No. 18-926

IN THE

Supreme Court of the United States

PUTNAM INVESTMENTS, LLC, ET AL.,
Petitioners,

v.

JOHN BROTHERSTON, ET AL.,
Respondents.

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

BRIEF OF INVESTMENT COMPANY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PAUL SCHOTT STEVENS
SUSAN M. OLSON
DAVID M. ABBEY
THE INVESTMENT COMPANY INSTITUTE
1401 H St. NW
Washington, DC 20005
(202) 326-5800

MARK A. PERRY
Counsel of Record
AARON SMITH*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com
**admitted only in Alabama*

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Investment Company Institute ("ICI") is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds and their shareholders, directors, and advisers. ICI's members serve 100 million United States shareholders and manage total assets of $20.7 trillion in the United States.

ICI serves as a source for statistical data on the fund industry and conducts public policy research on fund trends, shareholder characteristics, the industry's role in the United States and international financial markets, and the retirement market. For example, ICI publishes reports focusing on the overall United States retirement market, fund assets and flows, fees and expenses, and the behavior of defined contribution, or 401(k), retirement plan participants. ICI's expertise and research gives it the perspective and data to advocate for a sound legal framework for the benefit of funds and their investors.

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1 The parties in this case received timely notice under Rule 37.2(a) and consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Many of the institutions facing litigation over their investment product selections in retirement plans, including the petitioner in this case, are ICI members. Those members who have not been sued operate under growing uncertainty as plaintiffs continue to bring new suits that, depending on the jurisdiction, may subject fiduciaries to the burden of disproving that the appropriate inclusion of actively managed funds in a plan lineup caused losses to a 401(k) plan and its participants. ICI's members have an interest in protecting their ability to provide their employees—and the employees of other companies that sponsor plans—with a diverse array of investment strategies and options, including actively managed funds, to meet their retirement savings goals.

ICI's expertise allows it to offer real-world perspective on the likely impact of the First Circuit's erroneous decision. Its holding demonstrates an essential misunderstanding of the realities and legal landscape of the retirement investment marketplace, leading it to create misguided incentives that run contrary to ERISA's principles for fiduciaries and threaten harm to plan participants by limiting choice and access to investment options. ICI submits this brief as *amicus curiae* to urge the Court to review that decision.

SUMMARY OF THE ARGUMENT

The petition in this case presents an important legal issue on which the circuits are now split 6-4. The First Circuit, joining the Fourth, Fifth, and Eighth Circuits, has ruled that in an action under ERISA seeking monetary relief for breach of fiduciary duty, the defendant has the burden of *dis*-proving that the

losses to the plan resulted from the fiduciary breach. Pet. App. 39a. This ruling turns on its face the ordinary default rule, applied by the Second, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, that the plaintiff bears the burden of proving loss causation. The deleterious effect of this ruling is compounded by the First Circuit's conclusion that 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. Pet. App. 28a & n.14. This erroneous decision, which deepens an acknowledged and irreconcilable circuit split, has real-world implications that warrant the Court's immediate attention.

ICI's members make available a wide array of investment strategies for retirement investment options, including: actively managed funds, index funds, money market funds, target date or lifestyle funds, equity, bond, or sector-specific funds, and more. From among these options, fiduciaries of employer-sponsored defined contribution plans select investment options to offer to plan participants, in accordance with ERISA and based on the unique circumstances of the plan and the participants' best interests.

401(k) plans are designed to allow individual participants to create a diversified portfolio from among a range of investment alternatives. Plan participants, plan fiduciaries, and sponsors all have an interest in ensuring that a broad range of investment options remains available so that the often-diverse investment needs and preferences of participants and beneficiaries can be met. The ruling below threatens to harm

that interest by reducing the options that plan fiduciaries are willing to offer through ERISA-covered plans.

First, shifting the burden of proving causation, or the lack thereof, from the plaintiff to the fiduciary ignores the ordinary default rule and the plain language of ERISA specifying that fiduciaries are liable for "losses to the plan *resulting from*" a fiduciary breach. The ruling will inevitably adversely skew fiduciaries' selection decisions. Congress directed fiduciaries to make investment option selections in the best interests of participants. Participants' best interests vary based on many factors, including individual needs (e.g., age, marital and family status, other financial resources, risk appetite, and other factors) and the marketplace, so fiduciaries typically make available to plan participants a wide range of options. The ruling below gives fiduciaries greater—and potentially overwhelming—incentives to make choices driven by the threat of litigation based on a single point of reference (i.e., index funds), rather than simply by what plan participants' best interests dictate.

