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No. 13-550

IN THE SUPREME COURT OF THE
UNITED STATES

GLENN TIBBLE, et al.,
Petitioners,
v.

EDISON INTERNATIONAL, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

The protections afforded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, are of vital concern to workers of all ages and to retirees, as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. It is important to ERISA plan participants to ensure that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C.

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of amicus briefs and have filed letters reflecting their blanket consent with the Clerk of the Court.

§ 1104(a)(1)(A). To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets.

Given the primacy of defined contribution plans in the American workplace, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently. Accordingly, resolution of the issues in this case will have a direct and vital bearing on the ability of plan participants to protect their retirement accounts from mismanagement and to ensure economic security in retirement. In light of the significance of the issues presented by this case, AARP respectfully submits this brief, as amicus curiae to facilitate full and thorough consideration by the Court.

SUMMARY OF ARGUMENT

Alarmist arguments that decry an outcome for the petitioners as a death knell for employee retirement plans are cast more heat than light. The ERISA duty of prudence requires fiduciaries of employer sponsored defined contribution plans to regularly monitor and re-evaluate long standing plan investment options. Industry standard of practice has borne out this requirement to include regular re-evaluation of investment share class and fees, a recommendation resoundingly echoed by responsible employers and retirement management consulting groups. Mutual funds are not an outlier, and should be included in the regular review process.

A formalized legal requirement to evaluate existing investment options for imprudent fees will not weaken the 401(k) system. Rather, it merely embraces the procedures that plan sponsors and their fiduciaries should already be following. Furthermore, employers' own interests are served by continuing to offer retirement programs that attract and aid in maintaining a productive work force. Judicial affirmation of a fiduciary duty for an accepted best practice poses no burden on employer plan sponsors, nor does it threaten to erode their willingness to offer 401(k)s.

Requiring periodic fiduciary consideration of mutual fund fees as part of a prudent investment evaluation merely recognizes a fiduciary duty that is already embraced as standard practice.

ARGUMENT

I. CLAIMS THAT A RULING IN PETITIONER'S FAVOR WILL AMOUNT TO A DEATH KNELL FOR THE 401(K) PLAN ARE WHOLLY UNREALISTIC.

ERISA imposes a fiduciary duty of prudence on sponsors and administrators of defined contribution plans. Section 404, 29 U.S.C. § 1104 (2012). Professional standards, legal precedent, and common sense dictate that the ERISA mandated duty of prudence includes an ongoing obligation to monitor a plan's investment options, such as they may be, from time to time. A handful of self-professed plan advocates would argue that petitioners seek to

saddle plan fiduciaries with a dramatic and arduous new burden and paralyzing legal exposure. The claim is that expanding fiduciary duty will sound the death knell for individual account retirement plans. These commentators warn that holding fiduciaries liable for their failure to evaluate existing investments will open the floodgates to "hugely disruptive" lawsuits that may result in "employers just cutting out their retirement benefits as a response." *See* John Manganaro, *Experts See Big Stakes in SCOTUS Review of Tibble*, Plansponsor, (Oct. 6, 2014), http://www.plansponsor.com/Experts_See_Big_Stakes_in_Supreme_Court_Review_of_Tibble.aspx.

The critics of defining plan fiduciary duty to include the regular and periodic assessment of existing investments draw no support from logic or in industry practice. Concomitant with the responsibilities of a defined contribution plan fiduciary is the aspiration that plan investment options provide the best attainable value to plan participants. *See* 29 U.S.C. § 1001(b) (under ERISA, the fiduciary duty of a defined benefit plan administrator is to "protect the interests of participants in employee benefit plans and their beneficiaries…"). An administrator that does not regularly monitor the share class and fee structure of investment options offered under his watch is plainly neglecting his fiduciary duty of prudence under ERISA, and thus falling short of accepted professional standards. Petitioners' claims essentially seek to align judicial analysis of ERISA conduct standards with responsible plan fiduciary practice standards customarily applied in the industry.

A. The ERISA Fiduciary Duty Of Prudence Applicable To Defined Contribution Plan Administrators Already Encompasses A Duty To Monitor Plan Investment Options.

