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 AMICI CURIAE AARP AND AARP FOUNDATION SUPPORTING PETITIONERS AND URGING REVERSAL

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Among other things, AARP and AARP Foundation seek to increase the security, and adequacy of public and private pensions and other employee benefits that older individuals receive or may be eligible to receive, including through participation as amicus curiae in state and federal courts, including this Court.[2] One of amici's main objectives is to ensure that participants receive those

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[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or its counsel and that no person other than amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), undersigned counsel has received written consent from both parties to the filing of this brief.

[2] *E.g., Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (scope of ERISA "church plan" exemption); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016) (ERISA

benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001, et seq. The quality of these workers' lives in retirement depends substantially on their ability to obtain the benefits they were promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

The Court's decision in this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' ability both to protect their pension plans from mismanagement and to obtain redress for such mismanagement. AARP and AARP Foundation respectfully submit this brief because the decision below unnecessarily limits participants' ability to initiate and continue lawsuits to obtain relief for fiduciaries' breach of their duties of loyalty, prudence, and diversification to participants.

INTRODUCTION

The Eighth Circuit's decision forecloses participant claims on behalf of the plan whenever the plan is, however temporarily, sufficiently funded—regardless of any underlying breach of fiduciary duty. As Petitioners' brief aptly points out, the Eighth Circuit's decision would allow a fiduciary to simply

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preemption); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) (ERISA's civil enforcement provision).

gamble away plan assets with impunity. The following thought experiment reveals how ERISA's enforcement provisions ought to remedy fiduciary breach in such a situation.

Imagine a plan fiduciary goes to Las Vegas, gambles for personal gain with $1 million of a plan's assets, and loses all $1 million. The plan participants should be able to sue the plan fiduciary for breach of the duty of loyalty because she is misusing plan assets by self-dealing. The participants should be able to remove the fiduciary and recover the loss to the plan, regardless of the plan's funding status.

In a slight variation on the hypothetical, the fiduciary goes to Vegas to gamble but, by sheer luck, neither loses nor wins money and returns the entire $1 million to the plan. The participants should be able to sue the fiduciary for breach of her duty of loyalty due to self-dealing, regardless of the plan's funding status. At minimum, the participants should be able to obtain the judicial relief of removal of the fiduciary plus any revenue lost during the period when the fiduciary was risking the plan's assets for personal gain instead of investing them toward pension benefits.

Finally, take the case of the plan fiduciary that goes to Vegas, gambles with $1 million of the plan's assets, and, by sheer luck, doubles the money to $2 million. The fiduciary returns $1 million to the plan. Participants still should be able to sue the fiduciary for breach of the duty of loyalty and request that the court, in addition to removing the fiduciary, order the

fiduciary to disgorge the profit of $1 million that she made from the use of the plan's assets, regardless of the plan's funding status.

Whether the plan is underfunded or overfunded is irrelevant. Under all three scenarios, plan participants have a statutory right to sue the plan fiduciary for breach of the duty of loyalty under ERISA, as Congress has expressly authorized them to do in 29 U.S.C. § 1132(a)(2). Moreover, under all three scenarios, plan participants have an injury-in-fact giving rise to Article III standing: a breach of the unique trust between a fiduciary and a beneficiary. The remedies are different because the breaching fiduciaries' actions are different, but they all remedy the fiduciary's breach of trust and restore the guarantee of retirement income security Congress sought to establish when it enacted ERISA.

SUMMARY OF ARGUMENT

Congress authorized plan participants, along with the Secretary of Labor and plan fiduciaries, to file in a representative capacity on behalf of the plan to recover any losses to the plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). All these potential plaintiffs share a common interest in the "financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. In designing ERISA, Congress sought to strictly monitor and regulate the manner in which fiduciaries administer and manage their plans. *Id.* at 140 n.8. Starting from the foundation of the common law of trusts, Congress built a robust statutory

structure in which private litigants, along with the Secretary of Labor, can prosecute claims against plan fiduciaries arising from injuries to the plan caused by breaches of the fiduciary liability standards imposed under ERISA.

Congress's edifice did not exceed the bounds of Article III. When a participant sues a fiduciary for breaches of the duties of loyalty, prudence, and diversification under ERISA, the participant is seeking to remedy a genuine, concrete injury cognizable under the common law of trusts, which forms the foundation of ERISA's fiduciary requirements. *See Russell*, 473 U.S. at 142-43, 156. The participant's injury-in-fact is the breach of the fiduciary's promise to administer and manage the plan prudently and solely in her interests, that breach creating a risk to the plan's financial integrity, regardless of any immediate economic loss. This injury is not speculative, but real and concrete, and is sufficient injury-in-fact to support standing.

