No. 18-926

In the Supreme Court of the United States

PUTNAM INVESTMENTS, LLC, ET AL., PETITIONERS

v.

JOHN BROTHERSTON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MORGAN L. RATNER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

KATE S. O'SCANNLAIN
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
THOMAS TSO
Counsel for Appellate and Special Litigation
BLAIR L. BYRUM
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, requires a fiduciary to discharge his duties with respect to an employee benefit plan "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 the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Fiduciaries who breach their statutory duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a).

The questions presented are:

1. Whether, in an action for fiduciary breach under 29 U.S.C. 1109(a), a fiduciary bears the burden of proving that a loss is not attributable to the fiduciary's breach once the plaintiff establishes a breach and related plan losses.

2. Whether comparisons between the returns on a plan's investment portfolio and the returns on an index-fund portfolio are insufficient as a matter of law to support a finding of loss.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, protects "the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. 1001(b), by imposing trust-law duties of loyalty, prudence, and diligence on plan fiduciaries. 29 U.S.C. 1104(a)(1); see *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 411-412, 419 (2014). A fiduciary must discharge his duties "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 the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). If the fiduciary fails to do so, a plan participant, beneficiary, or fiduciary, or the Secretary of Labor, may sue on the plan's behalf to remedy the breach of fiduciary duty. 29 U.S.C. 1132(a)(2). A fiduciary is "personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a).

2. Petitioners are fiduciaries of a 401(k) defined-contribution plan (the Plan) sponsored by Putnam Investments, LLC. Pet. App. 3a. Respondents are Plan participants who sued on behalf of the Plan and a class of Plan participants, alleging that petitioners breached their duty of prudence in selecting and monitoring plan investments. *Ibid.*

Putnam is an asset management company that creates, manages, and sells mutual funds. Pet. App. 4a. Most of Putnam's mutual funds are actively managed by an investment advisor seeking to outperform the stock market. *Ibid.* Putnam's ERISA Plan allows participants to direct employee and employer contributions among a menu of investment options. *Ibid.* Petitioner Putnam Benefits Investment Committee, one of the Plan's named fiduciaries, is responsible for selecting, monitoring, and removing investments from the Plan's offerings. *Ibid.* The Investment Committee also selects default investment funds for participants who do not actively select funds. *Id.* at 62a-63a.

From November 2009 through January 2016, the Investment Committee included no mutual funds other than proprietary Putnam funds in the Plan's designated offerings. Pet. App. 4a-5a. The Plan instructed that "any publicly offered, open-end mutual fund (other than tax-exempt funds) that [is] generally made available to

employer-sponsored retirement plans and underwritten or managed by Putnam Investments or one of its affiliates" be included as an investment option. *Id.* at 5a. Plan participants could, however, also invest in non-affiliated funds through self-directed brokerage accounts. *Ibid.*

The Investment Committee had a process for monitoring the default investment funds. Pet. App. 62a-63a. It did not, however, have independent standards for monitoring other Plan funds, relying instead on Putnam's investment division to monitor their performance. *Id.* at 63a-64a. During the relevant time period, the Investment Committee never removed a Putnam fund from the Plan's offerings unless Putnam's investment division merged or closed the fund. *Id.* at 64a n.8.

In 2014, the Investment Committee began considering whether to add passive index funds (which Putnam did not offer) to the Plan. Pet. App. 63a. In September 2015, the Investment Committee voted to add six passively managed BNY Mellon collective investment trusts to the Plan's investment offerings. *Ibid.*

3. In November 2015, respondents sued on behalf of themselves, the Plan, and a class of Plan participants. Pet. App. 6a. They claimed that fees charged by Putnam subsidiaries to the mutual funds offered in the Plan constituted prohibited transactions under ERISA, 29 U.S.C. 1106, and that petitioners had breached their fiduciary duties of prudence and loyalty by offering Putnam mutual funds to participants without determining whether the funds were prudent investments. Pet. App. 6a.

The district court rejected the prohibited-transaction claim on a "case-stated basis" before trial. Pet. App. 7a; see *id.* at 48a-49a. The court then began a bench trial on the fiduciary-duty claims. *Id.* at 49a. After respondents

presented their affirmative case, petitioners moved for judgment on partial findings under Federal Rule of Civil Procedure 52(c). Pet. App. 49a. The court granted the motion and entered judgment for petitioners. *Id.* at 78a.

