No. 22-13643

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAIME PIZARRO, *et al.*,
Plaintiffs-Appellants,

v.

THE HOME DEPOT, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
No. 1:18-cv-01566-SDG
The Honorable Steven D. Grimberg

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1(a)(3), the undersigned counsel for the Chamber of Commerce as amicus curiae certifies that, in addition to those identified in the briefs filed by plaintiffs-appellants, the Secretary of Labor, and defendants-appellees, the following persons and entities may have an interest in the outcome of this case:

1. Jenya Godina, counsel for amicus curiae the Chamber of Commerce
2. Jordan L. Von Bokern, counsel for amicus curiae the Chamber of Commerce

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the Chamber of Commerce states that it is a non-profit membership organization with no parent company and no publicly traded stock. No publicly held company has 10 percent or greater ownership in the Chamber.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members sponsor or provide services to retirement plans that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), and the Chamber regularly participates as amicus curiae in ERISA cases implicating the principles governing those plans.

In this case, two critical fiduciary liability standards are under challenge. First, plaintiffs urge the Court to upend existing precedent to adopt a burden-shifting rule that has no basis in the statute. The Court should reaffirm its current approach, followed by the majority of other circuits, which recognizes that the plaintiff has the burden of proof on all elements of a fiduciary breach claim. Second, plaintiffs advocate for a loss causation standard that would award damages even when a plan was invested in a prudent investment, if the process used to select that investment was flawed. Plaintiffs' objective prudence standard blinks

[1] No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than amicus, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

reality, and would multiply the costs and risks of sponsoring an employee retirement plan, contrary to the purposes of ERISA.

401(k) plan litigation has reached a fever pitch. The application of practicable, law-based standards has never been more important. After a careful review of the record, the district court properly concluded that the plan participants here had the benefit of objectively prudent decisions, whatever their complaints about the process that led there. The Chamber respectfully submits this brief to help explain why that decision should be affirmed.

STATEMENT OF THE ISSUES

1. Whether, consistent with the well-established default rule for allocating the burden of proof on federal statutory claims and this Court's decision in *Willett v. Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335 (11th Cir. 1992), ERISA plaintiffs are required to prove loss causation as an essential element of their case.

2. Whether, regardless of which party bears the burden of proof on loss causation, fiduciary defendants cannot be held liable for damages under ERISA if they arrived at objectively prudent results.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress passed ERISA, it adopted a statutory framework that strikes a balance between protecting workplace benefits and encouraging employers to offer employee benefit plans in the first place. *See Conkright v. Frommert*, 559

U.S. 506, 516-17 (2010). The statutory limits on liability are an important component of that framework: people who manage ERISA plans are fiduciaries, but their liability for any breach of duty is restricted to losses "resulting from [the] breach." 29 U.S.C. § 1109(a). As this Court has explained, § 1109(a) "require[s] that the breach of the fiduciary duty be the proximate cause of the losses claimed by" the plaintiff. *Willett*, 953 F.2d at 1343. ERISA does not require fiduciaries to guarantee investment returns. Fiduciaries are liable only for harms that would not have occurred with a prudent process in place.

The new rules advocated by plaintiffs and the Department of Labor ("DOL") would significantly expand fiduciary liability risk, contrary to the statute's text and to the careful balance in Congress's design. The burden-shifting framework offered by plaintiffs and their amicus would relieve ERISA plaintiffs of the burden of proving loss causation, and, as a practical matter, would advance more cases to trial. Consistent with the ordinary default rule that plaintiffs bear the burden of proof on the elements of their claims, this Court already recognized in *Willett* that "the burden of proof on the issue of causation" rests with the plaintiffs. 953 F.2d at 1343. Nothing in ERISA indicates that Congress intended a different approach, and plaintiffs' arguments for reading their rule into the statute do not withstand scrutiny. The Court should remain aligned with the majority of other circuits that

correctly hold that ERISA plaintiffs bear the burden of proof on all elements of their claims.

