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.,
Respondents.

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

BRIEF FOR LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are legal scholars who write and teach about employee benefits, pension and/or trust law.[1]

Sean M. Anderson is a Teaching Associate Professor of Law at the University of Illinois College of Law.

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[1] The petitioners have filed with the Clerk of the Court a blanket letter of consent to the filing of amicus briefs in support of any party. Respondents consented to the filing of this brief by e-mail, a copy of which has been filed with the Clerk. In fulfillment of the requirement of Rule 37.6, Amici state that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than Amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

Anne-Marie Rhodes is the John J. Waldron Professor of Law at Loyola University Chicago School of Law.

Amici hope that their experience and expertise will assist the Court in its consideration of the important questions this case presents.[2]

SUMMARY OF ARGUMENT

Petitioners should have standing to pursue their claims. The law of trusts—upon which ERISA is based—makes clear that a trust beneficiary can sue to restore losses to the trust regardless of individual economic loss to the beneficiary.

As an initial matter, trust law has long recognized that beneficiaries have a property interest in the assets of the trust, and not merely a contractual right to benefits under the trust. An injury to the trust results in an injury to the beneficiary's property interest. This is true even if the losses to the trust do not immediately threaten a beneficiary's individual payouts. To restrict a beneficiary's standing to redress injuries to trust property to only instances in which a breach of trust immediately threatened the ultimate payment of benefits would improperly reduce the beneficiary's property rights to mere contractual rights.

[2] This brief represents the opinions of the named professors and is not made on behalf of the named institutions.

Additionally, trust law recognizes that a beneficiary may sue a trustee for a breach of the duty of loyalty without having to show that the breach caused tangible harm to the trust or its beneficiaries. This concept known as the "no-further-inquiry" principle.

The common law of trust also recognizes that a trustee has a duty of prudence and is liable for losses to the trust arising from breaches of that duty, including through the equitable remedy of surcharge.

ARGUMENT

I. THE CLAIMS HERE

The U.S. Bank Plan (the "Plan") is a defined benefit pension plan. A defined benefit plan "consists of a general pool of assets, rather than individual dedicated accounts. Such a plan, 'as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citation omitted).

Petitioners are participants and beneficiaries in the Plan. Respondents are sponsors and administrators of the Plan.

The complaint alleged that respondents violated the fiduciary duties of loyalty and prudence required under the Employee Retirement Income Security Act of 1974 ("ERISA"), and also caused the Plan to engage in prohibited transactions, between 2007 and 2010. In particular, petitioners alleged that respondents adopted an overly risky and self-interested strategy of

investing plan assets exclusively in equities, including respondents' own funds, resulting in a $748 million loss to the Plan. This loss also resulted in the Plan falling short of ERISA's statutory minimum funding requirements. Petitioners sought relief under ERISA sections 502(a)(2) and (3) to recover losses to the Plan and to require the breaching fiduciaries to disgorge any ill-gotten gains.

Respondents moved to dismiss these claims for lack of Article III standing, arguing that petitioners did not suffer an injury in fact because they have thus far received all benefit payments to which they were entitled.

The district court initially denied respondents' motion. Respondents subsequently made a substantial contribution to the Plan, which caused the Plan to exceed ERISA's minimum funding requirements. Although this contribution fell far short of reimbursing the Plan for the losses caused by respondents' alleged breaches, the district court granted respondents' renewed motion, concluding that because the Plan now satisfied ERISA's minimum funding requirements, petitioners no longer had a concrete interest in the relief sought.

Following its earlier decision, *Harley v. Minnesota Mining & Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003), the Eighth Circuit affirmed dismissal on statutory standing grounds: because the Plan was overfunded according to ERISA's minimum standards, petitioners lacked an individual monetary injury and thus no longer fell within the class of plaintiffs authorized to bring suit.

The decision of the appellate court is contrary to long-recognized principles of trust law, upon which ERISA is based: trust law has recognized for over 500 years that a trust beneficiary can sue to restore losses to a trust regardless of individual economic loss to the beneficiary. *See, e.g.*, Austin W. Scott, *The Importance of the Trust*, 39 U. Colo. L. Rev. 177 (1966-1967) (explaining that the law of trusts began during the fifteenth century when English chancellors began to enforce beneficiaries' claims concerning land transfers, recognizing a remedy in courts of equity).

