NO. ______

In the
Supreme Court of the United States

RJR PENSION INVESTMENT COMMITTEE, ET AL.,

Petitioners,

v.

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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December 1, 2014

QUESTIONS PRESENTED

This case implicates two interrelated questions that go to the heart of the private right of action under the Employee Retirement Income Security Act of 1974 ("ERISA"). Under ERISA, a plaintiff may recover money damages only for losses "resulting from"—*i.e.*, caused by—the defendant's breach of a fiduciary duty. 29 U.S.C. § 1109(a).

In a 2-1 decision, the Fourth Circuit deepened a well-documented circuit split over which party bears the burden of proof on loss causation under § 1109. Five circuits hold that the burden remains on the plaintiff at all times. The Fourth Circuit, however, has joined the Fifth and Eighth Circuits in holding that the burden of proof on loss causation shifts to the defendant after a finding that the defendant breached a fiduciary duty and the plan incurred a loss.

The court then further distanced itself from the majority approach by holding that a fiduciary with a duty of prudence can be held liable for an objectively prudent decision. Specifically, the majority held that the defendant can satisfy its shifted burden only by showing that it is "more likely than not" that a hypothetical prudent fiduciary would have made the *exact same* decision as the defendant. Judge Wilkinson dissented from the panel's decision regarding both the burden of proof and the substantive standard for loss causation.

The questions presented are:

(1) Whether the plaintiff bears the burden of proving loss causation under § 1109 or whether it can shift the burden on that element to the defendant by carrying its burden on the analytically distinct

elements of breach of fiduciary duty and loss to the plan; and

(2) Whether an ERISA fiduciary with a duty of prudence can be held liable for money damages under § 1109 even though its ultimate investment decision was objectively prudent.

PARTIES TO THE PROCEEDING

Petitioners RJR Pension Investment Committee, RJR Employee Benefits Committee, R. J. Reynolds Tobacco Holdings, Inc., and R. J. Reynolds Tobacco Company were appellees in the Fourth Circuit and defendants in the district court.

Respondent Richard G. Tatum, individually and on behalf of a class of all other persons similarly situated, was the appellant in the Fourth Circuit and plaintiff in the district court.

CORPORATE DISCLOSURE STATEMENT

R. J. Reynolds Tobacco Holdings, Inc., was publicly traded until July 31, 2004, but is no longer publicly traded. Reynolds American Inc., a publicly traded corporation, is the parent of R. J. Reynolds Tobacco Holdings, Inc., and holds 10% or more of its stock.

R. J. Reynolds Tobacco Company is not publicly traded. Reynolds American Inc., a publicly traded corporation, is an indirect parent of R. J. Reynolds Tobacco Company.

RJR Pension Investment Committee and **RJR Employee Benefits Committee** are not publicly traded entities and do not have any parent corporations.

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In 1999, RJR Nabisco spun off its tobacco business (R. J. Reynolds) from its food business (Nabisco). Like countless other employers, RJR Nabisco had offered employees a 401(k) retirement benefit plan that included an option to invest in employer stock. After the spinoff, however, the new RJR 401(k) plan was left holding Nabisco stock even though the two companies were no longer affiliated.

ERISA generally relaxes rules favoring diversification to allow employers to offer single-stock investments in *the employer's stock*. *See* 29 U.S.C. § 1104(a)(2). But there is no similar rule for *non-employer stock*, such as the post-spinoff Nabisco stock in the hands of the new RJR plan. Giving employees a non-employer, single-stock investment option conflicts with ERISA's pro-diversification policies without promoting the distinct interest in giving employees a stake in their employer.

The fiduciaries of the new RJR plan unanimously concluded that it would be imprudent to continue holding Nabisco stock, and they divested it from the plan six months after the spinoff. Shortly thereafter, Nabisco's stock price increased sharply due to an unsolicited and unexpected takeover bid from prominent investor Carl Icahn. Respondent, a participant in the RJR plan, filed a class action against the plan fiduciaries under ERISA, 29 U.S.C. § 1109, for failing to conduct an adequate investigation into the prudence of divesting Nabisco stock. With the benefit of 20/20 hindsight, Respondent asserts that an adequate investigation would have informed the fiduciaries that Nabisco stock was likely to rise following the spinoff.

The district court found RJR's investigation inadequate. But the court also held that this breach of fiduciary duty did not *cause* Respondent's alleged losses. Any alleged losses stemmed not from the inadequate investigation itself but from the fiduciaries' divestiture of the Nabisco stock funds, which was "an objectively prudent decision." App.150-65.

A divided Fourth Circuit reversed. Even though ERISA's text says nothing about burden-shifting, the panel majority rejected the rule of five circuits and followed decisions from the Fifth and Eighth Circuits holding that the burden of proof on one element—loss causation—shifts to the defendant after the plaintiff establishes *different* elements—the breach of a fiduciary duty and a loss to the plan. The panel further held that the defendant cannot satisfy that burden by showing that the substantive investment decision was objectively prudent, but must instead demonstrate that it is "more likely than not" that a hypothetical prudent fiduciary would have made the *same* decision as the defendant. App.30-32. Judge Wilkinson dissented on both issues.

The decision below deepens a well-recognized split of authority on whether ERISA embraces a burden-shifting regime or follows what Judge Wilkinson termed "first principles of civil liability." App.56. The court of appeals then strayed further from the majority approach by saddling the defendant with the burden of showing that the investment decision was not just objectively prudent, but that a hypothetical well-informed fiduciary more likely than not would have made the *exact same* decision. This Court's intervention is needed on both issues.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 761 F.3d 346 and reproduced at App.1-73. The opinion of the district court is reported at 926 F. Supp. 2d 648 and reproduced at App.76-166.

JURISDICTION

The Fourth Circuit issued its opinion on August 4, 2014. Petitioners filed a timely petition for rehearing *en banc* on August 18, 2014, which the court of appeals denied on September 2, 2014. App.74-75. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of ERISA, 29 U.S.C. § 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

STATEMENT OF THE CASE

A. The Spinoff of R. J. Reynolds from Nabisco

In 1985, R. J. Reynolds Tobacco merged with Nabisco Brands to create RJR Nabisco, which was the country's largest consumer products company at the time. By 1999, however, management concluded that a "separate ownership structure" would allow each company to be "better able to respond to the opportunities and challenges in its industry and thereby achieve its full potential." App.81. Management also believed that the food business was being "unnecessarily depressed by investors' fears regarding ongoing litigation against tobacco companies." *Id.*

The spinoff was approved by the RJR Nabisco board in March 1999 and took place on June 14, 1999. Following the spinoff, each shareholder of RJR Nabisco received shares in two separate, publicly traded companies, R. J. Reynolds Tobacco Holdings, Inc. and Nabisco Group Holdings, Inc. App.80.

B. Plan Fiduciaries Remove Nabisco Stock from the Post-Spinoff R. J. Reynolds Employee Benefit Plan

1. RJR Nabisco had offered its employees a 401(k) retirement plan that included a number of diversified investment options, such as mutual funds. Like countless other companies, RJR Nabisco also offered employees the opportunity to invest in company stock. ERISA generally requires fiduciaries of benefit plans to "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). But this duty to diversify does not apply to investments in employer stock, which Congress has long sought to encourage. *See id.* § 1104(a)(2); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465-67 (2014) (noting Congress' intent to encourage investment in "the stock of the participants' employer").

In March 1999, shortly after the spinoff was announced, a working group of human resources, benefits, and legal employees met to discuss the division of the RJR Nabisco employee benefit plan into separate RJR and Nabisco plans. App.87-92. The participants in that working group immediately noticed a potential problem. After the spinoff, each shareholder in RJR Nabisco would receive separate shares of both the new RJR and the new Nabisco. As a result, the post-spinoff RJR plan—known as the R. J. Reynolds Tobacco Company Capital Investment Plan ("Plan")—would be left holding a significant amount of Nabisco stock, even though there was no statutory justification for RJR employees to own Nabisco stock now that Nabisco was unaffiliated with their employer.[1] In other words, post-spinoff, the RJR Plan held large amounts of Nabisco stock solely because of a historical accident. Those holdings were not the result of ERISA's pro-diversification policies, the incentives that underlie employee stock ownership plans, or a deliberate decision by the RJR Plan's fiduciaries to offer Nabisco stock.

[1] The post-spinoff RJR Plan included two single-stock funds that invested in Nabisco stock (Nabisco Holdings Corp. and Nabisco Group Holdings, Inc.). Both funds implicate the same legal issues and will be referred to collectively as "the Nabisco funds."

The March 1999 working group quickly concluded that the post-spinoff RJR Plan should not offer single-stock Nabisco funds as an investment option. The participants in the working group believed that investments in a single-stock Nabisco fund would be too risky and would potentially run afoul of ERISA's duty to diversify plan assets. App.89-90. The working group recommended closing the single-stock Nabisco funds to new investments at the time of the spinoff, and fully divesting them six months after the spinoff. App.90-91. The Plan's fiduciaries agreed with, and adopted, the working group's recommendations. *Id.*

2. After the spinoff in June 1999, the price of Nabisco stock steadily decreased through the end of the year. Some analysts expressed concerns that tobacco litigation would bankrupt RJR and that, despite the spinoff, Nabisco would be liable for satisfying those judgments because of its past affiliation with RJR. App.95-98, 105-06. Indeed, Nabisco itself acknowledged in June 1999 that if RJR were unable to satisfy adverse judgments, "'it is possible that plaintiffs in these cases would seek to recover the unsatisfied obligations from the assets of [Nabisco].'" App.96. As a result of these litigation-related concerns—as well as a generally poor outlook for food stocks—Nabisco Group Holdings' stock price fell by approximately 30% in the third quarter of 1999. App.98-99.

Throughout the fall of 1999, the fiduciaries of the RJR Plan discussed the divestiture of Nabisco stock several more times. App.99-103. For example, on October 8, 1999, a group of executives, managers, and legal staff reaffirmed the decision to divest the Plan of all Nabisco stock by January 2000. App.100-02. The group was concerned that allowing continued investments in the Nabisco funds would be seen as a company "stamp of approval" for those risky and non-diversified single-stock funds. App.101. There were also concerns that the price of Nabisco stock "would continue to fall and never rebound." App.102.[2]

On January 31, 2000, the Plan sold its remaining Nabisco stock. App.110. At that time, Nabisco Group Holdings was trading at $8.62 per share, down nearly 60% since the spinoff. App.110. Two months later, prominent investor Carl Icahn made an unsolicited—and entirely unexpected—takeover bid for Nabisco. Icahn's actions triggered a bidding war that caused Nabisco's stock price to appreciate dramatically until the company was acquired by Philip Morris in December 2000. App.111-12.

C. Proceedings Before the District Court

Respondent Richard Tatum is a former R. J. Reynolds employee who participated in both the pre-spinoff RJR Nabisco plan and the post-spinoff RJR Plan. In May 2002, Tatum filed a class action complaint in federal district court, alleging that the fiduciaries of the Plan breached their duties under ERISA by eliminating Nabisco stock from the Plan

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[2] Two letters sent to Plan participants erroneously stated that "regulations do not allow the Plan to offer ongoing investment in individual stocks other than Company [*i.e.*, RJR] stock." App.106-07. Of course, even if ERISA does not *categorically prohibit* investments in a non-company single-stock fund, any such investment would be in substantial tension with fiduciaries' statutory duty to diversify plan assets.

without conducting an adequate investigation into whether that decision was prudent.

After extensive pre-trial proceedings, the district court held a four-week bench trial in January 2010. On February 25, 2013, the court issued a lengthy opinion holding that the fiduciaries failed to conduct an adequate investigation, but that this breach did not *cause* any losses to the Plan because the ultimate decision to eliminate Nabisco stock as an investment option was objectively prudent.

The district court first held that "under the ERISA prudence standard, RJR breached the duty to investigate the investment decision to eliminate the Nabisco Funds from the Plan." App.138. In particular, the court faulted the March 1999 working group for spending too little time discussing this issue, for focusing too heavily on the "general risk of a single stock fund," and for failing to consider "[t]he possibility of allowing the Nabisco [funds] to remain frozen indefinitely, in order to allow employees to move money from those funds at will." App.139. The court further concluded that the Plan fiduciaries failed to monitor whether their decision remained prudent following the spinoff. App.143-47. And the court noted that the fiduciaries could have addressed any concerns about Nabisco stock by "engag[ing] an independent analyst or outside counsel to analyze the problem." App.145.

Despite that finding of an inadequate investigation, the district court held that Respondent was not entitled to money damages because any deficiencies in the fiduciaries' investigation did not *cause* Respondent's alleged losses. App.147-65. An

ERISA fiduciary may not be held liable for damages if the ultimate investment decision was "objectively prudent"—*i.e.*, if the decision was "reasonable under the circumstances." App.148-49. The district court noted that prudence can encompass a *range* of different decisions, and "there might be more than one reasonable decision available to a fiduciary." *Id.* Indeed, even Respondent's expert acknowledged that "'prudent investors are not unanimous on most any issue,'" and that "'in certain circumstances, [one] prudent investor might think it is prudent to buy and one right next to him might think it is prudent to sell.'" App.148-49 n.27.

The district court concluded that the fiduciaries' decision to divest the Plan of Nabisco stock following the spinoff was "objectively prudent." App.150. Any single-stock fund "carr[ies] significant risk," and Nabisco stock was particularly risky at the time the relevant decisions were made. App.152. In late 1999, "a fiduciary monitoring the Nabisco Funds would have seen that the price of Nabisco stock was losing value nearly every day and that RJR was continuing to experience adverse rulings and verdicts related to the tobacco litigation." App.153. It thus would have been eminently "logical" for a prudent fiduciary to conclude that Nabisco was "a higher risk stock than many other undiversified funds" and was certainly more risky than "an alternate diversified fund." App.154.

The district court also rejected Respondent's argument that the fiduciaries of the RJR Plan should have foreseen the "bidding war" over Nabisco that caused the stock price to increase sharply in early 2000, shortly after the Plan sold its holdings.

App.159-62. As the court explained, "no one could have predicted" in 1999 that Carl Icahn would launch a takeover bid for Nabisco. App.160. Indeed, "[c]ertainly if one could have made such a prediction, the stock prices would have reflected it at a much earlier date." *Id.* Nothing in ERISA requires a fiduciary to make "speculative" trading decisions "on the basis that a takeover *might* be coming, in some unknown form." App.161-62.

In sum, the district court concluded that "the removal of [Nabisco] *was not imprudent*." App.164 (emphasis added). Based on: (1) the "inherent risk" of an undiversified single-stock fund; (2) the "particularly high risk" associated with Nabisco stock in light of its lingering exposure to tobacco litigation; and (3) the fact that there was "no reason to expect extraordinary returns" on Nabisco stock, "a hypothetical prudent fiduciary could have decided not to add or maintain the Nabisco Funds as either frozen or active funds in the Plan on January 31, 2000." App.164-65. The district court thus held that "the fiduciaries' failure to properly investigate their decision to eliminate the Nabisco Funds was not the cause" of any losses to the Plan. App.165.

D. The Fourth Circuit's Decision

On August 4, 2014, a panel of the Fourth Circuit affirmed the district court's finding of an insufficient investigation but reversed the district court's holding on loss causation by a 2-1 vote.

1. The panel majority agreed with the district court that the fiduciaries of the RJR Plan "failed to engage in a prudent decision-making process." App.17-25. According to the court, the fiduciaries did not spend enough time discussing or researching the prudence of holding Nabisco stock, did not fully consider potential alternatives, and did not re-evaluate the initial decision to divest in light of subsequent developments. App.19-21. The court also faulted the fiduciaries for purportedly focusing on concerns about "'their own potential liability'" rather than the Plan participants' best interests. App.21-22.

Turning to loss causation, the Fourth Circuit held that the *defendants* would bear the burden of proof on this issue. App.25-30. The court acknowledged the "default rule" that "the burden of proof rests with the plaintiff." App.26. But the panel nonetheless chose to follow decisions of the Fifth and Eighth Circuits holding that "once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation." App.29. The court concluded that this burden-shifting rule is the "'most fair'" approach because requiring the plaintiff to prove loss causation would create "'significant barriers'" to recovery. App. 26, 29.

The panel further held that a fiduciary could carry that shifted burden of proof on loss causation only if "the defendant-fiduciary can show, by a preponderance of the evidence, that a prudent fiduciary *would have* made the same decision … had it undertaken a proper investigation." App.30. The Fourth Circuit found that the district court had applied too lenient of a standard because it merely asked whether "'a hypothetical prudent fiduciary *could* have decided to eliminate the Nabisco Funds'" from the Plan. App.32. According to the panel, a "could have" standard would "diminish ERISA's enforcement provision to an empty shell," and "'allow[] breaching fiduciaries to avoid financial liability based on even remote possibilities.'" App.34. Because the district court applied an "incorrect legal standard" and because that error "may have influenced the court's decision," the Fourth Circuit remanded for a determination of whether "RJR has met its burden of proving by a preponderance of the evidence that a prudent fiduciary *would have made the same decision*." App.39-40 (emphasis added).

2. Judge Wilkinson dissented from the panel's holdings regarding both the burden of proof and the legal standard for loss causation. He sharply criticized the majority's decision to invert the burden of proof, noting that the plaintiff should normally bear the burden of proof on *every* element of the claim unless Congress has specifically adopted a burden-shifting rule. App.54-57. Judge Wilkinson concluded that both the weight of precedent and "first principles of civil liability" indicate that "the burden of persuasion should remain with the plaintiff in a § 1109 action." App.55-57.

On the substantive standard for loss causation, Judge Wilkinson emphasized that "under the remedial scheme laid out by ERISA, fiduciaries should not be held monetarily liable for objectively prudent investment decisions." App.49-50. Loss causation can be established only "if the substantive decision was, all things considered, an objectively unreasonable one." App.51. A procedurally deficient investigation that results in a substantively prudent decision does not cause a loss. Judge Wilkinson faulted the majority for "adopt[ing] the wrong standard, one that strays from the statutory test of objective prudence under then-existing circumstances, and one that trends toward a view of prudence as the single best or most 'likely' decision rather than a *range of reasonable judgments* in the uncertain business of investing." App.50 (emphasis added).

Under the proper legal standard, as long as the fiduciary's decision fell within "a reasonable range of investments that qualify as objectively prudent," then loss causation cannot be established and the fiduciary cannot be held liable for money damages. App.52. It is ultimately "'the imprudent investment rather than the failure to investigate and evaluate that is the basis of suit.'" App.52 (quoting *Fink v. Nat'l Savings & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part)). The proper test simply asks whether "hypothetical *prudent* fiduciaries consider the path chosen to have been a *reasonable* one." App.60. Critically, that standard "allows for the possibility that there may be several prudent investment decisions for any given scenario." *Id.* An investment decision "may be objectively prudent even if it is not the one that plaintiff, armed with all the advantages of hindsight, now thinks is optimal." *Id.*

As Judge Wilkinson explained, the panel's test—which asks whether a hypothetical prudent fiduciary "more likely than not" would have made the same decision—"ignore[s] the fact that there is not one and only one 'same decision' that qualifies as objectively prudent." App.61. That 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." App.62. Indeed, the majority's novel interpretation of the loss causation standard led the court to "reverse[] a 'merely' prudent, eminently sensible decision, and demand[] much more." *Id.* It is "difficult to see how fiduciaries can survive this loaded calculus, one in which procedural imprudence all but ensures the obliteration of the loss causation requirement." App.63-64.

Moreover, Judge Wilkinson emphasized that it was particularly perverse to fault fiduciaries who acted "in the interest of diversifying plan assets." App.65. ERISA expressly requires fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. § 1104(a)(1)(C), and the panel majority effectively "penaliz[ed] the RJR fiduciaries for doing nothing more than properly diversifying the plan," App.68.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address conflicts among the lower courts about two related issues at the heart of an ERISA claim under 29 U.S.C. § 1109—namely, which party bears the burden of proof on loss causation, and what the legal standard for loss causation should be.

I. Although the notion that the ERISA plaintiff should bear the burden of proof on each element of the claim seems straightforward, the courts of appeals are openly divided over which party must prove that an alleged breach of fiduciary duty caused a loss to an ERISA plan. Five circuits—the Second, Sixth, Seventh, Ninth, and Eleventh—place the burden where it belongs, *i.e.*, on the plaintiff at all times to prove a causal link between the breach of a fiduciary duty and the alleged loss to the plan. The Fourth

Circuit, however, has now joined the Fifth and Eighth Circuits in adopting the minority position, under which the defendant bears the burden of *disproving* loss causation once the plaintiff establishes breach of a fiduciary duty and a loss to the plan. Several courts of appeals have acknowledged the existence of this conflict, noting that "our sister circuits have divided" over "which party bears the burden of proving causation of damages resulting from a breach of fiduciary duty." *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 160 (3d Cir. 1999).

The five circuits taking the majority position have the far better view. This Court has emphasized that a plaintiff should bear the burden of proof on each element of the cause of action unless Congress has given some strong indication that it intends to adopt a burden-shifting framework. Nothing in the straightforward text of § 1109(a) remotely suggests that Congress was departing from the default rule with respect to ERISA's loss causation element. Indeed, the Fourth Circuit quite candidly acknowledged that it was shifting the burden of proof on loss causation to the defendant because otherwise it would be too difficult for plaintiffs to prevail. Needless to say, a perceived need to level the playing field is a far cry from the kind of indication of congressional intent needed to displace the default rule.

II. The Fourth Circuit not only misplaced the burden of proof, but also exacerbated matters by imposing an unrealistically demanding burden on defendants to disprove loss causation.

The district court correctly held that the fiduciaries' decision to divest the RJR plan of Nabisco stock fell well within a range of reasonable decisions and was objectively prudent. App.164-65. Because the ultimate substantive decision was objectively prudent, any procedural breach of fiduciary duty did not cause the plaintiffs' loss. *See Fink*, 772 F.2d at 962 (Scalia, J., concurring in part) (loss causation not established if fiduciary made an "objectively prudent investment[]"). Yet the Fourth Circuit majority rejected that straightforward approach and instead imposed a loss causation burden on the defendant that *no* other circuit has applied—namely, whether it was "more likely than not" that a hypothetical prudent fiduciary would have made "*the same decision*" as the defendant. App.30-32 (emphasis added).

That rule cannot be squared with the text of ERISA or other circuit precedent, and would lead to absurd results. As Judge Wilkinson explained at length, objective prudence generally encompasses a *range* of reasonable decisions, and the majority was flatly wrong to suggest that there is always only a *single* "best" decision that a prudent fiduciary necessarily would have made. This case illustrates the point, as the RJR fiduciaries' eminently reasonable decision to avoid a large holding of Nabisco stock on behalf of RJR employees could have been implemented in a variety of ways.

The upshot of the majority's approach is that a fiduciary with a duty of prudence who made an objectively prudent decision may nonetheless be held personally liable for money damages if it cannot prove that it is more likely than not that a hypothetical prudent fiduciary would have made the exact same decision—an inquiry that will inevitably be skewed by 20/20 hindsight. The Fourth Circuit thus has not only embraced the minority position by placing the burden on the defendant to disprove one element of the plaintiff's cause of action, but has taken the minority position to the extreme by making the defendant's burden uniquely daunting.

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

A. The Fourth Circuit's Decision Deepens a Well-Documented Circuit Split Over Which Party Bears the Burden of Proof on Loss Causation.

ERISA provides that a fiduciary who breaches his duties "shall be personally liable to make good to such plan any losses to the plan *resulting from* each such breach." 29 U.S.C. § 1109(a) (emphasis added). That is, even if a fiduciary has breached an ERISA duty, the plaintiff quite logically may not recoup money damages unless the breach actually *caused* a loss to the plan. Although plaintiffs generally bear the burden of proof on each element of their claim—and are not typically relieved of that burden of proving one element just because they have proved another—the courts of appeals are openly and deeply divided over which party must prove that an alleged breach of fiduciary duty caused a loss to an ERISA plan.

