different and that justified the  
8 difference. But they weren't trying to say, no, we  
9 don't have to come forward with this information.

10 MR. DONOVAN: That's precisely correct, Your  
11 Honor. In this case, the trustees did have the  
12 information -- the adviser did disclose it -- but the  
13 SEC does not require them to ask that question. All it  
14 requires them to do is if they do ask the question, if  
15 they do study the material, they must disclose the  
16 weight they put onto it.

17 JUSTICE BREYER: Suppose that you were  
18 appointed to a committee to set my pay, that might be  
19 helpful. I'd say, I'll pay you \$50,000 a year to do it,  
20 as long as I am satisfied with your results.

21 Now, would you, for example, not have in  
22 your mind: I would like to know what he's paid by other  
23 people that don't have someone like me setting his pay.  
24 Wouldn't that be in your mind?

25 MR. DONOVAN: It could be, sure.

1 JUSTICE BREYER: Yes -- well, so wouldn't  
2 that be a normal question to ask?

3 MR. DONOVAN: And the trustees did ask it  
4 here.

5 JUSTICE BREYER: Well, I don't know if they  
6 asked -- I mean, I think we are reviewing the  
7 district court opinion; I think we are reversing -- we  
8 are reviewing -- sorry. We're reviewing.

9 (Laughter.)

10 JUSTICE BREYER: I have laryngitis; I don't  
11 speak accurately.

12 (Laughter.)

13 JUSTICE BREYER: I think we are reviewing a  
14 -- a decision of a court of appeals setting a standard,  
15 and so wouldn't, when we set the standard, say we can't  
16 say if in every case you are not going to go out and ask  
17 him what he charges when he mows the neighbor's lawn,  
18 but we would like to know what he charges when he asks  
19 for money from people who do not have this kind of  
20 supervision, and we would like if it's a lot different  
21 to ask him why?

22 MR. DONOVAN: Justice Breyer --

23 JUSTICE BREYER: Okay, so what's the problem  
24 then with saying that in the opinion?

25 MR. DONOVAN: There is no problem with

1 saying that if it is a relevant consideration.

2 JUSTICE BREYER: Well, it's almost -- it's  
3 pretty unusual that it won't be, and I think certainly  
4 you have in the case in front of us a case where it  
5 would be relevant. You may have an answer to the  
6 question. There may be a perfectly good answer, so  
7 let's listen to it.

8 MR. DONOVAN: The difference, Your Honor, is  
9 that the Solicitor General and the plaintiffs would make  
10 the question and the answer dispositive in every case.  
11 I would acknowledge as --

12 JUSTICE BREYER: The answer dispositive?  
13 Well, I don't see it should be dispositive. Maybe the  
14 services would be quite different.

15 MR. DONOVAN: Precisely.

16 JUSTICE BREYER: All right. So -- but you  
17 no objection, then I'm not sure there is much of an  
18 issue. There might -- I mean, maybe there is some.  
19 That's the only issue, whether this should be  
20 dispositive always, or whether it should be a factor to  
21 take into account where relevant?

22 MR. DONOVAN: It is a factor that I consider  
23 that is likely to be relevant in any case --

24 JUSTICE BREYER: So you have no objection to  
25 send it back and say, look, of course this is relevant,

1 perhaps quite often relevant; why don't you look at it?

2 MR. DONOVAN: My objection -- my objection  
3 to sending it back is only that that analysis was done.

4 JUSTICE GINSBURG: But did -- but in the  
5 Seventh Circuit, Judge Easterbrook said, mainly we have  
6 to look to see if there was full disclosure, and then  
7 there might be cases where it's so out of line. And he  
8 said the comparison would be to other mutual funds. He  
9 excluded the comparison with institutional investors.  
10 So to that extent, was the Second Circuit wrong, saying  
11 this is not a relevant factor; what other mutual funds  
12 pay investment advisers may be a relevant factor?

