No. 17-667

In the Supreme Court of the United States

PIONEER CENTRES HOLDING COMPANY STOCK OWNERSHIP PLAN AND ITS TRUSTEES, ET AL.,
Petitioners,

v.

ALERUS FINANCIAL, N.A.,
Respondent.

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

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Alerus Financial Corporation, a Delaware corporation, owns 100% of the stock of Alerus Financial, N.A. Alerus Financial Corporation is widely held, but not SEC reporting, and as a result its stock trades on the OTCQB (formerly OTC pink or the pink sheets) over the counter market. There is no shareholder with more than 10% of Alerus Financial Corporation's stock.

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INTRODUCTION

Petitioners frame the issue in this case as a dispute over whether ERISA shifts the burden of persuasion on causation to the defendant, once the plaintiff has shown a prima facie case of loss. But this was not the critical issue presented by this case. The real issue—and the one to which the parties, the district court, the panel majority, and the dissent devoted the vast majority of their analysis—was whether the Plan had come forward with any non-speculative evidence that it had suffered any loss at all. Because the facts of this case do not actually present the question articulated by Petitioners, this case provides a poor vehicle to resolve the question that Petitioners have presented, and, regardless of the answer to the burden-shifting question, the outcome of the case will not be altered. In addition, the Court should deny certiorari because the Tenth Circuit's reasoning was correct, and the circuit split is not nearly as pronounced as Petitioners suggest—indeed, only one court of appeals has clearly articulated the position Petitioners advance. Finally, despite Petitioners' attempt to demonstrate its importance, the resolution of this highly technical issue has little likelihood of impacting any real world behavior. For all of these reasons, the petition should be denied.

PROCEDURAL HISTORY

Respondent, Alerus Financial, N.A., was hired by the Pioneer Centres Holding Company Employee Stock Ownership Plan ("the Plan") to serve as its fiduciary in negotiating a purchase by the Plan of all outstanding stock of Pioneer Centres Holding Company ("Pioneer"), a holding company that owned several high-end automobile dealerships, including Land Rover dealerships. Pet. App. 2a-3a. The planned transaction never occurred. Not only was the Plan (acting through Alerus) unable to come to terms on a sale with Pioneer and its CEO Jack Brewer, but Pioneer never obtained the approval of Land Rover, which it was required to do in order to transfer ownership of the stock to the Plan. *Id.* at 9a-10a.

The Plan sued Alerus for breach of fiduciary duty under 29 U.S.C. § 1109. *Id.* at 12a. As the district court, panel majority, and dissenting judge all recognized, non-speculative evidence that Land Rover would have approved the transaction was required for the Plan to have a claim under ERISA. *Id.* at 19a, 40a-41a, 92a. Thus, Alerus moved for summary judgment on the grounds that (1) it did not breach its fiduciary duties, but (2) even if it did, such breach did not cause any loss to the Plan because the Plan had no evidence that Land Rover would have approved the transaction. Alerus Fin., N.A.'s Mot. for Summ. J. at 10, 21, ECF No. 252. In response, the Plan argued that Alerus was not entitled to summary judgment because the burden of persuasion on causation shifts to the breaching fiduciary once the plaintiff establishes a breach and prima facie case of loss to the plan. Pet. App. 92a.

In considering the Plan's burden-shifting argument, the district court acknowledged a circuit split over whether the burden of persuasion on causation should shift to the fiduciary. *Id.* at 92a-93a. Citing cases now relied on by the Plan, however, the district court noted that these courts shifted the burden only after the plaintiff had already made a prima face case of breach *and a loss*. *Id.*

