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,
Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JAMES O. FLECKNER
ABIGAIL K. HEMANI
JAIME A. SANTOS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Counsel for Amicus Curiae

January 5, 2015

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT................................. 2

ARGUMENT 4

I. THE FOURTH CIRCUIT HAS CREATED AN UNWORKABLE STANDARD THAT, IN PRACTICE, ELIMINATES THE ELEMENT OF LOSS CAUSATION FOR PROCEDURAL-PRUDENCE CLAIMS. 4

A. The Fourth Circuit's Standard Would Be Unworkable And Impossible For Defendants To Meet In The Majority Of Cases... 5

B. Unlike The Fourth Circuit's Standard, The Majority Approach Applied By The District Court Is Fair, Workable, And Faithful To The Ultimate "Objectively Prudent" Inquiry.. 11

II. THE FOURTH CIRCUIT'S DECISION UNDERMINES SEVERAL CLEAR CONGRESSIONAL OBJECTIVES OF ERISA AND THREATENS TO HALT FURTHER PERCOLATION......................... 15

A. The Fourth Circuit's Decision Undermines The "Uniform Regime of Ultimate Remedial Orders And Awards" That ERISA Was Designed To Establish. 16

B. The Court Should Resolve The Split Now, Because Forum-Shopping Threatens To Impede Further Percolation Of This Issue....................... 17

C. The Fourth Circuit's Decision Exposes ERISA Plan Sponsors And Fiduciaries To Undue Administrative And Litigation Costs. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Bonin v. Am. Airlines, Inc.,
621 F.2d 635 (5th Cir. 1980)................................18

Bostic v. Ohio River Co. (Ohio Div.) Basic Pension Plan,
517 F. Supp. 627 (S.D. W. Va. 1981)..................18

Brock v. Crapanzano,
No. CIV.A. 84-1899-CIV, 1986 WL 15752
(S.D. Fla. July 23, 1986).....................................10

Brock v. Robbins,
830 F.3d 640 (7th Cir. 1987).........................13, 15

Cole v. Cent. States Se. & Sw. Areas Health & Welfare Fund,
225 F. Supp. 2d 96 (D. Mass. 2002)......................4

Conkright v. Frommert,
559 U.S. 506 (2010)....................................*passim*

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014).....................................1, 19

Fink v. Nat'l Sav. & Trust Co.,
772 F.2d 951 (D.C. Cir. 1985).............................12

Flynn v. Veasey Constr. Corp.,
310 F. Supp. 2d 186 (D.D.C. 2004).....................18

George v. Kraft Foods Global, Inc.,
641 F.3d 786 (7th Cir. 2011)................................10

Harley v. Minn. Mining & Mfg. Co.,
284 F.3d 901 (8th Cir. 2002)................................9

Heimeshoff v. Hartford Life & Accident Ins. Co.,
134 S. Ct. 604 (2013)..19

In re Beck Indus., Inc., 605 F.2d 624 (2d Cir. 1979)...14

In re Regions Morgan Keegan ERISA Litig.,
692 F. Supp. 2d 944 (W.D. Tenn. 2010) 20

In re Unisys Sav. Plan Litig.,
74 F.3d 420 (3d Cir. 1996) 9

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990)..16

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995)..............................12

Liss v. Smith,
991 F. Supp. 278 (S.D.N.Y. 1998).......................10

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..2, 12

Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013) 22

Pineiro v. Pension Benefit Guar. Corp.,
318 F. Supp. 2d 67 (S.D.N.Y. 2003)....................10

Plasterers' Local Union No. 96 Pension Plan v. Pepper,
663 F.3d 210 (4th Cir. 2011) 9

Renfro v. Unisys Corp.,
671 F.3d 314 (3d Cir. 2011) 12

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002) 16

Sims v. First Horizon Nat'l Corp.,
No. 08-2293-STA-CGC, 2009 WL 3241689
(W.D. Tenn. Sept. 30, 2009) 20

US Airways, Inc. v. McCutchen,
133 S. Ct. 1537 (2013) 1

Varity Corp. v. Howe,
516 U.S. 489 (1996) 19

Varsic v. U.S. Dist. Court,
607 F.2d 245 (9th Cir. 1979) 18

STATUTES

29 U.S.C. § 1001 *et seq.* 1

29 U.S.C. § 1109(a) .... *passim*

29 U.S.C. § 1132(e)(2) 18

OTHER AUTHORITIES

Deloitte Development LLC, *Annual Defined Contribution Benchmarking Survey* (2014) 22

