No. 18-926

In the Supreme Court of the United States

PUTNAM INVESTMENTS, LLC, *et al.*,

Petitioners,

v.

JOHN BROTHERSTON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether, in an action for fiduciary breach under 29 U.S.C. § 1109(a), the plaintiff bears the burden of proving that the breach caused losses to the plan, or whether the defendant has the burden of disproving loss causation.

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INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurers (ACLI) is the largest life insurance trade association in the United States, representing the interests of hundreds of member companies. Those companies are leading providers of financial and retirement security products, including life, disability, and long-term care insurance products and annuities, in both individual and group markets. ACLI members represent approximately 95 percent of industry assets in the United States.[1]

The vast majority of the products sold by ACLI members in the group employee benefits market are subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. ACLI has regularly filed *amicus* briefs in ERISA cases presenting issues of importance to its members. *See, e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99 (2013); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

The key issue addressed by this brief is whether a plaintiff alleging a breach of fiduciary duty has the burden to prove that the breach caused losses to the plan to recover under ERISA. In ACLI's view, the answer is yes. To establish liability, ERISA requires proof of "losses to the plan resulting from each [fidu-

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[1] No party or counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel funded the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for petitioners and respondents received timely notice of this filing, and both consented to the filing of the brief.

ciary] breach." 29 U.S.C. § 1109(a). The ordinary rule in civil litigation is that plaintiffs are required to prove every element of their claims. That rule should apply here. As explained below, there is no reason to shift the burden to the defendants to disprove loss causation.

Because ACLI's members create and administer investment products that are commonly included in retirement plans, they can become involved in ERISA fiduciary-breach litigation, either as defendants or as interested third parties. ACLI's members therefore have a substantial interest in ensuring that ERISA plaintiffs are required to prove all elements of a fiduciary-breach claim, including that the breach caused losses to the plan.

SUMMARY OF ARGUMENT

Congress struck a careful balance in enacting ERISA. It sought to "offer employees enhanced protection for their benefits" without "creat[ing] a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Requiring an ERISA plaintiff to establish every element of his fiduciary breach claim is critical to maintaining that balance.

As retirement plan balances have grown, retirement plan fiduciaries have become bigger targets for litigation. As a result, meritless ERISA cases are on the rise. More and more plaintiffs have claimed fiduciary breach based on meager allegations. For example, plaintiffs commonly claim that a fiduciary should have known that other investments would perform better than those selected by the fiduciary.

That is easy to allege with the benefit of hindsight – but such a claim seriously misunderstands the obligations of ERISA fiduciaries. The fiduciary's duty of prudence, *see* 29 U.S.C. § 1104(a)(1)(B), focuses on the process, not the outcome. A fiduciary is not liable simply because an investment did not perform well. But plaintiffs proceed on these weak claims because the potential payout (however unlikely and unsupported) is enormous.

One tactic enterprising plaintiffs' lawyers have used in fiduciary-breach cases is to attempt to shift the burden of proof to the defendant on loss causation, a critical element of a fiduciary-breach claim. Unfortunately, some courts of appeals have accepted that argument. Those courts require defendants to disprove that an alleged fiduciary breach caused losses to the ERISA plan. This is contrary to the "ordinary default rule" that a plaintiff has the burden to prove each element of a federal statutory cause of action. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

This burden-shifting rule poses serious problems for the orderly conduct of ERISA litigation. Defendants must be able to obtain early dismissal of meritless fiduciary-breach lawsuits. By relieving plaintiffs of their burden to prove every element of their claims, the circuits that have allowed burden-shifting have made ERISA fiduciary-breach cases much easier to plead and much more resistant to dismissal and summary judgment. That increases litigation costs to employers, increases burdens on the court system, and ultimately harms plan participants.

The time has come for this Court to step in and clarify that the plaintiff in an ERISA fiduciary-

breach action must prove that the asserted breach caused losses to the plan. The courts of appeals have divided on this important legal question, and they are unlikely to resolve their disagreement without this Court's intervention. This Court has twice called for the views of the Solicitor General on the issue. The issue is cleanly presented in this case, and it is dispositive. The costs to ERISA defendants (and ultimately to plan participants) are enormous and will continue to grow. This Court should grant certiorari now.

