No. 17-1712

IN THE

Supreme Court of the United States

JAMES J. THOLE, ET AL.,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Treatises

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Congress, in enacting such laws, frequently includes private rights of action that authorize suits against companies and others that violate the protections that Congress has provided. Public Citizen is interested in the effective enforcement of such federal laws, and it has often litigated issues of standing under those laws as a party or amicus.

Public Citizen submits this brief because it is concerned that arguments advanced by respondents here—that petitioners lack standing to pursue an action under the Earned Retirement Income Security Act of 1974 (ERISA) for respondents' alleged violations of their fiduciary duties—would impair the effectiveness of the employee protections that Congress enacted in ERISA. Public Citizen is also concerned that respondents' standing theories would strip Congress of its Article I authority to establish rights and responsibilities that are privately enforceable in federal court, particularly by workers or consumers whom Congress exercised its commerce power to protect.

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

Federal courts have the constitutional authority to adjudicate claims brought by plan participants and beneficiaries against plan fiduciaries for misconduct that causes financial injury to an employee benefit plan.[2] The redressable injury suffered by the plan satisfies the requisite Article III standing elements, and Congress has authorized participants to represent the plan's interests when fiduciaries breach their ERISA responsibilities. Article III does not preclude Congress from exercising its Article I authority in this manner simply because the plan is overfunded.

I. The elements of Article III standing—injury, causation, and redressability—are all present in this case. Petitioners allege that respondents breached their duties of loyalty and prudence under ERISA and that, as a result, their employee benefit plan suffered financial losses in the hundreds of millions of dollars. Petitioners seek restoration of those losses to the plan, disgorgement to the plan of any ill-gotten profits that respondents earned from their alleged violations, and injunctive relief to prevent future harm to the plan. Respondents' subsequent contributions to the plan have not been sufficient to provide the plan all of the monetary relief that petitioners seek, and those contributions do not address petitioners' request for injunctive relief. A live dispute over respondents' liability to the plan thus remains for an Article III court to adjudicate.

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[2] ERISA's distinction between a participant and a beneficiary is immaterial to this case. *See* 29 U.S.C. § 1002(7)–(8) (defining "participant" and "beneficiary"). Except where otherwise indicated, this brief uses "participant" to refer to both participants and beneficiaries.

II. Exercising its Article I authority, Congress validly authorized plan participants to bring actions against fiduciaries for monetary and injunctive relief. Section 409 of ERISA specifically addresses fiduciary liability to the plan for breaches of fiduciary duties, and section 502(a)(2) (as well as section 502(a)(3)) specifically designates plan participants as persons who may bring a civil action to vindicate the plan's interests. Indeed, when fiduciary misconduct is involved, plan participants will often be the only private persons associated with the plan who are capable of representing the plan, because fiduciaries, although also authorized to represent the plan, cannot be expected to bring suit against themselves for their own misconduct.

The court of appeals erred when it concluded that an action to enforce section 409 brought by a participant in an overfunded plan could not be an action "for appropriate relief" under section 502(a)(2). Section 409 authorizes relief to the plan rather than to individual participants, and it authorizes that relief irrespective of whether the plaintiff in the action is a plan participant, beneficiary, or fiduciary, or the government. The court of appeals was also wrong to hold that its interpretation of section 502(a)(2) was necessary to avoid Article III standing concerns. And the court was wrong to invoke ERISA's purpose to justify excluding participants of overfunded plans from the scope of section 502(a)(2). ERISA's purposes are furthered by holding fiduciaries accountable to a plan for misconduct that harms the plan.

III. Congress has the Article I authority to designate plan participants as the representatives of an injured plan in a suit against the plan's fiduciaries.

Article III does not separately require such participants to have suffered their own distinct injury in fact.

This Court has upheld federal courts' constitutional authority to adjudicate lawsuits brought by representatives of injured persons without requiring the representatives to make a separate showing of personal injury. This Court's associational-standing cases, for example, permit an association to sue in federal court on behalf of members who have suffered injury to an interest that is germane to the association's purpose. This Court has recognized that "next friends" may, in certain circumstances, represent persons who cannot represent themselves, even though the next friend may not have suffered a distinct personal injury. Likewise, the Court has allowed assignees of claims to bring suit on behalf of assignors who alone have suffered the requisite injury and who alone would receive any redress from the litigation.

These precedents confirm that Article III does not contain a hard-and-fast rule that representatives of injured persons must demonstrate a distinct injury to themselves to seek redress from a federal court. Article III, therefore, should not be interpreted to close the door on Congress's Article I authority to designate appropriate representatives by statute. Congress's decision to do so, although not unbounded, is entitled to respect.