The district court first concluded that petitioners had not breached their duty of loyalty. Pet. App. 66a. But it did not "conclusive[ly]" decide whether petitioners had breached their duty of prudence. *Id.* at 69a. The court noted that "on this record, it would be warranted in ruling that [the Investment Committee] * * * failed to monitor the Plan investments independently." *Ibid.* But "[b]ecause [petitioners] ha[d] not yet presented the entirety of their case," the court "refrain[ed] from making conclusive findings and rulings on whether [petitioners] breached their duty of prudence." *Ibid.*

The district court next concluded, however, that the prudence claim failed because respondents did not establish a related loss. Pet. App. 77a. The court assumed that if respondents "make a prima facie showing of loss, the burden falls on the fiduciaries to prove no loss was caused by [the breach]." *Id.* at 70a n.15. But it determined that respondents had failed to make that initial showing. *Id.* at 77a. The court explained that respondents' theory of loss rested on improper monitoring procedures, which allegedly made "*the entire* investment lineup of the Plan imprudent." *Id.* at 72a. And the court reasoned that, despite the procedural breach, it was unlikely that all of the Plan's investment offerings were imprudent, given the sophistication of Putnam's investment division (or even sheer luck). *Id.* at 76a. Accordingly, the court concluded that respondents' showing of loss on a plan-wide basis was "legally insufficient." *Id.* at 77a.

4. The court of appeals vacated the dismissal of the prohibited-transaction claim, affirmed the dismissal of the breach-of-loyalty claim, and, as relevant here, vacated the dismissal of the breach-of-prudence claim. Pet. App. 45a.

On the breach-of-prudence claim, the court of appeals first concluded that respondents had introduced sufficient evidence to support a finding of loss. Pet. App. 25a, 29a. It explained that respondents' expert, Dr. Steve Pomerantz, had compared each Putnam fund's total return to the total return for two passively managed funds, a Vanguard index fund and a BNY Mellon collective investment trust, and had recorded the difference between the Putnam fund and the passively managed funds as either a credit or a loss. *Id.* at 24a-25a. The court determined that it was reasonable to compare the returns of the Plan portfolio containing the imprudently selected funds to the returns of a portfolio of "benchmark funds or indexes comparable but for the fact that they do not claim to be able to pick winners and losers, or charge for doing so." *Id.* at 28a. The court emphasized, however, that petitioners could still challenge respondents' selection of comparators:

> This is not to say that Pomerantz necessarily picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period. * * * But these are questions of fact. And the district court never reached these questions precisely because it concluded that Pomerantz's approach to establishing that the investment funds selected by Putnam incurred losses was insufficient as a matter of law.

Id. at 28a-29a (footnote omitted); see *id.* at 28a n.14.

The court of appeals then "turn[ed] to the question of causation." Pet. App. 29a. The court explained that ERISA, while "clearly requir[ing] a causal connection between a breach and a loss," does "not explicitly state whether the plaintiff bears the burden of proving that causal link or whether the defendant must prove the absence of causation." *Id.* at 31a-32a. The court acknowledged that the "ordinary default rule" in the face of statutory silence is that the plaintiff bears the burden. *Id.* at 32a (quoting *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005)). But it explained that ERISA incorporates "the common law of trusts" and that trust law "places the burden of disproving causation on the fiduciary once the beneficiary has established that there is a loss associated with the fiduciary's breach." *Ibid.* Applying that trust-law principle, the court concluded that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach." *Id.* at 39a.

The court of appeals remanded the case for the district court to complete the bench trial; "to definitively decide whether Putnam breached its duty of prudence"; "if so, to decide whether [respondents] have shown a loss to the Plan"; and "if so, to decide whether Putnam can meet its burden of showing that the loss most likely would have occurred even if Putnam had been prudent in its selection and monitoring procedures." Pet. App. 40a; see *id.* at 45a-46a.

DISCUSSION

Petitioners contend (Pet. 13-36) that review is warranted to address which party bears the burden of proof on the issue of causation once a plaintiff has established a breach of fiduciary duty under ERISA and related

plan losses, and to address whether passively managed index funds can be appropriate benchmarks for establishing losses from the improper monitoring of actively managed funds. The court of appeals correctly decided both questions. Although some disagreement exists among the courts of appeals on the first question, this case would be a poor vehicle in which to resolve that disagreement because its midtrial interlocutory posture means that the facts have not been fully developed. Indeed, the antecedent determinations necessary to address whether petitioners' alleged breach caused a loss —whether there was even a breach and a related loss— have not been decided. Meanwhile, the second question is factbound, and petitioners do not identify any disagreement among the courts of appeals. Further review is therefore unwarranted.