The Court should also reaffirm that fiduciaries cannot be held liable for damages under ERISA if they reach objectively prudent results. A procedural shortcoming cannot have *caused* plan losses where fiduciaries employing a prudent process would reasonably favor the same investment options and service provider arrangements that were actually chosen for the plan. That is so even if—as is invariably the case—the fiduciaries had other reasonable options available to them: under the ordinary loss causation principles incorporated into the statute, a "but for" world should not be constructed with selections far afield of what the fiduciaries actually preferred for the plan if their choices were ones a prudent fiduciary in the same shoes could have made. Plaintiffs' narrow view of objective prudence improperly casts as "damages" the difference in outcomes from alternative paths the fiduciaries were not required to follow. And that enlargement of damages risk will divert resources away from the provision of workplace benefits, contrary to the purposes of ERISA.

The decision below should be affirmed.

ARGUMENT

I. PLAINTIFFS BEAR THE BURDEN OF PROVING LOSS CAUSATION UNDER ERISA

A. The well-established default rule requires plaintiffs to prove all elements of their claims.

Under Section 409 of ERISA, a fiduciary who breaches its duties is personally liable for "any losses to the plan *resulting from* each such breach." 29 U.S.C. § 1109(a) (emphasis added). Through that language, the statute imposes a requirement "that the breach of the fiduciary duty be the proximate cause of the losses claimed by" the plaintiff. *Willett*, 953 F.2d at 1343.

ERISA does not explicitly assign the burden of proof on loss causation, but the "ordinary default rule" is that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). It is "the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." *Id.* at 56 (quoting 2 McCormick on Evid. § 337 (5th ed. 1999)). This "default rule" "solves most" questions about allocation of the burden of proof, *id.* at 57, including proof of causation, *see, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009) (applying default rule to proof of causation under the ADEA).

Exceptions to the default rule do exist, but they "are extremely rare" and arise only when there is "some reason to believe that Congress intended" to depart

from the ordinary allocation of the burden of proof. *Schaffer*, 546 U.S. at 57. "[T]he touchstone of [the] inquiry is, of course, the statute." *Id.* at 56; *see Gross*, 557 U.S. at 177 (default rule applies unless "statute's text indicates that Congress has carved out an exception"). For example, it is accepted that the burden shifts to the defendant when a statute's "elements can fairly be characterized as affirmative defenses or exemptions." *Schaffer*, 546 U.S. at 57. But loss causation is a core element of a claim for breach of fiduciary under ERISA, not an affirmative defense or exemption. *See Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017); *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 105 (2d Cir. 1998) (Jacobs, J., joined by Meskill, J., concurring). ERISA's text and structure do not signal that Congress intended to place the burden of proof anywhere other than "where it usually falls, upon the party seeking relief." *Schaffer*, 546 U.S. at 58; *see Pioneer Centres*, 858 F.3d at 1336.

B. This Court held in *Willett* that ERISA plaintiffs bear the burden of proof on loss causation.

As the district court below correctly recognized, this Court has already held that ERISA plaintiffs bear the burden of proof on loss causation. *See Pizarro v. Home Depot, Inc.*, No. 1:18-CV-01566-SDG, 2022 WL 4687096, at *13 (N.D. Ga. Sept. 30, 2022). The Court's decision in *Willett* could hardly have been clearer on this point: after reversing the entry of summary judgment for the plaintiffs on their

fiduciary breach claims, the Court specifically noted that "the burden of proof on the issue of causation will rest on the beneficiaries," who would need to "establish that their claimed losses were proximately caused" by the defendant's alleged breach. *Willett*, 953 F.2d at 1343.

Plaintiffs and the DOL try to spin *Willett* in their favor, but they misunderstand the decision. Their argument focuses on a portion of *Willett* where the court simply applied the summary judgment standard: because the plaintiffs had already adduced sufficient evidence to generate a genuine dispute of material fact on the causation question, *see* 953 F.2d at 1338-39, 1343, the Court observed that, as with any summary judgment motion, a party can obtain judgment in its favor if it has evidence that extinguishes a genuine dispute created by the other party's evidence. The Court conclusively *rejected* the possibility of burden-shifting on the claim itself, by confirming that the burden remained on the plaintiffs to prove loss causation. *Id.* at 1344.

