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 Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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February 18, 2015

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REPLY BRIEF FOR PETITIONERS

In the decision below, the Fourth Circuit majority radically rewrote the rules for proving loss causation under §1109(a) of ERISA. The court deepened an acknowledged circuit split by adopting a judicially created burden-shifting rule that relieves plaintiffs of their duty to prove each element of their claims. The court then adopted a legal standard for loss causation that requires the defendant to show it made the *same* decision that a hypothetical prudent investor would have made—a standard that will often be impossible for defendants to meet, even though they made objectively prudent substantive decisions based on a flawed process.

Respondent offers no good reason to deny review of these issues. On the question of which party bears the burden of proving loss causation, Respondent asserts that there is no circuit split, but largely ignores the fact that three circuits—*including the Fourth Circuit itself*—have explicitly acknowledged a split. Respondent's insistence that the circuits that focus on "harmlessness" all adopt the same approach actually underscores the split—there is no role for a "harmlessness" inquiry if the plaintiff is *actually* required to prove loss causation (as the majority of circuits hold). Respondent dismisses burden-of-proof issues as unimportant and rarely dispositive, but this Court routinely grants certiorari to address burden-of-proof issues. As for the merits of the burden-shifting approach, Respondent simply ignores the well-established default rule that the plaintiff must bear the burden of proof on each element of a claim unless

the statute *expressly* provides otherwise. Nothing in §1109(a) comes close.

Respondent fares no better in arguing against review of the Fourth Circuit's newly minted legal standard for loss causation under §1109(a). Respondent denies that there is a split on this issue, but there is simply no reconciling the Fourth Circuit's requirement that a defendant show that a prudent fiduciary would have made the *same* investment decision as the defendant, and the majority of the circuits' adoption of the rule articulated by then-Judge Scalia in *Fink v. National Savings & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985), which requires the defendant only to have made an *objectively prudent investment*. Here, the fiduciaries of the RJR Plan made an eminently prudent decision to reduce the risk of the Plan by eliminating undiversified investments in Nabisco stock once it was no longer *employer* stock. The combination of the Fourth Circuit's loss causation standard and its burden-shifting rule place defendants in an impossible position. Review on both questions presented is badly needed.

I. The Court Should Grant Certiorari To Address Which Party Bears The Burden Of Proving Loss Causation Under §1109.

A. As multiple courts—including the Fourth Circuit—have recognized, "the circuit courts of appeals are split as to which party must demonstrate that [a] loss resulted from a breach." *Plasterers' Local Union v. Pepper*, 663 F.3d 210, 220 (4th Cir. 2011); *see also Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009); *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 160 (3d Cir. 1999).

Respondent's misguided attempt to rephrase the questions presented to focus on "harmlessness" only underscores the existence of a split. Respondent glibly asserts that each court to consider this issue has held that "after a plaintiff establishes breach and a related loss, the burden to prove harmlessness shifts to the breaching fiduciary." Opp.15 (citing *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992); *McDonald v. Provident Indem. Life Ins.*, 60 F.3d 234, 237 (5th Cir. 1995)). But "harmlessness" is just a synonym for burden-shifting, and by either name it is the minority approach. If the plaintiff *actually* needs to prove breach of a fiduciary duty and loss causation, there is no way the loss actually caused by the breach could be "harmless." Conversely, if there is still a question of harmlessness remaining after the plaintiff has carried its burden of showing a breach and "related loss," then "related loss" means something other than loss causation. Thus, by any other name, there is still a split on loss causation, as at least three circuits have acknowledged.

Respondent's attempt to distinguish the cases on the other side of the circuit split fails. At least five circuits correctly hold that the plaintiff—*and only the plaintiff*—bears the burden of proving loss causation, without so much as hinting at the possibility of shifting the burden of proof on causation (or triggering a "harmlessness" inquiry) merely because the plaintiff has established some *other* element of an ERISA claim. Pet.18-19.

