21-88 (L)

21-96, 21-114

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASEY CUNNINGHAM, CHARLES E. LANCE, STANLEY T. MARCUS, LYDIA PETTIS, and JOY VERONNEAU, individually and as representative of a class of participants and beneficiaries on behalf of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan,
Plaintiffs-Appellants-Cross-Appellees,

v.

CORNELL UNIVERSITY, THE RETIREMENT PLAN OVERSIGHT COMMITTEE, MARY G. OPPERMAN, and CAPFINANCIAL PARTNERS, LLC d/b/a CAPTRUST FINANCIAL ADVISORS,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court for the Southern District of New York No. 16-cv-6525 (Hon. P. Kevin Castel)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* states as follows:

- The Chamber of Commerce of the United States of America (Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.
- The American Benefits Council (Council) has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Council.

INTEREST OF THE *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** (Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, insure, or provide services to employee-benefit plans governed by ERISA. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee-benefit plans. Its more than 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

Each organization has a strong interest in ERISA litigation and regularly participates as an *amicus curiae* in this Court and in other courts on issues that affect employee-benefit design, administration, or litigation, including on the loss-causation issue addressed in this brief. *See, e.g.*, *Putnam Invs., LLC v. Brotherston*, No. 18-926 (U.S.); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014).

Amici's members are among the plan sponsors, fiduciaries, and service providers that benefit from Congress's decision to create, through ERISA, an employee-benefit system that is not "so complex that administrative costs, or litigation expenses," unduly burden plan sponsors. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (citation omitted). A key element of that carefully balanced system is the provision in 29 U.S.C. § 1109(a) making a fiduciary liable for losses to an ERISA plan *only* to the extent those losses "result[ed] from" the fiduciary's own "breach" of duty—*i.e.*, that the fiduciary did not make an "objectively prudent" decision. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 436 (3d Cir. 1996) (citation omitted); *accord United States v. Mason Tenders Dist. Council of Greater N.Y.*, 909 F. Supp. 882, 887 (S.D.N.Y. 1995).

Plaintiffs' proffered standard for satisfying this element, which shifts the burden of proof to an ERISA defendant and permits an ERISA plaintiff to simply

assume the objective imprudence of a fiduciary's decision after a procedural breach, could allow plaintiffs to recover millions in damages even for "objectively prudent" decisions—decisions that a prudent fiduciary could have made. That is just the type of rule that "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). In so doing, it would undermine a primary purpose of ERISA, which was to encourage employers to *voluntarily* offer retirement plans to their employees. Plan sponsors and plan fiduciaries alike, including *Amici*'s members, have a strong interest in averting such a result.

INTRODUCTION

ERISA makes fiduciaries liable *only* for losses that actually "result[ed] from" a breach of fiduciary duty. 29 U.S.C. § 1109(a). That requirement—known as "loss causation"—is the crucial element that prevents a windfall recovery by participants beyond the benefits promised under a plan. It also protects fiduciaries from being forced to insure the plan against anything that might go wrong following a lapse in process, without regard to whether the lapse actually caused a loss. Congress adopted the loss causation requirement because, as in court, some errors are harmless.

Plaintiffs have argued that whenever a fiduciary errs in the way it selects a service provider to the plan or the investment options to be included in the plan line-up, an ERISA plaintiff is not required to demonstrate that the service provider or funds the fiduciary selected were bad ones. Even though loss causation is an element of an ERISA claim for breach of fiduciary duty, Plaintiffs here argue that they need only show a "prima facie loss" (a term they never define) and that the burden of persuasion must then shift to the fiduciary to *dis*prove loss causation.

