No. 17-667

# In the Supreme Court of the United States

THE PIONEER CENTRES HOLDING COMPANY STOCK OWNERSHIP PLAN AND ITS TRUSTEES, ROBERT JENSEN AND SUSAN DUKES

PETITIONERS,

*v.*

ALERUS FINANCIAL, N.A.

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

## REPLY BRIEF FOR THE PETITIONERS


BRUCE E. ROHDE
CAMPBELL KILLIN BRITTAN & RAY LLC
*270 Saint Paul St.*
*Suite 200*
*Denver, CO 80206*
*(303) 322-3400*

DAVID R. EASON
EASON LAW LLC
*1129 Cherokee Street*
*Denver, CO 80204*
*(303) 381-3411*

DANIEL R. ORTIZ
*Counsel of Record*
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
*580 Massie Road*
*Charlottesville, VA 22903*
*(434) 924-3127*
*dro@virginia.edu*

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# REPLY BRIEF FOR THE PETITIONERS

## I. The Case Is an Ideal Vehicle

Alerus argues that the case is a poor vehicle to resolve the question presented because the Plan cannot establish loss, one of the two elements necessary to shift the burden of proof on causation. Br. in Opp. 6-9. In its view, there can be no loss unless the Plan can first show "that Land Rover would have approved [the transaction]." *Id.* at 7-8. But, as any first-year law student knows, that confuses loss with causation. Whether the transaction would have gone through *had Alerus triggered it* is not a question of loss or injury—the transaction, after all, clearly failed—but of what *caused* that loss.

This question in turn depends on whether Land Rover would have approved the transaction if Alerus had signed and forwarded the Plan's proposal. Alerus's doing so would have triggered the opportunity for approval—a process which would have provided Land Rover information about Pioneer's financial status and performance, permitted further discussion and negotiation, and (if Land Rover refused approval) allowed for a state court challenge.[1]

If Land Rover would have approved the transaction, then Alerus's refusal to forward the proposal caused the transaction to fail. If, on the other hand, Land Rover would have disapproved it and the

[1] As "[t]he parties agree[,] the laws of both California and Colorado would preclude Land Rover from unreasonably withholding approval regarding the transfer." Pet. App. 42a (Bacharach, J., dissenting) (citing code provisions).

state courts would have upheld Land Rover's refusal on challenge, then Alerus's refusal did not cause the transaction's failure. It would have failed in any event. Burden-shifting in this context is critical because it determines who—the Plan or Alerus—has to prove *what Land Rover would have done and whether the state courts would have upheld any disapproval*. As the sole fiduciary chosen to act for the Plan in order to protect it from conflicts of interest, Alerus stands in the better position to answer this "what-if" question and to bear the risk of uncertainty attending the answer.

Although the Tenth Circuit rejected burden-shifting, it correctly saw the case in exactly this way. The outcome, it held, turned on causation, not loss. Thus, the court "*first* address[ed] the proper allocation of the burden of proof with respect to the element of *causation*." Pet. App. 18a (emphasis added). The court ultimately affirmed the district court because, if the Plan bore the burden of proof, "a reasonable factfinder could not conclude that Alerus *caused* the Transaction to fail." *Id.* at 19a (emphasis added); *id.* at 25a (similar). In its "[c]onclusion," moreover, the Tenth Circuit characterized its holding as resting on causation, not loss: "[We] hold it is the plaintiff's burden to establish *causation*." *Id.* at 38a (emphasis added). And the Tenth Circuit made clear that causation was what tied together breach and loss, the other two, independent elements of the cause of action: "In order to prove the causation element, the Plan must demonstrate that Alerus's alleged breach (refusal to sign the revised Transaction documents) caused the Plan to suffer damages (failure of the Transaction)." *Id.* at 25a. In the very next sentence,

moreover, it identifies as the relevant issue of causation whether "Land Rover would have approved the sale had Alerus signed the revised Transaction documents." *Id.* at 25a-26a.

It makes no sense to argue, as Alerus does, that the distinction between loss and causation is "meaningless in this case." Br. in Opp. 8. Conflating causation and loss makes the burden-shifting test circular. Like a dog chasing its own tail, a plaintiff must (1) prove causation (2) to prove loss (3) to shift the burden of proving causation to the defendant. Just to state the argument discredits it. Cf. Jack Buck, *Jack Buck: "That's a Winner"* 58 (1997) ("You can't get a job until you have experience, and you can't get experience until you have a job."); Joseph Heller, *Catch-22: A Novel* 52 (1999) (describing this move, "Catch-22," as "the best [catch] there is").

