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 THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), empowers participants in employee benefit plans and their beneficiaries to sue plan fiduciaries who violate their duties under the statute. 29 U.S.C. 1132. The second subdivision of Section 502 allows participants and beneficiaries to sue for "appropriate relief" under section [409] of ERISA," 29 U.S.C. 1132(a)(2), which, in turn, makes plan fiduciaries who breach their duties "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to the plan any profits," and "subject to such other equitable or remedial relief as the court may deem appropriate, including the removal of the fiduciary." 29 U.S.C. 1109(a). The third subdivision of Section 502 authorizes plan participants and beneficiaries to bring a civil action for injunctive or other "appropriate equitable relief" to redress ERISA violations or to enforce ERISA or the terms of the plan. 29 U.S.C. 1132(a)(3).

Petitioners are participants in a defined benefit pension plan governed by ERISA who sued a number of plan fiduciaries, alleging that they caused $748 million in plan losses through imprudent, disloyal, non-diversified and self-serving investments. They sought recovery of these losses or any ill-gained profits, as well as injunctive and equitable relief requiring the fiduciaries to diversify the plan's investments and revise their investment strategy, and removal of the fiduciaries.

The question addressed by the Pension Rights Center as *amicus curiae* is whether a participant in a defined benefit pension plan should be deprived of Article III standing to seek such relief against fiduciary misconduct solely because the plan is considered fully funded under minimum funding requirements of ERISA and the Internal Revenue Code.

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INTEREST OF THE AMICUS CURIAE[1]

The Pension Rights Center ("Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization. The Center was established in 1976, less than two years after the enactment of ERISA, with a mission largely co-extensive with that of the statute: to protect and promote the retirement security of American workers, retirees, and their families. For over forty years, the Center has provided legal assistance to thousands of retirement plan participants and beneficiaries seeking to understand and enforce their rights under their plans, to recover benefits under the terms of their plans, and to ensure that their plans are adequately funded and prudently managed in their interests.

The issue presented here concerns the ability of such participants and beneficiaries to file suit where they allege that their defined benefit pension plans have been imprudently and disloyally managed through non-diverse and self-serving investments. The Eighth Circuit has concluded that retirement plan participants and beneficiaries lose their ability to file suit to recover plan losses and ill-gotten fiduciary gains any time the plan's funding status is sufficient to be considered fully funded for purposes of the plan's annual "minimum funding obligations" under ERISA and the Internal Revenue Code. 29 U.S.C. 1083(d); 26 U.S.C

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its employees, or its counsel made a monetary contribution to its preparation or submission.

430(d).[2] Moreover, the Eighth Circuit has also held that, if the plan is sufficiently funded, no matter the fiduciary misconduct alleged, the plan participants and beneficiaries also lack the ability to sue for injunctive relief, such as the removal of the fiduciaries or the divestiture of self-serving or insufficiently diversified investments.

This is in error given ERISA's clear statutory language empowering plan participants and beneficiaries to sue for precisely such relief against breaching fiduciaries, and the historic trust law principles of ancient vintage from which these statutory provisions are drawn. The Center has a keen interest in ensuring that plan participants and beneficiaries may bring suit to protect themselves and their plans from imprudence and self-dealing by the fiduciaries entrusted with plan management.

SUMMARY OF ARGUMENT

1. Both as a matter of statutory construction and constitutional law, plan participants and beneficiaries may seek monetary and equitable redress of fiduciary breaches that have caused losses to their defined benefit pension plan and benefited fiduciaries, regardless of the current funding status of the plan. There can be little dispute that the plan itself suffered an injury when it lost hundreds of millions of dollars in value allegedly due to fiduciary breaches. In suing to recover these losses on behalf of the plan, as the statute expressly permits them to do, petitioners have representational standing to assert the plan's interest in recovering these losses.

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[2] ERISA and the Internal Revenue Code ("Code") include parallel funding standards. In this brief, we refer to the standards collectively as ERISA's minimum funding standards.

