NO. 17-1712

IN THE

Supreme Court of the United States

JAMES J. THOLE, ET AL.,

Petitioners,

v.

U.S. BANK, N.A., ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) seeks to present its views, and the views of its supporters, on the issue whether an ERISA plan participant or beneficiary has demonstrated standing under Article III of the United States Constitution when she has not shown any individual financial loss or the imminent risk of such loss?[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and

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[1] Amicus will not address the issues of statutory standing under ERISA that the petitioners raised in their petition for certiorari. Instead, amicus will focus solely on the issue of Article III standing that the Court raised *sua sponte* when it granted the petition.

Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amicus states that counsel of record for the petitioners has provided blanket consent to the filing of amicus briefs, and that counsel of record for the respondents has consented in writing to the filing of this amicus brief.

small businesses located primarily in the New England region.

Amicus has long been committed to upholding Article III's limit on the federal courts' subject matter jurisdiction to "cases" and "controversies," which this Court has interpreted to require the plaintiff to prove an "injury in fact." Addressing this very issue, NELF filed an amicus brief in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and in *Edwards v. First American Corp.,* 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), *cert. dismissed as improvidently granted,* 132 S. Ct. 2536 (2012).

Enforcing the jurisdictional requirement of an injury in fact preserves the proper constitutional role of the federal judiciary and prevents it from usurping the powers of the political branches of government. These principles are especially compelling when, as here, Congress has enacted a comprehensive statutory scheme, namely ERISA, which is expressly intended to *eliminate* the risk of injury under the very circumstances that the petitioners in this case have alleged (a funding shortfall in a defined benefit plan). In NELF's view, there can be no justiciable case or controversy when a party merely alleges facts that trigger a statute's detailed remedial measures for the prevention of any harm to that party.

For these and other reasons discussed below, amicus believes its brief will assist the Court in deciding whether the petitioners have established Article III standing.

SUMMARY OF ARGUMENT

The petitioners allege that the respondents caused a funding shortfall to the defined benefit plan in which the petitioners participate. These bare allegations do not establish an injury in fact under Article III because they fail to show that the respondents created the risk of real harm to the petitioners' plan benefits, which are the petitioners' only *personal* interest in the plan. A funding shortfall triggers ERISA's exhaustive remedial measures that virtually *eliminate* the risk of harm to plan participants. In particular, ERISA requires the plan sponsor to restore the plan's losses. If the plan sponsor fails to do so, ERISA authorizes the Pension Benefit Guaranty Corporation (PBGC) to assume the plan's payment obligations. Nowhere do the petitioners allege that the respondents failed to fulfill their payment obligations, or that the PBGC would not have been able to pay their pension benefits in full.

The petitioners have misinterpreted *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), as permitting them to establish Article III standing without having to demonstrate any *personal* financial loss under the plan, i.e., without having to satisfy Article III's "particularization" requirement. Specifically, the petitioners err when they argue that *Spokeo* allows them to rely on the common law of trusts and the judgment of Congress (here, ERISA's civil remedies provisions) to establish representational standing to sue on behalf of the plan, without having to show any individual harm.

Spokeo says no such thing. To the contrary, that case emphasizes that Article III requires the plaintiff to establish a harm that is both concrete *and* particularized. Moreover, *Spokeo* is inapposite because it concerned Article III's *concreteness* requirement, while this case concerns Article III's *particularization* requirement. In *Spokeo*, it was undisputed that the plaintiff had alleged the violation of a *personal* statutory right. At issue was whether that statutory violation had caused him any concrete harm. The Court instructed that federal courts may consult the common law and the judgment of Congress in deciding whether an *intangible* harm might amount to a concrete harm under Article III.

By contrast, it is undisputed in this case that the petitioners have alleged a *tangible* concrete harm to the plan's assets. Therefore, *Spokeo*'s discussion of the role of the common law and the judgment of Congress in identifying *intangible* concrete harms does not apply. Instead, the real question here is whether the alleged tangible harm to the plan is likely to cause any tangible harm to the petitioners' limited *personal* stake in the plan, i.e., their *particular* pension benefits. And ERISA's elaborate protections compel an answer in the negative.