In determining whether the Plan had met this burden to produce prima facie evidence of a loss, the court observed that, "[a]t all material times, Land Rover indicated it would not approve and/or recommend the approval of the complete change of ownership . . . to the ESOP." *Id.* at 88a. It recognized that, "Land Rover's last position, prior to the filing of this lawsuit, was that it 'would not support a future ownership change giving majority ownership or control to an ESOP.'" *Id.* (citation omitted). In addition, numerous contemporaneous statements by Plan representatives reiterated that Land Rover would not approve the transaction. *Id.* Finally, in its corporate 30(b)(6) deposition, Land Rover's representative testified that he could not say whether Land Rover would have approved the transaction without speculating. *Id.* In light of this evidence, the district court held that "the material, undisputed facts establish [that] any opinion that Land Rover would have approved the transaction is speculative." *Id.*

Because there was insufficient admissible evidence that Land Rover would have approved the transaction (and therefore that the Plan suffered a loss), the court did not need to consider whether the burden of persuasion shifted to Alerus to disprove causation. *Id.*

at 95a. Summary judgment was appropriate "because even assuming Alerus, as the fiduciary, must disprove causation, Plaintiff has not established a prima facie case of loss in the first instance." *Id.* at 92a.

The Tenth Circuit affirmed, finding that the record evidence "overwhelmingly point[ed] to only one conclusion: Land Rover would not have approved the Transaction, even if Alerus had signed the revised Transaction documents." *Id.* at 26a. The court further rejected the Plan's arguments that Land Rover would have approved the transaction because state law required it to do so. *Id.* at 31a-34a. Finally, the court affirmed the district court's exclusion of the Plan's speculative expert opinions. *Id.* at 34a-38a. Therefore, applying the traditional summary judgment standard, the Court affirmed summary judgment in favor of Alerus "because the Plan failed to come forward with any evidence from which the jury could find causation without engaging in speculation." *Id.* at 27a.

While agreeing with the district court that the Plan failed to produce non-speculative evidence sufficient to carry its burden in opposing summary judgment, the Tenth Circuit majority also expressly rejected the Plan's proposed burden-shifting rule. *See id.* at 21a-22a ("We adopt a different analytical approach [than the district court] and reject outright the Plan's argument that ERISA breach of fiduciary duty claims should be resolved under a burden-shifting framework."). The court began by acknowledging the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id.* at 20a (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). The court acknowledged that trust law can

provide a burden-shifting rule in the common law, but found no reason to apply that rule to an ERISA claim because "there is nothing in the language of § 1109(a) or in its legislative history that indicates a Congressional intent to shift the burden to the fiduciary to disprove causation." *Id.* at 21a-22a. "Where the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach." *Id.* at 24a.

The court also recognized that the "majority of federal circuits that have considered the issue agree" that a burden-shifting rule does not apply to an ERISA claim. *Id.* at 23a. The court thus concluded "that the burden falls squarely on the plaintiff asserting a breach of fiduciary duty claim under § 1109(a) of ERISA to prove losses to the plan 'resulting from' the alleged breach of fiduciary duty." *Id.* at 25a.

Judge Bacharach dissented from the panel opinion. The dissent did not analyze or even discuss the burden-shifting question posed by the Plan in its petition for certiorari. *See id.* at 41a n.1 ("For the sake of argument, I assume the invalidity of [the Plan's argument that the district court should have shifted the burden of proof on causation]. Even with that assumption, I would reverse the award of summary judgment."). Instead, the dissent applied the summary judgment standard and, "[v]iewing the evidence and reasonable inferences in the light most favorable to the trustees and the plan, . . . conclude[d] that a reasonable fact-finder could" have found that Land Rover would have ultimately approved the transaction. *Id.* at 74a.

REASONS FOR DENYING THE PETITION

I. This Case Is a Poor Vehicle for Review Because Resolving the Question Presented in the Petition Would Not Change the Outcome of this Case.

The Court should deny the petition because this case provides a poor vehicle to resolve the question presented. Regardless of whether the burden of persuasion on causation shifts to the defendant, the case law is unanimous that the plaintiff must first come forward with a prima facie case of loss. In this case, that required prima facie evidence that Land Rover would have approved the transaction. Both the district court and the Tenth Circuit concluded, however, that the Plan had presented *no evidence* that Land Rover would have approved the transaction. Thus, regardless of whether burden-shifting applies, the outcome of this case will not change.