Petitioners also have standing to assert their own interests. As the intended beneficiaries of both the plan and ERISA's remedial scheme, their interests in the proper management of the plan are harmed when plan fiduciaries, who are charged with protecting their interests, act imprudently, disloyally and in a self-interested manner. In granting them the power to sue plan fiduciaries in such circumstances, ERISA draws from venerable trust law principles. This judgment of Congress, grounded as it is in historic practice, suffices to establish injury in fact.

Furthermore, petitioners' interest is harmed in another more tangible way when fiduciary mismanagement results in plan losses. When the defined benefit plan in which a plaintiff is a participant suffers a loss, here alleged to be at least $748,000,000, the participants' assurance of receiving the full benefit promised becomes less secure, even in a plan considered fully funded under ERISA's minimum funding standards. This constitutes a real risk of loss for purposes of Article III standing.

Finally, it is clear that petitioners have standing to sue for injunctive and other equitable relief, such as an order requiring divestiture of non-diverse or other improper investments and the removal of the fiduciaries. This kind of relief is not dependent on a showing of economic harm. The same is true for a claim seeking restoration of profits to prevent a fiduciary from benefiting from a breach. When plan fiduciaries violate their statutory and trust-based duties to the plan and its participants, those participants have a sufficient injury under ERISA to sue to correct these breaches.

2. Furthermore, a defined benefit plan's funding status is a difficult and controversial determination. It not only may be calculated on several different bases, but is also subject to numerous micro- and macro-economic factors that can quickly turn a fully funded plan into a severely underfunded one whatever funding measure is used.

For these reasons, funding status is a particularly bad metric of Article III standing, which is meant to answer the simple question whether the parties that have brought suit have a sufficiently concrete interest in the outcome of the suit. The answer to this question should not turn on a calculation that can confound actuaries and a status that can change significantly and numerous times over the course of a lawsuit, much less over the lifetime of a plan. Such a calculation is not a good measure of whether a plan and its participants have been harmed by fiduciary mismanagement.

ARGUMENT

I. PARTICIPANTS AND BENEFICIARIES HAVE STANDING TO SUE BREACHING FIDUCIARIES FOR MONETARY AND OTHER EQUITABLE AND REMEDIAL RELIEF, GIVEN ERISA'S CLEAR STATUTORY LANGUAGE, SUPPORTED BY HUNDREDS OF YEARS OF TRUST LAW, EMPOWERING THEM TO DO SO

To invoke federal court jurisdiction for purposes of Article III of the United States Constitution, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To meet the "injury in fact"

requirement, a plaintiff must show harm that is "concrete and particularized," including by showing a "real risk of harm." *Id.* at 1549. And while "Article III standing requires a concrete injury even in the context of a statutory violation," that injury need not be economic, and indeed may be "intangible" in nature. *Ibid*.

Petitioners have shown such a concrete and particularized injury in a number of interrelated ways. First, petitioners allege that the plan fiduciaries imprudently and disloyally managed the plan's assets through self-serving and insufficiently diversified investment that resulted in enormous financial losses to the plan. See Pet. App. 8a-9a. These losses indisputably constitute an injury to the plan, as even the Eighth Circuit has recognized, *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 905 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003), in the form of economic harm that is both concrete and tangible.

Petitioners brought suit, as the statute expressly allows them to do, to remedy these breaches through monetary and other equitable and remedial relief. 29 U.S.C. 1109(a), 1132(a)(2), 1132(a)(3). Given that this statutory right is drawn from the trust law, which empowered trust beneficiaries to file suit on behalf of the trust for damages resulting from a breach of trust, petitioners have statutory authority and constitutional standing to assert the interests of the plan in recovering these losses. See, *e.g.*, *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (recognizing the well-established principle that a trust beneficiary may sue a trustee for damages resulting from a breach of trust). Indeed, this Court long ago recognized that claims under ERISA Sections 409(a) and 502(a)(2) may only be brought for plan-based relief. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985)

(remedies under Section 502(a)(2) must "inure[] to the benefit of the plan as a whole").