Respondent (at 15-16) attempts to distinguish *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995), and *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090,

1099 (9th Cir. 2004), on the ground that they applied the "presumption of prudence" subsequently rejected in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). But that purported distinction is irrelevant. The presumption of prudence made it more difficult for plaintiffs to establish a *breach* of fiduciary duty in the employer-stock context. *Id.* at 2466. But breach and loss causation are analytically distinct elements of an ERISA claim. *Kuper* and *Wright*'s requirement that the plaintiff prove loss causation remains good law and in no way depends on what those cases said about how to prove a breach.

Respondent also asserts (at 16 & n.5) that there is no conflict with *Willett v. Blue Cross & Blue Shield*, 953 F.2d 1335 (11th Cir. 1992), and *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011), because those cases merely stand for "the unarguable proposition that a plaintiff must establish causation to win." That argument is baffling, because if that proposition is indeed "unarguable," then so too is the need for this Court's review, as the Fourth Circuit explicitly *rejected* the notion that the plaintiff must "establish causation to win." Instead, the court held that as long as the plaintiff has shown a breach of duty and a prima facie case of loss, it is the *defendant* that must *disprove* loss causation (or as Respondent euphemistically puts it, must prove "harmlessness"). *See* App.25-29.

Respondent essentially concedes (at 16-17) that the Second Circuit has rejected the burden-shifting rule adopted by the Fourth Circuit. *See Silverman v. Mut. Benefit Life Ins.*, 138 F.3d 98, 104 (2d Cir. 1998); *id.* at 105-06 (Jacobs and Meskill, J.J., concurring). He nonetheless asserts (at 16) that *Silverman* is

distinguishable because it involved a claim based on ERISA's "co-fiduciary" liability section. But, as Petitioners already explained, *see* Pet.21-22, that is no distinction at all because the decision in *Silverman*—like the Fourth Circuit's decision here—turned on the court's interpretation of §1109(a), which addresses the remedy for *any* breach of an ERISA fiduciary duty. Respondent has no answer to this point.[1]

B. Respondent concedes that the Third and Tenth Circuits have expressly acknowledged a split of authority on the burden of proof issue. *See Holdeman*, 572 F.3d at 1195 n.1; *Unisys*, 173 F.3d at 160. But he asserts (at 17-18) that even if there is a split, it does not warrant review because the issue matters "[o]nly in the highly improbable event that the evidence" is in perfect equipoise.

This Court obviously does not share Respondent's view that burdens of proof are irrelevant, as the Court routinely grants certiorari in cases addressing burden-of-proof issues. *See, e.g.*, *Medtronic v. Mirowski*, 134 S. Ct. 843 (2014); *Meacham v. Knolls Atomic Power*, 554 U.S. 84 (2008); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Raleigh v. Illinois*, 530 U.S. 15 (2000); *Director v. Greenwich Collieries*, 512 U.S. 267 (1994); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). And the burden of proof issue is especially important here because the combination of the inverted burden

[1] Respondent inverts time in suggesting (at 16-17) that the Second Circuit's *earlier* self-dealing decision in *N.Y. State Teamsters Council v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994), somehow detracts from the circuit split evidenced by *Silverman*. The latest words from the Second and Fourth Circuits plainly conflict.

of proof and the Fourth Circuit's deeply flawed substantive standard will make it nearly impossible for defendants to *ever* disprove loss causation. *See* Chamber of Commerce Br.3-6, 9-11.

Respondent asserts (at 18-19) that this case is a poor vehicle because further proceedings remain pending in the district court. But it would make little sense to postpone review on that basis because nothing in the proceedings below will affect the purely legal question of which party bears the burden of proof on loss causation. *See* Shapiro et al., *Supreme Court Practice* 283 (10th ed. 2013). Indeed, this Court routinely grants certiorari in cases in this precise posture.[2] And delaying review of the burden of proof issue until after final judgment risks requiring the district court to re-adjudicate loss causation a *third* time if this Court ultimately reviews and reverses.

C. Respondent fares no better in defending the merits of the Fourth Circuit's burden-shifting rule. In particular, Respondent fails to address, or even acknowledge, the well-established default rule that "[w]here the statutory text is silent … plaintiffs bear the risk of failing to prove their claims." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009). Nothing in the text of §1109(a) remotely suggests that Congress intended to shift the burden of proof on the loss causation element. The burden should thus remain

[2] *See, e.g.*, *City & County of S.F. v. Sheehan*, No. 13-1412; *KBR v. U.S. ex rel. Carter*, No. 12-1497; *Oneok v. Learjet*, No. 13-271; *United States v. June*, No. 13-1075; *Omnicare v. Laborers Pension Fund*, No. 13-435; *Integrity Staffing v. Busk*, 135 S. Ct. 513 (2014).

"where it usually falls, upon the party seeking relief." *Schaffer*, 546 U.S. at 57-58.

Respondent offers no defense of the panel majority's policy-based rationale that placing the burden of proof on the defendant is "fair" because proving loss causation presents a "significant barrier[]" to plaintiffs' recovery. App.26-29. Instead, Respondent's primary merits argument (at 19-20) is that burden shifting is consistent with trust law. But, although trust law may inform ERISA, it "will not necessarily determine the outcome," especially where—as here—other interpretive principles that apply across all manner of federal statutes point in a different direction. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Regardless, trust law is not nearly as settled as Respondent suggests. *See Whitfield v. Lindemann*, 853 F.2d 1298, 1304 (5th Cir. 1988) ("The [trust law] authorities are not in accord with regard to the burden of proof on the issue of causal relation."); Pet.26-27.

Finally, Respondent notes (at 20-21) that the United States has filed a series of *amicus* briefs supporting burden shifting. But those briefs actually underscore the importance of the issue and acknowledge the circuit split. *See* Br. for United States, *Cigna Corp. v. Amara*, No. 09-804, 2010 WL 4216276, at *18 (U.S. Oct. 22, 2010) (noting 2-1 split of authority between Fifth/Eighth Circuits and Second Circuit). In all events, the United States' "litigating position[]" is neither a new development nor entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Indeed, in *Silverman*, the Second Circuit *refused* to adopt the burden-shifting

framework advanced by the Secretary of Labor in an *amicus* brief. *See* 138 F.3d at 105-06 & n.1 (Jacobs and Meskill, J.J., concurring).

II. The Court Should Grant Certiorari To Address The Legal Standard For Loss Causation Under §1109.

A. The Fourth Circuit not only misallocated the burden of proof but also badly misconstrued the substantive standard for loss causation. *See* Pet.28-33. The proper standard simply asks whether the alleged breach caused defendants to make an objectively imprudent investment. *See Fink*, 772 F.2d at 962 (Scalia, J., concurring in part); App.51-54 (Wilkinson, J.). As the district court correctly recognized, Respondent cannot come close to meeting that standard because—whatever the procedural shortcomings—it was objectively prudent for the RJR fiduciaries to divest the Plan of risky and undiversified investments in non-employer stock. App.150-65. The panel majority nonetheless reversed, holding that it was not enough that divestment was objectively prudent; defendant's burden was to show that, absent the procedural error, a hypothetical prudent fiduciary "more likely than not" would have made the *same* decision "at the time and in the manner in which [defendants] did." App.32.

Respondent's insistence that the Fourth Circuit's standard simply reflects the defendant's burden to show "harmlessness" only underscores the extent to which the Fourth Circuit has, in fact, shifted the burden to the defendant. And Respondent's contention (at 23-24) there is no split because the decision below is consistent with the oft-cited *Fink*

standard is demonstrably false. Pet.34-35. Under *Fink*, a fiduciary who conducts an insufficient investigation but ultimately invests in a highly regarded blue-chip stock cannot be held liable, full stop. *See* 772 F.2d at 962. As Judge Wilkinson explained, that is the standard other circuits have "generally adopted." App.54. Under the panel's approach, by contrast, the fiduciary will be held liable unless he shows that a hypothetical prudent fiduciary would have selected the *same* blue-chip stock at the same time. App.30, 32. Respondent does not even attempt to explain how those two outcomes can be reconciled. Instead, he repeats the panel's error by "imput[ing] [his] own erroneous interpretation of loss causation" to *Fink*. App.52, 54 (Wilkinson, J.). But *Fink* is neither a Rorschach test nor the Fourth Circuit's approach.