Even the courts that have adopted some form of burden-shifting agree that, before any question of burden-shifting arises, the plaintiff must put on prima facie evidence of a loss. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014) (shifting the burden to defendant only after finding that "[o]verwhelming evidence supported the district court's finding that RJR breached its fiduciary duty . . . and that this breach resulted in a prima facie showing of loss to the Plan"); *Martin v. Feilin*, 965 F.2d 660, 671 (8th Cir. 1992) ("[O]nce the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan . . . the burden of persuasion shifts to the fiduciary . . . ."); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 871 (3d revised ed.

2008 & Supp. 2014) ("If [a beneficiary] seeks damages, a part of his burden will be proof that the breach caused him a loss . . . . If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee."). Indeed, even the Plan conceded that "under the prevailing view, the ERISA plaintiff is required to establish the fiduciary's breach and adduce evidence sufficient on its face to show a loss to the plan." Brief of Appellants/Petitioners at 38, *Pioneer Centres Holding Co. Employee Stock Ownership Plan v. Alerus Fin., N.A.*, No. 15-1227 (10th Cir. Mar. 7, 2016).

To demonstrate a "loss" in this case, the Plan had to put forth some evidence that its proposed transaction was viable in the first instance, i.e, that Land Rover would have approved it. But, based on the record before them, both the district court and the Tenth Circuit determined that the Plan could not produce any evidence that Land Rover would have approved the transaction had it been presented with the opportunity to do so. The district court found that the Plan's offered evidence, in the form of expert testimony and otherwise, constituted impermissible speculation. Pet. App. 88a-91a. Thus, the court concluded that "there is insufficient admissible evidence that [Land Rover] approval would have occurred. Accordingly, the ESOP fails to establish a prima facie case of loss." *Id.* at 95a.

Reviewing the evidence in the record as a whole, the Tenth Circuit likewise concluded "that it overwhelmingly points to only one conclusion: Land Rover would not have approved the Transaction, even if Alerus had signed the revised Transaction documents." *Id.* at 26a. It also rejected the expert

opinions offered by the Plan because they provided no more than speculation as to whether Land Rover would have approved the transaction.[1] *Id.* at 34a-38a. Based on this, the Tenth Circuit concluded that "the district court correctly granted summary judgment in favor of Alerus because the Plan failed to come forward with any evidence from which the jury could find causation without engaging in speculation." *Id.* at 27a.

Because the Tenth Circuit focused on the causation element, the Plan attempts to draw a distinction between producing evidence of a loss—which it agrees it bears some burden to do—and producing evidence of causation—which it argues should be defendant's burden to disprove. *See* Pet. at Question Presented ("The question presented is whether . . . the burden shifts to the fiduciary to establish the absence of loss causation once the beneficiary makes a prima facie case by establishing breach of fiduciary duty and associated loss."). While that distinction may be relevant in some ERISA cases, it is meaningless in this case. Here, there was no loss unless Land Rover would have approved the transaction. And, Alerus could not have been the cause of any loss unless Land Rover would have approved the transaction. App. of Appellants/

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[1] The Plan does not seek review of the exclusion of the expert testimony. Accordingly, the Tenth Circuit's ruling upholding the exclusion of their testimony is now final. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641, 648 n.3 (2013) (portions of Ninth Circuit opinion not reviewed by Supreme Court became final). Even if this Court were to accept review of this petition and find in favor of the Plan, the Plan would not be able to rely on its experts to establish a genuine issue of material fact, making it even more clear that no opinion by this Court will change the outcome of the case.

Petitioners at A4699:15, *Pioneer Centres Holding Co. Employee Stock Ownership Plan v. Alerus Fin., N.A.*, No. 15-1227 (10th Cir. Mar. 6, 2016) (district court recognizing that "the fact of loss is tied up in this causation issue"). Under either formulation, the Plan had to produce prima facie evidence that Land Rover would have approved the transaction. Because it could not meet this burden, summary judgment was appropriate.

Accordingly, this case does not turn on who bears the burden of persuasion to prove causation, but on whether the evidence offered by the Plan was too speculative to establish prima facie evidence of a loss at all. Both the district court and the Tenth Circuit correctly held that the evidence offered by the Plan was too speculative to satisfy this burden. Even the dissent's analysis did not depend on whether the burden-shifting rule applied, Pet. App. 41a n.1, so reversal by this Court would not alter its conclusion, either. Therefore, granting certiorari here and reversing the Tenth Circuit would not lead to any different outcome according to any of the judges to have considered this case.

II. The Tenth Circuit Correctly Rejected Petitioners' Proposed Burden Shifting Rule.

The Court should also decline to grant certiorari because the Tenth Circuit's analysis is correct—ERISA requires that the plaintiff bear the burden of proof on all of the elements of a claim for breach of fiduciary duty. ERISA 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* . . . .

29 U.S.C. § 1109(a) (emphasis added). This provision includes all the elements of the cause of action: when (1) the defendant is a fiduciary (2) that breaches its responsibilities, obligations, or other fiduciary duties, it is liable for (3) any losses to the plan (4) resulting from each such breach. The Plan concedes it bears the burden as to the first three of these elements, but contends that the statute, *sub silentio*, shifts the burden on the fourth element to the defendant. Nothing in the statute suggests, let alone compels, this reading. And well-established rules of statutory construction reject it.

First, the statute's plain terms include a causation element that cannot simply be read out of the statute. The statute refers to "losses to the plan *resulting from* each such breach." 29 U.S.C. § 1109(a) (emphasis added). The word "resulting" denotes causation. *See* Merriam-Webster Dictionary, http://www. merriam-webster.com/dictionary/resulting ("result" means "to proceed or arise as a consequence, effect, or conclusion"). "This statute therefore requires a plaintiff to demonstrate in a suit for compensatory damages that the plan's losses 'result[ed] from'" the defendant's breach. *Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998).

Petitioners seek to distance themselves from this statutory language, referring throughout the petition

to an "associated loss" rather than a "resulting loss." Pet. at Question Presented, 8, 12; *see also* Pet. 13 (referring to a "related loss"). The Tenth Circuit rejected this same tactic in the briefing below: "Where the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach." Pet. App. 24a. Petitioners' refusal to use the actual statutory language in their Petition is a telling indication that the plain meaning of the phrase "losses resulting from" a breach includes an element of causation.

Second, the Tenth Circuit relied on precedent from this Court that establishes the "ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id.* at 20a (citing *Schaffer*, 546 U.S. at 56) (alteration omitted); *see also id.* at 20a n.7 (applying the default rule to myriad statutory schemes). As noted above, Petitioners do not dispute the application of the ordinary default rule for three of the four elements necessary to make out a § 1109(a) claim. Where the statutory language and the ordinary default rule align, there is no reason to disregard both. Accordingly, the burden of proving causation and loss should remain "where it usually falls, upon the party seeking relief." *Schaffer*, 546 U.S. at 57-58.

Third, the Plan's argument that trust law should supplant the plain meaning of the statute is not well taken. Because the statute addresses the question, there is no "gap" in ERISA for courts to fill with the common law of trusts. *See* Pet. 16. "Although trust law may offer a 'starting point' for analysis in some

situations, it must give way if it is inconsistent with 'the language of the statute, its structure, or its purposes.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). Here, "Congress has placed the burden of proving causation on the *plaintiff* by requiring him to prove that the losses 'result[ed] from' the defendant's inaction." *Silverman*, 138 F.3d at 106 (Jacobs, J., joined by Meskill, J., concurring). Importing a burden-shifting framework from trust law therefore would be "inconsistent with the language of" § 1109. *Hughes Aircraft*, 525 U.S. at 447 (internal quotations omitted). In short, here "the only gap is between ERISA as it is written and ERISA as [petitioners] wish it had been written." Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 Harv. J.L. & Pub. Pol'y 541, 543 (1998).

III. Only One Court of Appeals Has Clearly Adopted Petitioners' Proposed Rule.

The plain language of the statute and application of the "ordinary default rule" allocating the burden of proof on the plaintiff have led a majority of the courts of appeals that have considered this question to conclude that the burden does not shift to the defendant. The Second, Sixth, Ninth, Tenth, and Eleventh Circuits have all explicitly rejected the burden-shifting framework proposed by the Plan. *See Silverman*, 138 F.3d at 104; *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 on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Wright v. Ore. Metallurgical Corp.*,

360 F.3d 1090, 1099 (9th Cir. 2004) (citing *Kuper*); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (11th Cir. 1992) ("the burden of proof on the issue of causation will rest on the beneficiaries").

The Plan asserts that the Second, Fourth, Fifth, and Eighth Circuits all apply the burden-shifting rule it advocates in its petition. In reality, the Plan vastly overstates the supposed split, as only one of these courts clearly adopts the Plan's proposed rule. The remaining three did not apply the broad rule advocated by the Plan here.

With respect to the Second Circuit, the Plan incorrectly argues that it shifts the burden of proving loss causation to the defendant, based on *New York State Teamsters Council Health & Hospital Fund v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994). The Tenth Circuit correctly found that the Second Circuit actually does not shift the burden of persuasion as to loss causation, based on the Second Circuit's later opinion in *Silverman*. Pet. App. 23a. As the Second Circuit stated in its 1998 *Silverman* opinion, § 1109(a) "requires a plaintiff to demonstrate in a suit for compensatory damages that the plan's losses 'result[ed] from'" the defendant's breach. *Silverman*, 138 F.3d at 104. Accordingly, in the Second Circuit, "causation of damages is . . . an element of the claim, and the plaintiff bears the burden of proving it." *Id.* at 105 (Jacobs, J., joined by Meskill, J., concurring).

The Plan cites an unpublished 1998 district court case to argue that, notwithstanding *Silverman*, the Second Circuit applies a burden-shifting rule for loss causation. Pet. 12 n.3 (citing *Salovaara v. Eckert*, No. 94 Civ. 3430, 1998 WL 276186 (S.D.N.Y. May 28,

1998)). The Southern District of New York has more recently rejected any notion that *Silverman* allows for burden-shifting in the Second Circuit. "Despite the language in *Salovaara*, the holding in *Silverman* is unambiguous . . . [that] causation [is] an element of the claim, for which plaintiffs have the burden of proof." *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 261 (S.D.N.Y. 2012). The Second Circuit thus firmly agrees with the Tenth Circuit that a plaintiff in an ERISA suit bears the burden of establishing both a loss and causation.

With respect to the Eighth Circuit opinion cited by the Plan, *Martin v. Feilen*, that case concerned the burden for calculating damages, not for proving causation. Contrary to the Plan's argument that an ERISA plaintiff does not have to prove causation, in *Martin*, the plaintiff "did prove that defendants . . . violated § 1104 by causing the ESOP to engage in stock transactions *that caused specific injury* to the ESOP." *Id.* at 671 (emphasis added). The Eighth Circuit held that, although the plaintiff presented "an unsound global damage theory," the district erred in awarding no damages. *Id.* The court thus remanded and placed on the fiduciary only the burden of persuasion "to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty." *Id.* In *Silverman*, the Second Circuit rejected the Plan's broad reading of *Martin*, explaining that "the issue in *Martin* involved the *calculation of damages* after the plaintiff proved a prima facie case that the plan suffered a loss resulting from the defendant's breach of its fiduciary duty." *Silverman*, 138 F.3d at 106 n.1 (Jacobs, J., joined by Meskill, J., concurring).

And with respect to the Fifth Circuit opinion cited by the Plan, *McDonald v. Provident Indemnity Life Insurance Co.*, it too does not establish a clear split with the Tenth Circuit's opinion. In dicta, the Fifth Circuit stated that once an ERISA plaintiff establishes a breach of fiduciary duty and prima facie case of loss to the plan, "the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty." *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995). But the Fifth Circuit concluded that the plaintiff failed to show any loss to the plan, and so never even reached the burden-shifting analysis as part of its holding. *Id.* The Plan even concedes that the Fifth Circuit "did not give any express reason for its holding" in *McDonald*. Pet. 13. In fact, so thin is the rationale of *McDonald* that the Plan did not even cite it in any of its briefing to the Tenth Circuit.

Thus, only the Fourth Circuit stands apart from the majority rule requiring an ERISA plaintiff to prove all the elements of his claim. Such a shallow disagreement does not impel this Court's involvement in a case where the lower court correctly applied the majority rule, and any conclusion to the contrary would not impact the outcome of this case.

IV. The Question Presented Is of Little Practical Significance.

Whether courts impose a burden-shifting framework when applying loss causation to ERISA cases is of little importance to the administration of ERISA litigation specifically, or to the administration of ERISA trusts generally.

Even when the issue is argued, it often makes no difference to the outcome of the case. Here, for example, the district court correctly noted that the Plan failed "to establish a prima facie case of loss," and so left the question of "whether the burden of persuasion shifts to the fiduciary to disprove causation if a prima facie case of loss is shown . . . for another day." Pet. App. 95a. Other courts have similarly found the question to be irrelevant. *See, e.g.*, *Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009) ("recogniz[ing] that courts have apparently split" on where the burden of persuasion rests, but "any burden-shifting error by the district court was irrelevant" because of evidence that the breach did not cause any losses); *McDonald*, 60 F.3d at 237 ("the plaintiffs failed to prove a loss *to the plan* as required by 29 U.S.C. § 1109(a)"); *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 160 (3d Cir. 1999) ("Because we have held that Unisys did not breach its fiduciary duties, we have no need to address the issue of which party bears the burden of proving causation of damages resulting from a breach of fiduciary duty.").

More fundamentally, Petitioners fail to show how action by this Court would have any impact on how ERISA trusts are administered throughout the country. Petitioners discuss the importance of ESOPs, Pet. 24, but draw no connection between the issue presented in the petition and administration of ESOPs. Nor do Petitioners demonstrate that action by this Court would affect fiduciaries of other ERISA plans, despite reciting several pages of statistics about the size and prevalence of ERISA plans. *Id.* at 24-26. Of course, the fact that ERISA plans are in widespread use does not mean that every dispute arising under ERISA must

be resolved by this Court. And Petitioners do not even attempt to argue that any ruling by this Court would have an appreciable impact on fiduciary behavior.

Allocating the burden of proving loss causation is a technical issue so deeply embedded in the already complex legal framework of ERISA that a legal ruling on that issue is unlikely to change the way ERISA trusts are administered. Petitioners' broad-sweeping claim that "the uncertainty over the process for proving loss causation under ERISA affects an extremely large number of Americans and bears upon the proper management of a large segment of the national economy" is untethered to any facts, and is so vague and general as to be virtually meaningless. *Id.* at 27.

Thus, little has changed since the Court denied certiorari on this identical issue in 2015. *See RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 2887 (2015). The infrequency with which the issue arises, and its irrelevance even in some of those cases, indicates that this hyper-technical question is not one of significant importance to ERISA plans in the country.

CONCLUSION

In sum, the Court should decline to grant certiorari where review would not change the result of the present case, the lower court is plainly correct, and there would be de minimis impact on the vast majority of future ERISA cases.

Respectfully submitted,

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