No. 18-926

IN THE

Supreme Court of the United States

PUTNAM INVESTMENTS, ET AL.,

Petitioners,

v.

JOHN BROTHERSTON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, fiduciaries are duty-bound to manage employee retirement plans in a prudent manner. 29 U.S.C. § 1104(a). A fiduciary who breaches this duty is liable for "losses to the plan resulting from [the] breach." 29 U.S.C. § 1109(a). In this interlocutory petition arising from a half-finished bench trial, Petitioners ask this Court to answer the following questions:

1. Whether the First Circuit correctly held, consistent with the common law of trusts, that if Respondents prove on remand both a breach of fiduciary duty and an associated loss to the plan, then the burden will shift to Petitioners to show that the plan would have suffered the same loss absent the breach.

2. Whether the First Circuit correctly held, consistent with the common law of trusts, that Respondents established a prima facie case of loss by showing that the investment options Petitioners maintained in the plan underperformed market-tracking index funds (including index funds that Petitioners themselves eventually adopted after Respondents filed this suit).

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INTRODUCTION

This Court need look no further than Petitioners' underlying briefing in the First Circuit to discern why certiorari is unnecessary on the primary issue raised by the petition. Although Petitioners now characterize the burden of proof on loss causation as "an important legal issue" (Pet. 2) worthy of Supreme Court review, they argued below that (1) the burden of proof on this issue is a "red herring"; (2) "adopting a burden-shifting framework would not affect the outcome of this case"; and (3) "[a]ny ruling on the burden shifting framework is therefore unnecessary." Appellees' CA1 Br. 50.

The posture of this case demonstrates why review of this issue is "unnecessary" at this stage. The current petition arises in the context of a ruling on a motion for judgment on *partial* findings pursuant to Federal Rule of Civil Procedure 52(c), brought in the middle of trial before Petitioners put on their defense and before Respondents' investment expert had even concluded his testimony. Although the district court noted that the Putnam Retirement Plan's ("Plan") Investment Committee was "no paragon of diligence," Pet. App. 77a, it "refrain[ed] from making conclusive findings and rulings on whether the Defendants breached their duty of prudence," *id.* at 69a. Nor did the district court make an initial finding of loss or engage in any meaningful discussion of the loss analysis of Respondents' investment expert *See id.* at 76a n.18. Thus, the issue of loss causation—and who bears the burden of proof on that issue—is, at

best, a tertiary issue that will only come into play, if necessary, after these threshold issues are decided on remand once the trial is complete.

In any event, the First Circuit's decision is consistent with established trust law, the longstanding position of the United States Department of Labor ("DOL"), and other circuit cases. There is no need for this Court to restate a rule that has already been restated in the Restatement of Trusts and reaffirmed by the DOL, particularly where this Court has emphasized that "courts must look to the law of trusts" when interpreting ERISA. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1827–28 (2015).

Indeed, this Court previously *denied* certiorari on the exact same issue after it was addressed by the Fourth Circuit in a manner consistent with the First Circuit's decision here. *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014), *cert. denied*, *RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 2887, 192 (2015). There is no reason to reach a different result in this case. Although Respondents contend there is a circuit split, most of the circuit cases they rely upon were previously distinguished by the Solicitor General in *Tatum*. The only genuinely new circuit authority they cite in support of their position is the Tenth Circuit's decision in *Pioneer Centres Holding Co. Stock Ownership Plan v. Alerus Fin., N.A.*, 858 F.3d 1324 (10th Cir. 2017), *cert. dismissed sub nom. Pioneer Centres Holding v. Alerus Fin.*, 139 S. Ct. 50 (2018). However, that case is also distinguishable because it involved a different

theory of liability that called for a materially different causation analysis—and because the defendant presented "overwhelming[]" and "undisputed" evidence of a lack of causation. *Id.* at 1338–40. Thus, the burden of proof did not affect the outcome.

As to the second question Petitioners raise concerning evidence of loss, Petitioners do not identify a single appellate decision that conflicts with the First Circuit's ruling that index fund benchmarks may be used, in appropriate circumstances, to establish losses associated with investments that were not prudently monitored and retained by the fiduciaries of a retirement plan. Rather, Petitioners ask this Court to wade into the "facts and circumstances of the case" and review what they characterize as a "fact-intensive question" regarding the index fund comparisons here, before the trial has concluded and the factual record is complete. Pet. 32. This is not a proper request, particularly since the First Circuit remanded for further factfinding on the issue of loss. Pet. App. 28a.

In any event, there is ample support for the First Circuit's holding that index fund comparisons are not "insufficient as a matter of law" to establish investment losses from a fiduciary breach. Pet. App. 29a. This methodology is expressly endorsed by the Restatement of Trusts as well as leading economists, including Nobel Laureate William Sharpe. Indeed, the second set of index fund comparators that Respondents' damages expert utilized (the BNY Mellon funds) were particularly

appropriate here because those index funds were eventually included in the Plan's investment lineup—after this suit was filed—by the Plan's Investment Committee.

For these and other reasons set forth herein, Respondents respectfully request that the petition be denied.

STATEMENT

I. Factual Background

Putnam Investments, LLC ("Putnam") is an asset management company that creates, manages, and sells mutual funds. Pet App. 4a. It sponsors a 401(k) plan, known as the Putnam Retirement Plan, that covers eligible current and former employees of Putnam and related companies. *Id.* at 60a.

From the beginning of the relevant period until 2016, the Plan had between $416 million and $608 million in assets. CA1 JA 1624. During this time, *all* the Plan's designated investment options were actively managed funds affiliated with Putnam. Pet. App. 60a–61a. Moreover, with only limited exceptions for certain categories of funds, *all* Putnam open-end mutual funds were added to the Plan lineup upon launch (before they even had a track record). *Id.* at 61a. No effort was made to pick and choose the "best" Putnam funds for the Plan. CA1 JA 1687–88.

