No. 24-620

In the Supreme Court of the United States

JAMIE 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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID TETRICK, JR.
DARREN A. SHULER
KING & SPALDING LLP
1180 Peachtree Street, NE
Suite 1600
Atlanta, GA 30309

ROMAN MARTINEZ
Counsel of Record
BRENT T.F. MURPHY
DEREK CHOI
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Counsel for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

Home Depot welcomes the government's change in position on the merits. As the government persuasively explains, the Eleventh Circuit got this case right: ERISA does not shift the burden of proof on loss causation to fiduciary defendants. Instead, that burden lies where it normally does—with plaintiffs. U.S. Br. 7-17.

Because the decision below was correct, there is no need for further review from this Court. Home Depot therefore respectfully disagrees with the government's suggestion to grant certiorari. If this Court sees fit to review the burden-shifting issue, it should do so in a different case where its intervention is likely to change the outcome.

Review is especially unwarranted here because the Eleventh Circuit has already made clear that Home Depot *would still win* this case even if this Court reversed on burden shifting. As the government acknowledges, the Eleventh Circuit agreed with Home Depot that even if defendants bore the burden to disprove loss causation, Home Depot could satisfy that burden by showing that its fiduciary decisions were "objectively prudent" U.S. Br. 21 (quoting App.16a)—i.e., that a reasonable fiduciary "could have" made the same choice, *id.* (citation omitted); App.16a-18a & n.4. That standard was certainly satisfied here: Both courts below determined there was no material dispute of fact that *all* of the challenged fees and investments selected by Home Depot were objectively prudent as a matter of law. BIO 9-10, 14-15.

The government calls the Eleventh Circuit's discussion of the "could have" loss-causation standard

dicta, and says the court's analysis of the facts was colored by its burden-shifting holding. But the Eleventh Circuit plainly *held* that the substantive loss-causation standard turns on whether the challenged decisions were "objectively prudent," and it expressly rejected petitioners' "*would* have" formulation as inconsistent with that standard. App.17a-18a n.4.

If the Court grants review here, Home Depot would once again argue—in the alternative—that the Eleventh Circuit's decision can be affirmed under the "objectively prudent"/"could have" test. Home Depot fully preserved that alternative argument below and in its initial brief opposing certiorari, and petitioners' challenge to that test is now forfeited. That forfeiture means that Home Depot would prevail here, regardless of whether or how the Court resolves the burden-shifting issue.

Even if the Court declined to address the alternative argument, Home Depot would win on remand. The lower courts would be bound by the Eleventh Circuit's analysis of the objective prudence standard, and there is no reason to think that the lower courts would change their analysis of the facts showing objective prudence. Because that is true, Home Depot will ultimately win this case, one way or the other.

More generally, although the government emphasizes the importance of burdens of proof, it offers no good reason to resolve the burden-shifting issue *in this case*, where the government agrees the Eleventh Circuit got the question right, and where that court also made it clear it would affirm summary judgment for Home Depot regardless. And as the government observes, the time and energy absorbed

by litigating ERISA lawsuits saps resources and distracts plan fiduciaries from the work that actually matters: helping employees effectively save for retirement. The Court should decline review and let Home Depot get back to that important work.

ARGUMENT

I. The Government Agrees That The Eleventh Circuit Properly Rejected Burden Shifting

The government now agrees that the Eleventh Circuit correctly answered the question presented. U.S. Br. 7-17. ERISA does not incorporate burden shifting on the question of loss causation; that burden remains with plaintiffs, as with any other element of their claim. The government's brief only underscores why the Eleventh Circuit—and Home Depot—are right.

As the government notes, this Court's "default rule" is that "[p]laintiffs bear the burden of persuasion regarding the essential aspects of their claims." U.S. Br. 8 (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005)). That default rule resolves this case, because petitioners supply no "reason to believe that Congress intended" to depart from the default rule when it comes to the burden of proving loss causation for ERISA fiduciary-breach claims. *Id.* (quoting *Schaffer*, 546 U.S. at 57). Several features of the government's analysis bear emphasis.