Here, ERISA's structure and the traditional principles of trust law on which the statute's protections are based support Congress's judgment that participants are appropriate persons to bring a representative suit on the plan's behalf. Under ERISA, plan assets—which include plan surpluses—generally must be used for the exclusive benefit of participants, and generally cannot inure to the benefit of the employer. Likewise, plan fiduciaries must act for the exclusive benefit of participants in managing the plan. Given the legal relationships that ERISA creates among fiduciaries, participants, and plan assets, it was natural for Congress to choose participants as the persons best suited to represent a plan's interests in actions concerning fiduciary mismanagement of plan assets.

Congress's judgment is supported by longstanding trust-law principles. Equity courts provided trust beneficiaries with rights and remedies to protect trust property. In particular, equity rules generally required beneficiaries to be joined in litigation implicating the trust and authorized beneficiaries to initiate suit on behalf of the trust in certain circumstances. Equity thus recognized that beneficiaries were not simply interested bystanders but had interests inextricably linked with those of the trust in litigation that affected trust property. Congress acted well within its constitutional authority in deciding to treat plan participants in a similar fashion, and upholding Congress's action in this case poses no risk of opening the federal courthouse doors to the generalized grievances of strangers.

ARGUMENT

According to petitioners, respondents breached their fiduciary duties under ERISA, causing petitioners' defined-benefit pension plan to suffer losses totaling hundreds of millions of dollars. While this litigation was pending, respondents restored a portion of those alleged losses by making excess contributions to the plan. Those contributions have, for the time being, caused the plan to become "overfunded," *i.e.*, to have sufficient funds under ERISA's accounting rules to pay pension benefits to plan participants and beneficiaries. The central question before this Court is whether Article III permits a federal court to adjudicate petitioners' claims when a defined-benefit plan is overfunded but has still suffered a financial injury caused by respondents' alleged breaches of fiduciary duties to the plan.

Although Public Citizen agrees with petitioners that they have Article III standing in their own right, *see* Pet. Br. 20–28, this brief focuses on petitioners' authority to litigate as representatives of their employee benefit plan. Congress has authorized petitioners to bring suit against respondents to vindicate the plan's financial interests, and petitioners' lawsuit seeks redress for the financial injury that respondents have allegedly caused the plan. In these circumstances, Article III does not require petitioners to demonstrate that they have suffered a personal injury in fact that is distinct from the harm suffered by the plan. Congress's judgment that plan participants are appropriate parties to represent the plan's interests against fiduciaries is entitled to respect, and nothing in Article III strips Congress of the Article I power to give effect to that judgment by authorizing participants to sue on the plan's behalf.

I. Petitioners have alleged that their employee benefit plan has suffered a cognizable injury.

Article III of the Constitution vests "[t]he judicial Power of the United States" in federal courts, and confines their jurisdiction to the "Cases" and "Controversies" specified in the Constitution. U.S. Const. art. III. This Court has construed Article III's case-or-controversy requirement to limit "the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). As this Court has explained, to satisfy the "'irreducible constitutional minimum' of standing," a 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." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The constitutional standing requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches, and confines the federal courts to a properly judicial role." *Id.* (internal citations and quotation marks omitted).

Neither the court of appeals nor respondents deny that the complaint in this case adequately alleges that the defined-benefit plan at issue has suffered an Article III injury. Petitioners allege that respondents breached their fiduciary duties and engaged in "prohibited transactions," which "allegedly caused significant losses to the Plan's assets in 2008, resulting in the Plan's underfunded status in 2008 through 2012." Pet. App. 29a. The complaint alleges that the plan suffered losses of $1.1 billion at the time of the financial crisis, of which $748 million could have been avoided if respondents had acted prudently and diversified plan assets. J.A. 90–91. Such financial losses satisfy the injury-in-fact component of Article III standing. *See*, *e.g.*, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 n.1 (2018) ("[T]he decrease in the market value of Weyerhaeuser's land as a result of the designation is a sufficiently concrete injury for Article III purposes."); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). The traceability element of Article III standing is also satisfied because petitioners allege that respondents' misconduct caused losses to the plan that the plan would otherwise not have suffered. J.A. 90–91.

The injury suffered by the plan would also be redressed by a favorable judgment. "The relief requested in this action is for the benefit of the Plan." Pet. App. 29a (quoting J.A. 59) (brackets and ellipsis omitted). The complaint seeks redress in the form of monetary relief that would restore to the plan the amount of the losses caused by respondents' alleged misconduct and disgorge to the plan any ill-gotten profits resulting from the violations. *See* J.A. 113–14 (Count I), 118 (Count II), 123 (Count III), 125 (Count IV), 128 (Count V), 130 (Count VI); *see also id.* at 140 (entitlement to relief); 141 (prayer for relief). The complaint also seeks injunctive relief to prevent the harm suffered by the plan from being repeated. *Id.* at 140, 141–42.

