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.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, authorizes participants and beneficiaries to bring a civil action "for appropriate relief" against fiduciaries of employee benefit plans who violate their duties, responsibilities, and obligations under the statute. 29 U.S.C. 1132(a)(2). Participants and beneficiaries also may bring a civil action for injunctive and "other appropriate equitable relief" to remedy any act or practice that violates the plan or ERISA. 29 U.S.C. 1132(a)(3). The questions presented are:

1. Whether defined-benefit plan participants and beneficiaries may seek relief under 29 U.S.C. 1132(a)(3) when the plan is overfunded.

2. Whether defined-benefit plan participants and beneficiaries may seek relief under 29 U.S.C. 1132(a)(2) when the plan is overfunded.

3. Whether petitioners have demonstrated Article III standing.

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INTEREST OF THE UNITED STATES

This case concerns whether a participant or beneficiary in a defined-benefit pension plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, has Article III standing to sue plan fiduciaries for alleged breaches of fiduciary duties in the event the plan is overfunded. The case also concerns whether such claims are authorized under ERISA Sections 502(a)(2) and 502(a)(3), 29 U.S.C. 1132(a)(2) and (3). The Secretary of Labor has primary authority for administering ERISA. 29 U.S.C. 1002(13), 1132-1135. The United States thus has a substantial interest in the proper interpretation of that statute. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. ERISA protects "the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). An ERISA plan fiduciary must "discharge his duties with respect to a plan" prudently, "solely in the interest of the participants and beneficiaries," and "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). In addition to adhering to those duties of loyalty and care, ERISA fiduciaries are "categorically" barred from engaging in certain "'prohibited transactions'" with insiders that are "likely to injure the pension plan." *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 155, 160 (1993); see 29 U.S.C. 1104(a), 1106(a)(1).

Section 502(a)(2) of ERISA authorizes a "civil action" by "the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of" ERISA. 29 U.S.C. 1132(a)(2). Section 409 in turn provides that a plan fiduciary that breaches its 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" from the breach. 29 U.S.C. 1109(a). It also provides for other appropriate "equitable or remedial relief," including "removal of such fiduciary." *Ibid.*

Section 502(a)(3) authorizes "a participant, beneficiary, or fiduciary" to bring a "civil action" "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or * * * to obtain

other appropriate equitable relief." 29 U.S.C. 1132(a)(3). This Court has described subsection (a)(3) as a "'catch-all' provision[]" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996).

2. Respondents are sponsors and administrators of a defined-benefit pension plan regulated under ERISA. Pet. App. 4a-6a. 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). To protect the likelihood that funds will be available to pay pension benefits when due, "Congress incorporated several key measures into ERISA," including fiduciary duties and minimum funding requirements. *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); see 29 U.S.C. 1081(a), 1082; see also 26 U.S.C. 412.

Petitioners are participants and beneficiaries in the plan who have thus far received all payments to which they are entitled. Pet. App. 4a-6a. In 2014, they filed an amended class action complaint under Sections 502(a)(2) and 502(a)(3). *Id.* at 2a-4a, 7a; see J.A. 140. The complaint alleged that respondents violated ERISA's duties of loyalty and prudence, including by failing to diversify plan investments, and caused the plan to engage in prohibited transactions between 2007 and 2010. Pet. App. 2a, 8a-9a. In particular, petitioners alleged that respondents adopted an overly risky and undiversified strategy of investing plan assets exclusively in equities, *id.* at 30a, resulting in a $748 million loss, see J.A. 91. Petitioners also alleged that respondents violated

ERISA "based on the purported conflicts of interest associated with the Plan's assets being heavily invested in [respondents'] own mutual funds." Pet. App. 9a.

Respondents moved to dismiss the claims, arguing that petitioners lacked Article III standing because they did not suffer an injury in fact. See Pet. App. 29a-30a, 34a. The district court denied the motion because the complaint alleged "that [respondents'] conduct caused the Plan to become underfunded in 2008 and remain underfunded through the commencement of the lawsuit." *Id.* at 34a. According to the court, "[petitioners'] injury in fact was that [respondents'] actions caused an 'alleged increased risk of default' and 'the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised.'" *Ibid.* (citation omitted).

The plan sponsors subsequently made a substantial contribution to the plan, which respondents say resulted in its becoming overfunded—that is, having sufficient assets to cover the present value of all liabilities, see 29 U.S.C. 1083. Pet. App. 3a, 38a-39a. The district court then dismissed the case as moot, concluding that petitioners no longer had "a concrete interest in the monetary damages they seek, and their other requests for relief do not work independently to keep the controversy live." *Id.* at 43a.

3. The court of appeals affirmed, but not on Article III grounds. Pet. App. 1a-25a. Instead, the court applied its earlier decision in *Harley* v. *Minnesota Mining & Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) (No. 02-566), which "concluded that [Section 502(a)(2)] does not permit a participant in a defined-benefit plan to bring suit * * * for alleged breaches of fiduciary duties when the plan is

overfunded." Pet. App. 14a (citation omitted). The court made clear that "'*Harley* was decided on *statutory* grounds,' not on Article III standing." *Id.* at 17a (citation omitted). Acknowledging that "some references in *Harley* to standing may have caused some confusion," *ibid.*, the court explained that resolving the case on statutory grounds was required by principles of "constitutional avoidance" and to "advanc[e] ERISA's primary purpose of protecting individual pension rights," *id.* at 18a n.10 (citation omitted).