First, the government correctly observes that petitioners' reliance on the common law of trusts is misplaced. As the government explains, although "ERISA's fiduciary duties are 'derived from the common law of trusts,'" "[t]his case" does not involve "the 'contours of an ERISA fiduciary's' trust-inspired duties." *Id.* at 8-9 (quoting *Tibble v. Edison Int'l*, 575

U.S. 523, 528-29 (2015)). Instead, it involves "a mine-run question of civil procedure and evidence." *Id.* at 9. On such questions, this Court's ERISA precedents look to general principles of civil procedure, not trust law. *See id.* (citing *Cunningham v. Cornell Univ.*, 604 U.S. 693, 701-02 & n.4 (2025); *id.* at 709 n.1 (Alito, J., concurring)); *see also* BIO 20. Those general principles place the burden of proving loss causation on plaintiffs. BIO 16-17.

Second, even if trust law were relevant, the government correctly notes that this Court "will not incorporate trust-law principles when the 'state of trust law' is 'unclear'" and "[p]etitioners have not identified any settled trust-law practice of shifting the burden of proving loss causation to defendants." U.S. Br. 8-9 (quoting *Conkright v. Frommert*, 559 U.S. 506, 516 (2010)). To the contrary, as Home Depot and the government both explain, many trust-law sources before and at the time ERISA became law explicitly put that burden *on plaintiffs*, or were "conspicuously silent" on who bore the burden. *Id.* at 10-11; *see* BIO 17. And petitioners' authority from the time of ERISA's enactment either addresses unrelated trust-law issues, or at most demonstrates that the law on causation "was in flux." U.S. Br. 11-13; *see* BIO 18.

Third, the government rightly observes (at 15-16) that incorporating an extratextual burden-shifting rule into ERISA would conflict with that statute's "reticulated scheme and objectives." Petitioners' various arguments for incorporating burden shifting do not hold water. For example, petitioners' argument that burden shifting is necessary to combat an informational imbalance is belied by the fact that "ERISA already provides 'a comprehensive scheme of mandatory disclosure and reporting,'" which

"mitigate[s] any disparities." U.S. Br. 15 (quoting App.15a); *see* BIO 22-23. And their argument that it furthers ERISA's purpose of protecting beneficiaries is similarly wrong. To the contrary, as the government explains, "burden shifting could make it all too easy" for plaintiffs to "press weak claims to trial or settlement," a prospect that is "antithetical to ERISA's interests." U.S. Br. 16; *see also* BIO 23.

For all these reasons, the government properly concludes that the Eleventh Circuit's decision rejecting burden shifting was correct. There is accordingly no need for further review from this Court. BIO 16-24.

II. The Government Acknowledges That The Eleventh Circuit Embraced Home Depot's Alternative Argument About The Substantive Loss-Causation Standard

Regardless of whether the Eleventh Circuit answered the burden-shifting answer correctly, this is the wrong case to consider that question because it makes no difference to the outcome here. As the Eleventh Circuit recognized—and as petitioners do not dispute—if a fiduciary's choices were "objectively prudent" (i.e., "reasonable"), then the fiduciary did not cause any loss to the plan. App.16a-18a. Both courts below already concluded that each of the fiduciary choices Home Depot made was objectively prudent as a matter of law, and therefore that summary judgment for Home Depot was appropriate. BIO 28-29. That analysis holds up regardless of who bears the burden on loss causation.

As the government acknowledges, the Eleventh Circuit correctly held that "losses are only compensable if they are caused by a fiduciary's bad

decisions rather than by the usual vagaries of the market." App.16a; *see* U.S. Br. 6. "To recover damages then, plaintiffs must show that the investments made were not objectively prudent." App.16a. That requires proof that the investments fell "outside the 'range of reasonable judgments a fiduciary must make based on her experience and expertise,' such that a hypothetical reasonable fiduciary in the same circumstances as the defendant, armed with the information that a proper evaluation would have yielded, would not (or could not) have made the same choice." *Id.* (quoting *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022)).

