No. 14-656

IN THE

Supreme Court of the United States

RJR PENSION INVESTMENT COMMITTEE, ET AL.,

Petitioners,

v.

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"This case involves an ERISA-covered pension plan that suffered a loss as a result of a fiduciary's breach of th[e] duty of care in failing to conduct an adequate investigation prior to making a significant investment decision for the plan."[1] It is now settled that Petitioners violated ERISA when they "made a divestment decision that cost its employees millions of dollars with 'virtually no discussion or analysis[.]'" App.42. Indeed, according to the Fourth Circuit, "the extent of procedural imprudence shown here appears to be unprecedented in a reported ERISA case." App.42. Other liability questions, however, are pending in the district court.

Notwithstanding Petitioners' assertion to the contrary, this litigation currently presents only two narrow questions about 29 U.S.C. § 1109(a) that have been answered identically by every circuit to have squarely addressed them and by the United States:

1. Once a plaintiff establishes a breach of the duty to prudently investigate an investment decision and a related loss to the plan, does the burden shift to the defendant to show its breach was harmless (the "Harmless Breach Burden Question")?

2. To establish that the failure to adequately investigate an investment decision was harmless, must a breaching fiduciary show that a prudent fiduciary would likely have made the same investment decision (the "Harmless Breach Standard Question")?

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[1] Brief of Seth D. Harris, Acting Sec'y of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 1, Tatum v. R.J. Reynolds Tobacco Company, 761 F.3d 346 (4th Cir. 2014) (No. 13-1360), 2013 WL 3193467 ("U.S. Tatum Br.").

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INTRODUCTION

In March of 1999, RJR Nabisco "decided to separate its food business, Nabisco, from its tobacco business, R.J. Reynolds. The company determined to do this through a spin-off of the tobacco business . . . ." App.3 (court of appeals opinion). In the words of the Fourth Circuit, "[t]he purpose of the spin-off was to enhance shareholder value, which included increasing the value of Nabisco by minimizing its exposure to and association with tobacco litigation.'" App.3 (quoting district court).

Nevertheless, a few months later, Petitioners forced the sale of all Nabisco stock in employees' 401(k) retirement savings accounts. App.123. According to "the district court's well-supported factual findings," Petitioners made this choice "with 'virtually no discussion or analysis,' without consideration of any alternative strategy or consultation with any experts, and without considering 'the purpose of the Plan . . . .'" App.42 (quoting district court). And they "carried out this decision by adhering to a timeline that was 'chosen arbitrarily and with no research.'" App.42 (quoting district court).

Indeed, in unequivocally rejecting the suggestion that Petitioners are "faultless victim[s] that, after following a 'prudent investment strategy' ha[ve] fallen prey to 'opportunistic litigation,'" the Fourth Circuit remarked that "the extent of procedural imprudence shown here appears to be unprecedented in a reported ERISA case." App.42 (also noting that Petitioners "failed to act 'solely in the interests of participants and beneficiaries' and instead 'improperly considered [their] own potential liability'") (quoting district court).

Of course, even an egregious breach of fiduciary duty cannot justify restitution of investment losses unless there are actually "losses to the plan resulting from [that] breach . . . ." 29 U.S.C. § 1109(a) (setting forth the relief available in a lawsuit, like this one, brought pursuant to 29 U.S.C. § 1132(a)(2)). But in this case, both the district court and the court of appeals found the resulting losses easy to identify: Petitioners "made a divestment decision that cost its employees millions of dollars." App.42.

Because those losses were the direct result of an arbitrary investment decision, both courts held that Plaintiff had met his prima facie burden on causation. App.29, 150. At that point, they gave Petitioners the opportunity to prove that their "unprecedented" ERISA violation was nonetheless harmless. App.42. That approach, which places the burden on a breaching fiduciary to show that its misconduct was harmless, is hardly controversial. It reflects the view of every court of appeals to have addressed the issue and the consistent position of the United States for over 30 years.

The district court then turned to its assessment of harmlessness. In so doing, it allowed Petitioners to prevail by showing that a prudent fiduciary (*i.e.*, one who performed an adequate investigation) *might* have made the same investment decision. App.149-52. But it is hornbook law that a legal violation is harmless only if the resulting injury *would* have occurred even in the absence of that violation. *See*, *e.g.*, *Restatement (Second) of Torts* § 26 (1959) ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct . . . .").

In recognition of that basic precept, the Fourth Circuit reversed and remanded for further proceedings.

App.30-36. Those post-remand proceedings have begun and are currently ongoing.

Were it not for the artistry of the Petition itself, it would be clear that the legal issues in this case do not satisfy this Court's criteria for review. The two questions presented are narrow, rare, and of limited practical significance. There is no conflict in the lower courts. And the substantive position of Petitioners cannot be reconciled with the structure or plain text of ERISA. Indeed, as the Fourth Circuit explained in remanding this case:

> Our decision is a modest one. We affirm the district court's holdings that RJR breached its duty of procedural prudence and that a substantial loss occurred. We simply remand for the district court to determine whether, under the correct legal standard, RJR's imprudence caused that loss. If the court determines that a fiduciary who conducted a proper investigation would have reached the same conclusion, RJR will escape all monetary liability, notwithstanding its procedural imprudence. But if the court concludes to the contrary, then the law *requires* that RJR be held monetarily liable for the Plan's loss. For . . . Congress has expressly provided that a fiduciary 'who breaches any of the . . . duties imposed [by ERISA] *shall be personally liable* to make good to [the] plan *any losses to the plan resulting from [the] breach.*'

App.41 (quoting 29 U.S.C. § 1109(a)) (emphasis added by court of appeals).

