No. 18-926

IN THE

Supreme Court of the United States

PUTNAM INVESTMENTS, LLC, ET AL.,

Petitioners,

v.

JOHN BROTHERSTON, ET AL.,

Respondent.

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

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BENEFITS COUNCIL, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE ERISA INDUSTRY COMMITTEE, AMERICAN RETIREMENT ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee-benefits programs governed by ERISA.

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 440 members are primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored programs.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the Chamber's intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, *amici*'s members, or *amici*'s counsel made a monetary contribution to fund its preparation or submission.

managers operating in the U.S. and global capital markets. On behalf of its industry's nearly 1 million employees, it advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed-income markets, and related products and services. It serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit http://www.sifma.org.

The ERISA Industry Committee ("ERIC") is a national non-profit organization representing the Nation's largest employers that sponsor employee-benefit plans for their workers, retirees, and families. ERIC is the only national association that advocates exclusively for large employer plan sponsors on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC members are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies affecting their ability to provide benefits to millions of active workers, retired persons, and their families nationwide, ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

The American Retirement Association ("ARA") is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system: the American

Society of Pension Professionals and Actuaries; the National Association of Plan Advisors; the National Tax-Deferred Savings Association; the ASPPA College of Pension Actuaries; and the Plan Sponsor Council of America. ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.7 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly files *amicus* briefs in cases that raise issues important to manufacturers.

The Business Roundtable is an association of chief executive officers who collectively manage more than 16 million employees and $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as *amicus curiae* in a variety of contexts where important business interests are at stake.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fiduciaries that manage employer-sponsored benefits plans will likely get sued no matter what they do. They get sued for holding on to risky investments, on the theory that there were safer alternatives. They get sued for selling such investments, on the theory that higher risk promises higher reward. Indeed, sometimes they get sued for both at the same time: one plaintiff alleges that the fiduciaries maintained too "heavy [an] investment" in certain securities, while another "assert[s] [t]he diametrically opposed theory" "that the … fiduciaries had imprudently *divested*" from those same securities. *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008). These competing claims put fiduciaries "between a rock and a hard place." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2470 (2014). And if the decision below is left in place, things will only get worse.

I. Lawsuits like these are already widespread. And, though often meritless, they are difficult to resolve cost-effectively. Courts are reluctant to grant motions to dismiss or motions for summary judgment in what they see (rightly or wrongly) as technical, fact-intensive cases. And even if some can be resolved without trial, the costs of doing so—discovery into the fiduciaries' actions, expert witnesses on complicated financial questions, and so on—are so high that the game is often not worth the candle, no matter how strong the fiduciaries' defense on the merits. Given these structural problems—as well as other factors like ERISA's liberal venue provision and courts' overenthusiasm for class certification—it is little wonder that plaintiffs increasingly secure large settlements regardless of the merits of their claims.

II. The decision below will make a bad situation worse. Loss and loss causation are essential elements of a claim arising from a fiduciary's alleged breach of duty. As such, they are two of the chief bulwarks for stemming the tide of meritless ERISA litigation. But the First Circuit's decision guts both of these requirements. It allows plaintiffs to establish a prima facie case of loss simply by showing, with benefit of hindsight, that the plan's chosen investments did not perform as well as the plaintiff's handpicked comparators over the plaintiff's handpicked time-frame; and it requires defendants to prove that their alleged breaches did not cause those self-identified harms, rather than requiring plaintiffs to prove loss causation as an element of their claim.

The First Circuit's decision to effectively eliminate these elements will harm plan sponsors, plan fiduciaries, and plan beneficiaries. By allowing plaintiffs to plead loss as a matter of law by comparing actively managed to passively managed funds, it will inevitably lead fiduciaries to prefer passive investment vehicles, reducing plan participants' choices and potentially generating smaller returns. And by forcing defendants to disprove loss causation, it will increase the costs of 401(k) litigation generally, leading to fewer 401(k) plans and less generous terms. This Court should intervene.

