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

RESPONSE BRIEF FOR U.S. BANK, N.A., ET AL.

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QUESTIONS PRESENTED

1. Whether Plaintiffs established Article III standing.

2. Whether the Eighth Circuit erred in holding that plan participants who face no risk of actual injury from a purported breach of fiduciary duty lack statutory standing under 29 U.S.C. 1132(a)(3).

3. Whether the Eighth Circuit erred in holding that plan participants who suffered no actual injury from a purported breach of fiduciary duty lack statutory standing under 29 U.S.C. 1132(a)(2).

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INTRODUCTION

This case's outcome does not matter to Plaintiffs. They are participants in the U.S. Bank Pension Plan, a defined-benefit retirement plan. They challenge investment decisions Plan fiduciaries made regarding Plan assets. But Plaintiffs' benefits are *fixed*. They do not depend on the Plan's assets. And Plaintiffs do not contend they could be deprived of their benefits—something that would require an apocalyptic cascade of failures of the Plan, U.S. Bancorp (the Plan's sponsor and one of the nation's largest banks), *and* the federal agency that insures retirement benefits. Win or lose, Plaintiffs will receive the exact same pension payments for the rest of their lives.

Nor will the remedies Plaintiffs demand have any other meaningful effects. Plaintiffs seek to preclude Plan fiduciaries from engaging in the challenged investment practices. But those practices ended nearly a decade ago, and the district court found as fact they would not resume. Plaintiffs also seek to compel U.S. Bancorp to contribute money to its Plan. But such a payment would simply offset U.S. Bancorp's future contributions. The only individuals who would come out ahead are Plaintiffs' attorneys—who have requested $31 million in fees.

Neither the framers of Article III nor the Congress that enacted ERISA contemplated that the federal courts would become venues for litigating such abstract (yet costly) disputes. As this Court has repeatedly held, Article III requires that plaintiffs demonstrate their *own* concrete injuries to invoke federal-court jurisdiction. Because Plaintiffs experience no such injury, they cannot bring this suit.

Plaintiffs hope to evade this constitutional requirement by invoking the common law of trusts. But trust law offers Plaintiffs no refuge: trust beneficiaries cannot challenge fiduciary misconduct that does not affect them. Equity is not blind to the real world. Consistent with Article III, trust beneficiaries may sue only where the "threatened or actual wrongdoing may or has affected [them] adversely financially." George G. Bogert et al., *The Law of Trusts & Trustees* § 871 (3d ed. 2019). Plaintiffs fail that simple test.

Nothing in ERISA could or does countermand Article III's requirements. The statute grants defined-benefit plan participants like Plaintiffs no personal *rights* regarding fiduciary management of plan assets. Instead, ERISA "identifies the 'plan'"—a separate legal entity—"as the victim of any fiduciary breach." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008).

While Congress granted plan participants causes of action to enforce ERISA's general requirements, such authorization is categorically insufficient to satisfy Article III. That is all the more true where, as here, the statutory provisions allow only "appropriate" relief and thus bar suits by parties lacking any concrete stake. ERISA nowhere suggests that Congress intended to authorize the sort of counter-productive litigation Plaintiffs pursue here.

The judgment should be affirmed.

STATEMENT

A. Statutory Background

1. Private pensions emerged in the late 1800s. Steven A. Sass, *The Promise of Private Pensions* 24 (1997). While these pensions promised employees benefits, they were rarely guaranteed. Employers often crafted pension-plan language to render any contemplated benefits unenforceable gratuities. John H. Langbein et al., *Pension and Employee Benefit Law* 108 (6th ed. 2015). Employers could also limit their exposure by providing for enforcement of benefits claims against only the plan. *Id.* at 70-71. In one scandalous example, Studebaker terminated a plan covering 11,000 autoworkers—leaving many with small fractions of their accrued benefits—even while Studebaker remained solvent. *Id.* at 67-70.

Spurred to action, Congress enacted ERISA and "turn[ed] private pension arrangements into a quasi-public, national institution." Sass, *supra*, at 225. In doing so, Congress struck a careful balance between protecting benefits and "containing pension costs." *Mertens v. Hewitt Associates*, 508 U.S. 248, 262-63 (1993).

2. ERISA governs two types of retirement plans: defined-contribution and defined-benefit. 29 U.S.C. 1002(34), (35). A defined-contribution plan, like a 401(k), offers "an individual account for each participant." 29 U.S.C. 1002(34). Because "each beneficiary is entitled to whatever assets are dedicated to his individual account," the risk of asset-value declines falls on the beneficiary. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999).

By contrast, defined-benefit plans guarantee participants "fixed periodic payment[s]" not linked to the value of individual accounts or the plan's "general pool of assets." *Ibid.* Because payments are fixed, the "employer typically bears the entire investment risk." *Ibid.* That is, "[i]t is the employer who must make up for any deficits, but also the employer who enjoys the fruits * * * if plan investments perform beyond expectations." *Beck v. PACE Int'l Union*, 551 U.S. 96, 99 (2007).

3. ERISA establishes various mechanisms to ensure plan participants receive their benefits.

First, ERISA grants participants certain rights. Participants are entitled to their "accrued benefits," which are nonforfeitable after a specified employment period. 29 U.S.C. 1053(a), 1054. Employers are responsible for these benefits even if the plan fails. 29 U.S.C. 1362(b). Participants also have rights to "full and fair review" of benefit denials and to specific reports and plan information. *E.g.*, 29 U.S.C. 1021(a), 1022, 1133.

Second, ERISA imposes "complex minimum funding requirements" on defined-benefit plans. *LaRue*, 552 U.S. at 255. A measurement called the Funding Target Attainment Percentage, or "FTAP," determines whether plans are on track. 29 U.S.C. 1083(d). FTAP compares the actuarial values of plan assets and liabilities. 29 U.S.C. 1083(d), (g), (h). A plan does not *violate* ERISA if its FTAP is under 100%. *Cf.* Br. 13. Instead, the plan is then "underfunded," and its sponsor (the employer) simply must make specified contributions. 29 U.S.C. 1083(a). If the FTAP falls below 80% (and an adjusted measure is below 70%), the plan is "at risk" and subject to additional requirements. 29 U.S.C. 1083(i). But if the FTAP is over 100%, the plan is actuarially "overfunded," and the sponsor need not make additional contributions. 29 U.S.C. 1083(a).

Third, ERISA created the Pension Benefit Guaranty Corporation (PBGC), which guarantees pension payments upon employer default (subject to specified monthly limits). 29 U.S.C. 1322(a). Employers offering defined-benefit plans must pay annual "premium[s]" to the PBGC, with that premium depending on the plan's funding status. 29 U.S.C. 1306(a)(3).

Fourth, ERISA requires that plan assets be held in "trust" and imposes "fiduciary" obligations on those managing them. 29 U.S.C. 1103(a), 1104(a). Fiduciaries must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). The statute prohibits certain interested-party transactions while directing the Department of Labor to establish exceptions to these prohibitions. 29 U.S.C. 1106, 1108(a).

Section 1109 holds fiduciaries responsible for breaches of these obligations. It provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. 1109(a).

Fifth, in Section 1132(a), ERISA establishes causes of action for judicial enforcement of these obligations. Plan participants may invoke four of them. Two allow "participants" to sue for the benefits, information, and other "rights" owed to them. 29 U.S.C. 1132(a)(1), (4).

Two other provisions are at issue here. The first, Section 1132(a)(2), provides that "civil action[s]" may be brought:

> by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title[.]

29 U.S.C. 1132(a)(2). Because Section 1109 governs the rights of the plan itself, any Section 1132(a)(2) recovery goes to the plan. *LaRue*, 552 U.S. at 1025-26.

The second, Section 1132(a)(3), authorizes "civil action[s]":

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. 1132(a)(3). This "catchall" may be invoked if other remedial provisions do not "provide[] adequate relief for a beneficiary's injury." *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996).

All private plaintiffs must serve their complaints on the Secretaries of Labor and the Treasury in all Section 1132(a) suits except those "for the purpose of recovering benefits." 29 U.S.C. 1132(h). The Secretary of Labor has "the right in his discretion to intervene" in such actions. *Ibid.*

B. Factual Background

1. U.S. Bancorp is the parent company of U.S. Bank, which was founded in 1863 and is the country's fifth largest commercial bank. U.S. Bancorp 2018

Annual Report at 20.[1] As of December 31, 2018, U.S. Bancorp had 74,000 employees and $467 billion in assets. *Ibid.*

U.S. Bancorp sponsors the Plan, a defined-benefit retirement plan. J.A. 58-59. U.S. Bancorp funds the Plan by contributing to a trust. Pet. App. 5a. U.S. Bank is the Plan's trustee and holds its assets. *Ibid*. Designated directors and employees act as fiduciaries to manage those assets. *Ibid*.

Defined-benefit plans like this are a dying breed (due in part to ERISA's unintended consequences). *LaRue*, 552 U.S. at 255; *see* Edward A. Zelinski, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 475-82 (2004). But U.S. Bancorp's Plan remains strong, with over 100,000 participants and roughly $5.5 billion in assets. U.S. Bancorp 2018 Form 5500. Plan benefits are secure. When the operative complaint here was filed, U.S. Bancorp's liquid assets—nearly $87 billion—would cover the Plan's liabilities dozens of times over. Dkt. 108-1 at 9. The bank's liquid assets now exceed $100 billion. 2018 Annual Report at 55.

2. According to Plaintiffs' complaint, the Plan's assets were invested almost entirely in equities in 2004. J.A. 68. U.S. Bancorp's 2004 annual report explained: "Based on an analysis of historical performance by asset class, over any 20-year period since the mid-1940s, investments in equities have out-performed

[1] Available at: https://ir.usbank.com/static-files/214e30b3-762e-4126-a676-fea1b3678977.

other investment classes but are subject to higher volatility." J.A. 72.

U.S. Bancorp bore any risk of this investment strategy. *Hughes*, 525 U.S. at 439; *see* Zelinski, *supra*, at 460 (defined-benefit plans take advantage of "employers' longer time horizons, which permit employers * * * to invest in riskier, but ultimately more profitable, investments"). If its investments yielded substantial returns (as they did through 2007), the Plan would remain overfunded, and U.S. Bancorp would not have to make additional contributions to cover its pension liabilities. J.A. 74. But if its investments were unsuccessful, U.S. Bancorp might be required to contribute. 29 U.S.C. 1083(a). Either way, participants' benefits would remain the same.

In 2008, the stock market crashed, and the Plan's assets lost substantial value. Pet. App. 8a. The Plan became "underfunded" under ERISA's actuarial rules, with an FTAP of 84%. *Ibid.*[2]

Because of U.S. Bancorp's contributions, investment returns, and other factors, the Plan again became "overfunded" over time. It reached an FTAP of 105.18% in 2014 and 115.30% in 2015. Pet. App. 38a.

During this post-crash period, Plan fiduciaries invested in asset classes other than equities. By 2012, only 75% of the Plan's assets were equities. J.A. 82.

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[2] The Plan was not alone: in 2009, nearly 80% of such plans were underfunded. Dkt. 108-1 at 13.

3. In 2007, Plan fiduciaries appointed FAF Advisors, Inc.—then a U.S. Bancorp affiliate—to manage the Plan's assets. J.A. 65. A substantial portion of these assets were invested in FAF-managed, equity-backed mutual funds. J.A. 66. ERISA regulations expressly permit such investments in affiliates if specified conditions are met. 42 Fed. Reg. 18,734, 18,734-35 (April 8, 1977). None of these conditions were alleged to be absent here.

In 2010, FAF's mutual-fund business was sold to an unaffiliated entity. J.A. 66. The Plan trust then "disposed of all of its investments in FAF Mutual Funds that were backed by equities." J.A. 82.