Respondents' subsequent contributions to the plan do not undo the injury that their alleged fiduciary breaches caused. The record below indicates that respondents' contributions equaled $311 million. Pet. App. 22a. A favorable judgment for petitioners, by contrast, could restore as much as $748 million to the plan, J.A. 91, or $437 million in additional funds beyond respondents' contributions. A favorable judgment would also grant petitioners injunctive relief to mitigate respondents' ability to mismanage plan assets in the future. Thus, the "irreducible constitutional minimum" of standing (*Defenders of Wildlife*, 504 U.S. at 560–61)—injury, causation, and redressability—continues to be present in this case.

II. Congress has authorized petitioners to bring a civil action on behalf of the plan to seek redress for the financial injury caused by respondents' alleged misconduct.

A. Congress addressed the injuries to a plan caused by breaches of fiduciary duties in section 409(a) of ERISA, 29 U.S.C. § 1109(a). Section 409(a) provides that fiduciaries who breach their duties "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." *Id.* (emphasis added). Section 409(a) reflects Congress's understanding that fiduciary misconduct causes injury to the plan, and that any monetary redress obtained for such misconduct should flow to the plan. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008) ("[T]he text of § 409(a) characterizes the relevant fiduciary relationship as one 'with respect to a plan,' and repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief."). Section 409(a) further provides for "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary," to prevent future harm to the plan. 29 U.S.C. 1109(a).

ERISA provides that an employee benefit plan "may sue or be sued … as an entity." 29 U.S.C. § 1132(d). Congress could further have authorized plans to bring suit in their own names to recover losses from fiduciaries who violate their ERISA responsibilities. Had Congress done so, Article III would not preclude a federal court from adjudicating the plan's claims. *See supra* part I. Under ERISA, however, only fiduciaries have "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a); *see also id.* § 1002(21)(A) (defining "fiduciary"). As here, where plan fiduciaries are alleged to have violated their fiduciary duties by mismanaging the plan, a cause of action that permitted only the plan to bring suit would not have been an effective means to vindicate the plan's interest vis-à-vis its fiduciaries.

Congress, accordingly, defined a class of individuals who could bring suit to enforce section 409 on the plan's behalf. Section 502(a)(2) of ERISA provides that a civil action for "appropriate relief" under section 409 may be brought by "the Secretary [of Labor]" or "a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(a)(2). As this Court has recognized, "the common interest shared by all four classes is in the financial integrity of the plan." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). Actions brought under section 502(a)(2) thus are brought "in a representative capacity on behalf of the plan as a whole," *id.*, and any "recovery" arising out of the action "inures to the benefit of the plan as a whole," *id.* at 140.[3]

B. The court of appeals did not disagree that a plan fiduciary could have brought suit on the plan's behalf to seek redress for the injuries suffered by the plan as a result of the alleged fiduciary breaches—if an

[3] Section 502(a)(3) separately authorizes a "participant, beneficiary, or fiduciary" to obtain injunctive or other appropriate equitable relief to address violations of ERISA or the plan's terms. 29 U.S.C. § 1132(a)(3). To the extent relief under section 502(a)(3) inures to the plan's benefit, the representational-standing analysis is the same as under section 502(a)(2) suits to enforce section 409.

unconflicted fiduciary willing to assert such claims existed. Invoking its precedents, however, the court erroneously concluded that "when a plan is overfunded, a participant in a defined benefit plan no longer falls within the class of plaintiffs authorized under [section 502(a)(2)] to bring suit claiming liability under [section 409] for alleged breaches of fiduciary duty." Pet. App. 18a (citing *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082 (8th Cir. 2009), and *Harley v. Minn. Min. & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002)).

The text of section 502(a)(2) expressly confers on "participant[s]" and "beneficiar[ies]" the right to bring a civil action to enforce section 409, and does not speak at all of overfunded defined-benefit plans. Elsewhere in ERISA, Congress crafted detailed provisions to address defined-benefit plans. *See*, *e.g.*, 29 U.S.C. §§ 1021(f) (notice requirements for certain defined-benefit plans); 1053(a)(2)(A) (vesting requirements for defined-benefit plans); 1083 (funding standards for single-employer defined-benefit plans). Given "Congress' care in delineating the universe of *plaintiffs* who may bring certain civil actions" under section 502(a), *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000), if Congress had intended to exclude overfunded defined-benefit plans from the protections of that section, that limitation would surely have appeared in the statutory text. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 455 (2002) ("Where Congress wanted to include successors in interest, it did so clearly and explicitly.").