Under the Plan's governing documents, the Putnam Benefits Investment Committee ("PBIC") has fiduciary responsibility for selecting,

monitoring, and removing (as necessary) investment options in the Plan. Pet. App. 4a. But

> the PBIC did not independently investigate Putnam funds before including them as investment options under the Plan, did not independently monitor them once in the Plan, and did not remove a single fund from the Plan lineup for underperformance, even when certain funds received a 'fail' rating from Advised Asset Group, a Putnam affiliate.

Id. at 5a–6a.

Instead of monitoring the Putnam funds in the Plan, the PBIC left it to Putnam's investment division to keep tabs on Putnam's funds in the regular course of its business and shut down any funds that were failing. *Id.* at 63a–64a. However, the company's investment division had a different set of responsibilities and incentives, and was not an ERISA fiduciary. *Id.* at 68a; CA1 JA 2527–28. Accordingly, the PBIC could not "blindly [] defer to the decisions of someone else." Pet. App. 68a.[1]

Because the PBIC relied entirely on the investment division, it did not have any standards

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[1] The Chief Operating Officer of Putnam's investment division testified that he was never told the PBIC was relying on the investment division to monitor funds in the Plan. CA1 JA 2291. When asked at trial whether the investment division had agreed to serve as a fiduciary for the Plan, he responded, "What do you mean by 'fiduciary'?" *Id.* at 2288.

or criteria for monitoring Plan investments. *Id.* at 64a. Indeed, the minutes for one PBIC meeting acknowledged that "[i]t is uncertain what would be enough for Putnam to remove one of its own funds from the Putnam Retirement Plan line up." *Id.*

Putnam's approach to its fiduciary obligations notably "contrasts with Putnam's recommendation to other plan sponsors" to adopt an Investment Policy Statement ("IPS"), which would "document qualitative and quantitative criteria for monitoring and removing funds from 401(k) plans." *Id.* at 64a–65a n.9. Putnam's Fiduciary Planning Guide for its plan-sponsor clients deemed an IPS "a hallmark of an active, engaged fiduciary." *Id.* But the PBIC never adopted an IPS itself, fearing that it would be impossible to comply with objective investment criteria in an IPS while retaining the existing Putnam-only investment menu. As the Chair of the PBIC wrote:

> Plan advisors, consultants and attorneys regularly counsel on the importance of a Plan having an Investment Policy Statement. Yet some in the legal profession counsel that the only thing worse than not having an IPS is having a written IPS and not following it.

CA1 JA at 5877 (emphasis in original). Thus, the idea of adopting an IPS "died a quiet death." *Id.* at 1899.

The PBIC's lack of process for selecting and monitoring investment options made the Plan an

outlier. Respondents' investment expert, Dr. Steve Pomerantz, testified that he had "never seen a plan that included all of the assets of a given adviser by fiat." *Id.* at 2575. He also found that the proprietary funds in the Plan were highly unusual options for similar retirement plans—51 of the 69 funds were not included in *any* retirement plan with more than $250 million in assets, and 17 of the 18 remaining funds were held in at most 0.2% of similarly sized plans, *i.e.*, no more than five plans out of more than 2,600. *Id.* at 2569–70, 6087–89. Even Putnam's most "popular" fund, the Putnam Equity Income fund, was found in less than 1% of similarly sized plans. *Id.* at 2570, 6089.

Dr. Pomerantz opined that the PBIC's imprudence in selecting and retaining proprietary funds during the relevant period resulted in more than $40 million in losses to the Plan. Pet. App. 25a. As part of his analysis, Dr. Pomerantz offered two damages models at trial comparing the performance and fees of the proprietary funds in the Plan with two alternative portfolios of market-tracking index funds: one portfolio containing Vanguard index funds, and another containing BNY Mellon collective investment trusts ("CITs") that the Plan adopted in 2016 after this lawsuit was filed. *Id.* at 24a–25a. Taking account of the proprietary funds' relative gains as well as losses, Dr. Pomerantz concluded that the Plan suffered approximately $45.6 million in damages when compared to the Vanguard portfolio and $44.3 million when compared to the BNY Mellon portfolio. *Id.*

Much of these losses were attributable to the high fees that the Plan paid for Putnam's proprietary funds, which cost substantially more than the average fee charged to similarly sized plans for comparable funds. CA1 JA 88–95. Between December 2009 and trial, Putnam and its affiliates received $27.9 million (present-day value $37.3 million) in fees in connection with the Plan's proprietary investment holdings. *Id.* at 2560–61.

II. Procedural Background

A. District court dismisses all claims.

In November 2015, Respondents filed this lawsuit against Petitioners on behalf of themselves and similarly situated Plan participants. As relevant here, Respondents asserted two types of claims. First, they alleged that the payment of fees to Putnam's affiliates in connection with Plan investments constituted prohibited transactions under 29 U.S.C. § 1106. Second, they alleged that Petitioners breached their fiduciary duties of loyalty and prudence by maintaining a Plan lineup consisting entirely of Putnam-affiliated funds, without any meaningful investment review process and without considering unaffiliated investment alternatives. Respondents sought recovery under 29 U.S.C. § 1109(a), which provides that a breaching fiduciary is liable for "any losses to the plan resulting from [its] breach."

1. The district court dismissed the prohibited-transaction claims on a "case-stated" record. CA1 ADD 1–33; *see* Pet. App. 7a (describing

the case-stated procedure). The fiduciary duty claims then proceeded to a bench trial.

2. At trial, Respondents presented evidence that the PBIC had breached its fiduciary duty of prudence by automatically including Putnam-affiliated funds—and only Putnam-affiliated funds—in the Plan. Pet. App. 60a–61a. To establish the associated loss to the Plan, Respondents relied on expert testimony from Dr. Pomerantz. *Id.* at 76a n.18. In the middle of trial, while Dr. Pomerantz was still testifying and before Respondents had rested their case, the district court invited Petitioners to move under Fed. R. Civ. P. 52(c) for judgment as a matter of law on partial findings of fact. CA JA 2592. The district court then suspended the trial while the motion was pending, and subsequently granted Petitioners' motion and entered judgment against Respondents on their fiduciary-duty claims. Pet. App. 47a–78a.