4. Plaintiffs Thole and Smith are former employees of U.S. Bancorp and current Plan participants. Pet. App. 4a-5a. Thole has received a monthly benefit of $2,198.38 since his 2011 retirement. Pet. App. 5a. Smith has received a monthly benefit of $42.26 since her 2010 retirement. *Ibid*. These plaintiffs were originally joined by two others, whose claims were dismissed after it was revealed they already received all their benefits in lump-sum payments. Dkt. 212.

Under the Plan's terms, both Thole and Smith will continue to receive their benefits for the rest of their lives. Pet. App. 5a-6a. Neither contends the Plan has missed any payments or is at any risk of doing so. Even if the Plan defaulted and U.S. Bancorp were somehow unable to meet its obligations, the PBGC would guarantee all of Plaintiffs' benefits. Dkt. 108-1 at 14 (guaranteeing monthly benefits up to $4,653.41).

C. Procedural History

1. Plaintiffs filed this purported class action on behalf of themselves and nearly 75,000 Plan participants. J.A. 102. Plaintiffs challenged two relevant aspects of the Plan's management. First, Plaintiffs asserted the U.S. Bank Defendants breached their fiduciary duties by not anticipating the 2008 financial crisis, claiming they should have terminated the "100% Equities Strategy" before then. J.A. 89. Second, Plaintiffs contended the investments in "FAF Mutual Funds, whose underlying investments consisted of equities," violated ERISA's interested-transaction prohibitions. J.A. 78-79.

Plaintiffs did not plead any way in which these alleged actions had or would affect them personally. They did, however, allege the Plan remained "underfunded" under FTAP and at "risk of default." J.A. 90, 92.

As authorization for their lawsuit, Plaintiffs invoked Sections 1132(a)(2) and 1132(a)(3). J.A. 140. They sought monetary relief: restoration to the Plan of the Plan's supposed losses. J.A. 141. They also sought prospective relief: an order enjoining the challenged investments and appointing new fiduciaries. J.A. 141-42.

2. The district court granted an initial motion to dismiss in part. *Adedipe v. U.S. Bank, N.A.*, 62 F. Supp. 3d 879 (D. Minn. 2014). The court first determined that Plaintiffs adequately pleaded Article III standing. The court characterized as

"undoubtedly compelling" the U.S. Bank Defendants' arguments and evidence that Plaintiffs faced no risk of lost benefits given both U.S. Bancorp's ability to meet any Plan obligations and the PBGC backstop. *Id.* at 891-92. Nevertheless, the court believed Plaintiffs' allegation that the Plan remained "underfunded" sufficed to establish "personal injury in fact." *Id.* at 895. It also concluded Plaintiffs' requested monetary relief would "remedy the underfunding that is at the root of their injury." *Id.* at 896. The court did not address Plaintiffs' standing to seek prospective relief. *Ibid.*

On the merits, the district court dismissed Plaintiffs' "100% Equities Strategy" claims as time-barred. The court found Plaintiffs' allegations that fiduciaries improperly disregarded supposed "warning signs" of the coming financial crisis "far too conclusory." *Id.* at 900.

But the court permitted the claims related to FAF's equity-based mutual funds to proceed. *Id.* at 902. The court acknowledged the complaint lacked any factual allegations that these investments contravened the regulation authorizing such investments. *Ibid.*; *see supra* p. 10. The court concluded, however, that the complaint "need not contain such allegations to be adequately pled" because this regulatory authorization was an affirmative defense. *Adedipe*, 62 F. Supp. 3d at 902.

3. The U.S. Bank Defendants subsequently moved to dismiss under Federal Rule of Civil Procedure 12(b)(1).

Dkt. 210. They produced evidence demonstrating the Plan was overfunded and thus at no conceivable risk of default. Pet. App. 38a.

The district court granted the motion, deeming Plaintiffs' claims moot. Pet. App. 50a. Relying on both the fact that the Plan was now overfunded and the prior evidence demonstrating U.S. Bancorp's "financial strength," the court found Plaintiffs had no remaining interest in the case. Pet. App. 38a-42a.

In addressing mootness, the court found it "'absolutely clear that the allegedly unlawful activity cannot reasonably be expected to recur.'" Pet. App. 48a. As the court determined, Plaintiffs had not alleged or "offered any evidence to suggest" the U.S. Bank Defendants would re-adopt the "100% Equities Strategy" they "abandoned in 2011." *Ibid.*

Likewise, the court found that with the FAF divestiture, any supposed misconduct related to affiliated mutual funds "ended by 2011 at the latest" and would not "resume." Pet. App. 49a. Though the Plaintiffs cited the Plan's current investment in an FAF "Prime Obligation Fund Cl Z," the court recognized, this Fund was a *money-market* fund, and Plaintiffs' claims "concerned FAF Advisors' equities-backed mutual funds." Pet. App. 49a n.6; *see* J.A. 78-79. While this investment predated 2007, Plaintiffs had never challenged it. Pet. App. 49a n.6.

4. Plaintiffs declared victory and moved for $31 million in attorneys' fees. Dkt. 252 at 14. They asserted their lawsuit caused U.S. Bancorp to make

voluntary contributions to the Plan, and that they had thus "obtained the significant portion of the relief" they sought. *Id.* at 39.

The district court denied fees, finding that Plaintiffs' lawsuit had not induced U.S. Bancorp's contributions. Dkt. 267 at 7-8. Instead, U.S. Bancorp began these voluntary contributions before the lawsuit commenced, doing so to reduce insurance premiums. *Ibid.*

5. The Eighth Circuit affirmed. Pet. App. 4a. Relying on circuit precedent, the court first concluded Plaintiffs lacked statutory standing under Section 1132(a)(2). *Ibid.* In *Harley v. Minnesota Mining and Manufacturing Company*, the court had held plan participants cannot invoke Section 1132(a)(2) where a defined-benefit plan's surplus means that any supposed investment loss will "not cause actual injury to the [participants'] interests." 284 F.3d 901, 906 (8th Cir. 2002). As the court explained, a "contrary construction would raise serious Article III" concerns because it would enable participants "who have suffered *no* injury in fact" to bring suit. *Ibid.* Moreover, because ERISA protects "'individual pension rights,'" individuals whose pensions were "fully protected" fell outside "'the zone of interests to be protected or regulated by the statute.'" *Id.* at 907. This understanding was confirmed by Section 1132(a)(2)'s text, which provides only "for *appropriate* relief," not all relief any plan participant might demand. *McCollough v. AEGON USA, Inc.*, 585 F.3d 1082, 1084-85 (8th Cir. 2009) (emphasis added).

The Eighth Circuit applied the same logic to Plaintiffs' attempt to invoke Section 1132(a)(3). Pet. App. 21a. Because there was no "injury to the plaintiffs' interests," their suit was "not one for appropriate relief" within the meaning of Section 1132(a)(3). *Ibid.*

Judge Kelly dissented as to Section 1132(a)(3), relying exclusively on allegations of *past* harm as a basis for Plaintiffs' *prospective* relief. Pet. App. 25a-26a. She did not address the district court's factual finding that "the allegedly unlawful activity cannot be reasonably expected to recur." Pet. App. 48a.

SUMMARY OF ARGUMENT

I.A. Plaintiffs cannot satisfy Article III because they have no stake in this litigation. As they effectively concede, there is no risk they will be deprived of their benefits. They thus have no concrete and particularized injury they might ask a federal court to redress. Their complaint should have been dismissed at the outset.

B. None of the attempts by Plaintiffs or the government to conjure injury in the absence of financial risk succeeds.

1. Plaintiffs cannot convert the U.S. Bank Defendants' alleged breach of fiduciary duty into "concrete" injury. The common law does not, as Plaintiffs contend, treat such a breach as a stand-alone basis for judicial intervention. To the contrary, common-law beneficiaries bringing suit for breaches of trust must show the challenged conduct affects their equitable interests in

the trust. While Plaintiffs discuss the general *remedies* trust law provides, they never address these limits on who may sue to secure those remedies.

Regardless, even if fiduciary breaches alone were actionable, the relevant fiduciary relationship under ERISA runs between the fiduciaries and the Plan itself. The Plan is thus the victim of any fiduciary breach. Sections 1132(a)(2) and 1132(a)(3), on which Plaintiffs rely, do not grant them statutory rights regarding the management of Plan assets. Rather, these provisions simply provide causes of action to enforce ERISA's substantive requirements. Plaintiffs can invoke these causes of action to enforce the rights of another entity (here, the Plan) only if Plaintiffs demonstrate the violation caused *them* real-world injury. They did not do so.

2. Plaintiffs have no equitable interest in the Plan's assets that would give them standing. This Court has expressly held that participants in defined-benefit plans have an interest only in their own benefits. That holding is consistent with common-law trust principles, which recognize that the scope of beneficiaries' equitable interests depends on beneficiaries' practical, financial interests. Regardless, by providing that plan assets are held in trust for the plan itself, ERISA forecloses Plaintiffs' claimed personal interest.

3. Plaintiffs cannot invoke the Plan's supposed injury as a basis for Article III standing. This Court has consistently held that litigants asserting others' rights must establish their *own* injuries-in-fact—

including in the analogous context of derivative stockholder suits. The same requirement applies to the limited category of common-law "derivative" beneficiary suits. Decisions upholding the Article III standing of *qui tam* relators are readily distinguished. There is no similarly long history of derivative beneficiary suits (much less derivative suits brought by uninjured beneficiaries). And Plaintiffs have no stake in the litigation because they have not been assigned any right to recover.

4. The government cannot resurrect the argument that Plaintiffs' benefits are at risk. First, Plaintiffs have repeatedly waived the issue. Second, the district court made a contrary finding of fact, which the government cannot show is clearly erroneous. Third, because Plaintiffs could be deprived of their benefits only if the Plan, U.S. Bancorp, and the PBGC *all* failed, any supposed risk is far too speculative to satisfy Article III.

C. Even if any of Plaintiffs' theories of injury-in-fact are viable, Article III precludes prospective relief. The district court found as fact that the alleged fiduciary misconduct will not recur. Plaintiffs cannot contest that finding. So their forward-looking remedies would not redress any cognizable injury.

II. Plaintiffs also lack statutory standing. Nothing in ERISA suggests Congress intended to authorize litigation that does not help plan participants but imposes millions of dollars in litigation costs on employers offering defined-benefit plans. Although

Sections 1132(a)(2) and 1132(a)(3) list "participants" as one set of potential plaintiffs, they do not specify that such participants may bring suit even when uninjured. This Court has interpreted similarly broad causes of action to exclude plaintiffs lacking a concrete stake. Such a common-sense construction is particularly warranted here given ERISA's specification that plaintiffs may seek only "appropriate" relief. Remedies sought by unaffected litigants are not appropriate. At the very least, this Court should construe any ambiguity in these provisions to avoid the serious Article III concerns arising from Plaintiffs' injury-free reading.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING

Win or lose, Plaintiffs will continue to receive the exact same benefit payments every month for the rest of their lives. Not one penny more or less. From the outset of this case, they have lacked any "direct stake in the outcome" and thus have not met the unwavering requirements of Article III. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

A. Plaintiffs Cannot Show Injury-In-Fact

1. The "irreducible constitutional minimum of standing contains three elements": plaintiffs must establish an "injury-in-fact," that injury must be " 'fairly traceable to the challenged action of the defendant,' " and it must be "likely" that "the injury will be 'redressed by a favorable decision.' "

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations omitted).

These requirements are not mere technicalities. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks omitted). "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009). This restriction confines "the federal courts to a properly judicial role," ensuring the judiciary does not assume powers the Constitution vested in the "political branches." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("Relaxation of standing requirements is directly related to the expansion of judicial power[.]") (quotation marks omitted).

2. Plaintiffs' suit fails Article III's "[f]irst and foremost" requirement of injury-in-fact. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). Plaintiffs can demonstrate "injury-in-fact" only by showing they "suffered [1] 'an invasion of a legally protected interest' that is [2] 'concrete and particularized' and [3] 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548. This case

primarily concerns the second of these three requirements.