The court of appeals held, however, that an action to enforce section 409 brought by participants in an overfunded plan would not be an action "for appropriate relief." Pet. App. 16a n.9 (citing *McCullough*, 585 F.3d at 1084–85). That interpretation is untenable.

Section 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries." *LaRue*, 552 U.S. at 256. And section 409 authorizes the same relief to the plan regardless of whether the section 502(a)(2) plaintiff is the Secretary of Labor, a fiduciary, a participant, or a beneficiary: "to make good to such plan any losses," "to restore to such plan" ill-gotten profits, and "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). Relief restoring a plan's losses is appropriate regardless of whether it is overfunded.

Section 502(a)(2) actions stand in marked contrast to actions under section 502(a)(1)(B), which may be brought by a participant to "recover benefits due *to him* under the terms of his plan, to enforce *his rights* under the terms of the plan, or to clarify *his rights* to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added); *see also LaRue*, 552 U.S. at 263 n.* (Thomas, J., concurring) ("[A] participant suing to recover benefits on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan."). The court of appeals' conclusion that a participant in an overfunded plan may only obtain "appropriate relief" under section 502(a)(2) for the amount of his defined benefit collapses the distinction between those two separate causes of action.

The court of appeals' misreading of section 502(a)(2) was wrongly influenced by two nontextual considerations. First, the court believed that its interpretation was needed to avoid "serious Article III case or controversy concerns." Pet. App. 15a (quoting *Harley*, 284 F.3d at 906). This Court's decision in this case will resolve the Article III question. In any event, the constitutional-avoidance canon does not permit a court to "rewrite a law to conform it to constitutional requirements." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)).

Second, the court of appeals believed that its interpretation of section 502(a)(2) advanced ERISA's "primary purpose" of protecting "'individual pension rights'" by allowing the plan and its fiduciaries to avoid "'costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment.'" Pet. App. 16a (quoting *Harley*, 284 F.3d at 907). The court's rule, however, extends not only to "modest but allegedly imprudent investments," but also to flagrant violations of fiduciary standards resulting in significant losses to the plan, such as those alleged here. Holding fiduciaries accountable to plans for such losses advances ERISA's purpose, which is why Congress enacted section 409 in the first place.

A court's view of statutory purpose should not override Congress's decision to grant plan participants the authority to enforce section 409 on behalf of the plan. *See Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). But in any event, the court failed to explain how the cost of litigation from participant suits on behalf of an *overfunded* defined-benefit plan could possibly threaten individual pension benefits. Indeed, the court's concern about the supposed threat of litigation costs to the financial well-being of an overfunded plan (and thus to the security of pension benefits) contradicts its claim that recoupment of substantial losses suffered by the plan does not advance the security of the plan (and of the benefits it is intended to provide) as long as the plan is overfunded.

In sum, section 502(a)(2) authorizes plan participants to file suit "in a representative capacity on behalf of the plan as a whole," *Russell*, 473 U.S. at 142 n.9, and for the "benefit of the plan as a whole," *id.* at 140. The court of appeals erred in interpreting section 502(a)(2) to exclude participants in an overfunded defined-benefit plan from the scope of that provision. The only remaining question, then, is whether Article III precludes a federal court from adjudicating actions brought on the plan's behalf by such participants when Article III would permit adjudication of the same claim asserted by another representative of the plan. As explained below, Article III does not require such a bizarre rule.

III. Article III permits Congress to authorize plan participants to conduct litigation in federal court to vindicate the interests of injured employee benefit plans.

In authorizing a plan participant to bring a civil action to redress the injury in fact suffered by the plan, Congress appropriately exercised its Article I powers in a manner fully consistent with Article III limits on the jurisdiction of the federal courts. As explained in petitioners' brief (at 20–28), petitioners have suffered their own discrete Article III injuries as a result of respondents' alleged misconduct. Such individual injuries are sufficient to satisfy Article III, but not necessary: When a plan has suffered the requisite injury, Article III does not require a second injury to ERISA plaintiffs who are plan participants. Although Article III does place some outside limits on Congress's discretion in designating appropriate representatives to assert an injury, this Court has recognized that a representative who has not suffered an injury may serve as a plaintiff on behalf of injured parties without violating the Constitution's case-or-controversy limitation. In the ERISA context, Congress's decision to name plan participants as appropriate representatives of the plan in an action against plan fiduciaries is consistent with this Court's precedents and necessary to avoid doing violence to ERISA's employee-benefits framework. Congress's judgment in authorizing participant actions to enforce section 409 as representatives of injured plans, including overfunded defined-benefit plans, should be upheld.