Other courts of appeals, as well as district courts within this Circuit, have read *Willett* the same way the district court did below—to definitively state that ERISA plaintiffs bear the burden of proof on loss causation. *See, e.g.*, *Pioneer Centres*, 858 F.3d at 1336; *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 35 (1st Cir. 2018); *Pledger v. Reliance Tr. Co*., No. 1:15-CV-4444-MHC, 2019 WL 10886802, at *28 (N.D. Ga. Mar. 28, 2019); *Dupree v. Prudential Ins. Co. of Am.*,

No. 99-8337-CIV, 2007 WL 2263892, at *37 (S.D. Fla. Aug. 7, 2007), *as amended* (Aug. 10, 2007); *see also*, *e.g.*, *Huang v. TriNet HR III, Inc.*, No. 8:20-cv-2293-VMC-TGW, 2023 WL 3092626, at *11 (M.D. Fla. Apr. 26, 2023) (stating that ERISA plaintiffs are required to prove that alleged fiduciary "breaches proximately caused a loss to the Plan").

C. Plaintiffs and the DOL provide no sound basis for reconsidering *Willett* and deviating from the ordinary default rule.

In the face of a well-established default rule and Eleventh Circuit precedent following it, plaintiffs and the DOL identify no persuasive reason for this Court to chart another course.

1. *ERISA's trust law roots do not support importing a burden-shifting rule into the statutory framework.*

Plaintiffs and the DOL do not identify a textual basis for departing from the "ordinary default rule." Rather, they argue for a judge-made burden-shifting rule drawn from trust law developed *after* ERISA was enacted. DOL Br. 10, 12-15; *see* Pl. Br. 27-28. Their arguments are not persuasive..

As an initial matter, the Supreme Court has repeatedly warned against reflexive incorporation of trust law principles into ERISA. Although trust law "often will inform" interpretation of ERISA, it "will not necessarily determine the outcome," and courts must consider the extent to which other relevant factors point in another direction. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *see, e.g.*,

Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020); *Conkright*, 559 U.S. at 516. Indeed, as Justice Thomas has pointed out, even using trust law as a "starting point for interpreting ERISA" is troubling because that practice is difficult to square with the foundational tenet that "[i]n every case involving construction of a statute, the starting point is . . . the language itself." *Thole*, 140 S. Ct. at 1623 (Thomas, J., joined by Gorsuch, J., concurring) (internal quotation marks and citation omitted).

This Court, too, has "reject[ed] the unselective incorporation of trust law rules into ERISA." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991); *see also Moore v. Am. Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1244 n.17 (11th Cir. 2000). This approach is rooted in recognition that "while it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts." *Useden*, 947 F.2d at 1581. Particularly because ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit Guar. Corp.,* 446 U.S. 359, 361 (1980), courts should incorporate trust law principles only "if the statute's text negates an inference that the principle was omitted deliberately," *Useden*, 947 F.2d at 1581. As discussed above, the text of 29 U.S.C. § 1109(a) does not indicate that Congress intended to replace the longstanding default rule with a burden-shifting framework, and plaintiffs and the DOL do not identify any textual hook for their arguments.

The argument for importing a burden-shifting framework into ERISA rests on especially shaky ground because plaintiffs and the DOL rely on treatises published decades after ERISA was enacted. *See, e.g.*, Pl. Br. 27; DOL Br. 13-14. At the time of ERISA's enactment, the Restatement of Trusts did not espouse a burden-shifting rule. *See* Restatement (Second) of Trusts § 205 (1959). Not only that, numerous cases *rejected* burden-shifting in the trust context, both before and after ERISA became law. *See, e.g.*, *U.S. Life Ins. Co. in City of N.Y. v. Mechanics & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982) (rejecting burden-shifting as a "novel proposition"); *Lane Title & Tr. Co. v. Brannan*, 440 P.2d 105, 112 (Ariz. 1968); *Streight v. First Tr. Co. of Omaha*, 275 N.W. 278, 287 (Neb. 1937). Even today, there is no uniform burden-shifting rule under state trust law. *See, e.g.*, *Gearhart v. Gearhart*, 143 N.E.3d 1244, 1283 (Ill. App. Ct. 2020) (plaintiff has the burden of proving causation in trust cases); *Healey v. Healey*, 529 S.W.3d 124, 135 (Tex. Ct. App. 2017) (same). Thus, even aside from the lack of any indication that Congress intended courts to consult trust law to allocate the burden of proof under ERISA, the mottled trust law landscape provides a notably poor source of guidance on the subject. *Cf. Conkright*, 559 U.S. at 516 (recognizing that on some issues trust law is inconclusive and does not provide an answer for purposes of interpreting ERISA).