13 MR. DONOVAN: I think the Seventh Circuit  
14 made that comparison. Judge Easterbrook did say that  
15 the services of institutional accounts ordinarily are  
16 different from mutual fund accounts. I agree that in  
17 the first instance, the first comparator usually should  
18 be mutual funds, and regrettably Judge Easterbrook did  
19 not cite to the record for the reasons to identify those  
20 differences. But it is in fact in the record, and there  
21 is no other record that suggests that they were the  
22 same. All we had below was the assertion that, on the  
23 one hand, an advisory contract for an institutional  
24 account said advisory services; and the other we had  
25 a mutual fund advisory contract that said advisory

1 services.

2 CHIEF JUSTICE ROBERTS: When you say you  
3 should look at the range and how far it's off, do you  
4 mean that in the Gartenberg sense? In other words, if  
5 it is way out of line, then you assume or can at least  
6 look further at whether there was a fair process? Or do  
7 you mean it in the normal case, in sort of setting the  
8 rates, you just look how far it is off?

9 MR. DONOVAN: I look at it in the Gartenberg  
10 sense, Your Honor. And the reason is because as I --  
11 from what I said the first question is, is when do you  
12 ask courts to substitute their judgment?

13 CHIEF JUSTICE ROBERTS: It's probably --  
14 you're not the person to -- to ask, but do you  
15 understand the Solicitor General's position to be your  
16 understanding of the Gartenberg sense or something else?

17 MR. DONOVAN: I believe they interpret in  
18 the Gartenberg sense. I think that the Solicitor  
19 General's position and the Respondent's, with respect to  
20 the standard that you ought to apply, is Gartenberg.

21 JUSTICE BREYER: What do we do about  
22 Gartenberg? That is to say, the key sentence you can  
23 read either way. The key sentence could mean -- it just  
24 depends on tone of voice. You must charge a fee that is  
25 not so disproportionately large that it bears no

1 reasonable relationship to the services rendered and  
2 could not have been -- could not have been the product  
3 of arms-length bargaining. Or you could say, look, it's  
4 unlawful where it's so large it doesn't -- where  
5 there is no reasonable relationship. And if there is no  
6 reasonable relationship, how could it have been the  
7 product of arm's-length bargaining?

8 MR. DONOVAN: I agree you can turn the words  
9 upside down. I think they turned it upside down --

10 JUSTICE BREYER: You object if we turn them  
11 upside down?

12 MR. DONOVAN: I think they turned them  
13 upside down for a reason, and the reason is 36(b)(1),  
14 which imposes the burden of proof upon --

15 JUSTICE BREYER: Well, I'm saying the tone  
16 -- be a little careful here.

17 MR. DONOVAN: Well, it's a --

18 JUSTICE BREYER: So we can say the substance  
19 is -- I'm just trying this out -- the substance is to  
20 look and see if it's reasonable, and if it's reasonable  
21 it certainly is the product of arm-length bargaining, if  
22 it's not reasonable, how could it be? Got to get an  
23 answer to that, okay? So, that way you see the tone is:  
24 Be careful -- you are a judge; you are not a rate-  
25 setter. How's that?

1                   MR. DONOVAN: I would accept the proposition  
2                   that it is reasonable if it is outside of what could  
3                   have been bargained at arm's-length. I think they  
4                   turned it upside down for the reason that the  
5                   statute reverses the burden of proof, and I think that  
6                   they also acknowledged that it is a process-oriented  
7                   thing for judges to do, because after all you are asking  
8                   here a standard for judges to apply in a contested  
9                   situation that recognizes the responsibility of the  
10                  board in the first instance. That's what 36(b)(2) is  
11                  all about.

12                 JUSTICE SCALIA: Would -- would you give us  
13                 the citations of the parts of the record that you say  
14                 render it unnecessary for us to remand for the lower  
15                 court to consider a comparison with non- -- with  
16                 institutional charges?

