

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 17-1711

JOHN BROTHERSTON; JOAN GLANCY,
Plaintiffs-Appellants,

v.

PUTNAM INVESTMENTS, LLC; PUTNAM INVESTMENT MANAGEMENT
LLC; PUTNAM INVESTOR SERVICES, INC.; THE PUTNAM BENEFITS
INVESTMENT COMMITTEE; THE PUTNAM BENEFITS OVERSIGHT
COMMITTEE; ROBERT REYNOLDS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANTS-APPELLEES' MOTION TO STAY THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d)(2), defendants-appellees Putnam Investments, LLC; Putnam Investment Management LLC; Putnam Investor Services, Inc.; The Putnam Benefits Investment Committee; The Putnam Benefits Oversight Committee; and Robert Reynolds (collectively, “Appellees”) respectfully request that this Court stay its mandate pending the filing and disposition of a petition for a writ of certiorari to the United States Supreme Court. This Court entered its opinion and judgment on October 15, 2018, and without a stay the mandate is scheduled to issue on November 5, 2018. A stay of the mandate would preserve the status quo during the limited period necessary to

seek Supreme Court review. This Court remanded for the district court to complete the bench trial, but that proceeding should not resume until the Supreme Court has the opportunity to decide who bears the burden of proof.

Rule 41(d)(2)(A) provides that the Court may stay the mandate “pending the filing of a petition for a writ of certiorari in the Supreme Court.” Only two requirements must be met for a stay to issue: (1) the potential petition must “present a substantial question,” and (2) there must be “good cause for a stay.” Fed. R. App. P. 41(d)(2)(B).¹ Those requirements are readily met here.

1. Appellees’ petition will present a substantial question for the Supreme Court—whether the plaintiff or the defendant bears the burden of proof on loss causation under ERISA § 409(a). This Court has already acknowledged that this issue is one on which the circuits are deeply split, with now four circuits (the First, Fourth, Fifth, and Eighth Circuits) holding that an ERISA defendant bears the burden of proof on loss causation, and at least four circuits (the Sixth, Ninth, Tenth, and Eleventh Circuits) holding that the plaintiff bears the burden of proving this element of an ERISA claim. Slip Op. 33-34; *Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017), *petition for cert. dismissed by stipulation*, No. 17-667 (U.S. Sept.

¹ This Court has imposed a heightened requirement in certain categories of cases—cases affirming a criminal conviction or NLRB order, and cases where a certiorari petition would cause only “pointless delay.” 1st. Cir. Local R. 41.0. None of these categories applies here.

20, 2018). And while this Court did not identify the Second Circuit with either camp, Slip Op. 34 n.15, courts both inside and outside the Second Circuit have read that court to reject a burden-shifting framework along with the Sixth, Ninth, Tenth, and Eleventh Circuits. *E.g.*, *Pioneer Centres*, 858 F.3d at 1336 (citing *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 105 (2d Cir. 1998) (two-judge concurrence)); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 260-261 (S.D.N.Y. 2012).

The Supreme Court has repeatedly confirmed that this question is a substantial one, twice calling for the views of the Solicitor General in cases raising the issue. *Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 138 S. Ct. 1317 (No. 17-667); *RJR Pension Inv. Comm. v. Tatum*, 135 S. Ct. 1541 (No. 14-656). In 2015, when several circuits had yet to weigh in on the issue, then-Solicitor General Verrilli recommended against granting the petition for a writ of certiorari on the ground that the extent of the circuit conflict was unclear. The Solicitor General suggested that some circuits that had rejected a burden-shifting framework might reconsider their view in light of the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014). *See* United States Amicus Br. at 14, *RJR*, *supra* (filed May 2015) (No. 14-656).

Since 2015, however, several more circuits have weighed in on the issue at length, including this Court and the Tenth Circuit in *Pioneer Centres*. The Sixth Circuit has also made clear that its rejection of a burden-shifting framework was unaffected by the Supreme Court’s decision in *Dudenhoeffer*. See Slip Op. 33 (citing *Saumer v. Cliffs Natural Resources Inc.*, 853 F.3d 855, 863 (6th Cir. 2017)). At this point, nearly every circuit has decided the issue, and the conflict will not be resolved without Supreme Court review.

Indeed, earlier this year the Supreme Court indicated its continued interest in this issue by again calling for the views of the Solicitor General in *Pioneer Centres*. The parties, however, stipulated to dismissal before the Solicitor General had an opportunity to weigh in.²

In light of the circuit conflict and the Supreme Court’s repeated and recent interest in the issue, Appellees’ petition for a writ of certiorari plainly will present a “substantial question.” The significant likelihood of Supreme Court review strongly favors a stay. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 17 (1st Cir. 2012) (staying the mandate in anticipation that “certiorari will be sought and that Supreme Court review . . . is highly likely”).

2. There is good cause for a stay during the time necessary to seek Supreme Court review. Once this Court issues the mandate to the district court,

² See <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-667.html>.

Judge Young will resume bench-trial proceedings. Staying the mandate pending certiorari will avoid compelling the parties and the district court to expend time and resources to prepare for and conduct the trial while the law is unsettled on a key element of the case. Indeed, if the district court retried the case in accordance with this Court's decision, and if the Supreme Court then articulated a different loss-causation standard, the case could even have to be retried *again*. Resuming proceedings in the district court while Appellees seek Supreme Court review would be neither efficient nor cost-effective.

Nor will a stay result in any substantial prejudice to Plaintiffs. The trial took place a year and a half ago. The incremental delay in further proceedings to accommodate a petition for certiorari is certainly outweighed by the burden and expense to the parties if the district court proceedings resume prematurely.

CONCLUSION

Because Appellees' forthcoming petition for certiorari presents a substantial question on which the circuits are deeply split, and because there is good cause to maintain the status quo and defer retrying the case while the Supreme Court considers that governing legal question, this Court should stay the mandate pending the filing and disposition of a petition for certiorari.

Dated: October 24, 2018
Boston, Massachusetts

Respectfully submitted,

/s/ James R. Carroll

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2)(a) because this motion contains 1,059 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). I further certify that the motion complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2010.

Dated: October 24, 2018

/s/ James R. Carroll

James R. Carroll

CERTIFICATE OF SERVICE

I, James R. Carroll, hereby certify on October 24, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and they will be served by the CM/ECF system:

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