ARGUMENT

I. Congress Expressly Authorized Participants and Beneficiaries to Sue for Breach of Fiduciary Duty in a Representative Capacity on Behalf of the Plan.

When fiduciaries breach their duties, participants suffer various injuries—both individual and collective. Congress separately provided relief for both. For individual losses, section 502(a)(1)

empowers participants and beneficiaries to sue "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). Second, Congress expressly gave individuals—in addition to the Secretary of Labor and plan fiduciaries—the tools necessary to sue *on behalf of the plan*. Section 502(a)(2) states that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409." 29 U.S.C. § 1132(a)(2). ERISA § 409(a), in turn, establishes that breaches of "any of the responsibilities, obligations or duties imposed upon fiduciaries" may give rise to a claim. 29 U.S.C. § 1109(a).

Consequently, in *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), the Court acknowledged that section 502(a)(2) of ERISA was the only civil enforcement provision focused on fiduciary obligations related to the plan's financial integrity. *See also* S. Rep. No. 93-127, at 35 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 621 (1976) (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 2364 (describing House version in identical terms). Empowering participants to sue to remedy breaches of fiduciary

duty on the plan's behalf fulfilled Congress's intent to ensure employees' retirement security.

A. Congress Enacted ERISA's Key Fiduciary Duties to Ensure that Participants Will Receive Their Benefits.

Prior to ERISA's passage, no federal standards required persons operating employee benefit plans to pay promised benefits or to avoid transactions that could dissipate plan assets. *See, e.g.*, Jeffrey Lewis, et al., EMPLOYEE BENEFITS LAW xcix-ci (4th ed. 2012). Among the events that prompted Congress to regulate retirement plans were Studebaker's corporate failure and its termination of its pension plan with insufficient assets to pay benefits, the trial of Jimmy Hoffa alleging (and later finding him guilty of) fraud on the Central States Pension Fund, and instances of other trustees embezzling or using pension funds for their own benefit. *See, e.g.*, James A. Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 8-10, 51-80, 112-113, 118 (2004); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 n.22 (1980) (quoting 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT 1599-1600 (1976)) (discussing closure of Studebaker and sale of P. Ballantine and Sons resulting in termination of insufficiently funded pension plans and workers' loss of substantial portion of pension benefits).

As a result of these horror stories, Congress wanted to "make as certain as possible that pension

fund assets would be adequate" to meet expected benefits payments and that fiduciaries would act in the best interests of participants. *Nachman Corp.*, 446 U.S. at 375. Congress believed that if fiduciaries were not required to operate pension plans loyally and prudently, and without self-dealing, pension plan assets would ultimately be unavailable to pay benefits. Accordingly, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries" and provides "for appropriate remedies [and] sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b).

B. Congress Authorized Participant Suits on the Plan's Behalf as a Crucial Enforcement Mechanism for ERISA's Fiduciary Standards.

Participant suits to remedy breaches of fiduciary duty on the plan's behalf under Section 502(a)(2) are a key building block of the enforcement structure Congress designed. In *Russell*, this Court acknowledged that the inclusion of the Secretary of Labor as one of the four classes of party-plaintiffs in § 502(a)(2) demonstrates that "actions for breach of fiduciary duty [are to] be brought *in a representative capacity on behalf of the plan as a whole*." 473 U.S. at 142 n.9 (emphasis added). Indeed, as Petitioners rightly note, the common interest shared by all four classes is the "financial integrity of the plan." *Id.*

Significantly, the statute makes no distinction among the entities authorized to sue for mismanagement of plan assets. These statutory

provisions clearly express Congress's intent that private litigants serve along with the U.S. Department of Labor ("DOL") to prosecute claims against plan fiduciaries arising from breaches of the fiduciary liability standards imposed under Section 404 of ERISA. *See* H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5107.