José Martin Jara, *What Is the Correct Standard of Prudence in Employer Stock Cases*?, 45 J. Marshall L. Rev. 541 (2012) 20

Stuart Robinson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes, Sept. 25, 2013, http://www.forbes.com/sites/stuartrobertson/2013/09/25/three-myths-keeping-small-businesses-from-starting-a-401k 23

René E. Thorne et al., *ERISA Stock-Drop Cases: Evolution and Future*, Law360.com, Dec. 11, 2008 20

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases like this one under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. *See, e.g.*, *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013).

Many Chamber members choose to provide their employees with benefits through plans governed by ERISA. Thanks to the uniform federal system of rights and obligations that ERISA creates, nationwide and multistate employers (including many Chamber members) need not suffer the unnecessary administrative cost of complying with many different legal regimes. Chamber members thus have a concrete interest in ensuring that ERISA plans are subject to a single nationwide standard

---

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

under ERISA, not a state-by-state or circuit-by-circuit patchwork.

Chamber members are also among the plan sponsors and fiduciaries that benefit from Congress's decision to create, through ERISA, "a system that is [not] so complex that administrative costs, or litigation expenses," unduly burden corporate sponsors. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted) (alterations in original). A key element of that carefully balanced system is the requirement in 29 U.S.C. § 1109(a) that plaintiffs prove loss causation before obtaining any monetary recovery from fiduciaries. The rule the Fourth Circuit announced in this case effectively dispenses with that requirement and allows plaintiffs to recover damages from fiduciaries *without* having to prove loss causation. And it imposes monetary liability even for objectively prudent decisions. That is just the type of rule that "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993). Thus, plan sponsors and plan fiduciaries alike have a strong interest in ensuring that the Fourth Circuit's rule does not escape review.

SUMMARY OF ARGUMENT

The Fourth Circuit has read an important element out of ERISA. As part of the statute's carefully balanced set of rights and remedies, Congress provided a fiduciary is not personally liable to pay money damages except for losses caused by the fiduciary's breach of duty. 29 U.S.C. § 1109(a). Without that limitation, fiduciaries would effectively

be forced to insure the plan against anything that might go wrong after a fiduciary's mistake, whether the mistake caused the loss or not.

But that is the situation fiduciaries now face after the Fourth Circuit's decision in this case. Splitting from other circuits, the Fourth Circuit has held that defendants must *dis*prove loss causation, and that they cannot carry their burden unless they show that a hypothetical reasonable fiduciary "would have" made the "same decision" that the defendants made, in all respects—*e.g.*, at the same "time," and in the same "manner." Pet. App. 30, 40. The Fourth Circuit held insufficient a showing that the defendants' decision was one of several choices a prudent fiduciary could have made.

That rule is unworkable in practice. The Fourth Circuit has put the burden on the defendant to show that its conduct matches up with a single hypothetical baseline, right down to details such as the "tim[ing]" and "manner" of implementation. But a fiduciary's job often entails deciding among *many* prudent choices—whether a handful of competent auditors or a hundred sound investment options. For precisely that reason, it frequently will be impossible to say—or to prove in court—that a hypothetical prudent fiduciary would have made *one particular choice*. And the absence of a solitary hypothetical baseline means that the defendant cannot disprove loss causation. So, by both reallocating the burden and raising the bar for defendants, the Fourth Circuit has read loss causation out of the statute.

The circuit splits created by the Fourth Circuit's ruling provide ample reason to grant review. And the sheer unworkability of the rule the court of appeals handed down is a reason to grant review

now. Until this Court answers the questions presented here, fiduciaries and plan sponsors that operate in multiple States will face multiple different rules about their own liability for money damages—just the opposite of the predictable and nationally uniform regime ERISA was supposed to create. And because ERISA "give[s] beneficiaries a wide choice of venue," *Cole v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 225 F. Supp. 2d 96, 98 (D. Mass. 2002), there is a real risk that forum-shopping will forestall any further percolation of this issue, as the decision below draws suits to the Fourth Circuit. This Court should review and reverse the Fourth Circuit's decision.

ARGUMENT

I. THE FOURTH CIRCUIT HAS CREATED AN UNWORKABLE STANDARD THAT, IN PRACTICE, ELIMINATES THE ELEMENT OF LOSS CAUSATION FOR PROCEDURAL-PRUDENCE CLAIMS.