ERISA and existing industry standards of practice impose a duty to regularly monitor plan investment performance, including the level and appropriateness of applicable fees. ERISA "establish[s] standards of conduct, responsibility, and obligation for fiduciaries of [those] plans." 29 U.S.C. § 1001(b). In order to carry out that policy, ERISA requires that the fiduciary "defray[] reasonable expenses of administering the plan," 29 U.S.C. § 1104(a)(1)(A)(ii), and act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use…." In other words, ERISA requires a trustee to exercise the skill and knowledge of an informed investor, or to ensure that designated plan administrators and the consultants whom they engage actually use the skill and expertise for which they were hired to analyze the relative values of investment options offered under the benefit plan. A reasonably informed person exercising "skill, prudence, and diligence" to minimize plan expenses should be expected to periodically evaluate the cost factors inherent in the plan's investment options.

The Department of Labor (DOL) explicitly recognizes the requirement to regularly monitor investment offerings. DOL regulations define the

standard of conduct to include a duty to review the performance of plan trustees and other fiduciaries "at reasonable intervals" and "as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." 29 C.F.R. § 2509.75-8 (2007). What constitutes a "reasonable interval" will vary by circumstances, but not to such an extent that a six year statute of limitations could run before an evaluation is required. *See Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 882 (N.D. Ill. 2009) (the court allowed a one year evaluation interval but opined that situations might exist where even this frequency of review is too scant).

The duty to monitor is also recognized by solid jurisprudence. For thirty years, the Seventh Circuit has recognized that a plan fiduciary has "a duty to monitor appropriately the administrator[] actions." *See Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984) (recognizing that "fiduciaries responsible for selecting and retaining their close business associates as plan administrators…[have] a duty to monitor appropriately the administrators' actions.") (citing to 29 U.S.C. §§ 1104(a)(1), 1105(a) and 1105(c), and Restatement (Second) of Trusts §§ 184, 224 (1959)). *See also Lingus*, 649 F. Supp. 2d at 882 ("The duty to monitor is thus a natural extension of the duty to appoint and remove plan fiduciaries."). The court in *Leigh* held that, although fiduciary duty does not require an examination of every action by a plan administrator, it does oblige "prudent and reasonable action to determine whether the administrators were

fulfilling their fiduciary obligations." 727 F.2d at 153. *See, e.g.*, *Harris v. Koenig*, 602 F. Supp. 2d 39 (D.D.C. 2009) (recognizing that monitoring duties of appointing fiduciaries under ERISA are well established, and that "the power to appoint and remove trustees carries with it the concomitant duty to monitor those trustees' performance.") (quoting *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998).

The duty to monitor includes ensuring that plan administrators correct imprudent investments. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) ("agree[ing] with the position taken by the Secretary of Labor…that the selection of plan investment options *and the decision to continue offering* a particular investment vehicle are acts to which fiduciary duties attach….") (emphasis added). The Fourth Circuit agreed that a fiduciary has a responsibility to ensure imprudent options are not offered to plan participants. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) ("a fiduciary of a defined contribution, participant-driven, 401(k) plan … who is given discretion to select *and maintain* specific investment options for participants—must exercise prudence in selecting *and retaining available* investment options.") (emphasis added).

Petitioners are not advancing a novel plan administration concept. Notably, in a client advisory the nationally prominent law firm Bryan Cave advises plan sponsor clients to meet at least quarterly "to consider information regarding performance, selection, and oversight of plan

investments" and to "establish a policy for ongoing plan expense and fee monitoring." Lisa Van Fleet and Carrie Byrnes, *Top Ten New Year's Resolutions for Retirement Plan Fiduciaries*, Benefits Bryan Cave (Jan. 2, 2014) http://benefitsbryancave.com/top-ten-new-years-resolutions-for-retirement-plan-fiduciaries/. Petitioners' seek to hold respondents to no larger duty.