Quite simply, no one can police a pension plan as well as its participants. The Department of Labor consistently has had inadequate resources to police the retirement system.[3] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION—ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT 10, 28 (2007); U.S. Gen. Accounting Office, 4 GAO-02-232, PENSION AND WELFARE BENEFITS ADMINISTRATION—OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM 2-3 (2002); U.S. Dep't of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC (1992). Indeed, the DOL could not police defined benefit plans by itself even if it had more

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[3] The Employee Benefits Security Administration in the Department of Labor is responsible for policing over "681,000 retirement plans, approximately 2.3 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance." U.S. Dep't of Labor, *EBSA Restores Over $696.3 Million to Employee Benefit Plans, Participants and Beneficiaries*, https://www.dol.gov/ebsa/pdf/fsfy15agencyresults.pdf (last visited June 22, 2016). It closed 2,441 civil investigations in fiscal year 2015. *Id.*

resources. Recent analyses show that approximately one quarter of all civilian workers have access to defined benefit plans—adding up to nearly 8 million people. Bureau of Labor Statistics, *Employee Benefits Survey*, https://www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm (March 2018); Pension Rights Center, Data on Access to Retirement Plans, http://www.pensionrights.org/sites/default/files/docs/participation.pdf (March 2018). These workers may passively wait for the overtaxed federal agency to come to their rescue—usually in cases where the damage to the plan is already irreparable—or they can, as Congress intended, step in on the plan's behalf to protect their own retirement security before it is too late.

If, on the other hand, participants cannot sue for losses to the plan, there would be a significant gap in ERISA's enforcement provisions. It seems counterintuitive that Congress would have passed a participant-protective statute with no legal recourse for participants to actually pursue the remedy Congress specified. As the district court in *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 265 (D. Mass. 2008), interpreted *Russell*:

> [R]equiring all plan participants to wait until they had an individuated injury would be to require them to wait until it was too late. Because any individual plaintiff might still be able to draw her full benefits from the remainder of the fund's assets upon retirement, an individual plaintiff

> could only demonstrate an immediate harm where the loss was so grievous that it threatened the financial integrity of the entire defined benefit plan. *See* [*Russell*, 473 U.S.] at 142-43 & n.9; *see also LaRue*, [522 U.S. at 235-56] (clarifying *Russell'*s holding). Because ERISA was meant to reach breaches of fiduciary duty that did not endanger the entire plan, the Court interpreted the statute as permitting any participant in a defined benefit plan to sue "on the plan's behalf" for any fiduciary breach — that is, to undo the damage that had been done to the pool of assets, however minuscule an individual share may be. *See Russell*, 473 U.S. at 142.

The language of ERISA § 502(a)(2) shows Congress's intent to confer broad prosecutorial authority on participants in employee benefit plans by creating an actionable statutory entitlement to prudent, loyal management of funds for each participant. When suing "on behalf of" the plan, the participant is recovering not only his proportion of the plan's loss, but the entire amount by which the plan assets were impaired as well as injury due to the abuse of trust. *Russell*, 473 U.S. at 139-40; *accord, LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008).

Together, § 502(a)(2) and § 409(a) provide broad relief—but only to the plan. *Russell*, 473 U.S. at 140, 144 (acknowledging that section 409 expressly

authorizes only plan-based relief). These sections permit the recovery of "any losses to the plan resulting from each" breach of fiduciary duty, restoration to the plan of any profits the fiduciary made through the use of plan assets, and other equitable or remedial relief within the court's discretion, including removal of the fiduciary. 29 U.S.C. §§ 1109(a), 1132(a)(2). Consequently, in the hypothetical case of the gambling fiduciary, Congress empowered participants to sue to recover any money the fiduciary gambled away, compel disgorgement of profits that are rightfully the plan's, and ensure the plan's future financial integrity by seeking the fiduciary's removal.

II. Participants Suffer an Injury-In-Fact Deriving From the Common Law of Trusts When Fiduciary Breaches Increase Risk to the Security of Defined Benefit Plan Assets.

This Court recently reaffirmed that, although Congress can create federal claims, a plaintiff, to have standing, must allege an injury-in-fact that (i) is both concrete and particularized, (ii) is traceable to the defendant, and (iii) a federal court can redress. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, No. 13-1339, 2016 U.S. LEXIS 3046 (May 16, 2016). The Court explained that the alleged injury may be tangible or intangible, noting that it has "confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Id.* at *15-16. In determining what constitutes an intangible injury, "both history and the judgment of Congress play important roles." *Id.* The Court recognized that it is

"instructive to consider whether an alleged intangible harm has a close relationship to a harm that traditionally has been regarded as providing a basis for a lawsuit in English or American courts." *Id.* The Court confirmed that Congress's "judgment is also instructive and important" because it "is well positioned to identify intangible harms that meet minimum Article III requirements." *Id.*

The Court acknowledged that "a risk of real harm" can "satisfy the requirement of concreteness," even if is difficult to measure. *Id.* Thus, the Court found that some statutory requirements create legally cognizable rights, and a court can assume concrete harm when a defendant breaches these statutory rights. *Id.* at *16-17 (identifying, as examples, libel, slander, and violations of statutes that require government agencies to release certain information to the public). The plan-based harms Congress sought to redress through ERISA §§ 502(a)(2) and 409(a) were injuries at common law that Congress judged necessary to codify.