The majority of circuits—including this one—disagree and follow the "ordinary default rule" that the Supreme Court has for decades applied to federal statutory claims: unless the statute says otherwise, the "burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. 49, 56, 58 (2005); *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 106 (2d Cir. 1998) (majority concurrence) ("Congress has placed the burden of proving causation on the *plaintiff* by requiring him to prove that losses 'result[ed] from' the defendant's inaction." (quoting 29 U.S.C. § 1109(a)) (emphasis and brackets in original). Despite Plaintiffs' effort to sow doubt about this Court's precedents, they have provided no reason to depart from the Supreme Court's direction when interpreting ERISA.

Plaintiffs' proposed standard would effectively make a fiduciary a guarantor of optimal 401(k) performance any time there is any sort of perceived shortcoming

in a fiduciary's decisionmaking process. Such a consequence would expose plan fiduciaries to such undue "administrative costs, or litigation expenses" that it would "discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (alteration in original) (citation omitted). That is precisely what Congress sought to avoid when it enacted ERISA. *Id*.

The Court should affirm the judgment below and, if the Court reaches the issue of loss causation, reaffirm its holding in *Silverman* that 29 U.S.C. § 1109(a) imposes the burden of proving causation on ERISA plaintiffs.

ARGUMENT

I. The Burden of Proof Never Shifts to an ERISA Defendant to *Dis*prove Loss Causation.

Plaintiffs spend a significant portion of their brief advocating for a loss-causation standard that would shift the burden to ERISA defendants to *dis*prove loss causation—an essential element of an ERISA damages claim under 29 U.S.C. § 1109(a). But there is nothing in ERISA to indicate that Congress departed from the ordinary default rule that places the burden on plaintiffs of proving every element of claims arising under federal statutes. To the contrary, as this Court has already held, "Congress has placed the burden of proving causation on the *plaintiff* by requiring him to prove that the losses 'result[ed] from'" a fiduciary breach. *Silverman*, 138 F.3d at 106 (majority concurrence) (quoting 29 U.S.C. § 1109(a)) (emphasis in original); *see also id.* at 104 (ERISA "requires a plaintiff to demonstrate

in a suit for compensatory damages that the plan's losses 'result[ed] from' Principal's breach" (citation omitted)).

Plaintiffs attempt (at 29) to sow doubt about whether this precedent is binding, suggesting that perhaps it applies only to *some* types of ERISA cases—where a defendant is not a "principal wrongdoer." But they provide no valid rationale for interpreting the same two words of ERISA's text to have different meanings depending on the identity of the defendant. And even on the merits, their arguments for shifting the burden to ERISA defendants—principal or otherwise—are flawed.

A. Under The Well-Established Default Rule Governing The Burden Of Proof For Federal Statutory Claims, ERISA Plaintiffs Must Prove Loss Causation.

Plaintiffs contend (at 32) that the common law of trusts employed a burden-shifting scheme regarding loss causation; they argue that "because §1109(a) is silent as to burdens of proof, ERISA's text does not compel a departure from trust law." But Plaintiffs have the inquiry exactly backward: under well-established Supreme Court precedent, where Congress is silent about the burden of proof on an element of a statutory claim, "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer*, 546 U.S. at 56, 58. The Supreme Court has explained that this is "the ordinary default rule," and it "solves most" questions about the allocation of proof, *Schaffer*, 546 U.S. at 56-57, including proof of causation. *E.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (applying default rule and

holding that the burden of proving causation under the ADEA lies with the plaintiffs). As this case involves federal statutory claims, it is not Defendants who must provide a reason to "compel a departure from trust law," Pls' Br. 32; rather, Plaintiffs must demonstrate "some reason to believe that Congress intended" to deviate from the longstanding burden-of-persuasion default rule, *Schaffer*, 546 U.S. at 57. As numerous circuits—including this one—have concluded, there is no reason to believe that Congress deviated here.

B. The Majority Of The Circuits—Including This One—Follow The Ordinary Default Rule And Place The Loss-Causation Burden On ERISA Plaintiffs.