Even when a plan sponsor delegates its responsibility to oversee the plan, the plan sponsor is not relieved of its duty to monitor. *See Leigh*, 727 F.2d at 135 ("[Defendants] could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust."). The inability to delegate the duty to monitor is recognized by private industry as well. *See* United Ret. Plan Consultants, *Delegating Fiduciary Risk and Responsibility*, *available at* http://www.unitedretirement.com/docs/default-source/news-articles/default-document-library/delegating-fiduciary-responsibilities.pdf?sfvrsn=6 (last visited Dec. 3, 2014) ("Because the selection *and subsequent monitoring* of service providers is a fiduciary duty itself, Plan Sponsors can never entirely delegate their fiduciary responsibilities.") (emphasis added).

B. The Act Of Monitoring Existing Plan Investments Makes No Exception For Mutual Funds That Are Longstanding On The Plan's Investment Menu.

Given that the majority of 401(k) funds use mutual funds to stock their plans, prudence requires continual and systematic review of mutual funds in the plan investment menu regardless of acquisition date. Department of Labor regulations and guidance are clear that there is no exception to the duty to monitor simply because a mutual fund is longstanding on an investment menu. Market variables, historic performance, management details, fees and expenses, and other factors each impact the assessment of the ongoing soundness of an investment choice. *See* Securities and Exchange Commission, *Invest Wisely: An Introduction to Mutual Funds*, http://www.sec.gov/investor/pubs /inwsmf.htm (last visited Dec. 3, 2014) ("Mutual funds are **not** guaranteed . . . You can lose money by investing in mutual funds.") (emphasis in original).

The suitability of the investment vehicle for the plan is always a necessary and proper subject of current concern. The criteria for judging an investment's risk of financial harm, and the reasonableness of its expense ratio, are not tied to the date the investment was initially selected for inclusion in the plan. The duty to monitor and reassess at a reasonable frequency is constant. *See, e.g.*, *DiFelice* at 423 ("[A] fiduciary must initially determine, and continue to monitor, the prudence of each investment option available to plan

participants. Here, the relevant 'portfolio' that must be prudent is each available Fund considered on its own."); *Chao v. Trust Fund Advisors*, No. 02-559, 2004 U.S. Dist. LEXIS 4026 at *13 (D.D.C Jan. 20, 2004) ("[W]hile a fiduciary may consider the prudence of an individual investment in the context of the 'whole portfolio,' such considerations do[] not immunize or permit any individual investment to be less than prudent.").

Mutual fund fees are a key consideration for fiduciaries that require regular monitoring. Department of Labor guidance specifically addresses the fiduciary's ongoing monitoring obligation to ensure plan investment fees are reasonable. *See Understanding Retirement Plan Fees and Expenses*, United States Department of Labor Employee Benefits Securities Administration, http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html (last visited Dec. 8, 2014) ("[E]valuating plan fees and expenses … is an important part of the fiduciary's responsibility. This responsibility is ongoing."). In addition to considering fees during the initial selection of a fund, fiduciaries must regularly reassess fee structure. *See Meeting Your Fiduciary Responsibilities*, United States Department of Labor Employee Benefits Securities Administration (last visited Dec. 8, 2014), http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html ("fees and expenses should be monitored to determine whether they continue to be reasonable."). Additionally, mutual fund investments carrying higher fees may not deliver better results than lower-cost index funds. Burten G. Malkiel, *A Random Walk Down Wall*

Street 400 (1999) ("The important point to realize is that mutual-fund asset performance bears no relationship to the expenses charged. Although you may 'pay for what you get' in some products, you don't buy any better investment management by paying high fees. Quite the opposite—high fees lead to inferior investment performance.").

Many retirement plans retain mutual funds for years after making the initial investment. *See* Jacklyn Wille, *High Court to Address Statute of Limitations For Suits Challenging Retirement Plan Fees*, Bloomberg BNA Pension & Benefits Reporter, Oct. 7, 2014, http://www.bna.com/high-court-address-b17179895745/. And although plan sponsors and fiduciaries likely employ periodic review process, *see* Part C, *infra*, for some, these procedures often do not dictate a critical review of the reasonableness of administration and investment fees. *See 10 things you're [probably still] doing wrong as an ERISA fiduciary*, Plansponsor.com, 34 (October 2011) *available at* http://www.ifebp.org/inforequest/0161208.pdf ("They do not compare their fees with those that are being paid by similar plans for similar services."). The Ninth Circuit's ruling rubber stamps a continuation of this neglect, virtually erasing significant elements of the plan fiduciary's duty to monitor by absolving them of the requirement to monitor the fee profiles of longstanding funds—leaving a gaping hole in the protection ERISA intended to provide for employee retirement plans.