II. TRUST LAW HAS LONG RECOGNIZED THAT BENEFICIARIES HAVE PROPERTY INTERESTS IN THE ASSETS OF THE TRUST

The common law of trusts has long recognized that trust beneficiaries have an equitable, property interest in trust assets.

A. DEVELOPMENT OF TRUST LAW

As explained in *The Importance of the Trust*, trust law started with transfers of land made for the use of the transferor or a third person. Scott, 39 U. Colo. L. Rev. at 177. These transfers began "not long after the Norman Conquest and had become common before the fifteenth century." *Id*. Early in the fifteenth century, the English chancellors began to enforce the claim of the beneficiary against the trustee. *Id*. They held the trustee "should be compelled in equity" to carry out the purpose for which the trust property was conveyed. *Id*. Thus, while there was no remedy in the court of law, there was now a remedy in equity. *Id*.

The chancellors were soon compelled to consider when a beneficiary had a claim against the transferee and whether they were merely enforcing a personal obligation of the transferee or protecting a property interest of the beneficiary. *Id.*

The chancellors came to recognize "that the beneficiary had a property interest and not merely a claim against the trustee." *Id*. at 178. This recognition was based on at least three key principles. First, the chancellors held that beneficiaries were entitled to relief against subsequent transferees of the trust property. *Id.* at 177-78. Second, the chancellors held that if the transferee exchanged the property for other property, the beneficiary was entitled to follow the res and compel the transferee to surrender the other property, since it was the product of property of the beneficiary. Third, the chancellors held that, upon the death intestate of a beneficiary of a use or trust of land, his interest should be treated as "an interest in land rather than merely as a claim against the holder of the legal title." *Id.*

Thus, "[a]lthough the trustee has the legal title, the beneficiaries are the equitable owners. The chancellors created a new kind of property interest." *Id*. at 178-79.

B. PROPERTY RIGHTS OF TRUST BENEFICIARIES

There are three elements in a trust:

> (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more benefi-

> ciaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.

Restatement (Third) of Trusts § 2(f) (Am. Law Inst. 2003) (Definition of a Trust).

A trust must involve "property." *See* 76 Am. Jur. 2d *Trusts* § 1 (2019) (General Nature and Definition of Trust) ("By definition, the creation of a trust must involve a conveyance of property."); Restatement (Second) of Trusts § 74 (Am. Law Inst. 1959) (The Necessity of Trust Property) ("A trust cannot be created unless there is trust property.").

The beneficiaries hold the beneficial interests in the trust property, while the trustee holds legal title to the property. *See, e.g.*, Restatement (Third) of Trusts § 42 (Am. Law Inst. 2003) (Extent and Nature of Trustees Title); 76 Am. Jur. 2d *Trusts* § 259 (Trust beneficiary's equitable interest, generally) ("As a general proposition, the creation of a trust divides title to the trust property, placing legal title in the trustee and equitable title in the beneficiary."); 90 C.J.S. *Trusts* § 265 (2019) ("An equitable or beneficial interest in the trust res [or trust property] is an identifiable interest in property, separate from the trustee's legal interest.").

The nature of a beneficiary's interest in the trust "constitutes a vested interest in the property itself and not merely a chose in action or a right to profits and is generally regarded as something more than a chose in action." 76 Am. Jur. 2d *Trusts* § 260 (*Nature of interest in trust as chose in action or vested interest*)

(*citing, e.g., Blair v. Comm'r.*, 300 U.S. 5, 13–14 (1937)). *Accord* 90 C.J.S. *Trusts* § 265 ("The beneficiary's interest is an equitable title, not a mere equitable right. An equitable, vested interest in trust property is regarded as a property interest, and is more than a mere chose in action.").

Likewise, this Court has long-recognized the principle that the beneficiaries of a trust have a property interest in the subject matter of the trust and not merely a personal claim against the trustee. *See Senior v. Braden*, 295 U.S. 422 (1935); *Brown v. Fletcher*, 235 U.S. 589 (1915).