Consistent with the ordinary default rule, seven courts of appeals have stated that the burden of proving a fiduciary breach *and* a loss as a result of that breach rests with an ERISA plaintiff. *See, e.g.*, *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017); *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); *Silverman*, 138 F.3d at 104; *id.* at 105-106 (majority concurrence); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343–44 (11th Cir. 1992); *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 838 (3d Cir. 1987).

1. This Court was one of the earliest to hold that the ordinary default rule applies to the element of loss causation under § 1109(a). In *Silverman*, the Court

considered claims brought against Principal Mutual Life Insurance Company (among other defendants), which an ERISA plan hired to take over plan administration and investment from Mutual Benefit Life Insurance Company. 138 F.3d at 100. The lawsuit alleged that the plan's trustees had embezzled $130,000 in plan funds and that Principal should be held liable for failing to investigate and take action to recover the embezzled funds. *Id.* at 100, 102. The district court granted summary judgment for Principal because the plaintiff "had failed to offer any evidence that the plan's loss resulted from Principal's breach." *Id.* at 102.

This Court affirmed, rejecting the plaintiff's argument that it had no burden to prove a causal connection between Principal's alleged breach and any losses to the plan. *Id.* at 104. Explaining that holding, a two-judge majority noted the Supreme Court's admonition that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Id.* at 106 (majority concurrence) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). And it recognized that Congress, in § 1109(a), "placed the burden of proving causation on the *plaintiff* by requiring him to prove that the losses 'result[ed] from' the defendant's inaction." *Id.* (quoting § 1109(a)).

The Tenth Circuit more recently addressed this issue at length and likewise held "that the burden falls squarely on the plaintiff" to prove loss causation. *Pioneer*, 858 F.3d at 1337. *Pioneer* involved a proposed employee stock purchase that had

to be approved by a third party. *Id.* at 1327, 1332. The transaction failed because the independent trustee for the transaction failed to execute the transaction documents, and the plaintiffs sued the independent trustee for breach of fiduciary duty. *Id.* at 1333. But because the plaintiffs failed to demonstrate that the third party would have approved the stock purchase even if the fiduciary had acted prudently, the district court "bypassed" the question whether the defendant had breached its fiduciary duties, as "it concluded the [plaintiffs] had not established loss." *Id.* at 1332.

On appeal, the plaintiffs argued (as Plaintiffs do here) that the district court should have shifted the burden to the defendants to disprove causation, relying on the common law of trusts. *Id.* at 1327. The Tenth Circuit "reject[ed] outright" the plaintiffs' burden-shifting argument, noting (as this Court did in *Silverman*) the Supreme Court's admonition that the "law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Id.* at 1336, 1337 (quoting *Varity*, 516 U.S. at 497).

The court stated that there was "nothing in the language of § 1109(a) or in its legislative history that indicates a Congressional intent to shift the burden to the fiduciary to disprove causation." *Id.* at 1336. Thus, it saw "no reason to depart from the 'ordinary default rule that plaintiffs bear the risk of failing to prove their claims.'" *Id.* at 1337 (quoting *Schaffer*, 546 U.S. at 56); *see also id.* ("Where the plain

language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach." (emphases in original)). It also observed that a "burden-shifting framework could result in removing an important check on the otherwise sweeping liability of fiduciaries under ERISA," which could discourage individuals from willingly undertaking fiduciary responsibility for an ERISA plan. *Id.* (citing *Silverman*, 138 F.3d at 106 (majority concurrence)).

