No. 24-620

In the Supreme Court of the United States

JAMIE H. PIZARRO, *et al.*,
Petitioners,
v.
THE HOME DEPOT, INC., *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) allows a plaintiff to obtain damages for a breach of the fiduciary duty of prudence if the fiduciary's alleged breach caused a loss to the retirement plan. 29 U.S.C. § 1109(a). ERISA is silent on the question of which party bears the burden of proof on the element of loss causation. This Court has generally held that when assessing the burden of proof as to federal causes of action, "the burden of persuasion lies . . . upon the party seeking relief," unless there is "some reason to believe that Congress intended otherwise." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).

Below, the Eleventh Circuit held that ERISA's silence on the burden of proof means the statute follows the default rule that a plaintiff bears the burden of proving the loss-causation element of her claim, and it rejected petitioners' claim for lack of loss causation because Home Depot's investment decisions were objectively reasonable.

The question presented is whether the Eleventh Circuit correctly analyzed the burden of proof and granted summary judgment to Home Depot.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent The Home Depot, Inc. states that it has no parent corporation and that no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Statutory Background 3

B. The Home Depot FutureBuilder 401(k) Plan 5

C. The District Court Proceedings.....................8

D. The Eleventh Circuit's Decision..................10

REASONS FOR DENYING THE PETITION..........15

I. The Eleventh Circuit's Rejection Of Burden Shifting Is Correct.................................16

II. This Case Is A Poor Vehicle Because Burden Shifting Would Not Change The Result 24

III. The Burden-Shifting Question Is Relatively Unimportant And Has Repeatedly Been Denied 31

CONCLUSION..34

TABLE OF AUTHORITIES

Page(s)

CASES

ABB, Inc. v. Tussey,
583 U.S. 874 (2017)..33

Albert v. Oshkosh Corp.,
47 F.4th 570 (7th Cir. 2022).................................3

Blankenship v. Boyle,
329 F. Supp. 1089 (D.D.C. 1971).........................18

Branch v. White,
239 A.2d 665 (N.J. Super. Ct. App.
Div. 1968)..18

Brotherston v. Putnam Investments, LLC,
907 F.3d 17 (1st Cir. 2018), *cert. denied*, 140 S. Ct. 911 (2020)..............................19

In re Estate of Maurice,
249 A.2d 334 (Pa. 1969).......................................18

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)..4

Fink v. National Savings & Trust Co.,
772 F.2d 951 (D.C. Cir. 1985)...............4, 9, 12, 25

Fish v. GreatBanc Trust Co.,
749 F.3d 671 (7th Cir. 2014)................................26

Fulton National Bank v. Tate,
363 F.2d 562 (5th Cir. 1966)................................18

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999)..20

TABLE OF AUTHORITIES—Continued

Page(s)

Hughes v. Northwestern University,
595 U.S. 170 (2022)................2, 3, 5, 12, 26, 27, 30

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995),
abrogated in part on other grounds by Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014)......................30

Mertens v. Hewitt Associates,
508 U.S. 248 (1993)..20, 22

Peabody v. Davis,
636 F.3d 368 (7th Cir. 2011)............................4, 31

Pension Benefit Guaranty Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Investment Management Inc.,
712 F.3d 705 (2d Cir. 2013) 4, 24

Perez v. Sturgis Public Schools,
598 U.S. 142 (2023)..23

Pfeil v. State Street Bank & Trust Co.,
671 F.3d 585 (6th Cir. 2012), *cert. denied*, 568 U.S. 1063 (2012), *and abrogated in part on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)......................31

Pioneer Centres Holding Co. Employee Stock Ownership Plan & Trust v. Alerus Financial, N.A.,
858 F.3d 1324 (10th Cir. 2017)..............................4

TABLE OF AUTHORITIES—Continued

Page(s)

Putnam Investments, LLC v. Brotherston,
140 S. Ct. 911 (2020)....................................33

Ramos v. Banner Health,
461 F. Supp. 3d 1067 (D. Colo. 2020), *aff'd*, 1 F.4th 769 (10th Cir. 2021)....................................9, 30

Renfro v. Unisys Corp.,
671 F.3d 314 (3d Cir. 2011)....................................26, 30

Rinehart v. Akers,
722 F.3d 137 (2d Cir. 2013), *vacated on other grounds by* 573 U.S. 956 (2014)....................................30

RJR Pension Investment Committee v. Tatum,
576 U.S. 1054 (2015)....................................33

Sacerdote v. New York University,
9 F.4th 95 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022)....................................19

Schaffer ex rel. Schaffer v. Weast,
546 U.S. 49 (2005)....................................1, 11, 17

Smith v. CommonSpirit Health,
37 F.4th 1160 (6th Cir. 2022)....................................3

Tatum v. RJR Pension Investment Committee,
761 F.3d 346 (4th Cir. 2014), *cert. denied*, 576 U.S. 1054 (2015)....................................4, 25, 27, 29

TABLE OF AUTHORITIES—Continued

Page(s)

Tibble v. Edison International,
575 U.S. 523 (2015) 3, 16

Tussey v. ABB, Inc.,
746 F.3d 327 (8th Cir.), *cert. denied*,
574 U.S. 911 (2014) 26, 30

Useden v. Acker,
947 F.2d 1563 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993) 12, 21

Varity Corp. v. Howe,
516 U.S. 489 (1996) 3, 20, 22

Willett v. Blue Cross & Blue Shield of Alabama,
953 F.2d 1335 (11th Cir. 1992) 9

Wright v. Oregon Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 31

Matter of Ziegler,
258 A.D. 1077 (N.Y. App. Div. 1940) 18

STATUTES

29 U.S.C. §§ 1021-1032 22

29 U.S.C. §§ 1021-1027 20

29 U.S.C. § 1023(b)-(c) 22

29 U.S.C. §§ 1052-1056 20

29 U.S.C. §§ 1058-1060 20

29 U.S.C. §§ 1082-1085 20

TABLE OF AUTHORITIES—Continued

Page(s)

29 U.S.C. §§ 1102-1112 20

29 U.S.C. § 1104(a)(1)(B) 3

29 U.S.C. § 1109(a) 1, 4, 16, 24

OTHER AUTHORITIES

George G. Bogert et al., *The Law of Trusts and Trustees* § 871 (2024 update, Westlaw) 18

George Gleason Bogert et al., *The Law of Trusts and Trustees* § 701 (2d rev. ed. 1982) 17

H.R. Rep. No. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639 20

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Restatement (Third) of Trusts (2012, Westlaw 2024 update) 18, 21

INTRODUCTION

There is no compelling reason for the Court to grant review of petitioners' burden-shifting question, and this case is a uniquely poor candidate for doing so in any event.