The court of appeals also affirmed dismissal of petitioners' claims under Section 502(a)(3) on statutory grounds. Pet. App. 19a-21a. The court acknowledged that "[c]ases from other circuits have concluded that a plan participant may seek injunctive relief under [Section 502(a)(3)] against fiduciaries of an overfunded plan." *Id.* at 19a (brackets and citation omitted). Nevertheless, the court determined that when a plan is overfunded, "there is no 'actual or imminent injury to the Plan itself,'" and therefore petitioners were not "within the class of plaintiffs whom Congress has authorized to sue under the statute." *Id.* at 21a (citation omitted).

Judge Kelly concurred in part and dissented in part. Pet. App. 25a-27a. She agreed that under circuit precedent, petitioners lacked authorization to sue under subsection (a)(2), but concluded that petitioners had alleged "an actual or imminent injury" to support their claim under subsection (a)(3). *Id.* at 26a.

SUMMARY OF ARGUMENT

I. This Court has recognized that ERISA builds on the traditional law of trusts. By analogy to traditional trust law, a beneficiary of an overfunded defined-benefit plan has Article III standing to sue for breach of fiduci-

ary duty (a) on behalf of the plan in a representative capacity; (b) on his own behalf for the invasion of a private legal right; and (c) when the breach results in a materially increased risk of monetary harm.

A. A plan beneficiary has standing to assert claims on behalf of the plan for injuries to the plan, just as a trust beneficiary may for injuries to the trust. Under a well-established principle of trust law, a beneficiary may bring such a suit when the trustee is unable or unwilling to do so. ERISA expressly incorporates that principle, assigning to beneficiaries the right to bring such suits. See 29 U.S.C. 1109(a), 1132(a)(2). Because a defined-benefit pension plan suffers a cognizable injury when a fiduciary breach reduces plan assets—whether or not the plan is overfunded—it follows that a plan beneficiary has standing to bring suit to seek recompense for that injury.

Such suits are all the more important under ERISA than under traditional trust law because the statute expands the universe of persons subject to fiduciary duties, thereby making it more likely that a trustee will hold interests adverse to the plan and thus be unwilling or unable to bring suit on behalf of the plan. Article III supports similar derivative suits in a variety of contexts, and the assignment of the plan's right to sue to beneficiaries resembles the assignment in *qui tam* statutes of claims belonging to the United States to private relators. In all of those suits, the relevant injury is that of the represented entity, not the named plaintiff.

B. An ERISA beneficiary also has standing in his own right to sue a fiduciary that breaches its duties, which are owed to the beneficiary. A fiduciary breach is thus an invasion of a private legal right held by the beneficiary, which historically has supported standing

without the need to demonstrate any injury beyond the invasion itself. Traditionally, courts would entertain suits by trust beneficiaries alleging fiduciary breach with no further inquiry into whether the breach caused any harm other than the breach itself. By analogy, an ERISA beneficiary likewise may maintain a suit for fiduciary breach without demonstrating additional injury beyond the breach. ERISA expressly incorporates that principle in Section 502(a), bolstering the historical case for standing with congressional judgment. See 29 U.S.C. 1132(a).

C. An ERISA beneficiary also has standing to sue for breach of fiduciary duty when the breach results in a materially increased risk of monetary loss. Whether a breach results in a materially increased risk does not depend on the plan's funding status; a plan that is underfunded by a dollar has virtually the same risk of future insolvency as a plan that is overfunded by a dollar. Moreover, traditionally even a beneficiary with only a contingent right to trust assets could sue a trustee for breach of fiduciary duty; by analogy, an ERISA beneficiary of a defined-benefit plan also has standing to assert claims based on a future risk of nonpayment or underpayment of promised benefits.

II. In addition to establishing Article III standing, a plaintiff bringing a statutory claim also must demonstrate that he is within the class of plaintiffs whom Congress has authorized to sue. Here, Congress was clear: "A civil action may be brought" under Section 502(a)(2) "by the Secretary, or by a *participant*, *beneficiary* or fiduciary" to seek "appropriate relief under section [409] of" ERISA. 29 U.S.C. 1132(a)(2) (emphasis added). Nothing in the text or structure of ERISA purports to limit such suits based on the type or funding status of

the plan. The court of appeals' contrary conclusion rested on its view that potentially costly litigation would undermine ERISA's "primary purpose" of protecting pension rights. Pet. App. 16a. But Congress reasonably determined that the best means of protecting those rights was to authorize beneficiaries to sue fiduciaries who breach their duties, notwithstanding the resulting litigation costs. Indeed, Congress expressly found that providing beneficiaries with "ready access" to the courts furthers, not hinders, ERISA's purposes. 29 U.S.C. 1001(b).

III. Likewise, Section 502(a)(3) expressly authorizes "participant[s]" and "beneficiar[ies]" to bring suit for injunctive and "other appropriate equitable relief" without any limitation based on the type or funding status of the plan. 29 U.S.C. 1132(a)(3). To be sure, plaintiffs ordinarily cannot obtain substantive relief under subsection (a)(3) if relief is available under another provision of ERISA. But that is an issue on the merits, not of standing, and so need not be addressed here.

ARGUMENT

The first question presented asks whether participants and beneficiaries of an overfunded defined-benefit plan may sue under ERISA Section 502(a)(3); the second asks whether they may sue under Section 502(a)(2); and the third, added by this Court, asks whether they have Article III standing. Because Section 502(a)(3) is a "'catchall' provision[]" that "act[s] as a safety net" only when other provisions of Section 502 do not provide a remedy, *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996), determining whether relief is available under Section 502(a)(2) is a logically antecedent inquiry. And determining whether a plaintiff has Article III standing ordinarily is antecedent to both of those inquiries. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101

(1998). Accordingly, the government will address the questions presented in reverse order.

I. BENEFICIARIES OF AN OVERFUNDED ERISA DEFINED-BENEFIT PLAN WHO ALLEGE A BREACH OF FIDUCIARY DUTY HAVE ARTICLE III STANDING

To have Article III standing, a plaintiff must show, among other things, that he suffers or has suffered a "concrete" injury. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). A concrete injury is one that is "'real,' and not 'abstract.'" *Ibid.* (citation omitted). Generally that means the injury must be tangible, but an "intangible" injury can be concrete under some circumstances. *Id.* at 1549. "[B]oth history and the judgment of Congress play important roles" in determining whether an intangible injury is sufficiently concrete. *Ibid.* Courts thus 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." *Ibid.* And "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements," it "may 'elevate to the status of legally cognizable injuries'" certain intangible harms "'that were previously inadequate in law.'" *Ibid.* (brackets and citation omitted).

History and congressional judgment are intertwined in the present context because "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). As this Court has explained, "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570

(1985). Trust law is thus the "starting point" for analysis under ERISA. *Varity*, 516 U.S. at 497.

Reflecting both traditional trust law and congressional judgment, ERISA supports a participant or beneficiary's standing to sue a plan fiduciary under three distinct yet overlapping theories. First, a participant or beneficiary may sue on behalf of the plan in a representative capacity. Second, a participant or beneficiary may sue on his own behalf because a breach of fiduciary duty constitutes an invasion of his own legal right. Third, a participant or beneficiary may sue because of a materially increased risk of monetary harm resulting from a breach of fiduciary duty. All three theories support standing regardless of whether the defined-benefit plan is overfunded or underfunded. (The distinction between a participant and beneficiary generally is immaterial for these purposes, cf. 29 U.S.C. 1002(7) and (8), so for simplicity's sake this brief will henceforth refer only to beneficiaries.)

A. A Plan Beneficiary Has Standing To Assert Claims On Behalf Of The Plan For Injuries To The Plan

ERISA authorizes plan beneficiaries "to bring actions on behalf of a plan to recover for violations of the [fiduciary] obligations defined in" ERISA. *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 (2008). This Court has observed that a defined-contribution plan suffers a cognizable injury when "a fiduciary breach diminishes plan assets." *Id.* at 256. Such diminishment "creates the kind of harms that concerned the draftsmen of" ERISA—principally, the "'misuse and mismanagement of plan assets by plan administrators'" and threats to "'the financial integrity of the plan.'" *Id.* at 254, 256 (citations omitted). Those concerns are no less pressing for defined-benefit plans.

Accordingly, lower courts have recognized that a defined-benefit plan also suffers a cognizable injury from any loss that "reduce[s] the pool of Plan assets," even when the plan happens to be overfunded. *Harley* v. *Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 905 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) (No. 02-566). Such an injury thus would support Article III standing for a suit brought on behalf of the plan. Under the common law, the right to sue on behalf of the trust for injuries to the trust "in the ordinary case vests in the trustee." 16 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 869, at 113 (2d rev. ed. 1995). ERISA reflects that principle, authorizing fiduciaries to bring suit under Section 502. See 29 U.S.C. 1132(a)(2) and (3).

But under a well-established principle of trust law, a beneficiary may bring suit in a derivative capacity to vindicate the trust's interests when the trustee will not. Bogert & Bogert § 869, at 118-123; see, *e.g.*, *Riviera Cong. Assocs.* v. *Yassky*, 223 N.E.2d 876, 879-880 (N.Y. 1966). In such a case, "[t]he beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust." Bogert & Bogert § 869, at 119. The trustee generally is a defendant in such suits. *Ibid.*; see, *e.g.*, *Western R.R.* v. *Nolan*, 48 N.Y. 513, 518 (1872) (beneficiary may sue on behalf of trust if "trustees refuse to perform their duty," in which case "the trustees should be brought before the court as parties defendant"); Restatement (Second) of Trusts § 199 (1959). The obvious rationale for that rule—and for naming the trustee as a defendant—is that trustees "will not sue [when] they are the very persons who would be liable for payment." *Riviera Cong.*, 223 N.E.2d at 880.

ERISA incorporates that fundamental principle of trust law, expressly assigning to beneficiaries the right of the plan to sue and recover for breach of fiduciary duty. See 29 U.S.C. 1109(a), 1132(a)(2). This Court has recognized that the remedies available in such a suit "inure[] to the benefit of the plan as a whole." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985); see 29 U.S.C. 1109(a). That recognition makes clear that, consistent with traditional trust law, such a suit is in substance one on behalf of the plan to seek redress for the plan's injuries, regardless of whether the named plaintiff happens to be a beneficiary or a fiduciary. See 29 U.S.C. 1132(a)(2); cf. Fed. R. Civ. P. 17(a)(1)(E) and (G). No further showing of injury is required to support Article III standing.

Indeed, suits to preserve the integrity of the plan are all the more important under ERISA than under traditional trust law. Unlike traditional trusts managed by a formal trustee, ERISA "expand[s] the universe of persons subject to fiduciary duties" to anyone who as a "functional" matter exercises "control and authority over the plan." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (emphasis omitted); see 29 U.S.C. 1105 (imposing co-fiduciary and co-trustee liability). As a result, an ERISA fiduciary, unlike a "traditional trustee," may "have financial interests adverse to beneficiaries." *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000). Those features make it more likely that ERISA plans will have fiduciaries who, as a result of those adverse interests, might be unable or unwilling to bring a suit to vindicate the plan's interests. Furthermore, suits against such functionally defined ERISA fiduciaries may be viewed as analogous not just to traditional suits against formal trustees, but to suits against third parties harming the

plan—which also have a long pedigree in traditional trust law. See, *e.g.*, Restatement (Third) of Trusts § 107 (2012).

To be sure, this Court has stated that "trust law does not tell the entire story" of the remedies available under ERISA. *Varity*, 516 U.S. at 497. But that observation was intended to emphasize that ERISA's remedies are *broader* than those traditionally available under trust law; as the Court explained, ERISA reflects a "congressional determination that the common law of trusts did not offer completely satisfactory protection." *Ibid.* So, for example, procedural requirements a beneficiary might have had to satisfy under the common law in bringing a suit on behalf of the trust—such as demonstrating the trustee's unwillingness to bring suit, cf. Restatement (Third) of Trusts § 107(2)(b)—are immaterial to an ERISA beneficiary's ability to bring such a suit. Moreover, any differences in such details would not affect the beneficiary's Article III standing; if anything, ERISA's more permissive structure bolsters the beneficiary's standing by adding congressional approval to historical tradition. Because both historical trust law and ERISA itself support a beneficiary's right to sue on behalf of the trust to recover for the trust's injuries, it follows that petitioners have Article III standing to seek redress for the plan's injuries here. See *Spokeo*, 136 S. Ct. at 1548.

Article III supports such derivative suits in a variety of contexts, and plaintiffs who satisfy the applicable procedural prerequisites unquestionably have standing to bring them. *E.g.*, *Dodge* v. *Woolsey*, 59 U.S. (18 How.) 331, 356 (1856) (shareholder derivative suit); *Merchants' Cotton Press & Storage Co.* v. *Insurance Co. of N. Am.*, 151 U.S. 368, 384 (1894) (suit in subrogation);

Gollust v. *Mendell*, 501 U.S. 115, 127 (1991) (derivative suit under federal securities laws); see Fed. R. Civ. P. 23.1, 23.2. In such suits, the relevant injury for purposes of standing is that suffered by the represented entity, not the named plaintiff, as long as the plaintiff is entitled to assert the entity's rights in litigation. See *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 528-534 (1984); cf. Fed. R. Civ. P. 17(a) and (b). As explained above, a trust beneficiary traditionally has had the necessary entitlement. Cf. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1154 & n.3 (10th Cir. 2013) (Gorsuch, J., concurring), aff'd, 573 U.S. 682 (2014). So too does an ERISA beneficiary. See 29 U.S.C. 1109(a), 1132(a)(2) and (3).

Indeed, ERISA's authorization for beneficiaries to sue on behalf of the plan to recover for the plan's injuries is analogous to the assignment in *qui tam* statutes of claims belonging to the United States to private relators. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773-774 (2000). Although a relator generally has suffered no personal injury and has no stake in the lawsuit beyond the *qui tam* bounty itself, "the United States' injury in fact suffices to confer standing on" the relator by virtue of the statutory assignment of the claim to the relator. *Id.* at 774. As explained above, historical trust law similarly provides that under certain circumstances a trust's claims for breach of fiduciary duty are in effect assigned to the trust's beneficiaries. Cf. *Daily Income Fund*, 464 U.S. at 535 & n.11 (discussing similar assignment of fiduciary-breach claims under the federal securities laws). Like *qui tam* suits, such beneficiary suits enjoy a "long tradition" in the law and thus present "'cases and controversies of the sort traditionally amenable to, and resolved

by, the judicial process.'" *Vermont Agency*, 529 U.S. at 774 (citation omitted); cf. *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 304 n.2 (2008) (Roberts, C.J., dissenting).