In its opinion, the district court emphasized that the "PBIC's review of the Plan lineup was no paragon of diligence." Pet. App. 77a. The court thus stated that, based on the present record, "it would be warranted in ruling" that Petitioners breached their duty of prudence. *Id.* at 69a. However, it added that its remarks on breach were necessarily "tentative[]" because Petitioners had not yet presented their defense. *Id.* at 70a.

The court then addressed the issue of loss, and held that Respondents' evidence of loss was insufficient as a matter of law to establish a prima facie case. *Id.* at 70a–78a. But, as the First Circuit noted, "[i]t is not clear why the district court so

concluded." *Id.* at 25a. The district court appeared to take issue with the fact that losses were calculated on a Plan-wide basis for the entire lineup of Putnam funds. *See id.* at 72a, 73a, 76a, 77a n.20. However, this was entirely consistent with the nature of the alleged breach, which was based on the PBIC's overall failure to monitor the Putnam funds in the Plan. In any event, Dr. Pomerantz individually calculated the losses associated with each proprietary fund in the Plan, *id.* at 27a n.13, and gave Petitioners a credit where the fund over-performed its benchmark, *id.* at 25a. At no point did the district court express any reservation about Dr. Pomerantz's index fund benchmarks. In fact, it appeared to acknowledge their appropriateness during the course of Dr. Pomerantz's testimony. *See* CA1 JA 2580–81.

Because the district court determined that Respondents "failed to establish a prima facie case of loss," Pet App. 77a, the court never reached the issue of which party carried the burden of proof on causation. *Id.* at 77a n.19 (stating that the question "need not be resolved today"). For purposes of its analysis, the district court assumed "the burden falls on the fiduciaries to prove no loss was caused" by their breaches. *Id.* at 70a n.15.

B. First Circuit reverses and remands.

The First Circuit affirmed the dismissal of one prohibited-transaction claim and the breach of loyalty claim; vacated and remanded the dismissal of the other prohibited transaction claim; and vacated and remanded the dismissal of the breach of prudence claim. Pet. App. 45a.

1. With respect to the breach of prudence claim (the only claim at issue here), the First Circuit concluded that the district court erred in holding that "the evidence was insufficient to make out a prima facie case of loss." *Id.* at 25a–26a. The court explained that the district court had "conditionally found" that "the entire portfolio of investment options" in the Plan "was selected by the use of imprudent means." *Id.* at 28a. Therefore, "to determine whether there was a loss" caused by that breach, the court concluded that "it is reasonable to compare the actual returns on that portfolio to the returns that would have been generated by a portfolio of benchmark funds or indexes"—a methodology endorsed in the Restatement of Trusts. *Id.* (citing RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. b(1)).

The First Circuit emphasized that its holding was preliminary. It observed that Dr. Pomerantz's analysis "may be subject to challenge" on remand depending on whether "Pomerantz necessarily picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period." *Id.* at 27a–29a. Further, the court noted that if the district court determines at the conclusion of the trial that the Plan suffered no "actual loss," "the issue of causation need not be decided." *Id.* at 39a n.17.

2. The First Circuit then "turn[ed] to the question of causation." *Id.* at 29a. The court held that *if* the district court finds that Respondents have "shown a breach of fiduciary duty and a loss to the plan" in connection with the retention of

Putnam's proprietary funds, the burden then will fall on Petitioners as the breaching fiduciaries to "to prove that such loss was not caused by [their] breach." *Id.* at 39a.

The First Circuit observed that where, as here, the statute lacks any "explicit textual direction" on a particular question, this Court "has time and again adopted ordinary trust law principles to construe ERISA." *Id.* at 33a. Those principles provide a clear answer here, because the common law of trusts has long "place[d] the burden of disproving causation on the fiduciary once the beneficiary has established a loss associated with the fiduciary's breach." *Id.* at 32a. And the court concluded that the traditional burden-shifting framework is consistent with ERISA's language and purpose. *Id.* at 34a–37a.

The First Circuit also determined that the burden-shifting framework is independently justified by the familiar rule that the burden of proof "may be allocated to the defendant when he possesses more knowledge relevant to the element at issue." *Id.* at 37a. In so holding, the court emphasized that the breaching fiduciary is in a far better position than the plaintiff to come forward with evidence of what the fiduciary "would have done had it not breached its duty in selecting investment vehicles." *Id.* at 38a.

Based on its holdings on loss and causation, the First Circuit instructed the district court to:

> complete the bench trial in order to definitively decide whether Putnam

> breached the duty of prudence *and, if so*, to decide whether plaintiffs have shown a loss to the Plan *and, if so*, to decide whether Putnam can meet its burden of showing that the loss most likely would have occurred even if Putnam had been prudent in its selection and monitoring procedures.

Id. at 40a (emphasis added). Instead of proceeding with their defense at trial, Petitioners filed the instant petition.

REASONS FOR DENYING THE PETITION

I. This Court should deny review of the causation issue.

a. This case is not a suitable vehicle for resolving the question presented.

In 2015, this Court declined to review the Fourth Circuit's decision in *Tatum*, which adopted the same burden-shifting framework that the First Circuit adopted here. Petitioners emphasize that last year, in *Pioneer Centres*, this Court again asked for the views of the Solicitor General on this question. But there is no reason to take even that step here because this case suffers from four independent vehicle deficiencies that were not present in *Pioneer Centres*.