A fiduciary is not required to insure an ERISA plan against every conceivable risk. In the retirement context, for example, nearly every investment option offered by a 401(k) plan entails some degree of risk, and the natural cycle of well-functioning markets results in both gains and losses (either of which may be only temporary). But fiduciaries are not liable for losses they did not cause—not at common law, and not under ERISA.

Rather, ERISA makes a fiduciary liable for losses to an ERISA plan *only* to the extent those losses "result[ed] from" the fiduciary's own "breach" of duty. 29 U.S.C. § 1109(a). That requirement—"loss

causation," for short—is the crucial element that protects fiduciaries from being turned into unwilling insurers against any and every loss.

Plans and fiduciaries can no longer count on that protection if they are subject to suit in the Fourth Circuit, because the Fourth Circuit has erroneously diverged from the law in other circuits in two key respects. First, the Fourth Circuit now requires fiduciaries themselves to bear the burden of *disproving* loss causation. And second, the Fourth Circuit requires fiduciaries seeking to carry that burden to make an all-but-impossible showing: that an objectively prudent fiduciary engaging in an objectively prudent decision-making process necessarily "would have" made the "same decision" as the defendants did—not just about what to do, but also about exactly how and when to do it. Pet. App. 30, 32, 39, 40 (requiring "same decision," same "time," same "manner"). As petitioners explain, this holding conflicts with the law in other circuits, Pet. 17-22, 33-35, and with the plain language of ERISA, Pet. 22-23, 28. But that is not all. The Fourth Circuit's standard is also unworkable, because it requires proof of an abstract counterfactual that will almost never exist in the real world in which ERISA plan fiduciaries must operate.

A. The Fourth Circuit's Standard Would Be Unworkable And Impossible For Defendants To Meet In The Majority Of Cases.

The questions presented warrant review not just because of the Fourth Circuit's reversal of the burden—other circuits treat loss causation as an

element of the plaintiffs' case—but also because of the unworkable standard that the Fourth Circuit has fashioned for defendants seeking to prove an *absence* of loss causation. This new burden on defendants is far from a mere procedural technicality. By making it unnecessary for plaintiffs to prove that element *and* all-but-impossible for defendants to disprove it, the Fourth Circuit has effectively removed altogether the requirement of loss causation from ERISA litigation alleging this type of fiduciary breach.

The Fourth Circuit's new standard requires a defendant to prove "that a prudent fiduciary *would have* made the same decision." Pet. App. 30. And "the same decision," to the Fourth Circuit, apparently means the same decision in every detail: the court of appeals faulted the district court for not "determining whether the evidence established that a prudent fiduciary, more likely than not, would have [acted] *at the time and in the manner* in which [petitioners] did." *Id.* at 32 (emphasis added). The Fourth Circuit refused to look at whether the challenged decision was, in substance, a prudent one. What mattered to the Fourth Circuit was whether the hypothetical prudent fiduciary would have followed every footstep of the path the defendants chose, right down to "time" and "manner" of implementation.

That artificial burden will be "impossible" for defendants to bear in practice, as Judge Wilkinson correctly predicted, Pet. App. 60. Plaintiffs regularly accuse fiduciaries of failing to conduct a sufficiently thorough investigation before making a decision for an ERISA plan. But in these cases, the underlying decision is almost never a neatly binary one.

Instead, fiduciaries face a multitude of possible courses of action; even after completing an objectively prudent investigation, there are still many different service providers, investment options, and benefit designs from which to choose. And different (though equally prudent) fiduciaries might choose different options. Indeed, 100 prudent fiduciaries engaging in a prudent decision-making process might make 100 different choices.

Yet under the Fourth Circuit's rule, having many good options is a serious problem rather than a blessing. The Fourth Circuit expressly held that a defendant cannot prevail by showing that it chose one of the many options that a prudent fiduciary "could have" selected—*i.e.,* options that were themselves *objectively prudent*. Instead, the defendant must prove that, more likely than not, a prudent fiduciary "would have" made precisely the same choice. Pet. App. 30. If there is no single prudent choice, then the defendant is out of luck. And because, in reality, there is almost never just one prudent choice, defendants will almost always be out of luck.