A. This Court has recognized that federal courts may adjudicate representative suits based on injuries suffered by the person or entity represented by the plaintiff.

1. In a variety of contexts, this Court has permitted federal courts to decide cases brought by representatives on behalf of persons or entities who have suffered the requisite Article III injury. These precedents confirm that Article III does not necessarily require such a representative plaintiff to have personally experienced injury in fact, so long as an injury in fact that the court's judgment would redress exists.

This Court's recognition of associational standing exemplifies this principle. As the Court has long held, a membership organization may maintain a federal action "to redress its members' injuries, even without a showing of injury to the association itself." *Food & Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("Since [the plaintiffs] allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right."). An association may represent its members in federal litigation when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Food & Commercial Workers*, 517 U.S. at 553 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). When these requirements are satisfied, "injury to an organization's members will satisfy Article III," and the organization may "litigate in federal court on their behalf" without "'eliminat[ing] or attenuat[ing] the constitutional requirement of a case or controversy.'" *Automobile Workers v. Brock*, 477 U.S. 274, 281 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Likewise, this Court has recognized the principle of "next friend" standing. In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Court considered whether a death-row inmate had standing to challenge the constitutionality of a state's failure to provide mandatory appellate review of the death sentence of another individual who had waived his right to appeal. After concluding that the inmate failed to demonstrate the requisite injury in fact to himself, *id.* at 156–61, the Court went on to consider whether he could maintain the action as a "next friend" to the other inmate, *id.* at 161–66. Observing that Congress had not enacted a "federal statute authorizing the participation of 'next friends,'" *id.* at 164, the Court indicated that a next friend may nonetheless have standing if "the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability," *id.* at 165. In addition, the Court explained that, in habeas cases, a next friend has to demonstrate that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate" and possibly "some significant relationship with the real party in interest." *Id.* at 163–64. The Court stated that these limitations were necessary to prevent a "litigant asserting only a generalized interest in constitutional governance [from] circumvent[ing] the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.* at 164. Critically, however, the Court did *not* require the next friend to demonstrate a discrete Article III injury to himself; indeed, the Court had already concluded that the putative next friend in *Whitmore* had failed to demonstrate that he had suffered a cognizable injury. *Whitmore*'s discussion of next-friend standing only makes sense because Article III does not preclude representative suits seeking federal redress on behalf of injured third parties.

Sprint v. APCC Services, Inc., 554 U.S. 269 (2008), is of a piece with these precedents. In *Sprint*, the Court confirmed that the plaintiff maintaining a federal suit need not have suffered a redressable injury in fact. In that case, the plaintiff was an assignee of a legal claim for monies owed by long-distance carriers to the assignors, who were payphone operators. To effectively obtain compensation for toll-free payphone calls, payphone operators assigned their claims to aggregators, who then pursued collection and agreed to remit all proceeds to the operators. *Id.* at 271–72. This Court held that Article III authorized federal courts to hear collection actions brought by payphone aggregators because, although "the aggregators did not originally suffer any injury … the payphone operators did"; and "'the assignee of a claim has standing to assert the injury in fact suffered by the assignor.'" *Id.* at 286 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)). The Court further concluded that a judgment would redress that injury because "the long-distance carriers would write a check to the aggregators for the amount of dial-around compensation owed." *Id.* at 287. As the Court observed, "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suits," and gave as an example trustees who "bring suit to benefit their trusts." *Id.*

2. Associational standing, next-friend standing, assignee standing, and even trustee standing would not be possible if Article III incorporated a hard-and-fast rule that the plaintiffs in a representative suit had to suffer their own distinct injury. And because such a rule cannot be found in Article III, Congress may validly exercise its Article I authority to designate appropriate plaintiffs to represent the interests of injured parties in federal court, particularly when those parties—such as the plan here—are unable to vindicate their own interests. Indeed, both *Food and Commercial Workers* and *Whitmore* recognized that, although courts may recognize representational standing even in the absence of statutory authorization, Congress has significant authority to authorize suits by representatives on behalf of injured persons. *Food & Commercial Workers*, 517 U.S. at 558 (holding that Congress may abrogate the third prong of the associational-standing test); *Whitmore*, 495 U.S. at 164 (suggesting that Congress could enact a "federal statute authorizing the participation of 'next friends'").