The Petition should be denied.

STATEMENT

Petitioners present a highly selective rendition of the facts and procedural history of this case. The opinions below present the facts faithfully and in great detail. App.3-22, 78-118, 133-137. What follows is a summary of the salient facts as found by the district court and the Fourth Circuit, as well as the relevant procedural history.

A. Factual Background

This ERISA breach of fiduciary duty case follows the decision by RJR Nabisco, Inc. ("RJR Nabisco") to separate its food business, Nabisco, from the tobacco company, R.J. Reynolds. The express purpose of the spin-off was to enhance Nabisco shareholder value by freeing Nabisco stock from the "tobacco taint"—*i.e.*, the negative impact of ongoing class action litigation against the tobacco company. App.81-82. Among those who stood to benefit from the divestment were participants in RJR Nabisco's 401(k) plan who had chosen to invest some of their account balances in Nabisco stock. App.3.[2]

After the spin-off, R.J. Reynolds Tobacco Company ("RJR") sponsored a new 401(k) plan for its employees (the "RJR Plan" or "Plan"). The RJR Plan offered the same funds as its predecessor, but did not allow participants to add to their Nabisco investments. App.4-6 (describing the "frozen funds").

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[2] The 401(k) plan allowed participants to direct the investment of assets attributable to their accounts into one or more of eight investment funds, enabling diversification. Two of those funds consisted of Nabisco stock. App.3.

In March of 1999, RJR convened a working group to discuss a variety of human resources issues related to the spin-off. App.5-6, 87-90. Through the working group, "RJR determined to eliminate . . . [all Nabisco stock] from the Plan." App.5. The working group reached that decision in under sixty minutes "with 'virtually no discussion or analysis,' without consideration of any alternative strategy or consultation with any experts, and without considering 'the purpose of the Plan . . . .'" App.42 (quoting district court). *See also* App.5, 89.

When they learned of the planned divestment, some participants complained. App.100-101, 115. At an October 1999 meeting, various RJR lawyers, executives, and human resources personnel discussed one such complaint. App.100-101, 145. The attendees "decided against changing course . . . largely because they feared doing so would expose RJR to liability" to those who had already chosen to sell their Nabisco investments in the wake of Petitioners' announcement. App.7.

Shortly after the October meeting, RJR sent a letter to all Plan participants stating: "Because regulations do not allow the Plan to offer ongoing investment in individual stocks other than Company stock, the 'frozen' [Nabisco] stock funds will be eliminated." App.106. In fact, as the RJR employee who drafted the letter knew, no law or regulation required the Plan to eliminate Nabisco stock. App.106. After learning of that lie, RJR executives and lawyers *repeated it* in a second letter sent to participants in January 2000. App.107, 143-44 (discussing "the communications known to be false when sent to participants").

On January 27, 2000, long-time RJR employee Richard Tatum emailed Plan fiduciaries to ask them to reconsider the divestment. App.114. He estimated that divestment on the planned schedule would result in a 60% loss to his 401(k) account. App.114. Mr. Tatum correctly pointed out that other companies spun off from RJR Nabisco had continued to offer Nabisco stock in their 401(k) plans. App.114 (describing his "understanding that former RJR employees of Winston-Salem Health Care and Winston-Salem Dental Care still had frozen Nabisco and RJR funds in their plans"). Mr. Tatum was told that "others had complained and nothing could be done to reverse the decision." App.115.

RJR sold all the shares of Nabisco stock in its employees' 401(k) accounts on January 31, 2000. Investor Carl Icahn initiated his fourth attempt to take over Nabisco that spring. App.111-12 ("Icahn had made three previous attempts to take over Nabisco, between November 1996 and the spring of 1999, and was well known to have an interest in the company."). Icahn's bid provoked competing offers, and both Nabisco and its holding company were acquired in December. "The closing prices [on December 11, 2000] represented an increase of 247 percent for [the holding company] and 82 percent for [Nabisco] from the January 31, 2000 share prices." App.112.

B. Procedural History

In May of 2002, Mr. Tatum filed this class action against RJR as well as two named Plan fiduciaries: the Employee Benefits Committee ("EBC") and the Pension Investment Committee ("PIC"). App.118. "Tatum alleged that RJR breached its fiduciary duties by

eliminating the Nabisco stock from the Plan without the thorough investigation or analysis required by ERISA, thereby causing losses to the Plan." App.118.

The district court granted defendants' motion to dismiss, but the Fourth Circuit reversed. *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004). Upon remand, the district court granted defendant's motion to dismiss the committee defendants, but allowed the case to proceed against RJR. App.119.[3] After certifying the class and denying cross-motions for summary judgment, the district court held a bench trial on Mr. Tatum's breach of fiduciary duty claim from January 13, 2010 to February 9, 2010. App.119-20.

1. In an impressive display of understatement, the Petition states: "The district court found RJR's investigation inadequate." Pet.2. In fact, the district court issued a scathing assessment of Petitioners' decision-making process:

> [T]he working group's decision in March 1999 was made with virtually no discussion or analysis and was almost entirely based upon the assumptions of those present and not on research or investigation. The total discussion of eliminating the Nabisco stocks took place in approximately one hour, no opposing viewpoints were expressed, no one followed up with further research on the assumptions made by the group . . . .

[3] The district court dismissed the EBC and the PIC on the ground that those committees were not subject to suit under ERISA. App.45. The Fourth Circuit reversed and reinstated these entities as defendants. App.46. The Petition does not challenge this aspect of the Fourth Circuit's decision.