2. Four circuits have articulated a different rule. The Eighth Circuit first took the position that "the burden of persuasion shifts to the fiduciary" to disprove causation. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). In reaching that decision, the court did not interpret (or even examine) the text of ERISA or explain why the common law of trusts should trump the default rule. Instead, it simply cited a trust-law treatise and cases from circuits that have since *rejected* a burden-shifting rule. *Id.* at 671-672 (citing cases from the Second, Seventh, and Ninth Circuits).[2]

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[2] None of those cases held that an ERISA defendant has the burden to disprove loss causation to avoid liability for breach of ERISA's fiduciary duties of prudence and loyalty. *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985), addressed a defendant's burden of rebutting a plaintiff's damages figure after the plaintiff had already proven a breach and resulting loss. *Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978), addressed the burden of proving a statutory *exemption*, not loss causation. *Leigh v. Engle*, 727 F.2d 113, 138-139 (7th Cir. 1984), and *Kim v. Fujikawa*, 871 F.2d 1427, 1430-1431 (9th Cir. 1989), addressed a defendant's

See supra p. 7. Subsequent Eighth Circuit decisions have simply recited the burden-shifting framework, citing *Martin*, without any further discussion. *See Eckelkamp v. Beste*, 315 F.3d 863, 867 (8th Cir. 2002); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994).

The Fifth Circuit likewise adopted a burden-shifting framework without analysis. In *McDonald v. Provident Indemnity Life Insurance Co.*, 60 F.3d 234 (5th Cir. 1995), the court merely quoted the Eighth Circuit's statement in *Roth* that once an ERISA plaintiff proves breach and a prima facie case of loss, "the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by … the breach of duty." *Id.* at 237 & n.14 (quoting *Roth*, 16 F.3d at 917). In doing so the court ignored existing circuit precedent holding that an ERISA plaintiff "has the burden of proving that [the defendants] violated their co-fiduciary duties resulting in loss to the [plan]." *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 352 (5th Cir. 1989). Indeed, *McDonald* was not even addressing the question of causation. Instead, the question was whether losses that indisputably *did* result from the fiduciary decision (in the form of higher insurance premiums for participants) but that *did not* adversely impact the plan as a whole were recoverable

burden of rebutting the plaintiff's showing of losses that resulted from prohibited transactions.

under ERISA—in other words, the case was about a failure to show loss, not a failure to prove causation. 60 F.3d at 237-238.[3]

No court adopted a burden-shifting standard after examining the issue in depth until the Fourth Circuit's 2015 decision in *Tatum v. RJR Pension Investment Commitee*, 761 F.3d 346, 363 (4th Cir. 2014), which held, over a vigorous dissent by Judge Wilkinson, that a breaching fiduciary "bears the burden of proof on loss causation" under "long-recognized trust law." *Id.* at 363. The court acknowledged the ordinary default rule that applies to elements of federal statutory claims but concluded that ERISA should be an "exception" because the burden was different under the common law of trusts. *Id.* at 362.

The court justified its holding based not on ERISA's text, nor even on legislative history, but on raw policy concerns and the court's view of ERISA's general purpose. It repeated the district court's view that a burden-shifting rule would be "the 'most fair' approach," because the loss-causation issue arises only once the plaintiffs have proved a breach—a rationale that would justify shifting the burden in *every* statutory loss-causation case. *Id.* at 362 (citation omitted). And it concluded that a burden-shifting framework would be consistent with the "structure

[3] The only other two Fifth Circuit decisions to recite this burden-shifting language did not involve loss causation at all; the claims failed because the Plaintiffs failed to establish any breach of fiduciary duty. *See Timmons v. Special Ins. Servs., Inc.*, 167 F.3d 537 (5th Cir. 1998) (unpublished); *Smith v. Prager*, 154 F.3d 417 (5th Cir. 1998) (unpublished).

and purpose of ERISA," which, in its view, aims to protect the interests of plan participants. And the court expressed concern that a contrary rule would "create significant barriers" for ERISA plaintiffs and "provide an unfair advantage to a defendant." *Id.* at 363 (citation omitted).

