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

SUPPLEMENTAL BRIEF FOR PETITIONERS

JAMES O. FLECKNER
MARTIN C. TOPOL
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

JASON A. TUCKER
PUTNAM INVESTMENTS
100 Federal St.
Boston, MA 02110

WILLIAM M. JAY
Counsel of Record
JAIME A. SANTOS
GOODWIN PROCTER LLP
1900 N St., N.W.
Washington, DC 20036
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioners
(Additional counsel listed on inside cover)

December 10, 2019

JAMES R. CARROLL
EBEN P. COLBY
MICHAEL S. HINES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
500 Boylston St.
Boston, MA 02116

RULE 29.6 STATEMENT

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

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SUPPLEMENTAL BRIEF FOR PETITIONERS

In 2015, the government denied that a split existed, but that position has become untenable. Recent decisions on both sides expressly recognize the stark split, which the decision below widens to 6-4. So now, while conceding the split, the government urges the Court not to resolve it.

The government's vehicle objection emphasizes that the First Circuit remanded the fiduciary-breach claim for Putnam to put on its evidence at trial. But the government never disputes the essential point: *if this Court reverses on the burden question, respondents' fiduciary-breach claim fails*. Respondents' evidence is already in, and if the burden is on them, they did not carry it.

The posture of this case is a virtue, not a vice—it guarantees that placing the burden "makes all the difference here," as the First Circuit said. Pet. App. 38a n.16. It would make no sense to wait until after Putnam presents evidence at trial to decide *whether Putnam should have to present evidence at trial.*

The burden-of-proof issue has come to this Court three times since 2015. The government, which as a regular ERISA plaintiff benefits from a burden-shifting rule, unsurprisingly does not want to see the First Circuit reversed. But that is no reason to allow the entrenched circuit conflict to remain unresolved. The Court should likewise grant review on the loss issue, which the government does not dispute is related to the first question, important, and frequently recurring.

I. This Court Should Finally Resolve The 6-4 Split On The First Question Presented.

The government ultimately concedes that the circuits are split on the first question presented. U.S. Br. 12. That question is purely legal, and it determines the outcome here: under the rule six circuits apply, respondents' fiduciary-breach claim cannot survive because respondents presented no evidence on the loss-causation element. The First Circuit and three other circuits say plaintiffs need not allege or prove causation. That is far from the nationwide uniformity ERISA is supposed to ensure.

Since the minority side of the split traces back to a decision the government won as plaintiff, *Martin v. Feilen*, 965 F.2d 660, 671-672 (8th Cir. 1992), the government understandably wants to keep the rule it prefers in the four circuits that have adopted it. But the government gives no valid reason to leave the conflict unresolved.

A. The Government Concedes A Square Circuit Conflict.

The government now agrees with Putnam, the court below, and other circuits that there is a square circuit conflict on the burden-of-proof issue. Notably, the government does *not* endorse respondents' contention (Opp. 21) that nothing has changed since 2015. The split amply justifies this Court's review.

The government's quibbles about the *extent* of the split are therefore largely beside the point—but they are incorrect in any event. For instance, the panel majority in *Silverman v. Mutual Benefit Life Insurance Co.*, 138 F.3d 98 (2d Cir. 1998), squarely rejected the government's argument for burden-shifting—

and did so for reasons that come directly from "the causation requirement of § 1109(a)." *Id.* at 105-106 (Jacobs, J., joined by Meskill, J., concurring). That reasoning applies to *all* breach-of-fiduciary-duty claims, which unambiguously refutes the government's suggestion (at 13) that perhaps the Second Circuit would apply burden-shifting to *some* such claims. And as the petition shows, district courts treat that holding in *Silverman* as the law of the circuit, despite the government's suggestion that the circuit's law is in conflict. Pet. 17 & n.10.[1]

Similarly, while the government appears to argue (at 13-14) that decisions allocating the burden to the plaintiff do not count unless they specifically say "*and no burden-shifting*," courts bound by those decisions do not apply that spurious distinction. The government knows that first-hand: in one of *the Department of Labor's own cases*, the district court canvassed the circuit split and allocated the burden to the plaintiff, based on *Willett v. Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335 (11th Cir. 1992), the same decision the government now says did not address burden-shifting specifically enough. *Perez v. DSI Contracting, Inc.*, 2015 WL 12618779, at *5 (N.D. Ga. July 24, 2015).