ARGUMENT

I. Meritless Fiduciary-Breach Lawsuits Impose Significant Costs On Employers And Plan Participants

A. Meritless Fiduciary-Breach Suits Are On The Rise

There has been a surge in ERISA class-action litigation in recent years. In 2016 and 2017 alone, plaintiffs brought more than 100 challenges to 401(k) plans, which was a substantial increase over prior years. George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?* 1-2 & fig. 1 (Ctr. for Ret. Res., Issue Br. 18-8, 2018), goo.gl/jvPAuy. Suits against the 403(b) plans of non-profit employers have increased as well. *See, e.g.*, Seyfarth Shaw LLP, *ERISA University Excessive Fee Cases Take Another Hit* (Oct. 10, 2018) (noting that "[n]early 20 universities have been sued under [ERISA] over the fees paid in their Section 403(b) qualified employee benefit defined contribution plans"), goo.gl/FkyhuZ; Carmen Castro-Pagan, *University Retirement Fee Cases: Where They Are Two Years Later*, Bloomberg Law (Aug. 20, 2018)

(explaining that these cases represent "a new wave of lawsuits" against universities), goo.gl/futdDD. This trend is expected to continue. *See* John Manganaro, *Retirement Plan ERISA Litigation Trends Still Heating Up*, PLANSPONSOR (Nov. 15, 2018), goo.gl/746KXK.

Many of these actions allege fiduciary breach. A fiduciary breaches its duties when it fails to employ "the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). This standard "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results." *PBGC ex rel. Saint Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (quotation marks and alteration omitted). A fiduciary is not liable for a decision, regardless of deficiencies in the process, "if a hypothetical prudent fiduciary would have made the same decision anyway." *Tussey v. ABB, Inc.*, 746 F.3d 327, 335 (8th Cir. 2014) (quotation marks omitted). That is, the fiduciary is not liable unless its imprudence actually caused the plan's losses. 29 U.S.C. § 1109(a) (authorizing recovery of "losses to the plan resulting from each such breach").

Although the duty of prudence depends on the fiduciary's process, rather than the outcome, plaintiffs commonly bring fiduciary-breach claims because the investments chosen by the fiduciary did not perform as well as other investments. The plaintiffs' theory in those cases is that the fiduciaries breached their duties because if they had chosen different investments, they would have made more money for the plan. *See, e.g.*, *Wilcox v. Georgetown Univ.*, No. 18-

422, 2019 WL 132281, at *10-11 (D.D.C. Jan. 8, 2019).

These claims are relatively easy for plaintiffs to allege, because all the plaintiffs need to do is hypothesize a way in which the fiduciary could have used a different process in choosing the investments and then try to shift the burden to the defendant to disprove that the new process would have made a difference. And plaintiffs have the benefit of hindsight, *i.e.*, they know how the investment options actually performed. Of course, the ERISA fiduciaries could not possibly have known how the investment would perform when they chose it for inclusion in an ERISA plan. But plaintiffs' lawyers nonetheless bring these claims in hopes of obtaining a windfall judgment.

Plaintiffs have raised a variety of contradictory claims in these cases. Consider the example of stable value funds – a common investment option in retirement plans. ERISA fiduciary-breach lawsuits have been filed alternatively alleging that:

- the fiduciary should not have offered a particular stable value fund as an investment option because it was *too risky*, *see In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-cv-2548, 2017 WL 1273963, at *1 (S.D.N.Y. Mar. 31, 2017);
- the fiduciary should not have offered the fund because it was *not risky enough*, *see Ellis v. Fidelity Mgmt. Tr. Co.*, 883 F.3d 1, 5 (1st Cir. 2018); and
- the fiduciary was *required* to offer the fund as an investment option, *see White v. Chevron Corp.*, No. 16-cv-0793, 2017 WL 2352137, at *2

(N.D. Cal. May 31, 2017), *aff'd*, No. 17-16208, 2018 WL 5919670 (9th Cir. Nov. 13, 2018).

These contradictory allegations highlight the ease with which plaintiffs bring fiduciary-breach cases and the difficulties those cases pose for defendants.