This Court's representational-standing cases confirm that, although Article III does not impose a distinct injury-in-fact requirement on representatives, it does place limits on whom a court may recognize as an appropriate representative. So too with Congress. When considering injury in fact, this Court has recognized that, although "Congress cannot erase Article III's standing requirements," *Spokeo, Inc.*, 136 S. Ct. at 1547–48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)), it may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *id.* at 1549 (quoting *Defenders of Wildlife*, 504 U.S. at 578) (brackets omitted). In identifying injuries, Congress's "judgment is … instructive and important," *id.*, even though it is subject to Article III limits. Congress's judgment in designating representatives who can sue on behalf of injured parties is likewise entitled to respect.

Hollingsworth v. Perry, 570 U.S. 693 (2013), is instructive. In that case, the Court considered the standing of proponents of a state ballot measure prohibiting same-sex marriage to appeal a district court decision holding the law unconstitutional. The Court concluded that the proponents lacked Article III standing because the interest they asserted was not "distinguishable from the general interest of every citizen" of the state. *Id.* at 707. And because the proponents lacked Article III standing, they could not, absent a valid representational relationship, "rest a claim to relief on the legal rights or interests of third parties," *id.* at 708 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)), such as the state.

The Court accordingly considered whether the proponents could serve directly as the state's representatives to defend the law after state officials declined to appeal the district court's decision. The Court held that the proponents could not serve in that capacity because they were not "state officers, acting in an official capacity," *id.* at 710, and because the state had not authorized them as "de facto public officials," *id.* at 712 (internal quotation marks omitted). But the Court found "readily distinguishable" its precedents on assignee and next-friend standing, situations where the putative representative and the represented party are both private parties. *Id.* at 711.

Similarly, in the governmental context, the Court acknowledged that a state has discretion to authorize state officials who would not otherwise have standing "to speak for the State in federal court." *Id.* at 710; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (stating that "state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests" (citing *Karcher v. May*, 484 U.S. 72, 82 (1987))). As this Court recently explained, although not unbounded, "the choice belongs to" the state, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019).

This Court's cases thus show that respecting Congress's judgment that plan beneficiaries are appropriate parties to represent the plan's financial interests vis-à-vis fiduciaries will not give Congress *carte blanche* to clothe any stranger with a generalized grievance with authority to litigate in an Article III court. Because, as explained below, plan participants are not strangers to the plans they seek to represent, Congress's decision to authorize them to litigate on the plan's behalf does not transgress Article III's case-or-controversy requirement.

B. The right of participants of overfunded defined-benefit plans to seek redress for the plan's financial injuries is consistent with Article III.

Congress's decision to authorize participants in plans—whether or not overfunded—to seek relief for fiduciary misconduct is a valid exercise of its Article I authority to regulate employee benefit plans and an integral component of ERISA's regulatory scheme. That decision builds upon the status of beneficiaries under traditional trust principles. In these circumstances, Article III poses no barrier to a plan participant's ability to hold plan fiduciaries accountable to the plan for their misuse of authority.

1. ERISA plans generally embody legal relationships among three groups of private persons: the plan's sponsor (typically, the employer), the fiduciaries who exercise discretionary control over the plan or its assets, and the plan participants and their beneficiaries. *See* 1 Lee T. Polk, ERISA Practice and Litigation §§ 2:2, 2:8, 2:11, Westlaw (database updated Mar. 2019); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 887–88 (1996). Under ERISA, plan assets must be "held in trust." 29 U.S.C. § 1103(a). With limited exceptions (*see infra* note 4), plan assets also can "never inure to the benefit of any employer," but must "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," *id.* § 1103(c)(1). Because plan assets "are dedicated to the exclusive benefit of plan participants and beneficiaries in the payment of benefits," ERISA "will generally not permit the employer to make use of those funds," even when the plan is overfunded. 1 ERISA Practice and Litigation § 7:46. Rather, an employer may access surplus funds only if the plan is terminated and "residual assets" remain after participants and beneficiaries are fully paid. *See* 29 U.S.C. § 1344(d); *Beck v. PACE Int'l Union*, 551 U.S. 96, 107 (2007).

Central to ERISA's framework are the "standards of conduct, responsibility, and obligation" that apply to fiduciaries. 29 U.S.C. § 1001(b). Consistent with the dedication of plan assets for the benefit of participants and beneficiaries, ERISA provides that plan fiduciaries must "discharge [their] 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." 29 U.S.C. § 1104(a)(1). Fiduciaries must exercise "care, skill, prudence, and diligence" in managing the plan and must "diversify[] 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." *Id.* §§ 1104(a)(1)(B), (C). ERISA also bars fiduciaries from engaging in self-dealing and various other prohibited transactions. *Id.* § 1106; *see generally Lockheed Corp.*, 517 U.S. at 887–88. An employer may act as a plan fiduciary, but when it does so, it takes on the responsibility to act in the interest of the participants and beneficiaries. *See Varity Corp. v. Howe*, 516 U.S. 489, 498–503 (1996).

