No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A fiduciary of an ERISA plan is personally liable for "losses to the plan resulting from" a breach of fiduciary duty. 29 U.S.C. § 1109(a).

Fiduciaries determine what investment options an ERISA retirement plan will offer to participants. Options may include "actively managed" funds, which seek a higher return than the market through the direction of an investment adviser, and/or passively managed "index" funds, which seek to duplicate the holdings of an established market index such as the S&P 500.

The questions presented are as follows:

1. Whether an ERISA plaintiff bears the burden of proving that "losses to the plan result[ed] from" a fiduciary breach, as the Second, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether ERISA defendants bear the burden of *dis*-proving loss causation, as the First Circuit concluded, joining the Fourth, Fifth, and Eighth Circuits.

2. Whether, as the First Circuit concluded, showing that particular investment options did not perform as well as a set of index funds, selected by the plaintiffs with the benefit of hindsight, suffices as a matter of law to establish "losses to the plan."

PARTIES TO THE PROCEEDING

Petitioners, who were defendants-appellees below, are Putnam Investments, LLC; Putnam Benefits Oversight Committee; Putnam Benefits Investment Committee; Robert Reynolds; Putnam Investment Management, LLC; and Putnam Investor Services, Inc.

Respondents, who were plaintiffs-appellants below, are John Brotherston and Joan Glancy, individually, on behalf of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan.

RULE 29.6 STATEMENT

Putnam Investments, LLC is an indirect, majority-owned subsidiary of Great-West Lifeco Inc., a publicly held company. Great-West Lifeco Inc. is a majority-owned subsidiary of Power Financial Corporation, a publicly held company. Power Financial Corporation is an indirect, majority-owned subsidiary of Power Corporation of Canada, a publicly held company. No other publicly held company owns 10% or more of Putnam Investments, LLC.

Putnam Investment Management, LLC, and Putnam Investor Services, Inc., are both indirect, wholly owned subsidiaries of Putnam Investments, LLC. Except for the companies listed above, no publicly held company owns 10% or more of either Putnam Investment Management, LLC, or Putnam Investor Services, Inc.

The Putnam Benefits Oversight Committee and the Putnam Benefits Investment Committee are not separately incorporated.

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PETITION FOR A WRIT OF CERTIORARI

Putnam Investments, LLC; Putnam Benefits Oversight Committee; Putnam Benefits Investment Management Committee; Robert Reynolds; Putnam Investment Management, LLC; and Putnam Investor Services, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals, as corrected on October 25 and November 13, 2018 (Pet. App. 1a-46a), is reported at 907 F.3d 17. The June 19, 2017 trial decision of the district court making findings of fact and rulings of law (Pet. App. 47a-78a) is not published in the *Federal Supplement* but is available at 2017 WL 2634361.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 409(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

INTRODUCTION

This petition presents an important legal issue on which the circuits are now split 6-4, and on which this Court has called for the views of the Solicitor General twice since 2015. In an action under ERISA seeking monetary relief for breach of fiduciary duty, does the plaintiff bear the burden of proving loss causation? Or does ERISA invert the usual rule and require the *defendant* to bear the burden of *dis*proving causation?

The split has deepened repeatedly since this Court first asked for the government's views. In 2017, the Tenth Circuit joined the majority side and became the sixth court of appeals to hold that the plaintiff bears the burden. The plaintiff in that case sought certiorari; the defendant agreed there was a split; and this Court again called for the government's views—but the case settled before the government could file a brief.

Weeks later, the First Circuit decided this case. Acknowledging that "[o]ur sister courts are split" on how to allocate the burden, Pet. App. 30a, the First Circuit joined three other circuits on the minority side and held that the burden shifts to the defendant. The court explicitly recognized that "the burden of persuasion makes all the difference here," because the district court determined at mid-trial that the plaintiffs had not made their case. Pet. App. 38a n.16.

This case offers the perfect opportunity to resolve a deep divide. Nearly every regional circuit has now weighed in, and their holdings are diametrically opposed: six follow the default rule in federal statutory cases and place the burden on plaintiffs. Four shift the burden to defendants based on their perception that this rule—even though it appears nowhere in the statute—is better policy and fairer to ERISA plaintiffs. This stark division on such a foundational issue undermines one of ERISA's core purposes: to create a nationally "*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) (emphasis added).

In deciding how to prove that "losses to the plan result[] from" a fiduciary breach, the Court should also review a related question concerning how to prove the scope of such "losses." An imprudently managed plan incurs no loss if prudently chosen investments would have performed no better. A plaintiff therefore must prove what the plan would have earned without the breach, taking into account the investments that prudent fiduciaries *of the particular plan* would have selected. But the First Circuit announced a new legal rule that violates that principle. The court held that a court *must* accept the hindsight performance of a stock fund that tracks a market index—whether or not a prudent fiduciary would have chosen actively managed mutual funds instead. The First Circuit directed courts to disregard the differences between actively managed investments and index funds, and never required respondents to prove that a prudent fiduciary would have substituted passively managed funds for the active ones given the circumstances, such as the purposes, terms, investment strategy, and return objectives of the plan and its participants. In other words, the First Circuit made case-specific facts effectively irrelevant to the loss inquiry and erroneously created a new test in which index funds are *per se* sufficient to measure loss in every case.

The questions presented affect any ERISA case in which the plaintiff alleges that a fiduciary breach caused losses to the plan. This Court should grant certiorari and restore the nationwide predictability and uniformity that ERISA promises.

STATEMENT

A. The Putnam Plan Gives Participants A Range Of Investment Options.

Putnam Investments is an asset-management company. Putnam is frequently recognized as one of the nation's top fund families. C.A. J.A. 2242-2243 (Putnam ranked the No. 1 or No. 2 mutual fund family for one-year performance three times during the relevant time period).