ARGUMENT

I. THERE IS A WELTER OF EXPENSIVE, DIFFICULT-TO-RESOLVE ERISA LITIGATION

A. ERISA Plan Sponsors Already Face a Deluge of High-Stakes Lawsuits

1. Although 401(k) plans have existed for nearly 40 years, litigation against the fiduciaries administering them was unusual until the early 2000s.[2] Since then, "plan participants have brought hundreds of lawsuits against sponsors of large retirement plans." David McCann, "Passive Aggression," *CFO.com*, https://bit.ly/2UXSCGs (June 22, 2016). And the tide of litigation is rising. "[O]ver 100 new 401(k) complaints were filed in 2016–2017—the highest two-year total since 2008–2009." George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, Center for Retirement Research at Boston College, No. 18-8, at 1–2 (May 2018) ("*401(k) Lawsuits*").

The list of the recently sued reads like a Who's Who in business: American Airlines, AT&T, BB&T, Chevron, Citigroup, Deutsche Bank, Gannett Co., Home Depot, Intel, Lockheed Martin, Lowe's,

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[2] A 401(k) plan allows employees to invest a portion of their pre-tax earnings—often accompanied by a contribution from their employer—with taxes to be paid when the money is taken out, usually at retirement. *See* 26 U.S.C. § 401(k); IRS, "401(k) Plans," https://www.irs.gov/retirement-plans/401k-plans (July 27, 2018). Similar litigation currently plagues other types of defined-contribution plans, including the § 403(b) plans offered by non-profit organizations such as universities. *See* Greg Iacurci, "Attorney Jerry Schlichter Opens Up About 403(b), 401(k) Suits," *Investment News*, https://bit.ly/2DeaPYQ (Aug. 18, 2016).

Nordstrom, Philips North America, Sears (twice), Target, TIAA-CREF, Verizon, Wal-Mart, and Wells Fargo, just to name a few.[3] It also includes many universities (such as Duke (twice), Georgetown, and Princeton).[4] But it also increasingly includes smaller entities. LaMettry's Collision—a Minnesota body shop with nine locations whose § 401(k) plan had just over 100 participants and less than $10 million in assets—was recently hit with a lawsuit.[5] It is not

[3] *See Ortiz v. Am. Airlines, Inc.*, No. 16-cv-380 (N.D. Tex.); *Alas v. AT&T, Inc.*, No. 17-cv-8106 (C.D. Cal.); *Sims v. BB&T Corp.*, No. 15-cv-732 (M.D.N.C.); *White v. Chevron Corp.*, No. 16-cv-793 (N.D. Cal.); *Leber v. Citigroup 401(k) Plan Investment Comm.*, No. 07-cv-9329 (S.D.N.Y.); *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-cv-9936 (S.D.N.Y.); *Quatrone v. Gannett Co.*, No. 18-cv-325 (E.D. Va.); *Pizarro v. Home Depot, Inc.*, No. 18-cv-1566 (N.D. Ga.); *Lo v. Intel Corp.*, No. 16-cv-522 (N.D. Cal.); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701 (S.D. Ill.); *Reetz v. Lowe's Cos.*, No. 18-cv-75 (W.D.N.C.); *McCorvey v. Nordstrom*, No. 17-cv-8108 (C.D. Cal.); *Ramsey v. Philips N. Am. LLC*, No. 18-cv-1099 (S.D. Ill.); *Catalfamo v. Sears Holding Corp.*, No. 17-cv-5230 (N.D. Ill.); *Meriwether v. Sears Holding Corp.*, No. 17-cv-5825 (N.D. Ill.); *Dormani v. Target Corp.*, No. 17-cv-4049 (D. Minn.); *Richards-Donald v. Teachers Ins. & Annuity Ass'n of Am.*, No. 15-cv-8040 (S.D.N.Y.); *Jacobs v. Verizon Commc'ns*, No. 16-cv-1082 (S.D.N.Y.); *Solano v. Wal-Mart Stores, Inc.*, No. 17-cv-03976 (C.D. Cal.); *Wayman v. Wells Fargo & Co.*, No. 17-cv-5153 (D. Minn.).