> Those present at the meeting . . . did not raise basic questions about the impact of corporate reorganizations on former company stock in an ERISA plan or about the impact on participants of removing a fund already in the Plan. . . . The group did not discuss all of the consequences of removing the funds or any possible reasons to keep them in the Plan. They did not discuss the purpose of the Plan, which was for long term retirement savings, or the purpose of the spin-off, which was, in large part, to allow the Nabisco stock a chance to recover from the tobacco taint and hopefully rise in value. The possibility of allowing the Nabisco stock to remain frozen indefinitely, in order to allow employees to move money from those funds at will, was not discussed. The idea that, perhaps, it would take a while for the tobacco taint to dissipate was not discussed, nor was the fact that determining for employees exactly when the stocks would be removed could result in large and unnecessary losses to the Plan through the individual accounts of employees. In addition, the six month timeline for the divestment was chosen arbitrarily and with no research other than asking those at the meeting their own experience with single stock funds.
>
> There is no evidence—in the form of documentation or testimony—of any process by which fiduciaries investigated, analyzed, or considered the circumstances regarding the Nabisco stocks and whether it was appropriate to divest.

App.138-40.

Put simply, RJR clearly breached its fiduciary duty in failing to investigate or monitor the reasonableness of the March 1999 decision. App.143. And when Petitioners learned of participant concerns about the planned divestment, they unlawfully "consider[ed] their own potential liability as part of the reason for not changing course on their decision to divest the Plan of Nabisco stocks." App.145. *See also* App.146 ("[T]he discussion focused around the liability of *RJR*, rather than what might be in the best interest of the participants.") (emphasis in original).

Of course, even an egregious breach of fiduciary duty cannot justify restitution of investment losses unless there are actually "losses to the plan resulting from [that] breach . . . ." 29 U.S.C. § 1109(a). So the district court next turned to the issue of resulting losses. App.147-65. The court found that Plaintiff had proven losses. App.149. Because those losses were the direct result of the arbitrary investment decision, the court determined that Plaintiff had met his prima facie burden on causation. App.149; *see also* App.25-26 & 26 n.9. At that point, it gave Petitioners the opportunity to prove that their misconduct was nonetheless harmless. App.150-65.

The district court determined, however, that Petitioners met their burden of showing harmlessness by establishing that "[a] hypothetical prudent fiduciary *could have* decided to eliminate the Nabisco [stocks] on January 31, 2000." App.165 (emphasis added). In so holding, the district court refused to consider the testimony of Plaintiff's expert Professor Thomas Lys, the Eric L. Kohler Chair in Accounting and Professor of Accounting and Information Management at the Kellogg School of Management at Northwestern University.

App.137 n.23. Professor Lys provided critical testimony at trial regarding his opinion about the likely behavior of a prudent *investor* in these circumstances. The court held that Professor Lys's testimony was "unhelpful" because, in its view, the prudent investor standard was irrelevant to an ERISA fiduciary's duties. App.137 n.23.

2. On appeal, the Fourth Circuit affirmed in part and reversed in part. App.2-3. It first affirmed the district court's "well supported" holding that RJR had breached its duty of procedural prudence. App.24-25. It specifically endorsed the district court's finding that RJR had acted to protect itself and not its employees. App.24 ("RJR blinks at reality in maintaining that its actions served to 'protect[ ] participants' or to 'minimize the risk of large losses.' To the contrary, RJR's decision to force the sale of its employees' shares of Nabisco stock, within an arbitrary timeframe and irrespective of the prevailing circumstances, ensured immediate and permanent losses to the Plan and its beneficiaries.").

The Fourth Circuit also affirmed the district court's holding that the burden of proving harmlessness shifted to Petitioners after Plaintiff had established breach and a related loss. App.25-26. *See also* App.29 ("Overwhelming evidence supported the district court's finding that RJR breached its fiduciary duty to act prudently and that this breach resulted in a prima facie showing of loss to the Plan."). As the court explained:

> '[W]hen 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.' *Restatement (Third) of Trusts* § 100, cmt. f (2012) (internal citation omitted); *see also* Bogert &

> Bogert, *The Law of Trusts and Trustees* § 871 (2d rev. ed. 1995 & Supp. 2013) ("If the beneficiary makes a prima facie case, the burden of contradicting it . . . will shift to the trustee.').
>
> The district court adopted this well-established approach.

App.26.

With respect to the standard for proving harmlessness, however, the Fourth Circuit reversed the district court's holding that RJR could prevail without "demonstrating that it would have reached the same decision had it undertaken a proper investigation." App.30. Relying on traditional principles of trust law and relevant precedents from the Third, Fifth, Seventh, and Eighth Circuits, the court of appeals held that "a plaintiff who has proven the defendant-fiduciary's procedural imprudence and a prima facie loss prevails *unless* the defendant-fiduciary can show, by a preponderance of the evidence, that a prudent fiduciary *would have* made the same decision." App.30-36 (emphasis in original).[4]

In remanding the case, the court of appeals instructed the district court to "consider all relevant evidence" in deciding whether RJR met its burden, App.39-40, including "the testimony of one of Tatum's

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[4] The Fourth Circuit easily rejected Petitioner's challenge to the legal significance of the district court's error. App.36. "Particularly given the extraordinary circumstances surrounding RJR's decision to divest the Nabisco [stock], including the timing of the decision and the requirements of the governing Plan document [providing that the Nabisco stocks be held in frozen funds], we must conclude that application of the incorrect legal standard may have influenced the court's decision." App.39.

experts, Professor Lys, regarding what a prudent investor would have done under the circumstances." App.39 n.17. The Fourth Circuit explained that the district court had abused its discretion by refusing to consider Professor Lys's testimony, which was "relevant as to what constituted a prudent investment decision." App.39 n.17 (citing *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 218 (4th Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) ("A fiduciary must behave like a prudent investor under similar circumstances . . . ."); *Katsaros v. Cody*, 744 F.2d 270, 279-80 (2d Cir. 1984) (investment expert's lack of experience with pension fund management did not affect qualifications to testify as to what constituted prudent investment decision in an ERISA case)).