B. Duty-of-Prudence Suits Against Universities Illustrate The Problem

ERISA cases against universities highlight this trend. Plaintiffs often allege that plan fiduciaries offered imprudent investments as part of university retirement plans. As one district court recently noted, "[t]his type of lawsuit seems to have taken higher education by storm, with suits brought all over the country." *Wilcox*, 2019 WL 132281, at *1.

For example, 17 lawsuits have been brought against universities in short succession alleging that fiduciaries acted imprudently in permitting plan participants to invest in two specific, common investment funds.[2] In those cases, the plaintiffs simply al-

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[2] *See Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018) (finding for defendant on all claims after bench trial), *appeal docketed*, No. 18-2707 (2d Cir. Sept. 12, 2018); *Wilcox*, 2019 WL 132281, at *13 (dismissing complaint in its entirety); *Davis v. Wash. Univ. in St. Louis*, No. 4:17-cv-1641, 2018 WL 4684244, at *5 (E.D. Mo. Sept. 28, 2018) (dismissing complaint in its entirety), *appeal docketed,* No. 18-3345 (8th Cir. Nov. 1, 2018); *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *14 (N.D. Ill. May 25, 2018) (dismissing complaint in its entirety), *appeal docketed*, No. 18-2569 (7th Cir. July 18, 2018); *Sweda v. Univ. of Pa.*, No. 16-4329, 2017 WL 4179752, at *11 (E.D. Pa. Sept. 21, 2017) (dismissing complaint in its entirety), *appeal docketed*, No. 17-3244 (3d Cir. Oct. 13, 2017); *Short v. Brown Univ.*, No. 17-cv-318 (D.R.I. filed July 6, 2017); *Daugherty v. Univ. of Chi.*, No. 17-cv-3736 (N.D. Ill. filed May 18, 2017); *Cates v. Trs. of Columbia Univ. in City of N.Y.*,

lege that the funds did not perform as well as other funds the plaintiffs chose as benchmarks, and then suggest ways in which the fiduciaries could have used a more prudent process in choosing the funds. Often, the "benchmark" funds are not comparable at all to the challenged investments, and the plaintiffs merely guess at ways the process might have been imprudent.[3] But if the case arises in a circuit that

No. 16-cv-6524 (S.D.N.Y. filed Aug. 18, 2016); *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (S.D.N.Y. filed Aug. 17, 2016); *Clark v. Duke Univ.*, No. 16-cv-1044 (M.D.N.C. filed Aug. 10, 2016); *Henderson v. Emory Univ.*, No. 16-cv-2920 (N.D. Ga. filed Aug. 11, 2016); *Stanley v. George Wash. Univ.*, No. 18-cv-878 (D.D.C. filed Apr. 13, 2018); *Kelly v. Johns Hopkins Univ.*, No. 16-cv-2835 (D. Md. filed Aug. 11, 2016); *Nicolas v. Trs. of Princeton Univ.*, No. 17-cv-3695 (D.N.J. filed May 23, 2017); *Munro v. Univ. of S. Cal.*, No. 16-cv-6191 (C.D. Cal. filed Aug. 17, 2016); *Cassell v. Vanderbilt Univ.*, No. 16-cv-2086 (M.D. Tenn. filed Aug. 10, 2016); *Vellali v. Yale Univ.*, No. 16-cv-1345 (D. Conn. filed Aug. 9, 2016).

[3] The petition raises a second question about whether a plaintiff can establish losses to the plan simply by comparing the chosen funds to particular index funds. *See* Pet. i. This brief does not separately address that question. But the university cases have shown that index funds often are not appropriate benchmarks for establishing losses, because they are insufficiently similar to the challenged funds. *See, e.g.*, *Wilcox*, 2019 WL 132281, at *11 ("That the CREF Stock Account, with its deliberate mix of foreign and domestic investments, may not have performed as some purely domestic accounts with different investments does not indicate imprudence on the part of Defendants."); *see also Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) ("The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [challenged funds] were an imprudent choice at the outset."). Because it will always be possible for plaintiffs to identify some benchmark fund that beat a challenged fund, courts should require plaintiffs to plead and prove that reasonable fiduciaries would have chosen the benchmark fund initially. After all, "ERISA's fiduciary duty of care re-

allows burden-shifting, once the plaintiff alleges fiduciary breach, the plaintiff may be allowed to proceed on those meager allegations.