Mutual funds by nature are a tricky and constantly fluctuating investment that necessitates

regular monitoring. *See* Lawrence Jones, *Anatomy of a Mutual Fund Disaster*, Morningstar.com (Jul. 14, 2008), http://news.morningstar.com/articlenet/article.aspx?id=243683. Shifting market variables can drastically impact the value of a given mutual fund. For example, a proliferation of internet-centric mutual funds in the late 1990s plummeted, and in some cases folded altogether, after the dotcom bubble burst in 2000. *See* Evelyn M. Rusli and Verne Kopytoff, *Investing Like It's 1999*, NYTimes.com, (March 27, 2011 3:12 PM), http://dealbook.nytimes.com/2011/03/27/is-it-a-new-tech-bubble-lets-see-if-it-pops/?_r=0 (Merrill Lynch debuted a notorious fund—Merrill Lynch Internet Strategies Fund—that lost 70% of its $1.1 billion investment assets a year after creation.). *See also* Rob Silverblatt, *The Decades' 10 Worst Fund Disasters*, U.S. News & World Report, (Dec. 30, 2009), http://money.usnews.com/money/blogs/fund-observer/2009/12/30/the-decades-10-worst-fund-disasters. Similarly, the recent mortgage crisis, and subsequent investor flight from financial sector and asset-backed securities markets, caused roughly 65% and 80% declines in two funds touted as "low risk." *See* Lawrence Jones, *From Difficult to Disaster: Redemptions' Impact on Funds*, Morningstar.com, http://money.usnews.com/money/blogs/fund-observer/2009/12/30/the-decades-10-worst-fund-disasters (Feb. 07, 2008).

Funds that are longstanding on a plan menu are not immune to the market pressures described above, and thus require the same vigilant fee monitoring as new acquisitions. *See* Donald Stone,

Investment Selection and Monitoring: A Practical Approach to Best Practices, 401khelpcenter.com, http://www.401khelpcenter.com/401k/stone_investment_selection.html#.VIXovPnF_zi (last visited Dec. 4, 2014) [hereinafter Stone, Investment Selection) ("Quarterly reporting and continuous monitoring should be the standard for all but the smallest plans where this may not be financially feasible."). Absolving a plan fiduciary of the duty to regularly monitor and reassess the viability and benefit of all funds offered for employee investment does not serve the "best interests of the participants" in a constantly, and at times rapidly, evolving market. This is the type of negligence the fiduciary duty is intended to prevent.

C. Savvy Employers, Legal Practitioners, And Consultants Who Specialize In Advising Plan Fiduciaries Conduct Regular Review Of Existing Investment Options In The Normal Course Of Business.

Application of the fiduciary duty of prudence to require fee scrutiny of investment offerings that have outlasted the ERISA statute of limitations is not earth shattering. More than likely, employers perceive this regimen as a barely perceptible tremor that simply echoes the current practices of responsible plan sponsors and retirement plan consulting specialists.

The need for regular monitoring of investments in employer sponsored retirement plans is also ubiquitous in the marketing materials of

major consulting groups. Morgan Stanley's Consulting Group advises fiduciaries of employer sponsored retirement savings plans that they are legally charged with demonstrating prudence in selecting and monitoring investment decisions. A responsible exercise of this duty includes, among other factors, a consideration of asset class and accompanying fee structure. *See* Morgan Stanley Consulting Group, *Investment Consulting Advice for Your Retirement Plan* (Aug. 2013) *available at* http://www.morganstanleyfa.com/public/projectfiles/0ae45459-9693-4d86-8b24-adb5a664125b.pdf.

Morgan Stanley continues to emphasize the importance of monitoring by touting the many analytic tools the firm offers to aid plan sponsors to "monitor[] fund performance." *Id*. at 2-3 (six-step investment process includes "Monitor Fund Performance" and specifies integrating a "detailed review of the investment options currently available" against your plan's investment policy criteria).