A. The Common Law of Trusts Establishes the Duties of Loyalty, Prudence, and Diversification that Fiduciaries Owe to Trust Beneficiaries.

The fiduciary duties of loyalty, prudence, and diversification that Congress codified in ERISA originate in the common law of trusts. 29 U.S.C. §§ 1104(a)-(a)(1)(C). Under the common law, a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship. Restatement (Third) of Trusts § 2 (2007). In the trust context, that relationship concerns the trust assets. Restatement (Second) of Trusts §§ 2, 74 (1959); Restatement (Third) of Trusts §§ 3, 10. Fiduciary duties safeguard the beneficiary's entitlement to the trust assets. Enforcement of fiduciary duties is a means of upholding the beneficiary's interest.

The common law duty of loyalty requires the trustee "to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts §170(l) , as continued in Restatement (Third) of Trusts § 170(l); *see also Lewis v. Welch*, 48 N.W. 608, 609-10 (Minn. 1891) (a trustee is bound not to self-deal because to do so would "tempt him [or her] to act for the promotion of his [or her] own interests, and thus subordinate, disregard, and prejudice the interests which as a trustee he is bound to protect and subserve."). Most importantly, it forbids the trustee from self-dealing with trust assets and from engaging

in conflicted transactions adverse to the trust. G. T. Bogert, TRUSTS § 95 (6th ed. 1987).

Where the trustee deals with the trust's property for his own use, he must disgorge any profits to the trust, even if he paid fair value for the property. *See, e.g., Lewis,* 48 N.W. at 611 (restricting reimbursement to trustee, with interest, where trustee engaged in self-dealing); *St. Paul Tr. Co. v. Kittson,* 65 N.W. 74, 76 (Minn. 1895) (trustees who co-mingle trust funds with personal funds and profit must pay a higher interest rate. The duty of loyalty is prophylactic in that it establishes boundaries for the trustee's actions.

The trustee also owes the beneficiary the fiduciary duty of prudence, which is an objective standard of care, that is, one of reasonableness. "The trustee has 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; see also Restatement (Second) of Trusts §§ 172-78, 188 (The trustee is "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."); *accord*, A. Hess & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 541 (3d ed. 2009) ("[T]he trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent manager engaged in similar business affairs and with objectives similar to those of the trust in question.").

In addition, the trustee owes the beneficiary the duty of diversification, that is, to invest plan assets in such a manner as to "spread the risk." G. T. Bogert, TRUSTS § 106 at 388 (6th ed. 1987); Restatement (Third) of Trusts § 90; *see also* Restatement (Second) of Trusts § 288 ("the trustee is under a duty to the beneficiary to exercise prudence in diversifying the investments so as to minimize the risk of large losses, and therefore he should not invest a disproportionately large part of the trust estate in a particular security or type of security"). The duty of diversification generally is considered part of the duty of prudence. See Restatement (Third) of Trusts § 90 (duty to diversify investments is within the prudent investor rule). Other related fiduciary duties such as to keep and render accounts, to furnish information, to invest or preserve trust assets and make them productive, to enforce and defend claims, to diversify investments, and to minimize costs are all under the umbrella of the duties of loyalty and prudence. Restatement (Third) of Trusts § 77; see also Restatement (Second) of Trusts §§ 172-78, 188; accord, A. Hess & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 541.

Accordingly, under the common law of trusts, a beneficiary could sue a fiduciary for a breach of any of these duties because the injury was the breach of trust itself, regardless of any monetary loss. *See generally* John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L.J. 625, 647-48 (1995) (comparing different views on whether equitable tracing arises from property or contract).