In dissent, Judge Wilkinson recognized that the court's holding was inconsistent with the ordinary default rule and with prior circuit precedent, which had rejected "the novel proposition that, whenever a breach of the obligation by a trustee has been proved, the burden shifts to the trustee to establish that any loss suffered by the beneficiaries of the trust was not proximately due to the default of the trustee." *Id.* at 375 (Wilkinson, J., dissenting) (quoting *U.S. Life Ins. Co. v. Mechs. & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982)). He also noted that the burden-shifting framework was contrary to ERISA's remedial scheme, which permits some remedies where a fiduciary's breach does not result in losses but permits *damages* "only upon a finding of loss causation." *Id.* at 376.

The First Circuit joined the majority view, largely for the same reasons the Fourth Circuit gave. *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 35, 38 (1st Cir. 2018) (treating ERISA as an "exception" to the "ordinary default rule"); *id.* at 37 (stating that adopting trust-law principles would not be inconsistent with ERISA's general policy purpose and structure).

3. As explained above, this Court already adopted the majority rule more than 20 years ago in *Silverman*. Nevertheless, Plaintiffs' brief (at 28-32) attempts to sow doubt about which rule this Court has adopted, citing *N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994), as supposedly in conflict with *Silverman*. They ask this Court to resolve the inconsistency by reading the text of § 1109(a) to place the burden of proving causation on ERISA plaintiffs "[w]here the alleged loss depends primarily on the conduct of a third party," and on ERISA defendants "[w]hen the beneficiary seeks relief directly from the principal wrongdoer based on the defendant's *own* breach." Pls.' Br. 29. But there is no inconsistency: as lower courts have recognized, *Silverman* governs the burden of proving causation, while *DePerno* governs how to calculate damages if breach and causation are established and numerous equally plausible damages measures exist—in that situation, "where there is uncertainty in damages, there is a presumption that the fund plans would have been invested in the most profitable of equally plausible investment strategies. Defendants have the burden to prove that the damages would have, in fact, been less." *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 260-261 (S.D.N.Y. 2012) (the loss-causation "holding in *Silverman* is unambiguous").

Indeed, this is not a situation in which the Court in *Silverman* could simply have overlooked *DePerno* because the parties failed to raise it. To the contrary, the

Secretary of Labor—who filed an *amicus* brief in *Silverman*—recognized that *DePerno* did not control the question presented in *Silverman* and asked the Court to extend *DePerno*'s holding to the question of which party bears the burden of persuasion on loss causation under § 1109(a). *See Br. of Sec'y of Labor*, *Silverman*, No. 96-7795, 1996 WL 33415587, at *8-*12 (2d Cir. Nov. 13, 1996). The Court declined to do so. *Silverman* therefore is binding, and courts within this Circuit treat it that way. *E.g., id.*; *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 285 (S.D.N.Y. 2018); *Hugler v. Byrnes*, 247 F. Supp. 3d 223, 235 (N.D.N.Y. 2017).

Because *DePerno* did not address loss causation, there is no need for the Court to engage in interpretive contortion to reconcile the decisions in the way Plaintiffs suggest. But it is worth lingering for a moment on why Plaintiffs' proposed approach is so problematic. First, it is completely unmoored from the text of § 1109(a)—which is, as this Court recognized in *Silverman*, what makes causation an element of a fiduciary-breach claim. 138 F.3d at 106. *Amici* are aware of no principle of statutory interpretation—and Plaintiffs certainly cite none—that would endorse interpretating a single statutory phrase to mean two diametrically opposed things depending on the identity of the defendant being sued. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) (rejecting the argument that "the *same* detention provision" should be given different meanings when applied to different classes of immigrants (emphasis in original)).