1. Most obviously, *Pioneer Centres* involved a final decision affirming a grant of summary judgment to the defendant. 858 F.3d at 1327. This case, in contrast, is interlocutory. No matter how this Court were to resolve the questions Petitioners

present, the case still would have to go back to the district court for further proceedings. This is because the First Circuit also revived Respondents' claim that the Plan's fiduciaries caused the Plan to engage in prohibited transactions under 29 U.S.C. § 1106(b)(3), and "remand[ed] for the district court to reconsider whether" Respondents satisfied the requirements of Prohibited Transaction Exemption 77-3 ("PTE 77-3") Pet. App. 19a.[2] This Court should allow that prohibited-transaction claim to reach finality to avoid the possibility of piecemeal petitions in this case. Under this Court's established practice, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 24 U.S. 251, 258 (1916); *see also Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). And several aspects of this case make

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[2] In resolving this issue on remand, the district court will specifically need to consider whether "the Plan was treated any less favorably . . . than other comparably situated plans," *id.* at 19a. In doing so, the district court must account for the fact that "Putnam's investment managers pay no revenue sharing to or for the benefit of the Plan," *id.* at 15a, but do offer such revenue sharing to other plans, *id.* at 14a–15a. While the district court may consider whether "the administrative fees paid by Putnam" outweigh this lost revenue sharing, it may "not consider the discretionary contributions made by Putnam to Plan participants." *Id.* at 19a. The First Circuit held that the district court erred in its earlier case stated order by giving Putnam an "offset" for those contributions, as this would "allow employers to claw back with their fiduciary hands compensation granted with their employer hands." *Id.* at 17a.

following that general rule especially appropriate here.

First, this is not a circumstance where allowing the case to return to the district court would result in prolonged discovery and motions practice. The further proceedings the First Circuit has ordered will be modest. The parties have agreed to a "case-stated" record for the prohibited transaction claim, and the trial on the breach of prudence claim is already more than halfway done, with seven of an expected eleven days already completed. The remaining proceedings in the district court, including any post-trial motion practice, could thus be wrapped up in a matter of a few months—less time, in fact, than it might take the Solicitor General to respond to a call for its views.

Second, it would put the cart before the horse to address the tertiary issue of causation before the district court makes definitive findings on the antecedent issues of breach and loss. In the event that either of those initial issues is resolved in Petitioners' favor, there will be no need to address the causation issue—and the question presented here will have no effect on the outcome of this case. *See* Pet. App. 39a n.17. And if the district court does, in fact, find both a breach and loss on remand, its findings regarding breach and loss will necessarily inform whether there was a causal connection between the two. It is not possible to make a reliable determination regarding whether a breach is causally related to a loss before the

specific nature of the breach and loss are first established.

Third, allowing trial to play out also would be helpful to this Court's resolution of the burden-shifting question if the Court were ultimately inclined to decide it. "[O]ne important reason" the First Circuit required breaching fiduciaries to disprove causation in connection with investment losses is because they "possess[] more knowledge relevant to [the causation] issue." *Id.* at 37a. As the First Circuit noted:

> In such circumstances, it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles, only to be told to 'guess again.' It makes much more sense for the fiduciary to say what it claims would have been done and for the plaintiff to respond to that.

Id. at 38a. The validity and power of this reasoning would be best evaluated in the context of a concrete record in which both sides have been heard—not on a partial record from a half-finished trial.

2. Petitioners not only seek interlocutory review; the question they present is mismatched to the posture of the case. Petitioners ask this Court to resolve a purported circuit split on the allocation of the burden of *persuasion*, but it is really the burden of *production* that matters at this stage of the case.

The "burden of proof" encompasses "two distinct burdens: the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). The First Circuit joined several other circuits in concluding that *both* the burdens of production and persuasion shift to the breaching fiduciary once an ERISA plaintiff establishes a breach and an associated loss. Pet. App. 38a–39a. However, because the case was dismissed mid-trial before Petitioners presented their defense, "a mere shift in the burden of production rather than the burden of persuasion" would be sufficient to require a remand for further trial proceedings. *See id.* at 38a. Petitioners do not raise any issue relating to the burden of production, and their arguments regarding the ultimate burden of persuasion are necessarily premature until they present some evidence of their own on causation. If they are unable to produce evidence on remand that a prudent fiduciary would have adopted the same investments (which is likely considering that 51 of the 69 proprietary funds in the Plan were not included in *any* other plans of similar size), the burden of persuasion will never come into play. Moreover, even if this Court were to wade into these burden-shifting waters now, any holding regarding the burden of production would not resolve the alleged circuit split regarding the

burden of persuasion that forms the centerpiece of the petition. *See infra* at 22–24.[3]

3. Notably, the question presented is one that *both* parties argued was non-dispositive in their earlier briefing, and that the district court also determined to be non-dispositive.

Petitioners argued before the First Circuit that "adopting a burden-shifting framework would not affect the outcome of this case," and "[a]ny ruling on the burden shifting framework is therefore unnecessary." Appellees' CA1 Br. 50. In so arguing, Petitioners stated that the dispositive issue was whether Respondents met "their initial burden of showing a prima facie loss." *Id.*

The district court agreed. It assumed (without definitively deciding) that "the burden shifting framework for loss causation" applied, Pet. App. 70a n.15, but found that "Plaintiffs fail[ed] to establish a prima facie case of loss" in any event, *id*. at 77a n.19.

Although Respondents strenuously disagreed with Petitioners' arguments and the district court's analysis regarding whether they established a

[3] Petitioners make much of the First Circuit's statement that "[b]ecause the district court resolved this case mid-trial, the burden of persuasion makes all the difference here." Pet. App. 38a n.16. However, Petitioners take this statement, which was made in a footnote, out of context. As the First Circuit recognized, the burden of persuasion matters only if a case is "in evidentiary equipoise." *Schaffer*, 546 U.S. at 58; *see* Pet. App. 38a. This could not be such a case, because Petitioners have not yet offered *any* evidence on the relevant issue.