Second, petitioners are not strangers to the plan nor are they completely analogous to the trustee, who is appointed and charged with responsibilities with regard to the plan and its assets. Instead, as participants in the retirement plan, their interest in the proper plan management is stronger than that of the trustee because they lie at the heart of the statutory scheme and are, indeed, the very reason for the plan's existence. 29 U.S.C. 1001 (ERISA's policy is "to protect * * * the interests of participants in employee benefit plans and their beneficiaries"). See also *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) (noting ERISA's basic goal of "promoting the interests of employees and their beneficiaries in employee benefit plans"). A pension plan, after all, does not exist for its own sake, but is designed for the purpose of providing retirement benefits to the participants and their beneficiaries. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (noting that one of Congress's central goals in enacting ERISA was to ensure "that if a worker has been promised a defined benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it").

Under the statute, plan participants have the right to have their plan prudently and loyally managed by plan fiduciaries, 29 U.S.C. 1104(a)(1)(A), (B), to have the plan invested in a diversified portfolio to "minimize risk of large losses," *id.* § 1104(a)(1)(C), and to insist that the fiduciaries refrain from engaging in the self-serving transactions that the statute categorically forbids. *Id.* § 1106(a)(1). Petitioners here allege that respondents violated all of these duties.

When ERISA Section 502 gives plan participants and beneficiaries the authority to sue to remedy such fiduciary breaches, it does more than grant them representational standing with regard to the plan's interests; it draws from venerable trust law that gives trust beneficiaries the right to bring suit to redress mismanagement of the trust precisely because they have a profound and direct interest in protecting their own beneficial interest in the trust. *E.g.*, Restatement (Third) of Trusts § 94 (recognizing that an action for breach of trust may be maintained by a beneficiary), § 107(2) (2012) (recognizing the right of a beneficiary to sue a third-party on behalf of the trust if the trustee fails to protect the beneficiary's interest); George Gleason Bogert & George Taylor Bogert, The Law of Trusts & Trustees §§ 861-862 (2d rev. ed. 1995) (recognizing the right of a beneficiary to sue a trustee for various equitable remedies, including the payment of money). In such a suit, the "actual harm" comes, first and foremost, "from the loss of a right protected by ERISA or its trust-law antecedents." *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (noting that the harm necessary for a surcharge remedy against a fiduciary may come either from detrimental reliance or from the loss a statutory right under ERISA). This is just the kind of intangible but nevertheless concrete and particularized harm that this Court in *Spokeo* recognized can support standing. 136 S. Ct. at 1549 (Congress's judgment, when grounded in historical practice, can establish injury in fact).

Moreover, as the beneficiaries of the retirement plan and its assets, the participants and their beneficiaries also suffer a corresponding and tangible harm when the plan's assets are depleted due to fiduciary breaches. Indeed, the very purpose of allowing participants and beneficiaries to sue on behalf of the plan under Section

502(a)(2) is to further "the common interest shared by [participants and beneficiaries] in the financial integrity of the plan." *Russell*, 473 U.S. at 141 n.9. When the plan suffers financial losses caused by fiduciary mismanagement and malfeasance, the security of the participants' retirement interests is undermined. There is nothing speculative about this increased risk. The fact that a plan that loses hundreds of millions in assets due to fiduciary mismanagement might not ultimately default on its obligations does not make the increased risk to participants any less real. This harm too suffices as an "injury in fact" for purposes of Article III. See *Spokeo*, 136 S. Ct. at 1549 ("injury in fact" may be based on a "real risk of harm").