In *Schaffer ex rel. Schaffer v. Weast*, this Court held that when assessing the burden of proof as to a federal cause of action, "[a]bsent some reason to believe that Congress intended otherwise," "the burden of persuasion lies where it usually falls, upon the party seeking relief." 546 U.S. 49, 57-58 (2005). Here, the Employee Retirement Income Security Act of 1974 (ERISA) is silent as to who bears the burden of proof as to the loss-causation element of a claim alleging the breach of the fiduciary duty of prudence. 29 U.S.C. § 1109(a). The Eleventh Circuit applied *Schaffer*'s default rule and held that the plaintiff bears that burden.

Certiorari should be denied because the Eleventh Circuit's decision was correct: ERISA does not shift the burden of proof to the defendant to disprove loss causation. ERISA's silence on the question of burden shifting means *Schaffer*'s default rule governs and plaintiffs bear the burden of every element of a violation. No exception to that general rule applies here.

Petitioners are wrong to invoke the law of trusts to support burden shifting. Trust law did not provide for burden shifting at the time ERISA was enacted—it placed that burden on plaintiffs. The primary authority petitioners cite for their burden-shifting principle is a Restatement of Trusts published almost four decades after ERISA's enactment. It at most establishes that the law of trusts is unsettled about

burden shifting *today*—not that trust law embraced a consistent burden-shifting principle in 1974, when Congress enacted ERISA. And even if trust law did embrace burden shifting, there is still no reason to think that Congress silently incorporated that principle into ERISA's detailed liability scheme.

In any event, this case is a poor vehicle for addressing burden shifting because the burden of proof makes no difference to the bottom-line result in this case. This Court has made clear that prudent fiduciaries may make a "range of reasonable judgments." *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). So long as an ERISA defendant's choices fall within that zone of reasonableness, the fiduciary has caused no loss to plan participants. Here, both the Eleventh Circuit and the district court have already concluded that Home Depot's investment decisions were objectively reasonable as a matter of law, and petitioners do not contest those findings in this Court. That resolves this case—in Home Depot's favor—regardless of which party bears the burden of proof on loss causation.

Finally, the existence of a circuit split is no reason to grant review here, because there is little reason to think the burden-shifting issue matters in a meaningful number of cases. Burden shifting makes a difference only where the evidence is perfectly in equipoise. In the real world, there is rarely a need for such an evidentiary tiebreaker. The relative insignificance of the burden-shifting issue is likely why this Court has repeatedly declined review of that issue—three times over the past decade—despite the split.

The Court should likewise deny the petition here.

STATEMENT OF THE CASE

This is an ERISA case in which petitioners allege that respondents, the administrators of the Home Depot FutureBuilder 401(k) Plan, breached their fiduciary duty of prudence by allowing Plan participants to be charged excessive fees and retaining imprudent investment options. The district court and Eleventh Circuit both rejected petitioners' theories because Home Depot's mainstream investment decisions were objectively reasonable. App.1a-116a.

A. Statutory Background

ERISA governs the operation and administration of private pension and employee retirement plans, and it imposes certain duties and disclosure requirements on retirement plan administrators. *See Varity Corp. v. Howe*, 516 U.S. 489, 496-97 (1996). The statute requires retirement-plan fiduciaries to discharge their responsibilities "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). This standard "is 'derived from the common law of trusts.'" *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015). It includes the procedural duties "'to properly monitor investments and remove imprudent ones,'" *Hughes*, 595 U.S. at 175, and to monitor fees and costs, *e.g.*, *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-82 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022).

"Because the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts, the appropriate inquiry will

necessarily be context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) (alteration in original). A fiduciary's actions must be judged "'based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight.'" *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013). In other words, "ERISA's 'fiduciary duty of care . . . requires prudence, not prescience.'" *Id.* (alteration in original).

If a fiduciary breaches her duty, ERISA makes her "subject to such . . . remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). The fiduciary is also personally liable for "any losses to the plan resulting from each such breach." *Id.* This requires proof that "the breach of fiduciary duty . . . proximately cause[d] the plaintiffs' losses"—i.e., "loss causation." App.9a; *see also, e.g.*, *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 361 (4th Cir. 2014), *cert. denied*, 576 U.S. 1054 (2015); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011).

As then-Judge Scalia once explained, ERISA's loss-causation inquiry turns on an assessment of the "objective prudence" of the fiduciary's substantive decisions: Even if a trustee uses an imprudent process, if he happens to select "objectively prudent investments (*e.g.*, an investment in a highly regarded 'blue chip' stock)," he may not be "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).

That explanation tracks this Court's guidance in *Hughes*: Because "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs" and predictions in the face of an uncertain future, "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." 595 U.S. at 177. Investment choices falling within that zone of reasonableness cause no cognizable loss under ERISA.

B. The Home Depot FutureBuilder 401(k) Plan

Respondent The Home Depot, Inc., is the largest home-improvement retailer in the United States. Doc.228-2 at 2 (¶1).[1] To provide for its employees' retirements, Home Depot sponsors the Home Depot FutureBuilder 401(k) Plan—a defined-contribution retirement plan. App.4a. At the end of 2019, the Plan had more than 230,000 participants and $9.1 billion in assets. *Id.* The Plan is overseen by two committees—respondents Investment Committee and Administrative Committee—members of each of which are appointed by The Home Depot, Inc., and who have responsibility for selecting and managing the Plan's investments and administering the Plan. *Id.* This brief refers to the three respondents, collectively, as Home Depot.

During the relevant time period, Home Depot hired three types of service providers to help it

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[1] "Doc." refers to N.D. Georgia, No. 18-cv-1566 docket entries. Record citations are to ECF-generated pagination.

administer the Plan: (1) a recordkeeper, who was responsible for activities like maintaining plan records, administering participant accounts, and processing investment instructions; (2) an investment consultant, who provided investment advice to the Plan's administrators in their role selecting, monitoring, and at times replacing investment options available to Plan participants, as well as when selecting and monitoring service providers to the Plan; and (3) a financial advisory service, who offered both free and paid financial advice to Plan participants and investment management services. App.4a.

The financial advisor charged two types of fees for the services it provided to participants. First, it charged a "plan access fee"—a flat dollar amount charged to all participants for basic advisory services offered to all Plan participants. App.5a. Second, it charged a "professional management fee"—a tiered fee, based on the individual participant's account balance, charged only to those who elected to enroll in the advisor's service that managed participants' investments for them. *Id.*

The Plan offers participants a variety of investment options, designed to cater to sophisticated and unsophisticated investors alike, and to a range of risk tolerances. As relevant here, those investment options included: (1) the BlackRock family of target date funds (TDFs); (2) the JPMorgan Stable Value Fund; (3) the TS&W Fund; and (4) the Stephens Fund. App.6a.

The BlackRock TDFs—like all TDFs—are designed as an all-in-one solution for retirement investing. *Id.* Each fund in the suite has a designated "target date"; investors choose a fund based on the

anticipated date of their retirement. *Id.* The fund follows a predetermined "glide path" that automatically adjusts the asset allocation in the fund over time, becoming less risky as the anticipated retirement date approaches. *Id.* In this way, the TDFs save individual investors the effort of selecting and making their own adjustments to investments over time. Every TDF suite's glide path is different, reflecting different choices about a variety of investment decisions. For example, different TDFs make different choices about balancing risk versus growth at particular points in the life cycle of the fund; others make varying choices about whether to reach the final allocation at the time of retirement (a "to" retirement glide path) or to continue adjusting investment allocation after a participant reaches retirement (a "through" retirement glide path). Doc.228-2 at 64 (¶¶196-97). The BlackRock TDFs used a more conservative glide path than many peer TDF suites. App.6a. Thus, at the same point in the glide path, they were less risky than many comparator funds. *Id.* The BlackRock TDFs were a popular option among many other Fortune 500 companies with large retirement plans, including Apple, Bank of America, Delta Air Lines, and Microsoft. *Id.*; Doc.228-2 at 63 (¶195).

The JPMorgan Stable Value Fund was designed as an investment option for preserving investors' principal while earning consistent, reliable returns. App.6a. It yielded positive returns for investors throughout the entire class period. *Id.*

The TS&W Fund and the Stephens Fund were both "small cap" funds. *See id.* They invested primarily in small-capitalization companies with potential for long-term growth or that were

undervalued relative to market and industry peers. *Id.*; Doc.228-2 at 72-73 (¶¶226-29). Based on those funds' performance, Home Depot chose to replace both funds with "small-mid cap" growth and value options in 2017. App.6a; Doc.228-2 at 87-88 (¶¶271, 273-74).

C. The District Court Proceedings

In 2018, petitioners filed an ERISA lawsuit against Home Depot in the Northern District of Georgia on behalf of a class of current and former participants in the Plan. *See* App.6a-7a. Their complaint alleged that Home Depot violated the fiduciary duty of prudence imposed on retirement plan fiduciaries in two ways.

First, petitioners asserted that Home Depot failed to appropriately monitor the fees charged by the Plan's financial advisor. App.7a. Petitioners alleged this failure caused Plan participants to pay excessive fees for the advisor's services. *Id. Second*, petitioners asserted that Home Depot failed to appropriately monitor the four investment options listed above, which petitioners alleged were imprudent investment choices. *Id.* Petitioners alleged that this failure caused the Plan to retain these imprudent investments, resulting in lower returns for participants. *Id.*

Following extensive discovery about Home Depot's investment decisions, the district court granted Home Depot's motion for summary judgment on both of petitioners' theories. App.30a-116a.

The district court began by addressing petitioners' argument that ERISA and Eleventh Circuit precedent placed the burden of *dis*proving loss causation on fiduciary defendants, and therefore that it was Home Depot's burden to show that "a prudent

fiduciary 'would have agreed to pay the same fees [to the Plan's financial advisor] and would have retained the [four] Challenged funds.'" App.67a. The court explained that this was a misreading of Eleventh Circuit law, which held that "the burden of proof on the issue of causation . . . rest[s] on the plaintiffs." App.68a (alterations modified) (quoting *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992)). Thus, "Home Depot Defendants are not required to disprove loss causation regarding either of Plaintiffs' claims to win summary judgment." App.67a. "[R]ather, to prevail, Home Depot Defendants must show an absence of any evidence supporting either breach or loss causation (the challenged elements), or that no reasonable factfinder could find breach or loss causation as a matter of law." *Id.*

The district court then concluded that, given the undisputed evidence in the record, Home Depot was entitled to summary judgment on the issue of loss causation. As the court explained, "if a plan fiduciary selects an objectively prudent service or investment option, the plan has not suffered a loss, and the element of loss causation is wanting." App.76a. Citing then-Judge Scalia's concurrence in *Fink*, the district court reasoned that an objectively imprudent investment decision is one "that no reasonable fiduciary would have [made]" under the circumstances. *Id.* (quoting *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020) (citing *Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part)), *aff'd*, 1 F.4th 769 (10th Cir. 2021)).

The district court then explained why the challenged decisions were well within the range of

reasonable choices for Home Depot to make under the circumstances. As to the fees charged by the Plan's financial advisor, the court highlighted that "[e]xpressed as a per capita fee (*i.e.*, dollars per participant), it is undisputed that Plan participants paid lower fees to [the financial advisor] for Professional Management throughout the Class Period than participants in almost all other plans serviced by [the same provider]." App.77a. And "expressed in basis points" (i.e., as a percentage of assets), the top tier fee charged by the financial advisor "was the same as or lower than all . . . plans with an average participant balance lower than the Plan's" serviced by the same provider. App.79a. "Put simply," the court concluded, Petitioners "failed to adduce evidence to show why the Plan's fees for Professional Management . . . were imprudent or imprudently bargained." *Id.*

Turning to Petitioners' challenge to the four investment options, the district court reached the same result. As to each option, the court concluded that there was no "genuine dispute of material fact on the element of loss causation" because each of the investments was a reasonable choice and therefore objectively prudent. App.85a, 99-101a, 104-07a, 110-13a, 115-16a. And as to the Stephens Fund, the court concluded that summary judgment was independently warranted because there was no genuine dispute on the question of breach, because Home Depot employed a prudent process to monitor that fund. App.113-15a.

D. The Eleventh Circuit's Decision

Petitioners appealed the district court's summary judgment decision, and a unanimous Eleventh Circuit

panel affirmed in an opinion by Judge Grant. The Eleventh Circuit rejected petitioners' argument that ERISA incorporates burden shifting on the question of loss causation, rejected petitioners' conception of the appropriate test for measuring loss causation, and agreed with the district court that Home Depot's investment decisions were objectively reasonable.

First, the court rejected petitioners' argument that ERISA incorporates burden shifting on the question of loss causation. The court noted that "ERISA, like many other statutes, does not explicitly assign the burden of proof on every issue—including loss causation." App.12a. Quoting this Court's decision in *Schaffer*, 546 U.S. at 56-57, the court observed that "the 'ordinary default rule' is 'that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.'" App.12a. "[S]o without any evidence that Congress intended to vary from it, 'we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.'" *Id.* (quoting *Schaffer*, 546 U.S. at 57-58). As the court explained, "[t]he ordinary default rule resolves this case": "If Congress had intended this departure from the norm, it could have said so; absent any affirmative indication to that end, we decline to impose it ourselves." *Id.*

The Eleventh Circuit acknowledged that "there are exceptions to this ordinary rule" that plaintiffs bear the burden of proof on the elements of their claims, but concluded "they do not apply here." App.13a. And it similarly rejected petitioners' reliance on the common law of trusts, observing that "ERISA is not the common law." App.14a. Although the court acknowledged "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," and therefore courts should "only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." App.14a-15a (quoting *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)). In the case of burden shifting, the court concluded that "Congress's omission" of that framework was "deliberate." App.15a.

Second, turning from the question of "who has the burden of proving loss causation," the Eleventh Circuit addressed "what will satisfy that burden." App.16a. On that question, the court held that "[t]o recover damages . . ., plaintiffs must show that the investments made were not objectively prudent." *Id.* (citing *Fink*, 772 F.2d at 962 (Scalia, J., concurring in part and dissenting in part)). In other words:

> [The fiduciary's choices] must have fallen outside the "range of reasonable judgments a fiduciary may make based on her experience and expertise," such that a hypothetical fiduciary in the same circumstances as the defendant, armed with the information that a proper evaluation would have yielded, would not (or could not) have made the same choice.

Id. (quoting *Hughes*, 595 U.S. at 177). The court emphasized that "[i]n any single set of circumstances, there might be—indeed, likely will be—many objectively prudent choices a fiduciary could make." App.17a.

The Eleventh Circuit noted the parties' debate over whether loss causation turned on whether a

reasonable fiduciary "could have" or "would have" made the same investment choice. App.17a-18a. As part of their argument that defendants should bear the burden of disproving loss causation, petitioners had asserted that the defendant could discharge that burden only by proving that a hypothetical prudent fiduciary "*would have*" necessarily made the same decision that the actual defendant made. *See* App.17a (emphasis added). Home Depot, by contrast, had argued that loss causation would be disproved if the evidence showed that the fiduciary's decision was within the range of reasonable choices that a hypothetical prudent fiduciary *could have* made under the same circumstances. *See* App.17a-18a & n.4.

The Eleventh Circuit ultimately saw no need to resolve the "could have"/"would have" debate, which it labeled a "sideshow." App.17a. The court explained that this distinction only matters if the defendant bears the burden of proof on loss causation. App.17a-18a. But because the court concluded that "plaintiffs have the burden," the difference was immaterial: "[I]f a plaintiff shows that a hypothetical prudent fiduciary 'could not have' made the same choice as the defendant, she has also shown that a hypothetical prudent fiduciary 'would not have' made the same choice, and vice versa." App.18a. The investment "is simply an imprudent choice." *Id.*

The Eleventh Circuit nonetheless acknowledged that under petitioners' (erroneous) view that the burden of proof on loss causation shifts to the defendant, "[t]here is a real difference between requiring proof that a reasonable fiduciary 'would have' picked the same investments versus requiring proof that it 'could have' done so." App.17a. The

Eleventh Circuit made clear that if petitioners' mistaken burden-shifting theory had prevailed, the court would have agreed with Home Depot that the defendant would need to show only that its challenged decisions were reasonable. Indeed, petitioners' approach—under which the defendant must "prove that a hypothetical prudent fiduciary *would* have also made the same choice"—"'ignores the fact that there is not one and only one "same decision" that qualifies as objectively prudent.'" App.17a-18a n.4 (alterations modified).

Finally, the Eleventh Circuit applied the loss causation standard and upheld Home Depot's challenged decisions. The court agreed with the district court that the evidence conclusively established that those decisions were objectively prudent as a matter of law. App.18a-29a.

As to the investment-advisor fees, the court agreed that Home Depot's decisions were reasonable. Among other things, the court noted that Home Depot negotiated several decreases in fees over the years, App.19a; that the advisor Home Depot chose was "the most popular service provider for 401(k) plans of similar size and complexity to Home Depot's," App.20a; and that the fee rate paid by the Plan was "by no means an outlier when compared to other plans with roughly the same assets," App.21a-22a. "In the end, no matter how the evidence is evaluated," the court concluded, "there is no triable issue of fact on the objective prudence of the fees charged by Home Depot's financial advisors." App.22a.

The Eleventh Circuit also found Home Depot's choice of investment options to be reasonable. The court first leveled a macro-level critique of petitioners' arguments for "suffer[ing] from a common flaw—the

principal evidence is drawn only from short time periods during which the funds underperformed their peers." App.23a. But "[a] few here-and-there years of below-median returns . . . are not a meaningful way to evaluate a plan's success as a long-term investment vehicle." *Id.*

The court went on to conclude that petitioners' arguments fared equally poorly on a micro level. Starting with the BlackRock TDFs, the court noted that these funds "were popular options offered by other employers' plans of comparable size and complexity, and consistently received positive ratings from industry analysts," as well as having "returns that matched those of their peers and market benchmarks almost perfectly." App.24a. Likewise, the JPMorgan Stable Value Fund "outperformed its benchmark . . . on a one-, three-, five-, and ten-year basis for the entire class period, with just a single exception" when it "missed its benchmark by two basis points (0.02%)." App.25a. As for the TS&W and Stephens Funds, the court held that "only a few years of underperformance" was insufficient to demonstrate the funds were objectively imprudent, and affirmed the district court's finding that petitioners' claim about the Stephens Fund failed for the independent reason that Home Depot's process for monitoring that fund was prudent. App.26a-27a.

Petitioners sought rehearing en banc. The Eleventh Circuit denied with no recorded dissents. App.123a-24a.

REASONS FOR DENYING THE PETITION

This Court should deny review for at least three reasons. First, the Eleventh Circuit's holding that ERISA plaintiffs bear the burden of proof on loss

causation is correct. Second, this case is a poor vehicle, as Home Depot would prevail even if it bore the burden of proof on loss causation, because the challenged investment decisions were all objectively reasonable. And third, the burden-shifting issue is relatively unimportant: It only makes a difference in a small number of cases, which is presumably why this Court has often (and recently) declined to review it. The petition should be denied.

I. The Eleventh Circuit's Rejection Of Burden Shifting Is Correct

The Eleventh Circuit got this case right: "ERISA does not impose a burden-shifting framework; instead, plaintiffs bear the ultimate burden of proof on all elements of their claims, including loss causation." App.10a. That holding is correct, and there is no need for this Court's review.

1. ERISA imposes procedural duties on fiduciaries—for example, to investigate and evaluate investment options. *E.g.*, *Tibble v. Edison Int'l*, 575 U.S. 523, 528-29 (2015). But even when a fiduciary has breached such a duty, that procedural failing alone is not enough to create damages liability. Instead, ERISA imposes monetary liability only for "losses to the plan *resulting from* each [fiduciary] breach." 29 U.S.C. § 1109(a) (emphasis added). This language requires proof of "[p]roximate causation" to "link . . . a breach of duty and a recoverable loss." App.12a. As the Eleventh Circuit noted, and as petitioners concede, the statute is silent on the question of which party bears the burden of proof on loss causation. *Id.*; Pet. 2.

This Court has made clear that when a statute is silent as to the burden of proof, courts should

"conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); *see also* 2 Robert P. Mosteller et al., *McCormick on Evidence* § 337 (9th ed. 2025 update, Westlaw). The only exception to that general rule is when a statute gives "some reason to believe that Congress intended otherwise." *Schaffer*, 546 U.S. at 57-58. As the Eleventh Circuit correctly concluded, ERISA provides no such reason: "If Congress had intended [a] departure from the norm, it could have said so," but did not. App.12a. So the general rule governs, and an ERISA plaintiff bears the burden of proving loss causation.

2. Petitioners' core argument rests on two essential premises: (1) that burden shifting is proper under the common law of trusts, and (2) that ERISA incorporates this common-law burden-shifting regime. Pet. 11-17, 20-27. Both are unsound.

a. Petitioners first argue (at 23) that the common law of trusts "applies burden-shifting in fiduciary breach cases." This is incorrect. At the time ERISA was enacted in 1974, burden shifting on loss causation was explicitly *rejected*. As one leading trust law treatise stated soon after ERISA's enactment: "The *beneficiary must bear the burden of proving* that the act or omission of the trustee *has caused a diminution* of the trust income or principal." George Gleason Bogert et al., *The Law of Trusts and Trustees* § 701, at 199 (2d rev. ed. 1982) (emphasis added). And burden shifting was not embraced in either the First or Second Restatements of Trusts (released in 1935 and 1959, respectively).

The handful of contemporaneous cases petitioners cite (at 23) do not provide support for a consistent

burden-shifting regime either. Each contains at most a sentence of conclusory holding, without reasoning. *See, e.g.*, *Branch v. White*, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968); *Matter of Ziegler*, 258 A.D. 1077, 1077 (N.Y. App. Div. 1940). And it is unclear whether the cases are discussing "burden shifting" as petitioners conceive it at all, rather than simply using burden as a shorthand for the need to explain a trustee's conduct. *See, e.g.*, *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971) ("[I]n view of the fiduciary obligation to maximize the trust income by prudent investment, the burden of justifying the conduct is clearly on the trustees."); *In re Estate of Maurice*, 249 A.2d 334, 336 (Pa. 1969) ("The court below was in error in dismissing the exception without requiring proof from the Executor in explanation of the overpayment of this tax and in proof that it employed common caution and skill."). Indeed, one case involved the completely different (and heightened) fiduciary duty of loyalty and did not shift the burden on loss causation, but rather the burden to demonstrate the trustee did not have a conflict of interest. *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 564 (5th Cir. 1966).

That leaves petitioners with only two modern secondary sources to support their burden-shifting regime—the Third Restatement of Trusts released in 2012, and the 2024 edition of *The Law of Trusts and Trustees*. *See* Pet. 23 (citing Restatement (Third) of Trusts § 100 cmt. f (2012, Westlaw 2024 update); George G. Bogert et al., *The Law of Trusts and Trustees* § 871 (2024 update, Westlaw)). Both sources post-date ERISA's enactment by decades, and they have no bearing whatsoever on the original meaning of that statute. Indeed, as noted above, earlier

editions of the same sources did not embrace burden shifting. *See supra* at 17.

Petitioners also cite (at 13-14) a handful of modern ERISA cases embracing burden shifting. But even if the common law has evolved since 1974, ERISA's meaning has not.

Petitioners' modern cases are not even on the same page about how burden shifting should work. *Compare Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 112-13 & n.68 (2d Cir. 2021) (placing burden of proving *loss* on plaintiff, and then placing burden on defendant to prove that *damages* would be less than the amount calculated using plaintiff's chosen alternative investment), *cert. denied*, 142 S. Ct. 1112 (2022), *with Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 39 (1st Cir. 2018) (placing burden on "the fiduciary to prove that [the] loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent"), *cert. denied*, 140 S. Ct. 911 (2020). That lack of uniformity undercuts petitioners' argument that there is a "'long-recognized'" and "consistent" burden-shifting principle in the law of trusts. Pet. 11-15. At most, petitioners can say that now—five decades after ERISA was enacted—trust law is unsettled on the question of burden shifting.

b. Even assuming that burden shifting was a feature of trust law at the time ERISA was enacted, it does not follow that ERISA adopted that approach. *See* App.14a n.3. Petitioners assert (at 22) that the Eleventh Circuit chose the wrong "'starting point'" by "presum[ing] trust law would *not* apply." They argue (at 21) that the presumption should have been the opposite—that the Eleventh Circuit should have "interpret[ed] ERISA with due regard for trust law principles."

This Court has cautioned "that trust law does not tell the entire story" when it comes to interpreting ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). That is because ERISA did not incorporate the trust law wholesale: "[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Id.* Indeed, "because ERISA is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,'" this Court has warned that "it should not be supplemented by extratextual remedies." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (citations omitted).

Thus, although petitioners are right that trust law can sometimes inform the interpretation of ERISA, even petitioners acknowledge that other cases reject extratextual principles derived from trust law. *See* Pet. 21-22 & n.7. That is especially true when the problem at issue is one already dealt with by ERISA itself, *see, e.g.*, *Hughes Aircraft*, 525 U.S. at 447-48, or involves a principle that is not unique to trust law, *see, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-59 (1993) (interpreting distinction between equitable and legal relief).

As in these latter cases, any inference that ERISA silently incorporated a common-law burden-shifting regime is weak. After all, ERISA deviates substantially from the common law regime in many ways, including through modified fiduciary standards, increased regulatory oversight and disclosure requirements, and other provisions. *See* 29 U.S.C. §§ 1021-1027, 1052-1056, 1058-1060, 1082-1085, 1102-1112; H.R. Rep. No. 93-533 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 ("The

principles of fiduciary conduct are adopted from existing trust law, *but with modifications appropriate for employee benefit plans*." (emphasis added)).

In light of those changes, it is implausible that Congress silently intended to incorporate a burden-shifting rule. As the Eleventh Circuit put it: "ERISA is a comprehensive and reticulated statute, bearing the marks of circumspect drafters." App.14a (quoting *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993)). A court should "therefore proceed carefully, and 'only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute.'" *Id.* (quoting *Useden*, 947 F.2d at 1581).

3. Petitioners' other arguments for burden shifting (at 23-27) do not move the ball. Petitioners note that in some contexts, the law shifts the burden of proof with respect to certain "disfavored contentions." Pet. 25 (citing *McCormick on Evidence* § 337). They argue that because the law disfavors "fiduciaries who claim that their breaches did not cause loss," this supports application of burden shifting on loss causation. But this contention assumes that burden shifting was an established trust-law principle in 1974 (it was not), and that ERISA incorporated that principle (it did not). *See supra* at 16-21.

Petitioners also argue that burden shifting is necessary "to 'encourage the trustee's compliance' with their high duties." Pet. 25 (quoting Restatement (Third) of Trusts § 100 cmt. f). But as the Eleventh Circuit acknowledged, ERISA enacted a host of reforms and mechanisms to ensure trustees' compliance with their obligations. App.14a-15a.

Indeed, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp.*, 516 U.S. at 497. For that reason, the statute enumerates new and "detailed duties and responsibilities" designed to ensure "'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'" *Mertens*, 508 U.S. at 251-52 (alteration in original). Given the many new responsibilities and obligations that Congress chose to include in ERISA, the natural conclusion is that the omission of burden shifting was "'deliberate[].'" App.14a-15a.

Petitioners further claim (at 26-27) that burden shifting is necessary to combat fiduciaries' informational advantage. The Eleventh Circuit correctly rejected this argument too. "ERISA's text, if anything, suggests that Congress dealt with the information imbalance problem by shrinking the [information] gap, not shifting the burden." App.15a. Specifically, ERISA requires "a comprehensive scheme of mandatory disclosure and reporting, both to plan participants and to the public at large." *Id.* (citing 29 U.S.C. §§ 1021-1032). These include, among other things, requiring plan administrators to file annual reports that disclose assets and liabilities, changes in fund balance, changes in financial position, the amount of fees paid to service providers, and more. *See* 29 U.S.C. § 1023(b)-(c).

Petitioners respond (at 27) that "ERISA disclosures barely scratch the surface of the factual question at the heart of causation," because

"disclosures do not necessarily indicate what a prudent fiduciary *would have done* absent breach." But that argument misstates the test for loss causation. The loss-causation question is whether the investment decision the fiduciary made was objectively prudent—i.e., reasonable at the time and under the circumstances. App.17a-18a & n.4; *see infra* at 24-27. And there is no meaningful informational advantage on that question, because the most important factor bearing on that inquiry—the past performance of individual investment options, including the funds at issue here—is publicly available information.

In all events, with discovery completed at summary judgment, there can be no serious argument that either party has a remaining informational advantage that would justify burden-shifting. Taking all of this together—ERISA disclosures, publicly available investment data, and discovery—there is no remaining advantage on the objective prudence of any investments.

Finally, petitioners (at 24-25) fall back on ERISA's general purposes. They say that "[b]ecause Congress intended ERISA to *enhance*, not reduce, trust law's duties, it would be contrary to Congress's purpose to reject trust law's burden-shifting framework." Pet. 24-25. This Court has repeatedly warned that "[i]t is 'quite mistaken to assume' . . . that any interpretation of a law that does more to advance a statute's putative goal 'must be the law.'" *Perez v. Sturgis Public Schs.*, 598 U.S. 142, 150 (2023). To the contrary, "[l]aws are the product of 'compromise,' and no law 'pursues its . . . purpose[s] at all costs.'" *Id.* (alterations in original). That is especially true in the case of a statute like ERISA, which creates a "complex,"

"'comprehensive,'" and "'reticulated'" scheme. App.14a.

In sum, the Eleventh Circuit followed this Court's precedents to the letter. Plaintiffs bear the burden of proof on all elements of an ERISA claim, including loss causation. The decision below was correct, and further review is unwarranted.

II. This Case Is A Poor Vehicle Because Burden Shifting Would Not Change The Result

Even if the burden shifting question were close, this case is a uniquely poor vehicle for considering that issue. Regardless of who bears the burden of proof on loss causation, if a fiduciary's choices are objectively prudent, then the fiduciary causes no loss to the plan. Here, as both courts recognized below, all of the fiduciary choices at issue were objectively prudent as a matter of law. That means Home Depot is entitled to summary judgment no matter who bears the burden on loss causation. This Court should not address the burden-shifting issue in a case where it makes no difference to the bottom-line result.

1. ERISA's loss-causation requirement ensures that there is monetary liability only for "losses to the plan *resulting from* each [fiduciary] breach." 29 U.S.C. § 1109(a) (emphasis added). As courts have widely acknowledged, an ERISA plaintiff "'cannot rely, after the fact, on the magnitude of the decrease in the [relevant investment's] price,'" because an investment option's loss of value, standing alone, is not proof that such a loss *resulted from* a defendant's breach. *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (alteration in original). After all, there is no

guarantee that any investment option—even a prudent one—will increase in value.

To establish that a loss "resulted from" or was "caused" by a *breach* (rather than by ordinary market risks) an ERISA plaintiff must show that the investment decision was objectively unreasonable. Then-Judge Scalia explained the point well in his influential concurrence in *Fink v. National Savings & Trust Co.*:

> Breach of the fiduciary duty to investigate and evaluate [investments] . . . does not sustain an action for the damages arising from losing [but substantively prudent] investments. 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. . . . It is the imprudent investment rather than the failure to investigate and evaluate that is the basis of [a valid damages] suit . . . .

772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

Requiring proof of more than a bare procedural breach is necessary because a fiduciary's procedural failings do not in themselves cause any financial loss to a retirement plan. Instead, they cause such a loss only if they enable the selection of an "objectively unreasonable" investment option, which itself loses value. *See Tatum v. RJR Pension Inv. Comm.*, 761

F.3d 346, 373 (4th Cir. 2014) (Wilkinson, J., dissenting) ("[L]oss causation only exists if the substantive decision was, all things considered, an objectively unreasonable one."), *cert. denied*, 576 U.S. 1054 (2015). So long as the fiduciary selects an objectively reasonable investment option, the plan suffers no loss and the fiduciary is not liable for money damages. *See, e.g.*, *Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 680 (7th Cir. 2014) (ERISA requires assessment of "the substantive reasonableness of the fiduciary's actions"); *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011).

To establish that an investment option is objectively unreasonable for loss-causation purposes, the evidence must show that the fiduciary's choice fell outside "the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). In other words, "no reasonable fiduciary" could have made the same choice under the circumstances. Doc.343 at 53-54; *accord Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir.) ("The Plan administrator deserves discretion to the extent its *ex ante* investment choices were reasonable given what it knew at the time."), *cert. denied*, 574 U.S. 911 (2014).

A fiduciary will rarely—if ever—be faced with a scenario in which only a single course of conduct or option is prudent. To the contrary, fiduciaries generally face a choice among multiple investment options that are reasonable at the time the decision is made. For that reason, a fiduciary's choice can be objectively prudent even if it would not be the best (or even the single most likely) choice of a prudent fiduciary, so long as it is still reasonable. *Hughes*, 595

U.S. at 176-77; *Tatum*, 761 F.3d at 377 (Wilkinson, J., dissenting).

The Eleventh Circuit echoed all of these points in its opinion. As the court observed, "ERISA recognizes that managing an employee-benefit plan 'will implicate difficult tradeoffs' yielding a range of reasonable options." App.17a (quoting *Hughes*, 595 U.S. at 177). Because "[n]o one—not even the most diligent fiduciary—can predict the future," "[d]ifferent prudent fiduciaries, facing the same set of circumstances, can exercise their judgment and reach different conclusions in light of that uncertainty." App.17a. For that reason, the Eleventh Circuit made clear that if petitioners are somehow right about burden-shifting, the appropriate loss-causation question would be whether a hypothetical prudent fiduciary "could have" made the same choice as the defendant—i.e., whether the defendant's choice fell within the range of reasonable options. App.17a & n.4.

2. Under the correct standard, even if Home Depot bore the burden of disproving loss causation, all it had to show was that the challenged investment decisions were objectively prudent and within the range of reasonable choices that a prudent fiduciary could have made under the same circumstances. Below, the Eleventh Circuit and the district court have already unanimously concluded that Home Depot met that burden. App.19a-28a; App.77a-116a. Petitioners' assertion (at 30) that under a burden-shifting regime "this case would have proceeded to trial" is flatly wrong. Home Depot is entitled to summary judgment regardless of who bears the burden of proof.

Both lower courts found there was no genuine dispute of material fact that Home Depot's choices reflected reasonable, mainstream investment decisions. Both courts concluded that Home Depot's choice of financial advisor and the amount of fees charged by that advisor were well within the mainstream. App.19a-23a; App.76a-83a. Indeed, as the Eleventh Circuit emphasized, by one metric Home Depot's fees were lower "than 96 percent of all other plans in every year during the class period." App.22a; *see* App.77a-78a.

Both courts likewise held that the challenged investment options were reasonable. For example, the BlackRock TDFs "were popular options offered by other employers' plans of comparable size and complexity, and consistently received positive ratings from industry analysts." App.24a; *see* App.99a-100a. And the BlackRock TDFs' "returns matched those of their peers and market benchmarks almost perfectly." App.24a; *see* App.99a-100a. Likewise, the JPMorgan fund "outperformed its benchmark . . . for the entire class period, with just a single exception," and "consistently outperformed" the comparator funds selected by the Plan's investment consultant. App.25a; *see* App.104a-07a. Although the TS&W Fund suffered "a few years" of short-term underperformance, it later "dramatically rebounded," "significantly outperform[ing] its benchmark and rank[ing] among the very top funds in its peer group." App.26a; *see* App.110a-13a. And when its performance fell again, Home Depot removed the TS&W Fund from the Plan. App.26a-27a; App.112a-113a. Finally, for the Stephens Fund, petitioners never marshaled more evidence than "a few years of underperformance," which is insufficient to

demonstrate the fund was imprudent. App.27a; App.115a.[2]

3. Petitioners no longer dispute the lower courts' conclusion that Home Depot's investment choices were objectively reasonable. Instead, they argue that reasonableness is not enough to establish that an investment is prudent and thus negates loss causation. In their view, a decision is not objectively prudent merely because a hypothetical prudent fiduciary *could have* made the same decision; instead, objective prudence requires that the hypothetical fiduciary necessarily *would have* done so. Pet. 30 (citing *Tatum*, 761 F.3d at 364).

Both Judge Wilkinson and the Eleventh Circuit have explained why petitioners' understanding of objective prudence is wrong. Most importantly, their standard cannot be reconciled with ERISA's text, which only requires that a fiduciary act consistent with the prudent person standard of care. As Judge Wilkinson noted, petitioners' preferred approach "would substitute for the fiduciary's duty to make a *prudent* decision a duty to make the *best possible* decision, something ERISA has never required." *Tatum*, 761 F.3d at 378 (Wilkinson, J., dissenting).

Petitioners' test appears to assume that in any given scenario there is only a single prudent investment choice. But in the real world, fiduciaries face complex choices made in the face of significant uncertainty about the future. A prudent fiduciary

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[2] Both the district court and the Eleventh Circuit found that petitioners' challenge to the Stephens Fund also failed for the independent reason that there was no breach of any fiduciary duty because Home Depot's monitoring process for that fund was objectively prudent. App.27a; App.113a-15a.

must choose among a "range of reasonable judgments," but she is not required to pick the single best investment option. *Hughes*, 595 U.S. at 177.

The Eleventh Circuit explained the core flaw in petitioners' approach with a useful hypothetical:

> [I]magine that, faced with a particular decision, there are three (and only three) reasonable investment choices: *A*, *B*, and *C*. By our read, [petitioners'] rule requires a fiduciary who chose *A* to show that each and every other prudent fiduciary would have also chosen *A*, even though *B* and *C* were also prudent choices. Because a fiduciary will not be able to make that showing, [petitioners'] rule would impose liability on a fiduciary even though it made an objectively prudent choice—completely contrary to ERISA's loss causation requirement.

App.18a n.4.[3]

Even if burden shifting applies, it makes no difference when, as here, the defendant fiduciary's choices were objectively reasonable as a matter of law. Petitioners do not (and cannot) challenge the district

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[3] The Eleventh Circuit's view that the loss causation standard merely asks whether a particular investment decision was unreasonable is consistent with the position taken by the majority of courts to have addressed this question. *See, e.g.*, *Tussey*, 746 F.3d at 338; *Rinehart v. Akers*, 722 F.3d 137, 151 (2d Cir. 2013), *vacated on other grounds by* 573 U.S. 956 (2014); *Renfro*, 671 F.3d at 322; *Kuper v. Iovenko*, 66 F.3d 1447, 1460 (6th Cir. 1995), *abrogated in part on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020), *aff'd*, 1 F.4th 769 (10th Cir. 2021).

court and Eleventh Circuit's conclusions. And that means that Home Depot prevails regardless of the answer to petitioners' burden-shifting question. The Court should not consider that question in a case where it makes no difference to the ultimate outcome.

III. The Burden-Shifting Question Is Relatively Unimportant And Has Repeatedly Been Denied

Petitioners argue (at 11-20, 27-29) that the courts of appeals are divided on the burden-shifting issue, which petitioners assert frequently arises and carries broad national importance. Petitioners are right that there is a circuit split, though they undercount the number of circuits correctly holding that ERISA plaintiffs bear the burden of proof on loss causation, as on other elements.[4] But there is no pressing need for this Court to resolve the split, which has little practical significance in the real world. This Court has repeatedly denied certiorari to review the burden-shifting issue in other cases, and it should do the same thing here.

To show the importance of burden shifting, petitioners assert (at 28) that "[t]he number of individuals and amount of assets that are potentially

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[4] Petitioners say (at 16-17) that only the Tenth and Eleventh Circuits follow the default rule placing the burden of proof on the plaintiff, but in fact the Sixth, Seventh, and Ninth Circuits do so as well, never having embraced burden shifting. *See Pfeil v. State Street Bank & Tr. Co.*, 671 F.3d 585, 596 (6th Cir. 2012), *cert. denied*, 568 U.S. 1063 (2012), *and abrogated in part on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004).

affected by this issue is staggering," citing the more than 234 million ERISA plan participants holding over ten trillion dollars in assets. The Court should reject this transparent effort to inflate the significance of their question presented. In fact, the actual scope of affected individuals and retirement dollars is small, if it exists at all.

By its nature, burden shifting only matters when the evidence put forth by the plaintiff and the defendant is in equipoise, and a tie-breaker must be employed to determine loss causation. But in the real world, the evidence is rarely (if ever) going to be evenly balanced in this way. Petitioners offer no reason to think that scenario occurs with any frequency, or that the question presented otherwise actually makes a difference to the outcome in any significant number of cases.

Indeed, petitioners have no serious argument that burden shifting is dispositive even in *this* case. As explained above, the lower courts' findings that the evidence demonstrated each of Home Depot's challenged decisions were objectively prudent as a matter of law means that the burden-shifting question had no impact on the result of this case whatsoever. *See supra* at 24-31. The same is likely true in the vast majority of ERISA cases.

Petitioners fall back on the importance of uniformity, citing various cases emphasizing the need for employers, administrators, fiduciaries, and participants to "'predict the legality of proposed actions'" and be subject to a "'predictable set of liabilities.'" Pet. 28. Of course, uniformity and predictability are positive features of any legal system. But the burden of proof is a procedural rule

that applies to ERISA litigation; it does not directly regulate the primary conduct of *anyone*.

For that reason, it strains credulity to think that disuniformity on burden shifting as to the element of loss causation is somehow shaping plan administrators' day-to-day decisions. Those decisions are going to be driven by straightforward investment considerations—not the formulation of an arcane litigation-specific principle. Here, too, petitioners exaggerate the importance of their question presented.

Given the relative insignificance of the burden-shifting issue, it should come as no surprise that this Court has repeatedly denied review of this question over the past decade. *See Putnam Invs., LLC v. Brotherston*, 140 S. Ct. 911 (2020) (filed after fully developed circuit split); *ABB, Inc. v. Tussey*, 583 U.S. 874 (2017) (same); *RJR Pension Inv. Comm. v. Tatum*, 576 U.S. 1054 (2015). Petitioners offer no reason why *their* case—unlike those that the Court has serially denied—is somehow more worthy of review. And no such reason is apparent: The prior denials were recent, and they fully aired the circuit split.

This Court should follow its recent practice and deny certiorari here as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

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