These examples, which concern only two investment funds, represent a very small subset of all ERISA class actions. Yet they provide a good example of the types of meritless claims defendants have faced in recent years.

C. Meritless Fiduciary-Breach Cases Impose Significant Costs On Employers And Plan Participants

Many defendants incur substantial costs in defending against meritless claims. "[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Saint Vincent Catholic Med. Ctrs.*, 712 F.3d at 719. Those costs add up quickly. For example, the defendants in one fiduciary-breach case spent $42 million just through the end of trial. *See Tussey v. ABB Inc.*, No. 2:06-cv-04305, 2015 WL 8485265, at *6 (W.D. Mo. Dec. 9, 2015).

And the trial court is rarely the last stop. In this case, for example, petitioners have defended this action through a trial in the district court and a trip to the First Circuit, and they are headed back to the district court for additional proceedings – even though no fiduciary breach has been established. Pet. App. 45a ("None of this means . . . that defendants have violated any duties or obligations owed to the Plan or its beneficiaries.").

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quires prudence, not prescience." *Saint Vincent Catholic Med. Ctrs.*, 712 F.3d at 716 (quotation marks and ellipsis omitted).

Defendants not only face substantial legal fees, but the potential for enormous money damages. Trillions of dollars are invested in ERISA plans. Inv. Co. Inst., *Frequently Asked Questions About 401(k) Plan Research* (Dec. 2018), goo.gl/hiCPUr. A plaintiff who establishes that an investment in a large plan was imprudent potentially can recover tens or hundreds of millions of dollars. *See, e.g.*, Pet. App. 25a, 51a n.3 (noting the "extraordinary money damages sought by the Plaintiffs' counsel on behalf of the class" – roughly $45 million); *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 279, 317 (S.D.N.Y. 2018) (rejecting claim for $358 million in fiduciary-breach damages against NYU retirement plan administrator); Consolidated Compl. at ¶ 196, *Cates v. Trs. of Columbia Univ.*, No. 16-cv-6524 (S.D.N.Y. Feb. 7, 2017), Dkt. 76-1 (claiming $242 million in losses from inclusion of a single allegedly imprudent investment option).

Plaintiffs' enormous damages demands often place pressure on defendants to settle. Even a defendant with a meritorious case may feel pressure to settle when faced with the prospect of potentially debilitating liability. And those settlements are costly. In 2017, defendants spent $928 million to settle ERISA class actions. Cort Olsen, *ERISA Class Action Settlements Reach Almost $1 Billion*, Emp. Benefits News (Jan. 23, 2018), goo.gl/8uHvt2. Individual settlements can cost tens or hundreds of millions of dollars. *See, e.g.*, Mot. for Prelim. Approval at 1, *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-cv-2548 (S.D.N.Y. Nov. 3, 2017), Dkt. 400 ($75 million settlement). Settlements often occur even when the defendant has done nothing wrong. *See, e.g.*, *Saint Vincent Catholic Med. Ctrs.*, 712 F.3d at 719 (noting the danger of "settlement extortion" in ERISA cases) (quotation marks omitted); *Hevesi v.*

Citigroup, Inc., 366 F.3d 70, 80 (2d Cir. 2004) ("[N]umerous courts and scholars have warned that settlements in large class actions can be divorced from the parties' underlying legal positions."). The way to decrease those costs is to ensure that ERISA plaintiffs are required to prove all elements of their claims.

II. Plaintiffs Must Have The Burden To Prove Loss Causation

A. Loss Causation Is An Important Issue In Fiduciary-Breach Cases

The loss-causation element plays a critically important role in ERISA fiduciary-breach cases. With the benefit of hindsight, it is easy for plaintiffs to allege that the fiduciary could have followed a different procedure in making investment decisions. For example, a plaintiff could claim that a fiduciary should have asked additional questions about a proposed course of action before committing to it. But unless there is proof that a different process would have resulted in a different outcome, there is no fiduciary liability under ERISA. *See Tussey*, 746 F.3d at 335-36; *see also* Pet. App. 26a ("ERISA defendants are not liable for damages that the plan would have suffered even with a prudent fiduciary at the helm."). That is, the fiduciary's actions must have caused losses to the plan for plaintiffs to recover for fiduciary breach. *See* 29 U.S.C. § 1109(a).