Take, for example, the facts of this case. The Fourth Circuit held that petitioners still could be liable even if divestiture of the Nabisco Funds was a prudent choice—as the district court found. Pet. App. 164-65. Rather, the defendants could avoid damages only if they could disprove loss causation, by "establishing that a prudent fiduciary, more likely than not, would" not only "have divested the Nabisco Funds," but would have done so "at the time and in the manner in which RJR did." *Id.* at 32; *accord id.* at 40. But because there are innumerable ways to

vary the "time" and "manner" of implementing a divestment decision, such a showing would be extraordinarily difficult, if not impossible. If there is a 49% likelihood that a fiduciary following a prudent process would have acted just as petitioners did; a 25% likelihood that it would have reached the same decision as petitioners but acted more quickly; a 25% chance that it would have reached the same decision but acted more slowly; and only a 1% chance that it would have reached any *other* decision (including a decision not to divest), the Fourth Circuit would still hold that the defendant has not carried its burden.

Other fact patterns that often recur in ERISA litigation likewise illustrate the problems with the Fourth Circuit's holding. For example, class-action plaintiffs often challenge a fiduciary's decision to offer particular investment options to 401(k) plan participants. In these cases, fiduciaries often have countless prudent options available to them. But because no fiduciary has a crystal ball, someday some of those choices may dip in value; that is how markets function.

Assume, for instance, that a plan investment committee is seeking to add an actively managed growth fund to the investment menu for a 401(k) plan. Because there are thousands of such funds available on the market that have similar profiles and fees, there frequently will be no single option that a prudent fiduciary "would" necessarily select; there will instead be numerous prudent options. So a defendant might struggle to show that 51% or more of the prudent fiduciaries in the marketplace would select the same fund, even after the most thorough selection process.

This example is not just a hypothetical—it mirrors real cases. And applying the Fourth Circuit's standard to those real cases, instead of the rule other circuits follow, would have real ramifications. Many procedural-prudence claims challenge the process used by a fiduciary to select investment options, investment vehicles, or investment strategies for defined benefit and defined contribution plans. *See, e.g.*, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434-37 (3d Cir. 1996) (pension plan participants alleged that fiduciaries inadequately investigated plan's investment in particular investment contracts); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 903 (8th Cir. 2002) (pension plan participants alleged that fiduciary failed to adequately investigate a $20 million investment before committing plan funds); *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 213 (4th Cir. 2011) (pension plan participants alleged that fiduciary failed to adequately review and investigate the plan's investment strategy and investment selections). Proving that a majority of prudent fiduciaries engaging in a prudent decision-making process would have chosen *these precise* investments is impossible, because there are thousands upon thousands of prudent investment options available to retirement plan fiduciaries. So, if the Fourth Circuit's test were the rule in these cases, then the plaintiffs could have pursued full recovery of their claimed losses upon proof of procedural imprudence, even if the investments they chose were, in fact, entirely prudent.

The Fourth Circuit's rule also will essentially eliminate the element of loss causation in the many

cases challenging fiduciaries' selection of a plan's service providers.[2] Companies sponsoring employee-benefit plans often engage *numerous* service providers—institutional trustees, recordkeepers, investment advisors, insurers, third-party administrators, auditors, consultants, outside counsel, etc.—and for any one of these services, there are hundreds of competent providers. In such cases, it would again be impossible to prove that *most* prudent fiduciaries would have, more likely than not, selected the *exact same* service provider that the defendant chose. Hence, even where a plan fiduciary has chosen an indisputably reputable provider and the plan paid market rate for its services, under the Fourth Circuit's test the fiduciary could be subject to liability and damages for that choice based on procedural-prudence claims of the sort Judge Cudahy has called "nitpicking." *George v. Kraft*

---

[2] For example, in *Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998), a plan participant alleged that plan fiduciaries failed to exercise procedural prudence in selecting service providers for employee health and pension plans because the fiduciaries did not engage in comparative shopping or solicit alternative bids. *Id.* at 288, 294, 300; *see also George v. Kraft Foods Global, Inc.*, 641 F.3d 786, 798 (7th Cir. 2011) (401(k) plan participants alleged that plan fiduciaries acted imprudently in failing to solicit competitive bids for recordkeepers once every three years); *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 93 (S.D.N.Y. 2003) (pension plan participants alleged that plan "contractors were carelessly selected" because they were chosen "to collect Plan data and administer the Plan, without using a bidding process"); *Brock v. Crapanzano*, No. CIV.A. 84-1899-CIV, 1986 WL 15752, at *7 (S.D. Fla. July 23, 1986) (claim that fiduciary was procedurally imprudent by failing to take any part in the selection or compensation of the plan's administrative service provider), *aff'd*, 819 F.2d 1148 (11th Cir. 1987).