Given its determination on burden shifting, the Eleventh Circuit was not required to go further to define what it means for an investment decision to be "objectively prudent"—and, in particular, whether the right question is whether a prudent fiduciary "could have" or "would have" made that decision.

Nonetheless, the Eleventh Circuit *did* go further. As the government acknowledges, the Eleventh Circuit's "decision below signals agreement with" Home Depot that the correct standard is "'could have.'" U.S. Br. 21 (citation omitted). Indeed, the Eleventh Circuit could not have been clearer:

> [W]e agree with Judge Wilkinson's dissent [in *Tatum v. RJR Pension Investment Committee*, 761 F.3d 346 (4th Cir. 2014),] that requiring a defendant to prove that a hypothetical prudent fiduciary *would* have also made the same choice "ignore[s] the fact that there is not one and only one 'same

> decision' that qualifies as objectively prudent."

App.17a-18a n.4 (third alteration in original). The Eleventh Circuit further emphasized that the "would have" rule adopted by the Fourth Circuit majority in *Tatum*—and advanced by petitioners below—would be "completely contrary to ERISA's loss causation requirement" insofar as it "would impose liability on a fiduciary even though it made an objectively prudent choice." *Id.* The Eleventh Circuit thus conclusively determined that petitioners' "would have" test is wrong, and that the "could have" test is correct.

Home Depot wins this case under the Eleventh Circuit's understanding of the "objectively prudent choice" test. As Home Depot has explained, a prudent fiduciary in Home Depot's shoes plainly "could have" made the same investment choices. BIO 28-29. Indeed, both courts below already recognized that Home Depot's choices fell well within the mainstream of reasonable investment decisions. App.19a-27a, 76a-115a. That is sufficient to resolve this case in Home Depot's favor.

The government does not seriously dispute Home Depot's reading of the decision below. As noted, the government acknowledges that the Eleventh Circuit embraced an objective prudence test for loss causation and "signal[ed] agreement with Judge Wilkinson's dissent" in *Tatum* and with Home Depot that a decision is "'objectively prudent'" when a prudent fiduciary "could have" made the challenged decision. But the government attempts to downplay the Eleventh Circuit's discussion of the "'could have'" test as a non-binding "footnote[]" added only "'[f]or what it is worth,'" and it suggests that this discussion "could

be revisited on remand." U.S. Br. 6, 21 (alteration in original) (quoting App.16a-17a n.4).

The government undersells how emphatic the Eleventh Circuit's opinion was on this issue. The court emphasized that if defendants bore the burden of disproving loss causation, the choice between "would have" and "could have" would have been important. App.17a-18a. And if that choice mattered, the court explained, the "could have" standard advanced by Home Depot is the only one consistent with "ERISA's loss causation requirement." *Id.* at 17a-18a & n.4. Indeed, the court rejected petitioners' favored "would have" test as "completely contrary" to that requirement. The Eleventh Circuit left no wiggle room on this issue.

If certiorari is granted, Home Depot will embrace the Eleventh Circuit's understanding of the objective-prudence test as an alternative ground to affirm. Home Depot will also note that petitioners forfeited any challenge to that aspect of the decision below in this court. The government argues (at 21) that the "substantive causation standard . . . falls outside the question presented and is therefore not before this Court." But "a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.2 (1984); *accord Yeager v. United States*, 557 U.S. 110, 125-26 (2009); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). As the government concedes (at 21), the substantive loss-causation standard "was hotly contested below," and Home Depot also fully briefed the issue again in its initial opposition to certiorari in this Court. *See* Home

Depot C.A. Br. 24-28; BIO 24-27, 29-31; App.17a (observing the "parties spill[ed] considerable ink arguing about" this question in their briefs). The argument is accordingly fully preserved for review here.