Second, this Court's opinion in *Silverman* made clear that it applied to claims against "principal" fiduciaries and co-fiduciaries alike. The Court distinguished the Eighth Circuit's decision in *Martin*—which involved fiduciary claims against principal fiduciary defendants—not by asserting that *Martin*'s holding was inapplicable to fiduciary-breach claims against co-fiduciaries, but rather by stating that *Martin* involved "the *calculation of damages*" after breach and causation had been established. 138 F.3d at 106 n.1 (emphasis in original). *Silverman*, the Court unambiguously clarified, "involves the burden of proving causation, not damages." *Id.*

Third, Plaintiffs' purported distinction—between cases involving misconduct by a "principal wrongdoer" (which they argue was at issue in *DePerno* and *Brotherston*) and cases involving losses that "depend[] primarily on the conduct of a third party" (which they argue was true of *Silverman* and *Pioneer*)—makes no practical sense. Pls.' Br. 29. The plaintiffs in both *Silverman* and *Pioneer* alleged that the defendants at issue had engaged *in their own breaches of ERISA*—in *Pioneer*, an independent trustee's refusal to consummate a transaction, 858 F.3d at 1330, and in *Silverman*, a plan administrator's and investment manager's failure to investigate and take action to recover embezzled funds, 138 F.3d at 102. That some third party might be relevant to the fiduciary-breach claims against the defendant provides no reason to adopt a contorted reading of § 1109(a). And if the Court

adopted such a countertextual reading, lower courts would be forced to engage in an impossible line-drawing exercise between "principal" and non-principal wrongdoers—a distinction that has no basis in ERISA.

C. Plaintiffs' Reasons for Departing from the Ordinary Default Rule Are Also Misguided on the Merits

As discussed above, because this case involves federal statutory claims, Plaintiffs must demonstrate "some reason to believe that Congress intended" to deviate from the longstanding burden-of-persuasion default rule, *Schaffer*, 564 U.S. at 57. And "the touchstone of [this] inquiry" is "the statute." *Id.* at 56. But Plaintiffs have provided no basis in ERISA's text, structure, or even legislative history to believe that Congress intended to depart from the ordinary default rule here.

To be sure, the ordinary default rule has exceptions, but those exceptions "are extremely rare" and generally well-established. *Schaffer*, 546 U.S. at 57. "For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions," *id.* at 57—like ERISA's statute of limitations or repose, 29 U.S.C. § 1113. Plaintiffs do not dispute, though, that loss causation is an element of an ERISA claim rather than an exemption or affirmative defense, *see Silverman*, 138 F.3d at 106 (majority concurrence). Nor do they argue that any other recognized exception applies.

Instead, their primary argument (at 27) is that the Supreme Court has instructed lower courts to look to trust law "in ERISA cases." That oversimplification is simply incorrect. The Supreme Court has instructed that trust law can help define *the contours of ERISA's fiduciary duties*, *see Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015)—duties that Congress expressly incorporated into ERISA *from trust law*. But it has never held that congressional silence justifies allowing trust law to take over the procedural rules that govern ERISA litigation—especially rules that are already governed by a longstanding canon of statutory interpretation—as opposed to the substantive standards governing a fiduciary's conduct. Indeed, the Supreme Court has repeatedly rejected plaintiffs' demands for broad constructions of ERISA's remedial provisions (of which § 1109(a) is one) based on appeals to trust law grounded in "vague notions" that ERISA's "basic purpose" is plaintiff-protective. *Mertens*, 508 U.S. at 261-263 (holding that ERISA omits some remedies that were available at common law); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (declining to construe ERISA's remedial provisions to embrace an "extratextual remed[y]" from trust law). As the Court has recognized, ERISA departs from trust law in a variety of ways: "trust law does not tell the entire story." *Conkright*, 559 U.S. at 516 (citation omitted); *see also Silverman*, 138 F.3d at 106 (similar).