B. A Breach Of Fiduciary Duty, Standing Alone, Constitutes A Cognizable Injury To A Plan Beneficiary

An ERISA beneficiary also has standing in his own right to sue a fiduciary that breaches its duties. As in traditional trust law, an ERISA fiduciary owes duties not just to the plan, but "to the beneficiaries" as well. *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000); see 29 U.S.C. 1104(a); see generally 11 Susan N. Gary et al., *The Law of Trusts and Trustees* §§ 541, 543-544, at 231-288, 330-728 (3d ed. 2019). Accordingly, a breach of fiduciary duty itself constitutes "an invasion of a legally protected interest" belonging to the beneficiary. *Spokeo*, 136 S. Ct. at 1548 (citation omitted). And that is true for defined-contribution and defined-benefit plans alike; indeed, when ERISA was enacted, "the defined benefit plan was the norm of American pension practice." *LaRue*, 552 U.S. at 255 (brackets and citation omitted). Nothing in the text of ERISA conditions a fiduciary's duties to beneficiaries on whether the plan is a defined-benefit or defined-contribution plan, or on whether the plan is underfunded or overfunded. See 29 U.S.C. 1001(b) ("establishing standards of conduct * * * for fiduciaries" to further ERISA's "policy"); cf. *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 418-419 (2014) (explaining that "the same standard of prudence applies to all ERISA fiduciaries"). Nor does anything in ERISA condition the right of "beneficiaries" to "maintain an action," *Harris Trust*, 530 U.S. at 250, on the type or status of the plan.

Historical trust law reinforces the conclusion that a breach of fiduciary duty, standing alone, permits a beneficiary to sue irrespective of any monetary loss. For instance, courts traditionally have entertained suits by a beneficiary alleging that the trustee violated its duty not to engage in conflicted transactions or disloyal conduct, with "no further inquiry" into whether the conflicted conduct caused any harm other than the breach itself. See Restatement (Second) of Trusts § 170(1) & cmt. b. Under the "no further inquiry" rule, "a beneficiary is given a judgment against a wrongdoing trustee though the beneficiary has not suffered any damage and the trustee has not made any profit from the transaction." Bogert & Bogert § 862, at 67-68; see 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 17.2, at 1080 (5th ed. 2007). And if the trustee *has* made a profit, the beneficiary is entitled to demand that the profit be disgorged "because the trustee will not be allowed to profit from a breach of trust, even if the profit does not come at the expense of the trust estate." 4 Scott et al. § 24.9, at 1687.

Despite some scholarly criticism, the "no further inquiry" rule has a strong pedigree in English and American law. See generally John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005). For example, in *Keech* v. *Sandford*, (1726) 25 Eng. Rep. 223 (Ch.), after a lessor refused to renew a lease to the trust, the trustee took the lease himself. *Ibid.* Even though neither the trust nor the beneficiary suffered any harm (because the trust was unable to renew the lease itself), the Chancellor ordered the trustee to assign the lease to the beneficiary along with all the profits he had earned from it. *Id.* at

223-224. "This may seem hard," the Chancellor acknowledged, "that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed." *Id.* at 223. Similar cases abound. *E.g.*, *Whelpdale* v. *Cookson*, (1747) 27 Eng. Rep. 856 (Ch.) 856; see *Aberdeen Ry. Co.* v. *Blaikie, Bros.*, (1854) 2 L.R.Eq. 1281 (H.L.) 1286-1287 (summarizing cases).

This Court, too, has long recognized the no-further-inquiry rule. For example, in *Michoud* v. *Girod*, 45 U.S. (4 How.) 503 (1846), the Court acknowledged that if a trustee "becomes himself interested in [a] purchase" of trust property, the beneficiary would have a cause of action to void the transaction "without any further inquiry" into the nature of the sale or the fairness of the price. *Id.* at 553, 557. That rule, the Court explained, has "been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our State chancery courts, as altogether putting the rule upon its proper footing." *Id.* at 556 (citing *Davoue* v. *Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816)); see, *e.g.*, *Jackson* v. *Smith*, 254 U.S. 586, 588-589 (1921); *Magruder* v. *Drury*, 235 U.S. 106, 118-120 (1914); *United States* v. *Carter*, 217 U.S. 286, 307 (1910).

A breach of fiduciary duty—without any additional harm beyond the breach itself—has thus "traditionally been regarded as providing a basis for a lawsuit in English [and] American courts" by beneficiaries of the trust. *Spokeo*, 136 S. Ct. at 1549; see *Aberdeen Ry.*, 2 L.R.Eq. at 1286-1287; *Michoud*, 45 U.S. (4 How.) at 553-558; see also 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 322, at 318 (1836). ERISA expressly incorporates that principle in Section 502, authorizing a benefi-

ciary to obtain "appropriate relief" for any breach of fiduciary duty under Section 409 and "other appropriate equitable relief" for any violation of certain ERISA provisions, including its fiduciary requirements. 29 U.S.C. 1132(a)(2) and (3).

That express incorporation is important not just because it demonstrates "the judgment of Congress" on this score, *Spokeo*, 136 S. Ct. at 1549, but also because the invasion of a private legal right can in some circumstances support standing when Congress has created the legal right by statute (irrespective of historical tradition). For example, in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), the Court held that "'testers'"—"individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers"—had Article III standing to sue over false information about housing availability because the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, created "a legal right to truthful information about available housing." 455 U.S. at 373; see *id.* at 374. The Court explained that in the private-rights context, an Article III injury can exist "solely" by virtue of "'statutes creating legal rights, the invasion of which creates standing,'" *id.* at 373 (citations omitted), and that "[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against," *ibid.* Here, too, an ERISA plan beneficiary alleging a fiduciary breach has suffered precisely the type of injury that ERISA was enacted to prevent. See *LaRue*, 552 U.S. at 256.