prima facie case of loss, Respondents also argued that the burden-shifting question was not essential to the outcome of the case because "[e]ven assuming that Plaintiffs were required to prove loss causation, they did so, both on a Plan-wide basis and a fund-by-fund basis." Appellants' CA1 Br. 65. As noted above and in Respondents' earlier briefing, the evidence shows that Petitioners were "unique" among retirement plan fiduciaries in offering only Putnam-affiliated funds, CA1 JA 2865; that other plans do not include all of the assets of a given mutual fund company by fiat, *id.* at 2575; and that the vast majority of the funds in the Plan (51 of 69) were not included in the investment lineup of *any* retirement plan with more than $250 million in assets, *id.* at 2569–70, 6087–89. Thus, prudent fiduciaries would not—and did not—make the same investment decisions as Petitioners.[4]

Further, the record reflects what Petitioners specifically would do—and did do—upon adopting a prudent fiduciary process: include index-tracking BNY Mellon CITs in the Plan lineup. *See*

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[4] Petitioners argue that Respondents cannot establish causation because the Putnam funds in the Plan were not objectively imprudent. Pet. 35. But even assuming such a showing were necessary, Respondents showed objective imprudence by establishing that Putnam's funds were not "highly regarded 'blue chip' stock[s]." *See Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). To the contrary, they were poorly regarded by the fiduciaries of similar plans, who almost universally rejected them.

Appellants' CA1 Br. 21–22, 66–68. It is undisputed that these funds, added to the Plan in 2016, were prudent investment options. CA1 JA 1673–74, 2448, 2573. Thus, Dr. Pomerantz's testimony explaining the difference in cost and performance between the imprudently retained Putnam investment options and the prudently adopted BNY Mellon portfolio established a causal link between Petitioners' imprudence and Respondents' loss.

4. Finally, it is also important to note that the First Circuit's holding here accords with the Fourth Circuit's holding in *Tatum*, 761 F.3d at 346 (which this Court left undisturbed, 135 S. Ct. 2887, 192 (2015)), and the longstanding views of the DOL, as the Solicitor General explained in that case, *see* United States Amicus Br. at 8–14, 135 S. Ct. 2887 (2015) (No. 14-656).[5] In *Pioneer Centres*, in contrast, the petitioner argued that the Tenth

[5] *See also, e.g.*, Secretary of Labor Amicus Br. at 1–2, *Tatum*, 855 F.3d 553 (4th Cir. 2017) (No. 16-1293) ("defending" its position that "the burden is on the fiduciaries to prove that the loss would have occurred in any event" in order to "ensure that breaching fiduciaries cannot easily escape liability for their breaches"); United States Amicus Br. at 18, *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) (No. 09-804) ("[T]he prevailing rule under trust law is that when a beneficiary shows a breach of trust and a prima facie case of loss resulting from the breach, the burden shifts to the trustee to prove that any loss is not attributable to the breach."); Secretary of Labor Amicus Br. at 8, *Silverman v. Mutual Ben. Life Ins. Co.*, 138 F.3d 98 (2d Cir. 1998) (No. 96-7795) ("The Secretary submits that the breaching fiduciary should bear the burden of persuasion to disprove causation once the plaintiff shows a *prima facie* loss to the plan.").

Circuit had *departed* from *Tatum* and from the DOL's longstanding view. *See Pioneer Ctrs.* Pet. 8-23, 139 S. Ct. 50 (No. 17-667). Thus, even if certiorari review might conceivably be warranted in in a case like *Pioneer Centres* to ensure that defendants properly abide by their ERISA obligations, no such action is warranted here.

b. Petitioners overstate the purported circuit split, which does not apply to the situation presented here.

Even apart from these fatal vehicle problems, the purported circuit split that Petitioners cite is more imagined than real.

1. In 2015, the Solicitor General explained that "there [was] no clear circuit split" regarding who bears the burden of proving causation in ERISA fiduciary breach cases. *See* United States Amicus Br. at 7, 11–14, *Tatum*, 135 S. Ct. 2887 (No. 14-656). The Solicitor General explicitly addressed and distinguished almost all of the cases that Petitioners now contend evidence a "circuit split." Although Petitioners cite two intervening decisions, neither materially alters the landscape.

The first cited decision, *Pioneer Centres*, did not involve a claim that a plan fiduciary imprudently selected investments, and the causation question did not turn on which alternative investments the plan's fiduciaries would have selected had they acted prudently. Instead, the plaintiffs in *Pioneer Centres* challenged the actions of an independent fiduciary outside the plan in refusing to approve a stock purchase

transaction involving a car dealership. 858 F.3d at 1327–31. In its defense, the independent fiduciary argued that its actions did not cause a loss to the plan because the transaction also required approval from the dealership's franchisor, which never would have been granted. *Id.* at 1331–32. Because the causation issue involved the hypothetical actions of a third party, not of the breaching fiduciary itself, the Tenth Circuit had no occasion to consider the established principle that the burden of proof "may be allocated to the defendant when he possesses more knowledge relevant to the element at issue." Pet. App. 37a; *see Schaffer*, 546 U.S. at 60. Moreover, the allocation of the burden of proof made no difference to the outcome because the defendant's evidence of lack of causation was "overwhelming[]" and "undisputed" by plaintiffs. *Pioneer Ctrs.*, 858 F.3d at 1338–40. Indeed, the district court order that the Tenth Circuit affirmed expressly stated that the burden-shifting issue was not dispositive. *See Pioneer Ctrs. Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.,* No. 12-CV-02547, 2015 WL 2065923, at *7 ("[Defendant] argues that regardless of who bears the burden of proving a 'causal link' between the alleged breach and the [plan's] alleged loss, summary judgment is appropriate as there is no admissible evidence that suggests Land Rover [the franchisor] would have approved the transaction. The Court agrees . . . .").

Petitioners also point to the Sixth Circuit's recent statement that the "plaintiff must show a causal link" between a breach and loss. *Saumer v.*

Cliffs Nat. Res. Inc., 853 F.3d 855, 863 (6th Cir. 2017) (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)). However, in merely citing *Kuper* without further discussion, the Sixth Circuit did nothing to alter the landscape on this issue.

2. Even if disagreement exists regarding who bears the burden of *persuasion* on causation, there is no clear disagreement among the circuits regarding who bears the initial burden of *production* (the only burden at issue here given the current posture of the case).