A. The First Question Presented Does Not Warrant Review In This Case

1. The court of appeals correctly concluded that petitioners bore the burden of proving that their failure to engage in appropriate monitoring did not cause the Plan's losses. See Pet. App. 30a-40a.

ERISA imposes a number of duties on those acting as fiduciaries of ERISA plans, including the trust-law duties of loyalty and prudence. See 29 U.S.C. 1104(a)(1)(B). It also provides that a breaching fiduciary shall be personally liable for "any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a). As the court of appeals acknowledged, the "resulting from" language requires that the breach be the cause of any losses to the Plan. See Pet. App. 29a (citation omitted). But the text of ERISA does not specify who bears the burden of proof on the issue of loss causation.

a. The "default rule" in ordinary civil litigation when a statute is silent is that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005). But "[t]he ordinary default rule, of course, admits of exceptions." *Ibid.*

One such exception applies under the law of trusts. This Court has repeatedly made clear that ERISA's fiduciary duties are "derived from the common law of trusts." *Tibble* v. *Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (quoting *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985)); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 496-497 (1996). Accordingly, "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble*, 135 S. Ct. at 1828; see *Varity*, 516 U.S. at 497 (explaining that trust law offers "a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements"); see also *Conkright* v. *Frommert*, 559 U.S. 506, 512 (2010); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989).

Under trust law, "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100 cmt. f (2012) (Third Restatement); see, *e.g.*, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871 (rev. 2d ed. 1995) (Bogert) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee."); 1 James Barr Ames,

A Selection of Cases on the Law of Trusts with Notes and Citations 494 n.1 (2d ed. 1893) ("When the [beneficiary] has shown that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the [beneficiary] has made out * * * a *prima facie* case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee.") (citation omitted). Put another way, when a trustee has breached his duties and a related loss to the plan has occurred, "he has a defense to the extent that a loss would have occurred even though he had complied with the terms of the trust." Restatement (Second) of Trusts § 212(4) (1959) (Second Restatement).

Petitioners contend (Pet. 26) that burden shifting is a "new creation" in trust law. But because Congress intended courts to incorporate trust law and "to develop a federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire*, 489 U.S. at 110 (citation and internal quotation marks omitted), it is not clear that courts are limited to applying trust-law principles only as articulated at the time of ERISA's enactment. Cf. *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (explaining that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises"). In any event, as noted above, the Second Restatement, in 1959, adopted an affirmative defense for fiduciaries analogous to the burden-shifting framework adopted by the Third Restatement. See pp. 8-9, *supra*. Burden shifting has long existed in accounting and self-dealing cases under the law of trusts. See, *e.g.*,

Petersen v. *Swan*, 57 N.W.2d 842, 846 (Minn. 1953); *Wood* v. *Honeyman*, 169 P.2d 131, 162 (Or. 1946); *In re Ziegler's Estate*, 258 A.D. 1077, 1077 (N.Y. App. Div. 1940); *In re Richardson's Will*, 266 N.Y.S. 388, 390 (N.Y. Sur. Ct. 1928). And burden shifting likewise appeared in a pension case predating ERISA's enactment. See *Branch* v. *White*, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968).

Petitioners' cases "articulat[ing] the opposite rule," Pet. 27, are not necessarily inconsistent. In *United States Life Insurance Co.* v. *Mechanics & Farmers Bank*, 685 F.2d 887 (1982), the Fourth Circuit stated that a "beneficiary must bear the burden of proving that the act or omission of the trustee has caused a diminution of the trust income or principal." *Id.* at 896 (quoting Bogert § 701 (1982)). But it relied on a trust-law treatise that elsewhere makes clear that a beneficiary has the burden of showing only "a prima facie case," at which point "the burden of contradicting it or showing a defense will shift to the trustee." Bogert § 871. Petitioners also cite (Pet. 27) *In re Beebe's Estate*, 52 N.Y.S.2d 736 (N.Y. Sur. Ct. 1943). Although that decision stated that objectors to a trustee's account had "not sustained 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," *id.* at 741-742, the court was addressing the failure to prove breach, not causation, see *id.* at 741.

b. Applying trust law's burden-shifting framework to ERISA fiduciary-breach claims also furthers ERISA's purposes. In trust law, burden shifting rests on the view that "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of

duty." *Estate of Stetson*, 345 A.2d 679, 690 (Pa. 1975); see *Nedd* v. *United Mine Workers of Am.*, 556 F.2d 190, 211 (3d Cir. 1977) (same). ERISA likewise seeks to "protect * * * the interests of participants in employee benefit plans" by imposing high standards of conduct on plan fiduciaries. 29 U.S.C. 1001(b). Indeed, in some circumstances, ERISA reflects congressional intent to provide *more* protections than trust law. See, *e.g.*, *Varity*, 516 U.S. at 497. Applying trust law's burden-shifting framework, which can serve to deter ERISA fiduciaries from engaging in wrongful conduct, thus advances ERISA's protective purposes. See Pet. App. 35a-38a.

By contrast, declining to apply trust-law's burden-shifting framework could create significant barriers to recovery for conceded fiduciary breaches. That is especially true if the question of causation focuses on what the particular fiduciary would have done if it had not committed the breach (as distinguished from the substantive standard of prudence, which turns on what a reasonable person in like circumstances would do, see 29 U.S.C. 1104(a)). See Third Restatement § 100 cmt. e.[1] The fiduciary is in the best position to provide information about how it would have made investment decisions in light of the objectives of the particular plan and the characteristics of plan participants. Indeed, this Court recognized in *Schaffer* that it is appropriate in some circumstances to shift the burden to establish "facts peculiarly within the knowledge of" one party.

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[1] The court of appeals took that view of the causation inquiry. See Pet. App. 38a (noting that "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles"). The parties have not raised any issue about whether the court appropriately framed the inquiry.

546 U.S. at 60 (citation omitted). And in doing so, *Schaffer* cited *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626 (1993), in which the Court relied on that principle in resolving an issue under ERISA, in that case involving an employer's withdrawal liability. See *Schaffer*, 546 U.S. at 60.

2. Petitioners assert (Pet. 15) that the courts of appeals are "deeply divided about which party bears the burden of persuasion regarding" causation. Although some disagreement exists on that question, the decision below is consistent with decisions of the majority of the courts of appeals that have directly addressed it, and the contrary view is not as widely held as petitioners assert.

Like the First Circuit here, the Fourth, Fifth, and Eighth Circuits have held that once a plaintiff establishes a fiduciary breach under ERISA and related plan losses, the fiduciary has the burden to prove that the breach did not cause those losses. See Pet. App. 39a; *Tatum* v. *RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014), cert. denied, 135 S. Ct. 2887 (2015); *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), cert. denied, 516 U.S. 1174 (1996); *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994).

In contrast, the Tenth Circuit does not apply burden shifting to ERISA fiduciary-breach claims. See *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Trust* v. *Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (2017), cert. dismissed, 139 S. Ct. 50 (2018). In *Pioneer Centers*, the Tenth Circuit declined to incorporate trust-law principles, adhering instead to *Schaffer*'s default rule. See *id.* at 1336-1337.

Petitioners assert (Pet. 16-18) that the Second, Sixth, Seventh, Ninth, and Eleventh Circuits agree with the Tenth Circuit. That assertion is overstated.

The Second Circuit has issued potentially inconsistent decisions on this issue. In *New York State Teamsters Council Health & Hospital Fund* v. *Estate of DePerno*, 18 F.3d 179 (1994), the court applied the trust-law burden-shifting framework, holding that the plaintiffs' showing of a breach and related plan losses "was sufficient to shift to the defendants the burden to show that" the fiduciary would have spent the same sums anyway. *Id.* at 183. By contrast, in *Silverman* v. *Mutual Benefit Life Insurance Co.*, 138 F.3d 98 (2d Cir.), cert. denied, 525 U.S. 876 (1998), the court declined to apply burden shifting in a case concerning a new fiduciary's liability for failing to remedy a breach by a prior fiduciary. *Id.* at 104-105. A concurring opinion for two judges noted that requiring the plaintiff to prove causation served as a check on the "broadly sweeping liability" of a fiduciary for plan losses caused by another fiduciary's breaches. *Id.* at 106 (Jacobs & Meskill, JJ., concurring). But where a plaintiff shows a breach and related losses from the fiduciary's *own* actions, the Second Circuit may well apply burden shifting. See *Salovaara* v. *Eckert*, No. 94-cv-3430, 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998) (stating that a "plaintiff must demonstrate both breach of fiduciary duty and a *prima facie* case of loss to the fund before the burden shifts to the defendant on the issue of causation of loss"), aff'd, 182 F.3d 901 (2d Cir. 1999) (Tbl.).

Meanwhile, the Sixth, Seventh, Ninth, and Eleventh Circuits have not squarely addressed the burden-shifting issue, although they have indicated in general terms that a plaintiff bears the burden of establishing an

ERISA claim. For example, the Eleventh Circuit in *Willett* v. *Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335 (1992), considered whether an insurance company was liable for failing to inform plan participants that their coverage had ended because their employer had not paid the premiums. *Id.* at 1339. The court denied summary judgment because it found a genuine issue of material fact about whether the insurer (as opposed to the employer) had caused the plaintiffs' losses, and it noted that "the burden of proof on the issue of causation will rest on the beneficiaries" on remand. *Id.* at 1343. But the court did not specifically address burden shifting. *Ibid.* Similarly, in *Peabody* v. *Davis*, 636 F.3d 368 (2011), the Seventh Circuit held that a fiduciary's investment decision was imprudent and remanded for a calculation of damages. *Id.* at 370. Although the court remarked that "the plaintiff must show a breach of fiduciary duty, and its causation of an injury," to prevail, *id.* at 373, there was no causation issue before the court and the court did not specifically address burden shifting.

The Sixth and Ninth Circuit decisions arose in connection with the former "*Moench* presumption," which some courts of appeals had applied in assessing a plan's investment in employer stock, see *Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996), but which this Court rejected in *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 418 (2014). Applying the *Moench* presumption before *Dudenhoeffer*, the Sixth and Ninth Circuits held that to show a fiduciary's continued investment in employer stock was imprudent, "a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." *Kuper* v. *Iovenko*, 66 F.3d 1447, 1459 (6th Cir.

1995); *Wright* v. *Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004). Those decisions did not consider burden shifting in an ordinary ERISA case where a plaintiff has established both a fiduciary breach and related plan losses. Since *Dudenhoeffer*, the Sixth Circuit has reiterated *Kuper*'s statement that "a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan," but in the limited context of explaining that "a fiduciary's failure to investigate an investment decision *alone* is not sufficient." *Saumer* v. *Cliffs Natural Res. Inc.*, 853 F.3d 855, 863 (2017) (quoting *Kuper*, 66 F.3d at 1459); see *id.* at 861-863.

3. Although the division among the courts of appeals might warrant this Court's review in an appropriate case, this case would be an unsuitable vehicle for resolving the first question presented for several reasons.

a. First, the court of appeals' decision is interlocutory. The absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to district court "is not yet ripe for review by this Court"). And here, several considerations reinforce this Court's ordinary hesitation to engage in interlocutory review. For one, significant resources have already been spent on a trial: The district court began a bench trial, see Pet. App. 49a, and the court of appeals vacated and remanded "for the district court to complete the bench trial," *id.* at 40a; see Br. in Opp. 15 (noting that "seven

of an expected eleven days" of trial have been completed). For another, the court of appeals also remanded respondents' separate prohibited-transaction claim, Pet. App. 19a, meaning that further proceedings would be required even if the Court were to grant the petition and rule for petitioners. Finally, because the district court issued a midtrial decision, see *id.* at 49a, this Court lacks the benefit of both sides' full factual presentations, which could aid it in understanding the contours of the burden-shifting issue in this case.

b. Second, this particular case's interlocutory posture is itself unusual because the other elements of respondents' breach-of-prudence claim that are necessary to establish liability before the question of burden shifting on loss causation even arises have not been established. Courts applying burden shifting to ERISA claims follow trust law's requirements that, *before* the burden may shift, a plaintiff must establish (1) a fiduciary breach and (2) a related loss. See, *e.g.*, *Tatum*, 761 F.3d at 362-363. In this case, neither element has yet been established. As noted, the district court entered judgment on respondents' prudence claim midway through a bench trial, before petitioners began presenting their case. See Pet. App. 49a. And the court accordingly "refrain[ed] from making conclusive findings" on whether petitioners had in fact breached the duty of prudence. *Id.* at 69a. When the court of appeals then vacated the finding that respondents failed as a matter of law to show loss, it thus remanded for the district court to decide whether respondents could establish both a breach and a related loss to the Plan. *Id.* at 40a, 45a. If plaintiffs fail to establish either element, the causation dispute will become moot.

Petitioners respond (Reply Br. 6) that "elements are proved in parallel" and that it makes no difference that a breach and a loss have not yet been found. But because showings of a fiduciary breach and a related loss are prerequisites to burden shifting on causation, the court of appeals indicated that the district court should consider those questions sequentially. See Pet. App. 40a (instructing district court "to definitively decide whether Putnam breached the duty of prudence," before "decid[ing] whether [respondents] have shown a loss to the Plan," and before applying burden shifting). And in any event, understanding the nature of any breach and loss the lower courts might find could materially aid the Court's review of the causation question—*i.e.*, the causal relationship between such a breach and such a loss.

c. Third, the unusual midtrial posture of this case implicates another aspect of burden shifting. The term "'burden of proof'" encompasses "two distinct burdens." *Schaffer*, 546 U.S. at 56. The "'burden of persuasion'" determines "which party loses if the evidence is closely balanced." *Ibid.* The "'burden of production,'" by contrast, determines "which party bears the obligation to come forward with the evidence at different points in the proceeding." *Ibid.*

Courts applying trust-law principles, including the court below, have shifted both burdens to the fiduciary. See Pet. App. 38a-39a; see also, *e.g.*, *Martin* v. *Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (explaining that "the burden of persuasion shifts"), cert. denied, 506 U.S. 1054 (1993). But as the court of appeals acknowledged, "it would not be farfetched to" shift only the burden of production. Pet. App. 38a. Indeed, the "common sense concern" underscoring a burden-shifting regime is that

"it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty," and that "concern could be addressed by a mere shift in the burden of production rather than the burden of persuasion." *Ibid.*; see *Tatum*, 761 F.3d at 375 (Wilkinson, J., dissenting) (contending that even if "the burden of *production* shifts to the defendant once the plaintiff makes a prima facie case of breach and loss, the burden of *proof* (persuasion) must lie with the plaintiff" under *Schaffer*) (citation omitted). Thus, it is possible that, whatever this Court might decide with respect to the application of trust law's burden-shifting framework to ERISA claims, the Court at a minimum could determine that a shift in the burden of production is appropriate. Cf. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 257-258 (1981).

Because the district court entered judgment before the conclusion of trial, a shift in the burden of *production* alone would require a remand here. If at least the burden of production shifts, then the court of appeals correctly remanded for trial to continue and for petitioners to introduce evidence sufficient to carry their burden of production.[2] It is only after petitioners presented such competing evidence that the burden of *persuasion* would become relevant, as that burden applies only in cases in which "the evidence is closely balanced." *Schaffer*, 546 U.S. at 56. Because this case could be resolved at this stage by addressing the burden of production only, there might be no need to reach the question

[2] In a footnote, the court of appeals stated that "[b]ecause the district court resolved this case mid-trial, the burden of persuasion makes all the difference here." Pet. App. 38a n.16. It is not clear exactly what the court meant, or whether it intended to distinguish the burden of persuasion from the burden of production.

concerning the ultimate burden of persuasion. That additional feature of this case resulting from its unusual interlocutory posture and midtrial disposition further counsels against review here.

B. The Second Question Presented Does Not Warrant The Court's Review

1. The court of appeals also correctly concluded that passively managed index funds are not, as a matter of law, improper comparators for determining whether a loss has occurred from an ERISA fiduciary's breach involving the improper monitoring of actively managed funds. See Pet. App. 22a-29a.

As with the first question presented, ERISA's fiduciary-duty provisions do not expressly address the appropriate method for calculating losses "resulting from" a breach. 29 U.S.C. 1109(a). Again, though, the common law of trusts provides guidance. In trust law, an appropriate remedy for a fiduciary breach is restoration of beneficiaries to "the position in which [they] would have been if the trustee had not committed the breach of trust." Second Restatement § 205 cmt. a. Where the breach is due to imprudent investments, the ordinary trust-law remedy is thus the difference between (1) "the value of those investments and their income and other product at the time of surcharge," and (2) "the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested." Third Restatement § 100 cmt. b(1).