Thus, a beneficiary does not merely possess a contractual right to the ultimate benefit of the trust (in the case of the Plan at issue, the future payment of retirement benefits); the beneficiary possesses an equitable interest in the property of the trust before the ultimate benefit is conveyed. As the Restatement (Second) of Trusts explains:

> It is important . . . to distinguish a trust from a contract creating a mere personal obligation, because of the difference in the extent of the protection which the courts afford to the interest of the beneficiary of the trust. The beneficiary of a trust has an equitable interest in the subject matter of the trust, and in its proceeds if it is disposed of, which gives him priority over the claims of the general creditors of the trustee and over transferees who are not bona fide purchasers.

Restatement (Second) of Trusts § 74 cmt. a (1959).

Accordingly, under long-standing principles of trust law, petitioners here have an undivided, equitable property interest in the assets of the U.S. Bank defined benefit plan trust. An injury to the trust results in an injury to petitioners' property interest. This is true even when the losses to the Plan's assets do not immediately threaten petitioners' individual payouts. To restrict petitioners' standing to only instances in which a breach of trust threatened the ultimate payment of their benefits would improperly reduce these property rights to mere contractual rights, which would be counter to the trust principles discussed above.

III. INDIVIDUAL MONETARY LOSS IS NOT NECESSARY TO REDRESS BREACHES OF FIDUCIARY DUTIES

Under trust law, a beneficiary may sue for a breach of fiduciary duty without an allegation of personal monetary harm or any other harm beyond the breach of the duty owed to the beneficiaries. For example, the Restatement (Third) of Trusts explains that a beneficiary has broad standing to sue a trustee "to enjoin or redress a breach of trust," which 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, 94(1) (Am. Law Inst. 2012) (What is a Breach of Trust?), (Standing to Enforce a Trust).

A. DUTY OF LOYALTY

Trust law recognizes that a beneficiary may sue his trustee for a breach of the duty of loyalty without having to show that the breach caused any tangible

harm to either the trust or its beneficiaries. Mark L. Ascher et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) ("[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."); *see also* George Gleason Bogert et al., *The Law of Trusts and Trustees* § 543, at 217 (2019) (Trustee's duty of loyalty to beneficiaries) ("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.").

Under this "no-further-inquiry" principle, a beneficiary only needs to establish that the trustee engaged in self-dealing or acted under a conflict of interest—nothing more is needed to seek a remedy. *See* Restatement (Third) of Trusts § 78 cmt. b (Am. Law Inst. 2003) (Duty of Loyalty) (stating that under the no-further-inquiry rule "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").

Trust law has a rich history of allowing claims to proceed—regardless of individual financial loss. *See, e.g.*, *Aberdeen Ry. Co. v. Blaikie, Bros.* [1854] 2 App. Cas. 1281 (HL) 1286-87 (summarizing cases).

Applying the no-further-inquiry rule, this Court recognized that when a trustee sells a part of the trust property and "becomes himself interested in the purchase," a trust beneficiary may seek relief without "any further inquiry" into the nature of the sale or the

fairness of the price. *Michoud v. Girod*, 45 U.S. 503, 553, 557 (1846).

Because a fiduciary breach has been traditionally actionable without additional allegations of personal harm, a fiduciary breach alone constitutes a concrete injury-in-fact under the principles summarized in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (courts ask "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"). *Cf. CIGNA Corp. v. Amara,* 131 S. Ct. 1866, 1881 (2011) (acknowledging that the injury from a violation of ERISA may come from "the loss of a right protected by ERISA or its trust-law antecedents").

B. DUTY OF PRUDENCE

Trustees have a duty of prudence—"a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts § 77(1) (Am. Law Inst. 2007) (Duty of Prudence). Both the Uniform Trust Code and the Restatement (Third) of Trusts recognize that a trustee must administer the trust as a prudent person would by considering the purposes, terms, and other circumstances of the trust. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution. *See* Unif. Trust Code § 804 (Unif. Law Comm'n 2000); Restatement (Third) of Trusts § 77(1), (2). *See also* Bogert et al. *The Law of Trusts and Trustees* § 541 (General duties—Duty to exercise ordinary skill and diligence) ("The trustee

has an overall duty to administer the trust as a prudent person would and must exercise reasonable care, skill, and caution in doing so.").