17                 MR. DONOVAN: Yes, Your Honor. I start at  
18                 page 16a and 17a of the district court's opinion where,  
19                 at page 16a at the bottom, the district court said the  
20                 services supplied are different. And --

21                 JUSTICE SCALIA: Where? At 16a of the Joint  
22                 Appendix, you are talking about?

23                 MR. DONOVAN: I'm sorry, Your Honor, the  
24                 petition.

25                 JUSTICE SCALIA: Of the petition.

1                   MR. DONOVAN: Correct. It's 16a of the  
2 petition, which is Judge Kocoras's opinion. At the  
3 bottom of the page, you will see that he said, "The  
4 services Harris provided to institutional clients varied  
5 but in all events were more limited than those provided  
6 to the funds."

7                   If you then go on to page 17, he goes  
8 through with respect to each of these three funds and  
9 chronicles the fees they paid and by comparison the fees  
10 charged to institutional accounts with similar  
11 investment objectives. The statement by the plaintiff,  
12 Petitioners here, that the fee charged was a 2X  
13 multiple, does not refer to that array of institutional  
14 accounts. It takes one in order to make the comparison  
15 what it is.

16                  And then, Justice Scalia, I would then go to  
17 page 32a of the district court's opinion where he  
18 describes what appear to be disputed issues of fact.  
19 And what he said those dispute issues of fact were about  
20 were what the Petitioners claim were flaws in the  
21 negotiation process -- in substance, what they would  
22 have done had they been negotiating, rather than the  
23 trustees. It is not a dispute about the ultimate test:  
24 Was this fee so far out of bounds it could not have been  
25 reasonable?

1                   To be sure, throughout a record that is as  
2 large as this one, you could imagine the parties  
3 disputed lots of things. What you could not fairly  
4 dispute was whether these fees, for these funds, using  
5 comparable funds and using institutional accounts, as  
6 Judge Kocoras did, were so far out of bounds they could  
7 not have been fairly bargained. And if that is the  
8 test, there is no need for remand.

9                   If, as I suggest and as the Solicitor  
10 General suggests, Gartenberg is the appropriate  
11 standard, Gartenberg is what the district court applied.

12                   This Court has, to be sure, on occasion --  
13 and it is rare -- both announced a test and applied it  
14 in the same circumstances.

15                   In circumstances where courts are looking  
16 for guidance on what the standard is and how to apply  
17 it, I suggest this is a case in which affirming what the  
18 district court did would be appropriate.

19                   JUSTICE GINSBURG: What about the  
20 Petitioners' allegation that the investment adviser did  
21 not provide full and accurate information? And they  
22 mention particularly concerning economies of scale,  
23 profitability, and several other matters, that that --  
24 that what everybody agrees is necessary, full  
25 disclosure, had not occurred.

1                   Is that a disputed issue of fact that  
2 warrants further inquiry?

3                   MR. DONOVAN: I don't think it is, Your  
4 Honor. And, again, I would go back to what Judge  
5 Kocoras said on 32a.

6                   There was absolutely suggestions in the  
7 record by the plaintiff that they would have negotiated  
8 differently, but, for example, with respect to  
9 ostensible misrepresentations on, among other things,  
10 profitability and the rest, this was because the  
11 plaintiffs' expert did an accounting and accounted for  
12 costs differently and said, had you accounted for costs  
13 and allocated them the way I did, you would have reached  
14 a negotiated result that was different.

15                   Well, that just isn't what happened. That's  
16 why Judge Kocoras said, this goes to the integrity of  
17 the negotiation. Would the negotiation have been  
18 different?

19                   The plaintiffs say, I would have done it  
20 differently, but that's all they said. And it is not a  
21 misrepresentation to say, I would have accounted for  
22 costs differently.

23                   Finally, I would -- the other question you  
24 asked is where in the record -- Justice Scalia, I'm  
25 sorry. It's at page 161 and following, where the

1 background of all the difference in fees and the  
2 difference in services is chronicled.

3 You can tell, from the pull-out charts at  
4 page 171, what fee is charged for each of these mutual  
5 funds and what fee is charged for institutional  
6 accounts.