This case is about Putnam's own retirement plan. Putnam established a 401(k) plan (the "Plan") for its employees, including its corporate officers and the investment-management professionals that manage Putnam funds. C.A. J.A. 1934-1940. Putnam contributes generously to its employees' 401(k) accounts—the company matches contributions made by employees, up to 5% of their pre-tax pay, and made additional voluntary contributions ranging from 5-15% of participants' compensation, even in years when the company was not profitable. C.A. J.A. 281, 571-587, 4845. Putnam is among the minority of employers that pays plan recordkeeping expenses, C.A. J.A. 566, 605—in most plans, all or most of those fees come from participants' retirement accounts.[1]

Because Putnam's Plan is a defined-contribution plan, the participants—current and former Putnam employees—are responsible for deciding how to invest their retirement accounts. The Plan offers a variety of investment options, with a wide range of risk and return characteristics, investment objectives, and fees. C.A. J.A. 3343-3358.

The menu included many, though not all, of the investment options that Putnam manages; it also included non-Putnam options. The Plan made available to participants nearly all of the open-end mutual

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[1] Deloitte Development LLC, *Defined Contribution Benchmarking Survey* 21 (2017), *available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-hc-defined-contributions-benchmarking-survey-report.pdf.

funds managed by Putnam that were generally made available to other employers' retirement plans. Pet. App. 60a-61a. Other options included collective investment trusts (CITs)[2] managed by an unaffiliated provider, BNY Mellon; passively managed index CITs managed by a Putnam affiliate; a common stock fund of Putnam's former parent company; and a brokerage window offered by TD Ameritrade, through which participants could invest in thousands of unaffiliated funds, both active and passive. C.A. J.A. 1220-1226, 3359.

The Putnam Plan included both actively managed funds and passively managed index funds. Pet. App. 4a-5a, 60a. "Actively managed" funds seek a higher return than the market generally through the use of "an investment adviser who actively researches, monitors, and trades the holdings of the fund"; "passively managed" index funds seek to duplicate the holdings and performance of an established market index, such as the S&P 500.[3]

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[2] CITs are investments in which multiple plans pool their assets and invest them together; many lack the transparency, ease of valuation, portability, and regulatory safeguards that are virtues of mutual funds. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671-672 (7th Cir. 2011); Investment Company Institute, *2018 Investment Company Fact Book* 292 (58th ed. 2018), *available at* https://www.ici.org/pdf/2018_factbook.pdf ("*Investment Company Fact Book*").

[3] *See* U.S. Dep't of Labor, *Understanding Retirement Plan Fees and Expenses* 9 (Dec. 2011), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-retirement-plan-fees-and-expenses.pdf.

B. Respondents Sue Putnam For Allowing Participants To Invest In Affiliated Mutual Funds Through The Plan Line-Up.

Respondents, former Putnam employees, filed a class action against Putnam and related defendants. In the claim relevant here, respondents alleged that the Plan's fiduciaries breached their duty of prudence by allowing participants to invest in Putnam-managed mutual funds without conducting an adequate investigation into those funds. Pet. App. 6a.[4] Respondents contended that petitioners must restore to the Plan any losses resulting from that breach. Pet. App. 43a. The district court granted class certification. 12/8/2016 Hearing Tr. 10.

The case proceeded to a bench trial. Respondents focused their evidence on just two elements of the fiduciary-breach cause of action: (1) whether Putnam's decisionmaking process was adequate, and (2) the monetary relief ("losses to the plan" and disgorgement of profits) that should be assessed pursuant to 29 U.S.C. § 1109(a) if the district court found a fiduciary breach. *See generally* Pls.' Trial Br. Respondents contended that loss causation was not part of

[4] Respondents also pressed several claims not at issue here, including allegations that petitioners breached the duty of loyalty and violated ERISA's prohibited-transaction provisions, 29 U.S.C. § 1106(a)(1) and (b). The district court ruled for petitioners on the prohibited-transaction claims at the summary-judgment stage; the court of appeals affirmed in part and vacated in part the district court's judgment regarding those claims. Pet. App. 7a-19a. At trial, the district court found in petitioners' favor on the duty-of-loyalty claim, and the court of appeals affirmed that finding. Pet. App. 40a-43a, 65a-66a. Those rulings are not at issue in this petition.

their burden, and they made no effort to prove it. *Id.* at 22.

To prove losses to the Plan, respondents offered Steven Pomerantz, a mathematician, as an expert. He compared the investment returns and fees of each of the Putnam funds in the Plan line-up to the investment returns and fees of two passively managed alternatives: (1) an index mutual fund offered by Vanguard, an "at-cost" investment-management operator,[5] and (2) one of the six BNY Mellon index CITs that were already in the Plan's line-up. C.A. J.A. 58, 2577-2578. Pomerantz added up the differentials and asserted losses of about $45 million. Pet. App. 24a-25a; C.A. J.A. 2581-2582, 2588.

Respondents did not, through Pomerantz or otherwise, compare the investment strategies of these index funds to the strategies of the Plan's actively managed Putnam funds. They undertook no analysis of whether a prudent fiduciary would have chosen Pomerantz's index-fund alternatives *for this Plan* in place of the actively managed Putnam funds given the Plan's overall investment strategy, the other investments in the Plan's portfolio, the Plan's risk and return objectives, or any other factors specific to the Plan and its participants—including participants' demonstrated preference for Putnam funds, C.A. J.A. 1961-1962, 2084-2085, 2165, 2268, and for active management, *see* C.A. J.A. 5909 (in 2016, less than 6% of plan assets were invested by participants in index options, and just 1.24% in BNY Mellon CITs). In fact, respondents did not offer any evidence of

[5] *See* Vanguard, *Why ownership matters at Vanguard*, https://about.vanguard.com/what-sets-vanguard-apart/why-ownership-matters/ (last visited Jan. 10, 2019).

whether the Putnam funds were imprudent options. Instead, they contended that if the fiduciaries' decisionmaking *process* was inadequate, "[t]he entire portfolio" was automatically imprudent, and all that was left for the court to do was calculate the amount of damages to award. C.A. J.A. 2641-2642.

C. The District Court Concludes That Respondents Failed To Make A Prima Facie Showing Of Loss Caused By A Fiduciary Breach.

