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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Courts across the country have recognized a profound split over who bears the burden of proving loss causation under ERISA. That issue recurs so frequently that this Court has considered three petitions raising it in the past four years, in different factual settings—a stock-drop case, *RJR Pension Inv. Comm. v. Tatum* (No. 14-656), a stock-acquisition case, *Pioneer Ctrs. Holding Co. Stock Ownership Plan v. Alerus Fin., N.A.* (No. 17-667), and here, one of the raft of pending cases challenging the inclusion of funds in a retirement-plan line-up. *Both* previous petitions prompted the Court to CVSG. Respondents nevertheless contend that the split is illusory, unimportant, and not dispositive.

All three contentions disregard what the First Circuit itself said: it recognized the deep circuit split on this issue, chose to "align [it]sel[f] with" one side, and held that the burden-shifting rule "makes all the difference here." Pet. App. 38a n.16, 39a. Indeed, the split has *widened* since the last CVSG.

This Court should couple its review of the loss-*causation* question with the related legal question concerning how to prove *loss*: whether a mechanical index-fund comparison suffices in every case, irrespective of plan-specific facts.

The loss-causation and loss questions affect virtually every ERISA fiduciary-breach case, and the persistent split drives decisions about whether, and where, to file suit. Chamber Br. 23-24. This Court should take up both questions.

I. This Case Is An Excellent Vehicle To Finally Resolve The Deep Circuit Split Over Burden-Shifting.

The reasons to decide the burden-shifting question are clear: there is a deep, widely acknowledged circuit conflict, and the First Circuit's decision to choose the minority side "ma[de] all the difference here." Pet. App. 38a n.16. Leaving the burden on ERISA plaintiffs, where it belongs, would not only resolve respondents' fiduciary-breach claim, it would allow other, similar cases—in which the plaintiffs lack proof of loss causation—to be resolved before trial.

A. Respondents' Attempts To Dispute The Circuit Split Strain Credulity.

Respondents disagree that there even *is* a circuit split, calling it "more imagined than real." Opp. 21. If that were true, then more than a dozen federal appellate judges (including then-Judge Gorsuch) have all "imagined" the same split petitioners and *amici* describe.[1]

Respondents themselves do little to refute the split; they rely instead on a filing by Solicitor General Verrilli in 2015. U.S. Amicus Br., *Tatum*, *supra* (No. 14-656). That brief is not the last word on the subject, which is why the Court again called for the government's views in *2018*.

The 2015 brief primarily expressed concern about the split's "durability," given this Court's then-recent

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[1] Pet. 15; ACLI Br. 18; *see also, e.g.*, *Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009); *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 220 (4th Cir. 2011).

decision in *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409 (2014), abrogating any "presumption of prudence" in certain ERISA cases. ACLI Br. 18-19; Pet. 18-19. Durability is no longer in doubt. The split has only deepened since 2015, and no court has changed positions following *Dudenhoeffer*—indeed, the Sixth Circuit has expressly reaffirmed its pre-*Dudenhoeffer* view that ERISA plaintiffs must prove causation. *Saumer v. Cliffs Natural Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017).

Respondents dismiss *Saumer* as irrelevant, arguing that the case "did nothing to alter the landscape." Opp. 23. That is exactly the point: despite the 2015 brief's speculation, not one court has changed its mind, and *both* sides of the split have added adherents. In any event, the 2015 brief's skepticism of the split was misplaced then and is demonstrably inaccurate now. Pet. 17 n.10, 18-19, 24-25.

Respondents also argue (at 20-21) that the Tenth Circuit's recent decision requiring plaintiffs to prove loss causation is distinguishable because it involved different facts—there, a stock purchase. *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A.*, 858 F.3d 1324 (2017), *pet. for cert. dismissed by stipulation*, No. 17-667 (Sept. 20, 2018). If anything, that this issue has been before this Court in three different factual contexts—a stock-drop case, a stock-acquisition case, and a fund-line-up case—in the last four years only underscores its ubiquity. All these cases applied 29 U.S.C. § 1109, and all should follow the same burden-of-persuasion rule for § 1109's loss-causation element.