3. On September 2, 2014, a timely petition for rehearing *en banc* was denied. *Tatum v. RJR Pension Inv. Comm.*, No. 13-1360 ("4th Cir. Dkt."), ECF No. 104. On September 23, 2014, the Fourth Circuit denied Petitioners' motion to stay the mandate. 4th Cir. Dkt., ECF No. 111. On December 1, 2014, Petitioners filed a petition for writ of certiorari in this Court. The district court declined to stay the case pending the petition. Litigation in the district court has recommenced and is extremely active. The parties filed extensive submissions regarding the evidence of causation on January 12 and January 20, 2015. *See, e.g.*, *Tatum v. R.J. Reynolds Tobacco Co.*, No. 1:02-cv-00373 ("Dist. Ct. Dkt."), ECF Nos. 457-462, 464. On January 20, 2015, Petitioners also filed a fourth motion to decertify the class. Dist. Ct. Dkt., ECF Nos. 463-464. The parties filed submissions on two other issues on February 2, 2015. Dist. Ct. Dkt., ECF Nos. 466, 470. Additional submissions by both parties are due on February 13 and February 23, 2015. *See* Dist.

Ct. Dkt., Min. Entry re: Status Conf., Nov. 19, 2014 (so ordering).

REASONS FOR DENYING THE PETITION

The Petition frames two questions for further review: (1) who bears the burden of proving causation under § 1109, and (2) whether a fiduciary can be held liable for making an "objectively prudent" investment decision.

This case presents neither question. Instead, it features two narrow, rare, and largely academic questions about the logistics of burden-shifting when a plaintiff proves a breach of fiduciary duty and a related loss to an ERISA plan. As explained in detail below, neither question warrants this Court's intervention.

I. The Harmless Breach Burden Question Does Not Warrant Further Review.

According to the Petition, further review is needed to resolve "[w]hether the plaintiff bears the burden of proving loss causation under § 1109 or whether it can shift the burden on that element to the defendant by carrying its burden on the analytically distinct elements of breach of fiduciary duty and loss to the plan." Pet.i-ii. But that question is simply not presented.

Petitioners' overbroad formulation ignores central findings of the district court. In the words of the Fourth Circuit, "[o]verwhelming evidence supported the district court's finding that RJR breached its fiduciary duty to act prudently *and* that this breach resulted in a prima facie showing of loss to the Plan." App.29 (emphasis added). *See also* U.S. Tatum Br. at 9 (explaining that Plaintiff had already established both that "plan fiduciaries breached their ERISA duties and that the plan suffered a related loss . . . ."); *see also id.* at 18

(explaining that here, unlike in other cases, plaintiff showed a "nexus between the plan's loss" and the fiduciary breach).

In light of these findings, both the district court and the court of appeals naturally concluded that Plaintiff made out a prima facie case of causation. App.26 (quoting George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 871 (2d rev. ed. 1995 & Supp. 2013)) ("'If the beneficiary makes a prima facie case, the burden of contradicting it . . . will shift to the trustee.' The district court adopted this well-established approach.").

Thus, properly stated, the first question actually presented by this case is:

> Once a plaintiff establishes a breach of the duty to prudently investigate an investment decision and a related loss to the Plan, does the burden shift to the defendant to show that its breach was harmless—i.e., that the loss would have occurred regardless of the breach?

As explained below, that question does not warrant this Court's intervention. There is no genuine disagreement in the lower courts. *See infra* 14-17. The question is rarely, if ever, outcome determinative. *See infra* 17-18. This case is a particularly unsuitable vehicle for review of the question. *See infra* 18-19. And the decision below, which faithfully adopts "long-recognized trust law," App.29, and the position advanced by the United States for over 30 years, is correct. *See infra* 19-21.

A. The asserted circuit split does not exist.

Since Congress passed ERISA in 1974, only three circuits have squarely confronted the question

presented. *See* U.S. Tatum Br. 11-20. All of them have held that after a plaintiff establishes breach and a related loss, the burden to prove harmlessness shifts to the breaching fiduciary. *See Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); App.1-48.

Petitioners cite decisions from five circuits that they claim conflict with the decision below: *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (11th Cir. 1992); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98 (2d Cir. 1998); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004); and *Peabody v. Davis*, 636 F.3d 368 (7th Cir. 2011).

Petitioners are wrong. There is no conflict.

Four of the five cases that Petitioners rely on contain only irrelevant dicta. For example, as the Fourth Circuit explained, "[n]either *Kuper* nor *Willett* addressed a situation in which plaintiffs had already established both fiduciary breach and a loss." App.27 n.10. *See also* U.S. Tatum Br. at 17-18 n.4 (observing that neither the *Kuper* nor *Willett* "courts was actually resolving the question of whether the burden shifts to the fiduciaries once the plaintiff has established a breach and made a prima facie showing of a resulted [sic] loss.").