2. *Burden-shifting cannot be justified based on supposed informational imbalances between plaintiffs and defendants.*

There is likewise no merit to plaintiffs' and the DOL's argument that a departure from the default rule is justified because "the burden may be allocated to the defendant when he possesses more knowledge relevant to the element at issue." DOL Br. 15-16 (quoting *Brotherston*, 907 F.3d at 38); *see* Pl. Br. 27-28. Where procedural rules provide plaintiffs with tools to obtain the information needed to prove their claims, this rationale for burden-shifting lacks force. *See Schaffer*, 546 U.S. at 60-61 (declining to require defendant schools to prove the appropriateness of an individualized education plan where parents have the ability "to access the necessary evidence" to challenge the school's decision); *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1114 (11th Cir. 2008) (declining to shift the burden to defendants where "proper use of discovery tools" would reveal the necessary information and plaintiffs would not be unfairly surprised at trial).

Plaintiffs' and the DOL's argument incorrectly presumes that proof of loss causation turns on information "peculiarly within the knowledge" of plan fiduciaries. Pl. Br. 28 (quoting *Brotherston*, 907 F.3d at 35-36); *see* DOL Br. 15-16. Plaintiffs have access to complete information about the fiduciary process through the ordinary avenues of discovery under the Federal Rules—something plaintiffs and the DOL do not and could not reasonably contest. And in any case,

loss causation in this context is an objective inquiry that asks whether a hypothetical prudent fiduciary would have arrived at different results. *See Plasterers' Loc. Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011); *infra* at 19-22. That information is as readily available to plaintiffs as to defendants.

3. *The DOL's appeals to ERISA's protective purpose are simplistic and misguided.*

Finally, the DOL attempts to justify adoption of a burden-shifting rule found nowhere in the statute based on a one-sided view of ERISA's purpose. *See* DOL Br. 21-22. The DOL's position is not only at odds with the Supreme Court's focus on statutory text and structure in *Schaffer*, but also wrongly overlooks ERISA's careful balancing of interrelated policy interests.

ERISA harmonizes "competing congressional purposes": a "desire to offer employees enhanced protection for their benefits" and a "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497; *see also, e.g.*, *Conkright*, 559 U.S. at 516-17. The Supreme Court has instructed that courts "may have to take account" of *both* of those interests when construing ERISA. *Varity Corp.*, 516 U.S. at 497. Little wonder, then, that the Court has rejected pleas to construe ERISA in a plaintiff-friendly fashion based on "vague notions" that ERISA's "basic purpose" only is to

protect plan participants. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993); *see, e.g.*, *id.* at 263 (rejecting expansive view of fiduciary liability that would have required the Court to "adjust the balance" "that the text adopted by Congress has struck").

Notably, the plaintiffs in *Schaffer* made a similar purpose-based argument, asserting that the IDEA seeks to protect students and parents, so school defendants should bear the burden to demonstrate that their individualized education plans are appropriate. *See* 546 U.S. at 58-59. The Court disagreed, explaining that shifting the burden to defendants could just as easily undermine Congress's aims by increasing litigation and administrative expense and diverting funds that would otherwise be used for educational services. *Id.* at 59. Particularly where there are "competing congressional purposes" involved, *Varity Corp.*, 516 U.S. at 497—as is indisputably the case under ERISA—courts cannot depart from the ordinary allocation of the burden of proof just to favor plaintiffs.

D. The weight of circuit authority supports leaving the burden of proof on loss causation where it ordinarily falls—on plaintiffs.

1. *A majority of circuits follow the ordinary default rule and require ERISA plaintiffs to prove loss causation.*

Consistent with the default rule, a majority of circuits that have spoken on the issue—including this Court in *Willett*, *see supra* at 6-8—have held that ERISA plaintiffs bear the burden of proof on loss causation.

The Tenth Circuit addressed the issue at length in *Pioneer Centres*, holding "that the burden [to prove loss causation] falls squarely on the plaintiff." 858 F.3d at 1337. The Tenth Circuit "reject[ed] outright" the contention that it should import burden-shifting principles into the ERISA statutory framework. *Id.* at 1336. In doing so, the Tenth Circuit emphasized the lack of any evidence of "Congressional intent to shift the burden to the fiduciary to disprove causation," underscored the limitations on the degree to which trust law informs interpretation of ERISA, and concluded that "[w]here the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach." *Id.* at 1336-37.

The Sixth, Seventh, and Ninth Circuits are in accord. *See Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011) ("[T]he plaintiff must show a breach of fiduciary duty, and its causation of an injury."); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." (emphasis omitted)).

Plaintiffs attempt to minimize the significance of the Sixth, Seventh, and Ninth Circuits' decisions on the ground that "burden-shifting was [not] before the court" in those cases. Pl. Br. 28 n.85; *see* DOL Br. 18. However, other courts of appeals have recognized that these decisions reflect the state of the law in these circuits. *See Brotherston*, 907 F.3d at 35 (placing Sixth and Ninth Circuits among courts that require plaintiffs to prove loss causation); *Pioneer Centres*, 858 F.3d at 1336 (same). The DOL further argues that *Kuper* and *Wright* should be disregarded because they involved application of the presumption of prudence for ESOP fiduciaries, which the Supreme Court later rejected in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 418-19 (2014). But the courts of appeals' holdings on the distinct question of loss causation did not depend on the presumption of prudence and remain good law. The Sixth Circuit has cited *Kuper* in reaffirming the relevant loss causation principle post-*Dudenhoeffer*, *see Saumer*, 853 F.3d at 863, and district courts in the Ninth Circuit have continued to read *Wright* to require plaintiffs to prove loss causation (as did the courts in *Brotherston* and *Pioneer Centres*). *See, e.g.*, *Walsh v. Bowers*, 561 F. Supp. 3d 973, 998 n.6 (D. Haw. 2021).[2]

[2] The DOL also proposes that "requiring a 'causal link' between breach and loss is not facially inconsistent with the trust-law requirement that plaintiffs prove a 'related loss' . . . to shift the burden to the fiduciary." DOL Br. 18-19. But the DOL does not argue that any of the courts requiring a "causal link" understand that

The Second Circuit likewise rejected burden-shifting in *Silverman v. Mutual Benefit Life Insurance Co.*, 138 F.3d 98 (2d Cir. 1998), where the plaintiff (and the DOL, as amicus) relied on the same trust law principles cited by plaintiffs and the DOL here to argue that ERISA plaintiffs need not prove causation, *see id.* at 105-06. The two-judge majority noted that "the Supreme Court has cautioned that 'the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties,'" and explained that "Congress has placed the burden of proving causation on the *plaintiff* by requiring him to prove that losses 'result[ed] from' the defendant's" breach. *Id.* at 106 (Jacobs, J., joined by Meskill, J., concurring) (quoting *Varity Corp.*, 516 U.S. at 497); *see also, e.g.*, *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 260-261 (S.D.N.Y. 2012) (treating as binding *Silverman*'s "unambiguous" holding on this point).

Plaintiffs and the DOL contend that a more recent Second Circuit decision, *Sacerdote v. New York University*, 9 F.4th 95 (2d Cir. 2021), endorses their preferred burden-shifting rule, but they overread the decision. The relevant

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standard to require only "some relationship" between breach and loss, *id.*, and a "causal link" requirement is much more naturally understood to call for an actual showing of loss causation. *Cf. Pioneer Centres*, 858 F.3d at 1337 ("Where the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach.").

discussion analyzes whether the district court's erroneous dismissal of excessive fee claims was harmless. In that connection, the court suggested that the defendants would have had the burden of proving that the quantum of damages was less than the difference between the imprudent fees and a prudent alternative shown by the plaintiffs—*i.e.*, that the upper bound of the reasonable range was higher than the plaintiffs' number, though still lower than what the plan paid. *Id.* at 113. *Sacerdote* thus endorses a distinct form of burden-shifting at the damages-calculation stage, rather than shifting the burden to the defendant to demonstrate that the asserted procedural breach caused no loss at all. *See Pioneer Centres*, 858 F.3d at 1336 n.9 (recognizing that some courts "shift the burden but only with respect to the calculation of damages" and this is different from requiring defendants to disprove loss causation). That understanding of *Sacerdote* is further supported by its recognition of *Silverman* in a footnote. *See Sacerdote*, 9 F.4th at 113 n.68. On its face, *Sacerdote* does not purport to dispense with *Silverman* and fundamentally reshape Second Circuit law.

2. *The decisions that have embraced burden-shifting lack persuasive value.*

In addition to their misguided reliance on *Sacerdote*, plaintiffs and the DOL emphasize decisions from the First, Fourth, Fifth, and Eighth Circuits as support for their preferred burden-shifting rule. Even setting aside their incompatibility with *Willett*, these decisions lack persuasive value.

Take, for instance, the Eighth Circuit's decision in *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992). *Martin* did not interpret (or even examine) the text of ERISA or explain why the common law of trusts should trump the default rule regarding allocation of the burden of proof. The court simply cited a trust law treatise that post-dates ERISA and cases from circuits that have since affirmed that ERISA plaintiffs *are* required to prove loss causation. *See id.* at 671-72 (citing decisions from Second, Seventh, and Ninth Circuits). *Martin* is also of limited significance because, as the Second Circuit has explained, "the issue in *Martin* involved the *calculation of damages*" after breach and loss causation were established, whereas "[t]he issue before this Court involves the burden of proving causation, not damages." *Silverman*, 138 F.3d at 106 n.1 (Jacobs, J., joined by Meskill, J., concurring); *see also, e.g.*, *Barry v. West*, 503 F. Supp. 2d 313, 326 (D.D.C. 2007) (distinguishing *Martin* on this basis and explaining "only after plaintiff demonstrates that [the defendant's] breach of duty caused a loss to the Plan can any 'uncertainties in fixing damages' be resolved in plaintiff's favor").

The Fifth Circuit's treatment of the issue is likewise unilluminating. In *McDonald v. Provident Indemnity Life Insurance Co*., 60 F.3d 234 (5th Cir. 1995), the court simply quoted without discussion an Eighth Circuit case that uncritically adopted the standard articulated in *Martin*. *Id.* at 237 & n.14 (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994)). Moreover,

McDonald did not even squarely address causation. The question in that case was whether losses that indisputably *did* result from the challenged fiduciary decision (in the form of higher insurance premiums for participants) but did not adversely impact the plan as a whole were recoverable under ERISA. *Id.* at 237-38. The case was thus about a failure to show a loss to the plan, not a failure to prove causation.

Only the First and Fourth Circuits have adopted the type of burden-shifting proposed by plaintiffs and the DOL after any considered deliberation. *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 361-63 (4th Cir. 2014); *Brotherston*, 907 F.3d at 35-39. *Tatum* and *Brotherston* rely on the same arguments offered by plaintiffs and the DOL here, which are unpersuasive for the reasons discussed. *See supra* at 8-13; *see also Tatum*, 761 F.3d at 374-76, 379 (Wilkinson, J., dissenting).