Worse yet, the burden-shifting rule the Plaintiffs propose appears to be a new creation, based on trust treatises published decades after ERISA's enactment. Pls.' Br. 28 (citing, *e.g.*, *Restatement (Third) of Trusts* § 100 (2012)). At the time of ERISA's enactment, however, the Restatement did not espouse any burden-shifting rule. *See Restatement (Second) of Trusts* § 205 (1959).[4] And numerous cases articulated the opposite rule. *See U.S. Life Ins. Co.*, 685 F.2d at 896 (rejecting burden-shifting argument as a "novel proposition"); *Lane Title & Tr. Co. v. Brannan*, 440 P.2d 105, 112 (Ariz. 1968); *In re Beebe's Estate*, 52 N.Y.S.2d 736, 741-742 (N.Y. Surr. Ct. 1943) (dismissing objections to approval of trust accounts because the objectors did not "sustain[] the burden of proving that the loss claimed to have been suffered by the trust was proximately caused by some act, fault or omission of the trustee"), *decree aff'd*, 52 N.Y.S.2d 796 (N.Y. App. Div. 1945); *Streight v. First Tr. Co. of Omaha*, 275 N.W. 278, 287 (Neb. 1937). Indeed, even today there is no uniform burden-shifting rule under state trust law. *See, e.g.*, *Herlehy v. Marie V. Bistersky Tr.*, 942 N.E.2d 23, 39 (Ill. App. Ct. 2010) (plaintiffs have the burden of proving causation in trust cases),

Thus, *at most*, courts were at ERISA's enactment and remain today in disagreement over who bears the burden of proving causation in trust-law cases.

[4] Section 205 of the Second Restatement was revised and renumbered as Second 100 of the Third Restatement.

And a rule followed in some places and rejected in others cannot justify construing ERISA contrary to the way federal statutes are ordinarily read. *Cf. Conkright*, 559 U.S. at 512-514 (declining to limit a plan administrator's discretion based on "unclear" and conflicting trust-law sources).

Plaintiffs' only other argument is to cite a principle "that burden shifting is appropriate when the defendant possesses more knowledge relevant to the element at issue." Pls.' Br. 29 (quotation marks omitted). But this argument incorrectly assumes that proving loss causation *does* turn on information peculiarly within plan fiduciaries' knowledge. The causation inquiry is an objective one; it asks whether a hypothetical prudent fiduciary would have achieved a different result—in other words, whether the defendant fiduciary's decision was "objectively imprudent." *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011). As Judge Wilkinson put it, "loss causation only exists if the substantive decision was, all things considered, an objectively unreasonable one." *Tatum*, 761 F.3d at 373 (dissenting opinion). Objective unreasonableness is generally proven using expert evidence, not evidence within the unique knowledge of *either* party.

And even if loss causation did involve evidence within the unique knowledge of ERISA defendants, it still would not be a reason to ignore the statutory default rule governing burdens of proof under federal statutory claims. "Very often one must plead and prove matters as to which his adversary has superior access to the

proof." *Schaffer*, 546 U.S. at 60-61 (quoting *McCormick on Evidence* § 337, at 413). That is why parties have access to discovery. Where Congress provides plaintiffs with the mechanism to obtain the relevant information—as ERISA does through its many disclosure requirements, and as civil litigation does through discovery rules—this rationale for shifting the burden has little force. *Schaffer*, 546 U.S. at 60-61 (declining to require schools to prove the appropriateness of an individualized education plan where parents have the ability "to access the necessary evidence" when challenging the school's decision).

Plaintiffs have simply provided no sound reason to depart from the ordinary default rule that governs federal statutory claims. This Court should therefore reaffirm its holding in *Silverman* that ERISA plaintiffs bear the burden of proving each element of their fiduciary-breach claims, including causation.

II. Plaintiffs' Loss-Causation Standard Would Discourage Employers From Offering Retirement Plans And Incentivize Meritless Procedural Challenges To Fiduciary Investment Decisions.

By requiring loss causation, Congress gave courts a powerful tool to weed out ERISA strike suits. But Plaintiffs' loss causation standard, which essentially eliminates the element of loss causation for procedural-prudence claims, would encourage plaintiffs' attorneys to "file first and build claims later" in hopes of a

windfall judgment whenever the market drops.[5] Even if the market is thriving, plaintiffs' attorneys will be incentivized to rush to court so long as they can identify some alternative investment with better returns, or some service provider that charges lower fees, and assert fiduciary-breach claims against a plan sponsor that counsel believes can pay a judgment, or even a settlement. *See PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (*PBGC*) (noting that many ERISA cases result in what the Second Circuit has dubbed "settlement extortion"—the use of "discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit") (citation omitted).