The key issue in this case is whether the plaintiff should bear the burden of proof with respect to this loss causation element. The allocation of the burden of proof on loss causation – that is, whether a prudent fiduciary could have made the same decision

anyway – takes on important practical significance at every stage of ERISA fiduciary-breach litigation:

Complaint. The strategic choices driven by the burden-of-proof question begin as early as plaintiffs' decision about where to file an action. ERISA provides for nationwide service of process and venue in any "district . . . where a defendant resides or may be found," 29 U.S.C. § 1132(e)(2), meaning anywhere the defendant is subject to personal jurisdiction. *See, e.g.*, *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 646 (6th Cir. 2006). As a result, ERISA plaintiffs suing large corporations or national insurance companies have choices of where to bring suit, and they can select a forum that most favors their interests – such as one of the circuits that has embraced burden-shifting on loss causation.

Motion to dismiss. A plaintiff must plausibly allege facts that satisfy each element of his claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If loss causation is an element of a prudence claim under ERISA, then, plaintiffs must plausibly allege that the choices made by the defendant fiduciary caused the plan's losses. But if a defendant has the burden to disprove loss causation, plaintiffs can state a claim without alleging anything about what caused the loss. In that situation, cases could proceed to costly discovery even if it is known, at the outset, that reasonable fiduciaries could have arrived at the same decision. Because the burden-shifting rule "does not readily divide the plausible sheep from the meritless goats," it renders the motion to dismiss – which ought to be an "important mechanism for weeding out meritless claims" – much less effective in practice. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014).

Summary judgment. Shifting the burden of proof on loss causation makes it much easier for meritless claims to withstand summary judgment. If plaintiffs have the burden of proof on loss causation, a fiduciary can prevail by showing a lack of "significantly probative" evidence that a prudent fiduciary would have behaved differently and avoided the losses to the plan. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the burden is reversed, fiduciaries must themselves present undisputed evidence that their choices were objectively prudent – not an easy task when plaintiffs often can create a dispute simply by submitting a contrary expert report.

Settlement. Because the burden-shifting approach substantially tilts the scale in favor of ERISA plaintiffs at each stage of litigation, it also increases the pressure on defendants to settle these cases. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"). By contrast, requiring plaintiffs to prove each element of their claims, including loss causation, makes it less likely that meritless cases will settle.

B. The Burden Should Be On The Plaintiff To Prove Loss Causation

The "ordinary default rule" in federal civil cases is that the plaintiffs bear the burden of proof on all elements of their claims. *Schaffer*, 546 U.S. at 56. The reasoning behind this rule is intuitive: The plaintiff "generally seeks to change the present state of affairs," and so he "naturally should be expected to bear the risk of failure of proof or persuasion." *Id.* (quoting 2 John W. Strong, McCormick on Evidence § 337, at 412 (5th ed. 1999)).

ERISA requires proof that the defendant's imprudent actions actually caused losses to the plan. 29 U.S.C. § 1109(a). As the court of appeals recognized, this makes "causation" an "element[]" of an ERISA fiduciary-breach claim. Pet. App. 20a-21a. The default rule that plaintiffs must prove loss causation thus applies "[a]bsent some reason to believe that Congress intended otherwise." *Schaffer*, 546 U.S. at 57.

No such reason exists here. As the court of appeals acknowledged, the text of ERISA provides no indication that Congress intended courts to take the extraordinary step of shifting the burden to the defendant on this critical element. *See* Pet. App. 32a (noting "the text's silence" on this question). So the court of appeals relied on trust-law principles and policy arguments that favor ERISA plaintiffs. *Id.* at 33a-34a.

The court of appeals erred in relying on trust law. This Court has sometimes looked to trust law to fill gaps left by Congress in defining substantive obligations under ERISA. *See*, *e.g.*, *Varity Corp.*, 516 U.S. at 496; *LaRue*, 552 U.S. at 253 n.4. But Congress also legislates against the background of settled principles of law. Here, Congress did not leave a gap – there was settled law at the time of ERISA's enactment that plaintiffs generally bear the burden of proof on each element of their claims, and Congress did nothing to change that default understanding. *See* McCormick's Handbook of the Law of Evidence § 337, at 786 (Edward W. Cleary ed., 2d ed. 1972) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be

expected to bear the risk of failure of proof or persuasion."). In any event, it is far from clear that trust law contained any settled burden-shifting principle in 1974 when ERISA was enacted, Pet. 26-27, or even since then.[4] This Court does not import trust law into ERISA when the relevant trust-law rule is "unclear." *Conkright v. Frommert*, 559 U.S. 506, 515 (2010).