Even if the Court declines to address the Eleventh Circuit's substantive loss-causation standard, petitioners' forfeiture ensures that it will still be binding on remand, under both stare decisis and the law-of-the-case doctrine. *See, e.g.*, *United States v. Files*, 63 F.4th 920, 926 (11th Cir.), *cert. denied*, 144 S. Ct. 419 (2023). The government is therefore mistaken to suggest (at 21) that the court's explanation of the substantive loss-causation standard is non-binding and "could be revisited on remand." And even if the Eleventh Circuit's analysis of the substantive standard were somehow not formally binding, the decision below makes clear there is no realistic possibility that the court would in fact revisit its reasoning on this issue.

Under the "could have" loss-causation standard, the result on remand would be summary judgment for Home Depot—even if Home Depot bears the burden of proof. As the Eleventh Circuit already found, Home Depot's choice of financial advisor and the fees charged by that advisor were well within the mainstream, and lower "than 96 percent of all other plans." App.19a-23a. And the plan's investment options were similarly reasonable, consisting of highly rated, affordable, and popular investments selected by the retirement plans of many other Fortune 500 companies. App.24a-27a, 54a. As a result, there is no genuine dispute of material fact that Home Depot's choices were objectively prudent.

The Court should not review a question that does not change the bottom-line result in this case.

III. There Is No Pressing Reason To Resolve Burden Shifting In This Case

The government does not identify any pressing reason for the Court to resolve the burden-shifting question in this case. Its primary argument for certiorari emphasizes (at 18-19) the generalized importance of burdens of proof. As Home Depot already pointed out, however, there is little reason to think that the burden of proof makes a meaningful difference in the vast majority of ERISA cases. BIO 31-32.

The government does not disagree (at 18) with Home Depot that burden-shifting will virtually never be outcome determinative as a tiebreaker. *See* BIO 31-32. The government counters that even if the "'burden of persuasion'" rarely makes a difference, that is not true of the "'burden of production,' which determines who 'bears the obligation to come forward with the evidence.'" U.S. Br. 18-19 (quoting *Schaffer*, 546 U.S. at 56). But the government offers no reason to think burden shifting on loss-causation matters to the burden of production in a meaningful number of cases, either.

It certainly made no difference here. Neither court below imposed the burden of proof on Home Depot. Nonetheless, petitioners marshaled evidence they said demonstrated Home Depot allowed participants to be charged excessive fees relative to similar plans, and picked investments that underperformed more appropriate options. *See* App.19a-28a. And Home Depot produced voluminous discovery in support of the reasonableness of its process and investment

decisions, including detailed information how the BlackRock and other investments at issue performed relative to potential comparators. *See, e.g.*, App.35a-37a, 41a-46a, 48a-60a.

In trying to show that the burden of production somehow might have mattered in *this* case, the government says "the court of appeals faulted petitioners for evidentiary shortcomings—gaps that might have counted against respondents under a burden-shifting rule." U.S. Br. 19 (citing App.20a-21a, 26a); *see also id.* at 21-22 & n.4. But those shortcomings are relevant under any approach to loss causation, and the Eleventh Circuit's discussion of the evidence does not come close to suggesting that petitioners would have won if Home Depot had the burden of production. Rather, the court's language was simply a shorthand way of saying that Home Depot was entitled to summary judgment, given the absence of any genuine, material dispute of fact on objective prudence.

Granting certiorari would do nothing more than prolong years of expensive litigation in a meritless case. As the government highlights (at 16-17), ERISA litigation is a drain on plan fiduciaries' time and resources, and results in a host of negative consequences for "the plan participants whom ERISA ultimately seeks to protect." That is certainly the case here, where plaintiffs have spent years second-guessing Home Depot's eminently reasonable decisions to best serve plan participants by selecting a market-leading financial advisor and blue-chip investment options.

The Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID TETRICK, JR.
DARREN A. SHULER
KING & SPALDING LLP
1180 Peachtree Street, NE
Suite 1600
Atlanta, GA 30309

ROMAN MARTINEZ
Counsel of Record
BRENT T.F. MURPHY
DEREK CHOI
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Counsel for Respondents

December 23, 2025