To be "particularized," the injury "must affect the plaintiff in a personal and individual way." *Ibid*. "[A] 'generalized grievance,' no matter how sincere, is insufficient." *Perry*, 570 U.S. at 706.

To be "concrete," the injury "must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. Although "intangible" injuries may sometimes suffice, they must be " 'real,' and not 'abstract.' " *Ibid*. This Court considers "history and the judgment of Congress" in determining whether an intangible injury is "concrete." *Id.* at 1549. Because the injury-in-fact requirement "is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as a basis for a lawsuit in English or American courts." *Ibid*. And because Congress is "well positioned" to determine whether intangible harm is real, "its judgment is also instructive and important." *Ibid.*

Yet merely invoking a statutory cause of action (as Plaintiffs do here) is insufficient to establish injury-in-fact. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. Nor, even, does it necessarily suffice to point to a statute that both "grants a person a statutory right" and "purports to authorize that person to sue to vindicate that right."

Spokeo, 136 S. Ct. at 1549. Article III "requires a concrete injury even in the context of a statutory violation." *Ibid.*

3. Plaintiffs' lawsuit fails these bedrock requirements. Plaintiffs have not been personally affected by the U.S. Bank Defendants' alleged misconduct in any concrete way. Given U.S. Bancorp's uncontested ability to meet its pension obligations (not to mention the PBGC's guarantee of Plaintiffs' benefits), Plaintiffs were at *no* risk of harm even when the Plan was underfunded. *Infra* pp. 52-53. The case thus should have been dismissed at the outset. *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 546 (5th Cir. 2016). And even if underfunding alone sufficed to establish a cognizable risk, Plaintiffs necessarily lost any such interest once the Plan was no longer underfunded. Pet. App. 40a-42a; *see Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013) ("an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation"). Indeed, Plaintiffs never dispute that their retirement benefits are 100% secure. *See* Br. i, 16-19.

Plaintiffs' suit is thus neither needed nor intended to ensure Plaintiffs receive their pension benefits. Instead, Plaintiffs hope to vindicate a general interest in trying to ensure the Plan is administered in accordance with ERISA's requirements (assuming it is not already). J.A. 107-42. Yet that concern is both generalized and wholly abstract. Because the U.S. Bank Defendants' alleged violation of these statutory requirements will not affect Plaintiffs in the slightest, Plaintiffs have no particular interest in enforcing them. At the very most, Plaintiffs point to an abstract "statutory violation," but that alone cannot establish the requisite "concrete injury." *Spokeo*, 136 S. Ct. at 1549.

Because they have no injury, Plaintiffs will be no better or worse off whether they win or lose. They have, in other words, "no direct stake in the outcome" of this litigation. *Perry*, 570 U.S. at 706. Indeed, Plaintiffs' only "stake" is their ability to seek attorneys' fees. *See supra* pp. 13-14. This interest in a " 'byproduct' of the suit itself" is categorically insufficient to satisfy Article III. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

B. Plaintiffs' Claimed Intangible Injuries Are Not Concrete Or Particularized

While expressly disclaiming any "financial loss or imminent risk thereof" (Br. i) from the conduct they challenge, Plaintiffs offer three separate theories of injury. The government adds yet a fourth, risk-based theory. All four fail.

1. Fiduciary breach alone is not a concrete injury

Plaintiffs first contend any breach of fiduciary duty, standing alone, causes ERISA plan participants "*de facto* harm." Br. 20. They rely on both the common law of trusts and ERISA's purported recognition of this harm. Br. 20-23. But even at common law, only a trust "beneficiary who can prove that the threatened or actual wrongdoing may or has affected him adversely financially may bring an action for relief." Bogert, § 871; *accord, e.g.*, Restatement (Second) Trusts § 214, cmt. b (1959); 4 Austin W. Scott et al., *Scott and Ascher on Trusts* § 24.19 (5th ed. 2016). "[H]istorical practice" thus provides no support for Plaintiffs' first theory of standing. *Spokeo*, 136 S. Ct. at 1549. And regardless, ERISA nowhere vests plan participants with *personal* rights in the investment of plan assets; rather, these fiduciary duties run to the plan itself. *LaRue*, 552 U.S. at 254. For both of these independent reasons, Plaintiffs' contention fails.

a. Trust law did not make harmless fiduciary breaches actionable

i. It is true that at common law, some breaches of duty were actionable without an additional showing of consequential harm. *See Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). Plaintiffs alleging trespass, for example, might maintain an action to secure nominal damages even if they suffered no harm other than the invasion of their interest in their property. *Ibid*. By contrast, other violations were not actionable "unless and until damages can be shown." 1 Dan B. Dobbs, *Law of Remedies* § 3.3(2) (2d ed. 1993). Negligence plaintiffs, for example, must demonstrate that the defendant failed to exercise due care *and* that this failure caused harm. *Ibid.*; *see* Restatement (First) Torts § 281 (1934). The plaintiff's right is not to have the defendant act in a particular way, but rather to be free of any negligently caused "invasion of [her] interest" in her person or property. *Ibid.*

Plaintiffs' trust-law theory of standing fails because breaches of trust fall in the latter category, not the former. Trust beneficiaries cannot bring suit whenever trustees breach their fiduciary duties in overseeing the trust. *E.g.*, *Harrison v. Randall*, 68 Eng. Rep. 562, 567 (1852) ("A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust."). Instead, a trust beneficiary may challenge fiduciary breaches only when they implicate that beneficiary's "interest" in the trust. Restatement (Second) Trusts § 214, cmt. b; *see, e.g.*, Restatement (Third) Trusts § 94, cmt. b (2012) (suit "may be maintained by any beneficiary *whose rights are or may be adversely affected by the matter(s) at issue*") (emphasis added); *Cohen v. United States Tr. Sec. Corp.*, 40 N.E.2d 282, 287 (Mass. 1942). A trust beneficiary's right, properly understood, is thus not a general right to have the trustee fulfill his fiduciary obligations, but rather a right to be free of fiduciary misconduct that adversely affects the beneficiary's interest. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (emphasizing the importance of accurately defining the right at issue in assessing standing).

This requirement reflects the development of trust law over the centuries. In thirteenth century England, the custom of "uses"—in which legal title to land was conveyed to one party for the use of another—became increasingly common. 1 *Scott and Ascher* § 1.4. "Uses" were "merely honorary obligations" unenforceable in common-law courts. *Id.* §§ 1.4-1.5. But by the end of the fourteenth century, the chancellors would enforce these "honorary" obligations in equity. *Id.* § 1.5. And over the next century, the chancellors began to treat "the beneficiaries' interest as a form of ownership," protecting the equitable interest in trust property much like the common-law courts protected legal interests in property. *Id.* § 1.1. Equity thus "gave the trust beneficiary an interest in the trust property." *Ibid.*; *see Senior v. Braden*, 295 U.S. 422, 432-33 (1935).

With a simple trust—*e.g.*, real property held by one trustee for one beneficiary—anything that adversely affects the trust property adversely affects the beneficiary's interest. The beneficiary's standing to challenge fiduciary misconduct in these circumstances is based on the threat to that interest. Restatement (Second) Trusts § 214; *see Scanlan v. Eisenberg*, 669 F.3d 838, 843-46 (7th Cir. 2012) (where beneficiary was "eligible to receive all of the Trusts' corpus," she had an "equitable interest in the corpus," and "from that equitable interest [she] acquire[d] standing to enforce the" Trusts).

But not all trusts are so simple. The courts of equity came to recognize that, like legal ownership, equitable interests could take many different forms corresponding to beneficiaries' financial interests. 1 *Scott and Ascher* § 1.5 (citing *St. Germain, Doctor and Student*, Dial II, ch. 22 (1523)). By the time of Blackstone, it could be said that "the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed: and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates." 3 William Blackstone, *Commentaries on the Laws of England* 439-41 (1768); *accord* 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 74 (1st ed. 1836) ("In general, in Courts of Equity the same construction and effect are given to perfect, or executed trust estates, as are given by Courts of Law to legal estates."). Thus, a beneficiary's interest "may be a present interest"; it "may be a future interest"; it "may be absolute and vested"; it may be "contingent"; it may be "determinable or with a condition subsequent attached"; and it may take still other forms. Bogert, § 181. "Generally speaking, for every legal interest in personalty or realty that can be created, a corresponding equitable interest can be vested in a beneficiary." *Ibid.*

Because not every fiduciary breach will necessarily affect each of these varying types of equitable interests, not every beneficiary can always challenge fiduciary misconduct. Instead, only beneficiaries whose interests are affected may challenge a purported fiduciary breach. *Id.* § 871; *see* Restatement (Second) Trusts § 214. Thus, for example, "if the breach of trust consists only in the failure to pay income to a life beneficiary, the beneficiary entitled to the principal cannot maintain a suit for breach of trust." Restatement (Second) Trusts § 214, cmt. b. Likewise, "where the breach of trust is merely in the failure to make trust property productive and the principal is in no way affected, the life beneficiary but not the remainderman can maintain a suit." *Ibid.*; *accord, e.g.*, *Whitney v. Smith*, 4 L.R. Ch. App. 513, 520 (1869); *Wisener v. Burns*, 44 S.W.3d 289, 294-95 (Ark. 2001).

These critical limitations are illustrated by the Connecticut Supreme Court's decision in *Terry v. Allen*, 23 A. 150 (1891). There, a trust beneficiary alleged the trustee improperly invested the trust corpus in risky assets. *Id.* at 151. But the plaintiff had only a remainder interest, receiving the trust assets upon death of the life beneficiary. *Ibid*. The trustee had also secured a bond protecting this remainder interest. *Ibid*. The court held the plaintiff "had no such interest as would entitle him to maintain his action." *Id.* at 152. As it explained, "[t]he remainder-men are protected, and are entitled to be always protected, by a good and sufficient bond against loss on account of any mismanagement of the estate." *Ibid*. Thus, "[s]hould the life-estate terminate to-day, a good and sufficient bond stands between them and possible loss on account of any illegal management or investment of the trust funds." *Ibid*. For that reason, the court could not "see [its] way clear in such a case to yield to the claim of the plaintiff that he may now compel the trustee to defend his investments and his management of the fund, and call upon the courts to prescribe in advance a rule by which such investments shall be governed." *Id.* at 152-53. So too here.

ii. Plaintiffs cite nothing to contradict this settled authority, dooming their contention that a breach of fiduciary duty alone gives them standing. Indeed, although Plaintiffs devote many pages to discussing the general remedies available to redress fiduciary breaches (Br. 28-41), they address the specific Restatement provision limiting who may *seek* such remedies only in a conclusory footnote. Br. 33 n.1.

(a). The "no further inquiry" rule does not support Plaintiffs' claim that any violation of fiduciary duty is itself a "*de facto* harm." Br. 20; *contra* Br. 35-38, 40-41; SG Br. 16-17. This evidentiary rule does not erase the consequential-harm requirement; it merely deems it satisfied under limited circumstances for certain parties. When trustees complete self-dealing transactions—such as selling trust property to themselves—they can be compelled to rescind the transaction and cannot defend it as fair to the trust. Bogert, § 543; Restatement (Second) Trusts § 170, cmt. b; 4 *Scott and Ascher* § 24.10. Instead, the transaction "carries fraud on the face of it." *Michoud v. Girod*, 45 U.S. 503, 553 (1846).