A trustee is liable for losses if there is a "breach of trust or breach of duty." 76 Am. Jur. 2d *Trusts* § 336. Liability of trustee for breach of duty. *See also* Restatement (Third) of Trusts § 100 (Am. Law Inst. 2012) (Liability of Trustee for Breach of Trust) ("A trustee who commits a breach of trust is chargeable with (a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered[.]"); Unif. Trust Code § 1001(b)(3) (the court may "compel the trustee to redress a breach of trust by paying money, restoring property, or other means").

Trust beneficiaries are able to sue for loss to the trust for improper management of the trust. *See, e.g.*, 76 Am. Jur. 2d *Trusts* § 362 ("A trustee that fails to meet the applicable standard of care is subject to a penalty including a surcharge."); *id.* at § 337 ("Thus, a trustee may be required, because of past loss of the trust corpus, to use his or her own resources to replenish the corpus.").

Here, petitioners alleged that respondents' imprudence caused a loss of $748 million of Plan assets held in trust, and thus petitioners would have been able to seek a remedy of surcharge at common law.

The common law further recognized that the beneficiary of a trust had a right to protect trust property regardless of whether the misconduct of the trustee

threatened the ultimate benefit to which the beneficiary was due. For example, courts have consistently held that a discretionary beneficiary may file suit to redress breaches of trust even though whether, and to what extent, the beneficiary would receive a benefit from the trust was left to the discretion of the trustee, thus precluding any demonstration of how an injury to the trust res would injure the beneficiary's ultimate benefit. *See, e.g.*, *Scanlan v. Eisenberg*, 669 F.3d 838, 843 (7th Cir. 2012) ("[j]urisdictions examining the nature of a discretionary beneficiary's interest have found that, like an ordinary beneficiary, a discretionary beneficiary has an equitable interest in the trust property") (citing cases).

Similarly, where there are multiple beneficiaries of a trust, any beneficiary may file suit to redress a breach of trust because the beneficiaries generally have an undivided equitable interest in the entire trust property. *See, e.g.*, Bogert et al., *The Law of Trusts and Trustees* § 181 (Beneficiaries with various types of interests) ("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[.]"); Restatement (Second) of Trusts § 214(1) (Am. Law Inst. 1959) (Several beneficiaries) ("If there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him or to enjoin or obtain redress for a breach of the trustee's duties to him."); *id.* cmt. a (rule "applicable to beneficiaries who have vested or contingent interests").

IV. PETITIONERS HAVE ARTICLE III AND STATUTORY STANDING

Given this extensive history of countenancing beneficiaries' claims to redress breaches of fiduciary duties, it is beyond peradventure that, at common law, petitioners would have had standing to pursue their claims against respondents. It cannot be that Congress, in enacting ERISA, chose to abrogate such standing.

Indeed, Congress' intent in passing ERISA was to bolster employees' pension rights. One way in which Congress did so was by providing beneficiaries with a means of legal redress for violations of those rights. *See* 29 U.S.C. §§ 1132(a)(2), (3) & 1109. "It is an elementary canon of statutory construction that '(t)he legislature is presumed to know the common law before the statute was enacted. . . .'" *Gov't V.I. v. 19.623 Acres of Land*, 602 F.2d 1130, 1138 (3d Cir. 1979) (citing 2A Sutherland, Statutory Construction, § 50.01 at 268 (4th ed. 1973)). "Relevant antecedent common law comprises part of a statute's legal history. And so the common law may be a valuable extrinsic aid to guide interpretation, along with all other components of the legal system at the time of enactment." 2B Sutherland Statutory Construction § 50.01 (7th ed. 2018).

To find no Article III or statutory standing would be contrary both to Congressional intent and ERISA's common law underpinnings. Such a holding would provide employees with less protection under ERISA than they had prior to its passage, contrary to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 102 (1989).

CONCLUSION

For the above stated reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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