This framework applies with full force to defined-benefit plans, and ERISA makes no distinction between overfunded and underfunded plans in applying these fiduciary responsibilities. Even in managing a plan's surplus funds, a fiduciary must act solely in the interest of participants and beneficiaries. In such a regime, plan participants and beneficiaries are a natural choice to represent the plan's interests *against* fiduciaries who violate ERISA and cause financial harm to the plan. Although section 502(a)(2) also permits a plan fiduciary to seek relief for fiduciary misconduct under section 409, that option provides no protection when all of the plan's fiduciaries are implicated in the breach. In many instances, participants and beneficiaries are the only private parties capable of enforcing ERISA's fiduciary standards. The plan, after all, is inanimate: It cannot sue to enforce its rights unless some human being acts on its behalf. And where the plan's claims are against those normally assigned to act for it—its fiduciaries—plan participants are the persons with a "significant relationship" to the plan and "truly dedicated" to the plan's "best interests." *Whitmore*, 495 U.S. at 163–64; *see also Russell*, 473 U.S. at 142 n.9 (recognizing participants' interest in "the financial integrity of the plan").

Some courts of appeals have misread this Court's decision in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), to support the view that participants lack standing to sue on behalf of a plan when the plan is overfunded. *See*, *e.g.*, *Duncan v. Muzyn*, 885 F.3d 422, 428 (6th Cir. 2018); *Harley*, 284 F.3d at 906. The statement in *Hughes Aircraft* that a participant has "no interest in the Plan's surplus," 525 U.S. at 439, however, did not speak to the participants' standing to sue on behalf of the plan. Rather, it went to the *merits* of the participants' ERISA claims. *Id.* at 441–43; *see also id.* at 439 ("These claims fail because the 1991 amendment did not affect the rights of pre-existing Plan participants and Hughes did not use the surplus for its own benefit."). In stating that participants had no interest in the plan's surplus, the Court was observing that participants have no affirmative right under ERISA to dictate the plan's lawful use of the surplus, even when the surplus "is partially attributable to the investment growth of [participants'] contributions." *Id.* at 441. At the same time, the Court suggested that, "[b]ecause only one plan exists," the participants in *Hughes Aircraft* would have prevailed if they had "allege[d] that Hughes used any of the assets for a purpose other than to pay its obligations to the Plan's beneficiaries." *Id.* at 442–43. Under the court of appeals' decision below, by contrast, participants would *not* have had standing to bring such a case.

In *Harley*, the Eight Circuit thought that ERISA's fiduciary responsibilities could be vindicated even absent participant suits because "the Secretary of Labor and any party with a reversionary interest in the plan's surplus have standing to sue" under section 502(a)(2). 284 F.3d at 908 n.5. But as the government has explained, "given limited resources, the Secretary of Labor cannot police every plan in the country." Br. for United States as Amicus Curiae (petition stage), No. 17-1712, at 14; *see also David v. Alphin*, 704 F.3d 327, 337 (4th Cir. 2013) (describing Labor Secretary's view that denial of participant standing when plan is overfunded would "immunize fiduciaries"). The government, accordingly, may choose to devote its resources to policing fiduciary misconduct that poses a higher risk of default rather than misconduct occurring in overfunded plans. In all events, this Court's decision on who may constitutionally serve as a representative for injured third parties does not sensibly turn on whether Congress has provided for governmental enforcement of the statute at issue.

Moreover, *Harley*'s statement that a fiduciary will be accountable to "any party with a reversionary interest in the plan's surplus," 284 F.3d at 908 n.5, has no support in ERISA's text. ERISA provides that any "residual assets of a single-employer plan may be distributed to the employer" only upon plan termination and, then, only if "all liabilities of the plan to participants and their beneficiaries have been satisfied" and other conditions are met. 29 U.S.C. § 1344(d)(1). But employers have no cognizable interest in plan assets prior to plan termination. Rather, ERISA mandates that "the assets of a plan shall never inure to the benefit of any employer," *id.* § 1103(c)(1), and prohibits fiduciaries from engaging in transactions for the benefit of employers or other parties in interest, *id.* § 1106(a)(1)(D). The statute, therefore, neither imposes a duty on fiduciaries to manage plan surpluses prudently for the benefit of employers' reversionary interests nor authorizes employers *qua* employers to sue fiduciaries for ERISA violations. *See* 29 U.S.C. § 1132. Plan surpluses are plan assets and can only be held "for the exclusive purposes of providing benefits" and "defraying reasonable expenses" of the plan." 29 U.S.C. § 1103(c)(1).[4] The only private parties that can

