No. 17-1712

In the Supreme Court of the United States

JAMES J. THOLE AND SHERRY SMITH, PETITIONERS

v.

U.S. BANK, N.A., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

KAREN L. HANDORF
MICHELLE C. YAU
MARY J. BORTSCHELLER
COHEN & MILSTEIN
West Tower, Suite 500
1100 New York Avenue, N.W.
Washington, D.C. 20005

PETER K. STRIS
Counsel of Record
BRENDAN S. MAHER
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

Counsel for Petitioners

QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, authorizes pension-plan participants to sue for a wide variety of relief against fiduciaries who breach their duties. 29 U.S.C. 1132(a).

Section 1132(a)(2), via 29 U.S.C. 1109(a), authorizes participants to hold fiduciaries "personally liable to make good to such plan any losses to the plan resulting from each such breach" and provides for "other equitable or remedial relief," including fiduciary removal. Section 1132(a)(3) authorizes suit "to enjoin any act or practice which violates any provision of" ERISA, and provides for "appropriate equitable relief" to redress ERISA violations. For centuries before Congress codified these remedies in ERISA, they were available under the law of trusts any time a fiduciary breached his duties.

Petitioners are participants in an ERISA defined-benefit pension plan managed by respondents. After respondents breached their fiduciary duties of loyalty and prudence by investing all the plan assets in high-risk equities, ultimately causing $748 million in losses to the plan, petitioners brought suit under 29 U.S.C. 1132(a)(2) and (a)(3) seeking restoration of these losses, fiduciary removal, and injunctive relief. The Eighth Circuit affirmed dismissal of both claims because petitioners had not yet suffered any individual financial harm—the plan still had enough assets to avoid the imminent risk of default.

The questions presented are:

1. Whether defined-benefit plan participants may seek relief under 29 U.S.C. 1132(a)(2) and (a)(3) without demonstrating individual financial loss or the imminent risk thereof.

2. Whether petitioners have demonstrated Article III standing.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are James J. Thole and Sherry Smith, the plaintiffs-appellants below.

Respondents are U.S. Bank, N.A., individually and as successor-in-interest to FAF Advisors, Inc.; U.S. Bancorp; Nuveen Asset Management, LLC, as successor-in-interest to FAF Advisors, Inc.; Richard K. Davis; Douglas M. Baker, Jr.; Y. Marc Belton; Peter H. Coors; Joel W. Johnston; Olivia F. Kirtley; O'Dell M. Owens; Craig D. Schnuck; Arthur D. Collins, Jr.; Victoria Buyniski Gluckman; Jerry W. Levin; David B. O'Maley; Patrick T. Stokes; Richard G. Reiten; Warren R. Stayle; and Does 1-20, the defendants-appellees below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioners allege that respondents committed blatant violations of their duties of prudence and loyalty under ERISA—investing in respondents' own funds and flouting basic asset-allocation principles by investing *all* the plan's assets in equities. These actions caused the plan to lose three quarters of a billion dollars. After petitioners sued, however, respondents contributed enough money to the plan to bring it back into compliance with ERISA's minimum funding rules. But the plan remained hundreds of millions short of where it would have been had respondents satisfied their duties.

Urged by respondents, the Eighth Circuit decided that respondents' fiduciary violations and the resulting hundreds of millions in losses were irrelevant. All that mattered was that respondents' subsequent contributions made the plan "overfunded," *i.e.*, compliant with ERISA's minimum funding requirements. According to the Eighth Circuit and respondents, fiduciaries cannot be sued for any action they take respecting plan assets, so long as the plan sponsor leaves enough left over (or subsequently contributes enough money) to ensure that participants' future pension payments are not imminently threatened.

Respondents do not base this position on ERISA's text or purpose or on the common-law trust principles underlying ERISA. Rather, respondents claim that Article III's case-or-controversy requirement means that participants cannot even get into court, because (so the argument goes) they suffer no individual economic injury from fiduciary breaches that deplete plan assets without putting the plan at risk of default.

Respondents are wrong. Under this Court's Article III jurisprudence and ERISA's unambiguous text, petitioners are the precise parties to enforce ERISA's protections. Well-established trust law shows that participants have a concrete interest in the proper management of all plan assets and suffer real harm when a fiduciary breaches his duties. And for centuries, trust law has allowed beneficiaries to sue without showing personal financial loss. A trust beneficiary may sue to restore losses to the trust's property caused by a breach of trust, whether or not the losses reduced her benefits. And under the "no further inquiry" rule, a beneficiary may sue for a breach of loyalty not only when she has not suffered financial harm but even when the trust corpus was not affected. The breach itself is injury enough to permit suit. Similarly, beneficiaries can seek to remove breaching fiduciaries who no longer deserve their position of trust, regardless of the economic effect on the beneficiary.

This Court has affirmed those same trust-law principles. For instance, as the Court has framed the "no further inquiry" rule, a beneficiary may sue a disloyal fiduciary even where the trustee secured "'better'" terms than "'any other person'" could have (*United States* v. *Carter*, 217 U.S. 286, 307 (1910)), "the estate was not a loser" (*Magruder* v. *Drury*, 235 U.S. 106, 120 (1914)), or the estate "may not have been injured" by the transaction (*Jackson* v. *Smith*, 254 U.S. 586, 588-589 (1921)). It therefore cannot be that individual economic harm is a prerequisite to petitioners' claims when, for centuries, a fiduciary breach alone could open the courthouse doors. Likewise, "ample" authorities justify removing a trustee for "neglect of duty and mismanagement of the trust property." *Cavender* v. *Cavender*, 114 U.S. 464, 472 (1885).

At bottom, respondents' position flies in the face of this long tradition of allowing lawsuits like petitioners'. It would give fiduciaries carte blanche to treat plan assets as their personal piggybank, as long as they leave enough to keep paying benefits. And it finds no support in the case-or-controversy requirement. The decision below, accepting respondents' view, was error and should be reversed.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (Pet. App. 53a-54a) is unreported. The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 873 F.3d 617. The district court's order (Pet. App. 28a-50a) is unreported but available at 2015 WL 11217175.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2017. The court of appeals denied a petition for panel rehearing and rehearing en banc on February 22, 2018. Pet. App. 53a-54a. On May 3, 2018, Justice Gorsuch extended the time to file a petition for certiorari to and including June 22, 2018. The petition was filed on June 22, 2018, and granted on June 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and the United States Constitution are reproduced in an appendix to this brief.

STATEMENT

A. Legal Background

1. *ERISA.* ERISA is a landmark federal statute enacted "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries * * * and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C.

1001(b); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004).

ERISA accomplishes this goal by carefully circumscribing plan administration and enforcement. While ERISA does not require an employer to offer a pension plan, if the employer does so, then ERISA mandates that "all assets" of the pension plan "be held in trust by one or more trustees." 29 U.S.C. 1103(a). With limited exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants" and paying plan expenses. 29 U.S.C. 1103(c)(1). Participants are therefore the beneficiaries of the trust created to hold plan assets.

Under ERISA, plan fiduciaries owe participants a duty of loyalty, under which they must act "solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of" providing benefits and defraying administrative expenses. 29 U.S.C. 1104(a)(1). Fiduciaries are also expressly prohibited from engaging in certain self-dealing transactions absent qualification for an enumerated exemption. 29 U.S.C. 1106. For instance, a fiduciary may not "receive any consideration for his own personal account" in connection with a plan transaction. 29 U.S.C. 1106(b)(3). And a fiduciary generally may not allow plan assets to be "use[d] by or for the benefit of a party in interest." 29 U.S.C. 1106(a)(1)(D).

ERISA also imposes a duty of prudence, under which fiduciaries must act "with the care, skill, prudence, and diligence" of "a prudent man" under the circumstances. 29 U.S.C. 1104(a)(1)(B). Section 1104 also 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). The duty of prudence includes the continuing obligation "to properly monitor investments and remove imprudent ones." *Tibble* v. *Edison Int'l*, 135 S. Ct. 1823, 1829 (2015).

Congress derived those fiduciary duties from the common law of trusts. See *id.* at 1828; *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transport, Inc.*, 472 U.S. 559, 570 (1985). And ERISA's reticulated scheme reflects Congress's judgment that it was important to expand on trust law to fully protect participants and beneficiaries. See *Varity*, 516 U.S. at 497.

To enforce these duties, ERISA relies heavily on private litigation. See, *e.g.*, *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-147 (1985) (explaining that "ERISA's interlocking, interrelated, and interdependent remedial scheme" was "crafted with" "evident care" (citation omitted)). Congress empowered participants to bring a wide variety of actions. For example, Section 1132(a)(2) authorizes participants to sue for the relief provided in Section 1109. 29 U.S.C. 1132(a)(2) (providing "[a] civil action" "for appropriate relief under section 1109"). In turn, Section 1109 provides that any fiduciary who breaches his duties is "personally liable" to restore to the plan "any losses to the plan resulting from each such breach" and "any profits" the fiduciary made. 29 U.S.C. 1109(a). It also broadly authorizes equitable and remedial relief, including removal of a fiduciary. *Ibid.* And ERISA further permits participants to seek injunctive and equitable relief to redress fiduciary misconduct. 29 U.S.C. 1132(a)(3) (authorizing lawsuits "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief").

As the Department of Labor has explained across administrations, this private right of action is crucial to fulfilling ERISA's goals: "The Secretary depends on participant suits to enforce ERISA, because she lacks the resources to do so singlehandedly, and plan fiduciaries are commonly defendants in such cases." Amicus Br. of Sec'y of Labor at 12, *David* v. *Alphin*, No. 11-2181 (4th Cir. Dec. 28, 2011); see also, *e.g.*, Amicus Br. of Sec'y of Labor at 1-2, *Thole* v. *U.S. Bank*, No. 16-1928 (8th Cir. May 2, 2017).