Finally, it is clear that ERISA grants plan participants the right to sue for a number of remedies – such as the return of ill-gotten profits from a breaching fiduciary, and injunctive relief undoing prohibited transactions, diversifying plan investments and removing fiduciaries in appropriate circumstances – that, by their nature, are not dependent on financial losses. For this reason, all circuits to have addressed the issue other than the Eighth Circuit have correctly concluded that plan participants may seek injunctive relief correcting statutory violations without the need to show any monetary loss. See *Horvath v. Keystone Health Plan East, Inc.* 33 F.3d 450, 453, 456 (3d Cir. 2003) (plaintiffs had Article III standing to assert a claim for injunctive relief remedying a failure of the plan administrator to make proper disclosures, without the need to show other resulting harm); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 610 (6th Cir. 2007) (plaintiffs had standing to seek injunctive relief with regard to fiduciary breaches in administering their health care plans without the need to show individualized losses). This same principle means that participants

have standing to sue for restoration of profits in order to prevent a fiduciary from benefiting from a fiduciary breach even where "plan participants – perhaps through luck or agency intervention – suffer no monetary loss." *Pender v. Bank of A. Corp.*, 788 F.3d 354, 366 (4th Cir. 205).

II. A PLAN'S FUNDING STATUS IS NOT A SENSIBLE MEASURE OF INJURY IN FACT

As discussed above, it should suffice for Article III purposes for participants in a defined benefit pension plan to assert that fiduciary breaches caused a loss to their plan or profited the fiduciaries. Indeed, for purposes of seeking injunctive and equitable relief, such as removal of a breaching fiduciary or divestment of non-diverse or otherwise improper investments, plan participants have standing to sue for relief so long as they plausibly allege fiduciary breaches under ERISA given the clear language of the statute and long-standing historical traditions. On the other hand, requiring participants to show that their plan is currently underfunded in order to bring suit under ERISA for fiduciary malfeasance, and allowing a showing that the plan is fully funded or overfunded to divest the participant of standing, is neither a workable standard for establishing standing nor a sensible measure of injury in fact.

A defined benefit plan "as its name implies, is one in which the employee, upon retirement, is entitled to a fixed periodic payment." *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 154 (1993). See also 29 U.S.C. 1002 (35). To ensure payment under such plans and protect retirement income for workers and their families even in case of default by the sponsoring employee, Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation that administers a plan termination

insurance program paid for through premiums from sponsoring companies.[3] 29 U.S.C. 1302. Moreover, to minimize the risk of involuntary plan termination and default, ERISA prescribes standards for the funding of defined benefit pension plans.

These funding standards are complicated and prescribe different measures of funding status for different purposes. For instance, ERISA establishes different (and more stringent) annual funding rules for multiemployer plans than for single employer plans. Compare, 29 U.S.C. 1082(a)(2)(C), 1084, 1085; 26 U.S.C. 431, 432 (multiemployer plans), with 29 U.S.C. 1082(a)(2)(A), 1083, 1085a; 26 U.S.C. 430 (single employer plans).

ERISA mandates yet another method of determining the funding sufficiency of a defined benefit plan when the sponsoring employer terminates the plan. An employer that wishes to terminate a plan generally must satisfy all liabilities through the purchase from an insurance company of a group annuity, and the plan must have sufficient assets to purchase such a contract. 29 U.S.C. 1341(a)(3) (requiring an employer that voluntarily terminates a defined benefit plan in a standard termination to "purchase irrevocable commitments for an insurer to provide all benefits liabilities under the plan"). Because insurers typically use far more conservative assumptions in calculating the value of the plan liabilities than plans do for determining funding obligations, a plan that is regarded as fully funded under ERISA's minimum funding rules is

[3] The PBGC, however, does not fully guarantee benefits. ERISA caps the amount of benefits the PBGC pays, limits the types of benefits it pays and restricts the distribution options, such as certain early retirement and lump-sum elections, from terminated plans. 29 U.S.C. 1322.

typically underfunded for purposes of satisfying plan liabilities on termination.

