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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

November 19, 2019

QUESTIONS PRESENTED

1. Whether Petitioners have demonstrated 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 to seek injunctive relief 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 to seek monetary relief under 29 U.S.C. § 1132(a)(2).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. THE DISTRICT COURT PROPERLY DISMISSED THE CASE AS MOOT ONCE THE PLAN BECAME OVERFUNDED 9

A. Article III Jurisdiction To Decide The Merits Of A Claim Ceases Once An Actual Controversy No Longer Exists 10

B. Participants In A Defined-Benefit Plan Suffer An Injury-in-Fact Only If Alleged Misconduct Creates Or Enhances A Discernable Risk Of Plan Default 12

C. Under ERISA, There Is No Discernable Risk Of Default When A Plan Is Overfunded 14

Page

D. In Adopting ERISA, Congress Did Not Intend To Bestow Article III Injury-in-Fact Status On Previously Unrecognized Intangible Harms 17

II. PETITIONERS MAY NOT ESTABLISH ARTICLE III STANDING BY INVOKING THE RIGHTS OF THIRD PARTIES SUCH AS THE PLAN 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases:

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 11, 15
Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 1, 10, 16, 25
DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10
Genesis HealthCare Corp. v. Symczyk,
569 U.S. 66 (2013) 11
Harff v. Kerkorian,
347 A.2d 133 (Del. 1975) 27
Hollingsworth v. Perry,
570 U.S. 693 (2013) 23
Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 2, 3, 12, 19
Kowalski v. Tesmer,
543 U.S. 125 (2004) 23, 27
LaRue v. DeWolff, Boberg & Associates, Inc.,
552 U.S. 248 (2008) 7, 13, 17, 22, 25
Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 11
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 19
Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 13, 21
Raines v. Byrd,
521 U.S. 811 (1997) 18
Sessions v. Morales-Santana,
137 S. Ct. 1678 (2017) 23, 24
Soehnlen v. Fleet Owners Ins. Fund,
844 F.3d 5776 (6th Cir. 2016) 6

Page(s)

Spokeo v. Robins,
136 S. Ct. 1540 (2016) 1, 7, 18, 19, 20, 22
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 1, 10, 12
Summers v. Earth Island Institute,
555 U.S. 488 (2009) 11
Tibble v. Edison Int'l,
135 S. Ct. 1823 (2015) 21
U.S. Bancorp Mort. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 12
Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 24
Virginia House of Delegates v. Bethune-Hill,
139 S. Ct. 1945 (2019) 11
Warth v. Seldin,
422 U.S. 490 (1975) 23

Statutes and Constitutional Provisions:

U.S. Const., Art. III . . . . *passim*

U.S. Const., Art. III, § 2 10

Employee Retirement Security Act of 1974 (ERISA),
Pub. L. 93-406, 88 Stat. 829 . . . . *passim*
29 U.S.C. § 1083(a) 3
29 U.S.C. § 1083(d) 3, 15
29 U.S.C. § 1109 4
29 U.S.C. § 1132(a)(2) 4, 5, 7, 13, 18, 21, 25
29 U.S.C. § 1132(a)(3) 4, 5, 7, 18

Page(s)

Fair Credit Reporting Act of 1970 (FCRA),
15 U.S.C. § 1681 *et seq.* 20
15 U.S.C. §1681n(a)(1)(A) 20

False Claims Act,
31 U.S.C. § 3729 *et seq.* 24

Miscellaneous:

James J. Park, *Bondholders and Securities Class Actions*, 99 Minn. L. Rev. 585 (2014) 27

Restatement (Second) Trusts § 214, cmt. b . . . 21, 22

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF regularly files briefs in this and other federal courts to urge the judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. In particular, WLF regularly appears as *amicus curiae* to support adherence to rules barring federal-court adjudication of claims filed by those lacking Article III standing. *See, e.g., Spokeo v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

Petitioners are participants in a defined-benefit retirement plan. They assert that Respondents operated the plan in violation of the Employee Retirement Income Security Act of 1974 (ERISA). Yet they have not shown that the alleged violations have injured them in any way; they have received their fixed benefits in a timely manner each month since their retirements. Nor have they shown that the alleged violations have created a risk of future nonpayment. Indeed, the plan is substantially overfunded, and its obligations are backed by a plan sponsor with liquid

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

assets 18 times greater than those of the plan. Because Petitioners have not demonstrated an injury that is both particularized and concrete, they lack Article III standing, and the federal courts lack jurisdiction to hear their claims.