Respondent essentially concedes a split by admitting (at 29) that the Third Circuit's *Unisys* decision found no loss causation "without any discussion of whether the investment [made by the defendant] was the best of all of the options." *See* 173 F.3d at 151, 153-54. That analysis cannot be squared with the decision below, under which loss causation depends on whether the defendant made the same decision that a hypothetical prudent fiduciary would "more likely than not" have made—in other words, the single *best* decision. App.30-32; *see* App.61-62 (Wilkinson, J.).

Respondent asserts (at 27-30) that the decision below has not caused an "avalanche of litigation against fiduciaries who choose from among a group of arguably prudent investment options." But that is

true only because the decision below—a stark departure from a relatively settled body of law—is barely six months old. As the Chamber of Commerce explains, fiduciaries routinely face ERISA suits when an investment loses value, and the Fourth Circuit's rule unquestionably "makes those suits easier for plaintiffs to litigate and win." Chamber of Commerce Br.20-23. Moreover, the error matters most in the least meritorious cases—namely, those involving a procedural, not substantive, error concerning a decision where a range of options were available to a prudent fiduciary.

Respondent argues (at 26-27) that the loss causation standard is unimportant because fiduciaries seldom breach their duty to adequately investigate. But procedural errors inevitably occur, and Congress opted not for liquidated damages, but recovery only upon showing loss causation. By threatening massive liability as an automatic consequence for a procedural foot-fault, the decision below encourages fiduciaries to "spend their time flyspecking their own decisions and papering the record thoroughly even in the easiest cases." Chamber of Commerce Br.21-22. Plan participants ultimately foot the bill for all that unnecessary bureaucracy. App.50-51 (Wilkinson, J.).

B. Respondent concludes (at 30-32) by arguing that the panel's loss causation standard is correct, but he does not even attempt to defend the panel's policy-based rationale that the loss causation standard should be "difficult for a defendant-fiduciary to satisfy." App.34. Instead, Respondent once again asserts only that the Fourth Circuit's rule is consistent with trust law. But disputed points of trust law are

no match for the language, structure, and purposes of ERISA, *see Hughes Aircraft v. Jacobson*, 525 U.S. 432, 447 (1999), which all make crystal clear that the decision below is untenable. Pet.28-33.

Respondent also fails to meaningfully address the most glaring problem with the panel's standard: that it fails to "allow[] for the possibility that there may be several prudent investment decisions for any given scenario." App.60 (Wilkinson, J.). Like the panel majority, Respondent would require fiduciaries to make "the single best or most 'likely' decision rather than [allowing] a range of reasonable judgments in the uncertain business of investing." App.50 (Wilkinson, J.); *see* Pet.29-31. That standard cannot be reconciled with "the remedial scheme laid out by ERISA," under which "fiduciaries should not be held monetarily liable for objectively prudent investment decisions." App.49-50 (Wilkinson, J.).

Finally, Respondent strains credulity by asserting (at 31) that there is no "meaningful alternative" to the panel's standard. In fact, there is a perfectly obvious and workable alternative to the panel's approach: the *Fink* standard, under which a fiduciary cannot be held liable for a decision "to make (or hold) objectively prudent investments." 772 F.2d at 962. That standard properly protects a fiduciary against liability as long as the decision falls within the *range* of reasonable investments. It also focuses the inquiry on a manageable objective standard concerning the reasonableness of the decision actually made, rather than on a hopelessly speculative counterfactual inquiry.

* * *

Respondent suggests (at 24) that this Petition presents two related issues for review only because neither is cert-worthy alone. Quite the contrary. Each issue independently warrants this Court's attention, but the Fourth Circuit's combined resolution of the two issues makes this Court's review imperative. Under the decision below, once a procedural mistake has been made, the burden to show loss causation shifts and can only be discharged if the defendant can show that the same decision would have been made but for the procedural error. In a case like this where a fiduciary would have more than one prudent course for winding down an investment that made little sense post-spinoff (since it undermined diversification without serving policies promoting ownership of employer stock), the decision below is a recipe for imposing liability for an objectively prudent decision. That result simultaneously implicates circuit splits and offends common sense.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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