This rule does not, as Plaintiffs contend, manifest a general principle that *all* breaches of fiduciary duty are in and of themselves concretely harmful. Rather, the "no further inquiry" rule embodies the conclusive presumption that a certain type of fiduciary breach will necessarily cause harm to the trust corpus (and thus, to any equitable interests that beneficiaries have in that corpus). *See* Restatement (Third) Trusts § 100, cmt. f (characterizing "'no further inquiry' principle" as modifying "the normal burden of proof"); Bogert, § 543. Harm is still required, but this presumption may satisfy that requirement. As Justice Story explained, the rule responds to the concern that, although the trustee may have "made a bargain advantageous to himself," the plaintiff may "not have it in his power distinctly and clearly to show it." 1 Story, *supra*, at 318. To overcome such evidentiary issues and deter possible misconduct, courts conclusively presumed self-dealing transactions were harmful to the trust estate, and that rescinding these transactions would benefit the estate. Bogert, § 543 ("Whether the action of the trustee was fair to the beneficiaries in any given case is often difficult to prove, and the beneficiaries will be at a disadvantage in terms of information concerning the transaction. For these reasons, equity permits the beneficiary to strike down all disloyal acts * * * ."); *Piatt v. Longworth's Devisees*, 27 Ohio St. 159, 195-96 (1875) ("The sale will be set aside, not because there *is* fraud, but because there *may be* fraud.").

In leaving a harm requirement intact but presuming it satisfied for beneficiaries with an interest in the transaction, the "no further inquiry" rule is much like defamation per se. Under that doctrine, certain types of false statements are deemed harmful to their subjects even if the subjects present no evidence of resulting harm. *E.g.*, Restatement (Second) Torts § 570 ("slander" actionable where the statement imputes, *inter alia*, a "criminal offense," a "loathsome disease," or "serious sexual misconduct"). The rationale is that "those forms of defamation that are actionable *per se* are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove." *Carey v. Piphus*, 435 U.S. 247, 262 (1978). Yet the existence of this legal presumption does not mean courts treat any false statement as *itself* a concrete harm. Instead, the doctrine simply reflects the understanding that certain types of false statements will necessarily injure the "plaintiff's interest in reputation." 2 Dobbs § 7.2(1). It is the invasion of that interest that is actionable.

Similarly, in the trust context, the "no further inquiry" rule does not demonstrate that any fiduciary breach is itself a concrete harm. Instead, the rule simply embodies the understanding that certain types of disloyal transactions will necessarily injure the trust corpus, thus authorizing a suit to rescind the transaction by any beneficiary "whose rights are or may be adversely affected" by that presumptive harm to the trust. Restatement (Third) Trusts § 94. It is that harm to the beneficiary's interest that is actionable. If beneficiaries (like Plaintiffs here) have no interest in the trust corpus, they cannot seek any remedy. *Ibid.*, *see infra* pp. 41-45.[3]

(b). Plaintiffs' remaining trust-law arguments also fail. Plaintiffs invoke the rule that the "trustee is chargeable with any profit made by him through the improper disposition or use of trust property."

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[3] Even if the no-further-inquiry rule somehow conferred standing, it would not salvage Plaintiffs' claims. If Article III *standing* is based on the intangible injury that supposedly arises when trustees engage in ERISA-prohibited self-dealing, then Plaintiffs must plead and prove the relevant ERISA regulations prohibited the challenged investments. *Lujan*, 504 U.S. at 561. Plaintiffs did not attempt to meet that burden here. *Supra* pp. 10, 12; *Adedipe*, 62 F. Supp. 3d at 902.

Restatement (Second) Trusts § 205, cmt. h; *see* Br. 34-35; SG Br. 16. Yet this rule does not demonstrate that all fiduciary breaches are themselves *de facto* harms; rather, it is again premised on the existence of harm to the trust (and injury to any corresponding interest of the beneficiary). "[A] trustee is accountable for *all* profits arising out of the administration of the trust, regardless of whether there has been a breach of trust." 4 *Scott and Ascher* § 24.7 (emphasis added). In other words, *any* profit earned with trust property is trust property. Thus, in suing for fiduciary breach, the beneficiary may "affirm the transaction and accept the results of the trustee's improper conduct, by electing to hold the trustee accountable for any profits." *Id.* § 24.9 (quotation marks and citation omitted). In such a case, the trust estate may not have been "injured" in the sense that the fiduciary breach depleted the trust's preexisting assets, but the estate *would* be injured if the trustee were permitted to keep any profits—which are legally "accountable to the trust estate." *Jackson v. Smith*, 254 U.S. 586, 589 (1921). And Plaintiffs cite nothing suggesting that beneficiaries lacking equitable interests in the recovery of these profits could nevertheless bring suit.

Plaintiffs also note that, where trustees have discretion to choose among beneficiaries to receive the trust estate, any of these beneficiaries can sue to protect it. Br. 32. This does nothing to advance Plaintiffs' claim. Such discretionary beneficiaries have recognized equitable interests in the trust corpus itself. *Scanlan*, 669 F.3d at 843. Anything that depletes the trust assets adversely affects that interest. *Id.* at 846. And the scope of these equitable interests reflects the fact that the beneficiaries' financial interests depend directly on the value of the trust corpus, which may be granted to them. *See Johnson v. Superior Court*, 199 P.2d 827, 829 (Ariz. 1948). Thus, conversely, where that possibility of a payout has been eliminated, the beneficiary "cannot maintain a suit" because she "no longer has a beneficial interest." 4 *Scott and Ascher* § 24.19; *see* Restatement (Second) Torts § 214, cmt. a. Likewise, "a beneficiary whose interest depends upon a contingency so remote that it is unlikely ever to occur may not be able [to] maintain a suit against the trustee." 4 *Scott and Ascher* § 24.19; *see, e.g.*, *McChord v. Caldwell's Ex'r*, 29 S.W. 440, 442 (Ky. 1895) (where beneficiary's interest was contingent on death of testator's grandchild without descendants and intestate, it was too "uncertain," and "subject to too many contingencies, to demand, seriously, the immediate interposition of the chancellor").

Equally unavailing is Plaintiffs' invocation of the remedy of trustee removal, which Plaintiffs assert is available even without "financial loss." Br. 39-40. Plaintiffs attack a strawman. Beneficiaries are of course not limited to seeking redress for *past* financial losses; they may also seek to remove fiduciaries whose "continuance as trustee[s] is likely to be detrimental to the interest of the beneficiary" in the *future*. Restatement (Second) Trusts § 199, cmt. e. That beneficiaries may seek to remove trustees who might cause prospective harm in no way demonstrates that beneficiaries can sue even if a purported fiduciary breach would never cause them any harm. Even the authority on which Plaintiffs rely for the proposition that "no financial loss" is required (Br. 40) expressly recognizes that "[t]he purpose of removal is not the infliction of a penalty for past behavior, but is the preservation of the trust property." *Moore v. Bowes*, 64 P.2d 423, 424 (Cal. 1937). Beneficiaries without interest in that property have no ground to seek this remedy. Bogert, § 871.

Finally, Plaintiffs make the puzzling assertion that because *trustees* could historically sue to redress wrongs to the trust, trust beneficiaries must be able to sue to redress fiduciary breaches. Br. 22-23. But trustees have both "legal title to the assets in the trust estate" and "an independent fiduciary obligation to sue to preserve those assets"—giving trustees the requisite personal stake in protecting those assets. *Sprint Commc'ns Co., L.P. v. APPCC Servs.*, 554 U.S. 269, 304 n.2 (2008) (Roberts, C.J., dissenting); *see* Bogert, § 869. It does not follow that every abstract breach of fiduciary duty is a concrete injury that grants *beneficiaries* standing. Indeed, in attempting to justify that conclusion, Plaintiffs appear to concede that standing in such cases is premised *not* on the fiduciary breach itself, but rather on the beneficiary's interest as the "equitable owner" of the affected trust assets. Br. 23; *see also* Br. 22 (contending trust law developed "to vindicate the trust beneficiary's critical, real-world interests"). Exactly right—and where a fiduciary breach does not implicate the beneficiary's interest, she cannot bring suit.[4]

b. ERISA grants plan participants no right to plan investment

i. Even if bare breaches of fiduciary duty were considered "invasion[s]" of common-law trust beneficiaries' "legally protected interest[s]," *Spokeo*, 136 S. Ct. at 1548, ERISA grants Plaintiffs here no similar right to fiduciary prudence or loyalty in the management of plan assets. As this Court has often emphasized, courts must "bear[ ] in mind the special nature and purpose of employee benefit plans" because "trust law does not tell the entire story." *Varity*, 516 U.S. at 497 (quotation marks omitted). Although the government suggests ERISA's remedies are necessarily "*broader* than those traditionally available under trust law" (SG Br. 13), ERISA is not a one-way ratchet: the statute is often narrower than the common law. *E.g.*, *Mertens*, 508 U.S. at 262; *Hughes*, 525 U.S. at 447.

That is once again true here. As this Court has held, ERISA "characterizes the relevant fiduciary relationship as 'one with respect to a plan'" and "identifies

[4] The government asserts that where fiduciaries breach express plan terms, the claim should be treated like a breach-of-contract action. SG Br. 18-19; *but see* Restatement (Second) Trusts § 197, cmt. b ("A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract[.]"). Because Plaintiffs abandoned any claim the U.S. Bank Defendants contravened the terms of the Plan, this Court need not address the issue. *Compare Adedipe*, 62 F. Supp. 3d at 901-02 (dismissing claim based on Plan terms), *with* Plaintiffs' CA Br. 1-2 (pressing no challenge to this ruling).

the 'plan' as the victim of any fiduciary breach." *LaRue*, 552 U.S. at 254. Any violations of ERISA fiduciaries' duties in managing plan assets are therefore violations of the *plan's* rights. Thus, to the extent that Congress in ERISA "identified" fiduciary breaches as "intangible harms" that qualify as "concrete," Congress determined the plan—not any individual participant—experiences that injury. *Spokeo*, 136 S. Ct. at 1549.

This conclusion follows from ERISA's plain text. "Congress invoked the common law of trusts to define the general scope" of ERISA fiduciaries' "authority and responsibility." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). But while ERISA's *standards of conduct* are thus largely derived from trust law, the statute makes clear that the entities to which fiduciaries *owe* those obligations differs. ERISA repeatedly characterizes fiduciaries' obligations in managing plan assets as "duties with respect to a plan." 29 U.S.C. 1104(a)(1) (duty of prudence); *accord, e.g.*, 29 U.S.C. 1106(a)(1) (prohibiting interested transactions by a "fiduciary with respect to a plan"). Section 1109 then removes any doubt. "[N]ot only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good *to such plan* and losses *to the plan* * * * and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*.'" *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (quoting 29 U.S.C. 1109) (alterations and emphasis in original). Thus, as this Court has expressly determined, these ERISA-imposed fiduciary duties govern "the relationship between the fiduciary and the plan itself as an entity," not "the rights of an individual beneficiary." *Id.* at 140, 142.

This deviation from the common law reflects the legal status of ERISA plans. A common-law trust is not a "distinct legal entity, but a 'fiduciary relationship' between multiple people." *Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016). Any fiduciary obligations thus run between the parties to that relationship—*i.e.*, the trustees and the beneficiaries. But under ERISA, the "employee benefit plan" is a separate (and highly regulated) legal entity. 29 U.S.C. 1132(d)(1). Congress granted the plan itself the right to have its assets held in trust and managed in accordance with ERISA's fiduciary standards. 29 U.S.C. 1109.

That does not mean ERISA grants plan participants *no* individual rights. Plan participants have rights to their nonforfeitable benefits and to proper determinations of those benefits. *E.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008). Participants have a right to have plan administrators deal honestly with them in describing the plan. *Varity*, 516 U.S. at 506, 514. And participants have statutory rights to information about the plan. *E.g.*, 29 U.S.C. 1021(a). What plan participants do *not* have is any individual right to "plan asset management." *Varity*, 516 U.S. at 511, 514. That right is the plan's. *LaRue*, 552 U.S. at 254; *Russell*, 473 U.S. at 142; *see*

Varity, 516 U.S. at 524 (Thomas, J., dissenting) ("ERISA's fiduciary obligations were designed to regulate the relationship between the fiduciary and the plan, and not the relationship between the fiduciary and individual participants.").

ii. Plaintiffs identify no basis for this Court to hold that Congress nevertheless granted plan participants a "statutory right" against fiduciary breaches—let alone a reason for this Court to credit Congress's supposed view that a violation of that purported right would cause plan participants concrete harm.