Second, allowing plaintiffs in ERISA fiduciary-breach cases to meet the loss causation element of a fiduciary breach claim solely by comparison to an index-fund-only hypothetical ignores the differences between actively managed investments and index funds as well as their differing benefits for participants while assuming that, as a *per se* matter, a prudent fiduciary would necessarily substitute passively managed funds for active ones no matter the circumstances. Because of their substantial differences and benefits, actively managed funds and index funds are not suitable as simple comparators for determining

loss causation. Plan fiduciaries can prudently determine that including actively managed funds as investment options is consistent with the purposes, terms, investment strategy, and risk/return objectives of the plan and its participants.

Both aspects of the decision below contravene ERISA's structure and purpose, as construed by this Court. They will continue to disrupt defined contribution retirement savings to the detriment of participants, plans, and fiduciaries until this Court resolves both questions presented in the petition for a writ of certiorari.

ARGUMENT

This case is emblematic of lawsuits in which plaintiffs have asked courts to second-guess, with the benefit of hindsight, plan fiduciaries' inclusion of investment options.[2] Even though the plaintiffs (as plan participants) *could* have allocated their own account entirely to passively managed index funds, the theory of these suits is that the fiduciaries breached their duties to plan participants by *making available* actively managed mutual funds.

The defined contribution plan at issue in this case, for example, allowed participants to decide how to allocate their retirement accounts among a diverse menu of options that included mutual funds managed by Putnam; collective investment trusts managed by

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[2] This litigation trend is mainly attributable not to any demonstrated wrongdoing in plan design or operation, but rather to the large dollar amounts that can accrue in employer-sponsored retirement plans, as well as the belief that many large employers will settle litigation if claims reach discovery.

an unaffiliated provider; and a brokerage option under which participants could invest in a wide array of other products. Pet. 4-6; Pet. App. 60a-61a. Participants who wished to track a market by using passively managed index funds had that option available. Participants who wished to invest in actively managed funds could do so. And Putnam employees who wished to invest in non-Putnam products had that option, too.

Yet some employees sued under ERISA, claiming Putnam breached its fiduciary duty of prudence. Such a claim requires a plaintiff to prove that a breach of a fiduciary duty caused loss to the plan. In the decision below, the court of appeals first concluded that the plaintiffs carried their burden to show loss by comparing the plan's returns to an index-fund-only portfolio, with the difference calculated at $45 million. Pet. App. 25a, 28a-29a & n.14. The court of appeals then turned to ERISA's causation requirement. Pet. App. 20a-21a, 29a-30a. Although the court acknowledged the ordinary default rule that plaintiffs carry the burden "regarding the essential aspects of their claims," Pet. App 32a—and recognized that a majority of circuits followed that traditional rule, Pet. App. 30a-31a—the court concluded that trust-law principles dictate that once loss is established, "the burden shifts to the fiduciary to prove that such loss was not caused by its breach." Pet. App. 39a.

In effect, the decision below allows ERISA plaintiffs to prove loss by comparing, in hindsight, apples (the fiduciaries' selections) to tomatoes (a hypothetical, single-track plan of only index funds, an extremely uncommon lineup for 401(k) plans), and then put the burden on the fiduciaries to disprove that

their actual decisions caused losses to the plan. Both aspects of this decision threaten to harm virtually all stakeholders in the marketplace for retirement planning products. The First Circuit's ruling creates an incentive for plan fiduciaries to make available certain options and not others, to the detriment of plans, participants, sponsors, and fiduciaries.

I. SHIFTING THE BURDEN OF PROVING CAUSATION WILL DISTORT FIDUCIARY DECISION-MAKING.

The First Circuit's decision to shift the burden of proving causation from the plaintiff to the defendant in a case involving the plan fiduciary's selection of plan investment options ignores not only the ordinary default rule, but also the plain language of ERISA specifying that fiduciaries are liable for "losses to the plan *resulting from*" a fiduciary breach. 29 U.S.C. § 1109(a) (emphasis added). The creation of an ERISA exception to the ordinary default rule is unsupportable and risks harming the very group—plan participants—that the exception is intended to protect.