[4] *See Clark v. Duke Univ.*, No. 16-cv-1044 (M.D.N.C.); *Lucas v. Duke Univ.*, No. 18-cv-722 (M.D.N.C.); *Wilcox v. Georgetown Univ.*, No. 18-cv-422 (D.D.C.); *Nicholas v. Trs. of Princeton Univ.*, No. 17-cv-3695 (D.N.J.).

[5] *See Damberg v. LaMettry's Collision, Inc.*, No. 16-cv-1335 (D. Minn.); Greg Iacurci, "Dismissal of Small 401(k) Plan Excessive-Fee Lawsuit 'Highly Atypical,'" *Investment News*, https://bit.ly/2GqSprk (July 1, 2016).

alone. CheckSmart and its $25-million-in-assets plan, for example, was also recently sued.[6]

2. The causes of this litigation explosion are not hard to identify. 401(k) and other defined-contribution plans are the dominant form of retirement savings across the country; 73% of employees who have a retirement plan at work are covered exclusively by such a plan. *401(k) Lawsuits*, at 2. As a whole, these plans hold staggering sums of money; 401(k) plans alone currently contain more than $5 *trillion* in assets. *See* Investment Company Institute*, Retirement Assets Total $29.2 Trillion in Third Quarter,* https://bit.ly/2UkgH9W (Dec. 20, 2018). Many individual employers' plans themselves hold considerable assets; Verizon's, for example, has more than 150,000 participants and invests more than $20 billion in funds. *See* Elizabeth Galentine, "The Top 25 401(k) Plans," *Employee Benefit News*, https://bit.ly/2TO0lqb (July 20, 2018).

Seventy-five percent of Americans like their 401(k) plans. *See* Sarah Holden et al., "American Views on Defined Contribution Plan Saving," *ICI Research Report*, https://bit.ly/2SOPBuz (Feb. 2019). But when the options within those plans go south—or don't go north as quickly as a plaintiff's lawyer would prefer—it is easy (and often lucrative) to claim that it is the fiduciaries' fault: offering different investment options, plaintiffs claim with the benefit of hindsight, would have led to fewer losses or more sizeable returns. And given the size of the plans in question, those

[6] *See Bernaola v. CheckSmart Financial LLC*, No. 16-cv-684 (S.D. Ohio).

alleged losses, even if small on a per-participant basis, quickly add up.

B. 401(k) Lawsuits Are Uniquely Difficult To Defend Against

Such litigation, though often meritless, is difficult to resolve quickly, because some of the ordinary tools of civil litigation—at least as deployed by many courts handling these cases—are not up to the task.

1. Take first the motion to dismiss. In many areas of the law, courts have little trouble assessing whether the plaintiffs have "nudged their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). But in the "arcane area of the law" that is ERISA 401(k) litigation, they often hesitate to do so, preferring to wait for "further record development" and "particularly" for "input from those with expertise." *LaLonde v. Textron, Inc.*, 369 F.3d 1, 6 (1st Cir. 2004). And that remains so even though this Court has already admonished lower courts not to overlook this "important mechanism for weeding out meritless [ERISA] claims." *Fifth Third Bancorp*, 134 S. Ct. at 2471.

Consider, for example, the district court's decision here. The plaintiffs' amended complaint ran 65 pages. *See* Dkt. 22, No. 15-cv-13825, *Brotherston v. Putnam Invs., LLC* (D. Mass.). The parties then spent 50 pages briefing ERISA's and the Plan's details. *See* Dkts. 33, 37, 38. But in just two paragraphs, the district court denied Petitioners' request, reasoning: "In factually complex ERISA cases like the instant one[], dismissal is often inappropriate." Dkt. 47, at 2. "At the current stage of the litigation," the plaintiffs had "allege[d] facts sufficient to state plausible claims." *Id.* at 3.