B. Congress Incorporated the Common Law Duties of Loyalty, Prudence, and Diversification into ERISA's Fiduciary Rules.

For ERISA's fiduciary standards of conduct, Congress incorporated several key measures from the common law of trusts. It imposed upon plan fiduciaries duties of loyalty, prudence, and diversification with respect to plan administration and the management of existing trust funds. ERISA § 404, 29 U.S.C. § 1104; *see also Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA); 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams), reprinted in 1974 U.S.C.C.A.N. 5177, 5186 ("Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds.").

Congress codified the common law duty of loyalty in ERISA by requiring the fiduciary "to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a), 29 U.S.C. § 1104(a). Congress categorically barred certain transactions between the plan and

parties in interest to prevent conflict of interests and self-dealing. ERISA § 406, 29 U.S.C. § 1106. Congress found that these transactions were "likely to injure the pension plan." *Comm'r v. Keystone Consol. Indus.*, Inc., 508 U.S. 152, 160 (1993).

Congress also codified the common law duty of prudence in ERISA by requiring fiduciaries to act "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." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

In addition, Congress codified the common law duty of diversification in ERISA by requiring fiduciaries to "[diversify] the investment of the plan so as to minimize the risk of large losses." ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon condition in one locality since the effect is to increase the risk of large losses. H.R. REP. NO. 93-1280, 2d Sess. at 304 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085. As this Court explained:

> It is of course true that the fiduciary obligations of plan administrators are to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits

> authorized by the plan. But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information . . . .

Russell, 473 U.S. at 142-43.

C. Common Law Breaches of Trust—and, Thus, Breaches of ERISA's Fiduciary Duties—Injure Participants By Increasing Risk to the Plan's Financial Security, Regardless of Current Funding Status.

Congress constructed the fiduciary duty provisions of ERISA, based on a common law foundation, to protect against the misuse and mismanagement of plan assets, that is, to guarantee, to the extent possible, a plan free from fiduciary malfeasance. Although Congress was certainly concerned with the immediate monetary loss that comes with plan mismanagement, Congress was also concerned with the increased *risk* of monetary loss to participants' benefits that results when fiduciaries engage in the misuse and mismanagement of plan assets. Congress recognized that misuse and mismanagement of plan assets increase the risk that plans will be unable to make good on the promise of benefits that defined benefit plans create. *Id.*

Current funding levels do not affect the basic fiduciary obligations outlined in sections 404 and 406 of ERISA. There is no exemption in ERISA for fiduciaries of an overfunded plan to self-deal in the plan assets or make imprudent decisions. The hypothetical gambling fiduciary is accountable to participants for her disloyal, imprudent use of plan assets long before her actions, having gone unaddressed, bankrupt the plan. It makes no sense to condition the ability to sue for a breach of fiduciary duty on the plan's funding status where the injury is the abuse of trust. Congress wanted to make sure that assets would be available for the payment of benefits and that the plan would be properly managed. If a breach of fiduciary duty is alleged and can be proven, then the participant should be able to recover for the plan's loss from that breach, regardless of its current funding status. And, irrespective of monetary loss, participants should be able to seek appropriate injunctive relief, including the fiduciary's removal.

In sum, a proper understanding of participant and beneficiary rights in a defined benefit plan accepts that those rights consist of far more than just a simple right to receive a stream of payments at some time in the future. Instead, as participants in an ERISA-regulated trust, participants enjoy a rich array of legal rights. These rights include a right held by the entire cohort of participants to have all of the plan assets used exclusively for their benefit and invested prudently. They also include a right to membership in a plan free of the types of fiduciary imprudence, fraud and self-dealing that pre-dated ERISA. *See* Dana Muir*, ERISA and Investment Issues,* 65 OHIO ST. L.J.

199, 218 (2004). Fiduciaries that, through breach of their statutorily imposed duty, impinge on any one of these rights do cause harm—and, thus, injury-in-fact to the legal rights of participants that may be remedied by monetary and injunctive relief.

Notably, honoring Congress's intent to empower participant suits to recover plan losses has not opened the floodgates to frivolous litigation, contrary to Appellee' prediction. Nor will it in the future. To seek the return of plan losses, participants must allege an actual breach of a fiduciary duty *causing* a loss—an allegation of any loss is not enough to support a claim. District courts are well-positioned to assess the plausibility of such allegations at the outset of a case, preserving efficiency without removing a crucial component of Congress's thoughtfully crafted enforcement structure.

CONCLUSION

For all these reasons, amici respectfully submit that the Court should reverse the decision of the Eighth Circuit in this case.

Respectfully Submitted,

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