No. 24-620

IN THE

Supreme Court of the United States

JAIME H. PIZARRO, *et al.*,

Petitioners,

v.

THE HOME DEPOT, INC., *et al.*,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF

ERISA plans are "affected with a national public interest." 29 U.S.C. § 1001(a). When fiduciaries breach their duties, they threaten the "continued well-being and security of millions of employees." *Id.* Under trust law, once beneficiaries show breach of duty and a related loss, the fiduciaries must prove that the loss would have occurred regardless of their breach. Restatement (Third) of Trusts § 100 *cmt.* f (2012). At stake on this appeal is whether ERISA fiduciaries must do the same under 29 U.S.C. § 1109(a).

As Respondents concede, the circuits are split on this question. Opp'n 31; Pet. 11-20. This split threatens Congress's goal of establishing uniform standards for the "evaluation of fiduciary conduct." H.R. Rep. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4655. It also affects the substantive rights of employees nationwide. Hardly a mere "procedural rule," Opp'n 32, the burden of persuasion is "a rule of substantive law"—one that "may be decisive of the outcome." *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (first quote); *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965) (second quote) (citation omitted).

That was the case below. Having held Petitioners would bear the burden on causation at trial, the lower courts focused on whether Petitioners' evidence satisfied their trial burden. App. 21a, 28a, 77a, 80a, 100a, 106a, 111a. Had the burden been shifted, the analysis would have reversed: The courts would have evaluated whether Respondents' evidence demonstrated, as a matter of law, that they made objectively prudent investment decisions. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Despite

Respondents' claims, Opp'n 27, the lower courts never reached that question. Since the lower courts' decisions rest on burden-shifting, this presents an ideal vehicle to address the circuit split.

This Court should resolve that split by reversing the Eleventh Circuit and holding that § 1109(a) incorporates trust law's burden-shifting framework. The Eleventh Circuit flouted this Court's instruction to use trust law as a "starting point" for analysis when ERISA's text is silent. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (citation omitted). Instead, it adopted an inverse presumption: that Congress rejected trust law absent express adoption within ERISA's text. App. 14a–15a; *see also* Opp'n 17. Thus, while it acknowledged supportive trust law precedent, the court rejected burden-shifting. App. 14a.

Every other court of appeal to address the question presented—whether ruling for or against burden-shifting in ERISA—has found that trust law adopts a burden-shifting framework. *See Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Trs. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1335-36 (10th Cir. 2017) (noting trust law adopts burden-shifting); Pet. 13-14 (collecting cases). Respondents alone assert the contrary. Opp'n 1. Under trust law, both before and after ERISA's enactment, a breaching fiduciary had the burden to prove that its misconduct did not cause losses to the trust. *See* Pet. 23; *Est. of Stetson*, 345 A.2d 679, 690 (Pa. 1975) ("[T]he burden of persuasion ought to shift to the trustee ….") (citing Restatement (Second) of Trusts § 212(4) (1959)).

This case presents an ideal opportunity for this Court to clarify that § 1109(a) retains trust law's burden-shifting

principles. Fiduciaries who have breached their duties and wish to avoid liability must prove that they nevertheless—"through prayer, astrology or just blind luck"—made prudent decisions. *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). The Court should grant review.

I. THERE IS NO DISPUTE THAT THE CIRCUITS ARE SPLIT

All parties agree that the circuits are split. The First, Second, Fourth, Fifth, and Eighth Circuits endorse some form of burden-shifting while the Tenth and Eleventh reject it.[1] Pet. 11-20; Opp'n 31. There is an undisputed lack of national uniformity in how courts evaluate § 1109(a) claims.

II. THE BURDEN OF PROOF IS AN ISSUE OF NATIONAL IMPORTANCE

Americans invest $11 trillion of their retirement savings in ERISA plans.[2] They entrust plan fiduciaries to continuously "monitor [plan] investments and remove

1. Respondents claim that the Sixth, Seventh, and Ninth Circuits "never embraced burden shifting" without disputing Petitioners' observation that they have never squarely ruled on the question. Opp'n 31 n.4. *See also* App. 12a n.2 (noting these circuits have ruled "without commenting on the burden-shifting argument").