The common law further undermines Alerus's argument. It has traditionally analyzed the effects of intervening acts and omissions of third parties as questions of causation, not loss. Tort law, for example, considers whether a third party's actions or omissions relieve someone from liability as part of the *causation* inquiry. See Restatement (Second) of Torts §§ 440-453 (Am. Law Inst. 1965) (discussing superseding causes); see also, *e.g.*, *McCabe* v. *Ernst & Young, LLP*, 494 F.3d 418, 436 (3d Cir. 2007) (relying on "general causation principles" to determine whether plaintiff's loss was a foreseeable outcome of defendant's omissions in an audit opinion). Trust law does too. See, *e.g.*, *CDX Liquidating Trust* v. *Venrock Assocs.*, 640 F.3d 209, 214-215 (7th Cir. 2011) (observing that evidence of an alternate reason for injury is a question of causation).

And courts have extended this analysis to ERISA. See, *e.g.*, *In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 772 F. Supp. 2d 519, 544-545 (S.D.N.Y. 2011) (analyzing whether loss would have occurred anyway as issue of causation).[2]

## II. The Split Is Real, Deep, and Entrenched

Alerus agrees that four circuits, the Sixth, Ninth, Tenth, and Eleventh, "have all rejected the burden-shifting framework" that the Fourth Circuit applies. Br. in Opp. 12, 15. That establishes at a minimum a four-one split, which by itself warrants this Court's review. See, *e.g.*, *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 153 n.4 (1972) (granting on two-one split). But the split is much deeper than that. Only by aggressively misreading other circuits' opinions can Alerus argue that the Second, Fifth, and Eighth Circuits do not side with the Fourth.

Consider the Eighth Circuit. In *Martin* v. *Feilen*, the only case respondent discusses, the Eighth Circuit held that "once [an] 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 to prove that the loss was not caused by * * *

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[2] Alerus argues in a footnote that the district court's exclusion of some expert testimony compounds the supposed vehicle problem. Br. in Opp. 8 n.1. This is incorrect. Once the burden of proof is correctly allocated, Alerus, not the Plan, will bear the risk of uncertainty on causation, to which this particular evidence was relevant. If evidence of what Land Rover would have done remains "speculative," as Alerus contends, *id.* at 9, then Pioneer will have satisfied this element of its claim. The fact that the dissent below found this element satisfied even if Pioneer had to bear the burden of proof, see Pet. App. 40a-41a, shows that shifting the burden would make all the difference.

the breach of duty." 965 F.2d 660, 671 (1992). Nowhere did it limit its holding to calculating damages. Twice since, moreover, the Eighth Circuit has made clear that its burden-shifting rule applies to liability, not just damages. See *Eckelkamp* v. *Beste*, 315 F.3d 863, 867 (2002) ("To establish a breach of fiduciary duty *claim* under ERISA, a plaintiff must show a breach of a fiduciary duty and a prima facie case of loss to the plan. Once the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.") (emphasis added) (citations and quotation marks omitted); *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (1994) (same).[3]

Next consider the Fifth Circuit. Respondent attempts to wish away its binding precedent, *McDonald* v. *Provident Indemnity Life Insurance Co.*, 60 F.3d 234 (1995), by claiming that the court's reasoning is "thin" and that its holding is "dicta." Br. in Opp. 15. Both claims are mistaken. *McDonald* did not offer extensive justification for adopting burden-shifting only because it was persuaded by and adopted the Eighth Circuit's extensive analysis of trust law in *Roth*. See *McDonald*, 60 F.3d at 237 & nn. 13-14 (quoting and citing *Roth*, 16 F.3d at 917). Why should it reinvent the wheel rather than adopt the reasoning

[3] The district courts in the Eighth Circuit uniformly share this understanding. See, *e.g.*, *Perez* v. *Harris*, No. 12-CV-3136 (SRN/FLN), 2015 WL 6872453, at *11 (D. Minn. Nov. 9, 2015) (same); *Walsh* v. *Principal Life Ins. Co.*, 266 F.R.D. 232, 256 (S.D. Iowa 2010) (same); *Lupiani* v. *Wal-Mart Stores, Inc.*, No. 03-5256, 2006 WL 2596055, at *3 (W.D. Ark. Sep. 11, 2006) (same).

of the then-leading circuit on its side of the split? That's judicial efficiency.