After seven days of a bench trial, once respondents finished presenting their evidence,[6] petitioners filed a motion for judgment on partial findings under Federal Rule of Civil Procedure 52(c). Petitioners argued, among other things, that even assuming a fiduciary breach, respondents had failed to establish loss causation. Mot. for J. on Partial Findings 12-16.

The district court granted petitioners' motion, making extensive findings of fact and conclusions of law. Pet. App. 48a-78a. The court first noted the deep circuit split about the burden of proving loss causation, Pet. App. 58a-59a, and held that respondents were required to make "a prima facie showing of loss caused by a breach of fiduciary duty." Pet. App. 73a, 77a. The court assumed that if respondents made that showing, the burden of persuasion would shift to petitioners. Pet. App. 77a n.19.

The district court concluded that respondents had failed to make such a prima facie showing. Instead,

[6] Respondents had not formally rested because petitioners had not finished cross-examining Pomerantz, respondents' final witness. 4/19/2017 Tr. 152.

respondents had advanced a "procedural breach" theory that simply assumed that each Putnam option was imprudent if the investment process was flawed, and calculated damages based on that assumption—a theory the district court concluded was irreconcilable with the statutory text and case law interpreting it. Pet. App. 72a-77a & n.20.

D. The First Circuit Joins A Minority of Circuits In Holding That ERISA Defendants Must *Dis*prove Causation.

As relevant here, the First Circuit vacated the district court's judgment on the duty-of-prudence claim. The court disagreed with the district court's analysis of causation and loss, held that respondents' showing of loss shifted the burden to petitioners to *dis*prove loss causation, and concluded that shifting the burden "makes all the difference." Pet. App. 29a-40a & n.16.

1. The court of appeals concluded that the district court had conflated two elements, loss and causation, when deciding whether respondents had made a prima facie showing of loss.[7] The court concluded that the loss element requires an analysis of the investment returns that would have been achieved in prudent investments, Pet. App. 22a-24a, whereas the

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[7] In fact, the district court did not suggest that respondents were required to establish only a prima facie case of *loss*; it stated that respondents had the burden of establishing loss and, separately, a prima facie case of loss *causation*. Pet. App. 71a ("[A]n ERISA plaintiff must establish a causal link between the breach and the damages claimed."); Pet. App. 73a (describing, as the relevant issue, "a prima facie showing of loss caused by a breach of fiduciary duty").

causation element requires an analysis of whether the fiduciary's investment decision was objectively prudent despite a flawed decisionmaking process, Pet. App. 26a-27a.

2. The court of appeals first concluded that Pomerantz's index-fund portfolio comparison was sufficient as a matter of law to support a finding of loss. The court acknowledged that unlike actively managed funds, index funds "do not claim to be able to pick winners and losers, or charge for doing so." Pet. App. 28a. But the court dismissed that difference as categorically irrelevant for purposes of computing loss. Pet. App. 28a & n.14 (index funds can be comparators "as a matter of law"). The court thought that a comment in the Restatement of Trusts makes index funds "an appropriate comparator for loss calculation purposes," *per se*. Pet. App. 23a (citing Restatement (Third) of Trusts ("Third Restatement") § 100, reporter's notes on cmt. b(1) (2012)); *see also* Pet. App. 28a. While it acknowledged that petitioners could raise factual challenges to the particular index-fund selections,[8] the court concluded that respondents' evidence was "legal[ly] sufficien[t]" to prove loss. Pet. App. 29a.

3. Turning to causation, the court of appeals recognized that it must "find causation before awarding damages" because causation is an element of a claim under 29 U.S.C. § 1109(a). Pet. App. 20a-21a, 29a-30a. It acknowledged that in federal statutory cases, there is an "ordinary default rule" about the burden

[8] While it held that index funds are appropriate comparators as a category, the court left open whether the *particular* index-fund alternatives in Pomerantz's portfolio might not be "suitable" in other ways. Pet. App. 28a.

of persuasion: "courts ordinarily presume that the burden rests on plaintiffs 'regarding the essential aspects of their claims.'" Pet. App. 32a (quoting *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005)). The court stated, however, that it "has long been the rule in trust law" that "the burden of disproving causation [rests] on the fiduciary." Pet. App. 32a-33a (citing *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014)).

The court concluded that "borrowing trust law's burden allocation actually poses no conflict" with the "ordinary default rule" because ERISA could simply be considered an "exception." Pet. App. 33a, 38a; *see also* Pet. App. 34a, 37a, 40a. The court stated that trust-law principles can be used to fill gaps in ERISA when doing so is not inconsistent with ERISA's purpose and structure. Pet. App. 33a-34a. It determined that adopting trust law in this context would create no inconsistency because Congress's "desire" in enacting ERISA was to offer beneficiaries greater benefits and protections than they previously had. Pet. App. 35a (citation omitted).

The court of appeals acknowledged that this Court has not always read ERISA to incorporate trust-law principles. But it thought the general rule should be to follow the common law except where less favorable to plaintiffs, even while it acknowledged cases taking a different approach. Pet. App. 36a (citing, using a "*But cf.*" signal, *Conkright v. Frommert*, 559 U.S. 506 (2010), and *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)).

Finally, the court of appeals stated that it made "more sense" for a fiduciary "to say what it claims it would have done" if it had acted prudently, rather than to require plaintiffs to prove it, because fiduciaries have many options in building a plan portfolio. Pet. App. 38a.

Thus, the First Circuit joined the minority of circuits and held that once a fiduciary breach and loss are established, "the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent." Pet. App. 39a. The court opined that its holding would impose no significant new burden on ERISA defendants, because it thought that a fiduciary "can easily insulate itself" by selecting index funds, rather than active funds. Pet. App. 39a-40a.

REASONS FOR GRANTING THE WRIT

The circuits are deeply divided about which party bears the burden of proving loss causation under ERISA. Nearly every regional circuit has now weighed in, and the last two circuits to do so chose opposite sides in reasoned decisions. Recognizing the issue's importance, this Court has twice called for the views of the Solicitor General—first in *RJR Pension Investment Committee v. Tatum*, No. 14-656, before recent decisions deepened the split, and again last year in *Pioneer Centres Holding Co. Stock Ownership Plan v. Alerus Financial, N.A.*, No. 17-667. The latter petition was dismissed by stipulation before the current Administration could file a brief. Since then, the split has grown even starker. The Court should grant certiorari without further delay.