Courts analyzing ERISA fiduciary-breach claims follow the same approach in determining loss: "The question of loss to the Plan * * * requires a comparison

between the actual performance of the Plan and the performance that otherwise would have taken place." *Donovan* v. *Bierwirth*, 754 F.2d 1049, 1057 (2d Cir. 1985). The selection of appropriate comparators depends on "the type of trustee and the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case." Third Restatement § 100 cmt. b(1). Appropriate comparators may include "the return experience (positive or negative) for other investments, or suitable portions of other investments, of the trust in question"; "average return rates of portfolios, or suitable parts of portfolios, of a representative selection of other trusts having comparable objectives and circumstances"; "or return rates of one or more suitable common trust funds, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." *Ibid.* And "[w]hen precise calculations are impractical, trial courts are permitted significant leeway in calculating a reasonable approximation of the damages suffered." *California Ironworkers Field Pension Trust* v. *Loomis Sayles & Co.*, 259 F.3d 1036, 1047 (9th Cir. 2001).

The court of appeals correctly recited those governing principles. See Pet. App. 21a-25a. It then explained that respondents had "attempted to" demonstrate loss by introducing expert testimony comparing the performance of Putnam funds to "two passive comparators," *id.* at 24a, and it determined that such evidence "was sufficient to support a finding of loss" on the facts here, *id.* at 29a. The court noted that "the Restatement specifically identifies as an appropriate comparator for loss calculation purposes 'return rates of one or more . . . suitable index mutual funds or market indexes (with such adjustments as may be appropriate).'" *Id.* at 23a

(quoting Third Restatement § 100 cmt. b(1)).[3] It thus observed that "there is legal support for the use of index funds and other benchmarks as comparators for loss calculation purposes." *Id.* at 28a n.14.

Petitioners characterize (Pet. 29) the court of appeals' conclusion as a "*per se* rule" that determining losses by comparison to an index-fund portfolio is "always appropriate." But that characterization misconstrues the court's opinion. The court concluded only that *suitable* index-fund comparators could support a finding of loss in this case, not that comparisons to index funds compel a finding of loss as a matter of law in all cases. See Pet. App. 28a-29a & n.14. Indeed, the court specifically noted that the index funds relied upon by Pomerantz might be inappropriate comparators even in this case. See *id.* at 28a (declining to hold "that Pomerantz necessarily picked suitable benchmarks"); *ibid.* (describing petitioners' argument "that Pomerantz's comparators were not plausible" as a "question[] of fact" for the district court on remand). And in recognition that Pomerantz's selected index funds might not be suitable comparators, the court remanded the case for the district court to "decide whether [respondents] have shown a loss to the Plan." *Id.* at 40a.

The selection of comparator funds largely depends on the facts and circumstances of the case, including the nature and scope of the breach, and petitioners accordingly do not identify any conflicting decision of this

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[3] The Restatement also specifically identifies "the return experience (positive or negative) for other investments * * * *of the trust in question*" as a potentially appropriate comparator. Third Restatement § 100 cmt. b(1) (emphasis added). Here, respondents' expert used a BNY Mellon fund added to the Plan in 2016 as one of his two comparators. See Pet. App. 24a-25a, 61a; Br. in Opp. 3-4.

Court or of any other court of appeals. For that reason, and given the limited scope of the court of appeals' decision, the question does not warrant the Court's review.

2. In any event, this case would be a poor vehicle for consideration of the second question presented because of its interlocutory posture and the district court's mid-trial decision. See pp. 15-17, *supra*. In particular, petitioners raise several challenges to respondents' loss evidence that the district court has not yet considered. See Pet. App. 28a-29a. Petitioners did not present their own expert testimony, or even finish their cross-examination of Pomerantz. See *id.* at 7a; Pet. 9 n.6. Any dispute about the appropriate benchmarks for evaluating loss will not crystallize until that point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MORGAN L. RATNER
Assistant to the Solicitor General

KATE S. O'SCANNLAIN
Solicitor of Labor
G. WILLIAM SCOTT
Associate Solicitor
THOMAS TSO
Counsel for Appellate and Special Litigation
BLAIR L. BYRUM
Attorney
Department of Labor

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