When the defendant is in a much better position to know vital facts on an issue, it is not unusual for the defendant to be assigned the burden of production while leaving the burden of persuasion with the plaintiff. For example, when a shipowner breaches its common-law duty to furnish a seaworthy vessel and loss occurs, “the law lays on him the duty to come forward” with evidence showing his breach did not cause the loss because “the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability.” *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 108–12 (1941). This obligation, however, “does not cause the burden of proof to shift”; “the burden of persuasion . . . remains upon [the plaintiff], where it rested from the start.” *Id.* at 111. Similarly, when plaintiffs produce prima facie evidence of race or sex discrimination, the burden of production then shifts to defendants to offer “a legitimate, nondiscriminatory reason” for their actions. *U.S. Postal Serv. Bd. of Governors v.*

Aikens, 460 U.S. 711, 714–16 (1983) (Title VII claims); *see also Johnson v. California*, 545 U.S. 162, 170–72 (2005) (*Batson* claims). But plaintiffs still carry the burden of persuasion. *See id.*

As the First Circuit observed, this reasoning supports, at the very least, "requiring the fiduciary [in this context] to first put forward its view of what likely would have happened but for the alleged fiduciary breach." Pet. App. 38a. And, indeed, none of the circuit decisions that Petitioners claim require plaintiffs to carry the burden of persuasion in this context have held that plaintiffs *also* carry the burden of production. The recent decision in *Pioneer Centres* is a good example, as the causation issue was resolved only after the defendants put forward admissible evidence on the issue of causation and the plaintiffs failed to rebut that evidence. No. 12-CV-02547-RM-MEH, 2015 WL 2065923, at *1–*4. Here, by contrast, Respondents are the only parties who have produced evidence on causation. It thus cannot be said that this case would come out differently in any other circuit. To the contrary, Judge Wilkinson's dissenting opinion in *Tatum*, on which Petitioners rely, explicitly allowed for the possibility that "the burden of *production* shifts to the defendant once the plaintiff makes a prima facie case for breach and loss." 761 F.3d at 375.

c. The burden of proof on causation is rarely outcome-determinative and does not affect primary conduct.

The purely procedural question of who bears the burden of proof on causation in ERISA fiduciary breach cases is not so important that it requires this Court's immediate attention (especially on an incomplete factual record).

1. The question presented involves only the method for resolving disputes in litigation over causation; it has nothing to do with the substantive requirements of ERISA. Moreover, the burden of proof on causation is relevant only in cases where "the question of causation is 'in evidentiary equipoise.'" Pet. App. 38a (quoting *Schaffer*, 546 U.S. at 58). Because "very few cases will be in evidentiary equipoise," *Schaffer*, 546 U.S. at 58, resolution of this issue would be of limited value at best.

Even in ERISA cases in which parties argue about the burden of proof regarding causation, the issue typically makes no difference to the outcome. Such was the case in *Tatum*, where—after unsuccessfully seeking certiorari—the fiduciary defendants prevailed on remand. *Tatum v. R.J. Reynolds Tobacco Co.*, No. 1:02-CV-00373, 2016 WL 660902, at *1 (M.D.N.C. Feb. 18, 2016), *aff'd sub nom. Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553 (4th Cir. 2017). In numerous other cases, the issue also was deemed "irrelevant" to the ultimate outcome. *Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009); *see also, e.g.*, *In re Unisys Sav.*

Plan Litig., 173 F.3d 145, 160 (3d Cir. 1999). Indeed, Petitioners here so argued. *See supra* at 18–19.

2. Nor does the procedural question presented affect primary conduct. As the First Circuit noted, Petitioners "point[] to no evidence that employers in, for example, the Fourth, Fifth, and Eighth Circuits, are less likely to adopt ERISA plans." Pet App. 39a–40a. Likewise, there is no evidence that existing plans are administered any differently based on any purported jurisdictional differences regarding burden-shifting. To the contrary, the plan sponsor in *Pioneer Centres* argued that there was no reason to believe that the burden-shifting question "would have any impact on how ERISA trusts are administered throughout the country." Br. in Opp. 16, *Pioneer Ctrs.*, 139 S. Ct. 50 (No. 17-667).

That leaves Petitioners asserting, purely in the abstract, that they fear meritless litigation. Pet. 22. However, these fears are unwarranted, as plaintiffs must first establish a fiduciary breach (and investment loss) before the issue of loss causation ever arises. As a result, fiduciaries who comply with their duties have nothing to fear.

While there has been an overall increase in ERISA litigation involving defined contribution plans, this simply reflects the significant growth of these plans, which have largely supplanted pension plans. *See* BANKRATE, *Pensions Decline as 401(k)*

Plans Multiply (July 24, 2014).[6] The uptick in litigation has nothing to do with the burden of proof on loss causation.

d. The First Circuit's decision is correct on the merits.

In any event, the burden-shifting framework the First Circuit adopted correctly interprets ERISA and this Court's precedent.

1. ERISA's fiduciary duties are "derived from the common law of trusts." *Tibble*, 135 S. Ct. at 1827–28. Consequently, this Court has consistently relied upon trust law to implement those duties. *See id.*; *see, e.g.*, *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112–14 (2008) (applying trust law to determine a conflict-of-interest issue under ERISA); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) (explaining that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility" under ERISA). And contrary to Petitioners' contention, this line of cases extends beyond substantive rules

[6] Available at https://bit.ly/2Hs6lBw (last visited Mar. 8, 2019). In any event, there is nothing inherently "meritless" about ERISA litigation; to the contrary, the evidence suggests that litigation such as this has played a *positive* role in encouraging plan fiduciaries to reduce fees. *See* Ashlea Ebeling, *401(k) Fees Continue to Drop*, FORBES (Aug. 20, 2015) (noting that "in part in response to 401(k) fee litigation," employers have "aggressively negotiate[d] fees and chang[ed] investment fund line-ups to include low-cost funds"), available at https://bit.ly/2C6jJrx (last visited Mar. 8, 2019).

and also applies to "procedural rules that govern ERISA *litigation*." Pet. 26 (emphasis in original). *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421, 439–40 (2011) (applying trust law to determine the nature of remedies under ERISA); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (applying trust law to determine the appropriate standard of review).