2. Once discovery begins, expenses mount quickly—largely on the defendants' side. Liability turns in part on whether the fiduciaries discharged their duties with "the care, skill, prudence, and diligence … that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Both parts of this inquiry—determining what the fiduciaries actually did and what an objectively reasonable fiduciary could have done—require tremendous resources. For the former, defendants must produce reams of documents about the fiduciaries' decisions and decision-making processes, as well as deposition testimony from many high-level officials. For the latter, defendants must provide expert testimony on what a reasonable fiduciary would have done given the specific, unique circumstances at issue.

The Second Circuit has already acknowledged the "ominous" "prospect of discovery in a suit claiming breach of fiduciary duty," given the resulting "probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) ("*PBGC*"). And that is only one slice of the overall costs in ERISA litigation. Every other issue—such as whether the plan participants actually suffered losses and whether those losses were caused by the fiduciaries' alleged breach—requires further discovery, usually including expert economic analyses on different subtopics. Moreover, many plaintiffs add additional claims about recordkeeping fees and other administrative expenses, usually requiring yet more discovery and expert-witness preparation. When you add the procedural costs—defending against class certification, moving for and opposing summary judgment, conducting a trial, post-trial motions, appeals, and so on—the outlays become staggering.

This case, again, is Exhibit A. According to Petitioners' counsel, after their motion to dismiss was summarily denied, they collected millions of documents, individually reviewed hundreds of thousands of those documents, and produced tens of thousands of them. Many were highly sensitive; they included confidential pricing information, proprietary profit information, participant-level data about investments and investment changes over time, and minutes from meetings of the Putnam Benefits Investment Committee. In addition, Petitioners had to prepare for a host of depositions: Putnam's President and CEO; its Chief Financial Officer; its Head of Human Resources; its Head of Benefits; its Head of Defined Contributions; its Head of Investment Product Management; its Director of Investment Retirement Solutions (and Director of Research at the Putnam Institute); its Associate General Counsel; a Senior Manager of Retirement Plans; and a Senior Relationship Manager for Defined Contributions.

Despite this welter of evidence and briefing, the district court still could not resolve all of the claims as a matter of law. *See* Dkt. 120. So, the parties endured a week-long bench trial, with three high-ranking Putnam officers testifying at Respondents' insistence. *See* Dkts. 172–85. Though Petitioners prevailed because Respondents had not proven loss causation, Pet. App. 78a, the First Circuit vacated and remanded after concluding that Respondents do not bear the burden on that issue, Pet. App. 38a n.16; Pet. App. 45a. Absent this Court's intervention, there is more litigation to come: no court has decided whether Petitioners breached their fiduciary duties, and Petitioners must have an opportunity to *dis*prove loss causation under the First Circuit's regime. Pet. App. 45a–46a. Petitioners have likely spent millions litigating this case, and the end remains far from sight.

3. In addition to these disadvantages, other features tip the playing field even more in the plaintiffs' bar's direction. For example, ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). Under that provision, courts may award fees to a plan participant even if she obtained merely "some degree of success on the merits"; she need not bear her own costs, nor need she even prove that she is a "prevailing party." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 244 (2010). By making it easier for plaintiffs' lawyers to get paid—by someone other than their clients—ERISA's fee-shifting provision makes it more likely that they will bring ERISA suits in the first place.

Courts' willingness to certify classes in these cases encourages even more litigation by vastly increasing the stakes. Many lower courts continue to apply class-certification case law from the defined-*benefit* context—where courts certified under Rule 23(b)(1)'s common-fund provisions—to the much different context of defined-*contribution* cases, which involve individualized questions about particular accounts.[7] By allowing plaintiffs to escape Rule 23(b)(3)'s "stringent" requirements, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997), these courts have made it easy for ERISA plaintiffs to transform individual, account-specific disputes into bet-the-company litigation. And even if this expansion of Rule 23(b)(1) were correct, the point would remain: 401(k) litigation is uniquely likely to be brought on a class basis, with enormous aggregated damages.