1. Where a statute does not explicitly allocate the burden of proof, the "ordinary default rule" is that plaintiffs have the burden to prove each element of their claims. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). The Second, Sixth, Seventh, Ninth, and Eleventh Circuits apply that straightforward default rule to ERISA, requiring plaintiffs who seek money damages from a fiduciary to affirmatively prove loss causation.

For example, the Sixth Circuit has held in no uncertain terms that "to show that an investment decision breached a fiduciary's duty to act reasonably in an effort to hold the fiduciary liable for a loss attributable to this investment decision, *a plaintiff must show a causal link* between the failure to investigate and the harm suffered by the plan." *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) (emphasis added). The Eleventh Circuit has similarly held that "the burden of proof on the issue of causation will rest on the beneficiaries [and] *they must establish* that their claimed losses were proximately caused" by the alleged breach of an ERISA duty. *Willett v. Blue Cross & Blue Shield*, 953 F.2d 1335, 1343 (11th Cir. 1992) (emphasis added); *accord Silverman v. Mut. Benefit Life Ins.*, 138 F.3d 98, 104 (2d Cir. 1998) (plaintiff must "show some causal link between the alleged breach of [the fiduciary's] duties and the loss"); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011) ("[T]he plaintiff must show … causation of an injury."); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) (the "'plaintiff must show a *causal link* between the failure to investigate and the harm suffered by the plan'").

In the decision below, the Fourth Circuit expressly rejected that approach. It instead adopted the minority position of the Fifth and Eighth Circuits, which apply a "burden-shifting" framework in claims against ERISA fiduciaries. App.25-30. Under that approach, "once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan … *the burden of persuasion shifts to the fiduciary* to prove that the loss was not caused by … the breach of duty." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (emphasis added); *accord McDonald v. Provident Indem. Life Ins.*, 60 F.3d 234, 237 (5th Cir. 1995) (same).

The Fourth Circuit fully endorsed the reasoning of those decisions and agreed with the Fifth and Eighth Circuits that "once a fiduciary is shown to have breached his fiduciary duty and a loss is established, [the fiduciary] bears the burden of proof on loss causation." App.29. In other words, the three circuits adopting the minority rule *presume* that if there is a breach of an ERISA duty and a subsequent loss, then the breach must have caused the loss. They consequently place the burden of proof on the fiduciary to show that the breach did *not* result in a loss to the plan.

At least three courts of appeals—including the Fourth Circuit—have explicitly acknowledged the split of authority on this issue. Three years before casting its lot with the burden-shifting circuits in this case, the Fourth Circuit reserved judgment on the issue but noted that "the circuit courts of appeals are split as to which party must demonstrate that [a] loss resulted from the breach." *Plasterers' Local Union v. Pepper*, 663 F.3d 210, 220 (4th Cir. 2011). Similarly, the Third and Tenth Circuits have not yet taken a position on this issue, but both courts have acknowledged that "our sister circuits have divided" over "which party bears the burden of proving causation of damages resulting from a breach of fiduciary duty." *Unisys*, 173 F.3d at 160; *accord Holdeman v. Devine*, 572 F.3d 1190, 1195 n.1 (10th Cir. 2009) ("[C]ourts have apparently split on the proper evidentiary framework, for analyzing a claim for breach of fiduciary duties under ERISA, after a plaintiff has proved a breach of duty.").

2. In a footnote in the decision below—which does not acknowledge the court's unequivocal statement three years earlier that "the circuit courts of appeals are split" on this issue, *Plasterers' Local*, 663 F.3d at 220—the panel majority sought to downplay the existence of a circuit conflict. App.27-28 n.10. In particular, the panel sought to distinguish the Sixth Circuit's decision in *Kuper* and the Eleventh Circuit's decision in *Willett*, claiming that neither of those cases "addressed a situation in which plaintiffs had already established both fiduciary breach and a loss." *Id.* That may be true as a sequential matter—since the courts happened to address liability before loss causation—but it is not accurate as an analytical matter.

To the contrary, *Kuper* and *Willett* hold without qualification that ERISA plaintiffs *always* bear the burden of proof on loss causation. Indeed, the Sixth Circuit emphasized in *Kuper* that "a fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable." 66 F.3d at 1459. Instead, "to hold the fiduciary liable for a loss attributable to this investment decision, *a plaintiff must show a causal* *link* between the failure to investigate and the harm suffered by the plan." *Id.* (emphasis added). The Sixth Circuit has thus made clear that even if the plaintiff establishes a fiduciary's "failure to investigate," *the plaintiff*—not the defendant—still bears the burden of proving loss causation. Similarly, in *Willett*, the Eleventh Circuit held without qualification that "the burden of proof on the issue of causation will rest on the beneficiaries." 953 F.2d at 1343.[3]

Finally, the panel attempted to distinguish the Second Circuit's decision in *Silverman* by noting that *Silverman* involved liability for a co-fiduciary's breach under 29 U.S.C. § 1105, while this case involves direct liability for a fiduciary's own breach under § 1104. App.27-28 n.10. But that purported distinction is immaterial. The Second Circuit's holding—like the Fourth Circuit's holding here—was based on its interpretation of § 1109(a), which addresses the *remedy* for a breach of ERISA's fiduciary duties and imposes the loss causation requirement. The Second Circuit held that § 1109 "requires a plaintiff to demonstrate" causation. *Silverman*, 138 F.3d at 104. That holding is flatly contrary to the Fourth, Fifth,

[3] The panel also cited language from *Willett* stating that "[i]n order to prevail … as a matter of law," the fiduciary must "establish the absence of causation." 953 F.2d at 1343. But the quoted sentence is actually discussing the standard to prevail on *the defendant's cross-motion for summary judgment*. The fact that a fiduciary bears the burden on its own summary judgment motion under Rule 56(a) hardly suggests that the plaintiff is relieved of its ultimate burden of proof. Indeed, four sentences later, the Eleventh Circuit reiterated that "the burden of proof on the issue of causation will rest on the beneficiaries." *Id.*

and Eighth Circuits' interpretation of the exact same statutory language.