7 If you take the plaintiffs' point of view  
8 and say that a comparison to institutional accounts is  
9 always required and may be dispositive and is always a  
10 fraction of what mutual fund charges and that judges  
11 are, in the first instance, the ones to decide who is  
12 fair and reasonable -- or what is fair and reasonable,  
13 as opposed to directors, I suggest you consign 8,000  
14 mutual funds to a trial.

15 On this record, these were funds that had  
16 best-in-class performance for fees that were at or below  
17 industry averages.

18 That is not a record upon which a reasonable  
19 person could conclude that the adviser has over-reached.  
20 That is at the heart of fiduciary duty.

21 I see my time is about to expire. Thank  
22 you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Frederick, you have 3 minutes  
25 remaining.

1 REBUTTAL ARGUMENT OF DAVID C. FREDERICK  
2 ON BEHALF OF THE PETITIONERS

3 MR. FREDERICK: The district court here did  
4 not make findings. This was a summary judgment case.  
5 And, in fact, the court didn't find that the disputes  
6 were nonexistent.

7 In fact, on page 30a, the district court  
8 said that the disputes were nonmaterial. And that's a  
9 very important distinction because the joint appendix  
10 that you have before you contains a lot of evidence in  
11 which it is disputed whether or not these were similar  
12 services.

13 The Harris manager on page 6 -- JA 650, the  
14 portfolio holdings of the funds are very similar. On  
15 512, the Harris fund manager testimony that, when he  
16 buys a stock, he buys it for all mutual funds and  
17 independent accounts, with the same investment  
18 objective.

19 On 505 to 506, the Harris research director  
20 testimony that the managers of the mutual funds and  
21 independent accounts share equally all work done by the  
22 research department. And 513 to 514, that the Harris  
23 fund manager says all of our analysts do research for  
24 all of our clients.

25 There is disputed evidence here as to what

1 constitutes similarity, Justice Sotomayor, these are  
2 comparing apples to apples because the record indicates  
3 that there are separate contracts for the additional  
4 fees that they charge to the mutual funds for the  
5 additional services provided.

6 We're simply talking about comparisons of  
7 money management, but if I could --

8 CHIEF JUSTICE ROBERTS: Was your friend  
9 correct, that these funds have better than average  
10 performance and lower than average fees?

11 MR. FREDERICK: In one small aspect of the  
12 damages period, that is correct, and after that was  
13 found, they had lower than average performance and  
14 higher than average fees, Mr. Chief Justice. It's a  
15 damages period that encompasses several years.

16 If I could go back to the point, though,  
17 about the fiduciary duty, what Judge Cardozo, when he  
18 was on the New York Court of Appeals, said, a fiduciary  
19 represents the punctilio of honor, and that is  
20 contrasted with the morals of the marketplace operating  
21 at arm's-length.

22 It surely cannot be the case that, where you  
23 are dealing with a fiduciary duty -- which is a higher  
24 standard recognized in the law -- that you can charge  
25 twice as much as what you are obtaining at arm's-length

1 for services that you are providing.

2 The Gartenberg Court, Justice Breyer, in  
3 fact, had the opposite language that you were adverting  
4 to, and that is at page 694 F.2nd at 928, where the  
5 Court said, quote, "The test is essentially whether the  
6 fee schedule represents a charge within the range of  
7 what would have been negotiated at arm's-length in the  
8 light of all the surrounding circumstances."

9 JUSTICE BREYER: I thought, by reversing  
10 that, picking out what the essence was, you would get  
11 pretty close to what you are arguing for, without  
12 getting into all this thing of whether it's just like a  
13 trustee or whether a lawyer should be a trustee or --  
14 you know, there are a lot of questions here that could  
15 float around, of any language we use.

16 MR. FREDERICK: That's right. The Second  
17 Circuit that went on to flip it and say, we had to prove  
18 a negative, which is not ordinarily what a plaintiff has  
19 to prove in any law case, by showing it -- it is so  
20 disproportionate it could not have been achieved at  
21 arm's-length, and that is where we think the court --  
22 courts have gotten this wrong.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 10:57 a.m., the case in the

1 above-entitled matter was submitted.)

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