Foods Global, Inc., 641 F.3d 786, 801 (7th Cir. 2011) (opinion concurring in part and dissenting in part).

In sum, because fiduciaries typically have a multitude of prudent options from which to choose, future defendants may find it virtually impossible to satisfy the Fourth Circuit's standard—to prove that an objectively prudent fiduciary engaging in an objectively prudent decision-making process more likely than not would have made precisely the same choice as the defendant made. If the Fourth Circuit had straightforwardly rejected the notion of loss causation, at least everyone would know that defendants have no hope of winning the issue. Instead, the Fourth Circuit has adopted an equally impossible approach without saying so, and turned loss causation into a mirage.

B. Unlike The Fourth Circuit's Standard, The Majority Approach Applied By The District Court Is Fair, Workable, And Faithful To The Ultimate "Objectively Prudent" Inquiry.

The Fourth Circuit majority acknowledged that its "intended result" was to create a standard that would be "more difficult for a defendant-fiduciary to satisfy." Pet. App. 34. The majority started from the assumption that "imprudent conduct will usually result in a loss to the fund," *id.* (internal quotation marks omitted), and then set out to create a test that would usually make a procedurally imprudent fiduciary liable for any losses the plan might suffer. But the Fourth Circuit's assumption misreads the statute: ERISA contains no imperative to hold fiduciaries liable for as many losses as possible.

Instead, Congress wrote loss causation into Section 1109 precisely because some imprudent conduct—even if it rises to the level of a breach—will not cause any loss to the plan. And Congress (reasonably) chose not to require fiduciaries to pay for losses they do not cause. *See Mertens*, 508 U.S. at 263 (rejecting an expansive view of fiduciary liability under ERISA that would have required the Court to "adjust the balance" "that the text adopted by Congress has struck" between the dual goals of benefiting employees and containing the costs associated with offering ERISA benefits).

By contrast, other courts correctly recognize that losses that follow an objectively prudent investment decision—which is one that a prudent fiduciary could make—were not "caused by" any failure on the fiduciary's part to be rigorously prudent on the way to making the investment decision. In *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), for example, the Sixth Circuit held that "to hold the fiduciary liable for a loss attributable" to an investment decision made after an inadequate investigation, there must be a "causal link between the failure to investigate and the harm suffered by the plan." *Id.* at 1459. And for this link to exist, the evidence must show "that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Id.* at 1460. *See also Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011) (approving "of an approach examining whether a questioned decision led to objectively prudent investments"); *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J.,

concurring in part and dissenting in part) ("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."). The Fourth Circuit could have found the substantively identical point in the holding of the very decision from which it purported (Pet. App. 34) to derive the assumption that breaches cause loss—*Brock v. Robbins*, 830 F.3d 640 (7th Cir. 1987). In *Brock*, the Seventh Circuit affirmatively rejected the notion that ERISA allows "monetarily penalizing an honest but imprudent trustee whose actions do not result in a loss to the fund." *Id.* at 647.

The panel majority repeatedly dismissed the alternative standard as flawed on the ground that it would entail consideration of what the court deemed to be a "remote" "possibilit[y]" that a prudent fiduciary *could* have made the same choice as the defendant, even after a flawless decision-making process. Pet. App. 33, 34. But under the standard the district court used, the degree of probability is entirely beside the point: what matters is that the decision could have been made by a prudent fiduciary, *because the decision was itself a prudent one*. If a fiduciary has 100 prudent options, each option might be called a "remote possibility." The relevant fact is not that any one option is a remote possibility—it is that all of those options are prudent ones.

The Fourth Circuit's criticism thus misses the mark: the district court's standard—and the

standard that other courts have adopted, Pet. 33-35—is both faithful to the concept of objective prudence and functional in practice. Under this test, so long as the ultimate investment decision is one that a "prudent" fiduciary "could have" made, following a prudent decision-making process, then the causal chain is broken, and any losses suffered by the plan did not "result from" the fiduciary's imperfect process. This standard is entirely consistent with the notion of objective prudence. If an investment decision is one that an objectively prudent fiduciary could have made, then it necessarily cannot be an imprudent decision.

The Fourth Circuit majority also went wrong in defending its own new rule. Seeking to minimize the rule's pernicious effects, the panel majority noted that *prudent* fiduciaries need not litigate loss causation. Pet. App. 41. That misses the point: Section 1109 requires proof of loss causation *in addition to* proof of a fiduciary breach before a plaintiff may hold a fiduciary personally liable for money damages. Indeed, this requirement is precisely what distinguishes breach of fiduciary claims for monetary damages from claims for disgorgement or equitable relief, which, unlike claims for monetary damages, contain no statutory loss causation requirement. *See* 29 U.S.C. § 1109(a).

To be sure, the Fourth Circuit did not like the idea that fiduciaries' procedural imprudence may not result in a monetary penalty. "Courts do not take kindly," it said, "to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." Pet. App. 34 (quoting *In re Beck Indus., Inc.*, 605

F.2d 624, 636 (2d Cir. 1979)). But that is akin to saying, in a tort case, "Courts do not take kindly to arguments about proximate causation." Loss causation, like proximate causation, is a limitation on damages liability for breach of duty that strikes a balance: Congress made a judgment that not every loss to an ERISA plan was the fiduciaries' fault, and that while equitable relief for fiduciary breaches would always be available, *see* 29 U.S.C. § 1109(a), not every breach and not every loss would subject fiduciaries to damages. *See Brock*, 830 F.2d at 647 (noting that "other remedies such as injunctive relief can further the statutory interests" of ERISA where there is no causal link between a fiduciary's breach and any losses suffered by the fund). The Fourth Circuit has now effectively neutralized that limitation. And that flawed decision warrants review.

II. THE FOURTH CIRCUIT'S DECISION UNDERMINES SEVERAL CLEAR CONGRESSIONAL OBJECTIVES OF ERISA AND THREATENS TO HALT FURTHER PERCOLATION.

ERISA's primary concern is ensuring a nationally uniform regulatory regime. The Fourth Circuit's decision creates a circuit conflict that disrupts that uniformity. And because many plaintiffs can simply avail themselves of the Fourth Circuit's rule through forum-shopping, this Court should not defer review in the hope the issue will percolate further. The Court should grant review *now* before plan sponsors and fiduciaries feel the full effect of the Fourth Circuit's rule in undue administrative and litigation expenses.

A. The Fourth Circuit's Decision Undermines The "Uniform Regime of Ultimate Remedial Orders And Awards" That ERISA Was Designed To Establish.

The Fourth Circuit's adoption of this new and divergent rule of liability defeats the very concept of nationwide uniformity that is so central to ERISA. When Congress enacted ERISA, it sought not only to create uniform substantive law governing the responsibilities of plan participants and fiduciaries, but also to create a nationwide "set of liabilities, under . . . a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Congress's goal was to create as much uniformity and predictability as possible for employers sponsoring employee benefit plans because, in light of the entirely voluntary nature of ERISA, such predictability was an essential part of inducing employers to offer benefit plans in the first place. *Id.*; *Conkright*, 559 U.S. at 516-17.[3]

In light of the existing circuit split, there is currently no uniform law governing fiduciaries' liability for asserted imprudence. Instead, the potential for damages varies widely, depending on where such a claim is filed. As explained above, if a plaintiff sues in the Fourth Circuit, the defendants will often be subject to liability for *all losses* that temporally follow a fiduciary decision whenever that decision was made without the full degree of process

---

[3] *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, (1990) (noting that conflicting directives and inefficiencies of a non-uniform body of law "could work to the detriment of plan beneficiaries").

that the plaintiffs and the court deem acceptable, even if the ultimate investment decision was itself unassailable. But when suit is filed in the Second, Third, or Sixth Circuit, the same fiduciary almost certainly could not be held liable for losses that follow an objectively prudent investment. This type of circuit-dependent divergence is precisely what ERISA was designed to prevent. The way to restore uniformity—and to give back to plan sponsors the benefits of predictability—is for this Court to grant certiorari.

B. The Court Should Resolve The Split Now, Because Forum-Shopping Threatens To Impede Further Percolation Of This Issue.

The Fourth Circuit's decision may change the rules of the game for many plans, sponsors, and fiduciaries nationwide, because any entity that may be sued in the Fourth Circuit for breach of fiduciary duty must take account of the decision below, and potentially modify its conduct, unless this Court grants review and reverses. And many fiduciaries outside the Fourth Circuit have reason to fear being sued there, thanks to ERISA's generous venue provisions: many plaintiffs understandably will seek to choose the Fourth Circuit's rule instead of the opposite precedent of their home circuits. Rather than percolate nationwide, the issue may well concentrate in the plaintiff-friendly Fourth Circuit. The time for this Court to resolve the split, therefore, is now.

ERISA's nationwide venue provision permits plaintiffs to bring claims in any federal district "where the plan is administered, where the breach

took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). Some courts have construed this provision broadly, concluding that Congress "clearly struck the balance in favor of liberal venue." *Varsic v. U.S. Dist. Court*, 607 F.2d 245, 248 (9th Cir. 1979); *see also Bonin v. Am. Airlines, Inc.*, 621 F.2d 635, 636 n.1 (5th Cir. 1980) ("A potential ERISA plaintiff is granted a wide choice of federal court venue [and] liberal service of process rules . . . ."). For example, some courts have held that "a defendant resides or may be found" in any district in which any single defendant could satisfy the minimum-contacts test of personal jurisdiction. *See Varsic*, 607 F.2d at 248-49. Under that rule, ERISA claims could be initiated almost anywhere the Constitution does not actually place off limits (for all defendants). Furthermore, in several cases, courts have held that a "breach t[akes] place" in any district in which any plaintiff resides. *See, e.g.*, *Bostic v. Ohio River Co. (Ohio Div.) Basic Pension Plan*, 517 F. Supp. 627, 637 (S.D. W. Va. 1981).

And while it is easy for a plaintiff to choose a venue that ERISA allows, it is difficult for a defendant to defeat that chosen venue through a motion to transfer. Courts have declared it appropriate to give "special weight" to an ERISA plaintiff's "choice of forum," even if the plaintiff chooses a forum with little or no connection to the events being litigated. *E.g.*, *Flynn v. Veasey Constr. Corp.,* 310 F. Supp. 2d 186, 193 (D.D.C. 2004).

In light of the liberal interpretation of ERISA's venue provision, plaintiffs' lawyers seeking to bring a procedural-prudence claim may be able to avail themselves of the looser standards currently in place in the Fourth Circuit, so long as any defendant has

some "minimum contact" with Maryland, Virginia, West Virginia, North Carolina, or South Carolina. In practice, then, the singular position adopted by the Fourth Circuit could end up governing a disproportionate number of procedural-prudence cases.

ERISA defendants ought to be subject to the same litigation risks whether they are sued in Richmond, Cincinnati, or New York, and differences in substantive law among the circuits should not drive the choice of forum. This Court should grant certiorari to restore the uniformity of rights and liabilities that Congress intended when enacting ERISA by establishing a nationwide rule governing the burden and standard of proof for loss causation in procedural-prudence claims.

C. The Fourth Circuit's Decision Exposes ERISA Plan Sponsors And Fiduciaries To Undue Administrative And Litigation Costs.

When Congress enacted ERISA, not only did it seek to ensure nationwide uniformity, it also "sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted) (alterations in original); *accord Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014) (same); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (same); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (same). Because the Fourth Circuit's decision will create precisely the type of discouragement that

Congress sought to avoid, it should not be left in place.

By essentially eliminating the element of loss causation for procedural-prudence claims, the Fourth Circuit further encourages plaintiffs' counsel to "file first and build claims later" whenever an investment dips in value—and makes those suits easier for plaintiffs to litigate and win. Such lawsuits are already common when a company that has an employee stock ownership plan ("ESOP") or simply offers corporate stock as an investment option for its 401(k) plan suffers a significant decline in its stock value.[4] The Fourth Circuit's rule opens a broader set of stock investments to such lawsuits: now, so long

---

[4] *See* José Martin Jara, *What Is the Correct Standard of Prudence in Employer Stock Cases*?, 45 J. Marshall L. Rev. 541, 544 (2012) (reporting that "over the past decade," settlements in ERISA stock-drop cases "have totaled over $1 billion"); René E. Thorne et al., *ERISA Stock-Drop Cases: Evolution and Future*, Law360.com, Dec. 11, 2008, http://www.law360.com/articles/80013/erisa-stock-drop-cases-evolution-and-future (discussing the dramatic increase in stock-drop cases filed in 2007 and 2008); *see also, e.g.*, *Sims v. First Horizon Nat'l Corp.*, No. 08-2293-STA-CGC, 2009 WL 3241689, at *20 (W.D. Tenn. Sept. 30, 2009) (alleging numerous procedural defects, including "failing to review the appropriateness of First Horizon Stock as an investment in the plan," "failing to engage independent fiduciaries that could make independent judgments regarding the Plan's investments in First Horizon Stock," and "failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served" and seeking to recover "losses of millions of dollars"); *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 956-58 (W.D. Tenn. 2010) (including, in an ESOP stock-drop action, a claim for failure to engage in a prudent process before selecting affiliated funds, rather than similar investments offered by unaffiliated advisors, for plan participants as an alternative to company stock).