B. The First Circuit Expressly Stated That This Legal Question Is Dispositive Here.

Next, respondents argue that this case is "interlocutory" since the First Circuit remanded, and that the burden-of-persuasion issue is not dispositive. The first argument is no reason to deny certiorari, and the second is demonstrably incorrect.

1. This Court regularly reviews appellate decisions that mistakenly remand for trial. A petition is not fatally "interlocutory" where the very question is whether the remand for trial was erroneous. To take one legally analogous example: in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court granted certiorari to consider a circuit split about loss causation under the securities laws, even though the Ninth Circuit had reversed and remanded for further proceedings. *Id.* at 340; *see also, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1139 (2018); *Sheriff v. Gillie*, 136 S. Ct. 1594, 1600 (2016). The "interlocutory status" of a case thus creates "no impediment" when there is an "important" legal issue that is "otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Stephen M. Shapiro et al., *Supreme Court Practice* 283, 285 (10th ed. 2013).

Burden-of-proof questions are particularly well suited to resolution at this stage. Correctly placing the burden may eliminate any need for further proceedings. That is the case here: the First Circuit acknowledged that allocating the burden "makes all the difference." Pet. App. 38a n.16.[2] If this Court

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[2] Petitioners argued below that the court could avoid deciding the burden issue *because respondents failed to prove loss*. Defs.'

holds that respondents have the burden, there will not be anything left to try, and the district court's judgment on respondents' fiduciary-breach claims will be reinstated.[3] And even if a remand for trial were necessary, the trial should proceed with the burden properly allocated. For both reasons, the First Circuit stayed its mandate pending certiorari.

2. Respondents contend that the Court should not review the burden-shifting issue now because the case must return to district court on a *different* claim, involving ERISA's prohibited-transaction rules. But procedurally, legally, and factually, the prohibited-transaction claim has nothing to do with the fiduciary-breach issue before this Court. They would not even be resolved in the same proceeding: according to respondents, the prohibited-transaction claim will *not* go to trial, but will be resolved on a paper record. Opp. 15. The remanded issue is a narrow factual question about revenue-sharing payments; the First Circuit did not want "to sift through the record" to answer that question itself. Pet. App. 19a. And delaying certiorari review would require the fiduciary-breach claim to go back for trial (under the wrong legal standards for loss and causation), post-trial briefing, another appeal, and another round of certiorari briefing—all of which would be

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C.A. Br. 50. The First Circuit disagreed, which made the burden issue dispositive. *Contra* Opp. 1, 18.

[3] Respondents contend (at 19-20) that they can prevail even if they have the burden, but they already presented their case, and neither the district court nor the First Circuit agreed.

unnecessary if this Court were to grant certiorari and reverse.[4]

3. Respondents also argue that loss causation is a "tertiary issue" that should not be decided until the "antecedent issues of breach and loss" are resolved. Opp. 15-16. But elements are proved in parallel, not in a rigid sequence, and a plaintiff's failure to establish breach, loss, *or* causation means that judgment is properly entered for the defendants. Indeed, a failure of proof on causation *alone* regularly results in summary judgment. *See, e.g.*, *Pioneer Ctrs.*, 858 F.3d at 1332; *Holdeman v. Devine*, 572 F.3d 1190, 1192 (10th Cir. 2009); *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104-105 (2d Cir. 1998); *accord Dura*, 544 U.S. at 338 (dismissal). There is no need for a trial on other elements when loss causation, under the correct burden, is outcome-determinative because the plaintiff cannot prove it—as here.

4. Finally, respondents contend (for the first time) that the circuit split on the "burden of persuasion" is irrelevant because "the only burden at issue here" is the "burden of production," which they contend rests with defendants. Opp. 17, 23-24.