This Court has already noted the general "risk of 'in terrorem' settlements that class actions entail": "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (Easterbrook, J.) (class actions can make the "stakes so large[] that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims"). But this general risk is especially pronounced where, as here, the usual means of weeding out bad claims or preventing inappropriate aggregation do not function well; the likelihood (and size) of settlement increases significantly when both sides reasonably believe the

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[7] Defined-benefit plans "provide a fixed, pre-established benefit for employees at retirement." IRS, "Choosing a Retirement Plan: Defined Benefit Plan," https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-defined-benefit-plan (July 26, 2018).

defendants might be trapped in easy-to-certify, high-damages cases with no prospect of a quick resolution.

That is exactly what is already happening in 401(k) litigation. Courts have already noted how the nature of discovery in ERISA litigation alone "elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *PBGC*, 712 F.3d at 719 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (alteration in *PBGC*)). And real-world results bear out the obvious risks presented by these suits. Just within the past year, BB&T, Deutsche Bank, and Philips North America settled cases for eight figures.[8] Many other defendants have also decided that paying millions of dollars to make a case go away makes more sense than paying millions of dollars to defend against it while leaving open the risk, however slight, of an enormous adverse decision.[9]

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[8] *See* Robert Steyer, "BB&T, Plan Participants Settle Fiduciary Breach Case," *Pensions & Investments*, https://bit.ly/2SfHEhy (Dec. 4, 2018) ($24 million); Greg Iacurci, "Deutsche Bank Settles 401(k) Self-Dealing Lawsuit for $21.9 Million," *Investment News*, https://bit.ly/2ScHrM9 (Aug. 15, 2018); Greg Iacurci, "Philips North America Reaches $17 Million Settlement in 401(k) Lawsuit," *Investment News*, https://bit.ly/2WsICpU (May 15, 2018).

[9] *See, e.g.*, Robert Steyer, "Edward Jones Agrees To Pay $3.2 Million To Settle 401(k) Fiduciary Breach Case," *Pensions & Investments*, https://bit.ly/2CSqEEr (Dec. 13, 2018); Rick Baert, "Franklin Resources, Former 401(k) Participant Settle ERISA Lawsuit," *Pensions & Investments*, https://bit.ly/2SawZVC (Dec.

II. THE FIRST CIRCUIT'S POSITIONS ON LOSS AND LOSS CAUSATION WILL INCREASE ERISA LITIGATION, HARMING PLAN SPONSORS AND PARTICIPANTS ALIKE

A. The First Circuit's Decision Eliminates Loss and Loss Causation as Elements of a Plaintiff's Claim

1. The First Circuit threw two additional wrenches into this already troubled scheme. *First*, it held that, as a matter of law, a plaintiff can plead loss simply by alleging that the plaintiff's handpicked index funds performed better over the plaintiff's handpicked time frame than the plan's actively-managed portfolio: "[T]o determine whether there was a loss," the plaintiff may "compare the actual returns on that portfolio to the returns that would have been generated by a portfolio of benchmark funds or indexes comparable but for the fact that they do not claim to be able to pick winners and losers, or charge for doing so." Pet. App. 28a. In other words, even though actively and passively managed funds rest on entirely different investment theories—one attempts to beat the market, while the other tries to track it—the First Circuit held that proof that one did better than the other during a particular period of time establishes loss categorically in ERISA litigation.

10, 2018); Rebecca Moore, "Citigroup, 401(k) Participants Agree To Settle ERISA Lawsuit," *PLANADVISOR*, https://www.planadviser.com/citigroup-401k-participants-agree-settle-erisa-lawsuit/ (Aug. 8, 2018) ($6.9 million); Liz Skinner, "TIAA To Pay $5 Million in 401(k) Excessive-Fee Lawsuit," *Pensions & Investments*, https://bit.ly/2RZadkk (May 12, 2017).

Second, the First Circuit held that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent." Pet. App. 39a. Unlike "ordinary" litigation, then—where "plaintiffs bear the burdens on the elements in their claims," *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56–57 (2005) (quoting C. Mueller & L. Kirkpatrick, *Evidence* § 3.1 (3d ed. 2003))—the First Circuit held that ERISA fiduciaries must *dis*prove loss causation and show that their alleged breaches did not cause the plaintiffs' claimed losses in order to prevail.

2. Both holdings will make the existing 401(k) litigation landscape even more inhospitable for plans and plan fiduciaries. The First Circuit's understanding of what proves a loss, for instance, effectively eliminates loss as an element of the plaintiff's claim. As Petitioners have explained, *see* Pet. 33–35, plaintiffs will always be able to satisfy the First Circuit's new metric. There are currently more than 9,000 mutual funds on the market (including almost 500 index mutual funds), with more coming every day. Over any hand-selected time period, it is virtually guaranteed that at least a few of those funds will have outperformed the plan's. Indeed, with the benefit of hindsight, plaintiffs will be able to maximize their claimed damages, comparing the best-performing index fund from among these many options with the worst-performing actively-managed assets in the plan. The First Circuit's decision thus represents the worst of both worlds: it guarantees that plaintiffs can adequately allege loss, and in a way that maximizes claimed damages and thereby coerces settlement. *See supra* pp. 13–15.

The First Circuit's position on loss causation similarly makes life even harder for ERISA fiduciaries. Rather than remove loss causation as an element of the plaintiff's claim in practice (as its holding on loss does), the First Circuit's decision removes it as an element as a matter of doctrine. Thus, even though ERISA fiduciaries are liable only for losses "resulting from" a breach, 29 U.S.C. § 1109(a), to survive a motion to dismiss or get past summary judgment, plaintiffs do not even need to try to show that the fiduciaries' chosen investments were objectively imprudent and caused losses. Instead, they can simply point to perceived problems in the fiduciaries' process, compare the portfolio's performance to their favorite index fund, and then take potshots at the *fiduciaries'* attempt to disprove causation. In that world, "the burden of persuasion makes all the difference"—for the plaintiffs. Pet. App. 38a n.16.

B. The First Circuit's Decision Will Make Plan Sponsors and Plan Participants Worse Off

1. If left in place, the First Circuit's resolution of both questions presented will harm plan sponsors and plan participants alike. Take first its conclusion about how plaintiffs may prove loss. As the First Circuit admitted, that approach will drive fiduciaries away from including actively-managed funds and toward including passively managed index funds—and *only* such funds—in the plan's portfolio. *See* Pet. App. 40a; *see also* McCann, "Passive Aggression" (57% of large plan sponsors cited the desire to "alleviate threat[s] of lawsuits" as the "primary reason they decided to offer passively managed investment options").

As a matter of both law and policy, the First Circuit's preference for passively managed index funds is misplaced. ERISA does not take a stance on what kinds of investments are a good idea any more than the "Fourteenth Amendment enact[s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Given the bewildering variety of investment options—and the range of circumstances under which different options may or may not be appropriate—Congress chose not to impose one-size-fits-all substantive requirements on plan investments. Instead, it imposed fiduciary duties on plan administrators, giving them discretion to select from among the many choices those investment vehicles best tailored to participants' wants and needs. *See* 29 U.S.C. § 1104(a)(1)(B). By effectively mandating the inclusion of index funds to the exclusion of others, the First Circuit's decision undermines Congress's flexible regulatory approach.

Forcing ERISA fiduciaries toward index funds will also harm participants. To be sure, such funds offer some advantages—they generally have lower administrative costs, and they may outperform some actively managed funds in certain circumstances. But that is not always true. Vanguard, for instance—"the poster child of passive funds"—has long offered its own active fund, the Vanguard PRIMECAP Fund. From its beginning in 1984 through (at least) October 2017, "that fund … generated annualized returns 2.4% higher than its benchmark, the S&P 500 index." Jordan Wathen, "3 Benefits of an Actively Managed

Fund," *The Motley Fool*, https://bit.ly/2G95Dst (Oct. 5, 2017).