[4] ERISA provides that plan assets and fiduciary responsibilities can flow to employers when a fiduciary is authorized to distribute plan assets to the employer, such as when a plan is terminated or in certain other limited circumstances. *See* 29 U.S.C. § 1103(c) (referring to exceptions to anti-inurement rule as set forth in 29 U.S.C. §§ 1103(c)(2)–(4) , 1103(d) , 1342, and 1344); *id.* § 1104(a) (explaining that fiduciary standard of prudence is "subject to" 29 U.S.C. §§ 1103(c), 1103(d), 1342, and 1344); *see also id.* § 1108(b)(9) (creating exception to prohibited-transaction rule for distribution of plan assets at termination). ERISA does not require fiduciaries to maximize or preserve employers' potential reversionary interest.

hold plan fiduciaries to account for mismanagement of overfunded pension plans, therefore, are innocent fiduciaries (if any) and plan participants and beneficiaries.

2. This Court has recognized both that Congress looked to traditional trust principles in establishing ERISA's fiduciary responsibilities, *Varity Corp.*, 516 U.S. at 496, and that history is "instructive" in Article III standing analysis, *Spokeo, Inc.*, 136 S. Ct. at 1549. In authorizing plan participants and beneficiaries to sue for harm done to the plan, Congress drew upon the role played by beneficiaries under traditional trust law. That history further supports the legitimacy of Congress's decision to grant petitioners authority to represent the plan's interest in this case and the consistency of that decision with Article III requirements.

A trust traditionally was regarded as entailing "an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." 2 Joseph Story, Commentaries on Equity Jurisprudence § 964 (10th ed. 1870). When a trust was created, "courts of equity … compel[led] the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary." *Id.* § 964. Equity jurisdiction "protect[ed] and enforc[ed] the execution of trusts" on the theory that "it [was] impossible to suppose that" trust obligations "should be left without any positive means of securing their due fulfilment, or that they might be violated without rebuke, or evaded with impunity." *Id.* § 965.

Because equity regarded trustees and beneficiaries as "owners of the whole interest in the trust estate," the beneficiaries were often required to be joined in litigation involving the trust, including litigation between beneficiaries and the trustee. 2 Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees §§ 873, 875, 881 (3d ed. 1882). The law further recognized the beneficiaries' interest in the trust by authorizing them to bring suit in equity against third parties on the trust's behalf if the trustee "improperly refuses or neglects to bring an action against the third person." Restatement (Second) of Trusts § 282 (Am. Law Inst. 1959); *see also* 2 Perry § 877. Traditionally, the trustee in such a suit would "be made a coplaintiff." John Norton Pomeroy, Remedies and Remedial Rights § 250 (1876). These principles arose out of equity's desire that "all those persons who have such relations to the subject matter of the controversy … be included in and bound by the present decree." *Id.* § 249. Thus, equity courts recognized that a trust beneficiary had a relationship to the trust that was distinct from that of a bystander, and the law of trusts protected that relationship by granting beneficiaries certain enforceable rights against both trustees and third parties.

ERISA does not follow traditional trust law in all respects. *See Varity Corp.*, 516 U.S. at 497. In particular, ERISA plans, unlike traditional trusts, are distinct legal entities that can sue and be sued (although they are not authorized to sue their fiduciaries directly). 29 U.S.C. §§ 1132(a), (d); *see also Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016) ("Traditionally, a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people."). Nonetheless, the history of equity courts supports Congress's decision to grant plan participants the authority to vindicate the plan's interests vis-à-vis plan fiduciaries. Just as equity regarded the *cestui que trust* as having a sufficient interest in the trust to join (and in some cases, initiate) litigation affecting the trust, so too Congress could recognize, in the exercise of its Article I power to regulate employee benefit plans, that plan participants are appropriate representatives of the plan in litigation against fiduciaries who violate their ERISA responsibilities. Recognizing Congress's authority to make such historically grounded judgments does not open the federal courthouse door to the "generalized grievance[s]" of strangers, *Hollingsworth*, 570 U.S. at 715, any more than this Court's decisions recognizing the representative standing of associations, next friends, and assignees did so. In all cases, this Court retains the ultimate decision whether a particular representative action takes the federal courts outside of their "properly judicial role" and risks "'usurp[ing] the powers of the political branches.'" *Spokeo*, 136 S. Ct. at 1547 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)). Given its historical pedigree, an action by an ERISA plan participant to hold plan fiduciaries to account for injuries suffered by the plan does not come close to that constitutional line.

CONCLUSION

For the foregoing reasons, and the reasons stated in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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