Indeed, while the government suggested in 2015 that some circuits might change their minds in light

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[1] The government does not address those cases, citing only dicta from a case decided just after *Silverman* that did not actually apply burden-shifting. *Salovaara v. Eckert*, 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998), *aff'd*, 182 F.3d 901 (2d Cir. 1999) (table). But "[d]espite the language in *Salovaara*, the holding in *Silverman* is unambiguous." *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 261 (S.D.N.Y. 2012).

of then-recent decisions, *see* Pet. 9, *that did not happen*. Courts continue to hold that circuit precedent places the burden on plaintiffs, *e.g.*, *Saumer v. Cliffs Natural Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017),[2] and not just in the employer-stock-ownership context. *See, e.g.*, *St. Jude Heritage Med. Grp. v. Integrated Wealth Mgmt., Inc.*, 2019 WL 4419003, at *8-*9 (C.D. Cal. Aug. 20, 2019). We are aware of *no decision* that has treated any of these holdings as anything less than binding precedent.

In short, the issue has basically stopped percolating: while it recurs frequently, ten circuits have chosen sides. That is exactly the kind of calcified split that warrants certiorari.

B. This Court Should Resolve The Conflict Now.

The government contends that the Court should not use this case to resolve the conflict because the First Circuit reversed and remanded the fiduciary-breach claim for trial. But that remand was based on the legal conclusion that Putnam bore the burden of disproving loss causation: if *respondents* bear the burden, they lose. And that outcome-determinative issue is a purely legal question; the government identifies absolutely no reason why more fact development would have any bearing on it. The interlocutory-posture argument is nothing but a make-weight.

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[2] The government suggests (at 15) that *Saumer* placed the burden on plaintiffs only in a "limited context." But that "limited context" was the issue on which circuits are split: whether, *to obtain losses following a fiduciary breach*, "a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." 853 F.3d at 863 (citation omitted).

Indeed, the posture of this case is a virtue, not a vice, because it confirms that the burden *matters*. Respondents did not prove loss causation, but the court of appeals reinstated the fiduciary-breach claim after concluding that the burden "makes all the difference here." Pet. App. 38a n.16, Bizarrely, the government buries this statement by the First Circuit in a footnote and says that it "is not clear exactly what the court meant." U.S. Br. 18 n.2. It is *abundantly* clear what the court meant: that allocating the burden determined the outcome. That is why this case is an excellent vehicle.

1. The government argues (at 16-17) that the Court should let the trial continue because more factual development *about breach and loss* could "aid" the Court in making a legal decision *about causation.* That is nonsense three times over. First, and most fundamentally, the government never explains how additional *factual* development could help answer this *purely legal* question presented. That question calls for statutory construction, not factfinding, and the answer is the same at motion to dismiss, summary judgment, and trial. That is why this Court had no trouble deciding how securities plaintiffs must prove loss causation *in a case at the Rule 12(b)(6)* stage, even though there had *been* no fact development and the Ninth Circuit had remanded for further proceedings. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005); Cert. Reply 4.

Second, respondents have already had the chance to present their case on breach and loss, so the "nature" of their theory has been revealed. No *new* theory of breach or loss is going to appear in *Putnam's* portion of the trial.

Third, the government appears to argue (at 7, 16-17) that breach and loss are "antecedent" questions that *must* be decided first, *even if they shed no light on loss causation*. There is no such rigid rule, and for good reason: A party can prevail at a bench trial by winning on a single "issue," if the opposing party's claim "can be maintained … only with a favorable finding on that issue." Fed. R. Civ. P. 52(c). It would defeat the purpose of judgment on *partial findings* under Rule 52(c) if the court had to make *complete findings* on every element in sequence.