Although Petitioners assert that this is more a matter of sequence than substance, Pet.20-21, they merely cite phrases from these decisions out of context. With respect to *Kuper* and *Wright*, for example, Petitioners select statements that were made in the context of assessing liability under a specialized employee stock ownership plan "presumption of prudence" that this Court rejected in *Fifth Third*

Bancorp. v. Dudenhoeffer, 134 S. Ct. 2459, 2466-67 (2014). And their citations to *Willett* dicta ignore the fact that *Willett* did not even involve losses to a plan, a necessary precondition to liability under 29 U.S.C. § 1109(a).[5]

Only Petitioners' fifth case, *Silverman*, even arguably conflicts with the decision below. But *Silverman* is inapposite for two reasons. First, as the Fourth Circuit noted, *Silverman* involved a claim based on ERISA's co-fiduciary liability section. *See* App.27 n.10 (explaining that the reasoning of *Silverman* "does not apply to the present case, in which plan participants sued under § 1104(a)(1) and alleged losses directly linked to the defendant-fiduciary's *own* fiduciary breach") (emphasis in original). Second, as the United States pointed out, there was no showing of related loss in *Silverman*. *See* U.S. Tatum Br. at 19 (the Fourth Circuit's position "does not conflict with the Second Circuit's rejection in *Silverman* of burden shifting in the absence of any showing of related loss").

In arguing that the Fourth Circuit erred in distinguishing *Silverman*, Pet.21-22, Petitioners fail to mention the Second Circuit's decision in *N.Y. State Teamsters Council v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994). This omission is particularly telling. In

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[5] *Peabody* is particularly unhelpful to Petitioners, as it states only the unarguable proposition that a plaintiff must establish causation to win. 636 F.3d at 373 ("To prevail under § 502(a)(2), the plaintiff must show a breach of fiduciary duty, and its causation of an injury.") (citation omitted). *Peabody* says nothing about *how* a plaintiff establishes causation, much less about the burden of proving harmlessness when a plaintiff has already proven both breach and a related loss.

DePerno, the Second Circuit endorsed the burden-shifting approach at issue in this case. *See* 18 F.3d at 182-83. And the Fourth Circuit expressly relied on that case in concluding that "[it does not] appear that the Second Circuit would apply the *Silverman* reasoning to a case brought under § 1104(a)." App.27 n.10 (citing *DePerno*).

B. The question rarely arises and has limited practical significance.

Conspicuously absent from the Petition is any attempt to argue that this question involves an important matter. Sup. Ct. R. 10(a). That is unsurprising. Only in the highly improbable event that the evidence on harmlessness is exactly even will the burden of proof on that issue make any difference.

Indeed, the very court of appeals cases that Petitioners claim "have acknowledged the existence of [the circuit] conflict," Pet.15, make clear that even Petitioners' misleadingly overbroad formulation of the question is rarely, if ever, outcome determinative. *See, e.g.*, *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 160 (3d Cir. 1999) (finding "no need to address the issue on which party bears the burden of proving causation of damages resulting from a breach of fiduciary duty" because defendant did not breach fiduciary duties); *Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009) (noting "apparent[ ]" split but concluding that "any burden-shifting error by the district court was irrelevant . . . ."). *See also Martin*, 965 F.2d at 671 (remanding the issue) (no reported district court decision on remand); *McDonald*, 60 F.3d at 237 (not reaching the question because there was no loss to the plan); *Peabody*, 636 F.3d. at 374-75 (without discussing or mentioning burden, agreeing with district court that a prudent fiduciary would have made the same decision).

Petitioners do not cite a single case (let alone any significant number of cases), in which the harmless breach burden question was outcome determinative. Nor does their amicus the U.S. Chamber of Commerce, despite its dire warnings about the consequences of the decision below. The Court should not wade into this largely theoretical debate.

C. This case is a poor vehicle for review.

Even if the question presented were worthy of certiorari and likely to be outcome determinative, this Court should deny the Petition because the interlocutory posture of this case makes it particularly unsuitable for review of that question.

1. No matter who bears the burden of proving or disproving that the fiduciary breach was harmless, the district court will need to re-adjudicate the issue. Among other things, the Fourth Circuit held that "[i]n evaluating the evidence, the district court abused its discretion to the extent it refused to consider the testimony of one of Tatum's experts, Professor Lys, regarding what a prudent investor would have done under the circumstances." App.39 n.17.

2. This case is already being actively litigated on remand and there are rulings to be made by the district court that may obviate any issue raised by the Petition. *See, e.g.*, Dist. Ct. Dkt., ECF No. 457 (January 12, 2015 supplemental submission regarding causation); Dist. Ct. Dkt., ECF No. 462 (January 20, 2015 supplemental submission regarding causation); Dist. Ct. Dkt., ECF No. 463 (January 20, 2015 motion of Petitioners to decertify class). *See also* Dist. Ct. Dkt., Min. Entry re: Status Conf., Nov. 19, 2014 (ordering further

submissions on class certification and related issues on February 2, February 13, and February 23).

It is precisely for such reasons that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); *see also* Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013) ("Ordinarily, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.") (internal quotation marks omitted).

D. The decision below is correct.

Contrary to the assertions of Petitioners and their amicus, the lower courts' resolution of the question is hardly controversial.

This Court has indicated that courts are to look to the common law of trusts in interpreting ERISA. *See, e.g.*, *Firestone Tire & Rubber Co. v Bruch*, 489 U.S. 101, 110-11 (1989) (citing *Restatement (Second) of Trusts* (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* (2d rev. ed. 1980)). Placing the burden on a breaching fiduciary to prove that the plan's loss was not caused by its breach is a "well-established approach" under trust law. App.26.

That approach was black letter trust law long before ERISA's enactment. *See, e.g.*, *Restatement (Second) of Trusts* § 212(4) (1959) ("Where . . . the trustee has in good faith failed to comply with the terms of the trust and has incurred a loss, *he has a defense* to the extent

that a loss would have occurred even though he had complied with the terms of the trust.") (emphasis added).