As detailed below, these enforcement mechanisms largely adopt the causes of action available to trust beneficiaries at common law, where it has long been established that a beneficiary could sue a breaching fiduciary to restore to the trust any loss caused by the breach, remove the trustee, and set aside unlawful transactions. *Infra* Part B; see, *e.g.*, Restatement (Second) of Trusts §§ 199, 205 (1959); Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott & Ascher on Trusts* §§ 24.3.5, 24.9 (5th ed. 2007).

2. *Article III.* The thrust of this case involves petitioners' Article III standing to assert claims under 29 U.S.C. 1132(a)(2) and (a)(3). Article III limits "[t]he judicial Power of the United States" to "Cases" and "Controversies." U.S. Const. Art. III. "'The purpose of the case-or-controversy requirement is to limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Sprint Comms. Co., L.P.* v. *APCC Servs.*, 554 U.S. 269, 274 (2008) (citation omitted) (emphasis removed). To ensure courts stay within that limit, this Court has "established that 'the irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted).

a. The questions presented here primarily concern "injury in fact, the 'first and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (citation and brackets omitted). An injury in fact is the "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citation omitted).

This personal stake distinguishes the plaintiff from the general public and demonstrates the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); see *Massachusetts* v. *EPA*, 549 U.S. 497, 517 (2007) ("[T]he gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness.") (internal quotation marks omitted).

Often, a plaintiff will satisfy the injury-in-fact requirement with a straightforward, tangible economic or physical injury. But in many cases, the Court has also found that various intangible injuries supply the concrete personal stake needed to confer standing. *E.g.*, *Spokeo*, 136 S. Ct. at 1549 ("[M]any of our previous cases [confirm] that intangible injuries can nevertheless be concrete."); *Sprint*, 554 U.S. at 288 (bare legal title); *Sprint*, 554 U.S. at 304 n.2 (Roberts, C.J., dissenting) ("Trustees * * * have an independent fiduciary obligation to sue to preserve [plan] assets. The trustee's discharge of its legal obligation is an independent, personal benefit that supports the trustee's standing to sue in federal court.").

The Court has also recognized that, in many circumstances, Article III countenances suits to vindicate harm suffered by another party. See, *e.g.*, *Sprint*, 554 U.S. at 287-288 ("[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth."). This is known as representational standing. See also *Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 773-774 (2000) (Article III permits representational suits by *qui tam* relators on behalf of the United States).

This case brings those lines of authority together. Suits under 29 U.S.C. 1132(a)(2) are by their nature representational: A participant sues "in a representative capacity on behalf of the plan as a whole" to restore monetary losses to the plan. *Russell*, 473 U.S. at 142 n.9. Likewise, removal of the fiduciaries and setting aside statutorily prohibited transactions necessarily affect the plan as a whole. At the same time, as explained below, participants still retain a personal, intangible stake in this type of case that makes them the appropriate parties to sue: the breach of fiduciary duty owed to them that affects their "interest * * * in the financial integrity of the plan." *Ibid.*

b. Although the Court has never definitively announced a standard governing the inquiry in cases like this one, several key principles have emerged.

First, even in a representational-standing suit, the plaintiff must show some personal interest that distinguishes himself from the general public and shows why the case poses the requisite adversity, even if the personal-interest requirement might be less demanding than in non-representational-standing cases. The Court has agreed that a wide variety of interests—monetary and non-monetary alike—suffice to demonstrate that necessary stake. See *Sprint*, 554 U.S. at 288 (majority op.) (bare legal title); *id.* at 304 n.2 (Roberts, C.J., dissenting) (trustee's "discharge of its legal obligation"); *Vt. Agency*, 529 U.S. at 772-773 (*qui tam* relator's monetary stake in recovery).

Second, to determine whether the plaintiff satisfies Article III's requirements, "both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549; see *Sprint*, 554 U.S. at 274 ("history and tradition offer a meaningful guide"); *Vt. Agency*, 529 U.S. at 774 ("history is particularly relevant to the constitutional standing inquiry"). Because standing doctrine is ultimately "grounded in historical practice," the Court "consider[s] whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549; see *Vt. Agency*, 529 U.S. at 774 ("Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by the judicial process.'") (citation omitted). Accordingly, a strong historical tradition of allowing suit signifies that the injury is sufficiently particularized and concrete.

In addition, Congress "is well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*, 136 S. Ct. at 1549. It thus "may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Ibid.* (internal quotation marks and brackets omitted). And it may "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Ibid.* (citation omitted). Of course, Congress may not license suits that fall outside the bounds of Article III.

But where Congress's decision to authorize a given suit is buttressed by common-law tradition, courts can be sure that Congress has not exceeded Article III's strictures.

B. Facts And Procedural History

1. Respondent U.S. Bank is among the largest banks in the country. It employs over 70,000 people and offers a pension plan for them. Respondents are sponsors and fiduciaries of that plan, and petitioners are participants in it. Pet. App. 4a-5a. The plan is a "defined benefit" pension plan, meaning it pays participants an amount of benefits set by the plan document. As of 2007, the plan had $2.8 billion in assets. J.A. 78-79. But that was soon to change.

By 2007, respondents had invested the *entirety* of the plan's assets in equities, a more volatile asset class than alternative investments. Pet. App. 7a-8a; see J.A. 42, 68-71, 111. Over 40% of those investments (approximately $1.2 billion) were in mutual funds of U.S. Bank's wholly-owned subsidiary, FAF Advisors. Pet. App. 7a, 9a; J.A. 78-79.

Respondents' all-equities strategy flouted basic investment-diversification guidelines, including the Securities and Exchange Commission's "Beginners' Guide" to asset allocation, and defied warnings from the plan's own investment consultants. See U.S. SEC, *Beginners' Guide to Asset Allocation, Diversification, and Rebalancing* (Aug. 28, 2009), available at https://www.sec.gov/reportspubs/investor-publications/investorpubsassetallocationhtm.html ("By including asset categories with investment returns that move up and down under different market conditions within a portfolio, an investor can protect against significant losses."); Exh. B to Decl. of Michelle C. Yau In Support Of Plaintiffs' Opposition to Defendants' Motion To Dismiss, D. Ct. Doc. No. 223 (D. Minn. Oct. 5, 2015) (excerpt from inculpatory presentation by respondents' investment consultants, filed under seal); J.A. 70 (alleging that U.S. Bank's 2007 annual report disclosed that a typical pension-plan investment allocation comprises only 62% equities).

Although equities provide potential for higher upside than lower-risk investments like bonds, they also expose the plan to the potential for greater losses. Pet. App. 7a-8a. Moreover, diversifying investments is important to reduce risk and uncertainty because different asset classes generally do not increase or decrease in value at the same time. *E.g.*, J.A. 70. Indeed, diversification is so fundamental an investment concept and so critical to protecting plan assets that Congress explicitly included it as part of a fiduciary's duties. 29 U.S.C. 1104(a)(1)(C).

Despite the obvious inadequacy of respondents' investment choices, respondents favored the 100% equities strategy because it advanced their own interests. Respondents sought to exploit pension accounting rules to artificially inflate U.S. Bank's reported income. Pet. App. 8a; J.A. 71-75. Those rules allow companies to calculate income based on the assumed rate of return on plan assets—and the higher upside of a 100% equities strategy could permit a rosier income assumption. *Ibid.* In turn, the higher reported income led to higher stock prices and enabled individual directors to exercise stock options at a higher price. Pet. App. 8a; J.A. 73-78.[1]

Respondents' investment of plan assets in the FAF mutual funds likewise aimed to benefit themselves rather than plan participants. U.S. Bank received management

[1] See J.A. 73-74 (discussing Daniel Bergstresser, Mihir Desai, and Joshua Rauh, *Earnings Manipulation, Pension Assumptions and Managerial Investment Decisions* (2005); Julia Lynn Coronado & Steven A. Sharpe, *Did Pension Plan Accounting Contribute to a Stock Market Bubble?* (Federal Reserve Board of Governors, FEDS Working Paper No. 2003-38, 2003)).

fees via the FAF investments. Pet. App. 9a. And by increasing FAF's total assets under management, FAF was able to attract more investors and earn greater fees. Pet. App. 9a; J.A. 80-81. Yet investing in FAF funds cost the plan higher fees than similar alternative funds would have. Pet. App. 9a.

When equity markets crashed in 2008, respondents' fiduciary breaches spawned predictable consequences. The plan lost $1.1 billion dollars—$748 million more than an adequately diversified plan would have. Pet. App. 8a; J.A. 90-91. That loss left the plan reeling: virtually overnight, the plan went from significantly "overfunded" to 84% "underfunded." Pet. App. 8a.[2]

Even then, respondents maintained the all-equities strategy and investments in FAF's mutual funds. They did so because of the benefits they derived from that approach. Tellingly, respondents finally altered their all-equities strategy only after U.S. Bank sold FAF in December 2010. J.A. 82. From 2007 through 2010, however, respondents failed to re-adjust the plan's asset allocation.

2. a. Petitioners sued respondents under 29 U.S.C. 1132(a)(2) and 1132(a)(3), seeking restoration to the plan of its losses; disgorgement of profits and fees; removal of the fiduciaries and appointment of an independent fiduciary; and an injunction to stop the misconduct (*i.e.*, to divest the conflicted FAF investments).

[2] The metric respondents cited in the district court does not establish that the plan is "overfunded" or has a surplus. Rather, 29 U.S.C. 1083 controls whether an employer must make minimum contributions for a particular plan year. The PBGC has consistently explained that "the concept of a surplus in plan assets is an actuarial construct relevant only in the event of [a plan] termination." Amicus Br. of PBGC, *David* v. *Alphin*, No. 11-2181 (4th Cir. Feb. 28, 2013).