2. U.S. Dep't of Labor, *Private Pension Plan Bulletin*, 3 (September 2024), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2022.pdf.

imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). When fiduciaries breach those duties—"the highest known to the law"—they jeopardize "the continued well-being and security of millions of employees and their dependents." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (citing Restatement (Second) of Trusts § 2 *cmt*. b (1959)) (first quote), 29 U.S.C. § 1001(a) (second quote). At stake here is whether fiduciaries proven to have breached ERISA's duties must shoulder *any* burden of proof in order to escape liability.

Respondents ask this Court to brush aside these stakes on little more than their word. First, Respondents claim—without authority—that the burden of proof is "relatively unimportant" because "in the real world," the evidence is rarely in equipoise. Opp'n 31-32. This Court has stated otherwise. "Where the burden of proof lies" is "rarely without consequence and frequently may be dispositive to the outcome." *Lavine v. Milne*, 424 U.S. 577, 585 (1976); *Accord Armstrong,* 380 U.S. at 551 ("[I]t is plain that where the burden of proof lies may be decisive of the outcome."). That is true at summary judgment as at trial. *See Celotex*, 477 U.S. at 322-23 (movants' summary judgment burden depends on whether they "will bear the burden of proof at trial."); 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2727.1 (4th ed. 2024) (collecting cases).

Next, Respondents baldly assert—without support—that the burden of proof is a mere "procedural rule" with no impact on fiduciary conduct. Opp'n 32-33. But the burden of proof is *not* a "procedural rule." It is "a rule of substantive law." *Greenwich Collieries*, 512 U.S. 271. *See also Garrett v. Moore-McCormack Co.*, 317 U.S. 239,

249 (1942) (holding burden of proof "cannot be considered a mere incident of a form of procedure"). Moreover, notwithstanding Respondents' averments, Opp'n 33, trust law shifts the burden precisely "to encourage the trustee's compliance with applicable fiduciary duties." Restatement (Third) of Trusts § 100 *cmt.* f (2012).

In sum, Respondents offer neither good reason nor authority for allowing this circuit split to linger. With ERISA, Congress explicitly sought to bring uniformity to the "evaluation of fiduciary conduct." 1974 U.S.C.C.A.N. 4639, 4655. Until this Court intervenes, that uniformity will be lacking.

III. THIS CASE PRESENTS AN IDEAL VEHICLE: BURDEN-SHIFTING WAS DISPOSITIVE

In this case, the element of causation is dispositive. The district court found genuine disputes on fiduciary breach for all claims germane to this petition, and Respondents never disputed the element of loss. App. 74a-76a, 83a, 98a, 104a, 109a. Accordingly, the lower courts' decisions rested entirely on their rejections of burden-shifting and corresponding rulings on the element of causation.

Neither court held that Home Depot "was entitled to summary judgment no matter who bears the burden on loss causation." Opp'n 24. Had that been the case, there would have been no reason for either court to reach the burden-shifting question. App. 10a-15a, 66a-68a. Nor did the courts rule that Respondents had established "objective prudence" as matter of law. Opp'n 29. Instead, they held that Petitioners' evidence was insufficient *to meet Petitioners' trial burden* on causation. App. 21a, 28a,

77a, 80a, 100a, 106a, 111a. The question presented here is whether the courts were correct to allocate that burden to Petitioners in the first instance.

Respondents' logic confuses how burden works on summary judgment. Under *Celotex*, the summary judgment analysis differs depending on which party, movant or non-movant, will bear the ultimate burden of persuasion at trial. 477 U.S. at 322-23. If the non-movant bears that burden, then the movant can prevail based on deficiencies in the non-movant's evidence. *Id.* But if the movant will bear the burden of persuasion at trial, it must support its motion with affirmative evidence that would entitle it to judgment as a matter of law. *See id.* at 331 (Brennan J., dissenting);[3] 10A Wright, Miller & Kane § 2727.1 ("[I]f the movant bears the burden of proof on a claim at trial, then its burden of production is greater.").

The lower courts never ruled that Respondents met that affirmative burden. Instead, their rulings hinged on Petitioners' purported inability to marshal evidence to show causation. *See, e.g.*, App. 21a ("The plaintiffs offer no evidence"); App. 28a ("failed to offer enough evidence"); App. 77a ("not adduced sufficient evidence"); App. 80a ("failed to marshal any evidence"); App. 100a ("lack of material evidence that *no prudent fiduciary*"); App. 106a ("marshal no material evidence"); App. 111a ("does not establish that no prudent fiduciary"). If Respondents

3. Justice Brennan's dissent has provided guidance to courts and commentators on the Rule 56 standard. *E.g.*, *In re Bressman*, 327 F.3d 229, 237 (3d Cir. 2003); *United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Ctys. in State of Ala.*, 941 F.2d 1428, 1438 (11th Cir. 1991); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); 10A Wright, Miller & Kane § 2727.1.

had the burden, these holdings would be insufficient for summary judgment. 477 U.S. at 331 (Brennan J., dissenting).

Neither lower court held that burden-shifting "makes no difference to the bottom-line result." Opp'n 24.[4] Burden-shifting was the necessary predicate for the courts' conclusions. *E.g.*, App. 18a ("We now apply that legal standard."). If the lower courts were wrong about burden-shifting, then the case must be remanded so that they can re-evaluate the evidence under the correct standard. *Cf., Crawford-El v. Britton,* 523 U.S. 574, 600-01 (1998) (remanding because the lower court adopted an incorrect standard of review); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 314–15 (2013) (remanding because the lower court inappropriately applied the "strict scrutiny" standard). Thus, this case presents an ideal vehicle for resolving the question presented.

IV. THE ELEVENTH CIRCUIT'S DECISION CONTRADICTS THIS COURT'S PRECEDENT

A. The Eleventh Circuit Erred by Assuming Trust Law Would Not Apply

This Court has reaffirmed its directive for interpreting ERISA time and again: The common law of trusts "offers

4. Respondents therefore incorrectly claim "Plaintiffs no longer dispute the lower courts' conclusions that Home Depot's investment choices were objectively reasonable." Opp'n 29. Neither court ever reached that conclusion, and Petitioners hotly contest that Respondents could show objective prudence. *See* Brief for Plaintiffs-Appellants at 42-68, *Pizarro v. Home Depot, Inc.*, No. 22-13643 (11th Cir. Feb. 3, 2023), ECF No. 20; Reply Brief for Plaintiffs-Appellants at 20-34, *Pizarro*, No. 22-13643 (11th Cir. Aug. 8, 2024), ECF No. 61.

a 'starting point for analysis [of ERISA] ... [unless] it is inconsistent with the language of the statute, its structure, or its purposes." *Harris*, 530 U.S. at 250 (alteration in original) (quoting *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 447 (1999)). *Accord Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law."); *Tibble*, 575 U.S. at 528-29 (reversing ERISA decision made "without considering the role of the fiduciary's duty of prudence under trust law").

The Eleventh Circuit's opinion, which Respondents endorse, Opp'n 16-17, contradicts this established precedent: It assumes trust law principles *never* apply unless expressly stated in ERISA's text. App. 14a-15a. Consequently, neither the Eleventh Circuit nor Respondents identify anything in ERISA's text, structure, or purpose that requires departing from trust law's burden-shifting.

In lieu of conducting that analysis, Respondents retreat to the adage that "trust law does not tell the entire story." Opp'n 20 (quoting *Varity*, 516 U.S. at 497). Well, yes. But this Court has rejected trust law only when "the language of [ERISA], its structure, or its purposes require[d] departing from common-law trust requirements." 516 U.S. at 497. That is precisely what happened in *Hughes* and *Mertens v. Hewitt Assocs.*—this Court concluded that ERISA's language and structure deliberately departed from trust law. 525 U.S. at 447 (finding "the wasting trust doctrine in this context would appear to be inconsistent with the language of ERISA's termination provisions."); 508 U.S. 248, 257-59 (1993)

(after lengthy analysis, finding trust law doctrine at issue would "revise the text of the statute.").

Here, however, nothing in ERISA's text, structure, or purpose suggests Congress rejected trust law's burden-shifting regime. While silent on burden in § 1109(a), ERISA expressly states that plan assets "shall be held in trust by one or more trustees." 29 U.S.C. § 1103(a).[5] Indeed, Congress "codifie[d] and ma[d]e applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts," (1974 U.S.C.C.A.N. 4639, 4649-50). *See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility."). And while Congress made "modifications" to trust law "appropriate for employee benefit plans," it did so specifically where trust law was "insufficient to adequately protect the interests of plan participants and beneficiaries." 1974 U.S.C.C.A.N. 4639, 4650-51. Here, trust law adequately protects participants' interests. Thus, it achieves ERISA's purpose without modification.

B. Trust Law Adopts Buden Shifting

Every Circuit to address the issue acknowledges support in trust law for burden-shifting. *See* Pet. 13-14; App. 14a; *Pioneer Ctrs.*, 858 F.3d at 1335-36 (noting trust law adopts burden-shifting).[6] Respondents do not dispute

5. Section 1103(b) enumerates limited exceptions to this rule, none of which apply here.

6. Respondents incorrectly claim that *Sacerdote* and *Brotherston* are at odds, Opp'n 19. Both cases put the burden on the

that leading sources endorse this approach. Opp'n 18; *See* Restatement (Third) of Trusts § 100 *cmt.* f; A. Hess, G. Bogert & G. Bogert, The Law of Trusts and Trustees, § 871 ("Bogert") (2024 update). Though Respondents argue that some sources post-date ERISA, Opp'n 18, that has never stopped this Court from drawing on them. *See, e.g.*, *Tibble,* 575 U.S. 529 (citing the Restatement (Third) of Trusts and Bogert (3d ed. 2009)); *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (citing Bogert (rev. 2d ed. 1995)).

Moreover, contrary to Respondents' assertions, Opp'n 17, courts (including this Court) had endorsed burden-shifting by ERISA's enactment. *See* Pet. 23; *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (holding "the burden is on the director[s]," as "fiduciar[ies]" with "powers in trust," to show "inherent fairness"). Indeed, "[i]n the earlier cases the courts generally assumed that the trustee [was] subject to a surcharge *even though there [was] no causal connection between the breach of trust and the loss*." Austin Wakeman Scott, The Law of Trusts § 205.1 at 1673 (3d ed. 1967) (emphasis added).[7]

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breaching fiduciary to show, in whole or in part, that the "loss was not caused by [the] breach." *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. 2018); *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 113 (2d Cir. 2021). Indeed, *Sacerdote* quotes from *Brotherson.* 9 F.4th at 113.

7. In various cases, loss alone shifted the burden to trustees to prove they had not *breached* their duties (and consequently caused the loss). *See Underhill v. Newburger*, 4 Redf. 499, 507 (Sur. 1881) ("[I]t would be a very unsafe rule to establish that the representative of an estate may overcome the force of an inventory, by a mere statement that he has sold the property at a greatly reduced price, and thus throw the burden of proving

Respondents fail to cite a single case predating ERISA, let alone one that "explicitly rejected" burden-shifting. Opp'n 17-18. Instead, Respondents rest on a 1982 edition of Bogert (*id.* 17)—a source that courts have found *supports* burden-shifting. *See Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (citing Bogert, § 871 (rev. 2d ed. 1982 & Supp. 1991)); *Lopez v. Lopez*, 243 A.2d 588, 594 (Md. 1968) ("If the [beneficiary] shows a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee.") (quoting Bogert, § 871 (2d ed. 1962)). Likewise, nothing in the First or Second Restatements rejected burden-shifting. Opp'n 17-18. Just the opposite: The Second Restatement embraced it. *See* Restatement (Second) of Trusts § 212(4) (1959) (stating that where a loss has occurred, a trustee "has a defense to the extent that a loss would have occurred even though he had complied with the terms of the trust"); *Est. of Stetson*, 345 A.2d at 690 (citing Restatement (Second) of Trusts § 212(4)).

Nor do ERISA's "many new responsibilities and obligations" achieve the goals of burden-shifting. Opp'n 22. First, none of those duties suggest Congress "deliberate[ly]" omitted burden-shifting. *Id.* Congress "invoked the common law of trusts" so that it need not set forth such background principles anew. *See Cent. States*, 472 U.S. at 570. Second, ERISA's disclosures of "past performance," come nowhere close to balancing the information gap between participants and fiduciaries.

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neglect or bad faith upon the contestants."); *In re Richardson's Will*, 266 N.Y.S. 388, 390 (Sur. 1928) ("Trustees in the face of such a loss are under the burden of showing facts and circumstances to establish they are without fault in the matter."); *McCallister v. Farmers Dev. Co.*, 143 P.2d 597, 604 (N.M. 1943) ("The burden ... rested upon the appellee").

Opp'n 23. Indeed, elsewhere, Respondents argue that performance data alone "is not proof" of causation. Opp'n 24. Regardless, the "hypothetical prudent fiduciary" standard implicates expert judgment. Those judgments are (supposed to be) within the ken of fiduciaries, not participants. 29 U.S.C. § 1104(a)(1)(B).

CONCLUSION

The petition for a writ of certiorari should be granted.

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