(a). Although both Plaintiffs and the government contend ERISA fiduciaries owe investment-related duties to plan participants, neither can support that assertion. Br. 20; SG Br. 14. Tellingly, neither attempts to address this Court's precedent holding that these obligations govern "the relationship between the fiduciary and the plan itself as an entity." *Russell*, 473 U.S. at 140.

Both rely on this Court's decision in *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000). But in the passage they quote, the Court was describing the "common law of trusts," not ERISA. *Ibid*. This Court did not say the relevant ERISA fiduciary duties likewise run to plan participants, and it had no reason to address the issue. *Ibid.*; *cf. Russell*, 473 U.S. at 140 (directly addressing that question).

The only other authority Plaintiffs and the government cite—29 U.S.C. 1104(a)(1)—does not help them.

Br. 20; SG Br. 15. That provision states, in relevant part, that an ERISA fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). Plaintiffs and the government seize on this last phrase. But this Court has already rejected this argument, holding that while the "fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries," these fiduciary obligations nevertheless run to the plan. *Russell*, 473 U.S. at 142. ERISA fiduciaries must act in the interests of participants because an ERISA plan's purpose is to benefit those participants, and ERISA fiduciaries owe the *plan* ERISA-imposed duties (*i.e.*, "duties with respect to a plan," 29 U.S.C. 1104(a)(1)) to properly manage its assets. *See Russell*, 473 U.S. at 140-42.

(b). Stymied by ERISA's substantive provisions, Plaintiffs turn to procedural ones. They claim Congress's authorization of participant suits in Sections 1132(a)(2) and 1132(a)(3) demonstrates that Congress views fiduciary breaches as concrete harms plan participants experience. Br. 41-44; *see* SG Br. 17-19. This attempt to conflate statutory rights with causes of action misapprehends both ERISA and Article III.

Section 1132 (at most) provides participants like Plaintiffs with *causes of action*; it does not grant them any statutory *rights* with respect to plan asset management that could be enforced through those causes of action. That is, neither of the provisions Plaintiffs invoke confers personal entitlements to have plan fiduciaries act in a particular manner. *Cf. Spokeo*, 136 S. Ct. at 1553-54 (Thomas, J., concurring) (provision requiring defendant to "assure maximum possible accuracy of the information *concerning the individual about whom the report relates*" could "arguably" create "a private duty owed personally" to the plaintiff); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (statute prohibiting misrepresentations "to *any person*" created an individual "legal right to truthful information about available housing") (quotation marks omitted). Rather, Sections 1132(a)(2) and 1132(a)(3) authorize plan participants (as well as the Department of Labor and plan fiduciaries) to bring "civil action[s]" to seek "appropriate relief" to address ERISA violations. 29 U.S.C. 1132(a)(2), (a)(3). Neither cause of action provides that these ERISA violations constitute violations of the participant's *own* rights. *Cf.* 29 U.S.C. 1132(a)(1) (authorizing suit to enforce participant's "rights"). Indeed, Section 1132(a)(2) provides remedies only for the plan for violations of the plan's rights. *LaRue*, 552 U.S. at 253-54.

Sections 1132(a)(2) and 1132(a)(3) thus allow plan participants (along with plan fiduciaries) to enforce ERISA requirements found elsewhere in the statute, including the prohibitions on mismanaging plan assets. These efforts supplement those of the Department of Labor—which likewise may enforce these obligations, and may even intervene in participants' suits. 29 U.S.C. 1132(a)(2), (a)(5), (h). These provisions do not grant participants any substantive rights of their own—they grant merely a procedural right to sue.

The distinction between statutory causes of action and private statutory rights is critical for Article III purposes. *See Havens*, 455 U.S. at 376. Where plaintiffs seek enforcement of statutory rights owed to *them*, Congress's grant of that right may sometimes (but not always) "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578). But this Court has never suggested that Congress's mere creation of a statutory cause of action has the same effect. After all, the bare minimum requirement of Article III is that the plaintiff suffer an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. While plaintiffs may have a cause of action to sue on the ground that "the rights of another were infringed," they have standing only if they also demonstrate they "suffer[] actual injury as a result of the defendants' conduct." *Havens*, 455 U.S. at 376 n.16 (quotation marks omitted).

This Court's decision in *Raines v. Byrd* is controlling. There, members of Congress challenged the Line Item Veto Act. 521 U.S. at 814. They invoked a statutory cause of action that expressly authorized "'any Member of Congress'" to "'bring an action * * * on the ground that any provision of [the Act] violates the Constitution.'" *Id*. at 815-16 (alterations omitted). In holding these "Members of Congress" lacked standing, this Court nowhere suggested that Congress's specific grant of this right to sue gave them a "legally and judicially cognizable interest" or demonstrated that Congress considered invasion of that interest "concrete."

Id. at 819. Rather, the Court quickly dismissed any such notion, declaring: "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 820 n.3. The same principle applies here.

Regardless, even if a statutory cause of action *could* demonstrate Congress's view that an "intangible harm[]" satisfies "minimum Article III requirements," *Spokeo*, 136 S. Ct. at 1549, Sections 1132(a)(2) and 1132(a)(3) contain no hint of any such determination. These provisions authorize a wide variety of parties to enforce a number of ERISA provisions by seeking "appropriate" relief. 29 U.S.C. 1132(a)(2), (a)(3). This Court has previously interpreted such general language to *preclude* suits by individuals who suffer no real-world injury. *Gollust v. Mendell*, 501 U.S. 115, 125 (1991). Sections 1132(a)(2) and 1132(a)(3) are susceptible to a similar construction. *See infra* pp. 59-63. At the very least, nothing in their broad language suggests Congress viewed every abstract breach of fiduciary duty as causing concrete injury to every listed entity—including plan participants, plan fiduciaries, and the Secretary of Labor—that may bring suit.

2. Defined-benefit plan participants have no interest in plan assets

Plaintiffs' second standing theory is that they have an equitable property right to the Plan assets, and that anything affecting those assets thus injures them. Br. 23-26. The government does not support this argument. SG Br. 20 ("a beneficiary has no individual claim to a plan's general asset pool"). And every court of appeals to consider the contention has rejected it. *See Perelman v. Perelman*, 793 F.3d 368, 374 (3d Cir. 2015); *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013); *Lee*, 837 F.3d at 530; *Duncan v. Muzyn*, 885 F.3d 422, 428 (6th Cir. 2018); *Harley*, 284 F.3d at 906; *Glanton v. AdvancePCS Inc.*, 465 F.3d 1125-26 (9th Cir. 2006). For good reason: this Court, in *Hughes Aircraft Co. v. Jacobson*, held that defined-benefit plan participants have no interest in the plan's assets. 525 U.S. at 440.

This Court could not have spoken more clearly: "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Ibid*. The defendant in *Hughes* had taken the assets of its existing defined-benefit plan (to which the plaintiff employees had contributed) and used them to provide new benefits to different employees (who had not contributed). *Id.* at 436-37. The plaintiffs claimed that, in doing so, the employer deprived them of their "vested interest" in those assets. *Id.* at 437. This Court rejected the argument, holding that the "structure" of defined-benefit plans forecloses any such claimed interest. *Id.* at 440. As it explained, "a plan's actual investment experience does not affect [participants'] statutory entitlement." *Ibid*. And "[s]ince a decline in the value of a plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus." *Ibid*. Thus, *Hughes* held, participants have no "claim" to the general pool of plan assets, but only "a right to a certain defined level of benefits." *Ibid.*

Plaintiffs attempt to distinguish *Hughes* on the ground that it addressed the merits of the plan participants' claim, while here Plaintiffs' standing is at issue. Br. 25-26. That is no distinction. The plaintiffs in *Hughes* had a stake in the litigation because, if they prevailed, they would be entitled to "a share of the $ 1 billion surplus." *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1303 (9th Cir. 1997) (Norris, J., dissenting). This Court thus treated whether they had any right to the plan assets as a merits issue. Here, by contrast, the merits of Plaintiffs' claims do not turn on whether they have a right to Plan assets. Instead, Plaintiffs have a *stake* in the litigation only if they have an interest in those assets. *E.g.*, J.A. 59 ("the relief requested in this action is for the benefit of the Plan"). Whether they have any such right is thus an Article III issue. But the underlying question is precisely the same as in *Hughes*: do defined-benefit plan participants have any interest in the plan's "general asset pool"? 525 U.S. at 440. *Hughes* held they do not. *Ibid*. Plaintiffs cannot now escape this holding.

In any event, even if *Hughes* had not resolved this issue, Plaintiffs offer no reason to hold that all defined-benefit plan participants have property interests in their plans' assets. Plaintiffs' principal contention is that this is true of common-law trusts. Br. 23-26. But common-law beneficiaries do not, as Plaintiffs assume, always have an equitable fee simple absolute in the trust estate. Instead, as described above (*supra* pp. 25-26), trust beneficiaries' equitable interests vary significantly depending on their practical interests. Bogert, § 181. Thus, only when beneficiaries show the "threatened or actual wrongdoing may or has affected [them] adversely financially" can they bring suit to protect their interests. *Id.* § 871; *see, e.g.*, Restatement (Second) Trusts § 214, cmt. b; *McChord*, 29 S.W. at 442. Under these trust-law principles, Plaintiffs would have no interest in the Plan assets because Plaintiffs' benefits are unrelated to the value of those assets (as *Hughes* recognized). 525 U.S. at 440.[5]

Finally, Plaintiffs would be wrong about ERISA defined-benefit plans even if they were right about common-law trusts. The sole statutory provisions Plaintiffs cite in support of their argument are Section 1103(a), which provides that Plan assets are held in "trust," and Section 1103(c), which says those assets cannot "inure to the benefit of any employer." Br. 23 (citing 29 U.S.C. 1103(a), (c)). But ERISA interposes

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[5] Plaintiffs quote the principle that " '[b]eneficiaries are generally tenants in common in that they have undivided equitable interests in the entire trust property.' " Br. 26 (quoting Bogert, § 181). This statement describes how present beneficiaries generally hold the property and devise their interests (*e.g.*, no beneficiary owns a particular subparcel of land, and their interests will not transfer as they would under a "joint tenan[cy]" with an "incident of survivorship"). Bogert, § 181. As the same treatise makes clear, beneficiaries' interests vary in numerous other dimensions: while they "must always be equitable, * * * otherwise they need have no particular characteristics." *Ibid.* And when the nature of a beneficiary's interest means it is unaffected by alleged fiduciary wrongdoing, the beneficiary cannot sue. *Id.* § 871.

another entity between plan fiduciaries and plan participants: the plan itself. 29 U.S.C. 1132(d)(1). And again, ERISA establishes that the relevant fiduciary relationship for plan-asset management is between the fiduciaries and the plan. *Russell*, 473 U.S. at 140; *see supra* pp. 34-38. Plan assets are accordingly held "in trust" for the plan as a whole, 29 U.S.C. 1103(a), and they can thus be used only for plan "purposes" (like paying participants and defraying plan costs), 29 U.S.C. 1103(c). Nothing in this structure vests individual defined-benefit plan participants with personal rights to the *plan's* assets.