B. The Burden of Proof Should Remain on the Plaintiff at all Times.

1. The five circuits that apply the majority rule are clearly correct that ERISA plaintiffs should bear the burden of proof on loss causation. "Where the statutory text is 'silent on the allocation of the burden of persuasion,' [courts] 'begin with the ordinary default rule that *plaintiffs bear the risk of failing to prove their claims*.'" *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009) (emphasis added). That default rule follows from the longstanding principle that "'the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.'" *Schaffer*, 546 U.S. at 56. Thus, "[a]bsent some reason to believe that Congress intended otherwise," courts should "conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.* at 57-58.

Absolutely nothing in the straightforward text of § 1109(a) suggests that Congress intended to shift the burden to the defendant to disprove loss causation. That should be the end of the matter. As Judge Wilkinson explained, § 1109(a) "has not provided for burden shifting to the defendant." App.55. Congress speaks clearly in the rare instances when it intends to invert the ordinary burden of proof,[4] and it did not do

[4] For example, Section 5 of the Voting Rights Act placed the burden of proof on covered jurisdictions to show that changes in voting practices "neither [have] the purpose nor will have the effect of denying or abridging the right to vote." 52 U.S.C.

so here. Indeed, this Court reiterated just last Term that lower courts should not craft artificial presumptions onto the text of ERISA when the statute "makes no reference to" such rules. *Fifth Third*, 134 S. Ct. at 2467 (2014) (rejecting judicially created "presumption of prudence" for investments in employer stock).

Moreover, the Fourth Circuit did not dispute that the plaintiff bears the burden of proof on the other elements of a claim under § 1109: that the defendant *breached* its fiduciary duties, and that the plan suffered a *loss*. There is no reason whatsoever to single out the element of loss causation for different treatment or to adopt a strange regime in which proof of certain elements provides the inexplicable bonus of flipping the burden on a different element. Congress drafted ERISA against the backdrop of the established default rule that plaintiffs bear the burden of proof on *all* elements.

The panel's approach also leads to the anomalous result that the *order* in which a court addresses the elements of an ERISA claim can affect which party bears the burden of proof. Lower courts have discretion to address the elements of a claim in whichever order makes sense under the circumstances, *see, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 241-42 (2009), and it cannot be right that the

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§ 10304(a). This inversion of the burden of proof was an "extraordinary and unprecedented" measure that was justified only by the extraordinary circumstances then prevailing in covered jurisdictions. *Shelby County v. Holder*, 133 S. Ct. 2612, 2624-27 (2013).

burden of proof turns on the happenstance of which element the court chooses to address first.

2. The Fourth Circuit acknowledged that the established default rule requires plaintiffs to prove loss causation when the statute is silent about the burden of proof. App.26. But it nonetheless adopted an "exception" to that rule, holding that loss causation will be presumed under § 1109(a) unless the defendant affirmatively proves otherwise. *Id.* The Fourth Circuit's reasons for adopting that approach do not withstand scrutiny.

The panel concluded that a burden-shifting rule for loss causation is the "'most fair'" approach, and is consistent with the "structure and purpose" of ERISA, because keeping the burden of proof on the plaintiff would create "'significant barriers'" to recovery. App.26-29. But the fact that plaintiffs may have difficulty demonstrating causation is hardly a promising basis for relaxing their burden of showing causation. If procedural transgressions by fiduciaries will often result in little obvious substantive harm to plan participants, that would seem to be an argument for demanding more, not less, proof of substantive harm (or at least an argument for leaving the default burden where it normally rests).

The Fourth Circuit's burden-easing approach is reminiscent of the long-discarded principle that remedial statutes should be interpreted to favor plaintiffs. This Court has clarified that remedial statutes, like all other statutes, should be construed neither broadly, nor narrowly, but correctly in light of text and sensible background norms, like the default rule that a plaintiff bears the burden on each element of a claim. *See CTS v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (rejecting use of remedial-construction canon "as a substitute for a conclusion grounded in the statute's text and structure"). It is simply not the proper role of the courts to adopt special rules to tilt the playing field in favor of one set of litigants. *See*, *e.g.*, *14 Penn Plaza v. Pyett*, 556 U.S. 247, 269 (2009) (courts may not rely on "judicial policy concern[s] as a source of authority for introducing a qualification into [a statute] that is not found in its text").

ERISA unquestionably seeks to protect plan participants, but no legislation "pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). The Fourth Circuit's burden-shifting rule might make it easier for plaintiffs to recover, but it will do so only by increasing costs and litigation risks for ERISA plans and plan fiduciaries. If Congress had intended to place a heavy thumb on the scale in favor of ERISA plaintiffs in proving loss causation, it easily could have done so in the text of the statute (though it is unlikely even then that Congress would have adopted the anomalous burden-shifting regime embraced by the Fourth Circuit).

In all events, the Fourth Circuit was wrong to suggest that that the loss causation requirement poses a unique "barrier" to recovery for ERISA plaintiffs. Causation is an integral element of many federal statutes, yet the plaintiff routinely bears the burden of proof on this element. *See, e.g.*, *Dura Pharm. v. Broudo*, 544 U.S. 336, 338 (2005) (burden on plaintiff to prove loss causation in securities fraud claim under Rule 10b-5); *McCaleb v. A.O. Smith*, 200 F.3d 747, 752 (11th Cir. 2000) ("A civil RICO action requires a plaintiff to prove more than 'but for' causation of injury; it requires proximate causation." (citing *Holmes v. SIPC*, 503 U.S. 258, 268 (1992)). The Fourth Circuit made no attempt to explain why ERISA plaintiffs need a special rule to help them prove loss causation, but RICO plaintiffs and Rule 10b-5 plaintiffs do not.

The Fourth Circuit also claimed to find support for its position in "the common law of trusts." App.26. The court relied on a comment from the Third Restatement—which does not appear in the First or Second Restatements, the only versions Congress could have consulted before enacting ERISA in 1974—stating that when a beneficiary proves a trustee has breached his duties and a related loss has occurred, "the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100, cmt. f (2012). In the Fourth Circuit's view, that comment—which it described as a "long-recognized trust law principle"—shows that Congress intended for ERISA fiduciaries to have the burden of disproving causation. App.29.

At the outset, although trust law "often will inform" the interpretation of ERISA, it "will not necessarily determine the outcome," especially where a competing interpretive principle points in the other direction. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). As noted, nothing in the text of § 1109 suggests that Congress intended to depart from the longstanding default rule that the plaintiff bears the burden of proof on each element of an ERISA claim.

Regardless, the Fourth Circuit's premise is also mistaken because a burden-shifting approach is not "long-recognized." To the contrary, "[t]he authorities are not in accord with regard to the burden of proof on the issue of causal relation." *Whitfield v. Lindemann*, 853 F.2d 1298, 1304 (5th Cir. 1988). Indeed, just a few years after ERISA was enacted in 1974, a leading trust-law treatise reiterated that "[t]he 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." Bogert, *Trusts and Trustees* § 701, at 199 (2d rev. ed. 1982). And, as Judge Wilkinson noted, the Fourth Circuit itself has rejected "'the novel proposition that, whenever a breach … by a trustee has been proved, the burden shifts to the trustee to establish that any loss suffered by the beneficiaries of the trust was not proximately due to the default of the trustee.'" App. 56 (quoting *U.S. Life Ins. v. Mechanics & Farmers Bank*, 685 F.2d 887, 896 (4th Cir. 1982)).

* * *

In sum, the burden-shifting approach is little more than an attempt to rewrite a seemingly clear statute to make it easier for plaintiffs to win. That approach has little to recommend it as a matter of policy, and is flatly contrary to the well-established rule that the plaintiff bears the burden of proof on every element of her claim unless Congress has clearly indicated otherwise. This Court should grant certiorari to resolve the split among the lower courts and make clear that ERISA plaintiffs—just like RICO plaintiffs, Rule 10b-5 plaintiffs, and countless other plaintiffs—bear the burden of proving loss causation.

II. The Court Should Grant Certiorari To Address The Legal Standard For Loss Causation Under § 1109(a) Of ERISA.

A. The Fourth Circuit Badly Misconstrued the Loss Causation Requirement.

1. In addition to misallocating the burden of proof, the Fourth Circuit exacerbated its mistake by badly misconstruing the legal standard for loss causation. Section 1109(a) makes an ERISA fiduciary personally liable for losses to the plan only if those losses "result[] from" a breach of fiduciary duty. A failure to investigate or other procedural shortcoming, by itself, does not directly cause any losses to the plan. Instead, the plan incurs a loss only if the failure to investigate *actually leads to a substantively imprudent investment.*

As then-Judge Scalia observed in an oft-cited opinion:

> I know of no case in which a trustee who has happened—through prayer, astrology, or just blind luck—to make (or hold) objectively prudent investments (*e.g.*, an investment in a highly regarded 'blue chip' stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink, 772 F.2d at 962 (Scalia, J., concurring in part). In short, "loss causation only exists if the [investment] was, all things considered, an *objectively unreasonable one*." App.51 (Wilkinson, J.) (emphasis added). As long as the fiduciary's decision fell within "a reasonable range of investments that qualify as objectively prudent," then loss causation cannot be established and the fiduciary cannot be held liable for money damages. App.52.

The Fourth Circuit rejected that commonsense approach in the decision below. The panel instead held that loss causation turns on whether a hypothetical prudent fiduciary "more likely than not" would have made "*the same* [*investment*] *decision*" that the defendant made. App.30-32 (emphasis added). That standard ignores that there will often be a range of prudent decisions, and as long as a procedural error did not take the fiduciary outside the range of prudence then the procedural error did not cause any substantive loss. Under the Fourth Circuit's misguided approach, even an *objectively prudent* decision can give rise to monetary liability unless the defendant can show that the decision was "more likely than not" the exact same decision a hypothetical prudent fiduciary "*would have* made." *Id.*

Like its holding on the burden of proof, the panel's standard was based largely on supposed policy concerns. The court noted that its standard was "difficult for a defendant-fiduciary to satisfy," which was the "intended result" because "'[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same.'" App.34.

The fundamental flaw that pervades the Fourth Circuit's decision is its demonstrably false assumption that investment decisions are binary, such that there is only a *single* prudent investment decision that a prudent fiduciary "would have made." But objective prudence can encompass a *range* of investments. As Judge Wilkinson emphasized, it "should not be a surprise" that ERISA "allows for the possibility that there may be several prudent investment decisions for any given scenario." App.60. Indeed, Respondent's own expert conceded that "'prudent investors are not unanimous on most any issue,'" and "'in certain circumstances, [one] prudent investor might think it is prudent to buy and one right next to him might think it is prudent to sell.'" App.148-49 n.27. The Fourth Circuit's legal standard for loss causation "strays from the statutory test of objective prudence under then-existing circumstances," and "trends toward a view of prudence as the *single best* or most 'likely' decision rather than a *range of reasonable judgments* in the uncertain business of investing." App.50 (Wilkinson, J.) (emphasis added).

The Fourth Circuit's approach is particularly absurd in circumstances where a fiduciary is choosing among multiple prudent investment options. For example, assume a fiduciary is deciding between four mutual funds, three of which are well-diversified and highly regarded, such that a hypothetical prudent fiduciary would be equally likely to choose any of the three. If the defendant fiduciary failed to conduct an adequate investigation but nonetheless chose one of those highly regarded funds, he would face liability under the Fourth Circuit's test because the defendant could not disprove loss causation by showing that it is "more likely than not" that a hypothetical prudent fiduciary would have made the *exact same* decision. That rule makes no sense at all. If the procedural defect caused the fiduciary to invest in the objectively imprudent fourth fund, then liability should follow and a plaintiff could discharge its burden of proof. But if the procedural error caused the fiduciary to pick one of three equally attractive and objectively prudent funds, then the procedural shortcomings did not *cause* the participants any substantive harm. Imposing liability in the latter circumstance punishes the fiduciary by making it the *de facto* insurer of the participants' investments whenever there has been a procedural shortcoming.[5]

The situation described above is hardly speculative. Plan fiduciaries must routinely choose from among thousands of different investment options for inclusion in the plan, and must continue to monitor each investment after it has been added to the plan. Even if the fiduciary makes objectively prudent choices, it would be extremely difficult to show that a hypothetical prudent fiduciary would have made *the exact same investment*. Yet that is what is required under the Fourth Circuit's newly minted standard for loss causation. And, although the panel disclaimed any reliance on hindsight, App.41, the subsequent performance of each of the relevant investment options will inevitably color a court's views about whether the fiduciary made the *best* possible investment.

Moreover, by "encouraging opportunistic litigation to challenge even the most sensible financial decisions," the panel's decision harms not only fiduciaries but also plan participants, who ultimately bear the burden of higher litigation costs that "run up plan overhead." App.50, 68-69 (Wilkinson, J.). Plan

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[5] Of course, even if the ultimate investment decision was objectively prudent, an "insufficiently studious" fiduciary can still be removed from her position for failing to conduct an adequate investigation. App.54 (Wilkinson, J.).

fiduciaries are already routinely sued whenever a plan investment loses value. The Fourth Circuit's lax approach to loss causation will make it much easier for those suits to survive a motion to dismiss or motion for summary judgment. As long as the plaintiff alleges a deficient investigation, the fiduciary will bear the heavy burden of showing that a prudent fiduciary would have made the exact same decision.

2. This case well illustrates the flaws of the Fourth Circuit's causation standard. The district court found after a four-week trial that the defendants' removal of Nabisco stock from the RJR plan "*was not imprudent*" in light of the inherent risks of single-stock funds, the "tobacco taint" that had been causing Nabisco's stock price to fall (and exacerbated the non-diversification risks of also holding RJR stock in the Plan), and the fact that there was "no reason to expect extraordinary returns on Nabisco stock" when the relevant decision was made. App.164-65 (emphasis added).[6] Judge Wilkinson similarly found it "inconceivable" that this "prudent decision[] made in the interest of asset diversification" could serve as the basis for an ERISA claim. App.69.

Indeed, given that ERISA imposes an explicit duty to diversify plan assets to minimize risk, *see* 29 U.S.C. § 1104(a)(1)(C), the fiduciaries would have been highly vulnerable to an ERISA claim if they had *retained* Nabisco stock in the RJR Plan and its price

[6] Tellingly, the plaintiffs did not appeal the district court's finding that elimination of the Nabisco funds was objectively prudent. Instead, they urged the Fourth Circuit to adopt a more plaintiff-friendly legal standard for causation, which is precisely what the panel majority did.

continued to decline. *See*, *e.g.*, *DiFelice v. U.S. Airways,* 497 F.3d 410, 424 (4th Cir. 2007) ("placing retirement funds in *any* single-stock fund carries significant risk, and so would seem generally *imprudent* for ERISA purposes").

Under the Fourth Circuit's interpretation of the loss causation standard, the RJR fiduciaries could face *personal liability* for their objectively prudent decision if a court viewing the transaction with the benefit of 20/20 hindsight finds it "more likely than not" that a hypothetical prudent fiduciary would have taken a different course. App.30-32. But as both the district court and Judge Wilkinson recognized, the proper standard for loss causation must reflect the basic reality that objective prudence encompasses a *range* of reasonable decisions. App.60 (Wilkinson, J.) (proper test under Supreme Court precedent is "whether hypothetical *prudent* fiduciaries consider the path chosen to have been a *reasonable* one"). A decision by fiduciaries to eliminate a risky, undiversified non-employer stock fund from the plan falls comfortably within that range, and cannot possibly serve as the basis for holding the fiduciaries personally liable for damages under ERISA.

B. Lower Courts Have Divided Over the Proper Legal Standard for Loss Causation.

The Fourth Circuit's decision is a stark departure from the standard of objective prudence that several other courts have applied. No other circuit requires a showing that it is more likely than not that a hypothetical reasonable fiduciary would have made the *exact same* investment decision as the defendant.

Instead, most courts have cited and applied the standard articulated by then-Judge Scalia in *Fink*, under which a fiduciary who makes an "objectively prudent investment" cannot be "held liable for losses from those investments because of his failure to investigate and evaluate beforehand." *Fink*, 772 F.2d at 962. Those courts correctly recognize that a failure to investigate causes a loss under § 1109 only if the fiduciary ultimately makes an imprudent investment. For example, the Sixth Circuit held in *Kuper* that the plaintiff must show that "an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue *was improvident*." 66 F.3d at 1460 (emphasis added); *accord Rinehart v. Akers*, 722 F.3d 137, 151 (2d Cir. 2013) (same), *vacated on other grounds*, 134 S. Ct. 2900 (2014); *Renfro v. Unisys*, 671 F.3d 314, 322 (3d Cir. 2011) (citing *Fink* and noting that the test is simply whether the "questioned decision led to objectively prudent investments").

Remarkably, the panel asserted that its test is "entirely consistent" with the *Fink* standard. App.35. But that is self-evidently wrong. The *Fink* opinion emphasized that, regardless of any lack of prudence in the investigation, a fiduciary will not be found liable for money damages if the ultimate decision was "objectively prudent"—*i.e.*, an "investment in a highly regarded 'blue chip' stock." *Fink*, 772 F.2d at 962. In contrast, under the panel's approach, a fiduciary who conducted an insufficient investigation may be held liable unless he shows that it is more likely than not that a hypothetical prudent fiduciary would have selected the *exact same* blue chip stock. App.32. Merely showing that the investment was objectively prudent in its own right would not be enough under the Fourth Circuit's test, but would easily satisfy the *Fink* standard.

To be sure, courts have formulated the loss causation standard in a variety of ways, and the division of authority is not as sharply defined as it is on the question of which party bears the burden of proof. But the one thing that is crystal clear is that the Fourth Circuit's decision is an outlier in what had been a relatively settled area of the law. No court has ever before adopted a causation standard under which an objectively prudent decision can give rise to liability under ERISA merely because it was not the *single best* decision that could have been made under the circumstances.

The Fourth Circuit's misinterpretation of the loss causation requirement thus warrants certiorari in its own right. But, at the very least, the Court should grant certiorari on this question in connection with the closely related question of which party bears the burden of proof. *See*, *e.g.*, *Fifth Third*, 134 S. Ct. 2459 (addressing whether ERISA includes a presumption of prudence for investments in employer stock, and further addressing the substantive standard for prudence).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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December 1, 2014