as discovery provides some evidence of imperfect process at some point along the way, plaintiffs can recover the full extent of the participants' investment losses, *even if the decision to retain the ESOP or stock fund was objectively prudent*. In many cases, therefore, the Fourth Circuit's rule will turn a perfectly ordinary market correction into an enormous windfall for plaintiffs.

This concern is not limited to cases involving ESOPs or corporate-stock funds. Instead, whenever there is a more general market downturn, plaintiffs' counsel will have an incentive to file suit claiming that fiduciaries should have chosen better-performing, better-hedged, or better-timed investment options for their 401(k) plans. And, again, the Fourth Circuit's rule could provide plaintiffs with a windfall: plaintiffs would merely have to identify a decline in the value of their investment options (not particularly difficult following a recession like the most recent one); identify some defect in the fiduciaries' procedures for selecting or retaining those investment options; and then recover millions in losses reflecting the difference in value between the investment options selected—even if objectively prudent—and the investment options that plaintiffs claim, with 20/20 hindsight, should have been chosen.

Given these perverse incentives, the Fourth Circuit's decision undoubtedly will create significant "undu[e]" administrative expenses. *Conkright*, 559 U.S. at 516-17. In order to protect against windfall judgments, plan fiduciaries and the plan sponsors that appoint or engage them may allocate substantial resources to ensuring that the fiduciaries' decision-making process is not only

prudent, but as close to bulletproof as possible. Without a meaningful element of loss causation, any procedural deviation could result in massive liability—so fiduciaries must spend their time flyspecking their own decisions and papering the record thoroughly even in the easiest cases, the cases in which the fiduciary is selecting among a number of indisputably prudent options.

Even if sponsors and fiduciaries do engage in a process sufficiently thorough to protect themselves against liability, they still will face significant "undu[e]" litigation expenses. *Conkright*, 559 U.S. at 516-17. As explained above, the Fourth Circuit's decision creates incentives for plaintiffs' lawyers to rush to *file* suit in the pursuit of a windfall award whenever the market drops. Just defending such suits entails significant cost, as courts have recognized: "[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). And, in light of these discovery burdens, many ERISA cases result in what the Second Circuit has dubbed "settlement extortion"—the use of "discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Id.*

For the large number of plan sponsors that are small or mid-sized businesses[5]—particularly those

---

[5] *See* Deloitte Development LLC, *Annual Defined Contribution Benchmarking Survey* 6 (2014), *available at* http://www2.

operating within the Fourth Circuit—there is a real risk that these additional undue administrative and litigation costs may discourage them from offering, or continuing to offer, benefits under ERISA—just as Congress feared. *See Conkright*, 559 U.S. at 517. And the risk and expense that the Fourth Circuit's rule will create threaten harm to the sponsors, fiduciaries, *and beneficiaries* of every plan subject to that rule—harm from crimping investment decisions; raising the costs of services, indemnification, and insurance; and ultimately diverting resources from other key aspects of employee benefit programs, such as 401(k) matching contributions or subsidization of healthcare premiums. That result is thoroughly at odds with Congress's design.

---

deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-cons-annual-defined-contribution-benchmarking-survey2013-081914.pdf (reporting that more than one-third of plan sponsors surveyed by Deloitte in 2013 and 2014 employed 500 or fewer employees); Stuart Robinson, *Three Myths Keeping Small Businesses From Starting A 401(k)*, Forbes, Sept. 25, 2013, http://www.forbes.com/sites/stuartrobertson/2013/09/25/three-myths-keeping-small-businesses-from-starting-a-401k (reporting that 24% of businesses with fewer than 50 employees offer a 401(k) plan).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JAMES O. FLECKNER
ABIGAIL K. HEMANI
JAIME A. SANTOS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

January 5, 2015

Counsel for Amicus Curiae