The court of appeals attempted to justify burden-shifting on the theory that the facts underlying it are particularly within the defendant's knowledge. Pet. App. 32a, 37a. But loss causation depends on objective facts – namely, whether a hypothetical prudent fiduciary could have made the same choices or selected the same investments as the defendant. *See*, *e.g.*, *Tussey*, 746 F.3d at 335. That inquiry naturally focuses on industry standards and the practices common among peer fiduciaries, which are put into evidence through reports of dueling experts who use publicly available information. *See*, *e.g.*, *Sacerdote*, 328 F. Supp. 3d. at 311-13. None of those facts are particularly known by the defendant.

Finally, the court of appeals' burden-shifting approach cannot be justified by its desire to protect plan participants and beneficiaries. *See* Pet. App. 34a-35a. "[N]o legislation pursues its purposes at all

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[4] *See, e.g.*, *U.S. Life Ins. Co. v. Mechs, & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982); *Kite v. Pascale*, No. 3:07-cv-0513, 2015 WL 1485022, at *8 (D. Conn. Mar. 31, 2015); *Young v. Humphrey*, No. H036803, 2013 WL 1098843, at *10-11 (Cal. Ct. App. Mar. 18, 2013) (unpublished); *In re Estate of Graham*, 919 N.W.2d 714, 723 (Neb. 2018); *SunTrust Bank v. Farrar*, 675 S.E.2d 187, 191 (Va. 2009); *In re Gerhard G. Poehling Family Tr.*, No. 2012AP1817, 2013 WL 2088946, at *12 (Wis. Ct. App. May 16, 2013) (unpublished).

costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). ERISA, in particular, was designed to balance the "competing congressional purposes" of protecting plan participants and beneficiaries and incentivizing employers to "offer[] welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497; *accord Conkright*, 559 U.S. at 517 ("ERISA represents a 'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'") (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004)). An approach that intentionally favors plaintiffs in a manner not tied to the text of the statute upsets the careful balance struck by Congress.

In short, the minority rule has no basis in the text of ERISA; is not grounded in prevailing trust law; and is not justified by any pro-plaintiff ERISA policy. There is thus no basis for displacing the ordinary default rule that ERISA plaintiffs must prove every element of their claims.

III. This Court Should Grant Certiorari To Clarify That Plaintiffs Bear The Burden Of Proving Loss Causation

A. The Courts Of Appeals Have Disagreed On The Burden-Of-Proof Issue

As the court of appeals recognized, there is a well-established circuit split on the burden-of-proof issue. Pet. App. 30a. Ten of the twelve geographical circuits have weighed in on the issue, dividing 6-4.

The Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits require a plaintiff to prove loss causation to make out a fiduciary-breach claim. *See Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) ("[A] plain-

tiff must show a causal link between the failure to investigate and the harm suffered by the plan."), *abrogated in part on other grounds by Dudenhoeffer*, 134 S. Ct. 2459; *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011) ("[T]he plaintiff must show a breach of fiduciary duty, and its causation of an injury."); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan.") (quoting *Kuper*, 66 F.3d at 1459); *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017) ("[C]ausation is an element of the claim and . . . the plaintiff bears the burden of proving it."); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992) ("[T]he burden of proof on the issue of causation will rest on the beneficiaries.").

The Second Circuit embraces that rule as well. *See Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998) ("[ERISA] requires a plaintiff to demonstrate . . . that the plan's losses resulted from [the fiduciary's] breach.") (quotation marks and alteration omitted). The court below was unsure whether *Silverman* represented the Second Circuit's position on the burden-shifting issue. *See* Pet. App. 31a n.15 (contrasting *Silverman*, 138 F.3d at 104, with *N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 180 (2d Cir. 1994)). But courts within the Second Circuit – and other courts of appeals – understand *Silverman* to be the Second Circuit's definitive position on this issue. *See*, *e.g.*, *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 261 (S.D.N.Y. 2012) ("[T]he holding in *Silverman* is unambiguous": "[C]ausation [is] an element of the

claim, for which plaintiffs have the burden of proof."); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 160 n.23 (3d Cir. 1999) (recognizing *Silverman* as the position of the Second Circuit); *Pioneer Ctrs.*, 858 F.3d at 1336 (same).