Respondent's claim that the Fifth Circuit's burden-shifting rule is dicta puzzles. It rests on the argument that since the plaintiff could not meet the second step of the Fifth Circuit's announced three-step test, both other steps (or at least the third) are dicta. See Br. in Opp. 15. But this is nonsense. As this Court held long ago:

> It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

*R.R. Cos.* v. *Schutte*, 103 U.S. 118, 143 (1880). The same is true here. Subsequent Fifth Circuit non-precedential opinions and district courts within the Fifth Circuit, moreover, uniformly consider *McDonald's* burden-shifting rule a holding, not dicta.[4]

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[4] See, *e.g.*, *Timmons* v. *Special Ins. Servs., Inc.*, No. 97-41545, 1998 WL 915366, at *1 (5th Cir. Dec. 21, 1998) (per curium) (same); *Mallory* v. *Lease Supervisors, LLC*, No. 7:16-CV-248-DAE, 2017 WL 5147095, at *3 (W.D. Tex. Aug. 28, 2017) (same); *Harris* v. *Bruister*, No. 4:10cv77-DPJ-FKB, 2013 WL 6805155, at *9 (S.D. Miss. Dec. 20, 2013) (same); *In re BP p.l.c. Secs. Litig.*, 866 F. Supp. 2d 709, 721 (S.D. Tex. 2012) (same), vacated on other grounds, 575 Fed. App'x 341 (5th Cir. 2014); *Powell* v. *Dall.*

Alerus's reading of Second Circuit law errs in two ways. First, Alerus does not deny that under the Second Circuit's "prior panel" rule the earlier holding in *New York State Teamsters Council Health & Hospital Fund* v. *Estate of DePerno*, 18 F.3d 179 (1994), not the later holding in *Silverman* v. *Mutual Benefit Life Ins. Co.*, 138 F.3d 98 (1998), controls, which puts the Second Circuit firmly against it. Alerus also does not dispute that the Second Circuit itself has, post-*Silverman*, held in a precedential opinion that the burden to disprove causation shifts to the defendant once the plaintiff establishes a prima facie case of fiduciary breach and associated loss. See *Salovaara* v. *Eckert*, 222 F.3d 19, 26-27, 29 (2000) (adopting reasoning of *Salovaara* v. *Eckert*, No. 94 Civ. 3430 (KMW), 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998)). In any event, even if respondent's reading of Second Circuit case law were correct, it would establish only that the split stands at five-three rather than four-four, hardly a difference arguing against granting cert.

## III. Alerus's Defense of the Tenth Circuit's Decision Underscores Its Weakness

Alerus proffers three arguments why burden-shifting is incorrect. The first and the third rest solely on a view of "the statute's plain terms," Br. in Opp. 10, the "statutory language," *ibid.*, and its "plain meaning," *id.* at 11, that the Tenth Circuit itself rejected. No one, including the Plan, denies that § 1109(a) requires causation. The statutory language is clear about *that*. *E.g.*, Pet. App. 19a. "But," as the

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*Morning News LP*, 610 F. Supp. 2d 569, 579-580 (N.D. Tex. 2009) (same).

Tenth Circuit recognized, "the statute is silent as to *who* bears the burden of proving a resulting loss." Pet. App. 20a. That, not whether causation is required, is the question of this case and nothing in the statute's text speaks to it.

Alerus's second argument fares no better. It claims that "[w]here the statutory language and the ordinary default rule align, there is no reason to disregard both." Br. in Opp. 11. "[T]he statutory language['s]" silence, however, "align[s]" with *any* position. It favors the Plan as much as Alerus. And a simple "ordinary default rule" does not exist. As this Court has held:

> No single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence of proof burdens. [I]n a case of first impression * * * reference to which party has pleaded a fact is no help at all. Among other considerations, allocations of burdens of production and persuasion may depend on which party—plaintiff or defendant, petitioner or respondent—has made the affirmative allegation or presumably has peculiar means of knowledge.

*Alaska Dept. of Envtl. Conserv.* v. *EPA*, 540 U.S. 461, 494 n.17 (2004) (citations and internal quotation marks omitted). Here, moreover, as the petition noted, the default rule in ERISA's source—trust law—places the burden on the breaching fiduciary, not the plan, Pet. 16-17, and the trustee, not the plan, has the "peculiar means of knowledge," Pet. 19-23.