Similarly, JP Morgan directs plan sponsors to "periodically monitor plan investments and prudently evaluate whether to keep or replace them." JP Morgan Asset Managers, *Understanding Your Fiduciary Role* 11 (April 2014) *available at* https://www.jpmorganfunds.com/blobcontent/391/31/1323377781893_RI-FIDGUIDE-0414.pdf (hereinafter JP Morgan).

And most benefit plan consulting groups do the same, *See, e.g.*, GCG, gcgfinancial.net, (last visited Nov. 30, 2014) (boasting services including

regular review of performance, quarterly monitoring reports and coordination of investment selection and de-selection); Wealth Enhancement Group, http://wealthenhancement.com/individual/our-approach/ (last visited Nov. 30, 2014) (Specialists will "constantly assess industry news, economic perspectives, market opportunities and product introductions…); Axia Advisory, www.axiaadvisory.com, http://www.axiaadvisory.com/retirement-plan-consult ing#5 (last visited Nov. 30, 2014). ("A review of the investment managers in the plan should be completed on a quarterly to semi-annual basis as ERISA expects the Plan Sponsor to monitor the investments for consistency with the [Investment Policy Statement]."); PlanPilot, Investment Monitoring, www.planpilot.com, http://www.planpilot.com/investment-consulting/inve stment-monitoring (last visited Nov. 30, 2014) ("PlanPilot utilizes…performance and risk models, which enable clients to make performance comparisons versus peers and benchmarks, analyze style consistency and identify the sources of return and risk."). In short, the standard to which petitioners seek to hold respondent is *de rigeur* in the context of plan administration best practices.

D. The Task Of Reviewing Mutual Fund Share Class And Fee Attributes In The Course Of Periodic Plan Review Is An Insignificant Undertaking For Plan Sponsors And Administrators.

Review of share class and fee attributes are essential to prudent mutual fund investing and

should be incorporated into regular investment plan monitoring. Evaluation of these critical considerations is an imperceptible burden to a plan fiduciary's existing obligation to monitor fund performance. Decisions as to suitability of a class for investment can be made using information readily available in the fund prospectus. *See* Securities and Exchange Commission, *Mutual Fund Classes*, http://www.sec.gov/answers/mfclass.htm (last visited Dec. 8, 2014). Even a casual investor can use a cost calculator provided by the Securities and Exchange Commission to determine whether the costs are reasonable. Securities and Exchange Commission, *Calculating Mutual Fund Fees and Expenses*, http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm (last visited Dec. 8, 2014) ("With just some basic information, you can use the tool to compare the costs of different mutual funds in a matter of seconds."). Plan fiduciaries, who are obligated to operate with the knowledge of a "prudent expert" should have little difficulty incorporating a quick evaluation of the cost basis of a mutual fund into their overall assessment. *See* Stephen D. Rosenberg, *Retreat from the High Water Mark: Breach of Fiduciary Duty Claims Involving Excessive Fees After Tibble v. Edison International,* 18 J. OF PENSION BENEFITS 12, 18 (2011) [hereinafter Rosenberg, Retreat from the High Water Mark) ("[Plan fiduciaries … are to act as a reasonably prudent person who is knowledgeable with regard to the investment options, something often referred to as a 'prudent expert' standard.").

Even if ongoing monitoring of existing funds cannot be as thorough as is done at the time of initial selection, the ease with which a fiduciary can evaluate share class and fee data renders failure to divest funds with unnecessarily high fees unacceptable. The Ninth Circuit astutely held that purchasing retail class shares when identical institutional class shares are available at a lower price violates the fiduciary duty of prudence. *See Tibble v. Edison Int'l*, 711 F. 3d 1061, 1085, 1087 (9th Cir. 2014) (affirming the district court finding of a violation of prudence for three funds where "all three funds offered institutional options … in the range of 24 to 40 basis points cheaper than the retail class options the Plan did include …."). Failure to recognize that past fund selections are similarly imprudent, and are harmfully siphoning employee retirement income is just as egregious a failure of fiduciary duty as is selecting overpriced funds in the first place. *See* Rosenberg, *Retreat from the High Water Mark* at 18 ("There is no credible reason to believe that a reasonable expert in mutual funds or similar investment options would not know that a large dollar investor can do better, simply by basic negotiation, than can the general public as a whole."). Time of acquisition is not the relevant consideration; rather, prudence requires the plan fiduciary to recognize and remedy the offending investment.