To justify that relief, petitioners alleged multiple violations of ERISA's fiduciary standards. First, respondents violated their duty of loyalty by maintaining the 100% equities strategy and investing in FAF mutual funds because those acts benefited respondents at the expense of petitioners and the plan. Second, those same actions (and inactions) violated respondents' duty of prudence and duty to diversify plan investments. The equities strategy plainly flunked the prudent-man and diversification standards of Section 1104(a)(1)(B) and (C), and respondents had no good reason to invest in the costlier FAF funds when cheaper, comparable alternatives were available. Moreover, respondents failed to properly monitor and revise the plan's investments.

b. When the lawsuit was commenced, the plan did not meet ERISA's minimum funding standards for defined-benefit plans (see 29 U.S.C. 1083), and the district court initially rejected respondents' standing challenge. Pet. App. 34a. But respondents subsequently contributed hundreds of millions to the plan, putting the plan over the funding minimum. See C.A. Def. App. 189 ¶ 8. The district court concluded that this new development robbed the case of any Article III case or controversy (Pet. App. 40a-46a)—even though the subsequent contributions totaled hundreds of millions less than the overall losses and respondents remained free to resume their improper actions going forward. In fact, respondents are still violating ERISA's prohibited-transaction rules by investing in an affiliated mutual fund.[3]

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[3] See, *e.g.*, U.S. Bancorp 2014 Form 5500 for the U.S. Bank Pension Plan, Schedule H, Line 4i (Financial Statements and Supplemental Schedules p.19) (filed Oct. 9, 2014), available at https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e3s1 (noting continued investment in affiliated First American

c. A partially divided Eighth Circuit panel affirmed. First, the court addressed the monetary-relief claim under Section 1132(a)(2). On that issue, the panel was bound by two Eighth Circuit decisions holding that participants lack a cause of action under the *statute* unless they have suffered an individual financial loss. Pet. App. 13a-18a; see *Harley* v. *Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002); *McCullough* v. *AEGON USA Inc.*, 585 F.3d 1082 (8th Cir. 2009). Following those precedents, the court wrote that a contrary construction would raise Article III concerns, as it thought that a participant in an overfunded defined-benefit plan suffered no actual injury. Pet. App. 15a. The court also worried about policy implications of "subjecting the Plan and its fiduciaries to costly litigation." *Id.* at 16a. The court thus concluded that a participant who had suffered no financial loss does not "fall[] within the class of plaintiffs authorized under § 1132(a)." *Id.* at 18a. The panel struggled to identify which text supported its holding, instead "presum[ing]" "that the suit would not be one 'for appropriate relief' under the circumstances." *Id.* at 16a n.9.

Second, the panel split on the question of petitioners' standing to bring their Section 1132(a)(3) injunctive-relief claim. The majority held that petitioners lack standing to pursue *injunctive* relief under ERISA unless they have suffered individual *monetary* harm. In reaching this conclusion, the majority recognized that "[c]ases from other circuits have concluded that a plan participant may seek injunctive relief under § 1132(a)(3) against fiduciaries of an overfunded plan" without showing harm to their monetary interests in the plan. Pet. App. 19a (brackets omitted) (citing *Loren* v. *Blue Cross & Blue Shield of Mich.*,

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Funds fund). Although U.S. Bank sold FAF in 2010, U.S. Bank still manages the mutual fund. *Id.*

505 F.3d 598, 607-610 (6th Cir. 2007); *Horvath* v. *Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-456 (3d Cir. 2003)).

But the majority then concluded the Sixth Circuit had changed course after *Loren*, now requiring individual monetary harm even to seek injunctive remedies. Pet. App. 19a-20a (citing *Soehnlen* v. *Fleet Owners Ins. Fund*, 844 F.3d 576, 583 (6th Cir. 2016)). Believing it was picking one side of a circuit split, the majority concluded that petitioners must show that the "investment loss * * * cause[d] *actual injury* to plaintiffs' interests in the Plan"—*i.e.*, a diminution in their own pensions or the imminent risk thereof. *Id.* at 20a (citation omitted).

d. Judge Kelly dissented in part. She agreed that the panel was bound by *Harley* and *McCullough* on Section 1132(a)(2)'s interpretation. But regarding petitioners' Section 1132(a)(3) claim, she thought the majority was wrong to require individual monetary harm to seek injunctive relief. Given the "unambiguous statutory text" authorizing petitioners' suit, Judge Kelly wrote that petitioners "f[ell] within 'the zone of interests to be protected or regulated'" by Section 1132(a)(3). Pet. App. 25a-26a (Kelly, J., dissenting). Judge Kelly also explained that petitioners had "shown an actual or imminent injury" that could be redressed by an injunction under Section 1132(a)(3). *Id.* at 26a. "The relief sought is not monetary, but injunctive, and the injury alleged is not speculative. Moreover, the complaint alleges that at least some of the defendants continue to serve as Plan fiduciaries and remain positioned to resume their alleged ERISA violations." *Ibid.*

3. Petitioners timely sought rehearing en banc, which the Eighth Circuit denied over the votes of Judge Kelly and Judge Stras. Pet. App. 54a.

SUMMARY OF ARGUMENT

This case mainly turns on whether petitioners have suffered an Article III injury in fact that allows them to seek restoration of losses to the plan caused by respondents' breaches, removal of respondents as plan fiduciaries, and injunctive relief. Petitioners have suffered the necessary injury, and that conclusion rests on three prongs: their personal stake in the matter, the lengthy trust-law tradition of allowing comparable suits at common law, and Congress's unambiguous approval of petitioners' claims.

A. Petitioners have a real, personal interest in this case that arises from the *de facto* harm incurred by a breach of fiduciary duty—particularly one that depletes plan assets.

First, both ERISA and trust law mandate that respondents owe fiduciary duties of loyalty and prudence to petitioners. The fulfillment of these duties is neither academic nor merely procedural, and their breaches cause real harm. It should require little explanation to appreciate that participants have concrete interests in having plan assets managed by prudent and loyal fiduciaries—which is exactly why Congress imposed these duties and why equity courts developed them at common law. Participants thus suffer *de facto* harm when fiduciaries breach their duties in an effort to improve their own bottom line and end up causing hundreds of millions in losses. Indeed, nobody disputes that a trustee may sue to protect plan assets; when the trustee is the wrongdoer, nobody should dispute that the participants can sue instead.

Second, both ERISA and trust law also recognize that participants have an equitable ownership interest in the plan assets. They are thus not mere bystanders to misconduct that impairs those assets. When respondents' breaches devastated the plan, petitioners' equitable ownership interest suffered. That intangible harm readily supports standing.

Respondents' contrary view would eviscerate ERISA's protections for defined-benefit plan participants. According to respondents and the Eighth Circuit, no matter how egregious a fiduciary breach, if the plan has enough money afterwards to satisfy ERISA's minimum funding requirements (or the sponsor contributes enough money to return plan assets to that level), then the breach cannot be redressed. Fiduciaries would have license to use plan assets as they wish—so long as they do not use too many assets. But ERISA is explicit that *all* plan assets are held in trust, and *no* plan assets may inure to the employer's benefit. Respondents' hope that Article III somehow countermands those instructions is baseless.

B. The common law of trusts has long permitted suits just like petitioners' for each of their requested remedies and for claims regarding both the duty of loyalty and the duty of prudence.

It is well settled that a trust beneficiary could sue to restore to the trust corpus any losses that she could prove the fiduciary breach caused. Common-law authorities did not require individual financial loss to the beneficiary. Rather, what mattered was loss *to the trust*.

That understanding is underscored by cases involving trustees who had discretion whether to pay one beneficiary or others. If the trustee breached his duties, *any* beneficiary could sue—even though the trustee's discretion meant the suing beneficiary might not see a dime.

Moreover, it is also well settled that a beneficiary could sue as a representative of the trust to redress harm to the corpus when the trustee was the culpable party. And by their nature, such representational suits did not turn on the beneficiary's financial loss—that was the whole point of suing on the trust's behalf.

For claims to redress a breach of the duty of loyalty, the historical tradition supporting petitioners' standing is unassailable. Trust law developed a special rule—the "no further inquiry" rule—that held a trustee *per se liable* merely on proof that the trustee engaged in disloyal conduct. The beneficiary did not need to show any loss or the unfairness of the transaction; the disloyalty sufficed to permit suit. The beneficiary could then invoke the usual trust-law remedies: restoration of plan losses caused by the breach; recovery of the trustee's profits from the breach; and voiding the disloyal transaction. The funding status of the plan here is plainly irrelevant under that rule.

As to fiduciary removal and injunctive relief divesting the plan from the prohibited FAF investment, the history is similarly overwhelming. To protect the plan and the sanctity of the fiduciary relationship, removal was available for any breach of trust, regardless of financial loss. Neither trust law nor Article III requires a participant to endure the "services" of a plainly imprudent, disloyal fiduciary. And the foremost (and obvious) remedy for a disloyal plan purchase is to set aside the transaction, regardless of any inquiry into its fairness or effects.

C. ERISA's unambiguous authorization of petitioners' claims confirms that Congress considered these claims appropriate for judicial resolution and shows that petitioners satisfy so-called "statutory standing."

Section 1132(a)(2) empowers any "participant" to sue "for appropriate relief under section 1109," which explicitly covers relief for "any losses to the plan resulting from each such [fiduciary] breach" and "removal of such fiduciary." Just as clear, Section 1132(a)(3) empowers any "participant" to sue "to enjoin any" ERISA violation or "to obtain other appropriate equitable relief" to redress such violation. Petitioners are "participants," and they seek the exact remedies Sections 1132(a)(2) and (a)(3) provide. There are no other prerequisites to suit, nor are there any ambiguities in those words. Petitioners plainly come within the class of plaintiffs Congress authorized to sue. The Eighth Circuit's judgment should be reversed.

ARGUMENT

PETITIONERS HAVE DEMONSTRATED ARTICLE III STANDING TO SEEK RESTORATION OF PLAN LOSSES, FIDUCIARY REMOVAL, AND INJUNCTIVE RELIEF, ALL OF WHICH ARE REMEDIES THAT ERISA EXPRESSLY MAKES AVAILABLE TO PARTICIPANTS

Under the Court's well-established Article III framework and the plain text of ERISA, petitioners are entitled to pursue several remedies for respondents' breaches of their fiduciary duties. Those remedies include restoration to the plan of the hundreds of millions in losses caused by respondents' breaches, removal of respondents as fiduciaries, and an injunction ordering divestiture of the statutorily prohibited investment in the FAF fund.