A. The Plain Language And Fiduciary Tenets Of ERISA Put The Burden Of Proof On Claimants.

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) (emphasis added). The limiting phrase "resulting from each such breach" requires a causal link between breach and loss. Despite this clear language, the First Circuit, joining the Fourth, Fifth, and Eighth Circuits,

ruled that in an action under ERISA seeking monetary relief for breach of fiduciary duty, the defendant has the burden of *dis*-proving that the losses to the plan resulted from the fiduciary breach. Pet. App. 39a. In doing so, the First Circuit creates an ERISA-specific exception to the ordinary default rule based on a one-sided view of ERISA's purpose.

Petitioners' petition for a writ of certiorari thoroughly discusses the circuit split in applying the burden of proof, convincingly explains why an exception to the rule is not warranted, and illustrates how a continued spilt undermines ERISA's goal of uniformity. Pet. 15-29. Rather than repeat those arguments here, this brief draws the Court's attention to why this case exemplifies the importance of applying in ERISA cases, as six circuits have done, 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 ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56-57 (2005), including proof of causation. *See Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (applying default rule in holding that "plaintiff retains the burden of persuasion to establish" but-for causation element of ADEA claim).

First, an ERISA-specific exception cannot be justified by a need for information solely within the defendant's possession. ERISA requires fiduciaries to act "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). And, importantly, prudence "cannot be measured in hindsight," *DiFelice* v. *U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007), but is instead judged by standing in the shoes of the fiduciary to assess the decision "when made," *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 309 (1989).

Thus, 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 fiduciary'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* v. *RJR Pension Inv. Comm.*, 761 F.3d 346, 373 (4th Cir. 2014) (dissenting opinion). Proving what decisions a hypothetical prudent fiduciary would have made does not require evidence that only the defendants possess. Consequently, there is no basis to shift the burden, as the plaintiffs have equal access to information needed to satisfy the causation element of their claim.

Second, cases like this are about the *menu* of investment choices being offered to plan participants. Choosing an appropriate menu of investment options for a 401(k) plan—whether index, actively managed or some combination—involves balancing a variety of factors. While defendants may have information that explains the construction of the *menu*, the plaintiffs typically have sole possession of information that explains their particular investment choices from that *menu* and what choices they would have made if other

options were available in the plan. Here, participants invested only about 6 percent of the plan's assets in index funds. Pet. 8. Only plaintiffs can explain why they did not choose to invest more in the index options offered.

Finally, the First Circuit justified its departure from the ordinary rule with a myopic view of ERISA's "purpose[]" of offering greater protections for retirement plan participants and beneficiaries. Pet. App. 34a-35a. In doing so, the First Circuit ignored the harm caused by imposing the burden of disproving causation on defendants.

B. The Court Of Appeals Erred In Shifting The Burden Of Proof To Fiduciaries.

As this Court has repeatedly recognized, when Congress enacted ERISA it "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* v. *Frommert*, 559 U.S. 506, 517 (2010) (quoting *Varity Corp*. v. *Howe*, 516 U.S. 489, 497 (1996)) (alterations omitted) (emphasis added); *accord Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (same); *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013) (same). Requiring plaintiffs to prove that losses "result[ed] from" a fiduciary breach, 29 U.S.C. § 1109(a), "ensure[s] that solvent companies remain willing to undertake fiduciary responsibilities with respect to ERISA plans." *Silverman* v. *Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 106 (2d Cir. 1998).

Yet the First Circuit's decision undermines Congress's aims. ERISA plan sponsors and fiduciaries are

frequent targets of litigation. *See* Practicing Law Institute, Securities Litigation: A Practitioner's Guide §§ 15:4.2-5 (2017) (surveying types of and trends in ERISA claims). Litigation of ERISA claims "has surged again" in recent years. George S. Mellman & Geoffrey T. Sanzenbacher, Ctr. for Ret. Research at Bos. Coll., *401(k) Lawsuits: What are the Causes and Consequences?* 1 (May 2018), https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf. The burden-shifting framework adopted by the First Circuit will only increase the frequency of ERISA litigation that is already on the rise; plaintiffs who have to prove one less element of a case have more incentive to bring the case in the first place. "[T]he [burden-shifting] approach will wreak havoc . . . , encouraging opportunistic litigation to challenge even the most sensible financial decisions." *Tatum*, 761 F.3d at 381 (Wilkinson, J., dissenting); *see* Peter M. Langdon, *For Whom the Plan Tolls*, 49 Creighton L. Rev. 437, 465 (2016) (noting that the burden-shifting framework "will render the ERISA fiduciary arena ripe for litigation" and expose fiduciaries to "greater scrutiny and legal challenges than in previous years").