The Court should couple its review of loss causation with a related and recurring issue of proving loss. The First Circuit insisted that, as a matter of law, loss can be measured by comparing what a portfolio of index funds would have earned, and that the comparison must disregard the differences in kind between index funds and actively managed investments, like those at issue here. Not only did the First Circuit insist that *courts* must treat actively managed funds as no different from index funds, it blithely asserted that *fiduciaries* should choose the latter over the former to avoid liability. By excusing ERISA plaintiffs from showing that their hindsight alternatives would have been chosen by a prudent fiduciary, despite their lack of active management, given the purposes, terms, investment strategy, and return objectives of the plan, the First Circuit's inquiry hollows out the requirement to prove loss and unfairly forces fiduciaries toward passive management.

These issues have broad significance: hundreds of ERISA class actions claiming breach of fiduciary duty are currently pending in federal court, demanding *billions* of dollars in recovery, and the burden-of-proof and loss issues are germane to all of them. If not reversed, the First Circuit's errors will leave retirement plans in a difficult position. First, the court acknowledged that its rule would create pressure on fiduciaries to substitute index funds for fear of ERISA liability—potentially costing beneficiaries market-wide a chance to pursue *billions* in superior returns. And second, defendants in future cases will be pressed to settle rather than litigate, which will frustrate future review by this Court—and encourage plaintiffs to file cases irrespective of their merits. This Court should take this opportunity to resolve both questions presented.

I. This Court Should Grant Certiorari To Resolve The Well-Documented 6-4 Split About The Burden Of Persuasion In Actions Against ERISA Fiduciaries.

A fiduciary who breaches one of ERISA's fiduciary duties must "make good … any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). The limiting phrase "resulting from each such breach" requires a causal link between breach and loss. The circuits are deeply divided about which party bears the burden of persuasion regarding this causal link. All that the circuits agree on is that they are split. *See, e.g.*, Pet. App. 30a; *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336-1337 (10th Cir. 2017), *pet. for cert. dismissed by stipulation*, No. 17-667 (Sept. 20, 2018). The Court should take this opportunity to finally resolve the conflict.

A. The Circuits Are Deeply And Irreconcilably Split On Whether ERISA Reverses The Burden Of Persuasion.

1. Six circuits have applied to ERISA cases the same rule that ordinarily applies in all civil litigation under federal statutes: plaintiffs bear the burden of proving every element of their claims. As this Court has explained, that 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). The six circuits in the

majority hold that this rule solves the burden-of-persuasion question under ERISA as well.

The most recent circuit to join the majority side was the Tenth Circuit, in 2017. That court examined the circuit split on the burden-of-persuasion issue and concluded that the burden must stay with an ERISA plaintiff. *Pioneer Ctrs.*, 858 F.3d at 1336-1337. The court concluded that trust law—the primary basis for the First Circuit's decision here—provided "no reason to depart from" the default rule, because (i) trust law does not necessarily dictate courts' interpretation of ERISA, (ii) Section 1109(a) makes causation "an element of the claim," not an affirmative defense or an exemption from liability, and (iii) causation is "an important check" on liability under ERISA, which otherwise would sweep quite broadly. *Id.*

The Tenth Circuit drew support from an earlier Second Circuit decision holding that the plaintiff was required to present evidence that the plan's loss resulted from the fiduciary breach. *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998); *accord id.* at 105 (majority concurrence) ("Causation of damages is therefore an element of the claim, and the plaintiff bears the burden of proving it.").[9] The majority expressly rejected trust law as a reason to shift the burden to the defendant, concluding that "Congress has placed the burden of proving causation on the *plaintiff*" by making causation an ele-

[9] Because the author of the panel opinion disagreed with one aspect of the analysis, the other two judges filed a separate opinion that, while styled a concurrence, commanded a majority and therefore became part of the holding. 138 F.3d at 105 & n.9.

ment. *Id.* at 106 (majority concurrence) (emphasis in original). The majority noted that this requirement helps to cabin ERISA's "broadly sweeping liability, to ensure that solvent companies remain willing to undertake fiduciary responsibilities with respect to ERISA plans." *Id.*[10]

The Sixth, Seventh, Ninth, and Eleventh Circuits have likewise applied the ordinary default rule, placing the burden of proving causation on an ERISA plaintiff alleging a fiduciary breach. *See Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan."), *abrogated in part on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Peabody v. Davis*, 636 F.3d 368, 374 (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) (quoting *Kuper*, 66 F.3d at 1459); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343

[10] The First Circuit suggested that *Silverman* is inconsistent with an earlier Second Circuit case, *New York State Teamsters Council Health & Hospital Fund v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994). Pet. App. 31a n.15. But there is no inconsistency: *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. *See 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). *Silverman* therefore is binding, and courts in the Second Circuit treat it as such. *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).

(11th Cir. 1992) ("On remand, the burden of proof on the issue of causation will rest on the beneficiaries.").

In a brief filed by Solicitor General Verrilli in 2015, before either *Pioneer Centres* or the First Circuit's decision here, the government suggested that *Kuper* and *Wright* might not represent the firm positions of the Sixth and Ninth Circuits. *See* U.S. Amicus Br. at 14, *Tatum*, *supra* (No. 14-656) ("2015 U.S. Br."). Those cases involved employee stock ownership plans, and they applied a presumption of prudence with regard to employer stock. The government speculated that those courts might change their mind based on *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), which rejected a presumption of prudence. 2015 U.S. Br. at 14. But no court has changed its mind on burden-shifting based on *Dudenhoeffer*'s unrelated holding; in fact, the Sixth Circuit has *expressly reaffirmed* that "a plaintiff must show a causal link between [a fiduciary's] failure to investigate and the harm suffered by the plan." *Saumer v. Cliffs Natural Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017) (quoting *Kuper*, 66 F.3d at 1459).