Petitioners' claims are explicitly authorized by 29 U.S.C. 1132(a)(2) and (a)(3), and petitioners' Article III standing rests on firm ground: petitioners have suffered a personal, *de facto* wrong from the breaches and the harm to plan assets in which they have an interest; for centuries common law permitted these kinds of suits; and Congress plainly identified petitioners' injuries as meeting Article III's requirements. Reversal is warranted.

A. Petitioners Have A Concrete Stake In Redressing Fiduciary Breaches Through Restoration Of Losses, Fiduciary Removal, And Injunctive Relief

Petitioners' standing is first evident from the real harm that an ERISA participant suffers as a result of fiduciary breaches that impair plan assets. See, *e.g.*, *Spokeo*, 136 S. Ct. at 1548-1549; *Sprint*, 554 U.S. at 285-286; *id.* at 299, 304 n.2 (Roberts, C.J., dissenting). This concrete personal stake derives from two factors that reinforce each other: when a fiduciary breaches his duties, the breach (1) invades the participant's legally protected interest in having that fiduciary obligation fulfilled and (2) injures trust property in which the participant has a long-recognized equitable ownership interest.

Both factors are well-rooted in ERISA and the common law of trusts, and they reveal the "'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Sprint*, 554 U.S. at 288 (citation omitted). Along with the lengthy history of allowing such suits (*infra* Part B), and Congress's judgment that the invasion of these interests is remediable in federal court (*infra* Part C), these factors confirm the Eighth Circuit's error.

1. Participants have a common-sense, real-world interest in having fiduciary duties fulfilled. ERISA provides that fiduciaries must discharge their duties "in the interest of the participants." 29 U.S.C. 1104(a)(1); see, *e.g.*, *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (noting "fiduciary duty to the beneficiaries"). That is no "bare procedural" requirement; it provides participants meaningful *substantive* rights, the violation of which causes *de facto* harm. *Spokeo*, 136 S. Ct. at 1549 (distinguishing between "bare procedural" rights, whose violation does not alone establish injury, and substantive rights, whose violation does).

The facts of this case put that point in sharp relief. It takes little imagination to recognize that a participant is vitally concerned with hundreds of millions of dollars in losses that resulted from self-dealing and incompetent investment decisions.

The extent and importance of those interests are underscored by the common law of trusts, which "define[s] the general scope of [fiduciaries'] authority and responsibility" under ERISA. *Cent. States*, 472 U.S. at 570. Under the common law, it is settled that fiduciaries owe various duties directly to the beneficiaries. Broadly speaking, "[a] breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries * * * of the trust." Restatement (Third) of Trusts § 93 (2003). For example, "'[t]he most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty.'" *Pegram* v. *Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, *Trusts* § 170, p. 311 (4th ed. 1987)). And "[t]he trustee is under a duty to the beneficiary to exercise prudence in diversifying the investments so as to minimize the risk of large losses." Restatement (Second) of Trusts § 228 cmt. a.

These duties exist to protect the trust beneficiary's substantive interests. A properly diversified trust corpus is substantively better for the beneficiary than a non-diversified one. Cf. John Norton Pomeroy, *Pomeroy's Equity Jurisprudence & Equitable Remedies* § 1074 (3d ed. 1905) (explaining that "principles of justice and expediency" forbid "trustees the same freedom of choice in investments which may be exercised by prudent business men in their own affairs"). So too is a loyally managed trust corpus—it is substantively preferable for the trustee not to pilfer assets for his own use. *Id.* § 1075; Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* §§ 321-322 (6th ed. 1853) (to protect beneficiaries, the duty of loyalty prevents trustees from taking any advantage of the trust relationship); George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts & Trustees* § 543 (2d. rev and 3d ed. 2019).

These requirements developed over the centuries not as free-floating procedural rights, devoid of independent meaning, but to vindicate the trust beneficiary's critical, real-world interests. See Austin W. Scott, *The Importance of the Trust*, 39 U. Colo. L. Rev. 177, 177 (1967) (discussing "practical" reasons for the "century to century" "invent[ion] [of] the trust").

Accordingly, when a fiduciary breaches his duty, that action violates substantive rights held directly by the participant. This is precisely the type of harm that "'sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Sprint*, 554 U.S. at 288 (citation omitted). The invasion of that legal interest thus provides standing. See *Scanlan* v. *Eisenberg*, 669 F.3d 838, 846 (7th Cir. 2012) (finding Article III injury because "dereliction of their fiduciary duties is a direct invasion of Scanlan's protected interest in the prudent and loyal administration of the trust"); Restatement (Second) of Trusts § 200 ("No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin redress for a breach of trust.").

Indeed, this scenario is the flip side of allowing a trustee to sue—which all members of the Court in *Sprint* recognized would invoke an Article III case or controversy. As Chief Justice Roberts noted in dissent (and the majority did not dispute), a trustee "hold[s] legal title to the assets in the trust estate and ha[s] an independent fiduciary obligation to sue to preserve those assets." 554 U.S. at 304 n.2 (Roberts, C.J., dissenting); see *id.* at 287-288 (majority op.). The trustee's "discharge of its legal obligation is an independent, personal benefit that supports the trustee's standing to sue in federal court." *Sprint*, 554 U.S. at 304 n.2 (Roberts, C.J., dissenting).

That same rationale supports participant standing. Whereas the trustee holds legal title to trust assets, the beneficiary is their equitable owner. See *infra* at 23-25. So when the trustee breaches his duty, the obligee-participant derives the very same "independent, personal benefit" from suing to redress that breach. And that is true whether the participant is seen as vindicating her own interest or suing as the trust's representative. In fact, under trust law, a beneficiary is the only person who *can* sue the trustee to redress a breach. Restatement (Second) of Trusts § 200. This is likely why the Court has long recognized that "a trustee is suable in equity in regard to any matters touching the trust." *Clews* v. *Jamieson*, 182 U.S. 461, 481 (1901).

2. a. Bolstering that personal stake from the fiduciary breach is petitioners' interest in "preserv[ing] th[e] [plan] assets." *Sprint*, 554 U.S. at 304 n.2 (Roberts, C.J., dissenting). Again, both ERISA and the common law of trusts show that the harm to this interest is concrete.

All plan assets are "held in trust" for the exclusive benefit of participants. 29 U.S.C. 1103(a); see 29 U.S.C. 1103(c)(1); see also, *e.g.*, Restatement (Third) of Trusts § 2 ("trust property" "is held by the trustee for the beneficiaries").[4]

Beneficiaries hold a real interest in the trust corpus or res (here, the plan assets). *E.g.*, Restatement (Second) of Trusts § 74 cmt. a ("[t]he beneficiary of a trust has an equitable interest in the subject matter of the trust"); 76 Am.

[4] Both "participants" and "beneficiaries" under ERISA are analogous to trust beneficiaries under the common law.

Jur. 2d Trusts § 259 (2019) ("[T]he creation of a trust divides title to the trust property, placing legal title in the trustee and equitable title in the beneficiary."). This Court has recognized that a trust beneficiary is "the owner of an equitable interest in the corpus of the property" held in trust. *Blair* v. *Comm'r of Internal Revenue*, 300 U.S. 5, 13 (1937); see, *e.g.*, *Senior* v. *Braden*, 295 U.S. 422, 433 (1935) (beneficiary has "more than a bare right and much more than a chose in action"). That interest entitles the beneficiary "to have a breach of trust enjoined and to obtain redress in case of breach." *Blair*, 300 U.S. at 13; see *Scanlan*, 669 F.3d at 843.

Authoritative commentators confirm that beneficiaries hold "a proprietary interest" in the trust property. Austin W. Scott, *The Importance of the Trust*, 39 U. Colo. L. Rev. 177, 179 (1967) ("[T]he beneficiaries of a trust have a proprietary interest in the subject matter of the trust and not merely a personal claim against the trustee. Although the trustee has the legal title, the beneficiaries are the equitable owners."); see also, *e.g.*, Helene S. Shapo, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 183, at 512 (3d ed. 2012) (explaining that the beneficiary's right "is now substantially equivalent to equitable ownership of the trust res" (citing, inter alia, *Blair*, 300 U.S. 5); Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott & Ascher on Trusts* § 13.1 (5th ed. 2007) (arguing that "the trust beneficiary ha[s] a proprietary interest in the subject matter of the trust" and noting that recognition of the beneficiary's proprietary interest dates back to the year 1471).

This interest—whether viewed as "proprietary" or "equitable ownership"—readily supports petitioners' standing. Respondents' failure to fulfill their duties to petitioners impaired the value of property in which petitioners have an interest. Petitioners' personal stake is plain.

b. Nothing in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999), detracts from this analysis. That case addressed challenges to a defined-benefit plan's amendments that established an advantageous early retirement for certain employees and restricted new participants' contributions. *Id.* at 436. The plaintiffs brought multiple ERISA claims, including for breach of fiduciary duty and for violation of ERISA's vested-benefits provision (29 U.S.C. 1053(a)) and anti-inurement restriction (29 U.S.C. 1103(c)(1)). 525 U.S. at 436. During the relevant period, the plan had a "surplus" because its "assets exceeded the actuarial or present value of accrued benefits." *Ibid.* The gravamen of the plaintiffs' claims was that this surplus should have been paid to them out of the trust.

In rejecting that argument, the Court stated that defined-benefit plan participants "have no interest in the Plan's surplus." *Id.* at 439. But that statement did not address the type of interest that underpins Article III standing. Rather, the Court was considering the merits of the plaintiffs' vested-benefits and anti-inurement claims under 29 U.S.C. 1053(a) and 1103(c)(1). 525 U.S. at 438-439. The lack of "interest" in the surplus mattered only to the conclusion that "no plan member has a claim to any particular [plan] asset" or the "entitlement to share in a plan's surplus." *Id.* at 439-440. The Court thus held that the plaintiffs had no viable *legal claim* to the money.

That conclusion does not implicate the injury-in-fact question here. Indeed, it should be self-evident that the Court did not—in a sentence—intend to discard centuries of trust law holding that beneficiaries have an *equitable* ownership interest in trust property.