The concern is that a fiduciary facing this increased threat of litigation will alter investment selections accordingly, rather than focusing *solely* on participants' best interests. Fiduciaries may choose established funds, previously litigated funds, "name brand" funds, or less creative funds—simply to lessen litigation risk. Mellman & Sanzenbacher, *supra*, at 4 (noting that "fiduciaries may believe it is beneficial to avoid the risk altogether" rather than offer options more prone to challenge). The point is not that any

particular outcome is "correct"; it is, rather, that fiduciaries making decisions in the best interests of participants should not have to overcompensate for the increased litigation risk posed by burden-shifting.

That a fiduciary might still prevail under the burden-shifting framework does not ameliorate these concerns. The minority burden-shifting approach threatens to increase not only the frequency of litigation but also its impact, by forcing plan fiduciaries to justify their actions at the preliminary stages of a lawsuit. Plaintiffs who do not have the burden to prove causation will have an easier time obtaining discovery, and "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan* v. *Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). The effect of proceeding past the motion to dismiss stage and into discovery would be significant when measured cumulatively over many cases. *See* Lockton Financial Services Claims Practice, *Fiduciary Liability Claim Trends* 1 (Feb. 2017), https://www.lockton.com/whitepapers/Boeck_Fiduciary_Liability_Claim_Trends_Feb_2017.pdf (observing that litigating certain types of ERISA cases "through the motion-to-dismiss stage costs between $500,000 and $750,000" and, "due to the number of documents involved and fact-intensive nature of these cases, completing discovery can cost between $2.5 million and $5 million").

The First Circuit's reversal of the ordinary burden undermines Congress's carefully calibrated approach.

It created liability exposure that will influence whether employers offer employee benefits and what type of plans and investments they offer. Thus, the decision risks harming the very group—plan participants—that its ERISA exception to the ordinary default rule was intended to protect.

II. COMPARING INDEX AND ACTIVELY MANAGED FUNDS TO ESTABLISH LOSSES, AS A MATTER OF LAW, IS INAPPROPRIATE.

The First Circuit compounded its burden-shifting error by allowing, *per se*, comparisons between a plan's investment options and a hypothetical lineup of only index funds to prove that a loss occurred. If left standing, the First Circuit would have fiduciaries offer *only* index funds to avoid litigation. This disregards the nuances of constructing an investment lineup that serves the best interests of a broad array of plan participants.

A. The First Circuit Misunderstood Differences Between Investment Options.

At the heart of the First Circuit's decision and, for that matter, fundamental to the claims made in the many cases challenging plan fiduciaries' selection of investment options, is an incomplete understanding of actively managed funds. Such funds have a legitimate role in helping plan fiduciaries assemble a broad and diverse menu of investment options consistent with their responsibilities under ERISA. The First Circuit acknowledged that index funds are a different kind of investment from the actively managed funds at issue, but articulated a demonstrably limited and perhaps prejudicial and uninformed understanding of those

differences. Pet. App. 28a. In doing so, the First Circuit missed the many reasons why plan fiduciaries generally do not limit 401(k) plan investment menus to index funds and why 401(k) plan participants generally do not put every dollar they invest into index funds when available through the plan.

First, actively managed funds, like index funds, can be excellent investments, and generally investors consider a range of factors in selecting investments. For example, net returns of the ten largest actively managed funds on average exceeded those of the ten largest index funds over recent 3-, 5-, and 10-year periods ending in December 2018. On average, the actively managed funds received a rating by Morningstar, a well-known fund-rating firm, of 4 out of 5, competitive with the 3.9 average rating for index funds.

Average Ratings and Returns of the Ten Largest Actively Managed and Index Funds[3]
As of December 2018

	Number of funds	Average Morningstar rating	Average returns		
			3-year	5-year	10-year
Actively managed	10	4.0	7.3	6.2	10.7
Index	10	3.9	6.9	5.0	10.4

[3] Source: ICI tabulations of Morningstar data. These figures are not necessarily representative of what investors may expect in the future, but they do suggest that 401(k) plan participants may wish to select from among a range of either actively managed funds, index mutual funds, or both.