Given these perverse incentives, adopting Plaintiffs' burden-shifting standard would undoubtedly create significant "undu[e]" administrative expenses. *Conkright*, 559 U.S. at 516-517 (citation omitted). To protect against windfall judgments, plan fiduciaries and the plan sponsors that appoint or engage them may allocate substantial resources to ensuring that the fiduciaries' decision-making

[5] The requirement of having to plausibly *plead* procedural imprudence to make it into discovery has not been an adequate deterrent. Courts commonly (though incorrectly) allow breach-of-fiduciary-duty claims to proceed into discovery where plaintiffs allege no facts about a fiduciary's decision-making process whatsoever, based solely on circumstantial allegations such as allegations of fund underperformance or the existence of alternative investment options with lower fees. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009).

process is not only prudent, but as close to bulletproof as possible. Without a meaningful element of loss causation, any procedural deviation could result in massive liability, so fiduciaries must spend their time flyspecking their own decisions and papering the record thoroughly even in the most straightforward cases—the cases in which the fiduciary is selecting among a number of indisputably prudent options. Such a result is completely at odds with Congress's design in enacting ERISA, a statute that creates a *flexible* system governing employer-sponsored benefit plans, which are entirely voluntary. ERISA does not mandate that plan fiduciaries select any particular investment options or service providers; it does not mandate any particular compensation structures or fee levels; nor does it require even any particular process for making fiduciary decisions. Instead, it creates a flexible system for voluntarily offering benefits to employees with the hopes that doing so will not result in a system that is "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (citation omitted) (brackets in original).

Under Plaintiff's reading, though, even if plan sponsors and fiduciaries engage in a process sufficiently thorough to protect themselves against liability, they still will face significant "undu[e]" litigation expenses. *Conkright*, 559 U.S. at 516-517 (citation omitted). Just defending such suits entails significant cost, as courts have recognized: "[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." *PBGC*, 712 F.3d at 719.

For the large number of plan sponsors that are small or mid-sized businesses,[6] there is a real risk that these additional undue administrative and litigation costs may discourage them from offering, or continuing to offer, benefits under ERISA—just as Congress feared. *See Conkright*, 559 U.S. at 517. And the risk and expense that Plaintiffs' loss-causation standard would create threatens harm to the sponsors, fiduciaries, *and beneficiaries* of every plan subject to that rule—harm from crimping investment decisions; raising the costs of services, indemnification, and insurance; and ultimately diverting resources from other key aspects of employee-benefit programs, such as 401(k) matching contributions or subsidization of healthcare premiums. That result is thoroughly at odds with Congress's design.

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[6] *See* Deloitte Development LLC, *2019 Defined Contribution Benchmarking Survey Report* 7 (2019), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-2019-defined-contribution-benchmarking.pdf (reporting that more than 20% of plan sponsors surveyed by Deloitte in 2019 employed 500 or fewer employees); Stuart Robertson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes (Sept. 25, 2013), http://www.forbes.com/sites/stuartrobertson/2013/09/25/three-myths-keeping-small-businesses-from-starting-a-401k (reporting that 24% of businesses with fewer than 50 employees offer a 401(k) plan).

CONCLUSION

The Court should affirm the judgment below and, if the Court reaches the issue of loss causation, hold that Plaintiffs failed to meet their loss-causation burden.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g)(1), I hereby certify that the foregoing Brief of the Chamber of Commerce of the United States of America and American Benefits Council as *Amici Curiae* Supporting Appellees complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 5,830 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: August 3, 2021 /s/ Jaime A. Santos
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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