That is nonsense. *No* court has split the burdens of persuasion and production for loss causation in ERISA fiduciary-breach cases: every circuit either puts both on plaintiffs, or puts both on defendants. So too here: the First Circuit expressly declined to

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[4] In *Dura*, this Court granted review on a loss-causation issue related to misstatements about a "spray device," even though the Ninth Circuit had remanded separate claims regarding "CD sales." 544 U.S. at 340; *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 935-936, 941 (9th Cir. 2003), *rev'd*, 544 U.S. 336 (2005).

adopt a rule shifting only the burden of production, noting that respondents had not argued for such a "middle ground." Pet. App. 38a-39a. Instead, it expressly "join[ed]" circuits that shifted "'the burden of persuasion.'" Pet. App. 30a, 31a. *That* is the "burden at issue here."

Respondents ignore "the general evidentiary rule that 'the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.'" *Dixon v. United States*, 548 U.S. 1, 8 (2006) (quoting 2 J. Strong, *McCormick on Evidence* § 337, at 415 (5th ed. 1999)); *accord Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 107 (2011) ("[T]he same party who has the burden of persuasion also starts out with the burden of producing evidence." (citation omitted)). That is why every decision assigning the burden of persuasion under § 1109 also assigns the burden of production, to the same party.

None of the burden-shifting decisions respondents cite from other contexts (Opp. 23-24, 30) suggests that *either* burden would shift here. As respondents acknowledge (at 30), the loss-causation inquiry is objective; neither party has an evidentiary advantage. Pet. 25-26; ICI Br. 8-9. And even if that were not true, the location of evidence would not suffice to shift the burden: "Very often one must plead and prove matters as to which his adversary has superior access to the proof." *Schaffer v. Weast*, 546 U.S. 49, 60 (2005) (quoting *McCormick on Evidence* § 337, at 413). That is why parties have access to discovery.[5]

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[5] Respondents cite a common-law admiralty case holding that when the owner of goods being transported by ship shows that the ship sank in "smooth water," courts may infer the ship's

In any event, like respondents' other merits arguments (Opp. 27-30), the contention that the burden *should* shift does not address the need to resolve the split on whether it does.

C. This Important Question Requires A Uniform Answer.

Respondents argue that even if there is a split, resolving it "would be of limited value at best" because the burden issue is merely procedural rather than "substantive." Opp. 25. That is an odd contention: since the issue affects *all* ERISA fiduciary-breach cases, and since it is not the subject of agency rulemaking or guidance, it is *more* broadly important for this Court's purposes than many narrow substantive questions that arise under ERISA.

Furthermore, respondents' contention that the issue is unimportant because the evidence is rarely closely balanced *at trial* ignores that this Court has considered this question three times in the past four years alone (and CVSG'd twice). As the cases in the split show, this issue is also significant *before* trial—at early motion practice, summary judgment, when negotiating settlement, and in deciding whether to file suit. ACLI Br. 4-9, 12-13; Chamber Br. 7-15, 23-24. And respondents' arguments (at 18 n.3, 25) about the rarity of "equipoise" at trial could be made in *any* burden-shifting case—yet this Court has regu-

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unseaworthiness unless the shipowner adduces contrary evidence. *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 112-113 (1941). The Court's analysis was "but a particular application of the doctrine of res ipsa loquitur." *Id.* at 113. No similar inference is justified here, under the statute or the facts.

larly granted certiorari to decide burden-of-proof issues. Pet. 21 & n.13.

II. The Related Loss Question Is Ripe, Broadly Important, And Dispositive.

Respondents do not dispute that the First Circuit created a categorical rule permitting ERISA plaintiffs to prove loss using a mechanical index-fund comparison in every case, irrespective of whether a prudent fiduciary *of that plan* would have invested in index funds, active funds, or other investments. Nor do respondents dispute that the First Circuit's decision will push fiduciaries of hundreds of thousands of employee-benefit plans toward index funds, no matter what options are best for those plans' participants. Respondents actually applaud that outcome. Opp. 36-37. But these undisputed consequences show why this Court should review the loss question—which is intertwined with the loss-causation question.