3. Plaintiffs cannot invoke the Plan's injury

Plaintiffs briefly press a third theory: while *they* suffered no injury, they may invoke the Plan's supposed injury. Br. 33-34. The government develops this contention in more detail. SG Br. 10-15. It asserts that a Section 1132(a)(2) suit is "in substance one on behalf of the plan to seek redress for the plan's injuries," and that "[n]o further showing of injury is required to support Article III standing." SG Br. 12. Section 1132(a)(2) may well contemplate a sort of derivative lawsuit. But that does not remedy the Article III defect in suits like Plaintiffs'—as the courts of appeals have unanimously concluded. *Lee*, 837 F.3d at 547-48; *Perelman*, 793 F.3d at 376; *David*, 704 F.3d at 335-36; *McCullough*, 585 F.3d at 1085-86; *Glanton*, 465 F.3d at 1125-26.

a. A plaintiff cannot satisfy Article III merely by pointing to another entity's injury. "Article III standing is not to be placed in the hands of 'concerned bystanders.'" *Perry*, 570 U.S. at 707-08. Thus, "none" of this Court's cases "comes close to establishing that mere authorization to represent a third party's interests is sufficient to confer Article III standing on private parties with no injury of their own." *Id.* at 710. Rather, "even when [this Court] ha[s] allowed litigants to assert the interests of others, the litigants *themselves* still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute." *Id.* at 708 (emphasis added, quotation marks and alterations omitted).

The shareholder-derivative decisions on which the government relies are not to the contrary. None supports the assertion that "the relevant injury for purposes of standing is that suffered by the represented entity, not the named plaintiff." SG Br. 14. Most of the cited decisions do not address standing at all. *E.g.*, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528-34 (1984) (discussing Federal Rule of Civil Procedure 23.1). And even these decisions' general descriptions of derivative actions cut against the government: shareholders may sue on behalf of the corporation because they have an ownership interest in the corporation. Any corporate injury thus will "result in lessening the dividends of stockholders, or the value of their shares." *Dodge v. Woolsey*, 59 U.S. 331, 341 (1855).[6]

The sole derivative decision the government cites that addresses Article III is *Gollust v. Mendell*, and it directly contradicts the government's argument. Far from concluding that the *corporation's* injury alone suffices, *Gollust* held that "if a security holder were allowed to maintain a [derivative] action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction." 501 U.S. at 125. Thus, this Court construed a statutory provision authorizing derivative suits to require that plaintiffs maintain the security interest that gives them a "financial interest." *Id.* at 126; *see Perry*, 570 U.S. at 711 (distinguishing *Gollust* on this basis).

b. Common-law trust principles provide the government equally little support. In general, only trustees may sue on the trust's behalf. Bogert, § 869. The government invokes a narrow, "emergency" exception: where trustees "cannot or will not" sue third parties, and the delay from enjoining the trustees to act might

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[6] The government's invocation of *Merchants' Cotton-Press & Storage Co. v. Ins. Co. of North America* is mysterious: the decision again does not address Article III, and parties invoke subrogation because they experience the injury of compensating for harm or liability for which the defendant is responsible. 151 U.S. 368, 384 (1894); *see* 1 Dobbs § 4.3(4).

preclude meaningful relief, beneficiaries may sue as "temporary representative[s] of the trust." *Ibid.*

These "derivative" suits do not, however, exempt beneficiaries from trust law's general requirement that they show *their* "rights are or may be adversely affected by the matter(s) at issue." Restatement (Third) Trusts § 94, cmt. b; *see id*. Reporter's Notes, cmt. a(1) ("standing" requirement applies generally to suits to "redress breaches of trust," along with "other enforcement proceedings in a more comprehensive sense"). Such suits are "a combination of two causes of action—one against the trustees for wrongfully refusing to sue and the other against the party who is liable to the trust." *Riviera Congress Associates v. Yassky*, 223 N.E.2d 876, 880 (N.Y. 1966) (quotation marks omitted). Because beneficiaries must show the trustee has "commit[ed] a breach of trust in failing or declining to bring an action against the third party," they must satisfy the ordinary requirements for breach-of-trust claims. 5 *Scott and Ascher* § 28.2.1. Thus, when beneficiaries may sue on behalf of the trust, they are nevertheless "the real parties in interest," and it is "their loss which is to be prevented." Bogert, § 869. If they have no loss (or risk of it), they cannot bring suit.

In any event, even if uninjured trust beneficiaries could bring derivative claims, such suits were unknown at the time the Constitution's framers limited the "judicial power" to "the traditional role of Anglo-American courts." *Summers*, 555 U.S. at 492. Historically, beneficiaries' *sole* remedy when trustees failed to sue third parties was to sue the trustees.

5 *Scott and Ascher* § 28.2.1. Only in the latter half of the nineteenth century did courts (perhaps spurred by the development of corporate derivative lawsuits) begin to allow beneficiaries to sue third parties for wrongs to the trust. *See* Bogert, § 869, fn. 35-45; *Hawes v. Oakland*, 104 U.S. 450, 454 (1881) (characterizing *Foss v. Harbottle*, 67 Eng. Rep. 189 (Ch. 1843), as "the earliest" decision giving shareholder derivative suits "careful consideration"). And even when courts permitted beneficiaries to maintain actions against third parties, they did not consistently treat such actions as derivative, but might instead grant direct relief to the beneficiary. *E.g.*, *Wheeler v. Brown*, 26 Ill. 369 (1861). Contrary to the government's contentions, trust-beneficiary derivative actions were thus not "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Stevens*, 529 U.S. at 777 (quotation marks omitted).

c. That *qui tam* relators have Article III standing is irrelevant. *Contra* SG Br. 14-15. Congress, in the False Claims Act, has partially assigned the government's claim for damages to relators, granting them "an interest in the lawsuit." *Stevens*, 529 U.S. at 772, 774 (emphasis omitted). Although relators themselves may not have originally suffered the underlying injury, Congress's assignment takes the government's property interest in its claim—a "chose in action"—and vests it in the relators, entitling them to recover *personally* for that injury. *Sprint*, 554 U.S. at 275-78. There is a "well nigh conclusive" tradition of such *qui* *tam* actions, dating to the thirteenth century. *Stevens*, 529 U.S. at 778.

Plaintiffs' Section 1132(a)(2) action bears little resemblance to these *qui tam* suits. First, there is no "well nigh conclusive" tradition of allowing uninjured plan participants to bring claims on behalf of their plans. *Ibid*. Derivative suits are a relatively recent innovation, and courts have never authorized suits by beneficiaries personally unaffected by the conduct they challenge. *See supra* pp. 48-49.

Second, Section 1132(a)(2) does not "assign" the plan's rights to plan participants (even assuming Congress could create Article III jurisdiction by taking one private party's claim and giving it to another). Plaintiffs have not acquired the Plan's cause of action; it is not now *their* claim. Indeed, they will recover nothing even if they prevail—that is why they have no personal "stake" in this litigation. *Perry*, 570 U.S. at 705. Rather, as with any other derivative suit, Plaintiffs sue *on behalf* of the Plan, seeking recovery that must go directly to the Plan. *Russell*, 473 U.S. at 140. And again, where litigants "assert the interests of others, the litigants themselves still 'must have suffered an injury in fact.'" *Perry*, 570 U.S. at 708. Plaintiffs cannot satisfy that basic requirement.

4. Plaintiffs face no risk of loss

The government also presses an argument Plaintiffs abandoned long ago: plan participants may challenge fiduciary breaches that "result[] in a materially increased risk of monetary loss." SG Br. 20. While no one disputes that general principle, it is inapplicable here.

First, Plaintiffs waived the contention many times over. Plaintiffs' brief nowhere contends their benefits are at risk. *Supra* pp. 21-22. This Court does "not ordinarily consider issues raised only by *amici*." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991). More important, Plaintiffs' certiorari petition not only failed to advance this theory, it built its case for review on an express *disclaimer* of the theory. *See* Pet. i ("May an ERISA plan participant or beneficiary seek restoration of plan losses * * * without demonstrating individual financial loss *or the imminent risk thereof*?") (emphasis added). This Court does not ordinarily "consider any argument" not raised in the petition, much less ones petitioners expressly disavow. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995). And Plaintiffs never even raised the issue before the Eighth Circuit. *See* Plaintiffs' CA Br. 15-45; Plaintiffs' CA Reply 3-20. Yet again, "[b]ecause this argument was not raised below, it is waived." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Second, Plaintiffs abandoned risk-based arguments for good reason: the record forecloses them. Indeed, the district court found as fact that Plaintiffs' benefits are not at risk. Pet. App. 40a. That Rule 12(b)(1) finding was based on evidence and is reviewed for clear error. 5B Wright & Miller, Federal Practice & Procedure § 1350 & n.79 (3d ed. 2019). This Court rarely if ever sets aside such findings. *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). Doing so when the affected party does not challenge the finding would be extraordinary.

The government provides no basis for so dramatically departing from this Court's ordinary practices. It contends the district court was "laboring under the misimpression that a plan's status as underfunded or overfunded was decisive." SG Br. 24. But any such "misimpression" cut in *Plaintiffs'* favor. The only allegations, evidence, or argument that Plaintiffs ever advanced on their personal financial risk were based on the Plan's underfunding. When the government asserts "at least some of the facts here remain in dispute" (SG Br. 24), it is referring solely to Plaintiffs' contentions that the Plan remained underfunded (contentions the district court correctly rejected and that Plaintiffs do not reassert). Pet. App. 39a-40a. The district court had previously (and erroneously) found that the Plan's underfunded status alone provided Plaintiffs with Article III standing, crediting but deeming insufficient the evidence that Plaintiffs' benefits were nevertheless secure given U.S. Bancorp's demonstrated capacity to satisfy its obligations and the PBGC's guarantees. *Adedipe*, 62 F. Supp. 3d at 891-92; *but see Lee*, 837 F.3d at 546 (correctly recognizing that a defined-benefit plan's underfunding does not by itself create a cognizable risk to participants' benefits). Once the U.S. Bank Defendants demonstrated the Plan was no longer underfunded, there was no evidence whatsoever that Plaintiffs' benefits were threatened. Pet. App. 40a. Thus, even assuming it is theoretically possible for participants in overfunded plans to face some cognizable risk (SG Br. 22), the district court properly found that Plaintiffs do not.

Third, the government is wrong on the law. The government's argument boils down to the following assertion: any reduction in the value of a defined-benefit plan's assets affects, however minutely, "the risk of future nonpayment or underpayment of the promised benefits" by increasing the risk of plan failure. SG Br. 20-22. "Standing is not an ingenious academic exercise in the conceivable." *Lujan*, 504 U.S. at 566 (quotation marks omitted). Instead, "threatened injury must be *certainly impending* to constitute injury in fact," and "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quotation marks omitted). These blackletter Article III principles are consistent with the trust-law authorities the government invokes (SG Br. 21): even where (unlike here) beneficiaries have contingent interests in the entire trust corpus, courts refuse to entertain their claims if those interests are too remote and uncertain. 4 *Scott and Ascher* § 24.19; *supra* pp. 31-32. Here, similarly, the suggestion that any loss of Plan assets might conceivably affect Plaintiffs' benefits would take the Court deep "into the area of speculation and conjecture, and beyond the bounds of [its] jurisdiction." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citation and quotation marks omitted).

That is particularly true given the degree to which Plaintiffs' benefits are protected even in the event of Plan default. The government asserts "the *employer's* solvency today is irrelevant to the *plan's* ability to pay beneficiaries in the future." SG Br. 24. But ERISA makes employers liable for accrued benefits when the plan itself fails, so the employer's solvency is directly relevant to whether participants will receive those benefits. 29 U.S.C. 1362(b); *see* Langbein, *supra*, at 187-88. To the extent the government is contending that an employer's future financial condition is uncertain, the same could be said of the plan itself, undermining the government's assertion that current changes in plan assets create cognizable risks of lost benefits. Regardless, the government never addresses the fact that the PBGC would fully guarantee all Plaintiffs' promised benefits. Dkt. 108-1 at 14. For Plaintiffs to suffer financial loss, the Plan, U.S. Bancorp, and the PBGC would *all* have to fail. That doomsday scenario, needless to say, rests on a "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Article III requires more. *Ibid.*

5. Plaintiffs' policy argument fails

Plaintiffs press a final policy argument for injury-free Article III standing. They contend that if plan participants cannot challenge defined-benefit plans' investment practices, fiduciaries will be able to "pilfer plan assets at will" or "take plan assets and gamble them all." Br. 26-27. But as this Court has long held, "the assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982).