Furthermore, apart from the generalized duties of loyalty and prudence, to the extent an ERISA fiduciary breaches its duties under the terms of the plan itself,

that breach also would constitute an invasion of a private legal right sufficient to support Article III standing. "A breach of contract always creates a right of action," and when "no harm was caused by the breach * * * judgment will be given for nominal damages." Restatement (First) of Contracts § 328 & cmt. a (1932); see, *e.g.*, *Wilcox* v. *Executors of Plummer,* 29 U.S. (4 Pet.) 172, 181-182 (1830); *Marzetti* v. *Williams*, (1830) 109 Eng. Rep. 842 (K.B.) 845. That is an application of the longstanding common-law rule that in the context of private rights, "the right alone [i]s essential" to sustain an action, and that "damage to the right [is] sufficient to warrant the owner in asserting the right against the party infringing it." *Mayor of the City of London* v. *Mayor of the Borough of Lynn Regis*, (1796) 126 Eng. Rep. 1026 (H.L.) 1041; see *Spokeo*, 136 S. Ct. at 1551, 1553 (Thomas, J., concurring).

It follows that when an ERISA fiduciary breaches duties owed to beneficiaries under the terms of the plan, those beneficiaries have Article III standing to sue the fiduciary for that breach, standing alone, without any further showing of harm. "ERISA's principal function" is "to 'protect contractually defined benefits,'" and the "statutory scheme * * * 'is built around reliance on the face of written plan documents.'" *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 100-101 (2013) (citations omitted). Congress thus expressly authorized beneficiaries to bring suit in federal court for violations of the terms of the plan. See 29 U.S.C. 1132(a)(1)(B) and (3). Indeed, ERISA makes clear that adhering to the duties set forth in plan documents, to the extent those documents "are consistent with the provisions" of ERISA, is among the fiduciary's duties prescribed by the statute itself. 29 U.S.C. 1104(a)(1)(D).

C. A Material Increase In The Risk Of Monetary Loss Is A Cognizable Injury

Finally, at least in the present context—in light of the express statutory cause of action and ERISA's comprehensive and prophylactic provisions to protect plan benefits—ERISA beneficiaries have standing to sue for breach of fiduciary duty when the breach results in a materially increased risk of monetary loss. Respondents concede (Supp. Br. 8) that "[n]o one, including the Eighth Circuit, questions that principle." Indeed, the Eighth Circuit even recognizes that if a fiduciary's breach causes a defined-benefit plan to become *under*funded—as allegedly happened here as an initial matter—beneficiaries would have standing to sue based on the increased risk of future nonpayment. See *Harley*, 284 F.3d at 905.

That conclusion remains true even if the plan remains overfunded. To be sure, beneficiaries of an overfunded defined-benefit plan are entitled only to their "'accrued benefit,'" not to the "plan's surplus." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999). But that means only that a beneficiary has no individual claim to a plan's general asset pool or to residual assets remaining upon the plan's termination. See 29 U.S.C. 1344(d)(1). A beneficiary still may maintain a suit alleging that the trustee had improperly used an overfunded plan's surplus funds, in violation of its duties under ERISA. See *Hughes*, 525 U.S. at 441-442. That principle applies with even greater force to a suit alleging not only that the trustee improperly used surplus funds, but also that the improper use resulted in a substantial loss of those funds, thereby materially increasing the risk of future nonpayment or underpayment of the promised benefits.

An ERISA beneficiary's standing to assert claims based on a materially increased risk of future nonpayment or underpayment finds further support in the traditional right of contingent beneficiaries to sue a trustee for breach of its duties. Restatement (Second) of Trusts § 214(1) & cmt. a. That right derives from "the rule that a trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property." *Shaw* v. *Weisz*, 91 N.E.2d 81, 87 (Ill. App. 1950). Accordingly, even if an individual's interest is "contingent and may not vest in possession," he is "entitled to maintain [an] action in equity in order to * * * secure * * * relief reasonably necessary to protect and preserve" the trust. *Burrows* v. *Palmer*, 125 N.E.2d 484, 487 (Ill. 1955).

That rule applies with equal force to defined-benefit plan beneficiaries, who hold vested benefits that rely on the plan's health and solvency. Even when a plan is overfunded, those beneficiaries retain an interest in an undivided share of the plan's assets because *all* of those assets are held in trust for, and must be used "for the exclusive benefit of," the beneficiaries. 26 U.S.C. 401(a)(2); see 29 U.S.C. 1103; 26 C.F.R. 1.401-1(3)(iv), 1.401-2. The employer may claim the plan's surplus *after* the plan is terminated and after all liabilities to the beneficiaries have been satisfied, see 29 U.S.C. 1344(d); *Hughes*, 525 U.S. at 440—but any such termination might not occur for years, if ever. And even when it does, employers have a strong tax incentive to share the surplus with beneficiaries in the form of a qualified replacement plan or pro rata increase in benefits. See 26 U.S.C. 4980(d)(1), (2), and (3). Therefore, any loss suffered by a defined-

benefit plan, even one that is overfunded, directly affects the expected value (*i.e.*, the value after accounting for risk probabilities and future uncertainty) of plan assets available to pay benefits and other plan liabilities to beneficiaries.