The petitioners' extensive reliance on the common law of trusts is further misplaced because ERISA has *departed* from that body of law, and has improved on it, by providing unique statutory protections for plan participants when there is a funding shortfall. These statutory measures

should be deemed to displace the representational standing recognized under the common law, in the event of a funding shortfall. To the extent that ERISA's civil remedies provisions suggest otherwise, ERISA's specific provisions for containing a plan shortfall should be interpreted to limit those general remedial provisions.

ARGUMENT

I. THE PETITIONERS HAVE NOT DEMONSTRATED AN "INJURY IN FACT" UNDER ARTICLE III BECAUSE THEY MERELY ALLEGE THAT THE RESPONDENTS HAVE CAUSED THE DEFINED BENEFIT PLAN IN WHICH THEY PARTICIPATE TO UNDERGO A FUNDING SHORTFALL.

A. A Funding Shortfall Triggers ERISA's Exhaustive Remedial Measures That Virtually *Eliminate* The Risk Of Harm To Plan Participants.

The petitioners are retired employees who are participants in the respondents' defined-benefit pension plan, which is heavily regulated by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq*. At issue is whether the petitioners demonstrated the necessary "injury in fact" under Article III when they sued the respondents for allegedly breaching their ERISA duties owed to the plan, allegedly

causing harm to the plan's assets.[2] To satisfy Article III at the pleadings stage, the petitioners must allege sufficient facts to establish an injury that is "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation and internal quotation marks omitted).

In a nutshell, the petitioners allege that the respondents caused the *plan* to suffer a financial loss that resulted in a funding shortfall for a few consecutive years, meaning that the value of the plan's assets was less than "the present value of all benefits accrued or earned under the plan as of the beginning of the plan year" during that time period. 29 U.S.C. § 1083(a)(1), (d)(1). *See also* Joint Appendix (J.A.) 42-43, 91-92. The petitioners also allege that, as a result, the respondents "significantly increas[ed] the risk of default of the Plan." J.A. 90.

These bare and conclusory allegations do not establish an injury in fact because they fail to show that the respondents' alleged harm to the *plan* created "the risk of real harm" to the petitioners' plan benefits. *Spokeo*, 136 S. Ct. at 1549. To begin with, "no plan member [in a defined benefit plan] has a claim to any particular asset that composes a part of the plan's general asset pool. Instead,

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[2] "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (emphasis supplied by Court) (citation and internal quotation marks omitted).

members [only] have a right to a certain defined level of benefits . . . ." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

Moreover, a mere funding shortfall in the plan, by itself, cannot create a "substantial risk" of harm to the petitioners' plan benefits, nor can it show that such harm is "certainly impending." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of *future injury* may suffice [to establish an Article III injury in fact] if the threatened injury is *certainly impending*, or there is a *substantial risk* that the harm will occur.") (emphasis added) (citation and internal quotation marks omitted). This is because ERISA provides exhaustive remedial measures that virtually *eliminate* the risk that a funding shortfall will cause a plan default, or any potential ensuing harm to plan participants. As the Court has explained:

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. *It was that default risk* that prompted Congress to require defined benefit plans . . . to satisfy *complex minimum funding requirements*, and to make premium payments to the Pension Benefit Guaranty Corporation [PBGC] for *plan termination insurance*.

LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008) (emphasis added). *See also* 29 U.S.C. § 1001(c) ("It is hereby further declared to be the policy of [ERISA] to protect . . . the interests of participants in private pension plans . . . by requiring [the plans] . . . to meet *minimum standards of funding*, and by requiring *plan termination insurance*.") (emphasis added).

In other words, a funding deficiency alone cannot give rise to a justiciable case or controversy because it is fully *anticipated* and fully *contained* by ERISA's remedial measures. This "complex and reticulated statute," *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984), provides layers upon layers of protections to ensure that a plan's participants receive their benefits, even under dire financial circumstances (*not* alleged here).