The First Circuit did not dispute that *if* respondents bear the burden of proving loss causation, then the district court properly stopped the trial under Rule 52(c) once they failed to do so. *See* Pet. App. 40a. It certainly did not impose the inflexible form of sequencing the government suggests, which would be even more pernicious before trial: by the government's logic, a court could not dismiss a complaint (or grant summary judgment) based on the failure to allege loss causation (or adduce evidence of it), unless it had already resolved breach and loss. But as this Court has long recognized, if a party with the burden of proof fails to raise a triable issue on *any element* of its claim or defense, the other party is entitled to summary judgment, because that "necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The government gives no valid reason why Putnam must endure a trial on factual questions that, if Putnam is right about the question presented, are immaterial.[3]

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[3] The government suggests (at 16) that petitioners might win on other grounds at trial. As the government recently argued (successfully) in another case, answering this purely legal ques-

2. The government also argues (at 16) that the Court would benefit from seeing "both sides' full factual presentations" on loss causation. But respondents *made* no factual presentation, so if they bear the burden, they lose. The Court does not need to wait and see what Putnam would present at trial, because if the Court reverses, Putnam need not present anything. That is the whole point of correctly allocating the burden.[4]

3. Finally, the government makes a confusing argument (at 17-18) that the interlocutory posture might matter *if* the Court were to rule that the burden of *production* shifts without also deciding whether the burden of *persuasion* shifts. That is fanciful at best: respondents made no burden-of-production argument below, and therefore the First Circuit *expressly declined* to adopt a split-burden standard. Pet. App. 38a-39a. Nor has any other court adopted such a standard in fiduciary-breach cases. Cert. Reply 6-7. Nor is there any reason to think this Court would duck the burden-of-persuasion question and leave the split unresolved.

It is exceptionally odd to suggest that this Court not even *try* to resolve a circuit split for fear that it *might* affirm on an alternative ground—especially one that respondents forfeited and no court has adopted. If the Court reverses, plaintiffs' fiduciary-

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tion and reversing would avoid unnecessary proceedings on remand, and those proceedings would not affect the answer. Cert. Reply at 4-5, *FNU Tanzin v. Tanvir* (No. 19-71).

[4] Cursorily, the government also argues (at 16) that certiorari should be denied because the First Circuit separately remanded the prohibited-transaction claim. But that claim rests on different facts, and respondents are not even seeking a trial on it. Cert. Reply 5; *see* Pet. App. 48a-49a n.1.

breach claim is over. That makes this case a more-than-suitable vehicle.

C. The Government's Self-Interested Merits Position Provides No Reason To Deny Certiorari.

The government, which litigates fiduciary-breach cases as a plaintiff, *see* 29 U.S.C. § 1132(a)(2), understandably prefers that defendants bear the burden. Indeed, in the first case to apply that rule, the *government* presented an "unsound global damage[s] theory" at trial and relied on burden-shifting to get a do-over on appeal. *Martin*, 965 F.2d at 671-72.

But the government's agreement with the minority position is no reason to leave the circuits split. If anything, the government's merits arguments show that the question is a purely legal one that is ripe for this Court's review.

The government acknowledges (at 8) that the "ordinary default rule" allocates the burden to plaintiffs. Remarkably, the government contends that ERISA silently replaces that rule not just with trust law, but with trust law that did not even exist at the time of ERISA.

First, while courts sometimes look to trust law "in determining the contours of an ERISA fiduciary's duty," U.S. Br. 8 (citation and brackets omitted), the scope of fiduciary duty is not at issue here. Rather, the relevant rule is that only "losses to the plan resulting from [a fiduciary] breach" may be the basis for a claim. 29 U.S.C. § 1109(a). And who must prove loss causation is a question of civil procedure not governed by common law.

Second, the government suggests (at 9) that changes in trust law *after ERISA's enactment* justify burden-shifting. In other words, the government argues, Congress ceded authority to the American Law Institute and treatise-writing law professors to allocate the burden—and perhaps change their minds over time. That remarkable assertion lacks any grounding in the text. If that is the basis for the government's merits position, it merely underscores the need to review and reject it. If judges cannot "freely invest old statutory terms with new meanings" that effectively "amend[] legislation," *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019), then clearly the ALI and the academy cannot either.