In contrast, the First, Fourth, Fifth, and Eighth Circuits have placed the burden of proof on defendants in fiduciary-breach cases to disprove loss causation. *See* Pet. App. 39a (adopting burden-shifting rule); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014) (same); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) (same); *Roth v. Sayer-Cleator Lumber Co.*, 16 F.3d 915, 920 (8th Cir. 1994) (same).

There is no prospect that the disagreement will be resolved without this Court's intervention. Indeed, of the last two courts of appeals to choose a side in the debate, one held that plaintiffs bear the burden to prove loss causation, while the other held the opposite. *Compare Pioneer Ctrs.*, 858 F.3d at 1335-36, *with* Pet. App. 30a-39a. And the courts of appeals have acknowledged their entrenched disagreement. *See* Pet. App. 30a ("Our sister courts are split on who bears the burden of proving or disproving causation once a plaintiff has proven a loss."); *Pioneer Ctrs.*, 858 F.3d at 1336-37 (noting circuit split).

This Court has twice called for the views of the Solicitor General on this issue. *See RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 1541 (2015) (No. 14-656); *Pioneer Ctrs.*, 138 S. Ct. 1317 (2018) (No. 17-667). In its 2015 *Tatum* brief, the United States expressed some skepticism about the durability of the disagreement in the circuits. *See* U.S. Br. at 11-14, *Tatum*, *supra*. But any doubt on that score has been removed by the intervening decisions of the First and

Tenth Circuits, which acknowledged the split and further cemented it. The United States also predicted that this Court's decision in *Dudenhoeffer* might cause some circuits to reconsider their previous holdings on the burden-of-proof issue. *Id.* at 14. But no court of appeals has reversed position since *Dudenhoeffer*, and the Sixth Circuit has reaffirmed its position. *See Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017). The disagreement in the circuits is significant and warrants this Court's intervention.

B. This Case Is An Ideal Vehicle For Resolving That Disagreement

This is an ideal case in which to resolve the burden-of-proof issue. The issue is squarely presented, and it was addressed at length by the court of appeals after full briefing. Pet. App. 29a-40a; *see* Resp. C.A. Br. 57-61; Pet. C.A. Br. 50-52; Chamber of Commerce C.A. Br. 6-18; Resp. C.A. Reply Br. 19-21.

Further, the burden-of-proof issue was dispositive in this case. The district court entered judgment for petitioners mid-trial after concluding that respondents had failed to meet their burden to show "a causal link between the breach and the damages claimed." Pet. App. 71a, 77a & n.19; *see* Pet. 10 & n.7. The court of appeals vacated that holding on the ground that plaintiffs are not required to prove loss causation. Pet. App. 26a-27a. As the First Circuit itself recognized, "the burden of persuasion makes all the difference here." *Id.* at 38a n.16.

C. This Court's Review Is Warranted Now

The entire point of ERISA was to provide nationwide rules for employee-benefit plans. Many employee-benefit plans operate nationwide, and plan

administrators must have "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Without that predictability, employers will be less likely to offer employee benefits in the first place. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). The disagreement in the circuits on the burden-of-proof issue has made fiduciary-breach cases much easier to prove in some circuits than in others, thus destroying ERISA's uniformity and predictability. Only this Court can restore it.

There is no point in awaiting further decisions in the courts of appeals. At this point, nearly every geographic court of appeals has taken a position on the burden-shifting issue, resulting in a circuit split that is both mature and stable. There is no reason to believe that additional decisions will add anything to the debate.

And there are simply too many pending cases whose resolution could depend on the burden-shifting question to justify additional delay. The issue has reached this Court three times in the last five years, and those cases are merely the tip of an iceberg hundreds of lawsuits strong. *See* Mellman & Sanzenbacher, *supra*, at 1-2 & fig. 1. All of those cases pose immediate, real-world burdens on employers that may well "unduly discourage [them] from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497. For all of these reasons, this Court should grant review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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