Even within the sweet spot for index funds—large-company stocks traded on domestic exchanges—the pros in passively managed funds may come with cons. For instance, "active managers have [historically] lagged behind benchmarks during long, strong bull markets," but "[t]hey tend to make up lost ground when markets level off or suffer corrections." Michael A. Pollock, "The Case for Actively Managed Funds," *Wall Street Journal*, https://on.wsj.com/2HEQaTb (Feb. 8, 2015); *see also id.* (noting that "nearly two-thirds of active large-cap funds beat the S&P" from 2000 to 2008). That makes sense: "in a down market, … active managers can put cash on the sidelines or use other strategies to minimize losses, while index funds must continue to hold the same mix of assets no matter what." Jeff Brown, "Do Actively Managed Funds Really Pay Off for Investors?", *US News*, https://bit.ly/2DK8VRi (Apr. 14, 2016); *see also, e.g.*, John Sullivan, "Should 401k Plans Offer Only Index Funds?", *401k Specialist*, https://bit.ly/2G1Du7o (Mar. 22, 2017) ("[A] good active manager can sell out of positions before capturing an entire market crash.").

Moreover, even if some passively managed funds have historically outperformed actively managed ones within some sectors, that is certainly not true across every asset class. For instance, "the median active bond manager has outperformed the median passive manager by about 50 basis points over the last ten years." Pimco, *Bonds Are Different: Resolving the Active vs. Passive Debate*, https://bit.ly/2RUI51D (2018). Again, that makes sense. "[A]n actively managed bond fund" has the "ability to reduce interest rate[s] in a rising rate environment or credit risk if an investor expects credit to deteriorate, such as late in an economic cycle," while still having "fairly low" expense ratios. Karl Kaufman, "What Do Investors Need To Know About Passive Versus Active Bond Funds?", *Forbes*, https://bit.ly/2S8yFyX (Dec. 30, 2018).

So too for many international stocks. In "emerging markets," "major indexes are tilted towards huge, state-owned enterprises, whereas the real growth is in smaller, consumer-driven businesses, where most active managers focus." Reshma Kapadia, "Active or Passive? Why You Should Use Both," *Barron's*, https://bit.ly/2Wu9eXL (July 29, 2017); *see also, e.g.*, Ted Seides, "The Death of Passive Management?", *Institutional Investor*, https://bit.ly/2NwvXk9 (Sept. 9, 2018) (noting that "emerging market indices" are "dominated by only a few companies and often are not representative of the economic opportunity set"). That may be why, according to one study covering the period from 1992 to 2011, "actively managed funds … ha[d] a modest advantage over the benchmarks, with the fund average for both total returns and risk-adjusted performance … being higher than the benchmark averages in nine out of 13 categories." John Rekenthaler, "International Funds: Active or Passive?", *Morningstar*, https://bit.ly/2CR0aTQ (Aug. 16, 2013) (citing A. Kaushik, *Performance and Persistence of Performance of Actively Managed U.S. Funds That Invest in International Equity*, 22 J. Investing 55 (Summer 2013)).

Other kinds of investment are simply not practical without active management or analogous costs. For instance, "creative options that may improve participant outcomes—like investment vehicles designed to provide a lifetime income stream when participants retire"—cannot easily be replicated through "passive investments." *401(k) Lawsuits*, at 6. But the "fear of litigation" might "prevent[] the use" of these beneficial alternatives; after all, such plans "involve more complexity than passive investments (and thus higher fees) and would require the plan to choose a provider, which itself entails some risk." *Id.* Plan fiduciaries should not be prevented from "offer[ing] drawdown products" like these because they fear the "legal consequences." *Id.*