Moreover, the risk of underpayment does not vanish the instant a plan crosses the threshold from underfunded to overfunded under a statutory formula. A plan that is underfunded by a dollar has virtually the same risk of future insolvency as one that is overfunded by a dollar. That marginal difference cannot affect standing; if the risk is sufficiently non-speculative in the one case, it is equally non-speculative in the other. Cf. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 411 (2013). Statutory funding status and minimum funding requirements are based on actuarial tables, inflation, interest rates, and other economic factors and predictions. See 29 U.S.C. 1081-1085a; see also Pet. App. 32a-33a (describing some of those calculations). Given normal fluctuations in those bases and assumptions, it is easy to imagine a plan toggling somewhat frequently between overfunded and underfunded status. It would be bizarre to tether a plaintiff's standing—and thus a federal court's power to hear a case—to such a volatile and arbitrary metric. Nothing in ERISA or Article III compels such a result.

* * * * *

Petitioners have alleged and adduced sufficient facts to support their Article III standing here. The operative complaint alleges that respondents' investment choices caused the plan to lose $748 million, J.A. 45, 91, and seeks to have respondents "pay such amount to the Plan as is necessary to make the Plan whole," J.A. 141. Those allegations are sufficient to support standing on

a representative basis for the plan's injuries. The operative complaint also alleges that respondents violated their fiduciary duties of prudence and loyalty to plan beneficiaries by investing 100% of plan assets in equities, on the ground that those investments "served [respondents'] interest while exposing the Plan to unnecessary risk of loss." J.A. 45; see, *e.g.*, J.A. 110-111. That is sufficient to allege the invasion of a legal right—namely, the right to a prudent and loyal ERISA fiduciary—individually held by petitioners under both traditional trust law and ERISA. Finally, the operative complaint alleges that the large monetary loss "significantly increas[ed] the risk of default of the Plan." J.A. 90. That suffices to allege a materially increased risk of future nonpayment or underpayment.

That said, a plaintiff's standing "must be supported * * * with the manner and degree of evidence required at the successive stages of the litigation." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, the district court dismissed the case as moot under Federal Rule of Civil Procedure 12(b)(1), see Pet. App. 35a, while considering documentary evidence that the parties had submitted, see *id.* at 37a-40a. That evidence principally concerned whether respondents' belated capital infusion changed the plan's status from underfunded to overfunded. See *ibid.* It did not undermine the allegations that the plan lost $748 million or that petitioners sought restoration of those funds to the plan (as required for the first theory of injury above); nor did it undermine petitioners' allegations that the equity-investment strategy violated duties of prudence and loyalty owed to them as beneficiaries (as required for the second theory).

Respondents contend (Supp. Br. 9) that "the record forecloses" any reliance on the third theory of injury because the plan is substantially overfunded and the employer here has "sufficient liquid assets—$86 billion worth—to meet its pension obligations many times over." But the *employer*'s solvency today is irrelevant to the *plan*'s ability to pay beneficiaries in the future (perhaps decades from now); respondents' theory would in effect immunize fiduciaries of defined-benefit plans from claims of fiduciary breach as long as the employer happened to have a strong balance sheet at the time. Moreover, at least some of the facts here remain in dispute, cf. Pet. App. 37a-40a, and to the extent the district court resolved that factual dispute, it did so while laboring under the misimpression that a plan's status as underfunded or overfunded was decisive: "*Because* the Plan is overfunded," the court concluded, "[petitioners] no longer have a concrete interest in any monetary relief that might be awarded to the Plan," *id.* at 40a (emphasis added). As in *Spokeo*, the lower courts should have the opportunity to apply the correct law to the facts in the first instance. And in any event, petitioners need only demonstrate injury under a single theory to support standing, and their allegations at this stage suffice under at least the first two theories of injury described above.

II. BENEFICIARIES OF OVERFUNDED ERISA DEFINED-BENEFIT PLANS WHO ALLEGE BREACH OF FIDUCIARY DUTY MAY SUE UNDER SECTION 502(a)(2)

In addition to establishing Article III standing, a plaintiff bringing a statutory claim must demonstrate what is sometimes called statutory standing, *i.e.*, that he "has a cause of action under the statute." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S.

118, 128 (2014); see *id.* at 128 n.4. That is "a straightforward question of statutory interpretation" about "whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue." *Id.* at 128-129.

The court of appeals here incorrectly held that beneficiaries of an overfunded defined-benefit plan are not "within the class of plaintiffs whom Congress has authorized to sue under" ERISA. Pet. App. 21a. Congress could not have been clearer: "A civil action may be brought" under Section 502(a)(2) "by the Secretary, or by a *participant*, *beneficiary* or fiduciary." 29 U.S.C. 1132(a)(2) (emphasis added); see *Russell*, 473 U.S. at 142 n.9 (recognizing that Section 502(a)(2) expressly "authorizes suits by four classes of party-plaintiffs," including "participants" and "beneficiaries"). Nothing in the text or structure of ERISA purports to limit such suits based on the type or status of the plan—be it retirement or welfare; defined-benefit or defined-contribution; or underfunded or overfunded.

To the contrary, Section 502(a)(2) authorizes any suit by a beneficiary seeking "appropriate relief under section [409] of" ERISA. 29 U.S.C. 1132(a)(2). Section 409 in turn provides that a plan fiduciary that "breaches any of the responsibilities, obligations, or duties imposed upon" it "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" from the breach. 29 U.S.C. 1109(a). As the Court concluded in *Russell*, "[t]here can be no disagreement * * * that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." 473 U.S. at 140. That is precisely what petitioners allege here. See Pet. App. 29a. Petitioners are thus squarely within the

class of plaintiffs whom Congress has authorized to sue under ERISA.

In concluding otherwise, the court of appeals set aside the statute's plain text in favor of what it viewed as "ERISA's primary purpose—'the protection of individual pension rights.'" Pet. App. 16a (citations omitted). Those rights would be "adversely affected," the court reasoned, were plans and fiduciaries subjected "to costly litigation." *Ibid.* (citation omitted).

The government agrees that one of ERISA's "central purposes" is "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (footnote omitted). But given limited resources, the Secretary of Labor cannot monitor every plan in the country. Congress thus reasonably determined that the *best* means of protecting individual pension rights was to authorize beneficiaries to sue fiduciaries who breach their duties, notwithstanding resulting litigation costs. Indeed, Congress expressly declared ERISA's "policy" to be "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b); see *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 44 (1987). "Identifying the interests protected by" a statute "requires no guesswork" when there is a "detailed statement of the statute's purposes." *Lexmark*, 572 U.S. at 131. Here, that detailed statement makes clear that providing beneficiaries "ready access" to the courts furthers, not hinders, ERISA's purposes. 29 U.S.C. 1001(b).

To be clear, the government takes no position on whether petitioners will be able to satisfy their burden

to show that respondents in fact violated their fiduciary duties; that is an issue for the lower courts to address on remand. The government likewise takes no position on petitioners' entitlement to relief as a substantive matter, including what equitable remedies a court may deem to be appropriate. The government's sole position is that the mere happenstance of a defined-benefit plan's toggling from underfunded to overfunded does not remove the plan's beneficiaries from the class of plaintiffs whom Congress has authorized to sue for breach of fiduciary duty under Section 502(a)(2).

III. BENEFICIARIES OF OVERFUNDED ERISA DEFINED-BENEFIT PLANS WHO ALLEGE A BREACH OF FIDUCIARY DUTY MAY SUE UNDER SECTION 502(a)(3)

The analysis under Section 502(a)(3) largely is the same as that under Section 502(a)(2). Like subsection (a)(2), subsection (a)(3) expressly authorizes "participant[s]" and "beneficiar[ies]" to bring suit for injunctive and "other appropriate equitable relief," without any limitation based on the type or status of the plan. 29 U.S.C. 1132(a)(3). Petitioners purport (Pet. 7) to seek such relief. See Pet. App. 29a. They are thus among "the class of plaintiffs whom Congress has authorized to sue under" ERISA. *Lexmark*, 572 U.S. at 128.

To be sure, certain differences between subsections (a)(2) and (a)(3) might affect the analysis in a particular case. For example, whereas subsection (a)(2) authorizes a plaintiff to bring only claims on behalf of the plan, see *LaRue*, 552 U.S. at 253-256, subsection (a)(3) permits claims for individual relief too, *Varity*, 516 U.S. at 492, 508-515. And while a claim under subsection (a)(2) may be filed only against a fiduciary for a violation of fiduciary duties, subsection (a)(3) "admits of no limit * * * on the universe of possible defendants," *Harris*

Trust, 530 U.S. at 246, and permits recovery for violations of "any provisions" of Title I of ERISA and of the plan itself, 29 U.S.C. 1132(a)(3). In a given case, the applicability of each of the theories of injury discussed above may depend on those variables, especially when a suit asserts only claims for individual relief against third parties without also asserting claims for relief to the plan, or for breach of a fiduciary duty or of the terms of the plan.

Here, it appears that petitioners' claims under subsection (a)(3), like their claims under subsection (a)(2), seek relief to the plan for violations of fiduciary duties, making it unnecessary to explore any of those potential differences. Specifically, petitioners' claims under subsection (a)(3) seek "to stop the misconduct, remove the fiduciaries, and have an independent fiduciary appointed." Pet. 7. That relief would inure to the benefit of the entire plan, not just individual beneficiaries. Accordingly, petitioners would have standing to pursue their claims under subsection (a)(3) for the same reasons as they do under subsection (a)(2).

True, as a "'catchall' provision[]" that "act[s] as a safety net," subsection (a)(3) ordinarily does not provide relief if "Congress elsewhere provided adequate relief for a beneficiary's injury." *Varity*, 516 U.S. at 512, 515. Given the nature of petitioners' claims under subsection (a)(3), subsection (a)(2) may well "provide[] adequate relief" to petitioners, rendering relief under subsection (a)(3) unavailable. *Id.* at 515. The government expresses no opinion on that issue here; whether relief under subsection (a)(3) is available in this case is a question on the merits, not a threshold question of standing under either Article III or the statute. It is enough here that ERISA's plain text does not remove

beneficiaries of overfunded defined-benefit plans from the class of plaintiffs whom Congress has authorized to sue to obtain equitable relief under Section 502(a)(3).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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