It was black letter trust law at the time of ERISA's passage. *See, e.g., Estate of Stetson*, 345 A.2d 679, 690 (Pa. 1975) (noting that "when a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred . . . the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty.") (citing Second Restatement as well as *Branch v. White*, 239 A.2d 665, 674 (N.J. Super. 1968); *see also Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 210 (3d Cir. 1977)).

And it has remained black-letter trust law ever since. *See, e.g.*, *Brink v. DaLesio*, 667 F.2d 420, 426 (4th Cir. 1982) ("It is generally recognized that one who acts in violation of [a] fiduciary duty bears the burden of showing that he acted fairly and reasonably."). *See also* George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 871 (2d rev. ed. 1985 & Supp. 2012); George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 701 (3d ed. 2009) ("Once the beneficiary has proven that a breach of trust occurred and loss resulted, then the burden shifts to the trustee to prove that the loss would have occurred, regardless of the breach . . . ."); *Restatement (Third) of Trusts* § 100, cmt. f (2012) ("In matters of causation, 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 . . . .").

Not surprisingly in light of these authorities, the United States has held this same considered position for

more than 30 years and across numerous administrations. *See, e.g.*, Brief of the Secretary of Labor, Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) (Nos. 91-1086, 91-1295), 1991 WL 11008811; Brief of the Secretary of Labor as Amicus Curiae, Silverman v. Mutual Ben. Life Ins Co., 138 F.3d 98 (2nd Cir. 1998) (No. 96-7795), 1996 WL 33415587; Brief of the United States as Amicus Curiae Supporting Respondents, CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011) (No. 09-804), 2010 WL 4216276 (observing that "the 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").

In short, the Fourth Circuit correctly applied over fifty years of hornbook trust law in shifting the burden to RJR to establish a harmlessness defense to liability. Petitioners offer no reason for this Court to consider the radical departure they advocate.

II. The Harmless Breach Standard Question Does Not Warrant Further Review.

According to the Petition, further review is also needed for this Court to determine "[w]hether an ERISA fiduciary with a duty of prudence can be held liable for money damages under § 1109 even though its ultimate investment decision was objectively prudent." Pet.ii. But as the Fourth Circuit explained, that misrepresents its decision. App.41 ("The dissent repeatedly charges that we hold [Petitioners] 'monetarily liable for objectively prudent investment decisions.' . . . These charges misstate our holding.").

Petitioners contend that the investment decision in this case was "objectively prudent" because it fell within a range of acceptable options. Pet.29-30. However, the district court and the Fourth Circuit held that Petitioners breached their fiduciary duty of prudence and that the Plan suffered a related loss. Those findings are no longer in dispute. As the United States explained below, Petitioners conflate fiduciary breach with causation. *See* U.S. Tatum Br. at 22 (dismissing as irrelevant that "several prudent courses of action are often available to a fiduciary . . . because here the breach has already been established," and concluding that "the only question in this case involves a prediction about what would have happened if the investigation had been conducted in a prudent manner.").

Thus, properly stated, the second question actually presented is:

> To establish that the failure to adequately investigate an investment decision was harmless, must a breaching fiduciary show that a prudent fiduciary would likely have made the same investment decision?

As explained below, that question does not warrant this Court's intervention. There is no circuit split over the proper legal standard for assessing whether a proven breach of procedural prudence was harmless. *See infra* 23-24. The question rarely arises and, despite the claims of Petitioners and their amicus, is of limited practical significance. *See infra* 24-30. And the decision below is correct. *See infra* 30-32.

A. There is unquestionably no circuit split.

There is no circuit split on the harmless breach standard question. As the Fourth Circuit recognized, every circuit to address the question has adopted precisely the same standard as that adopted by the decision below. App.30 (citing *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994); *Peabody*, 636 F.3d at 375; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000); *Unisys*, 173 F.3d at 153-54)).

Even Petitioners hedge their obligatory assertion that there is a split. Pet.35 ("To be sure, courts have formulated the loss causation standard in a variety of ways, and *the division of authority is not as sharply defined* as it is on the question of which party bears the burden of proof.") (emphasis added). That is an elegant acknowledgement that their circuit split position is barely colorable.

The Petition suggests that the decision below conflicts with then-Judge Scalia's concurring opinion in *Fink v. Nat'l Savings & Trust Co.*, 772 F.2d 951, 962 (D.D.C. 1985), and its progeny. Pet.34 (citing *Kuper*, 66 F.3d at 1460; *Rinehart v. Akers*, 722 F.3d 137, 151 (2d Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2900 (2014); *Renfro v. Unisys*, 671 F.3d 314, 322 (3d Cir. 2011). That claim is untenable.

The *Fink* concurrence did not specify the standard for "objective prudence" when a fiduciary has breached its duty "to investigate and evaluate" an investment decision, and the issue is whether that fiduciary is monetarily liable for the breach. Indeed, as the Fourth Circuit explained, nothing in that concurrence is

inconsistent with the "would have" standard. App.35. *Kuper* and *Renfro*, which Petitioners cite, are likewise consistent with the Fourth Circuit's holding. *See Kuper*, 66 F.3d at 1460 (stating that "defendants presented evidence indicating that a reasonable fiduciary would have continued to hold Quantum stock . . . ."); *Renfro*, 671 F.3d at 322 (citing the "would have" standard in *Roth*).[6]

Effectively conceding that the first question is not independently cert-worthy, Petitioners attempt to justify further review by bootstrapping the second question presented onto the first. Pet.35 ("[A]t the very least, the Court should grant certiorari on this question in connection with the closely related question of which party bears the burden of proof."). This Court should decline Petitioners' invitation. That the two questions may be interrelated does not make either deserving of this Court's attention.