WLF is concerned that if plan beneficiaries and participants are permitted to assert breach-of-fiduciary-duty claims under ERISA without any need to show a concrete injury, baseless ERISA lawsuits will proliferate. Petitioners allege that Respondents adopted an imprudent investment strategy (investing solely in equities) and that an alternative strategy would have yielded better returns. But if this claim is permitted to go forward, other uninjured plaintiffs would be entitled to assert breach-of-fiduciary-duty claims against fiduciaries that did *not* adopt a "100% equities" strategy—and such claims would be buttressed by research demonstrating that investing in equities is the best long-term strategy. WLF fears that an increase in ERISA litigation will discourage employers from continuing to offer defined-benefit plans to their employees. Creating disincentives to maintaining such plans—which play a vital role in retirement savings for millions of Americans—runs counter to Congress's intent in adopting ERISA.

STATEMENT OF THE CASE

U.S. Bancorp is the sponsor of a defined-benefit retirement plan (the "Plan") with over 100,000 participants. "Such a plan, as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citations omitted).

The employer bears the risk that plan assets may prove inadequate to cover all promised payments; it must pay into the plan the funds needed to cover any shortfall. *Ibid.* While participants in a defined-benefit plan are entitled to receive the fixed benefits promised them, they have no "claim to any particular asset that composes a part of the plan's general asset pool." *Id.* at 440.

Respondents U.S. Bank, N.A., *et al.* (collectively, "U.S. Bank") are Plan sponsors and administrators appointed to manage and invest the Plan's assets. Petitioners are two participants in the Plan. Both are now retired and are entitled to receive monthly retirement benefits for the rest of their lives. Since their retirements (in 2010 and 2011), they have received all monthly benefits to which they are entitled, and neither has alleged that there is any risk that they will not receive future Plan benefits.

Petitioners challenge the Plan's investment strategy from September 2007 through December 2010. Since at least 2004, the Plan invested all its assets in equities (the "Equities Strategy"). The holdings included a diversified selection of the shares of the common stock of individual companies as well as mutual funds that invested solely in equities. The strategy garnered stellar returns in 2004 through 2007, but the stock market crash of 2008 led to a 27% decrease in the value of the Plan's holdings during that calendar year. As a result, the plan went from being

overfunded in 2007 to underfunded at the end of 2008.[2] U.S. Bank made significant contributions to the Plan during the following six years, and the Plan was once again overfunded in 2014. U.S. Bank also altered the Plan's investment strategy. By 2010, its holdings included investments other than equities, such as debt instruments.

Petitioners filed suit in 2013, alleging that U.S. Bank, by maintaining an Equities Strategy, breached its fiduciary duties—resulting in a decrease in the value of the Plan's assets. They sued under Sections 502(a)(2) and 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) & (a)(3). Section 1132(a)(2) authorizes a civil action by a participant or beneficiary for "appropriate relief" under 29 U.S.C. § 1109 (a statute governing "Liability for breach of fiduciary duty"). Section 1132(a)(3) authorizes a civil action for an injunction or other "appropriate" equitable relief for proven violations of ERISA or the terms of a plan.

In December 2015, after the Plan returned to overfunded status, the district court granted U.S. Bank's motion to dismiss for lack of Article III jurisdiction. Pet. App. 28a-50a. The court found that after the Plan became overfunded, Petitioners no longer had "a concrete interest in any monetary relief that might be awarded to the Plan if they prevailed on the

---

[2] ERISA determines whether a plan is on track to meet its benefit obligations to participants ("overfunded") or not ("underfunded") based on a measurement called the Funding Target Attainment Percentage (FTAP). *See* 29 U.S.C.§ 1083(a), (d). A plan sponsor must make contributions to the plan if but only if the plan's FTAP does not exceed 100%.

merits." *Id.* at 41a. Nor did Petitioners' claim for equitable relief suffice to warrant continued Article III jurisdiction—because such relief is unavailable when (as here) any injury could be fully recompensed through monetary relief. *Id.* at 42a.

The court observed that the plaintiffs' standing evaporated due to actions taken by the defendants after the complaint was filed: their post-2013 contributions, along with other factors, caused the Plan to become overfunded. The court held that dismissal on mootness grounds was nonetheless warranted in light of its factual finding that "it is absolutely clear" that the challenged conduct—the Equities Strategy as well as the allegedly improper investment in mutual funds administered by a U.S. Bank subsidiary—had been abandoned by 2011 (*i.e.*, pre-suit) and "cannot be reasonably expected to recur." *Id.* at 48a.

The Eighth Circuit affirmed on statutory grounds. Pet. App. 1a-27a. The appeals court held that when a defined-benefit plan is overfunded, neither § 1132(a)(2) nor § 1132(a)(3) authorizes participants to sue plan administrators for breach of their fiduciary duties. *Id.* at 18a, 20a. It explained:

> Under both § 1132(a)(2) and (a)(3), the plaintiffs must show actual injury—to the plaintiffs' interest in the Plan under (a)(2) and to the Plan itself under (a)(3)—to fall within the class of plaintiffs whom Congress has authorized to sue under the statute. Given that the Plan is overfunded, there is "no actual or imminent injury to the Plan itself" that

> caused injury to the plaintiffs' interests in the Plan.

Id. at 20a-21a (quoting *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 585 (6th Cir. 2016)).

SUMMARY OF ARGUMENT

WLF agrees with U.S. Bank that Petitioners lacked Article III standing when they filed suit in 2013. Although the Plan was still slightly underfunded at that time, they faced no non-speculative risk of financial loss. They received all monthly payments on a timely basis. The Plan's underfunded status simply meant that U.S. Bank—with $87 billion in liquid assets when suit was filed in 2013—was required to make additional contributions to the Plan. Petitioners never suggested that U.S. Bank could not or would not make the required contributions. Because Petitioners have no claim to any of the Plan's assets, their only cognizable interest in the Plan's administration was and is an assurance that there will be enough funds to pay their fixed benefits. Thus, at no time have Petitioners shown the requisite injury-in-fact.

WLF writes separately to support the district court's mootness finding. Even if Petitioners could show injury-in-fact in 2013 by pointing to some risk to their expected benefits, any such risk was eliminated in 2014 once the Plan became overfunded. Congress established the FTAP measurement as an early-warning system to detect potential weaknesses in pension plans. If the FTAP is greater than 100%, ERISA has determined, the risk of default is so minuscule that plan sponsors need not contribute additional funds. Given that

determination, Petitioners lost any legal justification for claiming a concrete financial injury once the Plan's FTAP went above 100% in 2014.

This Court stated explicitly in *LaRue* that "[m]isconduct 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 to the entire plan." *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008). In other words, losses suffered by a defined-benefit plan are irrelevant for purposes of establishing a participant's injury-in-fact unless there is some discernable risk of default. Even under the strictest standard established by Congress, there is no plausible claim that any such risk existed after 2014.

Sections 1132(a)(2) and (a)(3) create private rights of action for participants and beneficiaries to sue administrators for breach of the fiduciary duties imposed on them by ERISA. ERISA authorizes such suits even though any relief inures to the benefit of the plan as a whole, not to the plaintiffs individually. But nothing in the statute suggests that Congress sought to excuse such plaintiffs from the Article III standing requirements, including the requirement to show a particularized and concrete injury-in-fact.

To support their standing claim, Petitioners allege intangible harms. Intangible harms can, of course, *sometimes* be sufficiently concrete to support Article III standing. The Court has recognized the importance of the role played by Congress in determining whether an intangible harm constitutes injury-in-fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1549.

Congress frequently signals its determination that an intangible harm is sufficiently concrete by authorizing an award of statutory damages (as did the statute at issue *Spokeo*) to any plaintiff who demonstrates a violation of the statute. ERISA includes no statutory damages provision, signaling Congress's understanding that ERISA plaintiffs alleging fiduciary breaches must satisfy traditionally applicable Article III standing requirements.

Nor does history support Petitioners. Under the common law, beneficiaries of a trust are entitled under some circumstances to sue the trustee for breach of fiduciary duties. But the right to sue is limited to beneficiaries who can prove they were injured (or face a significant risk of injury) because of the trustee's misconduct. It is not enough for a beneficiary to show that the trust or some other beneficiary has been injured, if those injuries do not adversely affect the beneficiary himself. Common-law precedent thus confirms that Petitioners' breach-of-fiduciary-duty allegation does not suffice to establish injury-in-fact.

Lacking a judicially cognizable interest of their own, Petitioners are not entitled to invoke someone else's interests (in this case, the Plan's) to establish Article III jurisdiction. As a general rule, a litigant cannot rest a claim to relief on the legal rights of third parties. And while the Court has recognized discrete exceptions to that rule, none of those exceptions apply here.

The United States points to shareholder derivative suits as support for its view that Petitioners may assert third-party standing. U.S. Br. 13-14. It

argues that just as holders of the common stock of a corporation are entitled in derivative actions to rely for Article III purposes on the injury to the corporation they purport to represent, so too may a plan participant rely on the injury allegedly suffered by the plan. *Ibid*.

The United States's analogy is inapt. While participants in a defined-*contribution* plan are somewhat analogous to the holders of common stock (because both suffer direct injury when insider misconduct causes a depletion of assets), participants in a defined-benefit plan are far differently situated. Their position is closer to that of corporate bondholders, whose legally enforceable rights are limited to fixed payments from the corporation. Corporate law has never recognized the right of bondholders to file derivative actions, even when insider malfeasance reduces a corporation's net worth.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE CASE AS MOOT ONCE THE PLAN BECAME OVERFUNDED

WLF agrees with U.S. Bank that Petitioners lacked Article III standing when they filed suit in 2013 because they failed to establish that U.S. Bank's alleged misconduct caused them to suffer an injury-in-fact. But even if Petitioners could demonstrate injury-in-fact in 2013 by pointing to some risk to their expected benefits, all such risk evaporated in 2014 once the Plan became overfunded. Without any other cognizable injury, the district court properly dismissed Petitioners' claims as moot in 2015 because they no longer presented a

justiciable case or controversy.

A. Article III Jurisdiction To Decide The Merits Of A Claim Ceases Once An Actual Controversy No Longer Exists

Article III, § 2 of the Constitution confines federal courts to deciding "Cases" or "Controversies." As the Court has repeatedly explained, "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." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). That limitation "is built on separation of powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 408 (2013). Both standing and mootness are aspects of the case-or-controversy requirement.

The "irreducible constitutional minimum of standing" contains three requirements:

> First, and foremost, there must be alleged (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not conjectural or hypothetical." ... Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. ... And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co., 523 U.S. at 102-103 (citations omitted). The standing requirement ensures that the plaintiff possesses a "personal stake" in the outcome of the litigation, *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009), and that a federal court is not simply being asked to provide an advisory opinion that does not decide any actual controversy.

The mootness doctrine ensures that the requisites for federal court jurisdiction continue to exist throughout the litigation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed"); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)). The Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English*, 520 U.S. at 68 n.22 (citations omitted).

A federal court's determination that Article III jurisdiction no longer exists does not mean that it lacks the power to take any further actions in the matter. Indeed, this Court has directed lower federal courts, when a case becomes moot, to dispose of the case in the manner "most consonant to justice ... in view of the

nature and character of the conditions which caused the case to become moot." *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (citations omitted). But Article III absolutely prohibits a federal court from addressing the merits of a plaintiff's claim following a determination that an actual controversy no longer exists. *Steel Co.*, 523 U.S. at 101-02 ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

B. Participants In A Defined-Benefit Plan Suffer An Injury-in-Fact Only If Alleged Misconduct Creates Or Enhances A Discernable Risk Of Plan Default

Whether Petitioners suffered (and continue to suffer) a tangible harm hinges on the nature of a defined-benefit plan and the rights of participants in such plans.

A defined-benefit plan is one in which the employee, upon retirement, is entitled to a fixed periodic payment. *Hughes Aircraft*, 525 U.S. at 439. Plan administrators invest plan assets in the expectation that investment income will suffice to cover all promised payments. If at any time income is projected to be insufficient to cover payments, the sponsor must make contributions to the Plan sufficient to cover the shortfall. The federal government provides an additional backstop for participants: if the employer becomes bankrupt and is unable to cover shortfalls, the Pension Benefit Guaranty Corp. steps in to pay promised benefits.

Participants in a defined-benefit plan have no claim on the plan except for the fixed benefits promised to them. In particular, they have no claim on any specific asset held by the plan. *Id.* at 440. So the only plan activity that can possibly harm them is a failure to pay promised benefits or some action that creates an imminent risk of such failure. *LaRue* confirmed that understanding: "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 to the entire plan." 552 U.S. at 255.

Section 1132(a)(2) authorizes a plan participant to sue a fiduciary who has breached a fiduciary duty owed to the plan. But that statute does not authorize the participant to seek a monetary recovery for himself. On the contrary, the Court held in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), that any recovery in a breach-of-fiduciary-duty suit filed under § 1132(a)(2) "inures to the benefit of the plan as a whole," not to the benefit of the participant. 473 U.S. at 140. Nothing in the language or structure of § 1132(a)(2) suggests a congressional expansion of the potential injuries to plan participants—creation or enhancement of the risk of default—that can arise from misconduct by a fiduciary of a defined-benefit plan.

C. Under ERISA, There Is No Discernable Risk Of Default When A Plan Is Overfunded

Given the safety features built into ERISA, participants in defined-benefit plans rarely face any risk of nonpayment and thus only rarely can claim that a breach of fiduciary duty has caused them to suffer a particularized and concrete injury. U.S. Bank has convincingly demonstrated that Petitioners incurred no such injury as a result of the alleged misconduct. The Plan was slightly underfunded when Petitioners filed suit in 2013. But the alleged misconduct neither created nor enhanced a risk of nonpayment of Petitioners' benefits: at the time of filing, U.S. Bank had been making regular contributions to the Plan, it had $87 billion in liquid assets from which to make additional contributions, and the PBGC stood ready to provide any necessary back-up.

But even if Petitioners could argue that in 2013 there was some risk to their future receipt of promised benefits, any such risk was eliminated in 2014 once the Plan became overfunded. Once the risk disappeared, Petitioners' claimed injury-in-fact disappeared—thereby requiring that Plaintiffs' claims be dismissed for lack of Article III jurisdiction.

Petitioners no longer challenge the district court's finding that the Plan became overfunded in 2014, nor could they plausibly do so. ERISA establishes a precise method for measuring whether a plan is on track to meet its benefit obligations to participants. That measurement, the FTAP, is calculated by comparing the plan's assets to "the present value of all benefits accrued

or earned under the plan." 29 U.S.C. § 1083(d). If the ratio between those two numbers (expressed as a percentage) is greater than 100%, the plan is deemed overfunded. The Plan's FTAP was 105.18% on January 1, 2014 and increased to 115.30% on January 1, 2015.

A defined-benefit plan's overfunded status has significant consequences under ERISA. If a plan is overfunded, the sponsor need not make any contributions to the plan that year—even though the present value of all benefits accrued or earned under the plan continues to grow. By so providing, Congress conveyed a very clear signal that participants in an overfunded plan do not face a discernable risk of nonpayment.[3]

Petitioners claim that U.S. Bank's alleged fiduciary breaches caused a reduction in the Plan's assets. Even if true, it is uncontested that the Plan has been overfunded since 2014—and thus Petitioners cannot now plausibly allege (if they ever could) that they face a discernable risk of loss. The mootness doctrine requires dismissal because even if Article III jurisdiction existed when Petitioners filed suit, that jurisdiction evaporated once the Plan became overfunded and Petitioners could no longer point to an injury-in-fact. *Arizonans for Official English*, 520 U.S.

---

[3] Indeed, ERISA's structure indicates that Congress expected that plans would become underfunded from time to time as a matter of course. The statute imposes increasingly strict remediation requirements as a plan's FTAP begins to fall substantially below 100%. Those requirements indicate that Congress did not consider a plan to be facing a significant risk of default if its FTAP falls only sightly below 100%.

at 68.

The United States argues that standing to sue should not depend on a plan's funding status. It argues that "a plan that is underfunded by a dollar has virtually the same risk of future insolvency as a plan that is overfunded by a dollar." U.S. Br. 7. But that argument fails to acknowledge that it was Congress that drew the line distinguishing between overfunded and underfunded plans and to require additional sponsor contributions to an underfunded plan while exempting the sponsors of plans with FTAPs above 100%. Moreover, the United States frankly acknowledges that a participant's standing turns on whether the breach results in "a materially increased risk" of monetary loss. *Ibid.* There is no basis for finding that a materially increased risk of loss still existed after the Plan became overfunded, particularly in light of the absence of evidence that any risk existed when the plan was still slightly underfunded in 2013.

A plaintiff can establish injury-in-fact by showing that his injury is either "actual" or "imminent." *Clapper*, 568 U.S. at 409. The Court has recognized that imminence is "a somewhat elastic concept." *Ibid.* On occasion the Court has found standing "based on a 'substantial risk' that the harm will occur." *Id.* at 414 n.5. But however one phrases the test for determining that injury is "imminent," Petitioners have not satisfied that test. The possibility of future default is wholly speculative now that the Plan is overfunded.

Indeed, there is no reason to think that the Plan would be any more overfunded than it is right now even if it had not suffered losses in 2008. In the absence of

those losses, U.S. Bank would have made far fewer contributions to the Plan in succeeding years.

Nor is Petitioners' injury-in-fact claim strengthened by the fact that they seek equitable relief, *e.g.,* an order requiring U.S. Bank to restore the Plan's losses and an injunction against further misconduct. As explained above, Petitioners have no interest in Plan management except as it "creates or enhances the risk of default to the entire plan." *LaRue*, 552 U.S. at 255. In the absence of a showing of increased risk, Petitioners have not demonstrated injury-in-fact, and federal courts lack Article III jurisdiction to provide any relief—whether monetary or equitable.

Furthermore, the alleged misconduct—U.S. Bank's decisions to adopt an Equities Strategy and to invest some assets in mutual funds controlled by a subsidiary—indisputably ended no later than 2011, more than two years before Petitioners filed suit. The district court made a factual finding that the alleged misconduct was unlikely to recur. Pet. App. 46a-50a & n.6. Petitioners have not sought review of the finding in this Court. That finding provides additional support for the district court's mootness determination with respect to injunctive relief.

D. In Adopting ERISA, Congress Did Not Intend To Bestow Article III Injury-in-Fact Status On Previously Unrecognized Intangible Harms

Petitioners argue that when Congress adopted ERISA, it recognized additional, intangible injuries-in-fact and authorized pension-plan participants to file suit

to redress those injuries. That argument is without merit.

Petitioners point to Congress's decision to include beneficiaries and participants among those authorized to file suit under §§ 1132(a)(2) and (a)(3) for an administrator's breaches of fiduciary duty. But creation of a right of action is largely irrelevant to the injury-in-fact question; "[i]t 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." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

Nor does the inclusion of beneficiaries and participants among those authorized to file suit suggest that Congress assumed that Petitioners and similarly situated participants would be deemed to possess Article III standing. Fiduciary misconduct is likely to inflict injury on numerous *other* categories of participants; *e.g.*, participants in defined-contribution plans and participants in defined-benefit plans on the brink of default. The most likely explanation is that Congress adopted §§ 1132(a)(2) and (a)(3) to provide a remedy to those actually injured by fiduciary misconduct, not to create new injuries-in-fact.

Petitioners point to two intangible harms that, they claim, the alleged misconduct inflicted on them. They assert that "when a fiduciary breaches his duties, the breach (1) invades the participant's legally protected interest in having that fiduciary obligation fulfilled and (2) injures trust property in which the participant has a long recognized equitable ownership interest." Pet. Br. 20. The Court has previously rejected the second

claim with respect to participants in a defined-benefit plan. *Hughes*, 525 U.S. at 440. Nor is there any evidence that ERISA sought to elevate the first of those two alleged harms to injury-in-fact status.

Spokeo explained at length the considerations relevant to determining whether an intangible harm is sufficiently concrete to qualify as an Article III injury-in-fact:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn 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 providing a basis for a lawsuit in English or American courts. ... In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."

136 S. Ct. at 1549 (quoting *Lujon v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

Petitioners point to nothing in ERISA's text suggesting that a participant suffers an injury-in-fact simply because a plan administrator fails to fulfill a fiduciary duty and without regard to whether his receipt of promised benefits has been placed at risk. If Congress really had intended to "elevate" intangible injuries of that type to "the status of legally cognizable injuries," one would expect some affirmative indication of that intent to be included in the statute. And as explained above, the inclusion of beneficiaries and participants among those authorized to sue for fiduciary breaches is no indication of such congressional intent.

Congress frequently signals its determination that an intangible harm is sufficiently concrete by authorizing an award of statutory damages to any plaintiff who demonstrates a violation of the statute. For example, *Spokeo* involved a claim under the Fair Credit Reporting Act of 1970 (FCRA). The plaintiff sought an award of damages for alleged violations of numerous procedural requirements imposed on consumer reporting agencies by the FCRA. The statute creates a right of action for all affected consumers, and authorizes an award of damages of between $100 and $1,000 to each consumer for each offense, without regard to whether he can prove actual damages. 15 U.S.C. § 1681n(a)(1)(A). That statutory damages provision is evidence that Congress determined that consumers suffer injury-in-fact whenever a credit reporting agency violates their procedural rights under the FCRA—regardless whether the consumer can prove actual damages.

ERISA includes no equivalent statutory damages provision. The absence of such a provision signals

Congress's understanding that plan participants do not suffer an injury-in-fact simply because a plan administrator has violated a fiduciary obligation. Rather, Congress understood that participants must satisfy traditionally applicable Article III standing requirements to sustain a breach-of-fiduciary duty claim.[4]

Nor does history support Petitioners. The common law of trusts may be relevant to whether intangible harm to plan participants constitutes injury-in-fact; after all, "an ERISA fiduciary's duty is derived from the common law of trusts." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (citation omitted). Under the common law, trust beneficiaries may not sue a trustee for breach of fiduciary duty unless they can demonstrate that the breach adversely affects their interests in the trust. Restatement (Second) Trusts § 214, cmt. b. In other words, under trust law beneficiaries cannot rely solely on their interest in ensuring that the trustee complies with his fiduciary duties; to assert a claim, they must show a more tangible injury.

Petitioners concede that "if the trustee breached a duty to pay income to a life beneficiary, the

---

[4] Moreover, the Court indicated in *Russell* that the right of action created by § 1132(a)(2) was not intended to remedy a defined-benefit plan participant's injuries that are distinct from the plan's injuries. *Russell* dismissed a beneficiary's § 502(a)(2) claim that plan administrators breached their fiduciary duties by delaying approval of his disability benefits. *Russell* held that the claims were not cognizable under § 1132(a)(2), whose sole purpose is to "benefit the plan as a whole." 473 U.S. at 140.

beneficiary entitled to the principal cannot maintain a suit for breach of trust." Pet. Br. 33 n.7 (citing Restatement (Second) of Trusts § 214, cmt. b). That concession undermines Petitioners' injury-in-fact claim. The reason why the beneficiary entitled to principal cannot sue is that the fiduciary breach did not injure his interests in the trust. Similarly, a participant in a defined-benefit plan may not sue for a fiduciary breach unless the breach injures his interests—which can only occur if the breach "creates or enhances the risk of default to the entire plan." *LaRue*, 552 U.S. at 255.

Spokeo teaches that, in determining whether an intangible harm constitutes injury-in-fact, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S. Ct. at 1549. The alleged intangible harm suffered by Petitioners—the frustration of their interest in having fiduciary obligations fulfilled by the Plan administrators—is not analogous to any harm that has traditionally been regarded as providing a basis for a lawsuit under the common law of trusts.

In sum, neither the common law of trusts nor Congress's enactment of ERISA supports Petitioners' claim that their alleged intangible harms constitute injury-in-fact and justify the exercise of Article III jurisdiction over their claims.

II. PETITIONERS MAY NOT ESTABLISH ARTICLE III STANDING BY INVOKING THE RIGHTS OF THIRD PARTIES SUCH AS THE PLAN

Petitioners argue alternatively that, for purposes of establishing standing, they should be permitted to rely on the injury-in-fact incurred by the Plan itself. But that argument runs headlong into the Court's longstanding aversion to recognizing third-party standing: "We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Beyond very limited exceptions, "we have not looked favorably on third-party standing." *Id.* at 130.

In those few instances in which the Court has upheld third-party standing, it has emphasized the necessity of demonstrating an extremely close relationship between the plaintiff and the party whose legal interests have allegedly been injured. For example, in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), the plaintiff was a man asserting the constitutional rights of his deceased father.

Moreover, third-party standing doctrine has never been understood to excuse compliance with Article III injury-in-fact requirements. The doctrine (when applicable) permits the party seeking relief to invoke someone else's rights, but he still must demonstrate that the challenged action injured him. *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) ("But even when we have 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.") (citation omitted). For example, the plaintiff in *Sessions* indisputably was injured by the denial of the rights he asserted on behalf of his father; the result of that denial was to prevent him from attaining U.S. citizenship.

As explained above, Petitioners have not shown that they were injured by the alleged fiduciary breaches. In the absence of an injury and of a very close relationship with the Plan akin to the father-son relationship in *Sessions*, Petitioners cannot invoke rights belonging to the Plan as their basis for invoking the jurisdiction of the federal courts.

Petitioners' reliance on *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), is misplaced. *Vermont Agency* held that *qui tam* relators possessed Article III standing to file False Claims Act (FCA) suits on behalf of the federal government. But, as the Court explained, *qui tam* relators are not asserting rights belonging to someone else. Rather, the Court explained, the FCA "effect[s] a partial assignment of the Government's damages claim" to the relator, and "the assignee of a claim has standing to assert the injury in fact suffered by the assignor." 529 U.S. at 773. In sharp contrast, the Plan has never assigned its rights to Petitioners.

Petitioners argue that they should be granted standing because if they are not, no one can establish standing, and "[f]iduciaries would have license to use plan assets as they wish—so long as they do not use too

many assets." Pet. Br. 17. The Court has never accepted that line of reasoning: "[t]he assumption that if [the plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Clapper*, 568 U.S. at 420. Moreover, Petitioners' "license to use plan assets as they wish" argument ignores the fact that all pension plans are subject to close government supervision. And employers have every incentive to monitor plans to ensure compliance with fiduciary duties because if fiduciary breaches lead to plan losses, it will be the employer's responsibility to cover those losses.

Indeed, the real problem here is not too few suits but rather that *everyone* can sue if Petitioners prevail. *Any* participant in a defined-benefit plan who is unhappy with the plan's investment policy will have standing to challenge the policy by filing a breach-of-fiduciary-duty claim without regard to whether payment of the participant's benefits has been jeopardized by the breach.

Although Petitioners allege that Plan administrators breached their fiduciary duties by maintaining an Equities Strategy in 2008, it is well documented that a strategy of investing in equities outperforms other investment strategies over the long term. So if Petitioners prevail on standing/mootness, plaintiffs' lawyers will be free to begin filing a far more plausible bad-investing claim: that plan administrators breach their duties of prudence by *failing* to adopt an Equities Strategy and thereby depriving the plan of investment income. *See LaRue*, 552 U.S. at 253 n.4 (fiduciary may be found liable in a § 1132(a)(2) action based on claims that his misconduct caused a plan to earn less than it

should have earned, even though the plan suffered no net losses).

The United States points to shareholder derivative suits as support for its view that Petitioners may assert third-party standing. U.S. Br. 13-14. It argues that just as holders of the common stock of a corporation are entitled in derivative actions to rely for Article III purposes on the injury to the corporation they purport to represent, so too may a plan participant rely on the injury allegedly suffered by the plan. *Ibid*.

The United States's analogy is inapt. Stockholders have very little in common with participants in a defined-benefit plan. Unlike those participants (who do not choose plan fiduciaries), stockholders retain control over the activities of the corporation—they can elect a new board of directors if they are unhappy with the directors' performance. More importantly, stockholders (unlike participants in defined-benefit plans) are injured whenever management wrongdoing causes losses. Those losses ultimately cause a drop in stock price, thereby inflicting injury-in-fact on all stockholders. In contrast, participants in defined-benefit plans are uninjured by plan losses so long as they continue to receive the fixed benefits promised to them. That stockholders are occasionally permitted to file derivative lawsuits on behalf of their corporation provides no support for authorizing participants in a defined-benefit plan to sue fiduciaries on behalf of the plan.

The position of those plan participants is far more akin to that of corporate bondholders. Although bondholders are issued securities by the corporation,

they have no ownership stake in the corporation, and their legally enforceable rights are limited to fixed payments from the corporation. *See* James J. Park, *Bondholders and Securities Class Actions*, 99 Minn. L. Rev. 585 (2014). So long as the corporation remains solvent, bondholders' risk of nonpayment is minuscule. As a result, corporate law has never authorized derivative actions by corporate bondholders on behalf of the corporation, even when insider malfeasance reduces a corporation's net worth. *See, e.g., Harff v. Kerkorian*, 347 A.2d 133, 134 (Del. 1975).[5] To the extent that there is any analogy between corporate law and ERISA breach-of-fiduciary-duty claims, the analogy suggests that participants in defined-benefit plans should *not* be permitted to step into the shoes of the plan and assert Article III standing based on the Plan's alleged injuries.

In sum, the Court has "not looked favorably on third-party standing," *Kowalski*, 543 U.S. at 568, and neither Petitioners nor the United States have supplied a coherent rationale for altering that position in ERISA litigation.

---

[5] If anything, the case for granting third-party standing is even weaker for participants in defined-benefit plans than it is for bondholders. Although the bonds of a solvent corporation will eventually be paid in full, such bondholders arguably suffer injury if corporate losses lead to a decrease in bond prices on the secondary market for bonds. There is, of course, no secondary market for pensions.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
WASHINGTON LEGAL
FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

November 19, 2019