A. The Question Presented Is A Purely Legal One That Is Dispositive Of Respondents' Fiduciary-Breach Claims.

1. Taking words out of context, respondents say the petition presents a "fact-intensive question." Opp. 30, 31. Not so. The petition asks the Court to settle a purely legal issue: whether ERISA plaintiffs can *always* rely on index funds to show loss, as the First Circuit held "as a matter of law." Pet. App. 28a & n.14, irrespective of any facts about the particular plan and its participants. Thus, the petition does not ask *this Court* to "wade into the 'facts and circumstances of the case,'" Opp. 3; it asks the Court to reject the First Circuit's *per se* rule and hold that *lower*

courts cannot ignore the facts and circumstances. That is the sort of *legal* question this Court routinely answers. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 653 (2010) (reversing the court of appeals' "overly rigid *per se* approach" to equitable tolling); *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380-381 (2008) (reviewing evidentiary issue where lower court may have applied an inappropriate "per se rule").

2. Respondents also argue that review would be premature because there is still factfinding to do on remand. But the First Circuit's decision *ruled out* factfinding *relevant to the question presented*. The First Circuit held that respondents' method of proving loss—a mechanical index-fund comparison—was adequate as a matter of law *in all cases* and for *all plan line-ups*, irrespective of the differences between actively managed funds and index funds and whether a prudent fiduciary would have chosen index funds given the plan menu and the plan participants' characteristics. The court left no opportunity for factfinding on those issues because it decided they were categorically irrelevant. Pet. 11 & n.8; Pet. App. 28a.

If this Court reverses, there will be nothing left to try. Despite *now* asserting that the loss inquiry is "fact-specific" in an effort to avoid certiorari, Opp. 31, respondents do not dispute that they presented no evidence about whether a prudent fiduciary would have substituted Pomerantz's index-fund alternatives in light of the Plan's overall investment strategy, other investments in the Plan's portfolio, or participants' demonstrated preference for active man-

agement, Pet. 8.[6] Indeed, the First Circuit said that no factual evidence was required. Pet. App. 28a & n.14. This issue is therefore not only ripe, but dispositive.

3. Finally, respondents argue that certiorari is not necessary because ERISA defendants *can* prevail at trial against Pomerantz's loss models, as another defendant did in *Wildman v. American Century Services, LLC*, __ F. Supp. 3d __, 2019 WL 293382 (W.D. Mo. Jan. 23, 2019).[7] But *Wildman* demonstrates the First Circuit's error: the court rejected Pomerantz's portfolio-comparison loss model, in part because he provided no evidence that the funds in his model would have been chosen by fiduciaries for that plan, and found that those models were "speculat[ive]" and "untethered to the facts of this case." *Id.* at *8-*9. The First Circuit's *per se* rule could make those facts categorically irrelevant.

B. The First Circuit's Decision On This Recurring Issue Will Have An Enormous Impact On Fiduciary Behavior.

Respondents make no effort to dispute that the standard for proving loss is an important and recur-

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[6] Respondents suggest that the CITs in one of Pomerantz's models were *per se* prudent substitutes because the Plan added those options in 2016. Opp. 19. That misses the point—Putnam *added* the CITs to the *existing* menu; Pomerantz's model would have made index CITs the *entire* menu. There is no evidence that a prudent fiduciary would have made such a decision. And contrary to respondents' false assertion (at 4), index funds were available throughout the class period. C.A. J.A. 1220-1226, 1487. They simply were not popular with participants.

[7] The *Wildman* plaintiffs did not appeal.

ring issue. Nor do they dispute that the First Circuit's decision will push fiduciaries to switch to index funds whether or not they are in participants' best interests. Instead, respondents argue that the First Circuit was *right* to put a thumb on the scale in favor of passive management. Opp. 36-37.

But ERISA does not condone or condemn any particular type of investment; it allows fiduciaries latitude to offer a diverse menu of investments depending on the participants' preferences and needs. ICI Br. 18. Respondents notably have no response to the *amicus* briefs' demonstration that judicially hardwiring into ERISA a preference for index funds is contrary to Congress's design, detrimental to plan participants, and contrary to participants' preferences. ICI Br. 18, 21-25; Chamber Br. 18-22.

The categorical loss standard the First Circuit created is closely related to the causation issue on which the circuits are intractably split. Each holding undermines the nationwide uniformity ERISA was supposed to create, while together having a nationwide impact on fiduciary behavior that will reduce participant choice. This Court should review and reverse both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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