In particular, ERISA requires a plan sponsor (typically the employer) to maintain 100% funding, whereby the value of the plan's assets must at least *equal* the present value of all vested or accrued plan benefits. *See* 29 U.S.C. § 1083(a)(1), (d)(1). Whenever a plan falls short of this 100% funding requirement, even by a small amount, ERISA requires the employer to restore any funding shortfall to the plan, within seven years of the deficiency. *See* 29 U.S.C. § 1083(c)(2)(A).

That is, ERISA places the burden entirely on the plan sponsor to assume the plan's investment risks and, therefore, to maintain adequate funding in the plan. *See Hughes*, 525 U.S. at 439 ("[The employer typically bears the entire investment risk

and--short of the consequences of plan termination [and the intervention of the PBGC]--must cover any underfunding as the result of a shortfall that may occur from the plan's investments."). Moreover, to enforce these funding obligations, the Internal Revenue Code imposes a 10% excise tax on the employer's unpaid required contributions to the plan. 26 U.S.C. § 4971(a)(1). Nowhere do the petitioners allege that the respondents ever failed to fulfill their ERISA funding obligations to the plan.[3]

Finally, if an employer (again, not *this* employer) fails to meet its funding obligations and must terminate the plan, Congress has created the elaborate safety net of the PBGC "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries." 29 U.S.C. § 1302(a)(2). *See also* 29 U.S.C. § 1341(c) (setting forth PBGC's payment obligations upon "distress termination" of single-employer defined benefit plan); *R.A. Gray & Co.*, 467 U.S. at 720 ("Among the principal purposes of this comprehensive and reticulated statute was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . . . Toward this end, [ERISA] created a plan

[3] Indeed, the respondents subsequently succeeded in restoring a *surplus* to the plan's assets. Appendix to Petition for Certiorari 3, 15, 21. This indicates the respondents' full compliance with ERISA's funding requirements, as well as the efficacy of those statutory requirements in preventing harm to plan participants when there is a funding shortfall.

termination insurance program, administered by the . . . PBGC, . . . [which] collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits . . . .") (emphasis added) (citation and internal quotation marks omitted).[4]

In short, when a plan undergoes even the slightest shortfall, ERISA imposes corrective funding requirements on the employer. If necessary, ERISA also authorizes the PBGC to intervene and assume the plan's payment obligations. Those highly precautionary statutory measures, in turn, defeat the petitioners' conclusory allegation that a bare funding deficiency can create a "significant risk of plan default," let alone an imminent risk of harm to plan participants. Simply put, ERISA's thorough protections defeat Article III standing based on a mere funding shortfall.[5]

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[4] According to the PBGC's own website, "[m]ost people receive the full benefit they had earned before the plan terminated." https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.
The PBGC's financing comes from insurance premiums paid by covered companies (such as the respondents in this case), from the PBGC's own investments (including the assets of pension plans that it has taken over as trustee upon a "distress termination" under ERISA), and from other sources. *See id*. Notably, the PBGC's website makes clear to the current or retired employee that "[y]our plan is insured *even if your employer fails to pay the required premiums*." *Id*. (emphasis added).

[5] In this connection, Congress itself would not have considered the respondents' plan to be "at risk" or "underfunded"--two statutory terms of art--because the

Clearly, a participant in a defined benefit plan with a funding shortfall would need to allege several *additional* facts to establish Article III standing and show that she faced the imminent risk of losing her plan benefits. For example, such a risk could arise *if* the employer either refused or were unable to meet its ERISA funding obligations, *if* the plan then faced the likelihood of a "distress" termination (29 U.S.C. § 1341(c)), and *if* the PBGC, in assuming management of the plan, could not cover the full amount of a participant's regular pension payments, based on ERISA's formula for the PBGC's maximum monthly coverage (29 U.S.C. § 1322(b)(3)).

However, the petitioners do not allege *any* one of these additional facts or conditions. And even if they had, such a "theory" of standing would have relied fatally "on a *highly attenuated chain of possibilities*[.] [It would] not satisfy the

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petitioners do not allege that the plan's assets ever fell below those statutorily defined levels. *See* 29 U.S.C. § 1083(f)(3)(C)(i)-(ii) (plan becomes "underfunded" when "the ratio (expressed as a percentage) which . . . the value of plan assets for the preceding plan year . . . bears to . . . the funding target of the plan for the preceding plan year . . . is less than 80 percent"); 29 U.S.C. § 1083(i)(4)(A)(i)-(ii) ("A plan is in at-risk status for a plan year if . . . the funding target attainment percentage for the preceding plan year . . . is less than 80 percent, and . . . 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."). Therefore, in Congress's *own* judgment, this plan's funding shortfall did not put the plan's participants at any cognizable risk of losing their pension benefits.

requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013) (emphasis added). Under ERISA, then, a mere funding deficiency is an unremarkable event that is not justiciable because it is thoroughly remedied by statute.

B. *Spokeo v. Robins* Does Not Excuse The Petitioners From Having To Establish A "Particularized" Loss Of Their Plan Benefits Under Article III.

The petitioners have misinterpreted *Spokeo* as permitting them to establish Article III standing without having to demonstrate an imminent *personal* loss, i.e., an imminent loss of their pension benefits. *See* Pet. Brief 28-29, 41-42. Specifically, the petitioners argue that *Spokeo* invites them to rely heavily on the common law of trusts, and on ERISA's civil liability and enforcement provisions (29 U.S.C. §§ 1109(a) and 1132(a)(2)-(3), respectively), in order to establish representational standing to sue on behalf of the plan, without having to show any imminent individual harm. *See* Pet. Brief 28-29, 41-42.[6] *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (ERISA's civil liability and enforcement provisions indicate "Congress' intent that actions for breach of fiduciary duty be brought in a

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[6] Amicus notes that the respondents vigorously dispute the accuracy of the petitioners' characterization of the common law of trusts as recognizing a beneficiary's right to sue without having to establish a personal loss. *See* Respondents' Brief 23-27.

representative capacity on behalf of the plan as a whole.”).

In effect, the petitioners argue that *Spokeo* holds that Article III’s “particularization” requirement may be waived by common law tradition or by an act of Congress. Of course, *Spokeo* says no such thing. To the contrary, *Spokeo* emphasizes that “the injury-in-fact requirement requires a plaintiff to allege an injury that is both concrete *and* particularized.” *Spokeo*, 136 S. Ct. at 1545 (emphasis supplied by Court) (citation and internal quotation marks omitted). *See also id*. at 1548 (Article III injury is “concrete *and* particularized and actual or imminent, not conjectural or hypothetical.”) (emphasis added) (citation and internal quotation marks omitted).

The Court in *Spokeo* even went out of its way to elaborate on Article III’s particularization requirement. “For an injury to be ‘particularized,’ it *must* affect the plaintiff in a personal and individual way.” *Spokeo*, 136 S. Ct. at 1548 (emphasis added) (citation and internal quotation marks omitted). *See also id.* (citing several other Court decisions addressing Article III’s particularization requirement). In other words, *Spokeo* actually serves to *reinforce*, not relax, the petitioners’ burden to establish an imminent personal harm under Article III.

In truth, the petitioners’ reliance on *Spokeo* is entirely misplaced because that case concerned Article III’s *concreteness* requirement, while this case concerns Article III’s *particularization*

requirement. In *Spokeo*, the issue was whether a company's violation of an individual's statutory right to accurate *personal* information caused him any concrete, identifiable harm. *See Spokeo*, 136 S. Ct. at 1544-45. The Court explained that the lower court (the Ninth Circuit) had erroneously conflated Article III's concreteness and particularization requirements when it held that the plaintiff had established Article III standing merely by identifying the violation of a personal statutory right. "Particularization is necessary to establish injury in fact, but it is *not sufficient*. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis, however, that independent requirement was elided." *Id.*, 136 S. Ct. at 1548 (emphasis added).

Accordingly, the Court in *Spokeo* focused on Article III's concreteness requirement, explaining that federal courts may consult the common law and the judgment of Congress in deciding whether an *intangible* harm could satisfy Article III's concreteness requirement. "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549.

In this case, however, there is no dispute that the petitioners have alleged a concrete *tangible* harm to the plan's assets when they allege a financial loss to the plan. Therefore, *Spokeo*'s discussion of the role of the common law and the judgment of Congress in identifying concrete *intangible* harms is beside the point. Instead, the real question here is whether the alleged concrete

tangible harm to the plan is likely to cause the same kind of harm to the petitioners' limited *personal* stake in the plan, namely, their *particular* pension benefits. And, as amicus has argued above, ERISA's elaborate protections should compel an answer in the negative.

C. The Petitioners' Extensive Reliance On The Common Law Of Trusts Is Misplaced Because ERISA Departs From That Body Of Law, And Improves On It, With Detailed Statutory Protections For Plan Participants When There Is A Funding Shortfall.

The petitioners' extensive reliance on the common law of trusts to support their argument for broad Article III standing for their ERISA claims fails for another reason. "Although trust law may offer a starting point for analysis in some situations, it must give way if it is inconsistent with the language of [ERISA], its structure, or its purposes." *Hughes*, 525 U.S. at 447 (citation and internal quotation marks omitted).

Notably, ERISA has *departed* from the common law of trusts, and has *improved* on that body of law, by providing unique statutory protections that protect plan participants when there is a funding shortfall (namely, ERISA's plan funding requirements and the intervention of the PBGC, which amicus has discussed above). These detailed statutory protections serve the same prophylactic purpose as the representational

standing recognized by trust law--to protect the trust's corpus, and ultimately the beneficiaries' interests, at an early stage of the alleged wrong. *See* Pet. Brief 37 (discussing a traditional doctrine of trust law as "a prophylactic measure to protect the trust and beneficiaries.").

Simply put, ERISA provides its own "prophylactic measure[s] to protect the [plan] and [participants]" when there is a funding shortfall. These unique statutory measures should therefore displace the representational standing recognized under the common law, when a plan participant alleges such a shortfall. To the extent that ERISA's civil liability and enforcement provisions suggest otherwise, ERISA's specific provisions for curing a plan shortfall should be interpreted to limit the applicability of those general civil remedial provisions when, as here, a plan participant merely alleges a funding shortfall. *Compare* 29 U.S.C. §§ 1083, 1341(c) (detailed minimum funding requirements and intervention of PBGC, to remedy funding shortfall) *with* 29 U.S.C. §§ 1109(a), 1132(a)(2)-(3)) (ERISA's broad civil liability and enforcement provisions). "[I]t is a commonplace of statutory construction that the specific governs the general." *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).[7]

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[7] The petitioners also argue that a decision denying them standing would allow a plan's sponsor to breach its ERISA duties with impunity and abuse a plan's assets, so long as it restored enough money to the plan, or left enough money in the plan, to cover the necessary pension payments. Pet. Brief 26-7. However, the petitioners have failed to consider that they are not the only persons who can enforce ERISA's duties.

In sum, ERISA departs dramatically from the common law of trusts by providing elaborate mechanisms to protect plan participants when there is a funding shortfall. These statutory protections serve to eliminate any justiciable case or controversy over that issue. In effect, Congress has foreclosed a plan sponsor's exposure to liability over a bare funding shortfall. "ERISA [is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests--*not all in favor of potential*

ERISA expressly provides for both private and *public* enforcement actions. *See* 29 U.S.C. § 1132(a)(2) ("A civil action may be brought . . . by *the Secretary*, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.") (emphasis added). Even though a plan participant may not have Article III standing to sue under ERISA on behalf of the plan, that should not prevent the Secretary of Labor from doing so. This is because an Article III injury is *presumed* whenever the United States brings suit to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. *See Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that" federal government suffers "injury to its sovereignty arising from violation of its laws . . . .").

Indeed, any other interpretation of Article III would obstruct the federal government's exercise of its Article II duty to ensure compliance with federal law. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) ('[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" (citation and internal quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive Branch] . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3.'").

plaintiffs. . . . There is, in other words, a tension between the primary [ERISA] goal of benefiting employees and the *subsidiary goal of containing pension costs*." *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262–63, (1993) (discussing ERISA's departure from common law of trusts with respect to defining who is a fiduciary subject to potential liability) (emphasis added) (citation and internal quotation marks omitted).

CONCLUSION

For the reasons stated above, the judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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