Moreover, plan sponsors that delegate administration of their benefits plans to consultant groups or committees typically will do so through an expressed investment policy statement ("IPS") that guides plan administrators on how to stay legally

compliant with their fiduciary duty. *See* JP Morgan at 10 ("a properly drafted [IPS] can go a long way in helping fiduciaries fulfill their duties."). JP Morgan advises plan sponsors to create an IPS that dictates among other things, "a monitoring and replacement process." *Id*. Plan sponsors could therefore easily implement a fiduciary requirement to consider share class and mutual fund fees in the regular monitoring prescribed in their ISP.

Many companies conspicuously practice policies that proactively stave off imprudent mutual fund investments by banning retail class investment. Cigna Corporation has a past and future policy of eschewing needlessly higher cost investment products. *See Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S. Dist. LEXIS 101165, at *140, 244-45 (C.D. Ill. July 3, 2013). The settlement prohibited Cigna Plans from "offering retail mutual fund investment options or separately managed accounts which invest in retail mutual funds." *Id*. at *140. Additionally it stated that "[Cigna] has agreed to continue to exclude retail class mutual funds from the Plan's lineup—as it has since the 1990s." *Id*. at 244-45.

Even if the investment fees do not patently rail against the best interests of the participant, plan sponsors can, and should, determine the competitiveness of investment fees through simple peer comparison. A best practices guide for plan sponsors advises fiduciaries to benchmark, not only plan performance against its peer group, but also fee and expense ratios. *See* Stone, *Investment Selection* ("expenses or manager's fees should not be above the

medium of its peer group.”). Case law has gone beyond guidance in at least one circuit. In *Tussey v. ABB, Inc.*, the Eighth Circuit held that fiduciaries can breach their duty of prudence in part by neglecting to “determine whether [the investment company’s] pricing was competitive” and by failing to “adequately leverage the Plan’s size to reduce fees. 746 F.3d 327, 336 (8th Cir. 2014).

Additionally, plan fiduciaries have the option, which many exercise, to use expert consultants to determine the reasonableness of an investment’s fees. *See* John M. Chavez, *White Paper: ERISA Fiduciary Responsibility: Fiduciary Reliance on Registered Investment Advisers*, Multnomah Group, http://www.multnomahgroup.com/fiduciary-reliance-on-registered-investment-advisers-white-paper (last visited Dec. 8, 2014) (“A qualified consultant can educate the plan sponsor on the services and expenses that are appropriate for a plan of a given size and can advise the plan sponsor on opportunities as the plan grows.”). In the wake of the Court electing to hear this case, one benefits consultant advises, “[t]he sponsor simply needs to select the share class that provides the lowest net cost to the participant.” Doug Conkel, *Tibble vs. Edison: What it will mean for plan sponsors and fiduciaries*, Retirement Town Hall (Oct. 16, 2014), http://www.retirementtownhall.com/?p=6532#sthash0tfd6UO9.dpbs. He continues by “encourag[ing] sponsors to study up on their plan’s fee arrangements, fee-leveling, and other best practices within the industry.” *Id.* All of this advice is eminently sensible and it is a far cry from novel or

cumbersome. Plan fiduciaries simply incorporate this readily accessible factor into the required monitoring process directed at existing plan investments, clearly an action that any prudent investor would reasonably undertake.

E. Claims That Inclusion Of An Ongoing Duty To Police Share Class And Fee Attributes Within The ERISA 401(k) Fiduciary's Duty Of Prudence Will Impact Employers' Willingness To Implement And Maintain 401(k) Plans Are Wildly Rash And Unfounded.

When it comes to recruiting and retaining employees over the long term, "not having a retirement plan is a glaring hole," Sabrina Parsons, executive of Palo Alto Software, said. "It's like restrooms in the office; you can't not have them." Sarah Max, *Many Reasons to Offer 401(k)s (Including Owner's Retirement)*, NYTimes.com (July 30, 2014) http://www.nytimes.com/2014/07/31/business/smallbusiness/Setting-up-a-401-k-plan-at-a-small-business.html?_r=0.