Here, trust law provides a direct answer as to which party bears the burden of proof on causation in a breach of fiduciary duty case. The Restatement of Trusts defines fiduciary liability using the same language as 29 U.S.C. § 1109(a), holding trustees liable for loss "resulting from" a breach. RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. e (2012). It then explains under this language that "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, *the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach*." *Id.* cmt. f (emphasis added); *see also* George G. Bogert & George T. Bogert, THE LAW OF TRUSTS AND TRUSTEES § 871, at 156–57 (rev. 2d ed. 1995) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee.").

Petitioners are wrong to suggest that this rule was not yet well established when ERISA was enacted in 1974. Pet. 27. The Restatement in effect at the time stated that when a trustee breached its duties and a loss occurred, the trustee had "a *defense* to the extent that a loss would have

occurred even though he had complied with the terms of the trust." RESTATEMENT (SECOND) OF TRUSTS § 212(4) (1959); *see also Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921) (applying the burden-shifting framework in the context of a breach of a "fiduciary nature").

2. The First Circuit's adoption of the burden-shifting framework is also consistent with ERISA's purpose and sound administrative principles. In enacting ERISA, Congress intended to "protect the interests of plan participants and beneficiaries." S. Rep. No. 93-127, at 29. The statute thus codifies fiduciary principles "developed in the evolution of the law of trusts"—and offers even greater protections where "reliance on conventional trust law . . . is insufficient" to carry out the statute's protective mission. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

There is no reason to offer *less* protection than trust law here. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). When a court has found a fiduciary guilty of imprudent decision-making behind closed doors, it is highly unlikely that the fiduciary will nonetheless happen upon a prudent plan menu. And "[t]he risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred." 2 MCCORMICK ON EVIDENCE § 337 (7th ed. 2013). It is therefore appropriate to shift the burden to the breaching fiduciary to prove that

some factor outside of its imprudent process caused the plaintiffs' loss.

3. At the very least, for the reasons set forth above, the First Circuit correctly perceived that a defendant's special access to knowledge in this situation warrants burden shifting. Pet. App. 38a; *see supra* at 12. Petitioners dispute that defendants have better access to relevant information regarding causation because the relevant inquiry is "objective" in nature. Pet. 25–26. However, even if so, that inquiry still turns in part on things like the "circumstances [that] informed the[] fiduciary's decision-making" and the fiduciary's "goal and objectives" in managing the plan. *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011). Defendants are clearly in a "better position" to know those facts. *Commercial Molasses*, 314 U.S. at 111.

II. This Court should deny review of the loss issue.

Petitioners separately raise a fact-specific issue regarding the loss methodology utilized by Respondents' expert. However, this issue is also unsuitable for certiorari.

a. The First Circuit's narrow holding on this "fact-intensive question" does not create a circuit split and does not warrant review.

The First Circuit held, under the circumstances of this case, that comparing the performance of the proprietary funds in the Plan with market-tracking index funds potentially could

establish a loss, and thus that the district court erred in determining that Respondents' showing of loss was "inadequate as a matter of law." Pet. App. 27a. Petitioners do not contend that this holding creates a circuit split or conflicts with this Court's precedent. Nor could they.

The selection of comparator funds is a "fact-intensive question" (Pet. 32) that depends on, among other things, "the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case." RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. b(1). This admittedly fact-specific question is precisely the type of question that does not warrant certiorari review. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, at *2 (U.S. Jan. 22, 2019) (Alito, J., concurring in denial of certiorari) (stating that this Court "generally do[es] not grant [discretionary] review to decide highly fact-specific questions.").

b. Any review of the loss issue is premature in any event.

As discussed *supra*, this Court should decline review of this case in its current mid-trial posture because there is much to be decided by the district court on remand, including the threshold issue of whether a breach has occurred. In the event that the district court finds a breach, additional matters relating to the loss issue will still need to be decided. Contrary to Petitioners' arguments, the First Circuit did not adopt a "categorical[]" rule making loss a "foregone conclusion," Pet. 29, 33. To

the contrary, the First Circuit held that Petitioners are free to dispute on remand whether Dr. Pomerantz "picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period"—questions that remain unresolved because "the district court never reached" them. Pet. App. 28a–29a.

Faced with this obvious vehicle problem, Petitioners resort to suggesting no future case will bring the loss issue to this Court because the First Circuit's decision will pressure defendants to settle. Pet. 33-34. But that argument is entirely unfounded. Just six months ago, another asset management firm, defended a similar breach of fiduciary duty claim involving its 401(k) plan at trial. *See Wildman v. Am. Cent. Servs., LLC*, ___ F. Supp. 3d ___, No. 4:16-CV-00737-DGK, 2019 WL 293382 (W.D. Mo. Jan. 23, 2019). In that case, "Dr. Pomerantz conducted an identical analysis" to the one in this case based on index fund comparisons. *Id.* at *18. After a full trial, the district court ruled in favor of the defendants on the issue of loss based on the specific facts of that case. *Id.* at *19. Petitioners in this case (and any other asset management firms that may find themselves party to suit) are no less capable of presenting their defenses at trial, especially given that *Wildman* was tried in the Eighth Circuit where burden-shifting on causation indisputably applies.

c. The First Circuit's opinion is correct.

In any event, the First Circuit's preliminary ruling on the loss issue is correct. There was nothing "radical" (Pet. 29) about its analysis.