The government also suggested that some earlier cases did not definitively resolve "the question whether a breaching fiduciary bears the burden of proof on causation after a plaintiff establishes a breach of fiduciary duty and plan losses." 2015 U.S. Br. at 13-14 (discussing *Willett* and *Peabody*). But decisions in the relevant circuits read those cases to place the burden on plaintiffs—including in cases, like this one, challenging plan fiduciaries' investment decisions.[11]

All told, therefore, the majority side now totals six circuits.

2. Four circuits require ERISA defendants to disprove loss causation once plaintiffs establish a fiduciary breach and losses to the plan.

The Eighth Circuit took that position first, stating that "the burden of persuasion shifts to the fiduciary" to disprove causation. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). 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 inapposite cases from circuits that have since *rejected* a burden-shifting rule. *Id.* at 671-672 (citing cases from the Second, Seventh, and Ninth Circuits). The Eighth Circuit has continued to apply the burden-shifting framework without further analysis. *E.g.*, *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (citing *Martin*).

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 cited *Roth* in holding that a fiduciary bears the burden of disproving causation once an ERISA plaintiff has proven a

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[11] *E.g.*, *Perez v. DSI Contracting, Inc.*, No. 14-cv-282-LMM, 2015 WL 12618779, at *5 (N.D. Ga. July 24, 2015) (reading *Willett* to place "burden of proof with regard to loss causation" on plaintiffs); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337-Civ.-JORDAN, 2007 WL 2263892, at *37 (S.D. Fla. Aug. 7, 2007) (same).

breach of fiduciary duty and a prima facie case of loss. *Id.* at 237 & n.14; *accord Timmons v. Special Ins. Servs., Inc.*, 167 F.3d 537 (5th Cir. 1998) (unpublished) (same); *Smith v. Prager*, 154 F.3d 417 (5th Cir. 1998) (unpublished) (same).

No court adopted a burden-shifting standard after examining the issue in depth until the Fourth Circuit's 2014 decision in *Tatum*, 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." 761 F.3d at 363. The court acknowledged the ordinary default rule but concluded that ERISA was an "exception" because the burden was different under trust law. *Id.* at 362.

The Fourth Circuit justified applying that "exception" based not on ERISA's text, or even its legislative history, but on raw policy and general statutory purpose. It endorsed the view that a burden-shifting rule would be "the most fair approach" once a plaintiff has proved a breach, *Tatum*, 761 F.3d at 362 (citation omitted)—a rationale that could apply equally to loss causation under *any* statute. And it concluded that a burden-shifting framework would be consistent with the "structure and purpose of ERISA," which, in the court's view, aims to protect the interests of plan participants. *Id.* at 363. The court thought that requiring plaintiffs to prove loss causation would "create significant barriers" for ERISA plaintiffs and "provide an unfair advantage to a defendant." *Id.* (citation omitted).

In dissent, Judge Wilkinson recognized that the court's holding was inconsistent with the ordinary default rule. 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." 761 F.3d at 375-376 (Wilkinson, J., dissenting).

The First Circuit joined the approach taken by the Fourth, Fifth, and Eighth Circuits, largely for the same reasons the Fourth Circuit gave. *See supra* pp. 11-13.[12]

B. The Continued Split Undermines ERISA's Goal Of Uniformity.

Knowing who bears the burden of persuasion on a given element is crucial in any case. This Court therefore has regularly granted certiorari to resolve the correct burden allocation under various federal statutes.[13] The split on this issue has particular significance under ERISA, because nationwide uniformity is at the very heart of ERISA's purpose. *See Rush*, 536 U.S. at 379. Because ERISA permits venue anywhere a defendant can be found, 29 U.S.C. §

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[12] Even these circuits differ on whether the plaintiff must *prove* loss before the burden shifts, or must simply present a "prima facie case of loss," though none has articulated what, exactly, a "prima facie case of loss" is. *Compare Tatum*, 761 F.3d at 357 (requiring plaintiffs to "ma[ke] a prima facie case of loss"), *and Martin*, 965 F.2d at 671 (same), *and McDonald*, 60 F.3d at 237 (same), *with* Pet. App. 39a n.17 ("We intentionally use the term 'loss,' rather than 'prima facie loss' ….").

[13] *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (burden of proving causation in Title VII retaliation cases); *Shinseki v. Sanders*, 556 U.S. 396 (2009) (burden of proving error in veterans' disability cases); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (burden of proving ADEA exemption); *Schaffer*, 546 U.S. at 55-56 (burden of proving adequacy of individualized education plan under the IDEA).

1132(e)(2), the split creates a substantial incentive to forum-shop. And given the explosion of lawsuits filed against plan sponsors and fiduciaries over the past 15 years,[14] the ability to forum-shop for a plaintiff-friendly causation rule will affect not just where cases are filed, but also which cases are brought and how they are litigated.

The question recurs frequently, and nearly every regional circuit has answered it, yet there will be no uniform answer until this Court provides one. And the First Circuit's response to that concern is telling: the court did not dispute that fiduciaries now will fear runaway liability for any losses the plan suffers, no matter the cause. Rather, it advised fiduciaries that they should *act* on that fear by switching to index funds. Pet. App. 40a.

This is no solution at all. Participants in retirement plans like Putnam's have a choice—they can choose index-fund options if they wish, but they can also choose to invest in actively managed funds, to accept a degree of risk, and to try to earn returns for their retirement that *exceed* the market. If everyone were limited to index funds, then when the market drops, *everyone*'s retirement would drop as well. Active management allows investors to choose a different path. That is why nearly $12 *trillion* in assets

[14] *See* Gerald E. Gasber, *The Great Litigation Explosion*, Gasber Financial Advisors, Inc. (June 20, 2016), http://www.gasberfinancial.com/news/401k-our-blog/155-gerald-e-gasber-cfpr-cimar-qpfc.html; Thomas E. Clark, Jr., *The Recent Wave of ERISA Litigation Is Turning into a Tsunami* 1-3, 401(k) Advisor (May 2016), *available at* https://info.wagnerlawgroup.com/hubfs/docs/TheRecentWaveofERISALitigationIsTurningintoaTsunamiA0213307.pdf.

are held in active mutual funds and only about $3.5 trillion are invested in index mutual funds. *See Investment Company Fact Book* 42. The First Circuit's reasoning threatens fiduciaries' ability to offer their beneficiaries that choice. Moreover, it *discourages* good fiduciary behavior—diversifying plan offerings and selecting investments based on what is good for a plan and its participants—and could threaten billions of dollars in shareholder value and upend the investment-management industry. This Court should not leave in place a circuit conflict that requires fiduciaries who can be sued in one of the minority circuits (and most can) either to restrict participants to an all-index line-up that abandons the pursuit of higher returns, or risk massive personal liability by giving their participants greater choice.