Put differently, simply because a participant cannot put a dollar of surplus in her pocket does not mean that she lacks an Article III "legally protected interest" in the plan assets. Those assets are explicitly held in trust for her benefit, and she is their equitable owner. See *supra* at 23-25; cf. Bogert, Bogert & Hess (rev. 2019), *supra*, § 181 ("Beneficiaries are generally tenants in common in that they have undivided equitable interests in the entire trust property; no one beneficiary owning any particular portion of the property to the exclusion of the others."). *Hughes*'s holding thus has no bearing on whether defined-benefit plan participants suffer an Article III injury from a fiduciary breach that depletes plan assets.

Unsurprisingly, then, the Court entertained the participants' claims on their merits. The vested-benefits claim failed because ERISA does not require that surplus be paid to participants; the anti-inurement claim failed because the plan actually used assets exclusively to pay benefits; and the fiduciary-breach claims failed because the employer simply was not acting as a fiduciary. *Hughes*, 525 U.S. at 441-446. Petitioners are likewise entitled to an assessment of their claims on the merits.[5]

3. The consequences of the Eighth Circuit's and respondents' contrary view are startling. According to that view, as long as the plan sponsor can pump enough money into the plan to keep it "overfunded," no defined-benefit plan fiduciary can be sued. Respondents could pilfer plan assets at will. They could take plan assets and gamble

[5] A simple hypothetical reinforces this point. Consider a fiduciary who moved all assets from the trust to some other vehicle, but remained able to make benefit payments. No one would argue that the participant lacks standing to have the money returned to the trust just because she has a legal right only to payment of some certain amount, rather than a legal right to the specific plan assets that backstop that payment.

them all, hoping they will never have to make another contribution. Still, under respondents' approach, no participant could sue as long as they left enough in the plan (or subsequently contributed enough) to cover the expected pension payments.

That position would render 29 U.S.C. 1103's trust requirement a dead letter for defined-benefit plans. If a participant lacks the ability to protect trust assets except insofar as fiduciary breach imminently threatens a benefit payment, then the participant has nothing more than a basic contract claim. But it is well settled that a trust differs "from a contract creating a mere personal obligation * * * . The beneficiary of a trust has an equitable interest in the subject matter of the trust." Restatement (Second) of Trusts § 74 cmt. a (1959); see *id.* § 197 cmt. b ("The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.").

Respondents' contention also would eviscerate ERISA's anti-inurement rule for defined-benefit plans. That provision mandates that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1). That is, *none* of a plan's assets may inure to the employer's benefit. There is no exception for "overfunded" plans or plan "surplus." Yet that is the unavoidable result of respondents' view—if the sponsor's liquid assets are large enough to cover the plan's obligations, defined-benefit plan participants lack standing to complain. See Resp. Supp. Br. 7, 9. And it would be particularly troublesome given that defined-benefit plans were the dominant form of plan at ERISA's passage. *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). It is thus little wonder that the Court in *Hughes* addressed the anti-inurement claim there on its merits.

At bottom, respondents' theory distorts Article III beyond all recognition and lacks any basis in modern Article III standing or the common law of trusts. Cf. *Scanlan*, 669 F.3d at 847 (a requirement to show an impact on distributions "would insulate trustees from" lawsuits, allowing a trustee to "mismanage a trust with impunity, * * * so long as there were enough assets left in the corpus to fund a future distribution"). Participants have obvious interests in protecting plan assets from fiduciary breach, interests that separate them from the general public and focus the controversy in a real way. Their injury far exceeds the "identifiable trifle" necessary to support standing. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); see *Scanlan*, 669 F.3d at 846 ("Scanlan has a 'required stake' in her suit; she has a legally protected interest in Trusts' corpus and in the proper administration of that corpus.").

4. To be clear, petitioners' personal stake extends to each remedy they seek. The loss restoration will return assets in which they hold an equitable ownership interest; removing the fiduciaries means the plan's assets will no longer be controlled by disloyal and imprudent managers; and the injunction ordering divestiture of the affiliated fund means plan assets are not being used to pay extra fees to benefit respondents' bottom line. These all correspond to *de facto* injuries that provide the necessary adversity to establish a case and controversy.

B. The Common Law Of Trusts Has Long Permitted Beneficiaries To Sue For Restoration Of Losses, Fiduciary Removal, and Injunctive Relief Absent Individualized Monetary Loss

The deep-rooted pedigree of suits like petitioners' confirms that they have standing either in conjunction with, or independent of, the "invasion of [the] legally protected interest" described in Part A. *Spokeo*, 136 S. Ct. at 1548 (citation omitted); see *supra* at 9; *Spokeo*, 136 S. Ct. at 1549 (in evaluating the sufficiency of intangible injuries, the Court considers whether the asserted "harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts").

Here, history supplies a clear answer. Trust law has long permitted a beneficiary to bring claims like petitioners' even where the beneficiary has not suffered individualized financial loss or the imminent risk thereof. The overwhelming authorities supporting that history are "'well nigh conclusive' in respect to the issue before" the Court. *Sprint*, 554 U.S. at 285 (majority op.) (citation omitted). For breaches of both the duty of loyalty and the duty of prudence, petitioners' claims are of the sort traditionally heard by the judiciary.

1. *Restoration of Losses.* The common law allowed trust beneficiaries to seek restoration of losses to the trust corpus when the trustee breached his duties of loyalty and prudence, and the law did not require a beneficiary to suffer a personal monetary loss.

a. Petitioners plausibly allege multiple fiduciary breaches. First, all of respondents' actions violated their duties of loyalty. Respondents maintained the all-equities strategy because it increased U.S. Bank's operating income, and respondents invested in FAF's mutual funds to earn FAF greater fees, which in turn benefited U.S. Bank as FAF's corporate parent. *Supra* at 11-12.

These allegations state classic breaches of the duty of loyalty. "Perhaps the most fundamental duty of a trustee is the trustee's duty of loyalty to the beneficiaries"—"[t]he trustee must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons." Bogert, Bogert & Hess (rev.

2019), *supra*, § 543; see *id.* § 543(G), (T). A trustee breaches this duty if he "acts in connection with trust property both on behalf of the trust and for the trustee's personal interests." *Ibid.*; see, *e.g.*, Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott & Ascher on Trusts* § 17.2.3, at 1109 (5th ed. 2007) ("[A] trustee must ordinarily not be guided, in administering the trust, by the interest of anyone other than the beneficiaries, or by objectives other than the trust purposes."); *id.* at 1107 ("A trustee may commit a breach of trust * * * by using trust property for the trustee's own benefit."); Restatement (First) of Trusts § 170(i) (1935) ("A corporate trustee cannot properly purchase for the trust property owned by an affiliated or subsidiary corporation in which it has the entire interest or a controlling interest * * * ."). Respondents' actions in furtherance of their own interests and those of affiliated parties plainly breached their duty of loyalty.

Second, petitioners also state paradigmatic claims for breach of respondents' duties to prudently manage plan assets and to diversify and monitor plan investments. As discussed, the 100% equities strategy violated the most elementary investment principles. See *supra* at 10-11; 29 U.S.C. 1104(a)(1)(B), (C); *Tibble*, 135 S. Ct. at 1828-1829; see also, *e.g.*, Restatement (Second) of Trusts § 228 (1959); *Erlich* v. *First Nat'l Bank of Princeton*, 505 A.2d 220, 236 (N.J. Super. 1984) (noting "the soundness of the principle of diversification as the best protection against loss") (citations omitted).

b. The common law of trusts shows that petitioners have Article III standing to sue to force a fiduciary "to make good to such plan any losses to the plan resulting from" the breaches of those duties. 29 U.S.C. 1109(a); see 29 U.S.C. 1132(a)(2).

For any breach of trust, it has long been settled that the beneficiary may "charge the trustee with any loss that resulted from the breach." Austin Wakeman Scott & William Franklin Fratcher, *Law of Trusts* § 205 (4th ed. 1989); see, *e.g.*, *ibid.* ("[I]f a breach of trust results in a loss to the trust estate, the trustee is chargeable with the amount of the loss."); Restatement (Second) of Trusts § 205 ("If the trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust * * * ."); *id.* cmt. c.

That rule covers all breaches of fiduciary duties, including those regarding loyalty, prudence, and investment. *E.g.*, Bogert, Bogert & Hess (rev. 2019), *supra*, § 706 ("The trustee who performed this [investment] duty negligently should be required to pay the trust the amount necessary to place the trust account in the position in which it would have been, had the duty been performed with reasonable care and skill."); Restatement (Second) of Trusts § 206.

None of these authorities required financial loss to the beneficiary. That is why the focus is on the breach of trust itself and loss *to the trust corpus*. To be sure, the beneficiary could ultimately recover only those losses that she could prove resulted from the fiduciary's breach. See, *e.g.*, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 871 (2d. rev. 1995) ("Evidence which merely shows a decrease in the value of the trust property, *without showing that the trustee wrongfully caused the decrease*, does not make a case.") (emphasis added). But that is a merits requirement, and, in any event, the beneficiary need not show any *personal* financial loss. And petitioners' allegations that the plan lost hundreds of millions of dollars due to respondents' actions indisputably satisfy the causation requirement.[6]

Cases involving multiple beneficiaries highlight the fact that trust law historically has not required an imminent risk of financial loss to the suing beneficiary. Where a trust is structured so that the trustee has discretion whether to pay either one beneficiary or others, any beneficiary can sue for a breach of trust that injures the corpus. Restatement (Second) of Trusts § 214 cmt. a; Scott, Fratcher & Ascher, *supra*, § 24.19 ("A beneficiary can sue to prevent or redress a breach of trust even if the trustee has discretion over whether the beneficiary is to receive any part of the trust property."); *Moskowitz* v. *Federman*, 51 N.E.2d 48, 53 (Ohio Ct. App. 1948) ("a suit in equity can be maintained by any member of the class to redress or enjoin a breach, although the named trustee has the authority to determine which of the members of the class shall take"); *Johnson* v. *Superior Court in and for Maricopa Cty.*, 199 P.2d 827, 829 (Ariz. 1948) (a beneficiary can sue "however minute or remote" her interest); see also *Scanlan*, 669 F.3d at 844 ("The mere fact that a beneficiary may ultimately never receive trust assets does not