1. The First Circuit's opinion properly applied longstanding common-law rules governing the determination of loss resulting from a breach of fiduciary duty. The Restatement of Trusts explains that losses in cases such as this may be determined by comparing the investments in the trust with "the projected returns on indefinite hypothetical investments." RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. b(1). Such "hypothetical investments" may include "suitable index mutual funds or market indexes." *Id.*; *see also Gilbert v. EMG Advisors, Inc.*, 172 F.3d 876 (9th Cir. 1999) (approving the measurement of damages via comparison to the Lehman Government Index-Aggregate).

Both the Vanguard and BNY Mellon CIT portfolios that Dr. Pomerantz used as comparators for the Plan consisted of market-tracking index funds. Thus, Dr. Pomerantz's testimony comparing the Plan's lineup to these "hypothetical investments" was consistent with the Restatement and not insufficient "as a matter of law." *See* Pet. App. 25a.

Indeed, Dr. Pomerantz's analysis was consistent with established trust law for a second, case-specific reason. The Restatement also endorses comparisons to "other investments . . . of the trust in question." RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. b(1). The BNY Mellon CIT portfolio that

Dr. Pomerantz used in his second model contained funds that the PBIC added to the Plan lineup in February 2016 and that were indisputably prudent. Therefore, on this independent basis, Dr. Pomerantz's methodology passed legal muster. *See Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) ("In determining what the Plan would have earned had the funds been available for other Plan purposes, the district court should presume that the funds would have been treated like other funds being invested during the same period in proper transactions.") (citation and internal quotation marks omitted).

2. Petitioners' criticisms of Dr. Pomerantz's market index fund comparisons are groundless (and also unsupported by any record evidence at this stage, as Petitioners have not yet presented their experts or completed their cross examination of Dr. Pomerantz).

For example, Petitioners contend that the actively managed funds in the Plan cannot be compared to index funds. Pet. 30. However, leading economics scholars recommend precisely this approach to measuring the value of active fund managers like Putnam. As Economics Nobel Laureate William Sharpe has stated, "[t]he best way to measure a manager's performance is to compare his or her return with that of a comparable passive alternative." William F. Sharpe, *The Arithmetic of Active Management*, FIN. ANALYSTS J., Jan.–Feb. 1991, at 8; *see also* Robert C. Jones & Russ Wermers, *Active Management in Mostly Efficient Markets*, FIN. ANALYSTS J., Nov.–

Dec. 2011, at 31 ("[T]he relevant comparison is to the passive alternative and not to the index itself.").[7]

Petitioners also characterize Dr. Pomerantz's comparisons as based on "hindsight." Pet. i, 14, 33. However, Dr. Pomerantz plainly was *not* using hindsight to maximize damages, as his analysis recognized that certain funds outperformed their BNY Mellon or Vanguard index fund comparators, and he gave Defendants a corresponding credit in his plan-wide loss tabulations. CA1 JA 2582–83, 2588. The fact that Dr. Pomerantz's comparators are endorsed by the Restatement further demonstrates that those comparators were based on principle, and not opportunistic hindsight. The Restatement recognizes that a proper choice of comparators "should not rely on hindsight." RESTATEMENT (THIRD) OF TRUSTS §100, cmt. b(1). Yet, the very same commentary endorses "index mutual funds" as comparators. *Id.* The clear implication is that market index funds are standard benchmarks that can and should be used to *avoid* hindsight bias, as they simply compare performance against the relevant market rather than the best-performing funds within that market.

3. Petitioners also make much of the First Circuit's statement that a plan fiduciary "can easily

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[7] The record is undisputed that Putnam's actively managed funds "carried higher fees than passively-managed funds." Pet. App. 24a. Thus, "[f]or each Putnam fund held by the Plan, Pomerantz asked *whether the Plan got something for those higher fees*." *Id.* (emphasis added).

insulate itself by selecting well-established, low-fee and diversified market index funds." Pet. App. 40(a). Petitioners argue that this statement will "force[] a universal shift to index funds." Pet. 34. But this shift is already underway due to ordinary market forces, as the percentage of defined-contribution plan assets held in index funds more than doubled between 2005 and 2017. *See* INVESTMENT COMPANY INSTITUTE, *Investment Company Factbook* 198 (58th ed. 2018).[8]

There is good reason for this transformation. Numerous studies show that most actively managed funds are unable to beat their index fund benchmark net of fees. *See, e.g.,* MORNINGSTAR, *Active/Passive Barometer* 2 (Aug. 2018) ("The average dollar in passively managed funds has tended to outperform the average dollar invested in actively managed funds.")[9]; James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. PA. J. BUS. L. 483, 485–86 (2013) ("Decades of research have shown that, when investing in relatively liquid and efficient markets such as the U.S. stock market, most people are better off putting their money in low-cost index mutual funds, which attempt to track the overall market or a major market segment, rather than in more expensive, actively managed mutual funds, which attempt to beat the market by betting on

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[8] Available at https://bit.ly/2NRBXlf (last visited Mar. 8, 2019).

[9] Available at https://bit.ly/2tc6DV0 (last visited Mar. 8, 2019).

particular stocks or groups of stocks."); Russ Wermers et al., *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, 65 J. FIN. 179, 181 (2010) (finding that more than 99% of actively managed funds do not beat their index fund alternatives over the long term net of fees); RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. m (reporter's note) (discussing SEC study finding that "[m]ost actively managed funds failed to earn market returns net of their cost.").

In any event, there is nothing in the First Circuit's opinion that compels the use of index funds. The court expressly stated that "any fiduciary that decides it can find funds that beat the market will be immune to liability unless a district court finds it imprudent in its method of selecting such funds, and finds that a loss occurred as a result." Pet. App. 40(a). Thus, liability only arises when (as in this case) plan fiduciaries fail to give appropriate thought to their choice of investments for the plan.[10]

CONCLUSION

For the foregoing reasons, the petition should be denied.

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[10] Consistent with the First Circuit's approach, the Restatement allows for the use of active management strategies, but cautions that active strategies entail additional "investigation and analysis expenses," and "these added costs . . . must be justified by realistically evaluated return expectations." Restatement of Trusts (Third) §90, cmt. h(2).

Respectfully submitted.

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