A decision for the petitioner will not cause employers to jettison their 401(k) plans. Benefits packages, including 401(k)s, are deeply embedded in the American employment culture, and are an integral part of employer recruiting and retention policies. According to the Bureau of Labor Statistics, 74% of full-time private industry employees have access to retirement benefits. *See* News Release, Bureau of Labor Statistics, *Employee Benefits in the*

United States (July 25, 2014) www.bls.gov/ncs/ebs/sp/ebnr0020.pdf. Nearly 50% of all business establishments offer a defined contribution plan. *See* Bureau of Labor Statistics, Employee Benefits Survey, Table 1 (March 2014), http://www.bls.gov/news.release/pdf/ebs2.pdf. A survey conducted by the Center for Advanced Human Resources found extrinsic rewards—a category inclusive of retirement benefits—to be the second most frequent reason cited by employees when asked why they stay with an employer. John Hausknecht et al., *Targeted Employee Retention: Performance-Based and Job-Related Differences in Reported Reasons for Staying* 18-19 (Center for Advanced Human Resource Studies, Working Paper Series, 2008), *available at* http://bit.ly/1B3KbMN (extrinsic rewards cited 41% of the time). *See also* MetLife, *Benefits Breakthrough: How Employees and Their Employers are Navigating an Evolving Environment* 2 (2014), *available at* https://benefittrends.metlife.com/assets/downloads/benefits-breakthrough-summaries-2014.pdf [hereinafter MetLife] ("Study finding a significant rise in the number of employees who agree that benefits are a very important reason they joined and/or stayed with their company."). The extent of 401(k) benefits offered by companies is of such importance to prospective employees that Bloomberg Businessweek recently began publishing a ranking list of which U.S. companies offer the best 401(k) plans. *See generally*, Margaret Collins and Carol Hymowitz, *Who's Got the Best Retirement Plan?*, businessweek.com, (July 24, 2014), http://www.businessweek.com/articles/2014-07-24/401-k-s-which-companies-have-the-best-retirement-pla

ns (ranking 401(k) plans among 250 of the largest U.S. employers).

Employers, likewise, derive tremendous utility from offering 401(k) plans. U.S. News describes an employer's motivation for offering a 401(k) as "primarily to attract the best employees in the most cost-efficient manner possible…." Emily Brandon, *6 Ways to Measure the Success of a 401(k) Plan*, U.S. News & World Report, (Jan. 31, 2011), http://money.usnews.com/money/blogs/planning-to-retire/2011/01/31/6-ways-to-measure-the-success-of-a-401k-plan (citing MetLife study). A spokesperson for Phillip Morris International explained their generous 401(k) program from a practical business perspective: "A robust retirement package for our U.S. personnel is essential to ensuring that we can attract, motivate and retain the best global talent." Margaret Collins and Carol Hymowitz, *The Best 401(k)s: Retire at 60 From Conoco with $3.8 Million; Facebook Last*, Bloomberg.com, (July 22, 2014), *available at* http://bloom.bg/1rn9SSp. Younger companies too, like Facebook, indicate a desire to grow, rather than limit, 401(k) benefits. *See id.* (Facebook expressed an intention to offer 401(k) matching contributions by April 2014. Stating in a letter to Bloomberg Businessweek: "We take a comprehensive approach to the benefits we offer all our people, which includes a robust 401(k) match…").

Given the value placed on 401(k) benefits by employees, and the undeniable financial benefits perceived and realized by employers through offering these plans, the claim that employers will cease

offering 401(k)s merely because the Court recognizes a duty of ongoing evaluation of share class and fee attributes—something that many companies routinely now do—is highly suspect and eminently unreliable.

CONCLUSION

For all of the foregoing reasons AARP submits that the Court should recognize that ERISA defined contribution plan fiduciaries are bound by their duty of prudence to periodically monitor mutual fund fees and expenses, and that failure to do so is actionable. The Ninth Circuit's decision should be reversed.

Respectfully Submitted,

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