C. This Case Presents An Ideal Vehicle For The Court To Resolve This Important And Recurring Question.

This case is an ideal vehicle to address the burden-of-proof question. That purely legal issue was the express basis for the First Circuit's decision, and as the court recognized, "the burden of persuasion makes all the difference here." Pet. App. 38a n.16.[15]

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[15] Respondents could not prevail under a non-shifting standard because they made no effort to prove causation. Instead, they argued that the court could simply assume "[t]he entire portfolio is imprudent because of a procedural breach" and therefore did not provide "a fund-by-fund analysis" of whether the funds chosen by fiduciaries were objectively prudent. C.A. J.A. 2641. The court of appeals did not credit that assertion but relied entirely on the burden shift.

This Court denied certiorari on this issue in 2015, on the government's advice. But that certainly did not signal that the issue would *never* warrant review. Indeed, just last year in *Pioneer Centres*, the Court called for the (new) Solicitor General to file a new brief on this issue. The split had deepened by then, with the Tenth Circuit taking the majority side, and the decision below deepens it still further. Those new decisions also show just how frequently the issue recurs: *ten* circuits have now weighed in, and the question arises in district court even more frequently.

Furthermore, neither of the reasons Solicitor General Verrilli gave for recommending denial of certiorari in 2015 applies here. First, the government suggested that the answer to the burden-shifting question "may not affect the outcome" of the *Tatum* litigation. 2015 U.S. Br. at 7-8. As already explained, that is not the case here, where "the burden of persuasion makes all the difference." Pet. App. 38a n.16. And second, the government suggested that the split was not yet clear. 2015 U.S. Br. at 7, 13-14; p. 18, *supra*. Circuits on both sides have now acknowledged that the conflict has crystallized beyond dispute. Subsequent decisions have dispelled any uncertainty about the circuits following the majority rule. And the Tenth Circuit joined the fray with a decision so clearly irreconcilable with the opposing position that the respondent in that case conceded the split. *See* Br. in Opp. at 15, *Pioneer Ctrs.*, *supra* (No. 17-667).

Because the issue has percolated thoroughly and the divide is intractable, the Court should grant certiorari now. At a minimum, the Court should again call for the views of the Solicitor General, as it did in *Pioneer Centres*.

D. The First Circuit's Holding Is Incorrect.

The ordinary default rule applies to ERISA as it does to any other federal statute. Section 1109(a) expressly makes loss causation an element of a claim by specifying that fiduciaries are personally liable only for "losses to the plan *resulting from*" a fiduciary breach. The First Circuit's decision incorrectly creates an ERISA-specific exception founded not on the text, but on subsequent trust-law writings that Congress never adopted.

1. The burden-of-proof default rule applies in *all* federal statutory cases unless Congress adopts a contrary rule. *See, e.g.*, *Gross*, 557 U.S. at 177. None of the recognized exceptions to the default rule applies here.

First, as the court of appeals recognized, causation is an element of respondents' claim, not a defense. Pet. App. 20a-21a, 30a. The court rightly did not rely on the rule that defendants must prove affirmative defenses, *see Schaffer*, 546 U.S. at 57.

Second, in cases like this, the relevant information is not peculiarly within the defendants' knowledge.[16] The inquiry is an "objective" one, as the First Circuit acknowledged. Pet. App. 26a-27a. It asks whether a hypothetical prudent fiduciary would have achieved a different result—*i.e.*, whether the defendant fiduci-

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[16] Even if it were, that would not suffice: burden-shifting on those grounds "is far from being universal, and has many qualifications upon its application." *Schaffer*, 546 U.S. at 60 (citation omitted).

ary's decision was "objectively imprudent." *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011); *see also* Pet. App. 39a. In Judge Wilkinson's words, "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 proven using expert evidence, not evidence within the unique knowledge of *either* party.

2. The common law of trusts provides no reason to ignore the ordinary default rule.

The First Circuit interpreted "the absence of explicit textual direction" as permission to borrow a burden-shifting rule from the 2012 Third Restatement. Pet. App. 33a. That approach turns the *Schaffer* line of cases on its head. The ordinary default rule applies to federal causes of action "unless a statute … provides otherwise." *Fairley v. Andrews*, 578 F.3d 518, 525-526 (7th Cir. 2009) (Easterbrook, J.).

That rule applies fully to ERISA, which gives no reason to believe that Congress, through silence, intended to make defendants bear the burden of *dis*proving a key element of a plaintiff's claim. In all of its cases involving ERISA and trust law, this Court has never held that congressional silence justifies allowing trust law to take over the procedural rules that govern ERISA *litigation*, as opposed to the substantive standards governing a fiduciary's conduct.

Worse, the rule the court of appeals imported into the statute is a new creation, not a "long-recognized" one, *contra* Pet. App. 32a-33a. The First Circuit relied on the *2012* Third Restatement as the source for this "long-recognized" principle. But at the time of ERISA's enactment, the Restatement did not espouse any burden-shifting rule. *See* Restatement (Second) of Trusts § 205 (1959). And numerous cases articulated the opposite rule. *See U.S. Life Ins. Co. v. Mechanics & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982) (rejecting burden-shifting argument as a "novel proposition"); *In re Beebe's Estate*, 52 N.Y.S.2d 736, 741-42 (N.Y. Sur. 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*, 268 A.D. 1051 (N.Y. App. Div. 1945).