Finally—and perhaps most importantly—the First Circuit's effort to cajole fiduciaries toward index funds ignores the personal choice at the heart of 401(k) retirement planning. Different plan participants have different risk tolerances, financial objectives, and investment philosophies. Indeed, many plan participants *in this case*—active fund managers—have different views than the First Circuit about the tradeoffs between active and passive investment; although the plan already offered a number of passive choices, participants directed only 6% of the plan's assets toward them. Pet. App. 31 (citing C.A. J.A. 5909). If the decision below stays on the books, fiduciaries will have little choice but to deprive participants of these popular options in favor of the First Circuit's preferred investment vehicles. That is not how ERISA should work.[10]

[10] Of course, the bitter irony is that *even after* fiduciaries follow the First Circuit's advice to switch to index funds, they will still find themselves in court. Many litigants have already claimed that fiduciaries should have sought the higher returns

2. The First Circuit's other conclusion—that fiduciaries bear the burden of proving that their alleged breaches did *not* cause the plaintiffs' purported losses—will similarly harm both sponsors and participants. To begin with, by departing from the views of six other circuits on this question, *see* Pet. 15–19, the First Circuit's decision conflicts with ERISA's overriding goal of uniformity. To "induc[e] employers to offer benefits," Congress wanted "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). As it stands, however, plan sponsors in Boston face higher litigation demands than those in New York or San Francisco.

Multistate employers are in an even tougher spot. What counts as a loss and whether fiduciaries will face the burden of disproving loss causation now turn on where they are sued. ERISA's venue provision, however, allows plaintiffs to bring suit where any defendant "may be found," not just "where the plan is administered, where the breach took place, or where a defendant resides." 29 U.S.C. § 1132(e)(2). As far as these employers are concerned, then, the First Circuit's minority view must be treated as the law of the land: even if the plan is headquartered in the more populous majority jurisdictions, a single defendant's mere presence within the First, Fourth, Fifth, or Eighth Circuits will subject them to the plaintiff-friendly burden-shifting rule. The uniform standards

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available through actively managed funds. *See, e.g.*, *Cervantes v. Invesco*, No. 18-cv-2551 (N.D. Ga.).

governing ERISA litigation ought to come from this Court, not from forum-shopping litigants bootstrapping outlier views onto everyone else.

Finally, by increasing the amount of 401(k) litigation and the cost of defending against it, the First Circuit's burden-shifting rule may decrease the number of 401(k) plans offered and lessen the favorability of the remaining plans' terms. This Court has long recognized that "Congress [in ERISA] sought 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).[11] While many large employers will continue to offer 401(k) plans despite the increased costs, smaller entities may react differently—after all, if LaMettry's nine-location body shop can get sued over its tiny plan, will it really be worth the headache for others?

Even those employees whose employers continue to offer 401(k) plans will be made worse off by the increased litigation sure to follow from the First Circuit's decision. Because that decision effectively removes proof of loss and loss causation as elements of the plaintiffs' claims, 401(k) litigation will turn primarily on whether the fiduciaries breached their duties. Fiduciaries already take great care—as they

[11] *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (noting the "public interest in encouraging the formation of employee benefit plans"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (same); *Fifth Third Bancorp*, 134 S. Ct. at 2470 (same).

should—to meet those obligations. But to prepare for *litigation* on that front, plan sponsors and fiduciaries will have no choice but to incur additional costs: hire yet more investment advisors, investment managers, and lawyers; excessively document the fiduciaries' discharge of their duties; pay skyrocketing insurance premiums for when the lawsuits nonetheless come; and so on.[12] Many of those costs will be passed along to plan participants, whether in the form of administrative costs or lower employer contributions. And that is in addition to the costs already discussed above: fewer investment choices and, quite possibly, diminished returns. *See supra* pp. 18–22. ERISA should not be construed so as to bring about these unfortunate, unnecessary results.

[12] *See, e.g.*, Greg Iacurci, "How To Design a 401(k) Plan That's Lawsuit Proof," *Investment News*, https://bit.ly/2SvYQzw (Mar. 6, 2018); Jacklyn Wille, "Uptick in Fee Ligitation Reshaping 401(k) Industry," *Bloomberg News*, https://bit.ly/2pn2tt9 (June 9, 2016).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari on both questions presented.

February 15, 2019

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