Plaintiffs' concerns are unfounded in any event: any number of parties may challenge such misconduct. ERISA expressly authorizes the Department of Labor to enforce ERISA's fiduciary obligations. 29 U.S.C. 1132(a)(2). Depending on the nature and extent of the fiduciary misconduct, both state and federal criminal sanctions may also apply. *E.g.*, 29 U.S.C. 1131(b) (criminal penalties for false statements related to plan); 29 U.S.C. 1144(b)(4) (exempting "generally applicable" state criminal laws from preemption). A fiduciary who "pilfered" plan assets would be prosecuted.

Aside from these public enforcement mechanisms, interested private parties may also put a stop to any misappropriation. If plan participants can show their benefits are threatened, they may sue. *Supra* pp. 50-51. If the misconduct does not threaten their benefits (as may often be true with defined-benefit plans), that is only because the *employer* generally bears this investment risk. *Hughes*, 525 U.S. at 439. As the victims of such misconduct, employers sponsoring defined-benefit plans have direct interests in ensuring plan assets are properly managed. Employers serving as plan "fiduciar[ies]" may invoke ERISA to sue for the plan, or other affected fiduciaries may do so. 29 U.S.C. 1132(a)(2).

Employers may also have non-ERISA means to ensure plan assets are preserved. Here, for example, the district court dismissed one of Plaintiffs' initial claims alleging fiduciary misconduct because U.S. Bank had already recovered the Plan's losses and, with the oversight of an uninterested third party, settled the claim. *Adedipe*, 62 F. Supp. 3d at 906-07; *see* Dkt. 104-1 at 5; Dkt. 108-1 at 82. If an employer for some reason fails to seek the remedies available to it, the ultimate stakeholders—the employer's shareholders—may hold the corporation's directors to account. *See* Langbein, *supra*, at 574 (while the participants "[i]n a significantly overfunded plan" would be "unaffected if the trustees were to * * * bet a billion on the third nag in the opening race," the "victims of the trustees' imprudent investing would be the sponsor's shareholders"). There is no reason to distort Article III to permit suits by parties with *no* financial stake.

C. Plaintiffs Cannot Seek Non-Monetary Relief

Even if any of their injury-in-fact theories were viable, Plaintiffs would lack standing to seek prospective relief. A plaintiff "bears the burden of showing that he has standing for each type of relief sought" and that each requested remedy "will prevent or redress [his] injury." *Summers*, 555 U.S. at 493. Plaintiffs seeking forward-looking relief thus must demonstrate a "real and immediate threat" the challenged conduct will recur. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

Here, the district court found it "absolutely clear that the allegedly unlawful activity cannot be reasonably expected to recur." Pet. App. 48a (quotation marks omitted). Unless Plaintiffs could demonstrate this factual finding was clearly erroneous—and they make no attempt to do so[7]—they cannot seek removal of the Plan fiduciaries or an injunction preventing readoption of long-abandoned investment practices. 5B Wright & Miller § 1350. Plaintiffs cannot invoke federal-court jurisdiction to prevent future misconduct that will not occur. *Summers*, 555 U.S. at 493.

Plaintiffs attempt to distinguish decisions like *Lyons*—which held a plaintiff could not seek an injunction against police chokeholds because he had not demonstrated he would again be subject to that tactic, 461 U.S. at 110—on the ground that fiduciaries have "continuous, ongoing obligations." Br. 50, n.14. But the relevant question is whether the U.S. Bank Defendants will *violate* those ongoing obligations. The district court found as fact they would not, and thus any possible future injury to Plaintiffs is also wholly "speculative." *Ibid.*

Nor would adherence to this Court's Article III jurisprudence "require the Court to jettison hundreds of years of common-law tradition." *Ibid*. At common law, the remedies of injunction and trustee removal were available only to prevent future misconduct. *E.g.*,

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[7] Plaintiffs suggest the district court misunderstood their complaint when it found they did not challenge the Plan's investment in the FAF money-market fund. Br. 51; Cert. Reply 6; *see* Pet. App. 49a & n.6. But their complaint was clear, defining the " 'FAF Mutual Funds' " that Plaintiffs challenged as funds "whose underlying investments consisted of *equities*." J.A. 78-79, ¶ 132 (emphasis added). Plaintiffs have never identified any evidence that could demonstrate the district court committed clear error in finding the alleged misconduct Plaintiffs *did* challenge would not recur.

4 *Scott and Ascher* § 24.3.2 ("If there is a reasonable likelihood that the trustee will commit a breach of trust, the beneficiaries can maintain a suit in equity to enjoin the breach."); *Haines v. Elliot*, 58 A. 718, 721 (Conn. 1904) ("removal of trustees" appropriate only when there is "a clear necessity for interference to save the trust property"); *see supra* pp. 33-34. Plaintiffs cite nothing to the contrary.

Plaintiffs' request for restoration of the Plan's alleged losses faces parallel redressability issues insofar as their claimed injury is the breach of fiduciary duty alone. Unless they have an interest in the Plan's assets (and they do not), adding to those assets will not "redress" any "injury" they themselves suffered from purported fiduciary breaches. *Summers*, 555 U.S. at 493. This redressability problem is aggravated by the Plan's overfunded status. *See supra* p. 9. The only consequence of court-ordered payments into the Plan would be a corresponding reduction of U.S. Bancorp's future funding obligations. *Hughes*, 525 U.S. at 440. U.S. Bancorp would, in effect, be making a payment to itself. Plaintiffs never explain how this meaningless remedy would redress any supposed injury to them.

II. PLAINTIFFS LACK STATUTORY STANDING

This Court may also affirm on the narrower ground on which the Eighth Circuit relied. As that court correctly held, neither Section 1132(a)(2) nor Section 1132(a)(3) grants plan participants statutory standing when their benefits are secure. Pet. App. 20a-25a.[8]

Statutory standing prevents parties from bringing suit when they have not suffered the sort of injury that concerned Congress. This Court "presume[s] that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark*, 134 S. Ct. at 1388. That presumption "applies unless it is expressly negated." *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

Congress did nothing to negate that presumption here. ERISA expressly states Congress's purpose to protect "the interests of participants in employee benefits plans." 29 U.S.C. 1001(b). Neither Section 1132(a)(2) nor Section 1132(a)(3) suggests Congress sought to permit suits by participants whose "interests" are *not* threatened. True, both sections list "participants" among those generally authorized to sue.

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[8] Plaintiffs no longer contend the Eighth Circuit violated *Steel Co.*'s mandate that "Article III jurisdiction is always an antecedent question" to a dispute's merits. Pet. 23 n.5 (quoting 523 U.S. at 101). As this Court has repeatedly held (including in *Steel Co.* itself), "statutory standing" is a threshold issue that "may properly be treated before Article III jurisdiction." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999); *see, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005); *Steel Co.*, 523 U.S. at 97 n.2. *Lexmark International, Inc. v. Static Control Components, Inc.*, on which Plaintiffs previously relied, confirmed only that "statutory standing" is not *jurisdictional*. 134 S. Ct. 1377, 1387 n.4 (2014). An issue need not be jurisdictional to be a "threshold ground[] for denying audience to a case on the merits" because the plaintiff or forum is inappropriate. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

29 U.S.C. 1132(a)(2), (a)(3). But the provisions do not specify that "participants" can do so even when *uninjured*, and this Court has interpreted similar language to exclude uninjured plaintiffs. In *Gollust*, this Court construed a statute providing that a "suit to recover an insider's profit may be instituted * * * by the owner of any security of the issuer" to preclude maintenance of that suit by plaintiffs who owned the security when the suit was "instituted" (as the statute required), but who subsequently "lost any financial interest." 501 U.S. at 121, 126 (alterations omitted). Likewise here, a general cause of action for plan "participant[s]" does not necessarily authorize claims where a "participant" lacks any financial stake.

Sections 1132(a)(2) and 1132(a)(3) in fact confirm that Congress had no intention of permitting disinterested parties' claims: their scope is expressly limited to suits for "appropriate" relief. 29 U.S.C. 1132(a)(2), (a)(3); *see Varity*, 516 U.S. at 515. As this Court has held, a requirement that relief be "appropriate" restricts the class of plaintiffs who may invoke a cause of action. In *FEC v. National Conservative Political Action Committee*, this Court confronted a provision authorizing the "national committee of any political party" to "institute such actions * * * as may be appropriate to implement" the statute. 470 U.S. 480, 484 (1985). The Court held this provision did not confer standing on the Democratic National Committee in suits against private parties, explaining that a contrary conclusion would "ignore the word 'appropriate.'" *Id.* at 486. The same reasoning applies here: suits by participants lacking any stake in the litigation are not "appropriate."

Plaintiffs make no headway in contending "appropriate" limits the *type* of relief that may be sought rather than the *parties* who can seek it. Br. 48-49. According to Plaintiffs, because these provisions also authorize suits by the Secretary of Labor and other parties, "either all of them may sue for whatever relief is appropriate, or none of them may do so." Br. 49. Yet the Court rejected that same argument in *FEC*: although the relevant provision authorized both the FEC and the political parties to bring "appropriate" actions, this Court concluded only FEC actions were "appropriate" against private defendants. 470 U.S. at 487. As this Court recognized, whether relief is "appropriate" often depends on the identity of the party seeking it. While restoration of a plan's losses, for example, may be an "appropriate" remedy for injured plan participants or the Secretary of Labor, it is not an "appropriate" remedy for unaffected plan participants. And if trust law is the "starting point" for interpreting ERISA, *Varity*, 516 U.S. at 497, this limitation follows directly from established trust-law principles. *Supra* pp. 24-27; *cf. CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (participant invoking Section 1132(a)(3) to seek surcharge "must show that the violation injured him or her").

Regardless, Plaintiffs cannot demonstrate that "appropriate" *unambiguously* limits remedies but not parties. *Cf.* Br. 47. In these circumstances, the "canon of constitutional avoidance" comes into play: "when a serious doubt is raised about the constitutionality of an Act of Congress, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (alterations and quotation marks omitted). There is, at the risk of understatement, at least "serious doubt" about the constitutionality of any statute authorizing Plaintiffs to bring their claim in federal court. *Supra* pp. 18-56. Because Sections 1132(a)(2) and 1132(a)(3) are susceptible to constructions that would eliminate that constitutional concern, they should be so construed. *Gollust*, 501 U.S. at 125; *see* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1227 (1993) ("[B]road statutory grant[s] should be construed in a manner consistent with constitutional limitations, including the Article III limitation that only those who suffer actual injury have standing to sue.").

This narrower reading is consistent with ERISA's purposes. Congress had two goals: "benefiting employees" and "containing pension costs." *Mertens*, 508 U.S. at 263-63 (quotation marks omitted). Suits like Plaintiffs' undermine the latter goal while doing nothing to advance the former. Because Plan participants' benefits are not at risk (as the district court expressly found), participants will receive nothing from the remedies Plaintiffs seek. Rather, the ultimate practical consequences of Plaintiffs' requested relief are negligible: Plaintiffs would compel U.S. Bancorp to make a payment that increases the Plan's surplus, thereby permitting U.S. Bancorp to forgo making additional payments in later years. *Hughes*, 525 U.S. at 440. Yet the collateral costs of such pointless litigation are significant—particularly where, as here, the plaintiffs seek millions in attorneys' fees. Dkt. 252 at 14. Whenever a plan's investments do not pan out, some attorneys will undoubtedly be eager to file strike suits on behalf of (uninjured) participants and micromanage-via-hindsight every fiduciary decision. Such costs "discourage employers from offering welfare benefit plans in the first place." *Varity*, 516 U.S. at 497. There is little reason to think Congress intended that result.