At most, at ERISA's enactment, courts were in disagreement over who bore the burden of proving causation. 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).

3. The First Circuit relied on a one-sided view of ERISA's purpose and policy considerations to justify adopting a burden-shifting rule that appears nowhere in the statute. The court appealed to ERISA's "purpose[]" of offering greater protections for retirement-plan beneficiaries. Pet. App. 34a-35a. The court even divined from this Court's precedents a supposed practice of "opt[ing] for the common law approach" when interpreting ERISA "except when rejection was necessary to provide enhanced benefi-

ciary protections," Pet. App. 36a—*i.e.*, follow the common law, unless plaintiffs prefer otherwise.

That is simply incorrect: this Court has repeatedly rejected plaintiffs' efforts to rely on trust law for broad constructions of ERISA's remedial provisions based on "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 this 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.

Moreover, a generalized purpose to protect beneficiaries is not enough to relieve plaintiffs of their burden. The plaintiffs in *Schaffer* made the same argument—that the IDEA seeks to protect students and parents, so defendants should bear the burden of persuasion. The Court rejected it, because shifting the burden to school defendants could just as easily undermine the IDEA's purpose by making administrative procedure and litigation more expensive. 546 U.S. at 59. So too here: in ERISA "Congress sought to create a system that is [not] 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).

This Court has recognized that ERISA was the product of "innumerable" compromises—and "not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Courts must "take account of" those "competing congressional purposes," *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996), and cannot bend the statutory cause of action just for the sake of favoring plaintiffs—especially not in ways that contravene the statute's text and the generally applicable rules of statutory interpretation.

II. The First Circuit Adopted A Radical View Of The Legal Standard For Proving Loss That Warrants This Court's Review.

Because the burden of proving loss causation warrants certiorari, this Court should also review the First Circuit's error on a related point—how to prove the extent of any loss. The First Circuit adopted a *per se* rule, holding index funds categorically sufficient as a measure of loss. That badly misapprehends the loss inquiry, and the error is of great significance: cases like this one are flooding into court,[17] and rulings like the First Circuit's create significant settlement pressure that will insulate the issue from review in future cases. This Court should take the opportunity, in conjunction with its review of the first question, to review this second question as well.

A. The First Circuit's Bright-Line Rule Badly Misinterprets The Legal Standard For Proving Loss.

The First Circuit concluded that it is always appropriate to determine whether "losses" have oc-

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[17] *See Wilcox v. Georgetown Univ.*, No. 18-422 (RMC), 2019 WL 132281, at *1 (D.D.C. Jan. 8, 2019) ("This type of lawsuit seems to have taken higher education by storm, with suits brought all over the country.").

curred by comparing the value of a plan's portfolio to an alternative portfolio that consists solely of index funds. Pet. App. 28a. The court acknowledged that index funds are a different kind of investment from the actively managed funds at issue here: unlike active funds, index funds "do not claim to be able to pick winners and losers, or charge for doing so." *Id.* But the court dismissed that difference as categorically irrelevant and held that it did not keep index funds from being "comparable" for purposes of computing loss. Pet. App. 28a & n.14 (index funds can be comparators "as a matter of law"). That fundamentally misunderstands the inquiry.

The measure of loss to an ERISA plan is not how much money the plan *could* have made, in hindsight. Rather, the question is what the value *would* have been without the fiduciary breach, taking into account the investments that prudent fiduciaries *of the particular plan* would have selected. *See, e.g.*, Third Restatement § 100. "The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall." *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (quotation marks omitted).

Conversely, investments that the plan would *not* have made are not appropriate measures of loss. "[T]o select a fair damages calculation, the court must determine what asset mix a prudent fiduciary would have maintained for the [particular] plans during the [particular] time frame." *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 573 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004); *accord* Third Restatement § 100, reporter's notes on cmt. b(1) (citing *Meyer*).

For those reasons, several courts have recognized that it is not appropriate to presume that trustees would have invested in index funds. For instance, on remand following this Court's decision in *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), a case similarly challenging the funds in a plan line-up, the district court rejected the use of an S&P 500 index fund as a damages measure. The court concluded that using that fund was "unambiguously irrational" given the plan portfolio as a whole and the facts and circumstances of the case, including plan participants' demonstrated aversion to that index fund and preference for active management. No. CV 07-5359 SVW (AGRx), 2017 WL 3523737, at *13-14 (C.D. Cal. Aug. 16, 2017). Similarly, a leading non-ERISA trust case concluded that an S&P 500 index fund did not provide the appropriate measure of loss for a breach of fiduciary duty, because the parties agreed "that a prudent trustee would not have invested all of the assets in [that index fund]." *Estate of Wilde*, 708 A.2d 273, 276 (Me. 1998), *cited in* Third Restatement § 100, reporter's notes on cmt b(1).

This case exemplifies why a plaintiff must prove losses with facts about the particular plan, rather than just assume the returns of an index fund. This case is about the *menu* of choices being offered to Plan participants—a menu that already offered passive options that plan participants largely *rejected*. As of 2016, participants as a whole had invested only about 6% of the plan's assets in index funds, including just 1.24% in BNY Mellon CITs. C.A. J.A. 5909. Thus, there is every reason to think that prudent fiduciaries would *not* have chosen the passive alternatives that Plaintiffs presented. *See* Third Restatement § 90; *id.* § 100, reporter's notes on cmt. b(1).

Putnam is an active manager, and the Plan's participants consist of Putnam managers, employees, and retirees—exactly the group that would be expected to understand the differences between active and passive investments, and the greater opportunity to benefit during different market conditions through active management.

The First Circuit considered none of that. It read the Restatement to make index funds *per se* appropriate. It held that comparing a portfolio of actively managed funds offered in the Plan's line-up to a portfolio of index funds was legally sufficient. And it concluded that courts must disregard the key qualitative difference between active and passive investments—the opportunity to try to beat the market—even though that is precisely the reason why prudent fiduciaries of a particular plan might well decide to offer actively managed options. *See* Pet. App. 28a. The court's legal conclusions rescued respondents' attempt to prove loss, because respondents' expert did not offer any evidence that the index-fund "alternatives" that he used would have been chosen by a prudent fiduciary considering the relevant factors. C.A. J.A. 103-109, 2575-2591.