[6] Although some authorities speak in terms of a loss "to the beneficiary," that is because the beneficiary has an interest in the corpus. *Supra* at 23-25. What makes clear that the beneficiary need not suffer an individualized financial loss is that, as noted above, the sources uniformly describe the remedy as restoring funds *to the trust*, not to the beneficiary. *E.g.*, Bogert, Bogert & Hess (rev. 2019) *supra*, § 706 ("A trustee who does not meet these standards in the performance of investment duties is liable for losses caused to the income and/or remainder beneficiaries. * * * The trustee who performed this duty negligently should be required *to pay the trust* the amount necessary to place *the trust account* in the position in which it would have been had the duty been performed with reasonable care and skill.") (emphases added).

prevent that beneficiary from bringing a claim."). In such situations, the trustee's discretion foreclosed the possibility of imminent or material risk of financial harm to the suing beneficiary. Yet, contrary to respondents' position here, the absence of financial harm proved no obstacle to the beneficiary's lawsuit.[7]

That the beneficiary sues as representative of the trust likewise confirms the immateriality of her financial loss. Although "in the ordinary case" the trustee is the entity that vindicates the beneficiaries' interests, that mechanism obviously makes no sense when the trustee is the wrongdoer. George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts & Trustees* § 869 (2d. rev. 2017) ("If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties."); cf. Restatement (Second) of Trusts § 200 ("No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin redress for a breach of trust.").

Trust law accordingly empowers the beneficiary to "act[] as a temporary representative of the trust." Bogert, Bogert & Hess (rev. 2017), *supra*, § 869; see, *e.g.*, *Riviera*

[7] The telling exception is that a beneficiary could *not* sue if the breach of trust did "not involve any violation of duty to him." Restatement (Second) of Trusts § 214 cmt b. For example, if the trustee breached a duty "to pay income to a life beneficiary, the beneficiary entitled to the principal cannot maintain a suit for breach of trust." *Ibid.* (In ERISA terms, one participant could not sue under Section 1132(a)(1)(B) for a failure to pay benefits to a different participant.) But where, as here, the breach (1) is of a duty owed to the beneficiary and (2) reduces the trust corpus, the historical sources leave no doubt that the beneficiary can sue to restore the trust's loss.

Cong. Assocs. v. *Yassky*, 223 N.E.2d 876, 879-880 (N.Y. 1966); *Western R.R. Co.* v. *Nolan*, 48 N.Y. 513, 518 (N.Y. 1872). That action squares perfectly with Congress's instruction that an ERISA participant sues for relief that "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140; see 29 U.S.C. 1109(a). Naturally for a representative suit, the participant need not show any personal monetary loss—that is the whole point of suing as a representative of the entity that did suffer financial harm.[8]

Further confirmation that petitioners' injury in fact does not require individual financial loss comes from the undeniable availability of another remedy that redresses this same injury yet does not require such harm. To redress a breach of trust, a beneficiary also may sue to obtain "any profit made by [the trustee] through the breach." Restatement (Second) of Trusts § 205; see, *e.g.*, Scott & Fratcher, *supra*, § 205; *Jackson*, 254 U.S. at 588-589 (holding that a fiduciary is liable for profits from a disloyal transaction "although the estate may not have been injured thereby"). The trustee's profits, however, depend in no way on the beneficiary suffering any financial loss. Yet it is indisputable that the injury arising from the breach of trust allows the beneficiary to sue. If no financial harm is necessary to seek profits, then no financial harm is necessary to seek restoration of losses—because the injury supporting those remedies is the very same.[9]

In all events, regardless of whether the beneficiary's suit is viewed as executing the beneficiary's own cause of action or as derivatively enforcing the trust's injury, the

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[8] This is not to say that the participant has no interest in the claim. As noted *supra* Part A, she has a stark interest in vindicating a fiduciary breach that depletes plan assets. That interest surely suffices to support the participant's standing to sue on behalf of the plan.

[9] Indeed, petitioners also seek disgorgement of respondents' profits. J.A. 141.

upshot of the historical practice is clear. A beneficiary may sue to restore losses to plan assets held in trust for her benefit, even absent losses to her pension benefits or the risk thereof. Any resistance to this longstanding tradition grossly misreads the historical sources. Petitioners' claims for restoration of plan losses based on the breaches of their duties of prudence and loyalty therefore satisfy Article III.

c. This conclusion is even clearer regarding petitioners' breach-of-loyalty claims—which, again, cover *all* respondents' actions, see *supra* at 29-30—because the common law has long subjected such claims to a special "no further inquiry" rule. Under that rule, for "centuries" trust law has held a trustee "*per se liable* simply upon a beneficiary's showing that the trustee had a personal interest in the transaction." Melanie B. Leslie, *In Defense Of The No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 544-545 (2005) (emphasis added).

Accordingly, for a breach-of-loyalty suit to proceed, the beneficiary need not show any harm to herself or that the fiduciary profited from the self-interested transaction. All that matters is that the fiduciary engaged in a transaction involving his own interests. If the beneficiary makes that showing, she is entitled to pursue the usual remedies for a duty-of-loyalty claim: "any loss or depreciation in value of the trust property resulting from the breach of duty, or any profit made by [the trustee] through the breach of duty, or any profit which would have accrued to the trust estate if there had been no breach of duty." Restatement (Second) of Trusts § 206 cmt. a.

The authorities supporting that point are numerous and unwavering. See, *e.g.*, 3 Austin W. Scott et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2007) ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee * * * [or] whether the breach has caused any actual harm to either the trust or its beneficiaries."); Bogert, Bogert & Hess (rev. 2019), *supra*, § 543 ("[E]quity permits the beneficiary to strike down all disloyal acts, and does not attempt to separate the harmless and the harmful by permitting the trustee to justify the representation of two interests."); *ibid.* ("The beneficiary can void a self-dealing transaction regardless of gain or loss to the trustee or gain or loss to the trust or the beneficiaries.") (footnotes omitted); Restatement (Second) of Trusts § 170 cmt. b ("It is immaterial that the trustee acts in good faith in purchasing trust property for himself, and that he pays a fair consideration."); Restatement (Third) of Trusts § 78 cmt. b. (2007) ("In transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee."); Story, *supra*, § 322 (explaining that the beneficiary may seek relief without showing "that the trustee has made some advantage" or "showing essential injury," because "the prohibition [against self-dealing] arises from the subsisting relation of trusteeship"); John H. Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 931 (2005) (explaining that the "no further inquiry" rule applies where "the trust 'incurred no loss'" or "'actual benefit accrued to the trust' from a transaction with a conflicted trustee") (citation omitted).

This Court, too, has repeatedly approved the "no further inquiry" rule and recognized its pedigree. In *Magruder* v. *Drury*, for example, the Court refused to allow a fiduciary to take a profit even though "the estate was not a loser in the transaction" and "the commission was no more than the services were reasonably worth." 235 U.S. 106, 120 (1914). Rather, "[i]t is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself." *Ibid.* ("While no wrong was intended, and none was in fact done to the estate, we think nevertheless that upon the principles governing the duty of a trustee, the contention that this profit could not be taken by Mr. Drury, owing to his relation to the estate, should have been sustained."). Similarly, the Court has explained that the rule controls even if "'the terms on which a trustee has dealt or attempted to deal with the estate'" were "'better'" than those that "'could have been obtained from any other person.'" *Carter*, 217 U.S. at 307 (quoting *Aberdeen Ry. Co.* v. *Blaikie Bros.*, (1854) 2 L.R.Eq. 1281 (H.L.)). Even then, the Court made clear, "'still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.'" *Ibid.* Financial loss to the beneficiary is strictly irrelevant to the claim's fitness for judicial resolution.[10]

The justification for this rule is straightforward and consistent with ERISA's goals. It is a prophylactic measure to protect the trust and beneficiaries by deterring trustees from falling prey to any temptation of self-inter-

[10] See also, *e.g.*, *Mosser* v. *Darrow*, 341 U.S. 267, 271-273 (1951); *Jackson*, 254 U.S. at 588-589 (holding that a fiduciary is liable for profits from a transaction "in which his personal interests were, or might be, antagonistic to those of his trust," "although the estate may not have been injured thereby"); *Scanlan*, 669 F.3d at 845-847 (concluding under common-law trust principles that a beneficiary has Article III standing to sue a trustee for breach of fiduciary duty even without harm to her monetary interest in the trust).

est. The rule "provide[s] against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity." *Magruder*, 235 U.S. at 119; see also, *e.g.*, *Mosser*, 341 U.S. at 271 ("Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting."); Bogert, Bogert & Hess (rev. 2019), *supra*, § 543(V) (the rule "act[s] as a deterrent to the commission of similar acts by the trustee in question and by other trustees in the future"); *id.* § 543 ("[I]t will be difficult if not impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction."); Story, *supra*, § 322 (the rule protects against "hazard of abuse" and "remove[s] the trustee from temptation"). Those purposes are best served by allowing suits absent any financial loss to the beneficiary. Cf., *e.g.*, 29 U.S.C. 1001(a), (b) (noting "the inadequacy of current minimum standards" and seeking to provide "ready access to the Federal courts").

The upshot of this history is undeniable: when a trustee violates the duty of loyalty, the beneficiary has an absolute right to seek the full panoply of trust-law remedies. And she may do so regardless of whether she suffered any financial loss herself.

Applying that history here easily supports petitioners' standing. The plan's funding status is immaterial to petitioners' ability to sue for respondents' breaches of their duties of loyalty. The "inflexible" "no further inquiry" rule permits suit merely to redress the breach. *Carter*, 217 U.S. at 307. Combined with petitioners' personal stake in the case, *supra* Part A, this well-established tradition all but settles petitioners' standing to sue for the hundreds of millions in losses caused by respondents' fiduciary breaches. See *Sprint*, 554 U.S. at 274-275.