Third, to the extent the government relies on pre-ERISA sources, they do not establish a uniform or longstanding rule of burden-shifting. Indeed, Illinois trust law *still* puts the burden on trust plaintiffs to prove causation, *see Herlehy v. Marie V. Bistersky Tr.*, 942 N.E.2d 23, 39 (Ill. App. Ct. 2010), and examples abound of pre-ERISA authorities placing the burden *on beneficiaries* to prove causation, Pet. 27; ACLI Br. 15 n.4; *accord Lane Title & Tr. Co. v. Brannan*, 440 P.2d 105, 112 (Ariz. 1968); *Streight v. First Tr. Co. of Omaha*, 275 N.W. 278, 287 (Neb. 1937).[5]

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[5] The government contends, unpersuasively, that the First Circuit's characterization of trust law is "not necessarily inconsistent" with petitioners' cases. U.S. Br. 10. But if the government were right that pre-ERISA common law was so clear as to shift the burden, federal courts would not have expressly rejected burden-shifting as a "novel proposition," based on *numerous* early-twentieth-century cases placing the burden on beneficiaries. *U.S. Life Ins. Co. v. Mechs. & Farmers Bank*, 685 F.2d 887, 896 & n.7 (4th Cir. 1982).

If the parties' discussions of the merits show anything, it is that *this Court* should decide whether trust law displaces the "ordinary default rule." The parties, and the circuits, have not just answered the burden question differently, they have taken fundamentally different approaches. This Court should finally resolve the issue and restore the nationwide uniformity that ERISA requires.

II. The Court Should Also Consider The Related, Important, And Frequently Recurring Question About Proving Loss.

The second question presented (about how to prove loss) is related to the first, and the two should be reviewed together. The government does not dispute that the loss issue is important; that it arises in virtually every case challenging a plan line-up; or that, because it affects damages as well as liability, it heightens settlement pressure and threatens to escape review. Pet. 33-36; Chamber Br. 17-18. And notably, the government does not endorse the First Circuit's wrongheaded assertion that fiduciaries should just shift investments into index funds.

Instead, the government incorrectly portrays the First Circuit as holding only that an index-fund comparison *can* prove loss. But petitioners have never argued that index funds are *per se* an inappropriate loss measure. For example, if the evidence indicates that a reasonably prudent fiduciary of a particular plan would have invested in index funds absent the breach, then an index-fund comparator might be appropriate.

Rather, what petitioners argued—directed to the First Circuit's actual holding—is that a bare compar-

ison between the actively managed funds in a plan's line-up and an alternative portfolio of index funds cannot, by itself, be enough to prove loss, because proving loss is a fact-intensive inquiry. Indeed, industry data compellingly demonstrates the differences and benefits of active management. ICI Br. 13-16.

The government seems to agree, affirmatively contending (at 21) that the question of loss, and the selection of comparator funds, "largely depends on the facts and circumstances of the case." But those "facts and circumstances" are exactly what the First Circuit says courts *may not consider*: it held that an index-fund comparison is sufficient "as a matter of law" to prove loss, Pet. App. 28a & n.14. The facts it disregarded—the characteristics of the Putnam plan and index funds' demonstrable unpopularity with Putnam participants, Pet. 8—make this case a particularly strong illustration of why the facts matter.

The government ducks the question presented by recharacterizing the First Circuit's conclusion as one that applies only "on the facts here." U.S. Br. 20; *id.* at 21. But the government does not offer any credible reading of the First Circuit's opinion that would support that view, and it entirely ignores the First Circuit's own acknowledgment that its decision would encourage other plans to drop an entire category of popular and successful investments (actively managed funds), or else risk massive class-action exposure. Pet. App. 40a.

The government's position thus simply disregards the important ways in which the First Circuit has locked in index funds as comparators that a trial court *must* accept. The government's interlocutory-

posture argument likewise ignores that the district court *may not* consider the relevant facts.

This perverse and harmful holding has extraordinary consequences for the investment-management industry, ERISA litigation, and ERISA plans as a whole. *See* Chamber Br. 18-22. It is worthy of this Court's consideration alongside the related loss-causation question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES O. FLECKNER
MARTIN C. TOPOL
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

JASON A. TUCKER
PUTNAM INVESTMENTS
100 Federal St.
Boston, MA 02110

JAMES R. CARROLL
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MICHAEL S. HINES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
500 Boylston St.
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WILLIAM M. JAY
Counsel of Record
JAIME A. SANTOS
GOODWIN PROCTER LLP
1900 N St., N.W.
Washington, DC 20036
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Petitioners

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