Even the Third Restatement, on which the First Circuit relied (Pet. App. 22a, 28a), does not go so far. It states that an index-fund comparison is one of many approaches that "may" be appropriate "[d]epending 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, reporter's notes on cmt. b(1). In other words, the appropriate damages measure is a fact-intensive question; an index-fund measure "may" be appropriate to serve as "[a] return projection for 'properly invested' funds" where it "reflect[s] the standards of prudent investment" in the context of the particular plan at issue. *Id.* The Restatement does not justify disregarding pertinent aspects of index funds.

B. The First Circuit's Decision Will Foment New Litigation While Frustrating This Court's Future Review.

The practical impact of the First Circuit's holding is severe: it makes loss a foregone conclusion in every case challenging the funds offered in a 401(k) or 403(b) plan line-up. There are more than 9,000 mutual funds available on the market—including nearly 500 index mutual funds alone.[18] With the benefit of hindsight, a plaintiff will always be able to find a cheaper or better-performing alternative. Basing liability on such a minimal showing will make fiduciaries guarantors of optimal plan performance any time there is an error in process. Using that method, plaintiffs can make the "loss" in every case look enormous, just as respondent's expert did—his calculation was $45 million, which the district court described as an "extraordinary money damages" request (Pet. App. 51a n.3), and more than half of Putnam's voluntary contributions to participants' accounts during the class period. *See* C.A. J.A. 571-590. The prospect of such windfall recoveries gives plaintiffs every incentive to bring every conceivable challenge to the investment procedures that plan fiduciaries follow.

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[18] *Investment Company Fact Book* 52, 251.

And though the First Circuit's opinion states expressly that offering index funds could "easily insulate" plan fiduciaries from liability (Pet. App. 40a), that is a deeply flawed proposition, for two reasons. First, as shown above, it would radically reshape the face of retirement planning by forcing a universal shift to index funds, which many investors are not currently choosing. *See* pp. 22-23, *supra*. And second, plaintiffs sue plan fiduciaries even when they offer index funds. They may argue that index funds underperformed, that there were *even cheaper* index funds available, *e.g.*, *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 793 (N.D. Tex. 2017); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2016 WL 5957307, at *1 (S.D.N.Y. Oct. 13, 2016); Compl. ¶ 37, *Bell v. Anthem, Inc.*, No. 15-cv-2062 TWP-MPB, ECF No. 1 (S.D. Ind. Dec. 29, 2015) (challenging index funds in plan line-up, including an index fund with an expense ratio, or fee, of 0.04%, because an alternative index option was available with a 0.02% expense ratio), or that a different investment structure (CITs or separate accounts) should have been chosen instead, *e.g.*, *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *9 (N.D. Cal. Aug. 29, 2016).

The liability exposure created by the First Circuit's decision will not only have a significant impact on plan sponsors and fiduciaries (and therefore on whether employers offer employee-benefit plans and what type of benefits they offer), it will also frustrate this Court's review of this issue in the future. Already, nearly every case challenging a defined-contribution plan line-up settles before trial given the potential monetary liability involved—this case is one of just a handful to proceed to trial over the past 15 years despite an explosion of these types of lawsuits during this same time period.[19] The First Circuit's decision would only exacerbate that problem by further increasing the settlement pressure on future fiduciaries, irrespective of the merits of the case.

C. This Issue Is Recurring And Important.

Proving loss is, in virtually every civil case, a key and vigorously disputed element, and ERISA cases are no different. For cases that are not dismissed at the pleading stage, attempting to measure loss occupies an enormous amount of litigants' and courts' time and resources—through battling expert reports, *Daubert* motions, summary judgment briefing, and extensive trial testimony (in cases that do go to trial).

Granting review of this issue will provide much-needed clarity in the myriad cases filed against plan sponsors and fiduciaries. The approach taken by respondents and endorsed by the First Circuit is not an aberration: this same method has been advanced by plaintiffs repeatedly. *See, e.g.*, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15 Civ. 9936 (LGS), 2018 WL 2727880, at *3 (S.D.N.Y. June 6, 2018);

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[19] *See, e.g.*, Peter J. Brennan, *Allianz to Pay $12m to Settle 401k Suit*, Orange Cnty. Bus. J. (Feb. 8, 2018), https://www.ocbj.com/news/2018/feb/08/allianz-pay-12m-settle-401k-suit/; Liz Skinner, *TIAA to pay $5M in 401(k) excessive-fee suit*, InvestmentNews (May 12, 2017), https://www.investmentnews.com/article/20170512/FREE/170519961/tiaa-to-pay-5m-in-401-k-excessive-fee-suit; Jacklyn Wille, *Jackson National to Pay $4.5M to Settle 401(k) Fee Lawsuit*, Bloomberg L. (Nov. 2, 2018), https://news.bloomberglaw.com/employee-benefits/jackson-national-to-pay-45m-to-settle-401-k-fee-lawsuit.

Pls.' Findings of Fact & Conclusions of Law at 105-107, *Sacerdote v. N.Y. Univ.*, No. 16-cv-06284-KPF, ECF No. 316 (May 13, 2018); Opp. to Mot. for Summary J. at 34, *Sims v. BB&T Corp.*, No. 15-CV-732-CCE-JEP, ECF No. 327 (M.D.N.C. Mar. 16, 2018); Opp. to Mot. for Summary J. at 23, *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614-JLS-JCG, ECF No. 151-1 (C.D. Cal. Sept. 27, 2017). And because recent years have also seen an explosion in settlements, *see supra* p. 34 & n.19, the opportunities for appellate guidance are exceedingly rare despite the significant practical impact of this issue.

Given the need for review of the loss-causation question, this Court should grant review of this related, important, and recurring issue as well, to provide much-needed uniformity and predictability to plan fiduciaries and plaintiffs alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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