CONCLUSION

The judgment should be affirmed.

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APPENDIX

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1. 29 U.S.C. 1001 (ERISA Section 2) provides:

Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential

Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, 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.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

2. 29 U.S.C. 1002(34), (35) (ERISA Section 3) provide in pertinent part:

Definitions

For the purposes of this subchapter:

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income,

expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * * * *

3. 29 U.S.C. 1021(a) (ERISA Section 101) provides in pertinent part:

Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section

1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1)[1] of this title; and

(2) the information described in subsection (f) and sections 1024(b)(3) and 1025(a) and (c) of this title.

* * * * *

4. 29 U.S.C. 1022 (ERISA Section 102) provides:

Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

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[1] See References in Text note below.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title), the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title), and if the employer so elects for purposes of complying with section 1181(f)(3)(B)(i) of this title, the model notice applicable to the State in which the participants and beneficiaries reside.

5. 29 U.S.C. 1053(a) (ERISA Section 203) provides in pertinent part:

Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2)(A)(i) In the case of a defined benefit plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service	**The nonforfeitable percentage is:**
3	20
4	40
5	60
6	80
7 or more	100.

(B)(i) In the case of an individual account plan, a plan satisfies the requirements of this paragraph if it satisfies the requirements of clause (ii) or (iii).

(ii) A plan satisfies the requirements of this clause if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(iii) A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
2	20
3	40
4	60
5	80
6 or more	100.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(d)(2) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made

(I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently reemployed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference.—

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of title 26) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of title 26, an excess deferral under section 402(g)(2)(A) of title 26, an erroneous automatic contribution under section 414(w) of title 26, or an excess aggregate contribution under section 401(m)(6)(B) of title 26.

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6. 29 U.S.C. 1054(a), (b)(1), (b)(3) (ERISA Section 204) provide in pertinent part:

Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and—

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33⅓) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

*   *   *   *   *

(3) A plan satisfies the requirements of this paragraph if—

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

*   *   *   *   *

7. 29 U.S.C. 1083(a), (d), (i)(1)(A), (i)(4)(A) (ERISA Section 303) provide in pertinent part:

Minimum funding standards for single-employer defined benefit pension plans

(a) Minimum required contribution

For purposes of this section and section 1082(a)(2)(A) of this title, except as provided in subsection (f), the term "minimum required contribution" means, with respect to any plan year of a single-employer plan—

(1) in any case in which the value of plan assets of the plan (as reduced under subsection (f)(4)(B)) is less than the funding target of the plan for the plan year, the sum of—

(A) the target normal cost of the plan for the plan year,

(B) the shortfall amortization charge (if any) for the plan for the plan year determined under subsection (c), and

(C) the waiver amortization charge (if any) for the plan for the plan year as determined under subsection (e); or

(2) in any case in which the value of plan assets of the plan (as reduced under subsection (f)(4)(B)) equals or exceeds the funding target of the plan for the plan year, the target normal cost of the plan for the plan year reduced (but not below zero) by such excess.

* * * * *

(d) Rules relating to funding target

For purposes of this section—

(1) Funding target

Except as provided in subsection (i)(1) with respect to plans in at-risk status, the funding target of a plan for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.

(2) Funding target attainment percentage

The "funding target attainment percentage" of a plan for a plan year is the ratio (expressed as a percentage) which—

(A) the value of plan assets for the plan year (as reduced under subsection (f)(4)(B)), bears to

(B) the funding target of the plan for the plan year (determined without regard to subsection (i)(1)).

* * * * *

(i) Special rules for at-risk plans

(1) Funding target for plans in at-risk status

(A) In general

In the case of a plan which is in at-risk status for a plan year, the funding target of the plan for the plan year shall be equal to the sum of—

(i) the present value of all benefits accrued or earned under the plan as of the beginning of the plan year, as determined by using the additional actuarial assumptions described in subparagraph (B), and

(ii) in the case of a plan which also has been in at-risk status for at least 2 of the 4 preceding plan years, a loading factor determined under subparagraph (C).

* * * * *

(4) Determination of at-risk status

For purposes of this subsection—

(A) In general

A plan is in at-risk status for a plan year if—

(i) the funding target attainment percentage for the preceding plan year (determined under this section without regard to this subsection) is less than 80 percent, and

(ii) the funding target attainment percentage for the preceding plan year (determined under this section by using the additional actuarial assumptions described in paragraph (1)(B) in computing the funding target) is less than 70 percent.

* * * * *

8. 29 U.S.C. 1103 (ERISA Section 403) provides:

Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(A) some or all of the participants of which are employees described in section 401(c)(1) of title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of

insured plans), or under section 420 of title 26 (as in effect on August 17, 2006), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

> (i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and
>
> (ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

9. 29 U.S.C. 1104(a) (ERISA Section 404) provides in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * * * *

10. 29 U.S.C. 1106 (ERISA Section 406) provides:

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such

plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

11. 29 U.S.C. 1108(a) (ERISA Section 408) provides in pertinent part:

Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

* * * * *

12. 29 U.S.C. 1109 (ERISA Section 409) provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

13. 29 U.S.C. 1131 (ERISA Section 501) provides:

Criminal penalties

(a) Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $100,000 or imprisoned not more than 10 years, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $500,000.

(b) Any person that violates section 1149 of this title shall upon conviction be imprisoned not more than 10 years or fined under title 18, or both.

14. 29 U.S.C. 1132(a), (d), (g), (h), (i) (ERISA Section 502) provide in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) 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;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any

provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be

[1] So in original. Probably should be "subtitle".

provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

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(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit

plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

* * * * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

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15. 29 U.S.C. 1133 (ERISA Section 503) provides:

Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

16. 29 U.S.C. 1144(a), (b) (ERISA Section 514) provide in pertinent part:

Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the

Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393–1 through 393–51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action—

> (A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or
>
> (B) for recoupment of payment with respect to items or services pursuant to a State plan for

medical assistance approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

* * * * *

17. 29 U.S.C. 1322(a), (b) (ERISA Section 4022) provide in pertinent part:

Single-employer plan benefits guaranteed

(a) Nonforfeitable benefits

Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when this subchapter applies to it.

(b) Exceptions

(1) Except to the extent provided in paragraph (7)—

(A) no benefits provided by a plan which has been in effect for less than 60 months at the time the plan terminates shall be guaranteed under this section, and

(B) any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded.

(2) For purposes of this subsection, the time a successor plan (within the meaning of section 1321(a) of this title) has been in effect includes the time a previously established plan (within the meaning of section 1321(a) of this title) was in effect. For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60-month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.

(3) The amount of monthly benefits described in subsection (a) of this section provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act [42 U.S.C. 430]) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

The provisions of this paragraph do not apply to non-basic benefits. The maximum guaranteed monthly benefit shall not be reduced solely on account of the age of a participant in the case of a benefit payable by reason of disability that occurred on or before the termination date, if the participant demonstrates to the satisfaction of the corporation that the Social Security Administration has determined that the participant satisfies the definition of disability under title II or XVI of the Social Security Act [42 U.S.C. 401 et seq.; 1381 et seq.], and the regulations thereunder. If a benefit payable by reason of disability is converted to an early or normal retirement benefit for reasons other than a change in the health of the participant, such early or normal retirement benefit shall be treated as a continuation of the benefit payable by reason of disability and this subparagraph shall continue to apply.

(4)(A) The actuarial value of a benefit, for purposes of this subsection, shall be determined in accordance with regulations prescribed by the corporation.

(B) For purposes of paragraph (3)—

(i) the term "gross income" means "earned income" within the meaning of section 911(b) of title 26 (determined without regard to any community property laws),

(ii) in the case of a participant in a plan under which contributions are made by more than one employer, amounts received as gross income from any employer under that plan shall be aggregated with amounts received from any other employer under that plan during the same period, and

(iii) any non-basic benefit shall be disregarded.

(5)(A) For purposes of this paragraph, the term "majority owner" means an individual who, at any time during the 60-month period ending on the date the determination is being made—

(i) owns the entire interest in an unincorporated trade or business,

(ii) in the case of a partnership, is a partner who owns, directly or indirectly, 50 percent or more of either the capital interest or the profits interest in such partnership, or

(iii) in the case of a corporation, owns, directly or indirectly, 50 percent or more in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii), the constructive ownership rules of section 1563(e) of title 26 (other than paragraph (3)(C) thereof) shall apply, including the application of such rules under section 414(c) of title 26.

(B) In the case of a participant who is a majority owner, the amount of benefits guaranteed under this section shall equal the product of—

(i) a fraction (not to exceed 1) the numerator of which is the number of years from the later of the effective date or the adoption date of the plan to the termination date, and the denominator of which is 10, and

(ii) the amount of benefits that would be guaranteed under this section if the participant were not a majority owner.

(6)(A) No benefits accrued under a plan after the date on which the Secretary of the Treasury issues notice that he has determined that any trust which is a part of a plan does not meet the requirements of section 401(a) of title 26, or that the plan does not meet the requirements of section 404(a)(2) of title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph does not apply if the Secretary subsequently issues a notice that such trust meets the requirements of section 401(a) of title 26 or that the plan meets the requirements of section 404(a)(2) of title 26 and if the Secretary determines that the trust or plan has taken action necessary to meet such requirements during the period between the issuance of the notice referred to in the preceding sentence and the issuance of the notice referred to in this sentence.

(B) No benefits accrued under a plan after the date on which an amendment of the plan is adopted which causes the Secretary of the Treasury to determine that any trust under the plan has ceased to meet the requirements of section 401(a) of title 26 or that the plan has ceased to meet the requirements of section 404(a)(2) of title 26, are guaranteed under this section unless such determination is erroneous. This subparagraph shall not apply if the amendment is revoked as of the date it was first effective or amended to comply with such requirements.

(7) Benefits described in paragraph (1) are guaranteed only to the extent of the greater of—

> (A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or
>
> (B) $20 per month,

multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect. In determining how many years a plan or amendment has been in effect for purposes of this paragraph, the first 12 months beginning with the date on which the plan or amendment is made or first becomes effective (whichever is later) constitutes one year, and each consecutive period of 12 months thereafter constitutes an additional year. This paragraph does not apply to benefits payable under a plan unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter.

(8) If an unpredictable contingent event benefit (as defined in section 1056(g)(1) of this title) is payable by reason of the occurrence of any event, this section shall be applied as if a plan amendment had been adopted on the date such event occurred.

* * * * *

18. 29 U.S.C. 1362(a), (b) (ERISA Section 4062) provide in pertinent part:

Liability for termination of single-employer plans under a distress termination or a termination by corporation

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of—

(1) liability to the corporation, to the extent provided in subsection (b) of this section, and

(2) liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (c) of this section.

(b) Liability to corporation

(1) Amount of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation.

(B) Special rule in case of subsequent insufficiency

For purposes of subparagraph (A), in any case described in section 1341(c)(3)(C)(ii) of this title, actuarial present values shall be determined as of the date of the notice to the corporation (or the finding by the corporation) described in such section.

(2) Payment of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation under this subsection shall be due and payable to the corporation as of the termination date, in cash or securities acceptable to the corporation.

(B) Special rule

Payment of so much of the liability under paragraph (1)(A) as exceeds 30 percent of the collective net worth of all persons described in subsection (a) of this section (including interest) shall be made under commercially reasonable terms prescribed by the corporation. The parties involved shall make a reasonable effort to reach agreement on such commercially reasonable terms. Any such terms prescribed by the corporation shall provide for deferral of 50 percent of any amount of liability otherwise payable for any year under this subparagraph if a person subject to such liability demonstrates to the satisfaction of the corporation that no person subject to such liability has any individual pre-tax profits for such person's fiscal year ending during such year.

(3) Alternative arrangements

The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

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