Second, fiduciaries may consider the variability of returns, in choosing plan investment menus. Plan fiduciaries can legitimately consider that plan participants value and will benefit from, all else being equal, investments with less return variability. For example, over the 3-, 5- and 10-year periods ending in December 2018, the ten largest actively managed funds had a smaller average return variability (measured as the standard deviation of monthly returns) than the ten largest index funds.

Average Return Variability of the Ten Largest Actively Managed and Index Funds[4]
As of December 2018

	Number of funds	Return variability (standard deviation)		
		3-year	5-year	10-year
Actively managed	10	8.6	8.7	10.9
Index	10	11.1	11.0	14.4

Third, importantly, there are few, if any, index funds in certain investment categories. For example, world allocation or world stock funds, high-yield bond funds, corporate or world bond funds, small cap growth stocks, and diversified emerging market stocks have few or no index funds from which to choose. Plan fiduciaries looking to include such investments in plan menus often may rationally—or have no choice but to—select actively managed funds.

Certain investment strategies especially benefit from or are premised on active management as well. For example, value investing—the kind of investing pursued by Warren Buffet—is at its core a strategy of

[4] Source: ICI tabulations of Morningstar data.

active management. International funds also can benefit from active management to manage default, country, and exchange rate risks. These circumstances therefore mean the portfolios of index and actively managed funds frequently differ substantially from one another and therefore give them different risk/return profiles.

Choosing an appropriate menu of investment options for a 401(k) plan thus involves numerous considerations, such as returns, return variability (i.e., potential upside and downside market impact), investment strategies, manager, plan characteristics, and the variety of participants and beneficiaries a plan serves. *See* Investment Company Institute, *Ten Important Facts About 401(k) Plans* 8 (Sept. 2018) (surveying the "wide array of investment options" available in a sample of 19,422 401(k) plans with 41.5 million participants), bit.ly/2WVVC86. The First Circuit's decision shows a woeful lack of understanding of actively managed funds and their legitimate role in ensuring that plan participants have the ability to structure a retirement portfolio that meets their needs and goals.

B. The First Circuit Erred In Holding Index Funds Categorically Sufficient For Determining Loss Causation.

Ignoring the significant differences between actively managed and index funds, the First Circuit adopted a *per se* rule holding that a hypothetical lineup of index-only funds is categorically sufficient as a measure of loss. Pet. App. 28a & n.14. This decision was completely divorced from any analysis as to

whether a prudent fiduciary would have actually used such a lineup.

This ruling appears based on the misguided assumptions that the inclusion of actively managed funds is presumptively imprudent, and that actively managed and index funds are readily comparable. By allowing index funds to be used to measure loss as a matter of law, the First Circuit assumes that any and every prudent fiduciary in any and every situation would select only index funds, regardless of the purposes, terms, investment strategy, and return objectives of the plan and its participants. It makes case-specific facts effectively irrelevant to the loss inquiry. And it replaces *ex ante* evaluation with *ex post* hindsight bias. Such a bright-line rule has no foundation whatsoever in ERISA.

1. The Court Of Appeals Ignored Fiduciaries' Duties In Constructing A Menu Of Plan Investment Options.

The First Circuit concluded that it is always appropriate to determine whether "losses" have occurred 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 and actively managed funds are different kinds of investments, but dismissed the differences as categorically irrelevant and held that index funds are "comparable" for purposes of computing loss "as a matter of law." Pet. App. 28a & n.14. That conclusion is based on a fundamental misunderstanding of plan fiduciaries' duties and responsibilities in constructing 401(k) investment option menus and how those duties and responsibilities are reviewed under ERISA.

ERISA does not favor or disfavor any particular investment option; on the contrary, the law is decidedly neutral with respect to investment option selection. Under ERISA, plan fiduciaries are expected to select investment options, in the best interests of plan participants and in light of the size and objectives of the particular plan, from among the wide variety of competitive products available. 29 U.S.C. § 1104(a)(1)(B); *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 143 n.10 (1985). Retirement planning is not a monolithic enterprise. Small, medium, and large employers in all industries (from restaurants and retail stores to professional and industrial firms) covering diverse workforces (varying by age, income, and education level) sponsor 401(k) plans, and they choose to design their plans to meet their unique circumstances. *See* U.S. Department of Labor, *Private Pension Plan Bulletin, Abstract of 2016 Form 5500 Annual Reports* 13, 47 (Dec. 2018), https://bit.ly/2SoaiOp.

The lower court decision not only ignores these important duties and responsibilities, but seemingly disregards actively managed mutual funds and their legitimate role in helping plan fiduciaries assemble a broad and diverse menu of investment options consistent with their responsibilities under ERISA. Assuming, as the First Circuit does, that prudent fiduciaries would offer nothing but index funds misses the multiple reasons why plan fiduciaries would prudently choose to include such products in the plan's investment menu—and why plan participants would select such funds from that menu. *See supra* Part II.A.

2. The Court Of Appeals Misconstrued The Legal Standard For Proving Losses.

The First Circuit's conclusion that it is always appropriate to determine whether "losses" have occurred by comparing the value of a plan's portfolio to an alternative portfolio that consists solely of index funds, Pet. App. 28a, also fundamentally misunderstands the well-established loss inquiry. ERISA's duty of prudence is "an objective standard" that "focuses on the fiduciary's conduct preceding the challenged decision." *Braden* v. *Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). So it "focus[es] on the process by which it makes its decisions rather than the results of those decisions." *Ibid.* The measure of loss to an ERISA plan is not how much money the plan could have made, in hindsight, but rather 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.*, Restatement (Third) of Trusts § 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* Restatement (Third) of Trusts § 100, cmt. b(1).

But the First Circuit allows a plaintiff to use 20/20 hindsight to compare a plan's actual lineup to a hypothetical index-only lineup, without the need to show that a prudent fiduciary would have selected an index-only lineup. Comparing funds based simply on *ex post* returns, however, misunderstands the nuances of the *ex ante* calculus fiduciaries undertake when creating a plan lineup—and how the law measures prudence.

Courts have recognized that fiduciaries may prudently decide to use actively managed funds due to considerations beyond cost—and, in the process, rejected attempts to compare a plan's results with an imaginary plan containing only index funds. *See, e.g.*, *Wildman* v. *Am. Century Servs., LLC*, 2019 WL 293382, at *13, 18 (W.D. Mo. Jan. 23, 2019) (approving fiduciary determination that "active management's added costs were justified by its performance" and rejecting an index-only comparator model because it "did not use suitable benchmarks" and "relied on unfounded assumptions"); *Tibble* v. *Edison Int'l*, 2017 WL 3523737, at *13-14 (C.D. Cal. Aug. 16, 2017) (rejecting challenge to use of index fund as damages measure because use of that fund was "unambiguously irrational" given the plan portfolio as a whole and plan participants' demonstrated aversion to that index fund and preference for active management).

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. Putnam offered a *menu* that included index options that plan participants largely rejected. The Putnam circumstances are not unique: Only "31 percent of [401(k)] assets" were invested in index funds in 2015. BrightScope & Investment Company Institute, *The*

BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2015 45 (Mar. 2018), www.ici.org/pdf/ppr_18_dcplan_profile_401k.pdf. Applying ERISA appropriately, legitimate questions will always exist as to what alternative investments an objective fiduciary, without the benefit of hindsight, would have chosen. *See* Restatement (Third) of Trusts § 90; *id.* § 100 cmt. b(1).

III. THE RULING BELOW, IF ALLOWED TO STAND, WILL HARM PLAN PARTICIPANTS.

Plan participants will be harmed by the decision below if it effectively compels fiduciaries to offer a far narrower menu of investment options. Although fiduciaries will undoubtedly continue to act in participants' best interests, the knowledge that their selections will be compared *ex post* to index funds and the onerous burden of disproving loss causation may lead plan fiduciaries to offer fewer investment options. Any "narrowing of the options available to employees . . . runs counter to a central purpose of ERISA." *Schwartz* v. *Newsweek, Inc.*, 827 F.2d 879, 883 (2d Cir. 1987). As a former assistant secretary of labor affirmed, the specter of potential lawsuits "definitely influence[s] how plan [sponsors] have been looking at investments." David McCann, *Passive Aggression*, CFO (June 22, 2016) (quoting Bradford Campbell), http://www.cfo.com/retirement-plans/2016/06/passive-investment-aggression/. Plan fiduciaries facing this increase in risk will have to flyspeck their decisions, knowing that litigation would mean not only defending, but also bearing the inverted burden to *dis*prove that their decisions caused any losses to the plan.

Participants are better off when they can select from a range of options that best suits their particular needs and goals. The whole point of 401(k) plans is to let participants "choose where to allocate the money in their accounts among the available options." BrightScope/ICI, *A Close Look at 401(k) Plans*, *supra*, at 42. Some will choose actively managed funds that may have higher expenses but other benefits; some will choose differently. Many factors play a role, including age, time to retirement, and appetite for risk. But the choice is theirs. *See, e.g.*, Investment Company Institute, *Investment Company Fact Book* 179 (58th ed. 2018) (detailing how "younger participants allocate more of their [401(k)] portfolios to equities compared with older participants"), https://www.ici.org/pdf/2018_factbook.pdf; Investment Company Institute, *Profile of Mutual Fund Shareholders, 2018* 16 (Dec. 2018) (survey results showing varying levels of risk tolerance among investors), https://www.ici.org/pdf/rpt_18_profiles18.pdf.

Of course, these investment strategies are not mutually exclusive; indeed, basic financial planning stresses the importance of investing in a diversified mix of assets accessible through a variety of investment offerings. But the First Circuit's decision pushes fiduciaries toward homogeneity, and the resultant decrease in options would hamper participants' ability to build a diversified portfolio. Mellman & Sanzenbacher, *supra*, at 6 (observing the possibility that "the fear of litigation prevents the use of creative options that may improve participant outcomes").

For example, the First Circuit's decision will reduce the incentives for an employer like Putnam to offer its own products—even though it may be prudent

to do so. Asset manager employers generally want to offer proprietary products to employees; after all, these are the products they and the employees know best. *Participant Directed Individual Account Plans*, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) (noting that "a company whose business is financial management" need not "seek financial management services from a competitor"); *see Am. Century Servs.*, 2019 WL 293382, at *11 (explaining that proprietary funds were "*more* beneficial to Plan participants"). The advantages of offering familiar products inure to participants. *See Dupree* v. *Prudential Ins. Co.*, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 7, 2007) (determining that offering proprietary products in investment plans was beneficial).

Executive Branch regulations authorize the inclusion of proprietary mutual funds in investment companies' retirement plans because it is "administratively feasible," "in the interests of plans and of their participants and beneficiaries," and "protective of the rights of participants and beneficiaries." *See Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute*, 42 Fed. Reg. 18,734, 18,734 (Apr. 8, 1977). If plaintiffs can rely on *ex post* comparisons to only one product type to prove loss—and then sit back and make fiduciaries disprove causation—fiduciaries will have every reason to avoid the trouble and just offer that one type of product. That reduces participant choice, contrary to their wishes. *See* Investment Company Institute, *American Views on Defined Contribution Plan Saving, 2017* 6 (Feb. 2018), https://bit.ly/2tgysvy.

Not only will the First Circuit decision lead to fewer options for participants, but the resulting increase in litigation risk also could make plans more expensive. When sponsors face a "fear of incurring fiduciary liability," there is a congruent "need to charge a higher price to compensate" for the "risk" of incurring such liability. *CSA 401(k) Plan* v. *Pension Prof'ls, Inc.*, 195 F.3d 1135, 1139 (9th Cir. 1999). "[F]ar from safeguarding the assets of ERISA-plan participants, the litigation spawned by the [burden-shifting rule] will simply drive up plan-administration and insurance costs." *Tatum*, 761 F.3d at 381 (Wilkinson, J., dissenting). That squarely contravenes the balance struck in ERISA: 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 (quoting *Varity Corp.*, 516 U.S. at 497) (alterations omitted) (emphasis added).

This Court has recognized that ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Disuniformity in the law of retirement planning "could work to the detriment of plan beneficiaries." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990). Employers "might offset" any "inefficiencies" created by the disuniformity "with decreased benefits." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 60 (1990).

The way to restore uniformity—and to give back to plan sponsors, fiduciaries, and plan participants the

benefits of predictability—is for this Court to grant review of both questions presented in the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted.

PAUL SCHOTT STEVENS
SUSAN M. OLSON
DAVID M. ABBEY
THE INVESTMENT COMPANY INSTITUTE
1401 H St. NW
Washington, DC 20005
(202) 326-5800

MARK A. PERRY
Counsel of Record
AARON SMITH*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com
**admitted only in Alabama*

Counsel for Amicus Curiae

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