Despite Alerus's confusion, shifting the burden on causation is hardly novel. Indeed, it is a common feature of fiduciary relationships. As this Court has

held, an agent in breach bears the burden of showing that the breach did not cause an injury to the principal. *Bank of British N. Am.* v. *Cooper*, 137 U.S. 473, 479 (1890) ("But we do not understand that the certainty of a different result must be established; on the contrary, the burden of proof is on the defendant."); see also *Nedd* v. *UMW*, 556 F.2d 190, 211 (3d Cir. 1977) ("[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove * * * that the loss would have occurred in the absence of a breach of duty."). The reason for this is simple. As Judge Friendly put it, "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Indus.*, 605 F.2d 624, 636 (2d Cir. 1979).

**IV. The Question Is Important**

Alerus contends that the allocation of the burden of proof on causation "often makes no difference to the outcome of the case." Br. in Opp. 16. It can point, however, to only three cases from the last nineteen years in which courts did not reach the question of whether to shift the burden because they found no loss. *Ibid.* And Alerus ignores the significant impact that burden-of-proof allocation has at the district court level. In the three years since the Fourth Circuit approved burden-shifting in *Tatum* v. *RJR Pension Investment Committee*, 761 F.3d 346 (4th Cir. 2014), for example, the majority of claims for breach of fiduciary duty under ERISA § 1109(a) have adequately alleged breach and loss—Alerus's own metric of

importance. Compare *Spires* v. *Schools*, 271 F. Supp. 3d 795, 806 (D.S.C. 2017); *Perez* v. *Chimes D.C., Inc.*, No. RDB-15-3315, 2016 WL 5815443 at *13 (D. Md. Oct. 5, 2016); *Longo* v. *Trojan Horse Ltd.*, 208 F. Supp. 3d 700, 707-708 (E.D.N.C. 2016); *Peters* v. *Aetna, Inc.*, No. 1:15-cv-00109-MR, 2016 WL 4547151 at *21 (W.D.N.C. Aug. 31, 2016) with *Rogers* v. *Unitedhealth Grp., Inc.*, 144 F. Supp. 3d 792, 800 (D.S.C. 2015). This burden-shifting, in fact, could be dispositive in the "[m]ajority of [c]ases." Chamber of Commerce Amicus Br. at 5, *RJR Pension Inv. Comm.* v. *Tatum*, 135 S. Ct. 2887 (2015) (No. 14-656).

ERISA's imposition of personal liability for fiduciary breach is not, moreover, a mere "technical issue." Br. in Opp. 17. This provision "deter[s] mismanagement or irresponsible acts or judgments." Staff of S. Comm. on Labor and Pub. Welfare, 94th Cong., 2d Sess., *Legislative History of ERISA* 1604 (Comm. Print 1976). A legal rule shifting outcomes in suits where fiduciaries had breached their duties would "have an appreciable impact on fiduciary behavior." Br. in Opp. 17. In general, a fiduciary is less sensitive to the abstract legal rules that regulate it than to the consequences those rules impose as applied on the ground.

Burden-shifting is thus far from a technicality. Indeed, it is a widely accepted means to influence the outcome of litigation and direct the behavior of potential litigants. Jurisdictional burden-shifting in Class Action Fairness Act suits, for example, is "virtually dispositive." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 411-412 (2008). And burden-shifting in Title VII suits

is employed to ensure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (citation omitted).

Finally, allowing the circuit split to persist undermines ERISA's uniformity, one of the Act's central goals. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002) (noting ERISA's goal of a nationwide, "uniform regime of ultimate remedial orders"). ERISA's expansive venue provision exacerbates this concern. By allowing plaintiffs to bring claims in any federal district "where the plan is administered, where the breach took place, or where a defendant resides or may be found," 29 U.S.C. § 1132(e)(2), the venue provision permits forum-shopping. As the U.S. Chamber of Commerce has noted, "[u]nder that rule, ERISA claims [can] be initiated almost anywhere the Constitution does not actually place off limits (for all defendants)." Chamber of Commerce Amicus Br. at 18, *Tatum*, *supra*, (No. 14-656).

## CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

BRUCE E. ROHDE
CAMPBELL KILLIN
BRITTAN & RAY LLC
*270 Saint Paul St.*
*Suite 200*
*Denver, CO 80206*
*(303) 322-3400*

DAVID R. EASON
EASON LAW LLC
*1129 Cherokee Street*
*Denver, CO 80204*
*(303) 381-3411*

DANIEL R. ORTIZ
*Counsel of Record*
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
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*580 Massie Road*
*Charlottesville, VA 22903*
*(434) 924-3127*
*dro@virginia.edu*

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