2. *__Fiduciary Removal__*. Petitioners also seek removal of the breaching fiduciaries and appointment of independent fiduciaries. There can be no dispute whatsoever that trust law authorized such relief even where the breach caused the suing beneficiary no individualized financial loss.

The authorities approving removal of a trustee for a breach of trust—whether loyalty or prudence—are legion. See, *e.g.*, Restatement (Second) of Trusts § 199(e) ("[t]he beneficiary of a trust can maintain a suit * * * to remove the trustee"); 76 Am. Jur. 2d Trusts § 231 ("A trustee may be judicially removed for neglect to perform his or her duties, a want of reasonable fidelity, or a breach of trust."); Bogert, Bogert & Hess (rev. 2019), *supra*, § 543(V) ("disloyalty is a common ground for the removal of a trustee"); Bogert & Bogert (2d rev. 1995), *supra*, § 861 ("if the trustee has committed a breach of trust, or threatens to do so, or is otherwise an unsafe administrator, the court may remove him"); Story, *supra*, § 1287 (equity courts "will remove the old trustees, and substitute new ones" if the trustees committed "any misapplication of trust property and any gross negligence or wilful departure from their duty in the management of it").

As the Court has explained, "the authorities are ample to justify the decree of removal" based on "neglect of duty and mismanagement of the trust property." *Cavender*, 114 U.S. at 472; see also, *e.g.*, *May* v. *May*, 167 U.S. 310, 320-321 (1897); *Kelsey* v. *Detroit Tr. Co.*, 251 N.W. 555, 556 (Mich. 1933) (explaining that at common law "a trustee could be removed and a new trustee substituted" when the trustee "dealt with the trust fund for his own personal profit and advancement," "committed a breach of trust," "neglected to use due care," "or showed a lack of fidelity to the interests of the trust") (citations omitted); *Davis* v. *Davis Tr. Co.*, 145 S.E. 588, 593 (W. Va. 1928) ("The ill-advised exchange of safe bonds for unsafe stock, and the subsequent indifference of the trustee to the perilous position of the trust fund, are ample grounds for the removal of the trustee.").

Again, no financial loss to the beneficiary is required. For instance, in one notable case, the trustees may have acted "honestly" in withdrawing money from the trust as an advance on an expected salary raise, and they even returned the money when the raise did not occur. *Moore* v. *Bowes*, 64 P.2d 423, 424 (Cal. 1937). Nonetheless, removal was proper because the trustees' "private interests conflict[ed] with their trust duties." *Ibid.*

Here, petitioners' allegations of respondents' disloyal and imprudent behavior fit hand-in-glove with those common-law authorities. Judge Kelly was thus on firm footing in writing that petitioners had standing to seek removal of the fiduciaries who breached their duties. Pet. App. 26a-27a (Kelly, J., dissenting).

3. *Injunctive relief.* It is also clear that petitioners can seek injunctive relief ordering respondents to undo the plan's investment in the affiliated FAF fund. It is "black letter" law that, for a violation of the duty of loyalty, "'the beneficiary may secure the aid of equity in avoiding the act * * * , regardless of the good faith of the trustee or the effect of the trustee's conduct on the beneficiary or benefit to the trustee.'" Restatement (Third) of Trusts § 78 cmt. b (quoting George T. Bogert, *Trusts* § 95 (Hornbook, 6th ed. 1987)); see, *e.g.*, *In re Lewis' Estate*, 37 A.2d 559, 561 (Pa. 1944) (explaining that, where a corporate trustee sells property "to itself as fiduciary," "the beneficiary can repudiate the investment").

The "no further inquiry" rule again corroborates that conclusion—the beneficiary need not demonstrate financial loss to redress a breach of loyalty by having the transaction set aside. Petitioners are entitled to ensure that plan assets are invested without the effects of divided loyalty, whatever those effects might be. Indeed, even where "the beneficiary affirms the purchase," he nonetheless "can compel the trustee to make an immediate sale of the property and to invest the proceeds in proper trust investments." Restatement (Second) of Trusts § 210 cmt. b.

That outcome is the only sensible one. Unless the unlawful investment is undone, the breach of duty will effectively continue indefinitely. Neither trust law nor Article III countenances such a state of affairs.

* * *

In sum, the historical tradition overwhelmingly warrants reversing the Eighth Circuit's decision. For centuries courts have entertained suits just like petitioners', and they have never made individualized financial loss or the risk thereof a prerequisite for a merits determination.

C. Congress Unambiguously Authorized ERISA Plan Participants To Seek Restoration Of Losses, Fiduciary Removal, And Injunctive Relief

The foregoing *de facto* personal stake and historical tradition lay a bedrock foundation for the standing inquiry's final piece: Congress's judgment. Building on centuries of trust-law practice, Congress recognized that participants hold a real-world interest in having their ERISA plans prudently and loyally managed. In light of that interest, and again adopting traditional trust-law rules, Congress established a critical role for participants in enforcing ERISA.

In 29 U.S.C. 1132(a)(2), Congress authorized any "participant" to sue "for appropriate relief under section 1109," which expressly includes liability "to make good to such plan any losses to the plan resulting from each such breach" and "removal of such fiduciary." And in 29 U.S.C. 1132(a)(3), Congress broadly authorized any "participant" "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief" to redress those violations.[11]

This "identif[ication] [of] intangible harms that meet minimum Article III requirements" confirms petitioners' standing. *Spokeo*, 136 S. Ct. at 1549.[12]

1. Congress's judgment matters to the standing analysis because Congress has the "power to define injuries and articulate chains of causation that will give rise to a case or controversy." *Spokeo*, 136 S. Ct. at 1549 (citation omitted).

ERISA's statutory structure is a straightforward exercise of that power: Congress believed that participants suffer real-world harm when their pensions are managed improperly, and it authorized a wide variety of participant suits under Section 1132(a) to redress that harm—regardless of direct financial loss to the participant.

a. ERISA's statutory scheme reflects "Congress' desire to offer employees enhanced protection for their benefits." *Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 114 (2008) (citation omitted). This desire was not abstract—it was motivated by "certain defects in the private retirement system," including "malfeasance and improper ac-

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[11] Petitioners requested removal of the fiduciaries alternatively under both Sections 1132(a)(2) and 1132(a)(3). J.A. 140-141. Petitioners sought this relief under Section 1132(a)(3) because the Eighth Circuit forbids plaintiffs to obtain such relief under Section 1132(a)(2), at least absent individual financial harm. See *McCullough*, 585 F.3d at 1087; cf. *Varity*, 516 U.S. at 511-513. To the extent such relief is in fact available under Section 1132(a)(2), the same historical tradition discussed in Part B would support Congress's judgment.

[12] For the same reasons, petitioners "ha[ve] a cause of action under the statute." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). The Court has occasionally, though perhaps mistakenly, called this inquiry "statutory standing." *Id.* at 1387 n.4.

tivities by pension administrators, trustees, or fiduciaries." H.R. Rep. No. 95-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639, 4641.

Congress's intent that ERISA protect participants from fiduciary misconduct is evident throughout the statute's text. Congress openly

> declared [it] to be the policy of [ERISA] to protect * * * the interests of participants in employee benefit plans and their beneficiaries, * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. 1001(b); see also *Davila*, 542 U.S. at 208.

After years of "comprehensive and exhaustive study" (H.R. Rep. No. 95-533, *supra*, at 4646), Congress elected to execute this policy in two key ways. *First*, it required that plan assets be held in trust "solely in the interest of [plan] participants and beneficiaries," and it imposed strict fiduciary duties of prudence and loyalty on those who manage plan assets, along with a *per se* prohibition against certain self-dealing transactions and certain transactions with interested parties. 29 U.S.C. 1104, 1106. Congress derived these duties from the common law of trusts—bringing to bear that body of law's substantive protections on behalf of ERISA participants. *Varity*, 516 U.S. at 496.

Second, Congress gave participants a tool to protect their interest in having an ERISA plan free from fiduciary misconduct: a cause of action that provides ready access to federal court. 29 U.S.C. 1132(a)(1)-(5), (8); see 29 U.S.C. 1001(b).

As relevant here, Section 1132(a)(2) permits "participant[s]" and "beneficiar[ies]" to sue "a fiduciary * * * who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" to recover "any losses to the plan resulting from each such breach." 29 U.S.C. 1132(a)(2), 1109. As this Court has explained, suits under Section 1132(a)(2) are *always* brought in a representative capacity on behalf of the plan in order to protect participants' interest "in the [plan's] financial integrity." *Russell*, 473 U.S. at 142 n.9. Indeed, Congress's judgment on this score is clear: "[t]here can be no disagreement * * * that § [1132](a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § [11]09." *Id.* at 141.

In addition, Congress allowed "participant[s]" and "beneficiar[ies]" "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). That right of action depends simply on allegations of an ERISA violation.

The plain text of those provisions makes clear that Congress did not condition either cause of action on whether the breaches left the plan underfunded or the participant in danger of losing her benefits. Such requirements have no textual basis whatsoever. Instead, Congress permitted participant suits for any fiduciary breach, in order to protect "participants[']" "interest * * * in the financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. The language is so plain and expansive that it is difficult to develop the point any further. Petitioners allege fiduciary breaches, and Congress thus authorized them to sue. That should be the beginning and the end of the inquiry.

b. Besides the Eighth Circuit, every court to address the issue has agreed with this straightforward analysis.

With respect to Section 1132(a)(2), this Court, as noted, has said that "[t]here can be no disagreement" on the matter. *Russell*, 473 U.S. at 141; see also *id.* at 142 n.9 ("[Section] [1132](a)(2), the enforcement provision for § [11]09, authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries."); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 53 (1987) ("A participant or beneficiary may also bring a cause of action for breach of fiduciary duty * * * [under] §§ [1132](a)(2) [and] [11]09.").