II. FIDUCIARIES CANNOT BE HELD LIABLE FOR CLAIMED LOSSES IF THEY REACHED "OBJECTIVELY PRUDENT" RESULTS

Whoever bears the burden of proof on loss causation, a fiduciary cannot be held liable for damages if, process aside, the results were objectively prudent. *See, e.g.*, *Plasterers'*, 663 F.3d at 219; *Roth*, 16 F.3d at 919. As then-Judge Scalia remarked, "I know of no case in which a trustee who has happened—through prayer, astrology or just blind luck—to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded 'blue chip' stock) has been

held liable for losses from those investments because of his failure to investigate and evaluate beforehand." *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). While equitable remedies may remain available in that scenario, an "action for the damages" cannot be sustained. *Id.*

As a starting matter, it should make no difference whether the inquiry is framed as what a prudent fiduciary "could have" done or what they "would have" done. An objectively prudent investment is one a prudent fiduciary would select, in the sense that Paris is a city that Rick Steves would recommend. There may be other good investments out there, just as there may be other European destinations worth visiting, but so long as the fund actually chosen is reasonable—like Judge Scalia's blue-chip stock—any fiduciary missteps along the way cannot have caused any harm. While the Fourth Circuit panel in *Tatum* divided on the supposed materiality of this framing, other courts have followed a more commonsense approach: a course of action is objectively prudent if it is among the options a prudent fiduciary would consider in light of the goals and objectives of the plan and the circumstances then prevailing. *See, e.g.*, *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020) (inquiry asks whether "no reasonable fiduciary would have maintained the investment and thus [the defendants] would

have acted differently" absent a procedural breach), *aff'd*, 1 F.4th 769 (10th Cir. 2021); *see also Plasterers'*, 663 F.3d at 219.

The objective prudence inquiry is naturally informed by ERISA's fiduciary standards, which accommodate the full "range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022); *see also, e.g.*, *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). The market offers a broad assortment of administrative services and investment products for fiduciaries to consider, and fiduciaries face complex, multi-faceted choices in evaluating those offerings. Reasonable fiduciaries may easily arrive at different conclusions when doing so. Indeed, 100 prudent fiduciaries considering the same issue—for example, selecting an investment option for a 401(k) plan menu—might well make 100 different choices. Even among similarly situated plans, there are often many reasonable ways to help participants build retirement savings. If a fiduciary's choice is one that reasonable fiduciaries would make in the surrounding circumstances, taking into account the fiduciary's legitimate "goal[s] and objectives," *Plasterers'*, 663 F.3d at 219, the existence of other reasonable alternatives does not disturb the determination that the fiduciary's choices were objectively reasonable.

Courts should be particularly wary of indulging plaintiffs' proffer of alternative prudent actions that look materially different from what a plan's

fiduciaries reasonably preferred in reality—investments with different strategies and risk levels; vendors with different offerings and service levels. Under straightforward causation principles, a court should strive to discern which features of the selected course, if any, were *unreasonably* preferred. *See, e.g.*, *Friend v. Sanwa Bank Cal.*, 35 F.3d 466 (9th Cir. 1994) (rejecting link between plan losses and failure to obtain informed consent). The fact that an investment has generated lower returns in hindsight than an investment that followed a different strategy does not mean the chosen investment was not among the reasonable alternatives *ex ante*. Indeed, while ERISA does not require fiduciaries to follow the crowd, *see DeBruyne v. Equitable Life Assurance Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990), where fiduciaries relied on investment options and service arrangements that have achieved widespread acceptance in the market, that is strong evidence of objective prudence. *See, e.g.*, *Ramos*, 461 F. Supp. 3d at 1129; *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273, 312 (S.D.N.Y. 2018), *aff'd*, 9 F.4th 95 (2d Cir. 2021); *see also Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part) (providing example of "'blue chip' stock"). Plaintiffs cannot credibly claim to have been harmed by decisions that fall squarely within the reasonable range of alternatives.

III. ACCEPTING PLAINTIFFS' ARGUMENTS WOULD UPSET THE CAREFUL BALANCE STRUCK BY CONGRESS AND FURTHER ENCOURAGE OPPORTUNISTIC LITIGATION THAT HARMS PLANS

A robust loss causation requirement is essential to ensure that fiduciaries are not held monetarily liable if any deficiencies in their process did not leave the plan worse off—the way Congress intended it to be. That check on liability is especially important in light of how commonly plan fiduciaries face allegations of procedural breach, which typically come paired with multi-million-dollar damages claims. Although class actions involving defined contribution retirement plans were once relatively "rare," they are now "a seemingly everyday occurrence." Jon Chambers, *ERISA Litigation in Defined Contribution Plans: Background, History, Current Status and Risk Management Techniques* 1, Sageview Advisory Grp. (Mar. 2021), https://bit.ly/3lIsyPp. The last several years have seen a flood of fiduciary breach litigation, with 88 new cases filed in 2022 alone. *See* Daniel Aronowitz, *The Key Fiduciary Liability Storylines of 2022*, Euclid Specialty (Jan. 10, 2023), https://bit.ly/3GZkDbk.

Plaintiffs' proposed rules would only exacerbate the problem by encouraging plaintiffs' lawyers to conjure whatever claimed losses they can—for example, by seizing on an investment option that experienced a dip in performance—and head to court in the hope that discovery will uncover some perceived procedural defect to attack. If the "loss" is simply a reflection of the

inherent unpredictability of financial markets, plan fiduciaries become effective insurers of performance gains, which is not what ERISA requires. Many fiduciaries (and their insurers) will choose to settle when confronted with even a modest risk of incurring outsized liability, which only further encourages the plaintiffs' bar to pursue weak claims in the hope of extracting a substantial settlement.

The pressure to settle is magnified by the difficulties of defending against fiduciary breach lawsuits, even when the claims are meritless. Some courts are reluctant to dismiss ERISA fiduciary breach claims on the pleadings, taking the (often incorrect) view that it is preferrable to wait for "further record development." *LaLonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004); *see, e.g.*, *Troudt v. Oracle Corp.*, No. 1:16-cv-00175-REB-CBS, 2017 WL 1100876, at *1 (D. Colo. Mar. 22, 2017) (asserting need for "caution in proceeding in a case of this nature on a barren factual record"); *Brotherston v. Putnam Invs., LLC*, Nos. 15-13825-WGY, 15-14128-WGY, 2016 WL 1397427, at *1 (D. Mass. Apr. 7, 2016) ("In factually complex ERISA cases like the instant ones, dismissal is often inappropriate."). Discovery, meanwhile, is extraordinarily expensive—and the burden falls almost entirely on the defendants' side. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013); *see also* Jacklyn Wille, *Spike in 401(k)*

Lawsuits Scrambles Fiduciary Insurance Market, Bloomberg Law (Oct. 18, 2021), https://bit.ly/307mOHg. And ERISA fiduciary-breach litigation is virtually always brought on a class basis, with plaintiffs claiming enormous aggregated damages. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"). These circumstances invite abuses, and easing plaintiffs' burden of proof would only make matters worse.

Heightened litigation risk also threatens to shape the fiduciary process in ways that do not help—and may ultimately harm—plan participants. The vast majority of plan fiduciaries exercise great care in meeting their obligations. But if any procedural misstep can lead to windfall damages unless fiduciaries are able to prove that all prudent fiduciaries would have made the same choice, even the most conscientious fiduciaries may feel compelled to pack on unnecessary procedures to guard against later claims that more could have been done. Such efforts come with substantial costs for plans: both the obvious economic costs associated with measures like hiring additional consultants and lawyers, and the subtler but no less impactful costs when fiduciaries' time and attention are diverted from their proper focus on ensuring that the plan serves participants' interests. Congress did not intend such an unduly burdensome, litigation-distorted regime when it designed ERISA, *see Conkright*, 559 U.S. at 516-17, and the Court should not impose it.

CONCLUSION

For the foregoing reasons, amicus urges the Court to affirm the district court's decision granting summary judgment for defendants.

Dated: June 23, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-4 and Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,981 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it uses a proportionally spaced typeface and Times New Roman 14-point font.

Dated: June 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the appellate CM/ECF system.

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