B. The question is rarely presented and of extremely limited practical significance.

Petitioners and their amicus build their entire position on the flawed premise that the decision below will result in widespread liability for fiduciaries based on judicial second-guessing of complex but reasonable investment decisions. *See, e.g.*, Pet.30-31 (arguing that

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[6] *Rinehart*'s discussion of objective prudence was in the context of its holding that plaintiff did "not overcome the *Moench* presumption." *Rinehart*, 722 F.3d at 151. As discussed above, see *supra* 15-16 (discussing *Kuper*), this Court has rejected that presumption.

the decision below converts fiduciaries into de facto insurers against losses from reasonable investment decisions); Pet.31 (stating that the decision will lead to "opportunistic litigation"); App.73 (claiming that the decision "will contribute to a climate of second-guessing prudent decisions . . . .").

As the Fourth Circuit explained, however, "contrary to the dissent's rhetoric, nothing in our holding requires a fiduciary to 'make a decision that in the light of hindsight proves best.'" App.41. Rather:

> So long as a fiduciary undertakes a reasoned decision-making process, it need never fear monetary liability for an investment decision it determines to be in the beneficiaries' best interest. This is so even if that investment decision yields an outcome that in hindsight proves, in the dissent language, less than "optimal." Indeed, our holding, like ERISA's statutory scheme, acknowledges the uncertainty of outcomes inherent in any investment decision.

App.41-42.[7] The Fourth Circuit is correct. And, properly understood, the question at issue is rarely presented and of extremely limited practical significance.

1. The harmless breach standard question only arises in a subset of ERISA fiduciary breach cases—

[7] In the words of one treatise, "Courts uniformly hold that the prudence of a fiduciary's investment decision is measured at the time the action is taken, not from the vantage of hindsight." Jayne E. Zanglein, et al., *ERISA Litigation* 978 (5th ed. 2014) (citing decisions of several courts of appeal).

when a plaintiff has proven that a fiduciary violated the procedural prudence requirement in Section 404(a)(1)(B) of ERISA. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring a fiduciary to act with the "diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . ."). Thus, a fiduciary who "is choosing among multiple prudent investment options," Pet.30, is immunized from liability unless it has already—as in this case—been found to have breached its duty by failing to adequately investigate the decision.

For precisely this reason, the harmless breach standard question is rarely implicated. Most fiduciaries undertake some meaningful investigation or analysis before making investment decisions.[8] And when a plaintiff challenges the prudence of a fiduciary's decision-making process, the bar is quite high. Indeed, as the Fourth Circuit observed, "courts have readily determined that fiduciaries who act reasonably—i.e., who appropriately investigate the merits of an investment decision prior to acting—easily clear this bar." App.18-19.

For example, in the only two cases discussed by the district court and Fourth Circuit involving allegations similar to those here, that a fiduciary imprudently divested a plan of one of its holdings, the courts found no

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[8] Decades of case law and regulatory guidance have stressed the importance of procedural prudence. *See* 29 C.F.R. § 2550.404a-1(b); *see also, e.g.*, *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983); *Katsaros*, 744 F.2d at 279.

fiduciary breach. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009); *Noa v. Keyser*, 519 F.Supp.2d 481 (D.N.J. 2007). Although the fiduciaries in *Bunch* conducted an extensive investigation, the fiduciaries in *Noa* avoided liability although they did far less. *See* App.132-133 (district court's discussion of those cases).

In short, only in those few cases where fiduciaries conduct little or, as in this case, no investigation or analysis before making their decisions, will the harmless breach standard question even come into play. And the number of relevant cases is even smaller because, unlike Plaintiff here, other plaintiffs may not be able to establish that the plan suffered a related loss. *See, e.g.*, *McDonald*, 60 F.3d at 237.

2. Even in those cases where the harmless breach causation standard is implicated, it will not produce the harsh results described by Petitioners and their amicus. Pet.30-32; Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioners at 5-11, Tatum v. R.J. Reynolds Tobacco Co., et al., No. 14-656 (Jan. 5, 2015) ("Pet. Am."). In assessing this proposition, the Court need look no further than the express representations of Petitioners' trial counsel. To this day, Petitioners' trial counsel trumpets the unique nature of this case on its website, stating: "In most cases of fiduciary breach, such as in the stock-drop context, there is a bright line between prudent and imprudent actions, thus the 'would have' standard makes sense."[9] It

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[9] Daniel R. Taylor, Jr., Adam H. Charles & Chad D. Hansen, *Tatum v. R.J. Reynolds Tobacco Co., et al.: Real Implications for ERISA's "Hypothetical Prudent Fiduciary" Standard*, Kilpatrick

is impossible to reconcile this candid admission with the newly minted claim of Petitioners and their amicus.

To be sure: Petitioners' initial statement is correct—"most cases of fiduciary breach" involve "bright line" choices. But even in the minority of cases involving choices among multiple reasonable options, there is no reason to believe that the decision below will cause any of the problems hypothesized by Petitioners and their amicus. The proof is empirical. Despite Petitioners' claim that their concern is "hardly speculative," Pet.30, neither Petitioners nor their amicus manage to cite a single case in which a fiduciary that has been found to have breached its duty of procedural prudence has also been found liable for choosing one of a number of arguably reasonable investment options. That is so despite the fact that the "would have" formulation adopted by the Fourth Circuit has been the rule in three other circuits for many years (20 years in the case of the Eighth Circuit). If predictions of "opportunistic litigation," Pet.31, and "forum shopping," Pet. Am.17-19, had any basis in reality, there would be some evidence. But there is none.

Petitioners quote then-Judge Scalia's concurrence in *Fink*, 772 F.2d at 962, but fail to grasp its obvious implication—even fiduciaries who completely fail to investigate or evaluate have *not been liable* for losses when they "make (or hold) objectively prudent investments (e.g., an investment in a highly regarded

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Townsend Knowledge Center, Alerts & Industry Summaries (Apr. 8, 2013), http://www.kilpatricktownsend.com/en/Knowledge_Center/Alerts_and_Podcasts/Legal_Alerts/2013/04/Tatum_v_RJ_Reynolds_Tobacco_Co_et_al.aspx.

'blue chip' stock)." In fact, in the one case the Chamber cites involving a fiduciary who chose one out of many similar investment options, the Third Circuit concluded without trouble that a hypothetical prudent fiduciary would have made the same investment. *Unisys*, 173 F.3d at 151, 153-54. The court so held without any discussion of whether the investment was the best of all of the options. *Id.* It certainly did not engage in hindsight, given that it found the decision to be objectively prudent despite the fact that the chosen insurance company was later seized by regulators. *Id.* at 150.[10]

In sum, nothing in the reported case law supports the contentions of Petitioners or their amicus that the decision below will lead to unjust results. The "would have" test has been in effect for many years in several circuits. There has been no avalanche of litigation against fiduciaries who choose from among a group of arguably prudent investment options, and in the rare case in which such a claim has been made, the test has not proven difficult to meet.

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[10] It also bears mention that—as an alternative holding—the Third Circuit in *Unisys* found that there was no breach of fiduciary duty in the *process* by which defendants made their choice. 173 F.3d at 153. *See supra* 17-18 (explaining that the harmless breach standard question will rarely matter because it only arises *after* a finding of procedural imprudence). Neither of the other two cases that Petitioner's amicus cites as supposedly demonstrating that procedural prudence claims are widespread involved a choice among multiple reasonable options. *See Harley v. Minn. Mining Mfg. Co.*, 284 F.3d 901, 905 (8th Cir. 2002); *Plasterers'*, 663 F.3d at 214-15.

C. The decision below is correct.

Trust law has long adopted a "would have" standard to decide whether to excuse a breaching fiduciary from liability.[11] *See, e.g.*, *Restatement (Second) of Trusts* § 205, cmt. f., at 460 (1959) ("If the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if *it would have occurred* in the absence of a breach of trust . . . .") (emphasis added); *Estate of Stetson*, 345 A.2d at 690-91 (remanding for a determination of whether the defendant had "proved that the loss to the trust *would have occurred* in the absence of a breach of duty") (emphasis added).

The standard has not changed since Congress enacted ERISA. *See, e.g.*, *Restatement (Third) of Trusts* § 100, cmt. e (2012) ("[W]hen 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.") (emphasis added); George Bogert & Amy Hess, *Bogert's Trusts & Trustees* § 701, at 204 (rev. 3d ed. 2009) ("Once the beneficiary has proven that a breach of trust occurred and loss resulted, then the burden shifts to the trustee to prove that the loss *would have occurred*, regardless of the breach . . . .") (emphasis added).

The "would have" standard for loss causation is also ubiquitous elsewhere. For example, tort law contains a

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[11] As discussed above, see *supra* 19-21, this Court has looked to trust law in interpreting ERISA.

basic "but for" causation rule under which "[t]he defendant's conduct is a cause of the event if the event *would* not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event *would* have occurred without it." W. Page Keeton et al., *Prosser & Keeton on Law of Torts* § 41, at 266 (5th ed. 1984) (emphasis added). In legal malpractice, causation is generally proven by showing that a plaintiff *would have* prevailed but for the malpractice. 4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 37.15, at 1563-64 (2013 ed.). Courts in these areas of law explicitly reject a "could have" standard as insufficient. *See id.* at 1564 (stating, "In any event, what 'could have' or 'might have' been decided is speculative and is not the standard.").

Petitioners fail to articulate a meaningful alternative standard to that of traditional trust law. Rather, they invoke and repeat the term "objectively prudent" from *Fink* like a talisman. But as the Fourth Circuit made clear, *Fink* is not inconsistent with the traditional trust law standard because "the term 'objective prudence' is not self-defining." App.30.[12]

Tellingly, Petitioners do not advocate the "could have" standard applied by the district court. But their "range of reasonableness" approach (Pet.30) amounts to the same thing; *i.e.*, some fiduciary somewhere could

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[12] Similarly, the decision below points out that the dissent's "objective prudence *simpliciter*" standard is "not self-defining (and the dissent does not attempt to define it)," is unclear as to how it would it would work in practice, and "[a]t times suggests" that it "is in fact a 'could have' standard." App.42-43.

have made that decision. Such a standard would render the procedural prudence requirement of 29 U.S.C. § 1104(a)(1)(B) virtually meaningless, even where there has been a breach of fiduciary duty and a related loss to the plan, because it would automatically excuse a fiduciary from liability in all but the most extreme situations. As this Court has recognized, "[i]nquiring what *could* have occurred . . . encompass[es] even the most remote of possibilities." App.33 (discussing *Knight v. Comm'r*, 552 U.S. 181, 188 (2008)) (emphasis in original).

Under the standard of the Fourth Circuit, every other court of appeals to consider the issue, and long-standing black-letter trust law, even when a plaintiff proves that the fiduciary made a decision based on an imprudent process and there is a related loss to the plan, a breaching fiduciary can *still* avoid liability by showing that a prudent fiduciary would probably have made the same decision. There is simply no reason to reject that standard, which allows even fiduciaries who breach their duty a final chance to avoid monetary liability for a plan's losses.

CONCLUSION

The petition for a writ of certiorari should be denied.

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