The courts below focused on ERISA's minimum funding standards for single employer plans, Pet. App. 6a, 33a, which Congress has often revised, sometimes in dramatic ways. These funding standards are not designed as a measure of ultimate plan solvency, but are attempts to predict how well a plan is funded at one moment in time. Moreover, they reflect competing legislative policies, including balancing adequate plan funding with reducing the annual volatility of employer contributions to the plan, and at the same time constraining plan sponsors from reducing their tax liability by deducting excessively large contributions. See Regina T. Jefferson, *Defined Benefit Plan Funding: How Much is Too Much*, 44 Case W. Res. L. Rev. 1 (1993).[4]

To determine the annual amount to be contributed, if any, the sponsoring employer must compare the plan's expected costs with the value of the plan's assets. To do so, the employer must calculate the plan's funding target, which is "the present value of all the benefits accrued or earned under the plan as of the beginning of the plan year," 26 U.S.C. 430(d)(1), and the plan's target normal cost, which is the present value of the benefits expected to accrue during the year plus plan expenses divided by the expected contributions for that year. 26 U.S.C. 430(b)(1). Where the total value of the plan assets (less certain permissible deductions) is less than a plan's funding target, ERISA and the Code require a minimum contribution,

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[4] Financial reporting of pension liabilities and pension assets for the financial profession is governed by the Financial Accounting Standards Board and differs from ERISA methodologies for valuing plan liabilities. See 29 U.S.C. 1103(d) (requiring actuarial certification in plan's annual report).

the amount of which is calculated by considering the plan's target normal cost along with certain amortization charges. 29 U.S.C. 1083(a)(1); 26 U.S.C. 430(a)(1). If, on the other hand, the value of plan assets equals or exceeds the target normal costs, ERISA and the Code provide that the minimum required contribution shall be calculated as the plan's target normal cost for the year reduced (but not below zero) by the amount of the excess. 29 U.S.C. 1083(a)(2); 26 U.S.C. 430(a)(2).

Even determining the present value of the plan's assets, may involve some measure of guesswork. Many assets, such as publicly traded stocks have an easily ascertained value, but other assets, such as real estate, hedge funds, and private equity funds, can be difficult to value. Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 218 (2004).

There is even more uncertainty surrounding the calculation of the plan's funding target. First, the predicted benefits for each future plan year must be reduced to present value using a specified discount rate, currently based on average yields on investment-grade corporate debt. ERISA specifies the appropriate methods for calculating discount rates based on when the plan expects to pay benefits: within five years; between five and twenty years; and after twenty years. The discount rate applicable to each of these expected payout periods is called the segment rate. 29 U.S.C. 1083(h)(B)(2). The minimum required contribution calculation is therefore linked both to the plan's liabilities and to fluctuations in the discount rates.

Lower interest rates may result in an underfunded plan that cannot meet its obligations. On the other hand, when interest rates are high, the plan appears more funded with respect to its long-term obligations,

resulting in a lower minimum required contribution required from the sponsoring employer.

In the 1990s, strong markets inflated the value of plan assets, and relatively high discount rates resulted in a decrease in plan liabilities, which reduced the required minimum contributions for employers. The sudden market downturn of the 2000s resulted in reduced plan asset values at the same time that lower statutory discount rates increased the present value of plan liabilities, causing many plans to become underfunded overnight. See *The Pension Underfunding Crisis: How Effective have Reforms Been? Hearing Before H. Comm. On Education and the Workforce*, 108th Cong. 2 (2003) (Statement of David John). In response, Congress passed several statutory measures as amendments to ERISA and the Code, including provisions reducing the time-frames for the second and third segment rates by allowing employers to now consider payments expected between 5 and 15 years and those due after 15 years, and allowing them to use the yield rates for bonds maturing during those periods. See 29 U.S.C. 1083(h)(2)(C)(ii), (iii); 26 U.S.C. 430(h)(2)(C)(ii), (iii).

In 2012, Congress again amended the allowable segment rates for calculating certain funding requirements through pension provisions in the Moving Ahead for Progress in the 21st Century Act (MAP-21), P.L. 112-141, 126 Stat. 405. These provisions now allow use of a higher interest rate through a 25-year average "stabilization" rate intended to smooth fluctuations in interest rates, although employers still have the option to use segment rates based on bond yields over a 24-month period instead of the smoothed segment rates calculated as a 25-year average for funding purposes. 29 U.S.C. 1083(h)(2)(C)(ii); 26 U.S.C. 430(h)(2)(D)(ii).

See Am. Academy of Actuaries, *The Pension Protection Act: Successes, Shortcomings, and Opportunities for Improvement*, at 2 n.5 (2018), *available at* https://www.actuary.org/sites/default/files/files/publications/Seven_Principles_IB_04062018.pdf**.**

This had the effect of decreasing the plan's funding target even though no market forces changed the true underlying liabilities. This is because, when calculating funding obligations, the higher the presumed interest rate, the lower the annual contribution levels presumed necessary to fund the plan's pension obligations. Therefore, required funding contributions are lowered by using the interest rates allowed under MAP-21 as compared to the more current 24-month segment rates that ERISA and the IRC would otherwise require because interests rates have been quite low since MAP-21 was enacted. See IRS, *MAP-21: New Funding Rules for Single-Employer Defined Benefit Plans*, *available at* https://www.irs.gov/retirement-plans-map-21-new-funding-rules-for-single-employer-defined-benefit-plans (pointing out that "[b]ecause interest rates are currently at historical lows, limiting the rates based on the 25-year average tends to increase the interest rates, and therefore lower the minimum funding requirements"). In other words, the increased interest rate assumptions allowed under Map-21 are a far less conservative method of calculating whether plan assets will be sufficient to cover expected liabilities, and are thus a less reliable predictor of plan solvency in the long run that the traditional interest rate assumptions based on 24-month bond curves.

These higher rates are what respondents and the courts below relied upon in determining that the plan was overfunded, a measure that petitioners disputed. Pet. App. 39a. Indeed, petitioners argued that the

plan was only 80% funded using the unadjusted (24-month) interest rates, and only 60% funded using financial figures reported by respondent in its annual report for 2014. *Ibid.* The point is not whether petitioners were right or wrong with respect to the plan's funding status in 2015, but that the funding status of a plan is almost always subject to both manipulation and debate.

Indeed, the funding rules also permit plan actuaries to employ a large measure of discretion in making predictions relevant to the expected cost to the plan of the promised benefits. These include such vital assumptions as pre- and post-retirement mortality, employee turnover, employee retirement dates, marital status at retirement, age of spouse at retirement, and employee choices of different benefit options. See Daniel F. McGinn, *Corporate Retirement Plans/An Actuarial Perspective*, 79-91 (1988); Dan McGill, et al., *Fundamentals of Private Pensions*, 595-616 (8th ed. 2005). At best, ERISA's funding standards reduce, but certainly do not eliminate the risk that a plan will become critically underfunded and be unable to meet its pension obligations.

Moreover, even if a plan's funding status as calculated for purposes of an employer's minimum required contributions were always a reliable indicator of whether the plan is sufficiently funded at the time in question, this status changes over time, and can do so quickly. For this reason alone, a plan's funding status is not a stable foundation on which to base standing.

For one thing, the value of plan assets is dependent on and subject to change based on a number of changing economic factors, such as the reaction of the stock market to particular market news, changes in monetary policy, trade deficits and potential or new legislation.

See, *e.g.*, Mark Carlson, *A Brief History of the 1987 Stock Market Crash with a Discussion of the Federal Reserve Response* (Nov. 2006), https://www.federalreserve.gov/pubs/feds/2007.200713.200713pap.pdf; Ben S. Bernanke & Kenneth N. Kuttner, *What Explains the Stock Market's Reaction to Federal Reserve Policy?*, 60 J. Fin. 1221 (2005).

In addition, the plan's investment portfolio plays a significant and inevitable role in whether a plan will be able to pay benefits. Plan fiduciaries have many choices about how to shape such a portfolio. Although some fiduciaries select plan investments, such as group annuity contracts or governmental obligations that are very low risk, most fiduciaries invest plan assets in some investments that carry greater risk but that correspondingly offer the possibility of a higher return. McGill, *supra,* 737-797.[5] Here, the portfolio was invested entirely in equities, and the resulting lack of diversification greatly increased the "risk of large losses," as ERISA recognizes. 29 U.S.C. 1104(a)(1)(C).

Furthermore, just as the value of plan assets can fluctuate over time due to the actual performance of the chosen investments, the value of its liabilities can vary as well based on a number of factors, almost all of which are beyond the control of the employer, such as the life expectancy of the participants. For funding purposes, life expectancy is sometimes calculated using mortality tables established by the Internal Revenue Service, but may also sometimes be calculated using other mortality tables, which are currently being chal-

[5] It is worth observing that U.S. Bank would enjoy the upside of any higher return in the form of lower future contributions and perhaps through the creation of a plan surplus, but that the risk of investment loss would be borne by the plan and its participants.

lenged in a number of lawsuits as based on out-of-date life expectancy data. See John Manganaro, *ERISA Lawsuit Argues Outdated Mortality Assumptions Harm Annuitants*, *available at* https://www.planadvisor.com/ERISA-lawsuit-argues-outdated-mortality-assumptions-harm-annuitants/. Likewise, participants may retire sooner on average than expected. Such variations between assumption and experience can significantly change the funding status of a plan.

The plan at issue in *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002), is illustrative. The Eighth Circuit determined that the plan was overfunded at the time of the breach in 1990 under the funding rules applicable at that time and affirmed the dismissal of the case. *Id.* at 906-08. However, by the time the Eighth Circuit decided the case in 2002 (at which point the minimum funding rules had changed), the plan was underfunded by approximately $600 million, even though the sponsor had contributed more than $800 million to the plan that year. See Muir, *supra*, 199, 218.

It is therefore not surprising that the average funding ratios for defined benefit pension plans reflect dramatic fluctuations over time. For instance, the funding ratios of all defined benefit pension plans insured by the PBGC have ranged from a high of 144% in 2000 to a low of 72% in 2012. Data Book Listing, *PBGC's Single-Employer Program, funding of PBGC-Insured Plans (1980-2013) Single Employer Program* 47, Table S-44, *available at* http://pbgc.gov/documents/2014-data-tables-final.pdf. Given its elusive and protean character, funding status is not a good measure of injury in fact for Article III purposes.

Finally, in concluding that participants in a plan that is "overfunded" are not harmed by plan losses, the

court of appeals, relying on its earlier decision in *Harley*, put too much weight on the fact that plan participants are only entitled to their accrued benefits and not to any surplus. See Pet. App. 7a, 15a (citing *Harley*, 284 F.3d at 907); see also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999). However, this observation oversimplifies the matter. Unless and until a plan is terminated, there is no surplus and the assets of the plan must be used for the exclusive benefit of the participants and beneficiaries, see 29 U.S.C. 1104(a)(1)(A), and cannot "inure to the benefit of any employer." *Id.* § 1103(c)(1). Moreover, even at termination, for the employer to be entitled to the surplus, the plan itself must (but need not) expressly provide for the reversion of any surplus to the employer rather than to the participants and beneficiaries. See *Bryant v. International Fruit Products Co.*, 793 F.3d 118, 122-23 (6th Cir. 1986). Even then, the Code imposes a 50% excise tax on any reversion of excess assets to the employer, subject to reductions for any "pro rata benefit increases" or for any transfer of excess assets to a "qualified retirement plan" covering most of the same participants. 26 U.S.C. 4980. For these reasons, surplus assets can be and often are used to benefit the participants after the plan is terminated.

Thus, whether a plan is likely to have sufficient assets to meet its benefit obligations, and whether any excess will be used for the benefit of plan participants and beneficiaries, is very difficult to determine. But courts need not engage in this complex analysis or make these kinds of predictions in determining whether plan participants and beneficiaries have standing under Article III. Where the assets of a plan have lost value due to fiduciary breaches, participants in that plan have suffered a sufficiently concrete harm to allow them to sue to recover those losses on behalf of the plan.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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