The courts of appeals apart from the Eighth Circuit are in accord—including those that ultimately found *Article III* standing lacking for Section 1132(a)(2) claims without direct financial harm to the participant. See, *e.g.*, *Lee* v. *Verizon Comm'ns Inc.*, 837 F.3d 523, 544-547 (5th Cir. 2016) (statutory standing did not "confer[]" constitutional standing); *David* v. *Alphin*, 704 F.3d 327, 332 (4th Cir. 2013) ("Appellants may bring suit under § [1132](a)(2) on behalf of the Pension Plan"); *Long Island Head Start Child Dev. Servs.* v. *Econ. Dev. Comm'n of Nassau Cty.*, 710 F.3d 57, 66 (2d Cir. 2013) ("Section [1132](a)(2) confers standing on a 'participant' to seek relief under § [11]09(a)"); *Loren*, 505 F.3d at 607-608 ("Plaintiffs may bring suit under § 1132(a)(2) on behalf of their respective plans"); *Glanton* v. *AdvancePCS, Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006).

Other courts of appeals also speak in unison regarding Section 1132(a)(3). The statute requires only an allegation that the defendant violated a specific fiduciary duty owed to the plaintiff. See, *e.g.*, *Horvath*, 333 F.3d at 456 ("Horvath need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that Keystone satisfy its statutorily-created disclosure or fiduciary responsibilities."); *Loren*, 505 F.3d at 610 (allowing Section 1132(a)(3) claims to proceed by "alleg[ing] only violation of the fiduciary duty owed to [plaintiffs] as a participant in and beneficiary of their respective ERISA plans"); *Kendall* v. *Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 120-121 (2d Cir. 2009).

2. In departing from this unbroken line of authority, the Eighth Circuit and respondents left behind the statute's text. The court ignored Congress's judgment and instead imported its own policy views about what types of ERISA suits should and should not be brought.

The Eighth Circuit has offered two grounds to support its position. First, in *Harley*, the court held that participants in an overfunded plan fall outside the statute's "zone of interests," because such suits are contrary to (the Eighth Circuit's view of) ERISA's purposes. See 284 F.3d at 907 ("the purposes underlying ERISA[] * * * are not furthered"). Second, in *McCullough*, the Eighth Circuit said that participants in overfunded plans are not seeking "appropriate relief" when they request restoration of losses caused by fiduciary breach. 585 F.3d at 1085, 1087. These arguments are wrong.[13]

a. *Harley*'s zone-of-interests analysis is a non-starter. The text of Sections 1132(a)(2) and (a)(3) is clear on its face, and it is settled law that the zone-of-interests test is relevant only "*absent* contrary instructions from Congress." 33 Charles Alan Wright & Charles H. Koch, *Fed. Prac. & Proc.: Judicial Review* § 8344 (2d ed. 2019) (emphasis added); see, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (explaining that the zone-of-interests inquiry

[13] The Eighth Circuit focused its analysis on Section 1132(a)(2), then concluded that that analysis also governed Section 1132(a)(3). The court's reasoning under both statutory provisions is therefore identical—and incorrect for the same reasons.

"can be modified or abrogated by Congress"); *Harley*, 284 F.3d at 910 (Bye, J., dissenting) ("[T]he plaintiffs' suit certainly satisfies the 'statutory' zone of interests tests when the statute itself authorizes plan beneficiaries['] [suit].").

Put differently, "courts lack authority either to expand or contract a statutory cause of action" using a zone-of-interests analysis. *Fed. Prac. & Proc.*, *supra*, § 8344. The zone-of-interests inquiry simply asks "whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue under [the statute]." *Lexmark*, 134 S. Ct. at 1387. In answering that question, courts "apply traditional principles of statutory interpretation." *Id.* at 1388. And "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Ibid.* (citation omitted).

But substituting its policy judgment for Congress's is precisely what the Eighth Circuit did in *Harley*. Far from employing "traditional principles of statutory interpretation," the court rested entirely on two non-textual grounds: "'constitutional avoidance' [and] 'advancing ERISA's primary purpose of protecting individual pension rights.'" Pet. App. 18a n.10 (citation and brackets omitted). Neither ground justifies departing from the statute's plain language.

Constitutional avoidance is a rule of priority about which issues a court should decide. *Nielsen* v. *Preap*, 139 S. Ct. 954, 971-972 (2019); *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014). Whatever the doctrine's merits, it does not justify reading any additional requirements into the statutory text—it is not a "traditional principle[] of statutory interpretation." *Lexmark*, 134 S. Ct. at 1388.

That leaves the court's other justification: advancing "ERISA's primary purpose" by preventing "costly litigation" when a plan is overfunded. Pet. App. 16a (quoting *Harley*, 284 F.3d at 907). This policy ground is itself untethered to ERISA's text or any other indication of ERISA's purposes. Every available shred of evidence shows that Congress believed it was "advancing ERISA's primary purpose" by *permitting* participant suits to remedy fiduciary breaches. *E.g.*, *Dedeaux*, 481 U.S. at 53; *Russell*, 473 U.S. at 140, 141 n.9; 29 U.S.C. 1001(b); H.R. Conf. Rep. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5087.

Regardless, this purely purposive approach is not the type of traditional statutory interpretation permitted by *Lexmark*. On the contrary, *Harley*'s "free-floating statutory interpretation," *McCullough*, 585 F.3d at 1088 (Bye, J., dissenting), grafts an additional requirement onto the text via the court's own judgment about what policies ERISA should embody. That is exactly what this Court has said the zone-of-interests analysis should not do.

b. The Eighth Circuit's later attempt to ground *Harley*'s interpretation in the statute's text fares no better. In *McCullough* the court admitted that *Harley* "did not identify the precise text of § 1132(a)(2) that it was construing." 585 F.3d at 1084. So the court simply "presume[d] [*Harley*] determined that the suit would not be one 'for appropriate relief' under the circumstances." *Id.* at 1085. But that is a thin reed on which to hang such a significant prerequisite to suit—especially one not otherwise mentioned in the statute. The court pointed to literally nothing in the text that suggests Congress meant to require that plans be underfunded when it said a suit must be one "for appropriate relief." See *id.* at 1088.

Even if the "appropriate relief" qualifier could be used to distinguish between suits seeking different *remedies*, it says nothing whatsoever about *who* may bring suit for whatever relief is "appropriate" under the circumstances. As this Court has recognized, Section 1132(a)(2) equally "authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries," all of whom share a "common interest" "in the financial integrity of the plan." *Russell*, 473 U.S. at 141 n.9. Section 1132(a)(3) is phrased identically—it draws no distinctions between "a participant, beneficiary, or fiduciary." It is simply impossible to read either Section 1132(a)(2) or Section 1132(a)(3) as authorizing suits by one of these plaintiffs but not another. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). That a suit must seek "appropriate relief" in no way modifies *which* plaintiff the statute authorizes to seek that relief—either all of them may sue for whatever relief is appropriate, or none of them may do so. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256-258 (1993) (discussing "appropriate equitable relief" under Section 1132(a)(3) not in terms of *who* may sue, but in terms of the "categories of relief" that are available).

Put simply, the Eighth Circuit's position has no basis in the text of Section 1132(a). Congress believed that participants have a *de facto* interest in the prudent and loyal management of their plans, and it authorized participants to vindicate that interest when fiduciaries breach their duties.

D. Petitioners Have Also Satisfied The Causation And Redressability Components Of Article III Standing

The resolution of the remaining elements of Article III standing—causation and redressability—follows inexorably from the preceding discussion. Indeed, the reason that trust law traditionally approved these types of claims is that they appropriately remedied the beneficiaries' injuries. That history overcomes any standing objection on these fronts. In addition, Congress's unambiguous authorization of these suits helps "articulate chains of causation" that satisfy Article III. *Spokeo*, 136 S. Ct. at 1549.

In any event, respondents' imprudent and disloyal acts quite obviously caused petitioners' complained-of injuries, and petitioners' requested remedies will just as obviously redress those injuries.

First, as to restoring plan losses, for purposes of the motion to dismiss, respondents cannot dispute petitioners' allegation that respondents' breaches caused the plan to lose hundreds of millions of dollars. Ordering respondents "to make good" those losses (29 U.S.C. 1109(a)) redresses the injury just as clearly as does ordering an embezzler to return stolen funds. Cf. Story, *supra*, § 1278 (trust-law remedies aim "to compensate the [beneficiary], and to place him in the same situation as if the trustee had faithfully performed his own proper duty").

Second, replacing the disloyal and imprudent trustees has been viewed for centuries as appropriate relief for fiduciary breaches, and for good reason—there is no basis for forcing a participant to endure such a damaged fiduciary relationship or inadequate management of trust assets. Again, the inquiry ends with that well-established tradition.[14]

[14] Respondents' reliance on *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983), reflects a fundamental misunderstanding of the nature of the fiduciary relationship. Resp. Supp. Br. 12. The continuous, ongoing obligations of a plan fiduciary to the participants bear no resemblance to the speculative supposition that a police officer might someday again interact with the same plaintiff. To accept respondents' contention would require the Court to jettison hundreds of years of common-law tradition.

Third, petitioners remain in violation of ERISA due to their investment in the FAF fund. Injunctive relief to divest the plan of that prohibited investment self-evidently redresses the injury it causes.

Petitioners have accordingly established Article III standing for all their claims and that they fall within the class of plaintiffs Congress authorized to sue. Petitioners' claims should proceed to their merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KAREN L. HANDORF
MICHELLE C. YAU
MARY J. BORTSCHELLER
COHEN & MILSTEIN
West Tower, Suite 500
1100 New York Avenue, N.W.
Washington, D.C. 20005

PETER K. STRIS
Counsel of Record
BRENDAN S. MAHER
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
peter.stris@strismaher.com

SEPTEMBER 2019

APPENDIX

APPENDIX

1. 29 U.S.C. 1103 provides in pertinent part:

Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

> **(1)** the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or
>
> **(2)** authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

* * * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on July 31, 2015), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

* * * * *

2. 29 U.S.C. 1104(a) provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

* * * * *

3. 29 U.S.C. 1109(a) provides:

Liability for breach of fiduciary duty

(a) 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.

4. 29 U.S.C. 1132(a) provides in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * * *

5. Article III, Section 2 of the United States Constitution provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * * *"