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 ALL OTHERS SIMILARLY SITUATED

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, requires a fiduciary to discharge his duties with respect to an employee benefit plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a). Fiduciaries who breach their statutory duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. 1109(a).

The questions presented are:

1. Whether, in an action for fiduciary breach under 29 U.S.C. 1109(a), a fiduciary bears the burden of proving that a loss is not attributable to the fiduciary's breach once the plaintiff establishes that the fiduciary breached his duties and a prima facie case of related plan losses.

2. Whether the standard for proving that a fiduciary's failure to conduct an adequate investigation caused losses to the plan depends on whether a fiduciary who had conducted an adequate investigation would have made the same decision, or whether a fiduciary who had conducted an adequate investigation could have made the same decision.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. 1001(b), by imposing trust-law duties of loyalty, prudence, and diligence on plan fiduciaries. 29 U.S.C. 1104(a)(1); see *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2463, 2467 (2014). A plan participant,

beneficiary, or fiduciary, or the Secretary of Labor, may sue on behalf of the plan to remedy a breach of fiduciary duty. 29 U.S.C. 1132(a)(2). A fiduciary is "personally liable to make good to [the] plan any losses to the plan" resulting from the breach and "to restore to [the] plan any profits" the fiduciary made through use of plan assets. 29 U.S.C. 1109(a).

2. This case concerns a breach of the duty of prudence in the administration of the R.J. Reynolds Tobacco 401(k) plan (the Plan). Respondent is a former employee of R.J. Reynolds Tobacco and a participant in the Plan. Pet. App. 9, 78. Petitioners RJR Pension Investment Committee (Investment Committee) and RJR Employee Benefits Committee (Benefits Committee) are named fiduciaries under the Plan and are responsible for plan administration and investment decisions. *Id.* at 4-5, 84-86.[1] All agree that the Plan is governed by ERISA. *Id.* at 125 n.17.

In 1999, RJR Nabisco separated its tobacco business (R.J. Reynolds) from its food business (Nabisco). Pet. App. 3. As part of that separation, RJR Nabisco's existing 401(k) plan was divided into two new plans—one for the food company and one for the tobacco company. *Id.* at 82-83. The tobacco company plan is at issue here. That plan expressly provided that tobacco company employees (like respondent) who were holding Nabisco stock could continue to hold the stock but could not purchase additional shares. *Id.* at 4, 90 n.5; see *id.* at 92 (quoting Plan language).[2]

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[1] Petitioners also include the company itself and related corporate entities. See Pet. App. 78, 126 n.18.

[2] After the spin-off, the Plan contained two funds containing Nabisco stock: the Nabisco Group Holdings Common Stock Fund, which was created by the division of the existing RJR Nabisco

Despite the Plan's express language requiring that Nabisco stock continue to be offered as a plan investment, petitioners decided to eliminate that stock from the Plan. Pet. App. 5. A working group of company employees who had "no authority or responsibility" to administer the Plan met for an hour or less and decided that all Nabisco stock would be sold six months after the spin-off. *Ibid.* There is no testimony "as to why six months was determined to be an appropriate timeframe." *Id.* at 5-6.

Without any meeting or discussion of the issue, the Benefits Committee "agreed with the working group's recommendation" and communicated that decision to plan participants. Pet. App. 6, 90-91. Plan participants began "questioning the timing of the elimination given the Nabisco stocks' continued decline in value." *Id.* at 145. In response, RJR human resources managers, corporate executives, and in-house counsel met to discuss whether to reverse the decision to sell the Nabisco stock. *Id.* at 7. That group, like the earlier working group, had no authority to administer the Plan. *Id.* at 5, 7. Without consulting any financial advisor, outside counsel, or independent fiduciary, the group decided to go ahead with the sale. *Id.* at 8; see *id.* at 140, 144. Around the same time, one member of the Benefits Committee attempted to amend the Plan to remove the Nabisco stock from the list of plan investments, but that amendment was not valid because it was not approved by a majority of the Benefits Committee. *Id.* at 6 n.2.

The company then sent a letter to plan participants stating that the Nabisco stock must be eliminated

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stock fund into two parts, and the Nabisco Common Stock Fund, which existed before the spin-off. Pet. App. 4 & n.1.

from the Plan to comply with governing regulations. Pet. App. 8. That statement was wrong; the person who prepared the letter knew it was wrong; no lawyer ever reviewed the letter; and the statement was never corrected, even after company officials were told it was wrong. *Id.* at 8-9. Instead, a few months later, company officials sent another letter repeating that incorrect information. *Id.* at 9, 107.

Respondent asked plan fiduciaries not to go through with the forced sale of Nabisco stock because it would decrease the value of his 401(k) account by 60%. Pet. App. 9. Company officials rebuffed respondent's request and sold the stock as planned, even though several corporate officers retained their personal holdings of Nabisco stock. *Id.* at 9-10, 110-111.

A few months after the Nabisco stock was removed from the Plan, that stock rose significantly in value. Pet. App. 10-11, 112 (by December 2000, the Nabisco Funds rebounded, one by 82% and the other by 247%).

3. In this suit, respondent alleges that petitioners breached their fiduciary duties by divesting the Plan of all Nabisco stock on an arbitrary timeline and without a thorough investigation. Pet. App. 11; see 29 U.S.C. 1109(a). The district court certified a class of all plan participants who held Nabisco stock in their 401(k) accounts before the forced sale. Pet. App. 11, 77, 119-120.[3]

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[3] Petitioners originally argued that the decision to sell the stock was not a fiduciary action; the district court agreed, but the court of appeals reversed and remanded. Pet. App. 11. Petitioners then argued that the Benefits Committee and Investment Committee were not proper defendants; the district court agreed, *id.* at 119, but the court of appeals reversed, *id.* at 45-46. Petitioners do not renew either argument before this Court.

After a bench trial, the district court concluded that petitioners breached their fiduciary duties but ultimately entered a judgment in their favor. Pet. App. 76-166. The court first explained that, under ERISA, a fiduciary making an investment decision must "engage[] in a reasoned decision-making process, consistent with that of a prudent man acting in like capacity." *Id.* at 131 (citation and internal quotation marks omitted; alteration in original). Based on the evidence presented at trial (including expert testimony), the court concluded that "[t]he process used by the decision-makers in this case fell far below what ERISA would require of a fiduciary." *Id.* at 138. The court noted that the working group's decision "was made with virtually no discussion or analysis," no "research or investigation," and no consideration of the "large and unnecessary losses" to the Plan that could result from the sale of Nabisco stock. *Id.* at 138-139. The court also found that the six-month timeline for divestment "was chosen arbitrarily." *Id.* at 139.

The court determined that, once a plaintiff proves a breach of fiduciary duty and a prima facie case of related plan losses, the defendant fiduciary has the burden to establish that the losses were not caused by the fiduciary's breach. Pet. App. 149-150. But the court decided that petitioners met that burden here, concluding that "a hypothetical prudent fiduciary could have decided not to add [to] or maintain the Nabisco Funds as either frozen or active funds in the Plan on January 31, 2000." *Id.* at 165.

4. The court of appeals affirmed in part, reversed in part, vacated the judgment of the district court, and remanded. Pet. App. 1-48. The court first agreed with the district court that petitioners had breached

their fiduciary duties. *Id.* at 22-25. The court explained that the fiduciaries acted imprudently in "forc[ing] the sale" of Nabisco stock "within an arbitrary timeframe," "without consulting any experts" and with no consideration of the "immediate and permanent losses" that the forced sale would cause to the Plan. *Id.* at 24-25. The court also concluded that the fiduciaries "failed to act solely in the interests of participants and beneficiaries," instead making decisions based on the company's "own potential liability." *Id.* at 42 (internal quotation marks omitted).

The court of appeals also agreed with the district court that, once a plaintiff establishes a fiduciary breach and a prima facie case of plan losses, the defendant fiduciary has the burden to show that the fiduciary breach did not cause those losses. Pet. App. 25-30. The court explained that, although the "default rule" in civil litigation is that "the burden of proof rests with the plaintiff," the common law of trusts (on which ERISA is based) embodies a different rule: "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." *Id.* at 26 (quoting 4 Restatement (Third) of Trusts § 100 cmt. f, at 69 (2012)). The court also explained that the trust-law rule is consistent with ERISA's purpose of protecting the interests of plan participants and beneficiaries. *Id.* at 29.

The court of appeals concluded, however, that the district court used the wrong legal standard for assessing causation. Pet. App. 30-44. The court held that, once a plaintiff shows that a fiduciary breached

its duty of prudence by using an inadequate decision-making process and further shows losses to the Plan, the plaintiff prevails unless the fiduciary can show "that a prudent fiduciary *would have* made the same decision"—or, put another way, that the fiduciary "would have reached the same decision had it undertaken a proper investigation." *Id.* at 30. The court rejected the district court's standard—whether a hypothetical prudent fiduciary "could" have chosen not to maintain investment in the Nabisco Funds, *id.* at 165—because "'could' describes what is merely possible, while 'would' describes what is probable." *Id.* at 33. The court then concluded that the district court's use of the "could" standard was not harmless and remanded on the issue of causation. *Id.* at 36-40.

Judge Wilkinson dissented, taking the view that an ERISA plaintiff has the burden of proof on causation, even when a fiduciary breach and related loss have been established, and that petitioners cannot be liable for plan losses because their decision was "objectively prudent." Pet. App. 49, 54-55.

DISCUSSION

Petitioners contend (Pet. 14-35) that review is warranted to address which party has the burden of proof on the issue of causation once a plaintiff has established a breach of fiduciary duty under ERISA and a prima facie case of related plan losses, and to address what standard should be used to assess causation when the fiduciary breach is a failure of process. The court of appeals correctly decided both issues, and contrary to petitioners' contentions (Pet. 14-22, 33-35), there is no clear circuit split on either question. This case would in any event be a poor vehicle for consideration of the questions presented, because resolution of

those questions may not affect the outcome on the causation question. Further review is therefore unwarranted.

A. The First Question Presented Does Not Warrant This Court's Review

1. The court of appeals correctly concluded that petitioners bore the burden of proving that their failure to conduct an adequate investigation before deciding to divest the Plan of the Nabisco Funds did not cause the Plan's losses. ERISA imposes a number of duties on those acting as fiduciaries of ERISA plans, including the trust-law duties of loyalty and prudence. See 29 U.S.C. 1104(a)(1)(B). When a fiduciary breaches one of those duties, he "shall be personally liable to make good to [the] plan any losses to the plan resulting from [the] breach." 29 U.S.C. 1109(a).

ERISA provides that a fiduciary shall be liable for losses "resulting from" a breach of fiduciary duty, but it does not specify who bears the burden of proof on the issue of causation of the loss. That question is answered, however, by the law of trusts. ERISA's fiduciary duties are "derived from the common law of trusts." *Tibble* v. *Edison Int'l*, No. 13-550, 2015 WL 2340845, at *4 (May 18, 2015); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 496-497 (1996). This Court therefore "look[s] to principles of trust law for guidance" to interpret ERISA's fiduciary-duty provisions. *Conkright* v. *Frommert*, 559 U.S. 506, 512 (2010) (citation and internal quotation marks omitted); see *Tibble*, 2015 WL 2340845, at *4; see also *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989) (applying trust-law principles to determine the appropriate standard of judicial review). Although the "default rule" in ordinary civil litigation when a statute is si-

lent is "that the burden of proof rests with the plaintiff," Pet. App. 26 (citing *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005)), trust law has long contained an important qualification to that principle in a case such as this.

Under the common law of trusts, "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." 4 Restatement (Third) of Trusts § 100 cmt. f, at 69 (2012); see, *e.g.*, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871, at 156-157 (rev. 2d ed. 1995) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee."). Put another way, when a trustee has breached the trust and there has been 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." 1 Restatement (Second) of Trusts § 212(4), at 484 (1959).[4]

This longstanding trust-law principle rests on the view that "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of

[4] Petitioners assert (Pet. 26) that the court of appeals erred in relying on the Third Restatement because the First or Second Restatements are "the only versions Congress could have consulted before enacting ERISA." But as noted in the text, both the Second and Third Restatements recognize that, once a plaintiff establishes a fiduciary breach and related loss, the trustee has the burden of showing that the loss would have occurred in the absence of the breach. This principle also is reflected in case law predating ERISA's enactment. See p. 9-10, *infra*; see also Br. in Opp. 19-20.

uncertainty as to the consequences of its breach of duty." *Estate of Stetson*, 345 A.2d 679, 690 (Pa. 1975); see, *e.g.*, *Nedd* v. *United Mine Workers of Am.*, 556 F.2d 190, 211 (3d Cir. 1977) (same). In the face of a breach of fiduciary duty and a related loss, trustees are "under the burden of showing facts and circumstances to establish they are without fault in the matter." *In re Richardson's Will*, 266 N.Y.S. 388, 390 (N.Y. Sur. Ct. 1928); cf. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921) (applying same rule in the context of a breach of a "fiduciary nature" occasioned by transactions between corporate boards having common members).

This trust-law burden-shifting rule furthers ERISA's purposes. ERISA "protect[s] * * * the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. 1001(b), by imposing trust-law fiduciary duties and authorizing accompanying remedies. These provisions ensure that plan assets are managed prudently and for the benefit of plan participants and beneficiaries. Once the plaintiff proves that there has been a fiduciary breach and a related loss to the plan, it is appropriate to impose on ERISA fiduciaries the burden of showing that the loss would have occurred even in the absence of their breach. Cf. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 286-287 (1977). A contrary rule would insufficiently deter ERISA fiduciaries from engaging in wrongful conduct and insufficiently protect beneficiaries' interests, and it would create significant barriers to recovery for conceded fiduciary breaches. See Pet. App. 29.

In this case, "[o]verwhelming evidence" established that petitioners breached ERISA's duty of prudence

by failing to undertake any "investigation, analysis, or review" before divesting the Plan of the Nabisco Funds, that petitioners failed to act solely in the interests of plan participants and beneficiaries, and that there was a "prima facie showing of loss to the Plan." Pet. App. 22, 29, 42. The courts below therefore appropriately required petitioners to bear the burden of proving that the Nabisco Funds would have been sold even if there had been an investigation satisfying ERISA's requirements.

2. Like the court of appeals, the Fifth and Eighth Circuits have held that when a plaintiff establishes that an ERISA fiduciary has breached his fiduciary duties and a prima facie case of related plan losses, the fiduciary has the burden to prove that his breach did not cause those losses. See Pet. App. 26-29; *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), cert. denied, 516 U.S. 1174 (1996); *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917, 920 (8th Cir. 1994); see also Pet. App. 27 (recognizing this agreement).[5]

The Second Circuit has issued potentially inconsistent decisions on this issue. In *New York State Teamsters Council Health & Hospital Fund* v. *Estate of DePerno*, 18 F.3d 179, 182-183 (2d Cir. 1994), the court recognized and applied the longstanding trust-law burden-shifting rule, holding that when the plain-

[5] Those decisions are consistent with the accepted rule that any uncertainty in measuring losses caused by a fiduciary breach is resolved against the fiduciary. See, *e.g.*, *Secretary of U.S. Dep't of Labor* v. *Gilley*, 290 F.3d 827, 830 (6th Cir. 2002); *Kim* v. *Fujikawa*, 871 F.2d 1427, 1430-1431 (9th Cir. 1989); *Donovan* v. *Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985); *Leigh* v. *Engle*, 727 F.2d 113, 138-139 (7th Cir. 1984).

tiffs "show[ed] that the defendants breached a fiduciary duty to the [plan]" and cost the plan over $45,000, it "was sufficient to shift to the defendants the burden to show that the [challenged action] was fair and reasonable under all of the circumstances." *Id.* at 183 (internal quotation marks omitted). But then in *Silverman* v. *Mutual Benefit Life Insurance Co.*, 138 F.3d 98 (2d Cir.), cert. denied, 525 U.S. 876 (1998), the court declined to apply that burden-shifting rule in determining whether a successor investment manager could be held liable as a co-fiduciary under 29 U.S.C. 1105(a)(3). See 138 F.3d at 105-107 (Jacobs & Meskill, JJ., concurring).

The fact that the Second Circuit rejected burden-shifting in *Silverman* does not mean it would do so in a case like this. *Silverman* arose in the unique situation of a new fiduciary's liability for failing to take action to remedy a breach (embezzlement) by a prior fiduciary, and the court noted that in those circumstances, requiring the plaintiff to bear the burden of proof on causation served as a check on the "broadly sweeping liability" of co-fiduciaries under 29 U.S.C. 1105(a)(3). 138 F.3d at 106 (Jacobs & Meskill, JJ., concurring). This case, by contrast, concerns fiduciaries' liability for their *own* actions under 29 U.S.C. 1109(a). Also, the *Silverman* court relied in its disposition on the fact that the plaintiff "declined to offer any evidence to support the fact or amount of damages, other than the underlying theft." 138 F.3d at 106-107 (Jacobs & Meskill, JJ., concurring). This case, by contrast, involves whether burden-shifting is appropriate when the plaintiff has established a fiduciary breach *and* related plan losses. For these reasons, this case is more like *DePerno* than *Silverman*, and so

the Second Circuit may well apply the trust-law burden-shifting rule here.[6] At a minimum, any uncertainty about the state of the law in the Second Circuit counsels in favor of forgoing further review of the question at this time.

The other decisions petitioners cite (Pet. 18-21) are inapposite because none of them addressed the question whether a breaching fiduciary bears the burden of proof on causation after a plaintiff establishes a breach of fiduciary duty and plan losses. *Willett* v. *Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335, 1343 (11th Cir. 1992), concerned whether an insurance company was liable for failing to inform plan participants that their coverage ended because their employer had not paid the premiums. The court of appeals found a genuine issue of material fact about whether the insurer (as opposed to the employer) had caused the plaintiffs' losses and then stated that "the burden of proof on the issue of causation will rest on the beneficiaries" on remand. *Id.* at 1343-1344. But the court did not consider any issue of burden-shifting. The decision in *Peabody* v. *Davis*, 636 F.3d 368, 375 (7th Cir. 2011), is similar: the court held that

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[6] *Silverman* did not attempt to reconcile its rejection of burden-shifting with *DePerno*; it did not even mention *DePerno*. But in *Salovaara* v. *Eckert*, No. 98-7892, 1999 WL 461820, 182 F.3d 901 (2d Cir. June 24, 1999), the Second Circuit affirmed a district court decision reconciling the two decisions as follows: under *DePerno*, burden-shifting applies when the plaintiff shows a prima facie case of breach and plan losses, but under *Silverman*, the "burden on causation does not shift to defendant if plaintiff has demonstrated only breach of fiduciary duty." *Salovaara* v. *Eckert*, No. 94-CV-03430, 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998); see *Salovaara*, 1999 WL 461820, at *1 (affirming "substantially for the reasons stated by the district court").

a fiduciary's investment decision was imprudent and then remanded for a calculation of damages. Although the court remarked that "the plaintiff must show a breach of fiduciary duty, and its causation of an injury" to prevail, *id.* at 373, there was no causation issue before the court, and the court did not consider any burden-shifting argument.

The other cited decisions addressed the so-called *Moench* presumption, stating that to overcome that unique presumption, which some courts of appeals had applied in assessing whether a plan's continued investment in employer stock was prudent, "a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." *Kuper* v. *Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Wright* v. *Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); see *Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996). But those decisions did not consider whether burden-shifting on causation is appropriate in ordinary breach-of-trust cases under ERISA when the plaintiff establishes a fiduciary breach and related plan losses. See Pet. App. 27 n.10. And, in any event, this Court rejected the *Moench* presumption in *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014), thereby abrogating the cited decisions.

B. The Second Question Presented Does Not Warrant This Court's Review

1. As with the first question presented, ERISA's fiduciary-duty provisions do not expressly address the applicable standard for determining whether the fiduciary's breach caused the plan's losses in a case like this. See 29 U.S.C. 1109(a) (establishing liability for losses "resulting from" the fiduciary's breach). But

the law of trusts provides the answer: under trust law, "[i]f a trustee commits the breach and a loss is incurred, the trustee ordinarily is not chargeable with the amount of the loss if the same loss would have occurred in the absence of a breach of trust." 4 Restatement (Third) of Trusts § 100 cmt. e, at 67-68.

"It is generally the rule that a trustee who breaches a fiduciary duty will not be surcharged for a loss sustained by the trust if there is no causal connection between the breach of duty and the loss," and whether there is such a causal connection depends on whether "the loss *would have occurred* in the absence of a breach of duty." *Estate of Stetson*, 345 A.2d at 690 (emphasis added); see 4 Restatement (Third) of Trusts § 100 cmt. e, at 67-68 ("would have" is the standard for establishing "the causal connection between the breach of trust and the loss"). Stated differently, a trustee who has "failed to comply with the terms of the trust and has incurred a loss" "has a defense to the extent that a loss *would have occurred* even though he had complied with the terms of the trust." 1 Restatement (Second) of Trusts § 212(4), at 484 (emphasis added); see *id.* § 205 cmt. f, at 460 (question is whether the loss "would have occurred in the absence of a breach of trust").[7]

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[7] Some courts have held that a fiduciary who has engaged in a prohibited transaction may not escape liability under this standard. See, *e.g.*, *Chao* v. *Hall Holding Co.*, 285 F.3d 415, 436 (6th Cir. 2002), cert. denied, 537 U.S. 1168 (2003); see also 4 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 24.9.1, at 1699 (5th ed. 2007) (proof of causal connection may not be required when "it is necessary to impose absolute liability to deter other trustees from committing similar breaches of trust," such as in cases of self-dealing). That approach would not aid petitioners

The trust-law causation standard is appropriate for assessing whether a fiduciary's failure to conduct a prudent investigation caused losses to an ERISA plan. The key question in a case of procedural imprudence is whether the fiduciary's failure to conduct an adequate investigation mattered, and whether it mattered depends on what likely would have happened in the absence of the fiduciary breach. Pet. App. 35 (standard asks "whether the loss would have occurred regardless of the fiduciary's imprudence"). The "would have" standard seeks to determine what is probable, consistent with the preponderance-of-the-evidence standard generally applicable in civil litigation. See *Branch* v. *White*, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968) ("[E]scape of a trustee from liability by reason of breach of trust can be defeated if the loss *probably* occurred by reason of the breach. A showing of certainty is not required."). It is a standard commonly used in assessing causation. See, *e.g.*, *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2525 (2013) ("It is thus textbook tort law that an action is not regarded as a cause of an event if the particular event would have occurred without it." (citation and internal quotation marks omitted)). By contrast, a standard that permitted a fiduciary who has breached his duties to escape liability based on a mere possibility that a fiduciary could have made the same decision would fail to protect the interests of plan participants and beneficiaries because it would allow a breaching fiduciary to escape liability even if the most likely outcome of an adequate investigation was a different course of action.

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because it is more plaintiff-friendly than the approach adopted by the court of appeals.

Petitioners contend (Pet. 29-33) that the court of appeals' standard requires proof that a prudent fiduciary would have made the "exact same" decision in the absence of the fiduciary breach. But the court of appeals did not require such proof. The court of appeals rejected the argument that a breaching fiduciary could "escape liability by showing nothing more than the mere possibility that a prudent fiduciary could have made the same decision," Pet. App. 34 (internal quotation marks omitted), then remanded to the district court to address "whether the loss would have occurred regardless of the fiduciary's imprudence," *id.* at 35; see *id.* at 48 (remanding "for further proceedings consistent with this opinion").

Contrary to petitioners' suggestion (Pet. 28-29), the "would have" standard does not foreclose consideration of a range of decisions; it depends on the facts on the case. In some cases, there may be several alternatives that would have been prudent. For example, there may be a range of mutual funds that are prudent investments for a 401(k) plan. In other cases, there is only one course that would have been prudent and that would have been taken by the fiduciary absent the breach. In this case, for example, the terms of the Plan required the fiduciaries to continue offering the Nabisco Funds. See pp. 20-21, *infra*.

Until other courts of appeals have considered whether there is a difference between a "would have" standard and a "could have" standard, it would be premature to assume that the former standard is as strict as petitioners claim.

2. There is no disagreement in the circuits on the second question presented. The Third, Fourth, Fifth, and Eighth Circuits have stated that liability for a

fiduciary who has breached his fiduciary duties by failing to conduct an adequate investigation depends on whether the same decision would have been made after an investigation that satisfied ERISA's standard of prudence. See Pet. App. 33-40; *Bussian* v. *RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) (no liability "if the provider selected would have been chosen had the fiduciary conducted a proper investigation"); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 154 (3d Cir.) (no liability if a "hypothetical prudent fiduciary would have made the same investments"), cert. denied, 528 U.S. 950 (1999); *Roth*, 16 F.3d at 919 ("Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway."); see also *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1304-1305 (5th Cir. 1988) (there is "no causal relation between [the fiduciary's] breach and the loss" if "the loss would have occurred regardless of the breach"), cert. denied, 490 U.S. 1089 (1989).[8]

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[8] As the parenthetical quotations indicate, some courts have framed the inquiry in terms of what a "hypothetical prudent fiduciary" would have done, while others ask what the fiduciary in that case would have done. There is force to the proposition that on the question of causation, as distinguished from the substantive standard of prudence (which by statute turns on what a reasonable person in like circumstances would do, see 29 U.S.C. 1104(a)), the inquiry in a case such as this should focus on what the actual fiduciary would have done if he had not committed the breach. See, *e.g.*, 4 Restatement (Third) of Trusts § 100 cmt. e, at 67-68. The parties in this case did not raise any issue as to whether there is a difference between those two inquiries and if so, what the appropriate inquiry would be. The decisions cited in the text also

Moreover, of the courts of appeals that have used the "would have" formulation, only the Fourth Circuit in this case has considered whether there is a difference between a "would have" standard and a "could have" standard; the other courts simply used the trust-law "would have" standard without addressing a "could have" standard. The fact that only one court of appeals has actually considered (but rejected) a "could have" causation standard counsels strongly against this Court's review of the issue at this time.

Petitioners contend (Pet. 34-35) that "most courts" ask whether an investment chosen after an inadequate process is "objectively prudent" and that that standard is different than the "would have" standard. But it is not clear that the "objectively prudent" standard is different from the "would have" standard in practice. In fact, the decision below viewed the "would have" standard as consistent with "objective prudence," see Pet. App. 33, and the other decisions petitioners cite explain that a fiduciary action is "objectively prudent" when an adequate investigation "would have" led the imprudent fiduciary to the same result. *Rinehart* v. *Akers*, 722 F.3d 137, 151 (2d Cir. 2013), vacated on other grounds, 134 S. Ct. 2900 (2014); *Renfro* v. *Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011); *Kuper*, 66 F.3d at 1460.[9]

Petitioners also note (Pet. 28) that then-Judge Scalia's separate opinion in *Fink* v. *National Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), used an

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did not address whether there is any difference between the two inquiries.

[9] These decisions also all involved the *Moench* presumption, which this Court abrogated in *Dudenhoeffer*. See *Rinehart*, 722 F.3d at 145; *Renfro*, 671 F.3d at 323; *Kuper*, 66 F.3d at 1459.

"objectively prudent" standard, stating that a trustee who has "fail[ed] to investigate and evaluate" an investment should not be liable for damages if the investment was an "objectively prudent investment[]." *Id.* at 962 (Scalia, J., concurring in part and dissenting in part). That opinion was simply distinguishing between two questions—whether there was a procedural deficiency and whether that deficiency actually harmed the plan. And, in explaining what "objectively prudent" meant, the opinion used a "would have" formulation. *Ibid.* (Scalia, J., concurring in part and dissenting in part) ("[T]he determination of whether an investment was objectively imprudent is made on the basis of what the trustee knew or should have known; and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate." (emphasis omitted)). Because it is not clear that a "would have" standard is different in practice than an "objectively prudent" standard, and because most courts have not considered the differences between a "would have" standard and a "could have" standard, this Court's review of the causation standard would be premature at this time.

3. This case would in any event be a poor vehicle for consideration of the second question presented because the Plan at issue required the petitioners not to sell the Nabisco stock, and the district court may rely on that fact on remand to decide this case. The Plan provided that "[t]he Trustee shall maintain" the Nabisco Funds as investment options, and it specifically "froze[]" those funds so that participants could maintain their current shares but could not buy additional shares. Pet. App. 92 (quoting Plan § 4.03). As

the court of appeals explained (*id.* at 37-39), the fact that the "governing Plan document required the Nabisco Funds to remain as frozen funds in the Plan" is "highly relevant" to assessing causation, because ERISA requires fiduciaries to act in accordance with plan documents so long as they are consistent with ERISA. See 29 U.S.C. 1104(a)(1)(D). The court of appeals held (and petitioners do not now challenge) that retention of the Nabisco Funds was not prohibited by ERISA. See Pet. App. 23 (explaining that offering non-employer single stock funds is not *per se* imprudent). Accordingly, the district court could find on remand that petitioners were required to follow the plan document and therefore would have retained the stock if it was not imprudent to do so. If the district court decided the case that way, any differences between a "would have" standard and a "could have" standard would not matter. And, more specifically, the fact that the Plan precluded sale of the Nabisco Funds means this is not a good case to consider whether the "would have" standard embraces a range of prudent options (because under such a standard on remand a prudent fiduciary would not have violated the Plan's express terms).

More broadly, review of the second question presented is not warranted at this time because courts have applied a "would have" standard over the years without it leading to any of the practical consequences petitioners predict. One reason may be that it is rare for imprudent conduct in making an investment decision to lead to a result that may be viewed as objectively reasonable. See Pet. App. 35 ("[I]ntuition suggests, and a review of the case law confirms, that while such 'blind luck' is possible, it is rare."); Br. in

Opp. 25-28. Because only one court has considered the differences between a "would have" standard and a "could have" standard, and because the real-world impact of the court of appeals' decision may be limited, further review of the second question presented is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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